

(Potentially) Resolving the Ever-Present Debate over Whether Noncitizens in Removal Proceedings Have a Due-Process Right to Effective Assistance of Counsel

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ABSTRACT: A noncitizen in removal proceedings who alleges that his or her counsel's deficient performance detrimentally affected his or her claim can file a motion to reopen the proceedings based on a claim of ineffective assistance of counsel. The circuit courts are split as to whether a noncitizen's right to reopen his or her removal proceeding is solely a matter of administrative discretion or a fundamental right rooted in the Fifth Amendment's Due Process Clause. This Note applies a modified version of the Supreme Court's procedural-due-process balancing test and the European Court of Human Rights' three-tiered Engel test to demonstrate that despite their classification as "civil" matters, removal proceedings implicate the same liberty concerns present in criminal prosecutions, and therefore should receive at least one constitutional safeguard afforded to criminal defendants: an unqualified constitutional right to effective assistance of counsel.

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I. INTRODUCTION

In one of his last acts as Attorney General, Michael Mukasey issued *In re Compean* (“*Compean I*”),¹ in which he determined that noncitizens in immigration removal proceedings do not have a statutory or constitutional right to effective representation.² The decision departed from the majority position among the circuit courts that noncitizens possess a due-process right to effective assistance of counsel, and effectively replaced a “familiar and workable” procedural framework for reopening removal proceedings based on claims of ineffective assistance of counsel³ with a new standard: “inadequate and unreasonable procedure[s]” apparently intended to “minimize judicial protection for immigrants.”⁴ On June 3, 2009, Attorney General Eric Holder vacated *Compean I*, expressing his concern that the manner in which Mukasey issued the decision did not result “in a thorough consideration of the issues involved.”⁵

Many in the immigration-law community have welcomed Holder’s order to vacate *Compean I*. Nevertheless, it is improper to overstate the positive scope or effect of Holder’s actions. Although the Attorney General instructed Immigration Judges (“IJs”) and the Board of Immigration Appeals (“BIA”) to apply the pre-*Compean I* framework to reopen all pending and future motions based on ineffective assistance of counsel, he did not address any of Mukasey’s substantive constitutional arguments.⁶ Consequently, Holder failed to clearly articulate the position of the DOJ (or the position of the Obama Administration) on this important and controversial issue.

However, shortly after Holder issued an order to vacate *Compean I*, then-Solicitor General Elena Kagan confirmed that the DOJ supports the view that because removal proceedings are characterized as civil proceedings,

1. *In re Compean (Compean I)*, 24 I. & N. Dec. 710 (2009) (interim decision), *vacated*, *In re Compean (Compean II)*, 25 I. & N. Dec. 1, 2 (2009) (interim decision).

2. ACLU, *COMPEAN DECISION BY ATTORNEY GENERAL MUKASEY REGARDING INEFFECTIVE ASSISTANCE OF COUNSEL IN IMMIGRATION PROCEEDINGS 1* (2009), *available at* http://www.aclu.org/images/asset_upload_file558_38744.pdf.

3. Thomas K. Ragland, *The Uncertain Right to Effective Assistance of Counsel in Immigration Proceedings*, AM. BAR ASS’N, http://www.abanet.org/litigation/committees/immigration/articles/o609_ragland.html (last visited Nov. 1, 2010).

4. ACLU, *supra* note 2, at 2–3; *see also* Letter from ACLU to Michael B. Mukasey, Att’y Gen. of the U.S. (Oct. 6, 2008), *available at* http://www.aclu.org/pdfs/immigrants/mukasey_letter.pdf (stating that any decision to overturn “long-settled precedent acknowledging the fundamental right of immigrants to obtain a new hearing in cases of counsel error . . . would be flawed”).

5. *Compean II*, 25 I. & N. Dec. at 2.

6. *See id.* at 3 (stating that there is no need to address “Attorney General Mukasey’s conclusion that there is no constitutional right to effective assistance of counsel in removal proceedings”).

noncitizens in removal proceedings do not possess a constitutional right to counsel and therefore do not possess a corresponding right to effective representation by retained counsel.⁷ Although Kagan acknowledged the clear circuit split on the issue, she argued that the issue “is still developing in the courts of appeals” and that it is not yet time for the Supreme Court to address it.⁸ Therefore, it appears that for the time being, the DOJ is content with maintaining the status quo.

In this respect, it is possible that the DOJ wishes to afford the Executive Office for Immigration Review time to “initiate rulemaking procedures . . . to evaluate the [current procedural] framework and to determine what modifications should be proposed for public consideration.”⁹ Whatever the reasons for the DOJ’s position, it appears that contrary to Kagan’s contention, the law on this crucial issue has stopped developing. The circuits are clearly split between those that recognize a constitutional due-process right to effective assistance of counsel in removal proceedings and those that do not. The Supreme Court must eventually rule on this issue, and it is surprising that it has yet to do so.

This Note analyzes the current status of the law, as well as the current circuit split on whether noncitizens in removal proceedings have a due-process right to effective assistance of counsel. Part II discusses the constitutional and jurisprudential sources of the right to counsel in criminal and “quasi-criminal” civil proceedings, as well as the Supreme Court’s procedural-due-process balancing test and the European Court of Human Rights’ *Engel* test. Part III discusses why the Supreme Court has historically been reluctant to extend to noncitizens a due-process right to effective assistance of counsel, and discusses the current circuit split. Part IV subjects removal proceedings to the rigors of the procedural-due-process balancing test and the *Engel* test to demonstrate that noncitizens in removal proceedings should have at least one major constitutional safeguard afforded to defendants in criminal proceedings: a constitutional right to effective representation. Part V discusses two potential outcomes of a Supreme Court decision on the issue and offers several policy recommendations on reforming the current administrative process for reopening removal proceedings based on a claim of ineffective assistance of counsel.

7. Brief for Respondent at 10, *Afanwi v. Holder*, 526 F.3d 788 (2009) (No. 08-906), 2009 WL 2625869. A writ of certiorari was filed to address two issues: (1) whether noncitizens possess a constitutional right to effective assistance of counsel in removal proceedings, and (2) whether the BIA has discretionary authority to reopen removal proceedings to afford relief from counsel’s failure to file a timely motion for review. The Supreme Court granted certiorari on the second issue only and remanded the case to the Eleventh Circuit to determine whether the BIA indeed has this right. *Afanwi v. Holder*, 130 S. Ct. 350 (2009) (mem.).

8. Brief for Respondent, *supra* note 7, at 10.

9. *Compean II*, 25 I. & N. Dec. at 2.

II. BACKGROUND

A. CONSTITUTIONAL AND JURISPRUDENTIAL SOURCES OF THE RIGHT TO COUNSEL IN CRIMINAL AND “QUASI-CRIMINAL” CIVIL PROCEEDINGS

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defense.”¹⁰ In *Strickland v. Washington*, the Supreme Court ruled that the Sixth Amendment right to counsel also includes a corresponding right to effective assistance of counsel in criminal cases, and that the “benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”¹¹ Therefore, whereas *all* criminal defendants possess a constitutional right to government-appointed counsel, “there is no [direct] corollary in the civil context.”¹² Nevertheless, the Supreme Court recognizes that defendants in certain “quasi-criminal” civil proceedings have a due-process right to government-appointed counsel. A “quasi-crime” is defined as “[a]n offense not subject to criminal prosecution . . . but for which penalties can be imposed.”¹³ Examples of civil proceedings that can be characterized as “quasi-criminal” include juvenile-delinquency proceedings, probation-revocation hearings, and parental-right-termination proceedings. All three involve offenses that are “not subject to criminal prosecution,” but for which courts can impose harsh penalties, such as institutionalization, incarceration, and loss of parental rights. In all three quasi-criminal civil proceedings, the Supreme Court has recognized the existence of a due-process right to government-appointed counsel.¹⁴ The following Subpart describes the three-tiered procedural-due-process balancing test the Court applies to determine whether due process requires government-appointed counsel in a particular quasi-criminal civil proceeding.

10. U.S. CONST. amend. VI.

11. 466 U.S. 668, 686 (1984).

12. Note, *A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings*, 120 HARV. L. REV. 1544, 1546 (2007).

13. BLACK’S LAW DICTIONARY 378 (7th ed. 1999).

14. See *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (stating that although “the revocation of parole is not a part of the criminal prosecution,” the potential deprivation of liberty that may result in a probation revocation proceeding “requir[es] that the parolee be accorded due process [protections]”); *In re Gault*, 387 U.S. 1, 41 (1967) (stating that in juvenile-delinquency proceedings where the child’s liberty is at stake, the Due Process Clause of the Fourteenth Amendment requires that the court appoint counsel to represent the child if the parents cannot afford to retain counsel).

1. The Supreme Court's Procedural-Due-Process Balancing Test

a. Tier 1

The first stage of the analysis focuses on the liberty interest at stake in a particular civil proceeding. To this end, the Court adopts a rebuttable presumption "that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty."¹⁵

b. Tier 2

The Court then considers whether the particular civil proceeding satisfies the demands of due process—i.e., whether it is fundamentally fair¹⁶—in view of the three factors it promulgated in *Mathews v. Eldridge*:

[T]he private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used . . . ; and . . . the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁷

Therefore, if the relative weight of (1) the civil defendant's private interest in the proceeding, (2) coupled with a high risk that the procedures used will erroneously deprive the defendant of his or her interest, (3) exceeds the government's interest in the proceeding, the Court is likely to determine that the current proceeding is fundamentally unfair, and therefore violates the defendant's due-process rights.

c. Tier 3

After balancing the *Mathews* factors, the Court "then set[s] their net weight in the scales against the presumption that there is a right to appointed counsel only where the [civil defendant], if he is unsuccessful, may lose his personal freedom."¹⁸ The three-tiered analysis can be summarized as follows: when the structure of the civil proceeding increases the likelihood of a fundamentally unfair outcome (as determined by the *Mathews* factors), the likelihood that the civil defendant will be deprived of his or her liberty interest increases as well. Therefore, because it is very possible that the outcome of the fundamentally unfair proceedings will deprive the civil defendant of his or her liberty, the initial presumption is

15. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981).

16. *Gagnon*, 411 U.S. at 790 ("[F]undamental fairness [is] the touchstone of due process . . .").

17. 424 U.S. 319, 335 (1976) (citation omitted).

18. *Lassiter*, 452 U.S. at 27.

rebutted. In this instance, the Due Process Clause requires that the court appoint counsel.

The Supreme Court is not alone in recognizing that certain civil proceedings closely straddle the civil–criminal line. Nor is the Court alone in fashioning a test to determine on which side of the civil–criminal line certain civil proceedings fall. In *Engel v. Netherlands*,¹⁹ the European Court of Human Rights (“ECHR”) articulated a three-tiered test analogous to the Supreme Court’s procedural-due-process balancing test. The *Engel* test provides European courts with a framework for determining when a defendant charged with a “noncriminal” offense according to the domestic law of the Member State is subject to a “criminal charge” for the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”).

2. *Engel* and the Meaning of “Criminal Charge”

The prominent feature of legal representation in many Western European states is its characterization as a fundamental “right,” as opposed to a “part of a gratuitous social welfare system.”²⁰ Consequently, Western European constitutions, high courts, and legislatures impose upon their respective states the burden of ensuring that they provide access to legal services.²¹ In recent decades, international law has supplemented domestic legislation and jurisprudence to obligate Western European states to provide free legal representation in criminal and certain civil matters.²² The forty-nine member states of the Council of Europe, for example, are bound both by domestic laws governing the right to representation, and by the European Convention, which requires a “fair and public hearing” in civil and criminal proceedings.²³ Despite the European Convention’s broad scope, article 6(3)(c) affords only *criminal* defendants a guaranteed right to free legal representation.²⁴ However, the ECHR has recognized that defendants in

19. *Engel v. Netherlands* (No. 1), 1 Eur. Ct. H.R. 647 (1976).

20. Lua Kamál Yuille, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT’L L. 863, 878 (2004); see Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going To Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 772 (2006) (stating that the range of legal services in many European states is “quite comprehensive with respect to representation of individuals in most areas of substantive civil law”).

21. Yuille, *supra* note 20, at 878–79.

22. See *id.* at 879 (stating that “domestic assurances have been bolstered by corresponding international guarantees that require each country to provide equal access” to representation).

23. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, E.T.S. No. 5 [hereinafter European Convention], available at <http://conventions.coe.int/Treaty/EN/Treaties/html/005.htm>.

24. *Id.* at art. 6(3) (“Everyone charged with a criminal offence has the . . . right[] . . . to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so

“noncriminal proceedings” may nevertheless receive the same guarantees that the European Convention affords to criminal defendants.²⁵ The relevant inquiry is whether the “noncriminal” defendant is the subject of a “criminal charge” within the meaning of article 6(1) of the European Convention.

In *Engel v. Netherlands*,²⁶ the ECHR sought to develop an “autonomous interpretation of criminal charge” that did not “g[i]ve paramouncy to the domestic classification of a respondent State.”²⁷ To this end, the *Engel* court formulated three criteria that help determine whether a defendant in a noncriminal proceeding is the subject of a criminal charge within the meaning of the European Convention: (1) the domestic classification of the proceeding; (2) the nature of the offense; and (3) the nature and severity of the penalty that the defendant risks incurring.²⁸ Although the *Engel* court intended to limit its analysis to military disciplinary proceedings, the three elements are “now . . . regarded as constituting the classic statement of the relevant criteria” upon which European courts rely in a variety of noncriminal proceedings.²⁹

This Note concedes that it is highly unlikely that the Supreme Court would recognize a due-process right to government-appointed counsel in removal proceedings, or recharacterize removal as a wholly criminal offense.³⁰ However, this Note will demonstrate—applying the *Engel* test and a modified version of the procedural-due-process balancing test—that: (1) because removal proceedings give rise to similar due-process concerns and impose similar penalties as do criminal prosecutions and quasi-criminal proceedings; and (2) because noncitizens in removal proceedings are subject to a “criminal charge” for the purposes of the European Convention, that noncitizens should have a due-process right to *effective* assistance of privately retained counsel.³¹

To better understand the Supreme Court’s reluctance to extend to noncitizens in removal proceedings a due-process right to government-appointed counsel—and the corresponding due-process right to effective assistance of counsel—it is necessary to understand why removal (i.e., deportation) is so firmly entrenched on the “civil” side of the civil–criminal line.

require.”); see also C.J.F. Kidd, *Disciplinary Proceedings and the Right to a Fair Criminal Trial Under the European Convention on Human Rights*, 36 INT’L & COMP. L.Q. 856, 856 (1987) (stating that articles 6(2) and 6(3) “apply only to criminal proceedings”).

25. Kidd, *supra* note 24, at 857.

26. 1 Eur. Ct. H.R. 647 (1976).

27. Kidd, *supra* note 24, at 857.

28. *Engel*, 1 Eur. Ct. H.R. at 678–79.

29. Kidd, *supra* note 24, at 858.

30. See *infra* Part III.

31. See *infra* Part III.

B. ACCESS TO COUNSEL IN REMOVAL PROCEEDINGS

1. The History and Jurisprudence Behind the “Civil” Label

Traditionally, the question of whether the noncitizen “is physically present within the United States” determined whether the government should extend to him due-process rights.³² In *Chae Chan Ping v. United States*,³³ (popularly known as the *Chinese Exclusion Case*) the Supreme Court rejected a Chinese laborer’s “asserted right of re-entry” to the United States despite having valid reentry documents.³⁴ In this regard, the Court reaffirmed that the United States “has no legal obligation to those outside [the country’s] borders seeking entry.”³⁵ Moreover, the Court defined the expansive scope of the federal government’s power to articulate and enforce immigration law and policy. Specifically, the decision confirmed that the federal government enjoys plenary authority to dictate the terms and conditions for noncitizens seeking entry into the United States.³⁶

In *Fong Yue Ting v. United States*,³⁷ the Supreme Court held that the plenary-power doctrine articulated in *Chae Chan Ping* “barred judicial review of deportation” of noncitizens.³⁸ The Court’s majority stated that that power to exclude and admit noncitizens “belongs to the political department of the government,”³⁹ and that the Court must “be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government.”⁴⁰ The majority further determined that deportation proceedings for unlawfully admitted noncitizens are “in no proper sense a trial and sentence for a crime or offense.”⁴¹ Rather, “[t]he order of deportation is not a punishment for crime . . . but a method of enforcing the return . . . of an alien who has not complied with [governmental regulations],” and therefore the noncitizen has not been “deprived of life, liberty or property, without due process of law.”⁴² In so holding, the Court effectively dismissed the

32. Nimrod Pitsker, Comment, *Due Process for All: Applying Eldridge To Require Appointed Counsel for Asylum Seekers*, 95 CALIF. L. REV. 169, 173 (2007).

33. 130 U.S. 581 (1889).

34. Pitsker, *supra* note 32, at 173 (discussing *Chae Chan Ping*, 130 U.S. 581).

35. *Id.*

36. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1634 (1992) (“The *Chinese Exclusion Case* established that the political branches would generally enjoy plenary power over immigration . . .”).

37. 149 U.S. 698 (1893).

38. Motomura, *supra* note 36, at 1635.

39. *Fong Yue Ting*, 149 U.S. at 705.

40. *Id.* at 712.

41. *Id.* at 730.

42. *Id.* (emphasis added).

argument that deportation proceedings “trigger the more substantial constitutional safeguards” present in criminal prosecutions.⁴³

Ten years after *Fong Yue Ting*, the Court first recognized that deportation proceedings initiated *after* noncitizens have entered the United States are subject to procedural-due-process protections. In *Yamataya v. Fisher*,⁴⁴ the Supreme Court determined that:

[A]n alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, [cannot] be taken into custody and deported without [an] opportunity to be heard upon the questions involving his right to be and remain in the United States.⁴⁵

To this end, while the Court recognized the government’s plenary authority to dictate the terms and conditions of immigration law and policy,⁴⁶ it stated definitively that the government cannot use that authority to arbitrarily deny noncitizens due-process protections.⁴⁷ The modern regulatory framework governing noncitizens’ access to counsel in removal proceedings reflects this tension between the government’s plenary authority to create immigration law and policy and its ability to dictate how the policy is judicially interpreted and enforced.

2. *Privilege or Right to Counsel in Removal Proceedings?*

The Immigration and Nationality Act (“INA”) provides that noncitizens “shall have the privilege of being represented, at no expense to the Government, by counsel of the [noncitizen’s] choosing who is authorized to practice in such proceedings.”⁴⁸ If, however, the noncitizen is unable to procure counsel, the Attorney General will provide a list of available

43. Motomura, *supra* note 36, at 1636.

44. 189 U.S. 86 (1903).

45. *Id.* at 101.

46. *See, e.g., id.* at 97 (describing Congress’s plenary authority to establish substantive conditions in immigration law). The Court stated:

That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention,—are principles firmly established by the decisions of this court.

Id.

47. *See id.* at 101 (stating that an “arbitrary power [to deport without trial cannot] exist where the principles involved in due process of law are recognized”); *see also* Motomura, *supra* note 36, at 1638 (“*Yamataya* planted the seed from which the procedural due process exception eventually grew.”).

48. 8 U.S.C. § 1229a(b)(4)(A) (2006).

attorneys “who have indicated their availability to represent pro bono [noncitizens] in proceedings.”⁴⁹ Although the INA’s regulatory provisions indicate that a noncitizen in removal proceedings has a statutory *privilege* of counsel, a majority of circuit courts hold that this language confers an affirmative *right* to counsel.⁵⁰ These circuits make clear, however, that noncitizens only have an affirmative right to *privately retained* counsel of their choice at their expense, and not to government-appointed counsel.⁵¹ Notwithstanding the majority position, at least one circuit has entertained the idea that noncitizens in removal proceedings have a due-process right to government-appointed counsel. In *Aguilera-Enriquez v. INS*,⁵² the petitioner challenged the constitutionality of the “at no expense to the government” provision of INA, arguing that his due-process rights had been violated when the IJ determined that the INA did not allow for government-appointed counsel in removal proceedings.⁵³ The Sixth Circuit, citing *Yamataya*, acknowledged that if congressional enactments do not afford a noncitizen procedural due process, “they must yield, and the constitutional guarantee of due process must provide adequate protection during the deportation process.”⁵⁴ In recognizing that noncitizens in removal proceedings may possess a due-process right to counsel, the Sixth Circuit “discarded the civil-criminal distinction as determinative of” this right.⁵⁵ Rather, the court held

49. *Id.* § 1229(b)(2).

50. *See, e.g.*, *Leslie v. Att’y Gen. of the U.S.*, 611 F.3d 171, 180–81 (3d Cir. 2010) (stating that the “statutory and regulatory right to counsel is also derivative of the due process right to a fundamentally fair hearing”); *Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (“The legislative history of [the INA] confirms that Congress wanted to confer a *right*.”); *see also* Brief for Am. Immigration L. Found. as Amici Curiae Supporting Petitioners at 20, *Compean II*, 25 I. & N. Dec. 1 (2009) (interim decision), available at <http://www.aila.org/content/fileviewer.aspx?docid=26852&linkid=184772> (stating that the cumulative effect of the INA provisions constitute an affirmative right to counsel, rather than a mere privilege). *Contra Compean I*, 24 I. & N. Dec. 710, 726 (2009) (interim decision), vacated, *Compean II*, 25 I. & N. Dec. 1 (“The fact that aliens in removal proceedings have a *statutory* privilege to retain counsel . . . does not change the constitutional analysis, because a statutory privilege is not the same as a right to assistance of counsel, including Government-appointed counsel, under the Constitution.” (citations omitted)).

51. *See Leslie*, 611 F.3d at 181 (“[A]lthough the Fifth Amendment does not mandate government-appointed counsel for aliens at removal proceedings, it indisputably affords an alien the right to counsel of his or her own choice at his or her own expense.” (citing *Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005))); *Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008) (“While binding Second Circuit precedent holds that aliens in deportation proceedings have ‘no specific right to counsel,’ the Fifth Amendment does require that such proceedings comport with due process of the law.” (quoting *Jian Yun Zheng v. U.S. DOJ*, 409 F.3d 43, 46 (2d Cir. 2005))).

52. 516 F.2d 565 (6th Cir. 1975).

53. *Id.* at 568.

54. *Id.*

55. Robert S. Catz & Nancy Lee Firak, *The Right to Appointed Counsel in Quasi-criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. C.R.-C.L. L. REV. 397, 437 (1984).

that “[t]he test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness—the touchstone of due process.’”⁵⁶

The dissent in *Aguilera-Enriquez* fervently objected to the majority’s “in a given case” approach, stating, “a resident alien has an *unqualified* right to the appointment of counsel.”⁵⁷ The dissent asserted that removal proceedings are inherently adversarial,⁵⁸ and that they “so jeopardize[] a resident alien’s basic and fundamental right to personal liberty” that it is improper to guarantee due-process protection “on a case-by-case basis.”⁵⁹

In the years following *Aguilera-Enriquez*, a few circuits have recognized the merits of the case-by-case approach in determining whether a particular noncitizen is entitled to a due-process right to appointed counsel.⁶⁰ However, despite some circuits’ conceptual recognition of a qualified right to government-appointed counsel, there are no published opinions applying the *Aguilera-Enriquez* case-by-case, fundamental-fairness test to find that the petitioner is indeed entitled to a due-process right to government-appointed counsel in a removal proceeding.⁶¹

C. RECOGNITION OF A DUE-PROCESS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL
IN REMOVAL PROCEEDINGS

Shortly after the Sixth Circuit’s decision in *Aguilera-Enriquez*, the Fifth Circuit recognized that noncitizens in removal proceedings may also possess a due-process right to effective assistance of counsel. In *Paul v. INS*,⁶² the court, in a footnote, interpreted the right to counsel to denote “not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render . . . effective assistance.”⁶³ Since *Paul*, seven other circuits have held that noncitizens in removal proceedings have a due-process right to effective representation.⁶⁴

56. *Aguilera-Enriquez*, 516 F.2d at 568 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

57. *Id.* at 572 (DeMascio, J., dissenting) (emphasis added).

58. *Id.* at 572 (“A deportation hearing . . . is always an adversary proceeding.”).

59. *Id.* at 571–72.

60. See, e.g., *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986) (“[A]ny right a petitioner may have to counsel is grounded in the fifth amendment guarantee of due process.”); *Barthold v. INS*, 517 F.2d 689, 690 (5th Cir. 1975) (“It is clear that any right an alien may have in this regard is grounded in the fifth amendment guarantee of due process rather than the sixth amendment right to counsel.”).

61. THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1034 (6th ed. 2008).

62. 521 F.2d 194 (5th Cir. 1975).

63. *Id.* at 198 n.8 (internal quotation marks omitted).

64. See generally *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008) (recognizing that the Fifth Amendment’s Due Process Clause entitles noncitizens in removal proceedings to

In 1988, in *In re Lozada*,⁶⁵ the BIA determined that in order to assert a due-process claim, a noncitizen must file with the BIA a motion to reopen removal proceedings based on a claim of ineffective assistance of counsel. In the motion, the noncitizen must demonstrate that counsel's deficient performance "was so fundamentally unfair that [he] was prevented from reasonably presenting his case," and that counsel's deficient performance prejudiced his removal hearing.⁶⁶ Furthermore, the BIA established three threshold procedural requirements that noncitizens must satisfy to support every motion to reopen: they must (1) provide an affidavit "setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the [client]"; (2) inform counsel of the allegations against him to allow him an opportunity to respond; and (3) indicate "whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not."⁶⁷

The BIA contends that *Lozada's* threshold requirements provide it with sufficient information to determine, without conducting a formal hearing, whether a noncitizen's claim against his prior counsel is credible.⁶⁸ The BIA further contends that it can identify most noncredible claims simply by reviewing the documentary evidence submitted.⁶⁹ All circuits that recognize a due-process right to effective assistance of counsel in removal proceedings require noncitizens to comply with *Lozada's* procedural requirements as requisite to their appellate review of the claim.⁷⁰

effective assistance of counsel); *Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008) (same); *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007) (same); *Fadiga v. Att'y Gen. of the U.S.*, 488 F.3d 142, 155 (3d Cir. 2007) (same); *Sene v. Gonzales*, 453 F.3d 383, 386 (6th Cir. 2006) (same); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2005) (same); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002) (same).

65. 19 I. & N. Dec. 637 (1988) (interim decision).

66. *Id.* at 638 (citations omitted).

67. *Id.* at 637.

68. *In re Rivera-Claros*, 21 I. & N. Dec. 599, 603-05 (1996) (interim decision) ("[H]earings are an added burden on both the parties and the Immigration Court, and they rarely assist in resolving the merits of the substantive immigration law issues presented by a particular case.").

69. *Id.* at 604; *see also Saakian v. INS*, 252 F.3d 21, 26 (1st Cir. 2001) (stating that the BIA can identify "false claims . . . either by the counsel's response to notification . . . or by an alien's insufficiently explained refusal to file a formal complaint against that counsel").

70. *See infra* Part III.B (discussing the circuit courts' review of noncitizens' compliance with *Lozada's* procedural requirements). Although most circuits require full compliance with *Lozada's* procedural requirements, the Ninth Circuit has, at times, held that strict compliance is not obligatory. *See Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000) ("While the requirements of *Lozada* are generally reasonable, they need not be rigidly enforced where their purpose is fully served by other means.").

III. THE CIRCUIT SPLIT

The circuit courts are split on the issue of whether noncitizens in removal proceedings possess a due-process right to effective assistance of counsel. The minority circuits do not recognize a Fifth Amendment due-process right to effective assistance of counsel in removal proceedings. Rather, the minority circuits defer to the BIA's discretion to determine whether counsel's ineffective assistance constitutes a sufficient basis for reopening the noncitizen's removal proceedings.⁷¹ Conversely, the majority circuits recognize noncitizens' right to effective assistance of counsel in removal proceedings and will grant the motions to reopen if counsel's ineffective representation constituted a due-process violation⁷² and the noncitizen has adequately complied with the *Lozada* procedural requirements. In granting the motion to reopen, the circuit courts remand the matter to the BIA for further proceedings consistent with the circuits' opinion.

A. THE MINORITY CIRCUITS

The Fourth, Seventh, and Eighth circuits recognize that while the Fifth Amendment's Due Process Clause applies to removal proceedings⁷³—as it does in any civil suit or administrative proceeding—it does not guarantee a right to effective assistance of privately retained counsel.⁷⁴ The circuits' reasoning is based on “a basic principle of American constitutional law . . . that the rights guaranteed by the Constitution cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings.”⁷⁵ That is, because the Fifth Amendment's Due Process Clause applies only to the actions of the

71. See *Shehadeh v. Gonzales*, 189 F. App'x 514, 516 (7th Cir. 2006) (“[R]elief derives from the BIA's discretion rather than constitutional imperative.”).

72. See *infra* Part III.B (discussing the majority circuits' two-fold inquiry to determine whether a counsel's ineffective assistance constituted a due-process violation).

73. See *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”).

74. See *Afanwi v. Mukasey*, 526 F.3d 788, 798 (4th Cir. 2008) (“[R]etained counsel's ineffectiveness in a removal proceeding cannot deprive an alien of his Fifth Amendment right to a fundamentally fair hearing.”), *vacated on other grounds*, *Afanwi v. Holder*, 130 S. Ct. 350 (2009) (mem.); *Rafiyev v. Mukasey*, 536 F.3d 853, 855, 861 (8th Cir. 2008) (“[T]here is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding.”); *Magala v. Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005) (stating that although noncitizens are constitutionally entitled to due process of law, “good lawyering” is not such an implicit constitutional right).

75. *Afanwi*, 526 F.3d at 798 (citation omitted); see also *Rafiyev*, 536 F.3d at 860 (stating that it is “difficult to see how an individual, such as [a noncitizen's] attorney, who is not a state actor, can deprive anyone of due process rights” (citation omitted)); *Magala*, 434 F.3d at 525 (“Every litigant in every suit and every administrative proceeding is entitled to due process, but it has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome.”).

federal government, the government is not accountable for the deficient performance of privately retained counsel. To be sure, the circuits acknowledge that a private act can trigger scrutiny under the Due Process Clause only if a “sufficiently close nexus” is established between the government and the private party’s conduct such that “the action of the latter may be fairly treated as that of the [government] itself.”⁷⁶ However, this nexus is often difficult to establish since private counsel “does not exercise ‘powers that are traditionally the exclusive prerogative’ of the Government,”⁷⁷ and his deficient representation is rarely a consequence of government “coercion or encouragement.”⁷⁸ Therefore, the minority circuits maintain that while retained counsel’s ineffective assistance may have unfortunate consequences for the immigrant client, it does not violate the Constitution.⁷⁹

B. THE MAJORITY CIRCUITS

Eight circuit courts of appeals recognize that noncitizens in removal proceedings have a due-process right to effective assistance of counsel.⁸⁰ To successfully assert a due-process violation, the courts require the noncitizen to demonstrate that: (1) his prior counsel’s performance was “deficient to the point that it impinged upon the fundamental fairness of the hearing”; and (2) that his counsel’s performance prejudiced his removal proceedings.⁸¹ The courts have articulated different definitions of the “fundamental fairness” and “prejudice” standards, and they differ as to whether the noncitizen must establish one, or both, to successfully assert a due-process violation. Because of these variations, it is important to carefully delineate the different standards in order to determine which would provide the most-just framework to adjudicate ineffective-assistance-of-counsel claims.

76. *Compean I*, 24 I. & N. Dec. 710, 718 (2009) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

77. *Id.* at 721 (citation omitted).

78. *Id.* (citation omitted) (noting that for a constitutional link to exist between the privately retained attorney’s actions and the government, the government must be responsible for the specific conduct the plaintiff is complaining about).

79. *Afanwi*, 526 F.3d at 799. Despite the circuits’ refusal to recognize a due-process right to effective assistance, they propose two alternative remedies. The first form of relief is a civil suit for damages for attorney malpractice. See *Magala*, 434 F.3d at 526 (“[T]he civil remedy is damages for malpractice, not a re-run of the original litigation”). The second remedy is relief granted by the BIA, which has discretionary authority to review claims of ineffective assistance of counsel notwithstanding constitutional or statutory constraints. *Id.* (stating that the BIA could grant relief as a matter of discretion and that “administrative law demand[s] that it do so carefully and rationally”).

80. See *supra* note 64 (listing circuit courts of appeals that recognize a due-process right to effective representation in removal proceedings).

81. *Dakane v. U.S. Att’y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2005).

1. “Fundamental Unfairness” and “Prejudice”

The majority circuits utilize three basic approaches in determining what constitutes “fundamental unfairness.” The First, Ninth, and Tenth circuits require noncitizens to demonstrate that counsel’s ineffectiveness prevented them from reasonably presenting their case.⁸² Similarly, the Sixth Circuit holds that a fundamentally unfair removal proceeding is one in which the noncitizen has been denied justice;⁸³ this circuit evaluates the precise meaning of “denial of justice” on a case-by-case basis. Finally, the Second and Third circuits utilize an outcome-determinative standard, holding that a removal proceeding is fundamentally unfair whenever it is reasonably likely that the order of removal would not have been entered *but for* counsel’s ineffective representation.⁸⁴

The majority of circuits also adhere to two basic approaches in defining “prejudice.” The Third, Sixth, Tenth, and Eleventh circuits adhere to a reasonable-probability–outcome-determinative standard, holding that counsel’s ineffective representation prejudices his client’s removal proceeding if it was reasonably probable that but for counsel’s errors, the outcome would have been different.⁸⁵ Similarly, the Ninth Circuit adheres to an outcome-determinative standard, but lowers the noncitizen’s burden of proving prejudice by requiring that he merely demonstrate “plausible grounds for relief.”⁸⁶ The different “fundamental fairness” and “prejudice” standards are summarized in the chart below:

82. See generally *Torres-Chavez v. Holder*, 567 F.3d 1096, 1100 (9th Cir. 2009) (stating that poor performance by a noncitizen’s lawyer may constitute a violation of the noncitizen’s Fifth Amendment due-process rights); *Akinwunmi v. Ashcroft*, 103 F. App’x 646, 648 (10th Cir. 2004) (same); *Hernandez v. Reno*, 238 F.3d 50, 55 (1st Cir. 2001) (“We have said that a process becomes fundamentally unfair when ‘the alien [is] prevented from reasonably presenting his case.’” (alteration in original) (quoting *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988))).

83. See *Allabani v. Gonzales*, 402 F.3d 668, 678 (6th Cir. 2005) (“To constitute fundamental unfairness, however, a defect in the removal proceedings ‘must have been such as might have led to denial of justice.’” (citations omitted) (quoting *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001))).

84. See *Xiuqing Jiang v. Mukasey*, 285 F. App’x 824, 827 (2d Cir. 2008) (stating that to demonstrate fundamental unfairness, the noncitizen “must allege sufficient facts to show that competent counsel would have acted otherwise”).

85. See generally *Fadiga v. Att’y Gen. USA*, 488 F.3d 142 (3d Cir. 2007) (“[T]he . . . ‘reasonable likelihood’ standard—or its equivalent, the ‘reasonable probability’ standard—is . . . appropriate to the prejudice inquiry in the context of an alleged denial of due process in removal proceedings due to ineffective assistance of counsel.”); *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006) (explaining that “prejudice” inquiries are determined *ex post* and require considering “whether due process was violated by evaluating whether the alien’s claims could have supported a different outcome”).

86. See *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826 (9th Cir. 2003) (citation omitted).

“Fundamental Unfairness”	Prejudice
<p>“Obstructing the Presentation of the Case” Standard (1st, 9th & 10th circuits) Fundamental unfairness requires proof that counsel’s ineffectiveness prevents a noncitizen from reasonably presenting his case.⁸⁷</p>	<p>“Reasonable-Probability”–Outcome-Determinative Standard (3d, 6th, 10th & 11th circuits) To establish prejudice, the noncitizen must show that counsel’s performance “is so inadequate that there is a <i>reasonable probability</i> that <i>but for</i> the attorney’s error, the outcome of the proceedings would have been different.”⁸⁸</p> <ul style="list-style-type: none"> •“Reasonable probability” means ‘a probability sufficient to undermine confidence in the outcome.’⁸⁹
<p>“Denial of Justice” Standard (6th Circuit) To demonstrate fundamental unfairness the defect or practice complained of “must have been such as might have led to a denial of justice.”⁹⁰</p>	<p>“Plausible” Outcome-Determinative Standard (9th Circuit) “Prejudice is found when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings.”⁹¹</p> <ul style="list-style-type: none"> •The key question, therefore, is not whether the noncitizen’s claims “would [ultimately] prevail, but merely whether they are <i>plausible enough</i> to warrant consideration by the BIA on remand.”⁹²
<p>“Reasonable Likelihood” Outcome-Determinative Standard (2d & 3d circuits) The noncitizen must demonstrate that there is a “reasonable likelihood” that the outcome [of the noncitizen’s] hearing . . . would have been different absent the errors allegedly made by his counsel.”⁹³</p>	

In addition to their different interpretations as to what constitutes “fundamental fairness” and “prejudice,” the circuit courts differ as to

87. See *Bernal-Vallejo v. INS*, 195 F.3d 56, 63 (1st Cir. 1999).

88. *Dakane v. U.S. Att’y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2005) (emphasis added).

89. *Obleshchenko v. Ashcroft*, 392 F.3d 970, 972 (8th Cir. 2004) (emphasis added).

90. *Allabani v. Gonzales*, 402 F.3d 668, 676 (citation omitted).

91. *Rojas-Garcia*, 339 F.3d at 826 (citations omitted).

92. *Nehad v. Mukasey*, 535 F.3d 962, 972 (9th Cir. 2008) (emphasis added).

93. *Fadiga v. U.S. Att’y Gen.*, 488 F.3d 142, 160 (3d Cir. 2007) (stating that “reasonable likelihood” is synonymous with “reasonable probability”).

whether the noncitizen must establish one, or both, to successfully assert a due-process violation. The Sixth Circuit holds that the two standards are “analogous,” and therefore requires the noncitizen to demonstrate only one to establish a due-process violation.⁹⁴ Conversely, the First, Second, Third, Fifth, Ninth, and Eleventh circuits require the noncitizen to demonstrate both fundamental unfairness *and* prejudice in order to establish a due-process violation.⁹⁵ Finally, while the Tenth Circuit requires the noncitizen to demonstrate that his counsel’s ineffective representation prejudiced his claim, the prejudice must rise to the level of fundamental unfairness. The Tenth Circuit appears to collapse the “fundamental unfairness” requirement into a showing of prejudice.⁹⁶ The charts below summarize the different approaches to which the circuits adhere:

Fundamental Fairness OR Prejudice (6th Circuit)	Fundamental Fairness AND Prejudice (1st, 2d, 3d, 5th, 9th, 11th circuits)	Hybrid Application: Prejudice Defined as Fundamental Fairness (10th Circuit)
“The alien carries the burden of establishing that ineffective assistance of counsel prejudiced him <i>or</i> denied him fundamental fairness in order to prove that he has suffered a denial of due process.” ⁹⁷	A noncitizen claiming ineffective assistance of “counsel must demonstrate that counsel’s performance was so ineffective as to have impinged upon the fundamental fairness of the hearing.’ . . . ‘and that [she] was prejudiced by [her] counsel’s performance.” ⁹⁸	A noncitizen in removal proceedings must demonstrate “that his counsel’s ineffective assistance so prejudiced him that the proceeding was fundamentally unfair.” ⁹⁹

94. *Sako v. Gonzales*, 434 F.3d 857, 863–64 (6th Cir. 2006).

95. See generally *Restrepo-Mejia v. Holder*, 323 F. App’x 338, 340 (5th Cir. 2009) (“To prevail on a claim of ineffective assistance of counsel at a deportation proceeding, an alien must show (1) ineffective representation *and* (2) substantial prejudice . . .” (emphasis added)); *Saakian v. INS*, 252 F.3d 21, 25 (1st Cir. 2001) (stating that in addition to demonstrating that the removal proceeding was fundamentally unfair, “it is generally also expected that the alien show at least a reasonable probability of prejudice”); *Rahnamaie v. INS*, No. 89-70549, 1992 WL 133124 (9th Cir. June 16, 1992) (“In a deportation proceeding, a claim of ineffective assistance of counsel must demonstrate that the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting her case and that the attorney’s conduct prejudiced the outcome of the proceedings.” (citing *Ramirez-Durazo v. INS*, 794 F.2d 491, 499–500 (9th Cir. 1986))).

96. *Bernabe-Orduno v. Gonzales*, 244 F. App’x 190, 193 (10th Cir. 2007).

97. *Sako*, 434 F.3d at 863 (emphasis added).

98. *Xiuquing Jiang v. Mukasey*, 285 F. App’x 824, 827 (2d Cir. 2008) (alterations in original) (emphasis added) (citation omitted).

99. *Bernabe-Orduno*, 244 F. App’x at 193.

IV. ANALYSIS: THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN REMOVAL PROCEEDINGS

The courts unanimously agree that the Sixth Amendment does not provide noncitizens in removal proceedings a right to appointed counsel, nor does it provide a corresponding right to effective assistance of counsel.¹⁰⁰ Moreover, there is little support among all the circuits for expanding the “affirmative right” to privately retained counsel to a constitutional right to government-appointed counsel.¹⁰¹ Consequently, it is unlikely that the Supreme Court or the government would extend to noncitizens in removal proceedings *all* the constitutional safeguards afforded to defendants in criminal prosecutions and “quasi-criminal” civil proceedings. Nevertheless, there is a compelling argument that noncitizens in removal proceedings should have at least *one* of the constitutional safeguards afforded to these defendants—an unqualified constitutional right to effective representation. The following Subparts will apply a modified version of the Supreme Court’s procedural-due-process balancing test and the ECHR’s *Engel* test to demonstrate that because: (1) removal proceedings give rise to similar due-process concerns and impose similar penalties as do criminal prosecutions and quasi-criminal proceedings; and (2) noncitizens in removal proceedings are subject to a “criminal charge” within the meaning of article 6(1) of the European Convention, noncitizens in removal should have an unqualified due-process right to *effective* assistance of privately retained counsel.

A. THE PROCEDURAL-DUE-PROCESS BALANCING TEST

The Supreme Court has used the procedural-due-process balancing test to determine whether certain defendants in “quasi-criminal” civil proceedings are constitutionally entitled to government-appointed counsel.¹⁰² To this end, the Supreme Court requires the defendant to rebut the initial presumption that he or she was not entitled to appointed counsel unless there is “at least a potential” that she will be deprived of physical liberty.¹⁰³ The civil defendant can rebut this presumption by demonstrating that there is an increased risk that the structure of the proceedings (i.e., not having the benefit of counsel) will erroneously divest her of the private

100. *See id.* *See generally* United States v. Yousef, 327 F.3d 56, 143 (2d Cir. 2003) (stating that noncitizens in removal proceedings do not have a Sixth Amendment right to counsel, nor a corresponding right to effective assistance of counsel, because removal proceedings are civil matters); Nativi-Gomez v. Ashcroft, 344 F.3d 805, 807 (8th Cir. 2003) (same); Mojsilovic v. INS, 156 F.3d 743, 748 (7th Cir. 1998) (same); United States v. Saucedo-Velasquez, 843 F.2d 832, 834–35 (5th Cir. 1988) (same); Delgado-Corea v. INS, 804 F.2d 261, 262–63 (4th Cir. 1986) (same).

101. *See* cases cited *supra* note 50.

102. *See supra* notes 12–18 and accompanying text.

103. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31 (1981).

interest at stake in the proceeding, which would lead to a fundamentally unfair outcome and, ultimately, a deprivation of her liberty interest. In this instance, due process requires that the court appoint counsel for the defendant. Because this Note concedes that it is unlikely that the federal courts will recognize a due-process right to government-appointed counsel in removal proceedings, the initial presumption is modified as follows: There is no right to *effective* assistance of privately retained counsel in the absence of at least a potential deprivation of liberty. This presumption is then set against the net weight of the three *Mathews* factors. If the *Mathews* factors indicate that there is a high probability that the removal process will erroneously deprive the noncitizen of his or her private interest and result in a fundamentally unfair outcome (i.e., deportation), this would deprive the noncitizen of his or her liberty. This result would effectively rebut the initial presumption.

1. Tier 1: The Initial Presumption: Deprivation of Liberty Interest

To create the initial presumption that there is no right to effective assistance of privately retained counsel in the absence of at least a potential deprivation of liberty, it is necessary to identify the precise liberty interests at stake in removal proceedings. In *Padilla v. Kentucky*,¹⁰⁴ the Supreme Court held that a criminal defense attorney's failure to inform his noncitizen client that pleading guilty to a criminal charge carries a risk of deportation violated the noncitizen's constitutional right to effective assistance of counsel. In reaching this holding, Justice Stevens reaffirmed the Court's longstanding position that "deportation is a particularly severe 'penalty,'"¹⁰⁵ stressing that U.S. law "has enmeshed criminal convictions and the penalty of deportation for nearly a century."¹⁰⁶ Although *Padilla's* holding is confined to the criminal arena, Justice Stevens's characterization of deportation as a penalty underscores the notion that, as in criminal prosecutions and "quasi-criminal" civil proceedings, noncitizens in removal have significant liberty interests at stake.¹⁰⁷ To this end, the Supreme Court has acknowledged that removal "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of

104. 130 S. Ct. 1473, 1482 (2010).

105. *Id.* at 1481.

106. *Id.*

107. *Leslie v. Att'y Gen. of U.S.*, 611 F.3d 171, 181 (3d Cir. 2010) ("We must always take care to remember that, unlike in everyday civil proceedings, the liberty of an individual is at stake in deportation proceedings." (quoting *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 381 (3d Cir. 2003) (Rendell, J., dissenting)) (internal quotation marks omitted)); *see also* *Rosales v. Bureau of Immigration & Customs Enforcement*, 426 F.3d 733, 735 (5th Cir. 2005) ("[A] final deportation order subjects an alien to a restraint on liberty sufficient to place the alien 'in custody.'").

freedom.”¹⁰⁸ In view of the Court’s holding, it is apparent that noncitizens in removal risk the potential deprivation of the physical right to remain in the United States, as well as corresponding economic, social, and familial rights.

2. Tier 2: The *Mathews* Factors

a. *Private Interests*

In removal proceedings, a noncitizen’s private interests are virtually indistinguishable from his or her liberty interests. The noncitizen has a powerful interest in remaining in the United States; reuniting with his or her spouse, children, or relatives; and achieving financial stability.¹⁰⁹ Furthermore, many noncitizens, if their removal is ordered, have a significant interest in not separating from their U.S.-citizen spouse or children, and in not having to return to countries where they have faced (or may face) persecution, physical harm, death, or imprisonment.¹¹⁰ Although these are only a few interests at stake in removal proceedings, it is nonetheless clear that deportation exacts a significant human toll on noncitizens and can deprive them of life, liberty, and their pursuit of happiness.

b. *The Risk that the Procedures Used Will Result in Erroneous Deprivation of the Private Interest*

The second factor necessary to consider is the risk that the procedures used—providing a right to privately retained counsel without providing a corresponding right to effective assistance—will lead to erroneous deprivations of the noncitizens’ private interests. It is well established that immigration laws are “notoriously complex”¹¹¹ and that “successful presentation of any claim depends upon an understanding of the current legal standard and an expectation of practice consistent with that standard.”¹¹² As such, there is significant emphasis on the need for

108. *Leslie*, 611 F.3d at 181 (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (internal quotation marks omitted)).

109. *See Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008) (“In immigration matters, so much is at stake—the right to remain in this country, to reunite a family, or to work.”).

110. Beth J. Werlin, Note, *Renewing the Call: Immigrants’ Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 406 (2000) (stating that noncitizens who “fear[] persecution upon return to [their] country of origin . . . [have] an interest in remaining in the United States”).

111. *Leslie*, 611 F.3d at 181 (quoting *N-A-M v. Holder*, 587 F.3d 1052, 1058 (10th Cir. 2009)).

112. Elizabeth Glazer, Note, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157, 1180 (1985); *see also Zhang v. United States*, 506 F.3d 162, 169 (2d Cir. 2007) (stating that immigration law is a “notoriously complex and constantly shifting area of law”).

competent representation in removal proceedings,¹¹³ as well as acknowledgment that ineffective assistance of privately retained counsel has become an uncomfortable feature of the immigration process.¹¹⁴ Therefore, when a privately retained attorney provides ineffective assistance to his noncitizen client, his conduct taints the entire removal proceeding, and denies his client the opportunity to fully and fairly present his or her case. And when the government relies on this tainted process to effectuate removal, the noncitizen is deprived of his or her private interests. In this instance, the government cannot reasonably contend that privately retained counsel's ineffectiveness completely exculpates it from due-process responsibility. As the federal courts have stated, this scenario plays out with "disturbing frequency."¹¹⁵ This analysis suggests that there is a high probability that a process in which individuals do not have legal recourse to protect against "unscrupulous appearance attorneys who extract heavy fees in exchange for false promises and shoddy, ineffective representation"¹¹⁶ will erroneously deprive noncitizens of their private interests.

c. The Government's Interest

The government is socially, politically, and economically invested in the administration of immigration law and policy. Therefore, the government's primary interest in not recognizing a due-process right to effective assistance of counsel in removal proceedings is to ensure that "meritless" motions do not "[tie] up the system and [postpone] an alien's removal for months or even years based on the difficulties inherent in assessing and adjudicating a lawyer's performance after the fact."¹¹⁷ Indeed, the volume of immigration cases has burdened the immigration courts, the BIA, and the circuit courts.¹¹⁸ However, some have proposed that "little if any weight" should be

113. See *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008) ("Representation by competent counsel is particularly important in removal proceedings because the proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate." (internal quotation marks omitted)).

114. See *Aris*, 517 F.3d at 596 ("With disturbing frequency, this Court encounters evidence of ineffective representation by attorneys retained by immigrants seeking legal status in this country."); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) ("All too often, vulnerable immigrants are preyed upon by unlicensed *notarios* and unscrupulous appearance attorneys who extract heavy fees in exchange for false promises and shoddy, ineffective representation.").

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

116. *Morales Apolinar*, 514 F.3d at 897.

117. *Compean I*, 24 I. & N. Dec. 710, 730 (2009).

118. In 2009, the immigration courts handled 321,525 removal proceedings, which constituted approximately ninety-eight percent of total proceedings in the immigration courts. Since 2005, immigration courts have administered no less than 270,000 removal proceedings per year. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2009 STATISTICAL YEARBOOK C3 (2010), available at <http://www.justice.gov/eoir/statpub/fy09syb.pdf>; see also Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J.

afforded to the “fiscal and administrative burdens” of providing noncitizens in removal proceedings a remedy for “prejudicial ineffective assistance of counsel” because the government has a greater interest in the fair and accurate administration of its laws.¹¹⁹

Both positions are compelling. To be sure, it is impractical to completely ignore the burdens that an unqualified due-process right to effective representation may impose upon the government. However, one cannot equally ignore the fact that the seven circuits that recognize a due-process right have been able to sufficiently adjudicate the petitions for review of ineffective assistance of counsel claims. Moreover, the requirement that noncitizens comply with the *Lozada* procedural requirements inevitably “weeds out” many frivolous claims. Consequently, there is little reason to believe that a Supreme Court opinion recognizing noncitizens’ unqualified due-process right to effective assistance of counsel would impose burdens on the government that are significantly beyond what the courts and the DOJ already endure.

3. Tier 3: Rebutting the Presumption

The *Mathews* factors suggest that the government’s interest in the efficient and expeditious administration of its laws does not outweigh the significant risk that the removal process, characterized by pervasive, “shoddy” representation, will deprive the noncitizen of his or her private interest in remaining in the United States, reuniting with his or her family, and/or avoiding persecution in the country to which he or she would be deported. Therefore, because the noncitizen’s interests “are at their strongest” in removal proceedings, the risk that the current structure of removal proceedings will erroneously deprive noncitizens of their interests is high, and the government’s interest is less persuasive, this Note concludes that the *Mathews* factors overcome the presumption against the right to effective assistance of privately retained counsel in removal proceedings.¹²⁰

LEGAL ETHICS 3, 3 (2008) (discussing the “avalanche of immigration cases” loading the Second Circuit’s docket); John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Court of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13 (2006–2007) (discussing the significant surge in petitions for review filed in the federal circuit courts and stating that “it is hard not to be struck by its sheer weight when actually confronted by the stacks of paper working their way through the courts”).

119. Petition for Writ of Certiorari at 25, *Afanwi v. Mukasey*, 130 S. Ct. 350 (2009) (mem.) (No. 08-906), 2009 WL 157096 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (stating that the financial and administrative burdens imposed upon the government are “counterbalanced by the Government’s weighty interest in the sound implementation of its laws”); see Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT, Apr. 2005, at 1, 5, available at http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf (“Lack of counsel also subverts the government’s interest in the most informed decisions being made under its laws.”).

120. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31 (1981).

Due process, then, requires that noncitizens in removal proceedings have the right to effective assistance of counsel.

To provide additional support to the procedural-due-process balancing test's results, the following Subpart will demonstrate that removal proceedings comport with the meaning of "criminal charge" for the purposes of the European Convention, thereby lending further credence to the argument that noncitizens in removal proceedings should have at least one constitutional safeguard afforded to criminal defendants—a constitutional right to effective assistance of counsel.

B. THE EUROPEAN COURT OF HUMAN RIGHTS' ENDEL TEST

As a preliminary matter, the notion of consulting foreign and international law to help determine domestic constitutional jurisprudence is not without controversy. The Supreme Court is generally divided between Justices who believe that reference to international law can be relevant in assessing the "evolving standards of decency,"¹²¹ and Justices who believe that the "basic premise . . . that American law should conform to the laws of the rest of the world . . . ought to be rejected out of hand."¹²² Admittedly, the United States is not a member of the Council of Europe or a party to the European Convention on Human Rights. Thus, the "no due process" circuits, the Supreme Court, and the government are not obligated to comply with the ECHR's jurisprudence. Nevertheless, reference to the *Engel* test may help reinforce the procedural-due-process balancing test's results.

1. Element 1: Domestic Classification of the Proceeding

The starting point in the *Engel* analysis is the "classification of the [proceeding] in the domestic law of the . . . State."¹²³ If domestic law classifies the proceeding as noncriminal, this does not end the analysis, as elements two and three may still demonstrate that the proceeding "involve[s] the determination of a criminal charge."¹²⁴ U.S. law classifies removal proceedings as civil. And although this Note attempts to demonstrate that, often, there is little that distinguishes noncitizens in removal proceedings and criminal defendants, it is not likely that the government or the courts will reclassify removal proceedings as "criminal." This does not end the analysis, however; because element one is "no more than [a starting point],"¹²⁵ elements two and three may still support the contention that individuals in removal are subject to a criminal charge within the meaning of the European Convention.

121. *Roper v. Simmons*, 543 U.S. 551, 604 (2005).

122. *Id.* at 624 (Scalia, J., dissenting).

123. *Kidd*, *supra* note 24, at 858.

124. *Id.*

125. *Id.*

2. Element 2: Inherent Nature of the Noncriminal Offense

In order to satisfy element two it is necessary to demonstrate that the noncriminal offense with which an individual is charged has “an inherently criminal character.”¹²⁶ With respect to removal proceedings, the Supreme Court has never fully repudiated its position in *Fong Yue Ting* that removal proceedings are “in no proper sense a trial and sentence for a crime or offense.”¹²⁷ However, there are compelling reasons to believe that this “ideology” has become anachronistic, and that noncitizens in removal proceedings are treated similar to individuals charged with criminal offenses. To initiate removal proceedings, the Department of Homeland Security (“DHS”) issues a charging document, the most common being a Notice to Appear (“NTA”).¹²⁸ The NTA specifies, *inter alia*, the type of proceedings initiated against the noncitizen, the acts or conduct the noncitizen has allegedly violated, the charges against the noncitizen, and the statutory provisions the noncitizen has allegedly violated.¹²⁹ In essence, the NTA charges the noncitizen with a violation of U.S. law and orders him or her to appear before a tribunal. The DHS subsequently files the NTA with the immigration court, which conducts removal proceedings in two stages: the master calendar hearing and the individual merits hearing.¹³⁰ The master calendar hearing “conform[s] to the . . . adversarial model”¹³¹ similar to a criminal arraignment,¹³² but “without many of the procedural protections present in criminal trials.”¹³³ At the individual merits hearing, the noncitizen takes the stand and testifies as to why he or she is eligible for a particular form of relief. Although the noncitizen may argue that he or she is eligible for multiple forms of relief—i.e., asylum, withholding of removal, and relief under the Convention Against Torture—his or her main objective during the hearing is to convince the tribunal that it should not subject him or her to the punishment and the penalty of deportation. In this fundamental way, noncitizens in removal are treated as if they are charged with a crime; they bear the burden of proving why they should not be deprived of their physical, economic, and social liberties. The Supreme Court has recognized the merit of this argument, stating that “[a]lthough removal proceedings are civil in nature . . . deportation is nevertheless

126. *Id.*

127. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

128. ALEINIKOFF ET AL., *supra* note 61, at 1027.

129. 8 U.S.C. § 1229(a)(1)(A), (C), (D) (2006).

130. ALEINIKOFF ET AL., *supra* note 61, at 1028.

131. THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 628 (5th ed. 2003).

132. ALEINIKOFF ET AL., *supra* note 61, at 1028.

133. Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 119 (2008).

intimately related to the criminal process.”¹³⁴ Other scholars have also characterized the removal process as serving an “inquisitorial” and disciplinary function seeking to root out those individuals whom the justice system has determined cannot remain in the United States.¹³⁵ Accordingly, it is reasonable to conclude that while removal proceedings are not *per se* criminal proceedings, noncitizens in removal endure similar treatment and risk losing similar liberties as individuals charged with criminal offenses.

3. Element 3: Nature and Severity of the Potential Penalty

An individual in a noncriminal proceeding can demonstrate that he or she is subject to a criminal charge if “imprisonment or other serious deprivation of liberty is a possible penalty in the . . . proceeding[.]”¹³⁶ For decades, the Supreme Court has adhered to its determination in *Fong Yue Ting* that “[t]he order of deportation is not a punishment for crime. . . . but a method of enforcing the return . . . of an alien who has not complied with [governmental regulations].”¹³⁷ However, this position is no longer tenable, as the Supreme Court has come to recognize that “deportation is a penalty—at times a most serious one.”¹³⁸ Most recently, the *Padilla* Court reaffirmed this notion and further chipped away at *Fong Yue Ting*’s legacy.¹³⁹ Incarceration and deprivation of socioeconomic liberties are potentially severe penalties that can be imposed on individuals in removal proceedings. For example, the Bureau of Immigration and Customs Enforcement (“ICE”) has the authority to arrest and detain noncitizens during the pendency of their removal proceedings.¹⁴⁰ This authority implies that ICE can detain noncitizens for months or even years. In addition to this potential deprivation of the noncitizen’s physical liberty, removal can also deprive the noncitizen of his or her fundamental socioeconomic liberty interests: (1) an interest in living and working in the United States; (2) an interest in reuniting with or not separating from one’s family; and (3) an interest in avoiding deportation to a country in which his or her life has been or will be endangered.¹⁴¹ To be sure, deportation will not impose such severe

134. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

135. John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, “*Death Is Different*” and a *Refugee’s Right to Counsel* 24 (Cornell Legal Studies Research Paper No. 1290382, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1290382.

136. Kidd, *supra* note 24, at 859.

137. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

138. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

139. See *Padilla*, 130 S. Ct. at 1481 (2010) (“We have long recognized that deportation is a particularly severe penalty; but it is not, in a strict sense, a criminal sanction.” (citation omitted) (citing *Fong Yue Ting*, 149 U.S. at 740)).

140. 8 C.F.R. § 287.5(c)(1), (6) (2009).

141. See *Kaweesa v. Gonzales*, 450 F.3d 62, 69 (1st Cir. 2006) (stating that the petitioner had a “weighty interest in avoiding deportation” to a country where she was raped and members of her family had been killed).

penalties on every noncitizen in removal. However, “in considering the severity of the penalty [the relevant inquiry] is the maximum penalty which *could* [be] inflicted upon the [individual in noncriminal] proceedings that is crucial.”¹⁴² In this regard, incarceration and deprivation of socioeconomic liberties certainly qualify as “maximum penalties” of the removal process.

The European courts generally consider the three *Engel* elements as alternative and not cumulative,¹⁴³ giving the third factor a more determinative role in characterizing a particular noncriminal proceeding as involving a “criminal charge.”¹⁴⁴ In balancing the three *Engel* elements, it appears that because noncitizens in removal proceedings are effectively treated as if they are charged with a criminal offense, and because they face potential incarceration and other serious socioeconomic deprivations of liberty, it is reasonable to conclude that individuals in removal are subject to a “criminal charge” within the meaning of article 6(1) of the European Convention.¹⁴⁵

The procedural-due-process balancing test and the *Engel* tests provide sufficient justification for extending to noncitizens in removal proceedings one major constitutional safeguard afforded to defendants in criminal proceedings—a constitutional right to the effective representation. In view of the preceding analysis, the following Subparts address two outcomes of a potential Supreme Court decision on the issue of whether noncitizens in removal proceedings possess a due-process right to effective assistance of counsel.

142. Kidd, *supra* note 24, at 860 (emphasis added).

143. See *The Queen on the Application of “G” v. Governors of “X” School and “Y” City Council*, [2009] EWHC (Admin) 504, [52] (Eng.) (discussing the ECHR’s unreported decision in *Matyjek v. Poland*, in which the court stated that established jurisprudence has determined that *Engel*’s second and third criteria are “alternative and not necessarily cumulative”); *Lauko v. Slovakia*, App. No. 26138/95, 33 Eur. H.R. Rep. 40, para. C63 (1998) (observing that the factors are alternative and not cumulative). *But see Lauko*, 33 Eur. H.R. Rep. at para. 57 (“[A] cumulative approach may be adopted where the separate analysis of each [factor] does not make it possible to reach a conclusion as to the existence of a ‘criminal charge.’”).

144. See *Clingham v. Royal Borough of Kensington and Chelsea*, [2002] UKHL 39, [30], [2003] 1 A.C. 787 at 810 (appeal taken from Eng.) (“It is right . . . to observe that the third [*Engel*] factor is the most important.”); *B v. Chief Constable of Avon and Somerset Constabulary*, [2000] EWHC (QB) 559, [28], [2001] 1 W.L.R. 340 at 352 (Eng.) (stating that no case can be considered criminal if the court does not impose a penalty). *But see Gough v. Chief Constable of Derbyshire*, [2001] EWHC (Admin) 554, [2002] Q.B. 459 at 490 (Eng.) (stating that ECHR jurisprudence has indicated that “severity alone cannot be decisive,” and that “when considering whether an order imposes a penalty or punishment, it is necessary to look beyond its consequence and to consider its purpose”).

145. European Convention, *supra* note 23.

V. RECOMMENDATIONS FOR A POTENTIAL SUPREME COURT DECISION

A. OUTCOME 1: SCOTUS RECOGNIZES A DUE-PROCESS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN REMOVAL PROCEEDINGS

Assuming that the Supreme Court decides to follow the majority of circuits and formally recognizes that noncitizens in removal proceedings possess a due-process right to effective assistance of counsel, the Court will then have to consider what constitutes a due-process violation. To this end, the Court should require a noncitizen to demonstrate that counsel's ineffectiveness impinged upon the fundamental fairness of the proceeding *and* prejudiced his or her case. Requiring an *ex ante* (determining fundamental fairness) and *ex post* (determining prejudice) review of motions to reopen¹⁴⁶ will ensure that the courts grant motions to reopen for only meritorious claims.

The Court should also follow the First, Ninth, and Tenth circuits' "fundamental fairness" standard—requiring proof that counsel's ineffectiveness prevents a noncitizen from reasonably presenting his case—as well as the Ninth Circuit's "plausible" standard for assessing "prejudice."¹⁴⁷ These two standards provide an appropriate middle ground that best balances both the noncitizen's and the government's interests. Requiring a more stringent standard, *i.e.*, requiring the noncitizen to demonstrate that he or she "would" have obtained relief or that his or her proceeding "would" have been different, but for counsel's errors, "sets the bar too high in [removal proceedings] . . . in which the alien seeks discretionary relief."¹⁴⁸ Conversely, requiring the noncitizen to show that it is "plausible" that he or she would have obtained relief but for his or her counsel's ineffectiveness "sets the bar too low" and allows the noncitizen to establish fundamental unfairness and prejudice "where there is only a slight possibility that the error had any effect on the deportation proceeding."¹⁴⁹

With respect to the procedural framework, the Court should uphold *Lozada* but dispense with the third requirement that noncitizens file a formal grievance against their former counsel. The process of filing a grievance is often too costly and time consuming for many noncitizens and discourages them from bringing legitimate claims. Given the courts' criticism of the immigration bar, burdensome reporting procedures should not impede a

146. See *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006) (stating that "prejudice" considerations require an "ex post" determination as to "whether due process was violated by evaluating whether the alien's claims could have supported a different outcome"). Conversely, "fundamental fairness" considerations "examine[] the process afforded *ex ante*, considering whether the denial of effective counsel makes such a proceeding fundamentally unfair." *Id.*

147. See *supra* text accompanying notes 88–92.

148. *United States v. Aguirre-Tello*, 353 F.3d 1199, 1209 (10th Cir. 2004).

149. *Id.*

noncitizen's efforts to reopen his removal proceeding based on a claim of ineffective assistance of counsel.

B. OUTCOME 2: SCOTUS DOES NOT RECOGNIZES A DUE-PROCESS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN REMOVAL PROCEEDINGS

Assuming that the Supreme Court determines that noncitizens in removal proceedings do not have a due-process right to effective representation in removal proceedings, the BIA will retain sole discretionary authority to reopen these matters. In this scenario, the Attorney General should reassess *Lozada's* procedural requirements. To this end, the Attorney General should dispense the requirement that noncitizens file a formal complaint with the local bar association because it does not further the "BIA's intended objectives, namely, to increase confidence in the claim; reduce the likelihood that a hearing will be needed; help police the immigration bar; and protect against possible 'collusion' between the client and the lawyer."¹⁵⁰ Moreover, the Attorney General should not require that a noncitizen submit a "detailed" affidavit of his or her prior attorney's deficient performance. Rather, the affidavit should merely stipulate the procedural history of the noncitizen's case, and the basis for the allegations of ineffective assistance of counsel. Eliminating the "detailed" requirement would help ensure that noncitizens who cannot speak or read English very well, or who cannot afford to retain new counsel to assist in the preparation of the affidavit, can nevertheless demonstrate, in plain terms, that prior counsel's performance violated their due-process rights. Finally, the Attorney General should retain the requirement that noncitizens notify their prior counsel of the allegations directed against them. This requirement helps ensure "the integrity of the process [and] serves to protect lawyers against false accusations."¹⁵¹ Relying on only the first two *Lozada* requirements would "ensure both that an adequate factual basis exists in the record for an ineffectiveness complaint and that the complaint is a legitimate and substantial one."¹⁵²

VI. CONCLUSION

Noncitizens in removal proceedings should possess an *unqualified* due-process right to effective assistance of counsel. The government's current position, to which three circuit courts adhere, is untenable and fundamentally unfair. The Supreme Court's procedural-due-process

150. Letter from Am. Immigration Council to Thomas G. Snow, Dir., Exec. Office for Immigration Review (Nov. 12, 2009) (quoting *In re Rivera-Claros*, 21 I. & N. Dec. 599 (1996) (interim decision)), available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/IAC-EOIRletter-2009-11-12.pdf>.

151. *Id.*

152. *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000).

balancing test suggest that the government's interest in the efficient administration of its laws does not outweigh the significant risk that the removal process—characterized by pervasive, “shoddy” representation—will deprive the noncitizen of his or her private interest in remaining in the United States, reuniting with his or her family, or avoiding persecution in the country to which he or she would be deported. Moreover, the ECHR's *Engel* test suggests that removal proceedings serve an “inquisitorial” and disciplinary function that imposes upon noncitizens severe penalties analogous to criminal sanctions—potential incarceration and other serious deprivations of socioeconomic liberty. In view of the tests' results, the minority of circuit courts and the Supreme Court should recognize that noncitizens in removal proceedings have a due-process right to effective representation.