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PRESERVING PROCESS IN THE WAKE OF POLICY:
THE NEED FOR APPOINTED COUNSEL IN
IMMIGRATION REMOVAL PROCEEDINGS

MARK T. FENNEll*

INTRODUCTION

Archbishop Oscar Romero once said, “If there were love of neighbor there would be no terrorism, no repression, no selfishness, none of such cruel inequalities in society, no abductions, no crimes.” Unfortunately, history shows that systemic ignorance, suspicion, and greed act as barriers to solidarity and truth. Peoples and nations continually struggle with identity and social organization—often translating into injustice. In the wake of modernity and liberal democracy, seemingly atomistic individuals struggle to identify with a greater social or national community. Perhaps one of the most practical and uncontroversial ways humanity subdivides itself is through national citizenship.

Citizenship, however, is more than simply a passport or postal address. Citizenship requires a constructed sense of nationalism somehow that sets countries apart. A common device used to distinguish national cultures is the creation of a “threat” to that culture. Examples throughout history reveal that for every set of constructed values, there exists an alternate set of values endangering the legitimacy of the majority. In order to maintain a certain worldview, nations repeatedly go through an often violent cleansing process to strengthen and unite the community. The ancient Romans massacred Christians, Christians massacred Moors, the Puritans had witches, the Nazis Jews, capitalists communists, and so forth. Especially when groups or governments perceive a threat to be internal or subversive, significant efforts are made to preserve the status quo.

Since its founding, the United States has intentionally excluded or deported noncitizens who “threaten” American society. Practical realities make such decisions necessary. The danger of these decisions lies not in the categorization of individuals, but in the subordination of basic human dignity to such categories. As the United States increasingly perceives immigration as dangerous, society is more willing to commit or allow unjust acts to occur against noncitizens.


The fear created after the terrorist attacks in Oklahoma City, New York City, and Washington D.C. legitimized unjust procedures in American immigration law. As immigrants became increasingly categorized as national security threats or criminals, they became increasingly vulnerable to harsh immigration policies. Despite this trend, procedural protections have become weaker, leaving many innocent noncitizens defenseless. At the very least, noncitizens should be guaranteed a right to present their case in a meaningful and fair way.

Particularly since September 11, 2001, trauma and fear have become foundational elements of American immigration policy. Although national security and general crime control are obviously vital national interests, policymakers must be cautious not to use fear as a justification for dehumanization and injustice in the immigration context. Although expanding the grounds for deportation may be necessary to ensure safety, higher stakes require higher procedural protections. Without adequate safeguards—such as an absolute right to appointed counsel for indigent noncitizens—the risk of injustice is simply too high.

This Note explores the current need for a categorical right to appointed counsel under the Fifth Amendment in removal proceedings. Part I explains the existing statutory and constitutional right to counsel in removal proceedings and how current laws and precedents do not protect indigent noncitizens. Part II discusses how terrorist acts over the past fifteen years have distorted immigration policy, allowing national security and crime-control issues to dominate debate. Part III tracks immigration law over the same time period, showing the increased severity and complexity of removal proceedings. Part IV argues that this increase in severity demands an equivalent increase in procedural due process protection. Finally, Part V reasons that a categorical right to appointed counsel is not only legally justified, but also cost-effective, morally right, and central to American principles.

I. EXISTING PROCEDURAL RIGHTS DO NOT ADEQUATELY PROTECT INDIGENT NONCITIZENS

A. Complicated Removal Proceedings Demand Legal Representation for Noncitizens

Removal proceedings are complicated and often terrifying for noncitizens faced with potential banishment from home and family. The majority of indigent noncitizens are expected to navigate the immigra-
tion system without any legal training and often in a language not their own.³

The Department of Homeland Security (DHS) initiates removal proceedings by issuing a “Notice to Appear” which states specific charges “against the alien” as well as “the statutory provisions alleged to have been violated.”⁴ After a noncitizen receives a “Notice to Appear,” they can either challenge the grounds for the deportation itself or apply for statutory relief.⁵ During the adversarial hearing, an attorney employed by the Bureau of Immigration and Customs Enforcement (ICE) presents the government’s case in front of an immigration judge employed by the Executive Office for Immigration Review (EOIR).⁶ Although a noncitizen has a right to present evidence and rebut the government’s evidence,⁷ an unrepresented noncitizen is unlikely to know what specific elements need to be proven in order to avoid deportation.⁸ There are several forms of relief if the noncitizen can meet certain statutory criteria.⁹ Such criteria, however, are often ambiguous and difficult for even trained immigration lawyers to comprehend.¹⁰ If the record does not indicate that a noncitizen may be eligible for some form of relief, the immigration judge has no responsibility to inform the noncitizen that such relief may be available.¹¹

Furthermore, there is little opportunity for meaningful judicial review of immigration court orders. In 2002, Attorney General John Ashcroft issued new rules for judicial review which restricted the Board of Immigration Appeals’ (BIA) review of immigration judges’ factual findings, shortened the preparation time for appellate briefs and tran-

⁵. Donald Kerwin, Revisiting the Need for Appointed Counsel, INSIGHT [MIGRATION POLICY INSTITUTE], Apr. 2005, at 1, 1-2.
⁷. See INA § 240(b)(4)(B) (“[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer.”).
⁸. Werlin, supra note 3, at 394.
¹⁰. See INA § 240A(b)(1)(B) (stating that the Department of Homeland Security may cancel removal if the noncitizen, among other criteria, “has been a person of good moral character”). Such language is virtually meaningless to noncitizens unfamiliar with immigration law.
¹¹. Moran-Enriquez v. INS, 884 F.2d 420, 422 (9th Cir. 1989).
scripts, reduced the BIA from twenty-three judges to eleven, and expanded the use of one-member decisions issued without a reasoned, written opinion. After an immigration judge orders the removal of a noncitizen, the noncitizen must file a “Notice to Appeal” within thirty days. This form is only six pages long, consisting of general instructions and fill-in-the-blank questions. Despite the seemingly basic nature of the form, a BIA member—often before any briefs have been filed or any transcripts have been prepared—may enter a “summary dismissal” if the noncitizen does not meet any number of legally complex conditions. If a noncitizen is not represented by counsel, surviving summary dismissal is difficult.

If a BIA member does not summarily dismiss the noncitizen’s appeal, the member must decide the case alone unless one of six enumerated situations apply. This standard is high and drastically limits a noncitizen’s access to a three-member panel. Again, knowing and understanding such a threshold is near impossible without representation. Even if an appeal does warrant a three-member panel, the panel may still issue a summary dismissal. One study revealed that over half of all BIA decisions were issued without a written opinion, and members decided up to fifty cases in one day. Several federal circuit courts have criticized BIA practices.

13. 8 C.F.R. § 1003.38(b).
15. See 8 C.F.R. § 1003.1(d)(2) (basis for summary dismissal includes appeals that lack adequate reasons for appeal, appeals filed for improper purposes, appeals filed with intention to file a brief but failure to do so, appeals outside BIA jurisdiction, appeals that are untimely, and other miscellaneous reasons).
17. See 8 C.F.R. § 1003.1(e)(vi). The six enumerated situations are inconsistent rulings among immigration judges, need for a precedential decision, a decision not in conformity with the law, a major national impact, clearly erroneous factual findings, and the need to reverse. A BIA member is prohibited from writing an opinion if affirming a lower court decision and either the issues are controlled by precedent or are not so substantial as to warrant an opinion. Id. § 1003.1(e)(4)(i)(A)–(B).
18. Id.
19. Id. § 1003.1(d)(2).
21. See, e.g., Recinos De Leon v. Gonzales, 400 F.3d 1185, 1187 (9th Cir. 2005) (characterizing the immigration judge’s opinion as incoherent and criticizing the BIA for affirming without opinion); Lao [sic] v. Gonzales, 400 F.3d 530, 533–35 (7th Cir. 2005) (stating that the immigration judge’s opinion contained errors of fact and logic and criticizing the BIA for affirming with a “short, unhelpful, boilerplate opinion”).
Once a noncitizen has exhausted all of their administrative remedies, he or she may file a petition for review in the federal courts of appeal.\textsuperscript{22} If a noncitizen does not file a brief within forty days of the administrative record becoming available, the court \textit{must} dismiss the case "unless a manifest injustice would result."\textsuperscript{23} Immigration legislation passed in 1996 limited judicial review by barring from review entire categories of removal orders, most denials of discretionary relief, and other judicial remedies.\textsuperscript{24} Such limitations have heightened the importance of initial argument before an immigration judge. Without representation—and particularly when a noncitizen does not speak English—a noncitizen is unlikely to understand the ultimate implication of their initial actions.

In 2006, 65% of all completed cases in immigration court involved noncitizens without legal representation.\textsuperscript{25} Between 2001 and 2006, the number of unrepresented noncitizens increased by 84,410 people despite a significantly less dramatic increase in cases.\textsuperscript{26} The EOIR's 2006 Statistical Yearbook stated:

Of great concern to EOIR is the large number of individuals appearing \textit{pro se}. Immigration Judges, in order to ensure that such individuals understand the nature of the proceedings, as well as their rights and responsibilities, must take extra care and spend additional time explaining this information.\textsuperscript{27}

However, given the overcrowded dockets of immigration courts, it is unlikely immigration judges can adequately assure that noncitizens understand the complicated immigration process.\textsuperscript{28}

As the number of unrepresented noncitizens increases, the number of appeals filed with the BIA has decreased.\textsuperscript{29} In 2006, noncitizens appealed only 9% of all immigration judge decisions.\textsuperscript{30} Furthermore, a 2004 study showed that the EOIR approved 39% of represented, non-detained asylum seekers, but only 14% of unrepresented, non-detained

\begin{itemize}
\item\textsuperscript{22} INA § 242(a)(1); \textit{see also id.} § 242(b)(2) (noncitizen files a petition for review in the appellate circuit where their removal hearing was held).
\item\textsuperscript{23} \textit{id.} § 242(b)(3)(C).
\item\textsuperscript{24} \textsc{Stephen H. Legomsky}, \textit{Immigration and Refugee Law and Policy} 728 (4th ed. 2005).
\item\textsuperscript{26} \textit{id.}; U.S. Dep't of Justice, Exec. Office for Immigr. Rev., FY 2005 Statistical Year Book, at G1 fig.9 (2006), \textit{available at} http://www.usdoj.gov/eoir/statspub/fy05syb.pdf [hereinafter EOIR 2005 Statistical Year Book].
\item\textsuperscript{27} EOIR 2006 Statistical Year Book, \textit{supra} note 25, at G1.
\item\textsuperscript{29} EOIR 2006 Statistical Year Book, \textit{supra} note 25, at Y1 fig.32.
\item\textsuperscript{30} \textit{id.}
asylum seekers.\textsuperscript{31} For represented and unrepresented detained asylum seekers, the approval rates were 18% and 3% respectively.\textsuperscript{32} Although these drastic differences in approval rates do not necessarily indicate erroneous results, the correlation between representation and success cannot be ignored.\textsuperscript{33} Particularly in asylum cases—where error can mean sending a noncitizen off to be persecuted in another country—the risks involved warrant increased procedural protection.

B. Statutory Right to Counsel Proves Illusory

Section 292 of the 1952 Immigration and Nationality Act (INA) states that “[i]n any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.”\textsuperscript{34} In general, a noncitizen receives an attorney only if he or she can afford to hire an attorney, or if he or she can locate an attorney willing to take his or her case pro bono.\textsuperscript{35} When a noncitizen proceeds pro se, there must be a “knowing and voluntary waiver” of the right to counsel.\textsuperscript{36} An immigration judge must “inquire specifically” as to whether the noncitizen wishes to proceed without counsel and receive a “voluntary affirmative response” in order for such a waiver to be valid.\textsuperscript{37} However, if a noncitizen cannot afford counsel and cannot obtain pro bono counsel, such an inquiry is substantively meaningless.

INA § 239(b)(2) requires an immigration judge to provide a list of available lawyers or social service organizations that are willing to represent indigent noncitizens pro bono.\textsuperscript{38} In 1982, however, Congress passed the Legal Services Corporation (LSC) appropriations bill restricting federal funding for certain types of legal services provided throughout the country.\textsuperscript{39} The 1982 legislation prohibited LSC beneficiary organi-

\textsuperscript{31} Donald Kerwin, Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded, IMMIGR. BRIEFING, No. 04-06, at 1, 6, 11-12 (June 2004).
\textsuperscript{32} Id.
\textsuperscript{33} See Philip P. Anderson, In Defense of Detainees, A.B.A. J., Mar. 1999, at 6, 6 (citing a study of the Government Accounting Office that found that noncitizens with legal representation have three times the chance of success as aliens without counsel).
\textsuperscript{34} INA § 292, 8 U.S.C.A. § 1362 (West 2006).
\textsuperscript{35} See INA § 239(b)(1)-(3), 8 U.S.C.A. § 1229 (West 2006).
\textsuperscript{36} Velasquez Espinosa v. INS, 404 F.2d 544, 546 (9th Cir. 1968); Tawadrus v. Ashcroft, 364 F.3d 1099, 1103-04 (9th Cir. 2004) (holding that noncitizen silence does not effectively waive counsel).
\textsuperscript{37} Tawadrus at 1103.
\textsuperscript{38} INA § 239(b)(2), 8 U.S.C.A. § 1229 (West 2006); see also INA § 239(a)(E)(ii), 8 U.S.C.A. § 1229 (West 2006) (stating that “a current list of counsel prepared under subsection (b)(2)” is to be included in the Notice to Appear).
\textsuperscript{39} See Pub. L. No. 97-377, 96 Stat. 1830, 1874-75 (1982) (limiting eligibility to (1) Legal Permanent Residents, (2) those who have already been granted refugee or asy-
zations from maintaining immigration practices. Furthermore, in 1996, Congress passed the Omnibus Consolidated Rescissions and Appropriations Act, preventing LSC beneficiary organizations from representing most noncitizens even when all funds associated with the representation originated from non-government sources. The list provided by immigration judges, therefore, includes significantly fewer organizations than it did twenty-five years ago.

In addition to prohibiting many immigration lawyers from representing noncitizens pro bono, the government also maintains the power to transfer detained noncitizens to remote holding facilities—often in rural communities—where legal aid simply does not exist. Therefore, an indigent noncitizen’s statutory right to counsel is illusory at best since the government effectively limits the number of available lawyers.

Although government violations of a noncitizen’s statutory right to counsel have been found in a small number of cases, the level of government impediment must be exceptionally high for a noncitizen to prevail. Even if the government does violate a noncitizen’s statutory right to counsel, many courts impose an additional prejudice requirement that effectively cures the violation. For the government to violate a noncitizen’s statutory right to counsel, a noncitizen must already have an attorney or have the ability to obtain one. The court then determines whether the government acted in such a way that it prevented the nonci-

42. See Gandarillas-Zambrana v. Bd. of Immigr. Appeals, 44 F.3d 1251, 1256 (4th Cir. 1995), cert. denied, 516 U.S. 806 (1995) (although noncitizen transferred over 1,000 miles away from family, friends, and employer, arbitrary change of venue for deportation hearing did not violate statutory or constitutional rights).
43. See, e.g., Baltazar-Alcazar v. INS, 386 F.3d 940, 945 (9th Cir. 2004) (statutory right to counsel violated when judge barred noncitizen’s counsel from courtroom after refusing to consolidate cases); Campos v. Nail, 43 F.3d 1285, 1289 (9th Cir. 1994) (statutory right to counsel violated by denying motion to change venue to obtain counsel); Rios-Berrios v. INS, 776 F.2d 859, 862 (9th Cir. 1985) (statutory right to counsel violated by granting inadequate continuance).
44. See, e.g., Ponce-Leiva v. Ashcroft, 331 F.3d 369, 375 (3d Cir. 2003) (judge did not abuse discretion and, therefore, did not violate noncitizen’s statutory right to counsel despite denying a continuance to obtain representation).
45. See Baltazar-Alcazar, 386 F.3d at 947 n.6 (noting that the 7th, 2d, and D.C. Circuits do not require prejudice. 5th, 4th, and 10th Circuits do require prejudice. 9th and 3d Circuits have yet to decide the question.).
46. Kerwin, supra note 5, at 1 (noting that in most cases indigent noncitizens cannot secure counsel at all, making their statutory right to counsel ineffectual).
tizen from gaining the benefits of counsel, and if so, whether such an action made a difference in the outcome.  

Violation of a noncitizen's statutory right to counsel could also occur in cases where the noncitizen was not properly informed of his or her right to counsel or the complexity of his or her case. In essence, once a noncitizen has been informed of his or her rights—often in a foreign language—the INA does not require the government to provide counsel.

C. Constitutional Right to Counsel is Weak

In addition to a statutory right to counsel, a noncitizen also has a constitutional right to counsel under the Fifth Amendment in deportation/removal proceedings. However, no Sixth Amendment right to appointed counsel exists since deportation/removal proceedings are deemed civil and not criminal in nature. The traditional civil-criminal distinction—and therefore the distinction between Fifth and Sixth Amendment protection—centers on whether removal is a "punishment" or simply a legal determination of status resulting from statutory conditions placed on a noncitizen. The Fifth Amendment states, "No person shall . . . be deprived of life, liberty, or property, without due process

47. See Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 564 (9th Cir. 1990) (detaining noncitizen far away from potential and existing counsel violated noncitizen's right to counsel). But see Gandarillas-Zambrana, 44 F.3d at 1256 (holding that "statutory privilege of legal representation" does not include right to be detained where ability to obtain representation is greatest).

48. See Reyes-Palacios v. INS, 836 F.2d 1154, 1155 (9th Cir. 1988) (given complexity of asylum case, immigration judge should have asked noncitizen if he wished to be represented); Partible v. INS, 600 F.2d 1094, 1096 (5th Cir. 1979) (although immigration judge informed noncitizen of statutory right to counsel, noncitizen waived right without any understanding of the complexity of the case or arguments that could be made on her behalf).

49. Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100 (1903) ("[T]his court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution."). In practice, however, procedural due process rights were minimal before the 1952 INA. See, e.g., id. at 101-02 (due process does not require interpreter for noncitizen).

50. See, e.g., Reyes v. Ashcroft, 358 F.3d 592, 596 (9th Cir. 2004); Michelson v. INS, 897 F.2d 465, 467-68 (10th Cir. 1990); Mantell v. U.S. Dep't of Justice, 798 F.2d 124, 127 (5th Cir. 1986).

of law.” The “touchstone” of procedural due process is “fundamental fairness.” Therefore, due process is an “expanding concept” as current notions of fairness evolve.

In the landmark 1975 case Aguilera-Enriquez v. INS, a noncitizen challenged the “at no expense to the government” clause of INA § 292 as unconstitutional. The Sixth Circuit acknowledged that “if procedures mandated by Congress do not provide an alien with procedural due process, they must yield, and the constitutional guarantee of due process must provide adequate protection during the deportation process.”

Appointed counsel, therefore, could have been necessary for “adequate protection.” Nevertheless, the petitioner lost because he could not establish prejudice. The court—looking only at the record before it—concluded that no defense was available and, therefore, no lawyer could have made a difference. Aguilera-Enriquez established a case-by-case test for whether the government must provide counsel for indigent noncitizens. Ironically, by adopting a case-by-case approach instead of a categorical per se rule, a noncitizen is required to make legally nuanced arguments in order to obtain appointed counsel. In other words, a noncitizen needs a lawyer to get a lawyer. Unless the court finds a unique assault on “fundamental fairness,” a noncitizen’s inability to pay an attorney does not offend their Fifth Amendment rights.

Judge DeMascio’s dissent in Aguilera-Enriquez recognized the inherent flaws in the majority’s opinion. First, Judge DeMascio appreciated that “deportation is punishment, pure and simple.” For the government to unilaterally banish a legal permanent resident without so much as appointing counsel is “unconscionable.” Second, Judge DeMascio realized that a case-by-case approach with a prejudice element requires a retrospective appeals process where the court speculates on “what conten-
tions appointed counsel could have raised."\textsuperscript{64} Such a system cannot assure due process of law.

The essential difference between \textit{Aguilera-Enriquez}'s majority opinion and its dissent is the different characterization of what it means to be deported. The majority stated that although deportation is "drastic" and "at times the equivalent of banishment or exile," it is "not penal in character."\textsuperscript{65} The dissent, on the other hand, contended that "[e]xpulsion is such lasting punishment that meaningful due process can require no less."\textsuperscript{66}

The right to appointed counsel depends on this distinction. In \textit{Gideon v. Wainwright}, the Supreme Court extended a Sixth Amendment right to appointed counsel in all criminal cases—including state cases—via the Due Process Clause of the Fourteenth Amendment.\textsuperscript{67} Realizing the punitive nature of a criminal conviction, the court reasoned, "Without [legal counsel], though [the accused] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."\textsuperscript{68} As the court recognized, this risk of punishing innocent people strikes at the core of "fundamental fairness" under the Fifth (and Fourteenth) Amendment. If deportation can be characterized as an even more dangerous and lasting penalty for often technical violations, \textit{Gideon}'s reasoning suggests that noncitizens should at the very least be afforded the right to establish their innocence.

In \textit{In re Gault}, the Supreme Court extended a categorical right to appointed counsel under the Fourteenth Amendment’s due process clause in civil juvenile delinquency cases.\textsuperscript{69} The court reasoned that juveniles—who cannot be expected to understand the complicated and technical nature of the judicial proceeding\textsuperscript{70}—"need[] 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."\textsuperscript{71} Even though

\textsuperscript{64.} Id. at 573.
\textsuperscript{65.} Id. at 568.
\textsuperscript{66.} Id. at 572.
\textsuperscript{67.} 372 U.S. 335, 343 (1963). The Fourteenth Amendment contains a parallel due process clause to the Fifth Amendment applicable to the states, U.S. Const. amend. XIV, § 1.
\textsuperscript{68.} \textit{Gideon}, 372 U.S. at 345 (citing Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).
\textsuperscript{69.} \textit{In re Gault}, 387 U.S. 1, 41 (1967) ("We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.").
\textsuperscript{70.} Id. at 39 n.65.
\textsuperscript{71.} Id. at 36.
such proceedings are deemed civil, the "awesome prospect" of separating the youth from his or her family and restricting the youth's freedom justifies the assurance of counsel for indigent individuals.\textsuperscript{72} Under the same reasoning, a right to appointed counsel should apply to noncitizens in immigration court.

In the immigration context, a Fifth Amendment right to appointed counsel has not been established because removal proceedings are characterized as non-punitive and, therefore, civil. In general, courts will defer to the statute at issue in order to determine whether a sanction is civil or criminal.\textsuperscript{73} If Congress passes a statute that is designed to regulate activity in order to accomplish a legitimate governmental purpose,\textsuperscript{74} it will be deemed non-punitive and free from the "cumbersome baggage" of criminal procedure.\textsuperscript{75} Unless the statute is "so punitive either in purpose or effect," the courts will defer to Congress in regards to whether the sanction triggers certain constitutional protections.\textsuperscript{76}

Since immigration statutes traditionally serve a rational remedial purpose, most courts will not extend constitutional safeguards to those facing deportation beyond minimal procedural rights.\textsuperscript{77} However, many—including members of the Supreme Court—argue that private interests at stake in deportation proceedings compare to the gravity of

\begin{itemize}
  \item \textsuperscript{72} Id.
  \item \textsuperscript{73} See United States v. Ward, 448 U.S. 242, 248 (1980) (holding that a fine imposed for emitting hazardous materials was civil, not criminal, because of statutory label).
  \item \textsuperscript{74} See United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984).
  \item \textsuperscript{76} In \textit{Kennedy v. Mendoza-Martinez}, 372 U.S. 144, 168–69 (1963), the Court articulates relevant factors for when a Congressional label can be overridden. The Court includes \[\text{whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.}\textsuperscript{77} Pauw, \textit{supra} note 75, at 309; Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903) (holding that Fifth Amendment due process protections apply to noncitizens in deportation hearings).
\end{itemize}
criminal punishment particularly when families are divided, property is lost, and the noncitizen is banished to a country no longer familiar.78

D. Political Implications of Extending Procedural Rights Limit Legislative Action

For over a century, it has been established law that the U.S. Constitution greatly restricts the courts from interfering with Congressional or Executive immigration policy.79 This is problematic in immigration law since it means that procedural protection for noncitizens is subject to political pressure.80 Similar to the Civil Rights Movement in the 1960s, many politicians are reluctant to act because they fear upsetting their constituencies over such controversial and emotional topics.

Ever since the Supreme Court decided Fong Yue Ting v. United States in 1893, Congress has enjoyed nearly unfettered power to deport all noncitizens it fears "will corrupt the manners of the citizens[,] ... create religious disturbances, or occasion any other disorder, contrary to the public safety."81 This power is founded on the maxim that every sovereign nation, in the interest of self-preservation, must be able to regulate who enters and remains within its borders.82 Because this basic principle of international law affects foreign relations, only the political departments of the government have the authority to make such determinations.83

By this reasoning, it could seem logical that noncitizens do not deserve increased procedural rights. The Court in Ting reasoned that deportation is not punishment "but a method of enforcing the return to his own country of [one] who has not complied with the conditions" on which the government "has determined that his continuing to reside [in the United States] shall depend."84 The Court concluded that constitutional rights that apply in the criminal context such as trial by jury, the limit on unreasonable search and seizure, and protection from cruel and unusual punishment "have no application" to noncitizens.85 Even in 1893, however, certain members of the Court found such logic flawed. In his dissent, Justice Brewer railed, “Deportation is punishment. It

78. See, e.g., Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963) ("[D]eportation is a drastic sanction, one which can destroy lives and disrupt families."); Pauw, supra note 75, at 337–45.
81. Fong Yue Ting v. United States, 149 U.S. 698, 708 (1893).
82. Id.
83. Id. at 731.
84. Id. at 730.
85. Id.
involves—First, an arrest, a deprival of liberty; and, second, a removal from home, from family, from business, from property.\textsuperscript{86} Quoting President James Madison, Justice Brewer continued, "[I]f a banishment of this sort be not a punishment . . . it will be difficult to imagine a doom to which the name can be applied."\textsuperscript{87} Justice Brewer did not argue that constitutional due process restricts Congress from deporting anyone they please, but rather that the stakes are high enough to warrant a trial with constitutional protections.

Until the 1980s, procedural due process for noncitizens was guided by the maxim: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."\textsuperscript{88} However, the Supreme Court's 1982 decision \textit{Landon v. Plasencia} held that courts could extend constitutional due process rights to noncitizens in deportation proceedings based on a case-by-case balancing test.\textsuperscript{89} Nevertheless, the Court acknowledged that "we have only rarely held that the procedures provided by the executive were inadequate."\textsuperscript{90} In the 1993 case \textit{Reno v. Flores}, the Court interpreted away a procedural due process claim, reasoning, "Congress has given the Attorney General broad discretion to determine whether, and on what terms, an alien arrested on suspicion of being deportable should be released pending the deportation hearing."\textsuperscript{91}

This near-plenary power of Congress to define procedural due process for noncitizens creates a problematic catch-22. Congress will not ease immigration policy because of political pressure, yet courts are reluctant to recognize due process rights not defined by Congress. However, given the precedent of \textit{Plasencia}, the courts have an opportunity to extend procedural due process rights in order to achieve fundamental fairness.

\section*{II. National Security Concerns Distort Immigration Debate}

Due largely in part to the terrorist attacks of the mid-1990s and the cultural trauma of September 11, 2001, immigration policy is no longer a civil concern charged with evaluating the status of foreign individuals.\textsuperscript{92} Rather, current immigration policy reflects an attitude that immigrants

\begin{itemize}
\item \textsuperscript{86} \textit{Fong Yue Ting}, 149 U.S. at 740 (Brewer, J., dissenting).
\item \textsuperscript{87} \textit{Id}. at 741. Justice Brewer also makes a prophetic, although deplorably racist, statement, stating, "It is true this statute is directed only against the obnoxious Chinese; but, if the power exists, who shall say it will not be exercised to-morrow against other classes and other people?" \textit{Id}. at 743.
\item \textsuperscript{88} \textit{Knauff v. Shaughnessy}, 338 U.S. 537, 544 (1950).
\item \textsuperscript{89} \textit{Landon v. Plasencia}, 459 U.S. 21, 32–34 (1982).
\item \textsuperscript{90} \textit{Id}. at 33.
\item \textsuperscript{91} \textit{Reno v. Flores}, 507 U.S. 292, 294–95 (1993).
\item \textsuperscript{92} \textit{See Fong Yue Ting}, 149 U.S. at 730 ("[The deportation process] is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appro-
threaten the physical and economic safety of citizens.\footnote{93} This “national security” element to immigration law encourages the mentality that immigrants threaten American society and therefore should be punished for any wrongdoing. In order to deal with America’s post-September 11th vulnerability, policymakers have defined a one-dimensional battle between “us” and “them.”\footnote{94}

National security has always been a legitimate ground to remove a noncitizen.\footnote{95} The INA defines “National Security” broadly to include “national defense, foreign relations, or [the] economic interests of the United States.”\footnote{96} Whenever Congress legislates in regards to national security, the courts are particularly reluctant to review legislative and executive action.\footnote{97} As stated above, it is well established that “[t]he power to exclude or expel aliens, being a power affecting international relations, is vested in the political departments of the government.”\footnote{98}

Concededly, it is imperative that the President be able to direct foreign relations and defend the nation with one voice.\footnote{99} However, as political rhetoric and federal legislation increasingly characterize immigration policy as national security policy, noncitizens become vulnerable to mob mentalities of fear. This reality demands an increase in procedural due process rights including a categorical right to appointed counsel.

National rhetoric aimed at restoring a sense of security increasingly combines immigration, crime, and terrorism into one imprecise con-

\footnote{95. See, e.g., The Alien Enemy Act of 1789, 50 U.S.C.A. §§ 21–24 (West 2006) (applicable during formal declarations of war); An Act to Regulate the Immigration of Aliens in the United States, 32 Stat. 1213, 1214, 1221 (1903) (power to remove those who believe in, or advocate for, the forceful overthrow of the U.S. government); Subversive Activities Control Act of 1950, 64 Stat. 987, 1006 (excluding Communist Party members); INA § 212(a)(3)(A)–(B).}  
\footnote{97. See Baker v. Carr, 369 US 186, 210–17 (1962) (defining political question doctrine of non-review).}  
\footnote{98. \textit{Fong Yue Ting}, 149 U.S. at 713.}  
\footnote{99. \textit{Carr}, 369 U.S. at 281 (Frankfurter, J., dissenting).}
One year after the 1992 bombing of the World Trade Center in New York City, President Bill Clinton stated, "[W]e must not and we will not surrender our borders to those who wish to exploit our history of compassion and justice. We cannot . . . allow our people to be endangered by those who would enter our country to terrorize Americans." Almost naturally, Clinton blends notions of immigration and security, tempering "compassion and justice" in the interest of protecting domestic wellbeing. Although Clinton’s statement is appealing—no citizen would want people to enter the country for the sole purpose of terrorizing Americans—it represents a dangerous association between immigration and national security policy. Crimes committed by noncitizens, domestic threats of terrorism, and immigration should not be "subsumed under the broad rubric of national security threats." As more Americans view immigrants as a threat to internal peace and safety, citizens are more likely to suspend basic civil and human rights out of an "otherwise heroic and blameless national mission." Under this membership theory, vulnerable Americans will err on the side of deporting innocent noncitizens rather than risk physical, social, or economic harm.

The traumatic events of September 11, 2001 catalyzed this national anti-immigrant sentiment and culture of suspicion. Sociologist Jeffrey C. Alexander defines a "cultural trauma" as a "horrendous event that leaves indelible marks upon [the collective’s] group consciousness, marking their memories forever, and changing their future identity in fundamental and irrevocable ways." Certainly, September 11th fits this definition. The sudden, intense, and dramatic images from that day instantly provoke feelings of "violation" and "intrusion." Immediately following the attacks, American solidarity skyrocketed. Instinctively, the country prepared itself to mobilize and avenge the terrorist attacks.

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102. Id. at 1831.


104. Stumpf, supra note 100, at 376.


106. Jeffrey C. Alexander, Toward a Theory of Cultural Trauma, in Alexander et al., supra note 103, at 1.

107. Smelser, supra note 103, at 266.

108. Id. at 268.

109. Id. at 269.
The enemy, however, was ubiquitous and virtually invisible. Despite conventional military operations in Afghanistan, many Americans—perhaps for the first time—perceived a very real domestic threat of terrorism. It was not lost on Americans that the terrorists had entered the United States legally, taken flight lessons in the Midwest, and slept comfortably in a Boston hotel before that fateful morning.\textsuperscript{110} Combined with the country's vengeful energy, policymakers became armed with the political capital to "sanitize" the country.\textsuperscript{111}

Immediately after the 2001 attacks, between 1,200 and 2,000 people of Muslim, Arab, and South Asian descent were taken into custody—many in secret with limited or no access to the outside world.\textsuperscript{112} At least 752 of these people were charged with immigration violations.\textsuperscript{113} One documented noncitizen of Pakistani descent was placed in prison after taking a picture at a scenic overlook near the Hudson Valley.\textsuperscript{114} Although the only charge against him was assisting an undocumented friend find an apartment, he was held in custody for over two years before being deported.\textsuperscript{115} The country's fear of social pollution mixed with the court's reluctance to get involved with international politics kept many of these removal proceedings safely within the confines of a non-punitive civil proceeding.\textsuperscript{116}

Immigrants always bear a heavy burden when a country develops a fear of social pollution. Three infamous examples include the Palmer Raids of 1919, the internment of Japanese Americans during World War II, and the prosecution of suspected communists during the Cold War. As Neil Smelser notes, "[E]xtreme national fear and unity have always had their darker potential—for the muting of political opposition[,] . . . scapegoating of internal minority groups thought to be dangerous or somehow linked to the danger, and for the compromise of civil liberties in the name of vigilance and security."\textsuperscript{117} The very notion of freedom throughout America implies a lack of governmental control. This lack of

\begin{itemize}
\item 111. Tumlin, \textit{supra} note 105, at 1176.
\item 115. \textit{Id.}
\item 116. \textit{See INS v. Lopez-Mendoza}, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime.").
\item 117. Smelser, \textit{supra} note 103, at 270.
\end{itemize}
control has often been a source of insecurity. Particularly when provoked through acts of violence (e.g., anarchist riots, Pearl Harbor, the Cuban Missile Crisis, September 11, 2001, etc.), government aggression is "justified, responsibility for it diminished, and guilt absolved."\(^{118}\) "National scars" are simply swept under the carpet of history.\(^{119}\)

When immigration is characterized as a threat rather than an American ideal of opportunity, innocent immigrants are persecuted for the comfort of the majority. In 1915, at the beginning of the anarchist movement, President Woodrow Wilson warned of "hyphenated Americans" who "have poured the poison of disloyalty into the very arteries of our national life. . . . Such creatures of passion, disloyalty and anarchy must be crushed out."\(^{120}\) Wilson's "poisoned blood" analogy emphasizes the notion of an internal, deadly threat under the skin of the country.\(^{121}\) In 1950, infamous Wisconsin Senator Joseph McCarthy stated, "The reason why we find ourselves in a position of impotency is not because our only powerful, potential enemy has sent men to invade our shores, but rather because of the traitorous actions of those who have been treated so well by this nation."\(^{122}\) Similar to President Wilson, McCarthy likens the country to an impotent man sterilized by internal infection.

Current reactions to terrorism and economic downturns echo these historical mantras. The Department of Homeland Security in 2003 made clear that no immigrant group, "even those traditionally protected by the U.S. immigrant policy, is immune from suspicion if it is associated, even unfairly, with al Qaeda [terrorists]."\(^{123}\) Even if such suspicions were warranted, procedural protections should have been expanded—not contracted—so that unfair suspicion did not result in unjust deportations.

### III. Recent Legislation Blends National Security with Immigration Law

Since the mid-1990s, lawmakers—in response to social stigmas—have broadened the scope and heightened the stakes for immigration

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118. Id. at 272.
119. Id. at 273.
121. Id. These sentiments translated into mass arrests—of primarily labor union workers—and large scale deportations.
offenses. Despite increased severity in immigration proceedings, procedural safeguards have decreased.124 This imbalance creates a vast opportunity for injustice on the highest level.

In response to the first bombing of the World Trade Center in New York in 1992 and the Oklahoma City Bombing in 1995, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).125 Ironically, since it was sparked by the destruction of the Murrah Federal Building in Oklahoma City—the act of a white U.S. citizen—the AEDPA addressed immigration specifically as a central threat to America.126 The AEDPA expanded the definition of "terrorist alien" while at the same time contracting procedural safeguards such as habeas corpus review (amending INA § 106(a)).127 Furthermore, the AEDPA authorized the Secretary of State in consultation with what is now the Department of Homeland Security to categorize any organization as a "foreign terrorist organization" so long as (1) the organization is foreign, (2) the organization engages in "terrorist activity," and (3) those "terrorist activit[ies]" threaten the security of the United States.128 If a noncitizen is found to be a member of one of these "terrorist organizations," they are automatically deportable.129

Even more relevant, the AEDPA combines terrorism with criminal activity, thereby justifying the deportation of an increased number of noncitizens.130 New abrogated removal procedures apply not only to "terrorist aliens," but also to "criminal aliens."131 The term "criminal alien" is defined by vague categories such as "crimes of moral turpitude" and "aggravated felonies"—terms of art that have significant immigration consequences.132 INA § 237(a)(2)(A)(iii) states that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."133 This seemingly simple and automatic provision is in actuality immensely complex. Responding to such an accusation requires a thor-
ough analysis of what constitutes an “aggravated felony,” what constitutes a “conviction,” and what constitutes an “admission.”

As legislation like the AEDPA expands the grounds for removal, more noncitizens are at risk of being swept up under the increasingly broad definitions. Such legislation exemplifies reactionary “get tough” policies and creates a virtually automatic deportation ground void of due process rights. For example, if noncitizens are found deportable for having committed certain criminal offenses, the AEDPA prohibits any judicial review of the order.\footnote{135}

In addition to the AEDPA, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) the same year.\footnote{136} Although admittedly more concerned with economics than security, IIRIRA continued the trend of defining immigrants as dangerous and unworthy of procedural protection.\footnote{137} Generally speaking, IIRIRA expanded the grounds for deportation once again and abolished forms of relief previously available.\footnote{138} IIRIRA again expanded the definition of “aggravated felony” to include certain crimes that are only misdemeanors under some state laws.\footnote{139} Penalties for low-level crimes and immigration-related offenses increased, bars to reentry heightened, mandatory detention provisions expanded, and available public benefits decreased.\footnote{140} Beginning with perceived threats of terrorism, safety issues bled into immigration policy and transformed the removal process into a much more intimidating experience. Two years after AEDPA and IIRIRA, the Department of Justice claimed that the immense increase in deportations contributed to the decline in national crime rates.\footnote{141}

After the tragic events of September 11, 2001, the nation’s collective fear and awareness of internal “social pollution” culminated in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act).\footnote{142} Although the AEDPA and IIRIRA began a general trend of lumping national security, crime, and immigration into one concept, September 11th marked a fundamental shift in political rhetoric. What was once commonly referred to as “border control” became “border security,” symbolizing a new intimate connection with the U.S.

\begin{itemize}
\item \text{135.} AEDPA § 440(a).
\item \text{137.} Chacón, \textit{supra} note 101, at 1852.
\item \text{138.} Pauw, \textit{supra} note 75, at 333-34.
\item \text{139.} \textit{Id.} at 338-39; see 8 U.S.C.A. § 1101(a)(43) (West 2006) (enumerating types of aggravated felony).
\item \text{140.} Chacón, \textit{supra} note 101, at 1853; IIRIRA §§ 211-13, 301-08, 321, 501-10, 531, 551-53, 561-65, 571-77, 591-94.
\item \text{141.} Chacón, \textit{supra} note 101, at 1848.
\end{itemize}
War on Terror.\textsuperscript{143} The USA PATRIOT Act expanded the definition of “alien terrorist” and “terrorist activity.”\textsuperscript{144} The Act rendered removable all aliens who “afford material support” for terrorism.\textsuperscript{145} Noncitizens need not provide support to a terrorist organization designated as such by the federal government, but any organization that has engaged in “terrorist activity.”\textsuperscript{146} “Terrorist activity” is broadly defined as any action that uses a “dangerous” device for anything other than “mere personal monetary gain.”\textsuperscript{147}

In 2002, Congress reorganized the Immigration and Naturalization Service (INS) into several divisions within the newly created Department of Homeland Security.\textsuperscript{148} The two main divisions concerned with immigration enforcement and services were called The Bureau of Immigration and Customs Enforcement (ICE) and the Bureau of Customs and Border Protection (CBP) respectively. These new departments indicate the post-September 11th shift in terminology. What was once a “Service” under the Department of “Justice” is now a bureau of “Enforcement” and “Protection” under the Department of “Homeland Security.” Implicit in those terms is the idea that immigration is a natural threat to America. According to the ICE FY 2006 Annual Report, ICE was created “from the crucible of the terrorist attacks of September 11, 2001,” and its mission is to “protect America and uphold public safety by targeting the people, money and materials that support terrorist and criminal activities.”\textsuperscript{149} Marcy M. Forman, the director of ICE investigations, testified to a Senate subcommittee in 2006 that “[o]ur mission is to protect the American people by combating terrorists and other criminals who cross the Nation’s borders and threaten us here at home.”\textsuperscript{150} In contrast, the former INS defined its mission as “facilitating the entry of legally admis-

\textsuperscript{144} INA §§ 501(1), 241(a)(4)(B); 212(a)(3)(B)(iii).
\textsuperscript{145} \textit{Id.} § 212(a)(3)(B)(iv)(VI).
\textsuperscript{146} \textit{Id.} § 212(a)(3)(B)(iv)(VI)(aa).
\textsuperscript{147} \textit{Id.} § 212(a)(3)(B)(iii)(V)(bb).
sible persons into the United States and preventing the unlawful entry and employment of those ineligible for admission." 151

In 2005, immigration and security rhetoric expanded again with the passage of the REAL ID Act. 152 Under this Act, a "terrorist organization" now included any "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in," any form of terrorist activity. 153 In short, policymakers broadened the term "terrorism" to such an extent that the federal government has created a virtually unchecked power to detain and remove any noncitizen. Throughout this muddled overlap of immigration and national security, noncitizens have very few rights to contest false accusations.

In order to cope with the current perception of insecurity, policymakers have scrambled to identify a common, recognizable enemy. Loyal Americans have no physical, easily identifiable, or distinguishable characteristics. Therefore, policymakers—whether knowingly or unknowingly—have used great discretion in defining certain "individuals or groups as deviant . . . [by] excluding some to reinforce the unity of the rest." 154 Historian Robert Moore writes that defining such a group rests on one fundamental assumption: if the deviants assert their power, "they may subvert a social structure which is founded on the premise of their impotence." 155 In other words, a majority of society must sense a threat from some ill-defined minority and believe that without positive action, the minority will fundamentally change the status quo.

Particularly since September 11, 2001, the greatest threat to American society has been defined as "terrorism." This label, however, does not identify any distinguishable group. Although it is undeniable that many terrorist threats fall into several immigration categories, it is also undeniable that the vast majority of immigration is economic in nature. Given the increase in severity and complexity of immigration law, procedural safeguards must protect innocent noncitizens from becoming political scapegoats.

155. Id. at 95.
IV. POST-SEPTEMBER 11TH IMMIGRATION POLICY REQUIRES HEIGHTENED PROCEDURAL SAFEGUARDS FOR NONCITIZENS

These trends in political rhetoric and federal legislation heighten the need for meaningful legal representation for noncitizens. As the law becomes increasingly broad, harsh, and un-reviewable, noncitizens have much more at stake during removal proceedings. Since politicians are unwilling to temper immigration policy and risk appearing weak on national security, increased procedural protections must be enforced by the courts through the U.S. Constitution. Recognizing a categorical right to appointed counsel under the Fifth Amendment is necessary to achieve "fundamental fairness" in a system that possesses an increasingly punitive character.

As stated above, a right to procedural due process is essentially the right to be heard and judged fairly. When the government seeks to deprive any person—not just a citizen—of life, liberty, or property, the amount of due process owed must conform to "currently prevailing standards." Since the 1960s, scholars have argued for a statutory and constitutional right to appointed counsel in deportation/removal proceedings. What separates current debate from past debate is the increase in severity and complexity surrounding immigration law and policy. Between 2001 and 2006, the number of removal proceedings increased by 113,477. The 1996 IIRIRA legislation nearly tripled the number of immigration detainees by 2003. Such dramatic increases are due largely in part to the expanding grounds for removal, and increased enforcement.

As immigration categories—and subsets of immigration categories—continue to form a murky system of nuanced definitions and procedural hurdles, the risk of error increases. In a 2004 case, Leocal v. Ashcroft, the INS placed a legal permanent resident who had lived in the United States for over twenty-four years in removal proceedings following a DUI conviction. The government argued that the DUI constituted a "crime of violence," making the noncitizen an "aggravated felon" and

158. See generally Irving A. Appleman, Right to Counsel in Deportation Proceedings, 14 SAN DIEGO L. REV. 130 (1976); Gordon, supra note 54; Margaret H. Taylor, Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform, 29 CONN. L. REV. 1647, 1660-63 (1997); William Haney, Comment, Deportation and the Right to Counsel, 11 HARV. INT'L L.J. 177 (1970); Robertson, supra note 9.
159. EOIR 2005 STATISTICAL YEAR BOOK, supra note 26, at C4 tbl.4; EOIR 2006 STATISTICAL YEAR BOOK, supra note 25, at C4 tbl.4.
subject to expedited removal. In a unanimous decision, the U.S. Supreme Court disagreed, allowing the long-time U.S. resident to remain with his family in the United States. In Leocal, the noncitizen obtained pro bono counsel without which the "issue would never have been articulated, much less pursued."

When politicians sweep up immigration policy under national security and crime control policy, a disproportionate amount of "innocent" noncitizens are put at risk of deportation. Despite the Department of Homeland Security's inflated anti-terrorism rhetoric, only twelve individuals (0.0015% of out 814,073 noncitizens) were charged with terrorism claims between 2005 and 2007. Furthermore, only 114 individuals (0.014%) were charged under the broader category of "national security charges" during the same time period. The reality is that 86.5% of all charges against noncitizens in immigration courts involve non-security related offenses (e.g., entering the U.S. without inspection, not having a valid immigrant visa, overstaying a student visa, etc.). Since immigration courts are not permitted to sentence individuals to prison, the Justice Department brings most security-related cases in Federal District Court. According to a March 2006 study produced by the Government Accountability Office (GAO), only 10–15% of the resources in ICE's Office of Investigation were being used for national security purposes. Harsh immigration laws passed to safeguard the country, therefore, burden primarily economic migrants.

It is also well-researched that immigrants are not more likely to commit crimes than citizens. The "no tolerance" policies that have developed over the past decade, however, place many noncitizens in danger of deportation. On average, noncitizens in immigration courts found to be "aggravated felons" have lived in the country for at least

162. Id. at 4.
163. Id. at 13.
164. Kerwin, supra note 5, at 2.
165. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, supra note 149.
166. Id.
167. Id.
168. In FY 2004-06, the Department of Justice filed 620 prosecutions against "international terrorists, domestic terrorists or terrorism financiers." Only 28 of these 620 were referred to the Justice Department by the Department for Homeland Security. Id.
169. Id.
171. Stumpf, supra note 100, at 387–89 (noting that uniformed border patrol agents resembling police enforcement have drastically increased enforcement efforts over the past several years).
fifteen years and have family members who are either U.S. citizens or legal permanent residents. In 1992, the INS reported that it deported 10,303 noncitizens classified as "aggravated felons." In contrast, the Department of Homeland Security in 2006 deported 23,065 noncitizens classified as "aggravated felons." Once a noncitizen is branded an "aggravated felon," deportation is unstoppable, adjustment of status is unavailable, detention is mandatory, judicial review is limited, and permanent ejection from the United States is guaranteed. In short, a noncitizen could commit petty larceny as an eighteen-year-old and be deported twenty years later for violating a condition of residency even though petty larceny was not an immigration violation at the time it was committed. The law remains steadfast that such an outcome is not punishment. Therefore, weak constitutional protections leave indigent noncitizens without legal representation.

The case-by-case analysis of whether to appoint counsel in removal proceedings under the Fifth Amendment is based on three factors established in Mathews v. Eldridge: (1) the interests of the noncitizen, (2) the effectiveness of appointed counsel in preventing error, and (3) the interests of the government. First, the interests of noncitizens are often very high. Many noncitizens immigrated as young children, own property in the United States, and have family members who are either U.S. citizens or legal permanent residents. In addition, some noncitizens would face physical harm or persecution if forced to return to violent or unsafe countries. Deportation is, therefore, often analogous to banishment or criminal punishment. Second, the availability of counsel is necessary to prevent error. Competent legal counsel would be familiar with possible grounds for relief. Finally, not only is the government’s interest in maintaining the integrity of removal proceedings vital; providing fair due process is central to American principles.

Therefore, since the risk of unjust and harsh sanctions runs high in removal proceedings and it is in the government’s interest to process noncitizens fairly, appointed counsel for the indigent is necessary. Current

173. Id.
174. Id.
175. Id.
176. Pauw, supra note 75, at 306.
177. 424 U.S. 319, 335 (1976).
178. Werlin, supra note 3, at 405.
180. Werlin, supra note 3, at 405.
181. Robertson, supra note 9, at 1035–36 (discussing various forms of relief).
182. See supra Part III.
rent realities have increased the severity of immigration violations to such an extent that Fifth Amendment “fundamental fairness” requires a categorical right to appointed counsel.

V. APPOINTED COUNSEL IN REMOVAL PROCEEDINGS IS EFFICIENT, MORAL, AND CONSTITUTIONALLY REQUIRED

Over the past several years, U.S. immigration law has become increasingly unforgiving and vengeful. Particularly since September 11, 2001, new legislation has decreased procedural protections in removal proceedings, increasing the potential for grave injustice. On the other hand, the world has undergone a drastic transformation since the end of the Cold War. Perhaps Americans believe potential injustices in immigration proceedings are acceptable in light of current political and economic realities. The argument for a categorical right to appointed counsel under the Fifth Amendment, however, transcends much of the current substantive immigration debate. Whether or not the laws themselves are appropriate or justified is irrelevant to whether or not those laws should be applied correctly in individual cases. Because a categorical right to appointed counsel under the Fifth Amendment is pragmatically sensible, morally necessary, and central to American principles, Congress and the courts should recognize such a right for indigent noncitizens.

First, a categorical right to appointed counsel at the government’s expense could potentially decrease immigration costs to society. By increasing the number of lawyers throughout the system, immigration courts could operate more efficiently. In 2004, the BIA published a three-year “impact assessment” report on its own pro bono project. The BIA reported that extra attorneys helped immigration judges identify relevant issues through well-written court briefs, increased approval rates by three to four times those of unrepresented noncitizens, and improved case efficiency by reducing the time needed to resolve issues. Since legal representation decreases time spent on court proceedings and noncitizen detention periods—often by decreasing the number of continuances granted—system costs also decrease. Furthermore, providing lawyers for all indigent noncitizens would deter frivolous government

183. Tumlin, supra note 105, at 1193.
184. For a detailed description of three possible models: (1) a public defender-like system, (2) an immigration representation project model, and (3) a legal orientation/rights presentation model, see Kerwin, supra note 5, at 13-15.
185. Id. at 1.
187. Id. at 10-15.
188. Kerwin, supra note 5, at 7.
claims and large-scale raids conducted for political purposes. Again, this check would reduce costs.

Second, a right to appointed counsel is morally right. Because of the severe implications of deportation—banishment from home, family, work, and property—procedural deficiencies are not simply technical constitutional issues for lawyers and academics. Such deficiencies have real-world consequences that often affect society's most vulnerable. The Catholic Church has addressed many of these issues in its defense of basic human dignity.\textsuperscript{189} The Church believes that using security and economic issues to dehumanize noncitizens—or any human being—offends Christian love and solidarity.\textsuperscript{190} Pope John Paul II wrote that Americans have a duty to promote solidarity "capable of inspiring timely initiatives in support of the poor and the outcast, especially refugees forced to leave their villages and lands in order to flee violence."\textsuperscript{191} Certainly the Church's "preferential option for the poor" cannot be better illustrated than by an indigent noncitizen at risk of being unjustly "cast out" from his or her society.\textsuperscript{192} The Church believes that to ignore policies that actively promote structures of sin is morally wrong.\textsuperscript{193}

Although such ideals could easily be dismissed as philosophical principles irrelevant to modern society, such statements contain a persuasive truth. As Pope John Paul II stated:

It is above all a question of interdependence, sensed as a system determining relationships in the contemporary world, in its economic, cultural, political, and religious elements, and accepted as a moral category. When interdependence becomes recognized in this way, the correlative response as a moral and social attitude . . . is solidarity. This then is not a feeling of vague compassion or shallow distress at the misfortunes of so many people . . . [but] a

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\begin{enumerate}
\item Specific in reference to the United States, the Catholic Church believes that although "[the] Church is well aware of the problems created by [immigration]," all people have a "natural right . . . to move freely within their own nation and from one nation to another. Attention must be called to the rights of migrants and their families and to respect for their human dignity, even in cases of non-legal immigration." \textsc{Pope John Paul II, Post-Synodal Apostolic Exhortation: Ecclesia in America para. 65 (1999).}
\item \textit{Id.} para. 56 (criticizing a "purely economic conception of man"); \textit{see also} \textsc{Pope John Paul II, Sollicitudo Rei Socialis (Twentieth Anniversary of Populorum Progressio) para. 33 (1987),} ("Both peoples and individuals must enjoy the fundamental equality which is the basis . . . of the right of all to share in the process of full development.").
\item \textsc{Ecclesia in America, supra} note 189, para. 52.
\item \textit{See Pope Paul VI, Gaudium et Spes: Pastoral Constitution on the Church in the Modern World} para. 1 (1965) ("The joys and the hopes, the griefs and the anxieties of the men of this age, especially those who are poor or in any way afflicted, these are the joys and hopes, the griefs and anxieties of the followers of Christ.").
\item \textsc{Ecclesia in America, supra} note 189, para. 56.
\end{enumerate}
\end{footnotesize}
firm and persevering determination to commit oneself to the com-
mon good . . . because we are all really responsible for all.\textsuperscript{194}

As the United States becomes increasingly "interdependent" in a
globalized world, the unjust treatment of noncitizens has concrete effects.
Whether or not the current law is justified, statutory categories should
not replace human identities.\textsuperscript{195} Pope John Paul II stated, "The stronger
and richer nations must have a sense of moral responsibility for the other
nations, so that a real international system may be established which will
rest on the foundation of the equality of all peoples."\textsuperscript{196}

Finally, respect for civil liberties and human rights lies at the core of
the U.S. constitutional system. The Constitution's preamble articulates a
comprehensive vision aiming to "establish Justice, insure domestic Tran-
quility, provide for the common defence, promote the general Welfare,
and secure the Blessings of Liberty."\textsuperscript{197} Therefore, any discussion of
national security must include not only protection of physical safety, but
also political and economic rights—"the loss of which could threaten the
fundamental values and vitality of the state."\textsuperscript{198} It has been argued that
the common good or the nation's general welfare is always harmed when
individual human rights are suppressed.\textsuperscript{199} Certainly the founding
fathers agreed that equal opportunity—not necessarily equal fulfill-
ment—and the common good ought to dominate popular sentiments
and oppressive factions.\textsuperscript{200} Principles of natural law on which the United

\begin{itemize}
\item \textsuperscript{194} SOLLICITUDO, supra note 190, para. 38; see also Matthew 10:40–42; 20:25;
\item \textsuperscript{195} Daniel Kanstroom, Legal Lines in Shifting Sand: Immigration Law and Human Rights in the Wake of September 11th, 25 B.C. THIRD WORLD L.J. 1, 4–5 (2005) (suggesting that traditional immigration categories such as "citizen" versus "noncitizen" and "criminal" versus "civil" should be replaced with "a more . . . human rights approach").
\item \textsuperscript{196} SOLLICITUDO, supra note 190, para. 39.
\item \textsuperscript{197} U.S. CONST. pmbl. (emphasis added).
\item \textsuperscript{198} AMOS A. JORDAN ET AL., AMERICAN NATIONAL SECURITY 3 (5th ed. 1999).
\item \textsuperscript{199} See CONFERENCIA DEL EPISCOPADO MEXICANO & U.S. CONF. OF CATH.
\item \textsuperscript{200} See, e.g., THE FEDERALIST No. 10, at 72 (James Madison) (Clinton Rossiter ed., Signet Classic 2003) (1961):
Complaints are everywhere heard from our most considerate and virtuous citi-
zens, equally the friends of public and private faith and of public and personal
liberty, that our governments are too unstable, that the public good is disre-
garded in the conflicts of rival parties, and that measures are too often decided,
not according to the rules of justice and the rights of the minor party, but by
the superior force of an interested and overbearing majority.
\end{itemize}
States was founded dictate that all human beings—not just citizens—are created free and equal.\textsuperscript{201}

If procedural rights can be swept away for some, there is no guarantee they cannot be swept away for others. In 1800, James Madison, the father of the Bill of Rights, argued to a Congressional Committee that even though granting immigrants residency was a "favor," such a favor could not be arbitrarily revoked once granted.\textsuperscript{202} Madison directly stated that, "although aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over [noncitizens]."\textsuperscript{203} To threaten the liberty interests of noncitizens without proper procedural checks allows for tyrannical impulses not easily contained. National security does not simply mean physical safety.\textsuperscript{204}

In 1886, the Supreme Court stated:

[I]Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches, and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.\textsuperscript{205}

As Justice O'Connor warned recently, "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."\textsuperscript{206} Such a statement is not an abstract ideal, but a fundamental principle of American law. Without a strong principle of due process, the power of government can overwhelm individual rights, causing injustice.

\textbf{Conclusion}

The current statutory and constitutional right of appointed counsel for indigent noncitizens is weak. As national security and crime-control


\textsuperscript{203} \textit{Id.} at 527.

\textsuperscript{204} Donald Kerwin & Margaret D. Stock, \textit{The Role of Immigration in a Coordinated National Security Policy}, \textit{21 Geo. Immigr. L.J.} 383, 425 (2007) (citing Rachel Kleinfield Belton, Carnegie Endowment for Int'l Peace, \textit{Competing Definitions of the Rule of Law} 5–6 (Carnegie Papers, Rule of Law Series No. 55, 2005) (identifying five elements of the rule of law: (1) government adherence to standing laws; (2) protection of lives, rights, and property; (3) equality before the law; (4) human rights; and (5) efficient predictable justice)).

\textsuperscript{205} Boyd v. United States, 116 U.S. 616, 635 (1886).

concerns increase, removal proceedings become more and more complex and punitive. In order to protect innocent noncitizens from getting lost in the system and possibly losing everything in their life worth living for, courts must heighten the standards of procedural due process. By establishing a \textit{per se} right to appointed counsel, the government decreases the chance of error at little cost to itself. In fact, the costs may be far greater in turning a blind eye to injustice.

Like all civilizations, America must prioritize its fears in order to define what separates it from the rest of the world. American policymakers must decide whether the threat of terrorism outweighs the risks placed on indigent noncitizens in removal proceedings. The country as a whole must decide if we are safer by deporting potentially innocent U.S. residents, or if eroding civil liberty outweighs a possible terrorist attack. As the Nazi-Concentration-Camp survivor Martin Niemöller warned:

\begin{quote}
When the Nazis came for the communists,
I remained silent; I was not a communist.

When they locked up the social democrats,
I remained silent; I was not a social democrat.

When they came for the trade unionists,
I did not speak out; I was not a trade unionist.

When they came for the Jews,
I remained silent; I was not a Jew.

When they came for me,
there was no one left to speak out.\textsuperscript{207}
\end{quote}
