MONTES-LOPEZ V. HOLDER: APPLYING *ELDRIDGE* TO ENSURE A *PER SE* RIGHT TO COUNSEL FOR INDIGENT IMMIGRANTS IN REMOVAL PROCEEDINGS

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ABSTRACT

Part I of this Comment reviews the historical and current state of procedural due process and its role in Immigration Law, specifically removal proceedings. Part II extends certain legal arguments in *Montes-Lopez v. Holder,* which held among divided federal Circuit Courts that an immigrant in removal proceedings has a statutory and constitutional right to appointed counsel. Finally, Part III demonstrates how a non-citizen in deportation hearing has a *per se* right to counsel outlined by the Immigration and Nationality Act (INA) and brought to life by the Fifth Amendment's due process clause.

INTRODUCTION

Miguel is a citizen and national of Honduras. He dreamed of being a professional soccer player even though he knew his odds were quite long. Miguel stayed out of trouble, studied hard in school, and was devoutly religious. When he turned thirteen, it was not long until his age, gender, and nature of his character made him a target for a gang called *Mara Salvatrucha*, more commonly known as "MS-13." When Miguel resisted their overtures to join the gang, local MS-13 members became violent. Terrorizing the young boy's weekly soccer matches, gang members eventually shot and killed numerous playmates including Miguel's brother and best friend before his very eyes. The gang continued to threaten Miguel's life regularly.

Fearful for his life, Miguel entered the United States and eventually made his way to North Carolina. Miguel was enrolled in school and when he turned sixteen, transportation became problematic. He discovered he needed a driver's license. People in his community told Miguel he should visit an attorney and seek help. Upon doing so, Miguel found out just how vulnerable he was to being deported back to Honduras. Further, he discovered that without a legal status he could not drive, work, or possibly apply for federal loans to attend college one day. Without legal assistance,

Miguel never would have known that he could apply for the recent Deferred Action for Childhood Arrivals ("DACA") and potentially end the psychological trauma he had fled in Honduras.[1]

If Miguel were in fact real, he would be very fortunate to be protected from the immediate harm he would face living in Honduras due to the country's political and social climate. Honduras' largest human rights problems are governmental corruption, organized crime, political instability, and violence against women and children. Gangs such as MS-13 often target young boys for recruitment, and refusal to join can result in torture, extortion and even death.[2] If Miguel sought asylum at the Fourth Circuit, it is likely he would be ineligible for asylum relief due to well-established case law that young Salvadoran men who resist recruitment in gangs are not members of a particular social group.[3] As a result, someone like Miguel would desperately need an attorney's legal and emotional guidance.

An attorney's legal guidance can provide sound claims, like applying for the recent 2012 DACA in place of asylum. An attorney's emotional guidance would also be helpful in articulating to Miguel the importance of recounting the travesties at trial since he is likely the only witness to the persecution he faced. The latter is not a simple task due to applicants' fears of divulging gang-affiliated details. There are also educational, linguistic, and cultural barriers that must be overcome in order to have a successful day in court.

Only someone like Miguel, young and unaccompanied, can truly understand the sacrifices made to come to the United States and the complex myriad of effects that would result from deportation. *Bridges v. Wixon* recognized that deportation may deprive an immigrant of "all that

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1. Deferred Action for Childhood Arrival is a recent memorandum authored by the Obama Administration on June 15, 2012 that gives a two year delayed prosecution to certain qualifying undocumented youth attending school here in the United States. JANET NAPOLITANO, DEP'T HOMELAND SEC., MEMORANDUM: EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (Jun. 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

2. 2014 UNHCR Regional Operations Profile—Latin America: Honduras, THE UN REFUGEE AGENCY, http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e492686 (last visited January 2014).

3. Matter of S-E-G-, 24 I. & N. 579 (B.I.A. 2008). While the Sixth and Seventh Circuits have challenged this, the Fourth District has not deviated from the approach developed by the Board in S-E-G and Matter of E-A-G.

makes life worth living."[4] Often, effective representation is the best defense against an unfair outcome in a deportation hearing. However, nearly fifty percent of all immigration cases go without "the most essential guardians of fairness—a lawyer"[5] leaving immigrants without counsel five times more likely to lose their case than those who have counsel.[6] A recent study noted that,

> "although the rationale for appointed counsel is especially compelling for some – such as those with serious mental disorders and unaccompanied minors – the requirements of fundamental fairness must be assessed in all cases in light of the complexity of Immigration Law, the role of government prosecutors, and the severity of the harm caused by deportation."[7]

Likewise, the "vulnerability, language impediments, and cultural barriers that immigrants face make fairness more difficult to achieve and oversight of systemic failures more difficult to accomplish" so that in this particular context, the right to appointed counsel is "the essential starting point for ensuring fairness in the deportation system."[8]

Part I of this Comment reviews the historical and current state of procedural due process and its role in Immigration Law, specifically removal proceedings. Part II extends certain legal arguments in the opinion of *Montes-Lopez v. Holder,* which held among divided federal Circuit Courts that an immigrant in removal proceedings has a statutory and constitutional right to appointed counsel. Finally, Part III demonstrates how a non-citizen in deportation hearings has a *per se* right to counsel outlined by the Immigration and Nationality Act (INA) and brought to life by the Fifth Amendment's due process clause.

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4. 326 U.S. 135, 147 (1945) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

5. Lucas Guttentag & Ahilan Arulanantham, Extending the Promise of Gideon: Immigration, Deportation, and
the Right to Counsel, HUM. RTS. MAG., Apr. 2013, at 14.

6. Id. (quoting NEW YORK IMMIGRANT REPRESENTATION STUDY STEERING COMM., ACCESSING JUSTICE
II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 11 (Dec. 2012), available at
http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.).

7. Id. at 16.

8. Id.

PART I: PROCEDURAL DUE PROCESS AND THE APPLICATION TO NON-CITIZENS

A. Historical Overview of Due Process

"Immigration Law," [9] commonly understood as federal law governing the admission and expulsion of aliens, was formally introduced in 1875.[10] The first immigration statute excluded convicts and prostitutes from U.S. admission.[11] Since Immigration Law's introduction, "Congress, executive agencies, and the courts have adopted, interpreted, and applied countless immigration statutes and regulations, thereby creating an elaborate and extensive body of sub-constitutional law."[12] This sub-constitutional law was initially administered by the judicially created Plenary Power Doctrine, giving Congress and the Executive branch broad and "often exclusive authority in immigration matters."[13] Over time, the Plenary Power Doctrine progressively eroded so that mainstream constitutional due process principles could emerge.[14] Although mainstream constitutional due process principles are being introduced into the field of Immigration Law, the Plenary Power Doctrine has not dissipated in its entirety.

In 1886, the Supreme Court opinion in *Yick Wo v. Hopkins* gave life to constitutional protections for all individuals inside the United States, including "aliens from invidious discrimination at state hands."[15]

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9. The first immigration statute excluded convicts and prostitutes form admission to the United States. Act of Mar. 3, 1875 (Act of 1875), ch. 141, §5, 18 Stat. 477 (repealed 1974). The only earlier federal statute on the general subject was the 1978 Alien and Sedition Acts. See Act of June 25, 1978, ch. 58, §1, 1 Stat. 570, 571 (providing that the President may order any alien whom he judges "dangerous to the peace and safety of the United States" to leave the country without hearing); Act of July 6, 1978, ch. 66, §1, 1 Stat. 577, 577 (providing that the President, during war, may apprehend, restrain, secure, and remove all enemy aliens without hearing) (codified at 50 U.S.C. §§ 21-33 (1988)). Section 1 of ch. 58 of the Act of June 25, 1798 was enacted for a two-year term and expired without being extended.

10. See Stephen H. Legomsky, Immigration Law and Principles of Plenary Congressional Power, 1984 SUP. CT. REV. 255, 257 (1985).

11. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974).

12. "Subconstitutional immigration law" is a term utilized by Hiroshi Motomura to mean the interpretation and application of statues, regulations, administrative guidelines and the like. Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights, 92 COLUM. L. REV. 1625 (1992).

13. Id.

14. Id. at 1631.

15. 118 U.S. 356 (1886). In Yick Wo, there was a race-neutral San Francisco municipal ordinance that the city enforced in a manner that made it nearly impossible for non-citizens of Chinese descent to operate laundries, in which in that city and at that time, the majority of

Subsequently, in 1896, the Court established in *Wong Wing v. United States,*[16] that a non-citizen could invoke the Fifth and Sixth Amendments in a criminal setting to secure a judicial trial.[17] Over time, non-citizens could invoke "Gideon's Promise," an indigent's right to appointed counsel in criminal proceedings resulting in incarceration as punishment.[18] In 2010, the Supreme Court held in *Padilla v. Kentucky* that a criminal defense attorney's failure to advise a non-citizen of the possible immigration consequences of a plea agreement and/or criminal conviction can give rise to an ineffective assistance of counsel claim under the Sixth Amendment.[19]

Even within Immigration Law, substantive rights have been extended to recognize same-sex marriages. Meaning, since the Supreme Court holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional,[20] same-sex petitioners can file for the same immigration benefits as opposite-sex petitioners. Therefore, with the above-mentioned rights, it is clear the stunted growth of constitutional procedural safeguards in Immigration Law sharply contrasts with the constitutional protections of non-citizens in almost all other areas of law, including constitutional substantive Immigration Law.[21] Only mainstream procedural constitutional principles remain seriously undeveloped.

Although in the twentieth century, the development of Immigration Law and policy has finally "reached a state in which courts can no longer simply recite the Plenary Power Doctrine and reject aliens' constitutional

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laundry businesses were owned by Chinese, most of which were non-citizens. Id. Although, later cases clarified that this principle of broad substantive constitutional principle applies outside of the immigration context, leaving solely procedural due process rights but not substantive (i.e. equal protection) for immigrants in immigration proceedings. Id.

16. Wong Wing v. United States, 163 U.S. 228 (1896).

17. Id. at 238.

18. Gideon v. Wainwright, 372 U.S. 335 (1963). This detail about a non-citizen having the right to have the right to counsel in all cases resulting in incarceration as punishment was not decided within Gideon or specifically by way of a Supreme Court decision. Nevertheless, the right to counsel in a criminal setting requires certain qualifications, such as an affidavit of indigence, for the criminal to be facing the "actual threat" of imprisonment and more; however, there are no criminal procedural requirements that the defendant be a citizen or show any proof of citizenship or residency. As a result, there is nothing that stops a non-citizen from invoking the government-appointed right to counsel when facing a criminal conviction that may result in imprisonment.

19. 559 U.S. 356 (2010).

20. Same-Sex Marriages: Statement from Sec'y of Homeland Sec. Janet Napolitano, U.S. CITIZEN AND IMMIGRATION SERVICES (July 1, 2013), http://www.uscis.gov/family/same-sex-marriages.

21. Motomura, supra note 12.

claims,"[22] there is still a need for extensive reform. Public law and public policy trends continuously chip away at the Plenary Power Doctrine, putting forth an ethical image of Immigration Law in its second century.[23] These monumental strides are important and necessary; however, for procedural reform to occur holistically, our American legal culture must understand and accept the benefits of such a reform. Following close behind the apex of the Civil Rights Movement, the issue of comprehensive immigration reform[24] took center stage in American politics when the then President John F. Kennedy recognized the need for fair Immigration Law and policy.[25]

President Kennedy explained to the American people that "every ethnic minority, in seeking its own freedom, helped strengthen the fabric of liberty in American life. Similarly, every aspect of the American economy has profited from the contributions of immigrants."[26] Coining the phrase, "America is a nation of immigrants," Kennedy understood the myriad of benefits stemming from equal, fair, and flexible immigration reform. Such a reform would have mirroring effects on other major social ills that also are in desperate need of an overhaul.

B. Due Process Rights for U.S. Citizens

For U.S. citizens, the due process right to counsel turns on whether the context of the case is criminal or civil. The Supreme Court has held that the right to appointed counsel is guaranteed at the onset of adversarial proceedings in criminal cases by way of the Sixth Amendment.[27] Additionally, when a criminal defendant is in a custodial interrogation or the "functional equivalent", he or she is guaranteed the right to counsel in order to protect his or her Fifth Amendment right against self-incrimination.[28] In contrast, the right to appointed counsel is not an

22. Motomura, supra note 12, at 1627; see, e.g., T. Alexander Aleinikoff, Federal Regulation of Aliens and the Constitution, 83 AM. J. INT'L L. 862, 870 (1989); Louis Henkin, The Constitution and Untied States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 HARV. L. REV. 853, 863 (1987); Legomsky, supra note 10, at 255; Peter H Schuck, The Transformation of Immigration law, 84 COLUM. L. REV. 1, 34 (1984).

23. Motomura, supra note 12, at 1631.

24. Previously, the bulk of immigration reform occurred in piecemeal by means of executive orders, memos, legislation and case law.

25. Motomura, supra note 12.

26. JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1958).

27. Gideon v. Wainwright, 372 U.S. 335 (1963).

28. Miranda v. Arizona, 384 U.S. 436 (1966).

absolute right in a civil proceeding. The Supreme Court held appointed counsel is absolutely provided for in specific civil contexts, such as: juvenile delinquency, civil commitment, some probation revocation proceedings and parental termination proceedings.[29]

Outside of these enumerated rights, a *per se* right to counsel in civil cases for U.S. citizens may be obtained on a case-by-case basis by first analyzing if without counsel, the party will be deprived of life, liberty or property. If so, the next requirement is to weigh the three factors set out in *Mathews v. Eldridge*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[30]

Eldridge replaces all previous due process tests particularly because of its recognition of the complainant's private interests that may be at stake.

C. Due Process Rights for Non-Citizens

1. Statutory Procedural Due Process Rights: Immigration and Nationality Act

It is well established that Immigration Law is deemed purely civil in nature.[31] Thus, procedural safeguards afforded to both citizens and non-citizens in criminal cases, such as the guarantees offered by the Fifth or Sixth Amendments, do not extend to petitioners in an immigration proceeding.[32] Without these procedural safeguards, a *per se* right to counsel for deportation proceedings may be attained solely by coupling the

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29. See, e.g., Vitek v. Jones, 445 U.S. 480 (1980) (holding that counsel should be provided to prisoners treated as mentally ill); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (discussing whether counsel should be provided to prisoner in revocation of probation matters); In Re Gault, 387 U.S. 1 (1967) (holding juvenile has right to counsel in proceedings).

30. 424 U.S. 319, 335 (1976) (citation omitted).

31. Montes-Lopez v. Holder, 694 F.3d 1085 (2012).

32. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

statutory promise of counsel under the Immigration and Nationality Act (INA) and the Fifth Amendment due process clause. When the INA's promise is deemed illusory, the Fifth Amendment due process clause will guarantee the right to counsel if a non-citizen can demonstrate that without counsel he or she will experience a deprivation of life and liberty. Next, it must be proven that the *Eldridge* factors will always weigh in a non-citizen's favor.

The INA provides that non-citizens have a right to a "full and fair hearing," which includes a "reasonable opportunity to present evidence."[33] Pursuant to the statute, non-citizens in deportation proceedings have "the privilege of being represented, at no expense to the Government, by counsel, authorized to practice in such proceedings, as the [non-citizen] shall choose."[34] Also, it is the government's responsibility, outlined by the INA, to inform non-citizens of free legal services in the area. Federal courts of appeal have even instructed Immigration Judges to be "especially diligent" when adjudicating cases involving *pro se* litigants.[35] Although the INA, paramount in its authority, highlights an immigrant's statutory right to hire counsel and case law further develops this statutory right, the right to appointed counsel provided by the government is non-existent.

Not only does the INA illustrate an important right and fail to take steps to fund such a right, common practice does not reflect the INA and case law sentiments. It is seldom common practice for an Immigration Judge to take reasonable steps to give the plaintiff an opportunity to obtain counsel.[36] Those familiar with immigration courts know very well that, because of the complex and fluid nature of Immigration Law, non-citizens who come into contact with immigration enforcement officers are ordered deported and are physically removed from the United States without ever seeing a lawyer.[37] As a result, immigrants, an extremely vulnerable population, often "either cannot afford counsel or are shuffled through the system before they have a chance to find a lawyer."[38] Accordingly, if the right to counsel is recognized by the U.S. government by way of the INA as being a fundamental right but does not facilitate the funding of such a right,

33. INA § 240, 8 U.S.C. § 1229a(b)(4)(B) (2012).

34. INA § 240(b)(4)(a), 8 U.S.C. § 1229(a) (2006); INA § 292, 8 U.S.C. § 1362 (1996).

35. See Jacinto v. INS, 208 F.3d 725, 734-35 (9th Cir. 2000); Keren Zwick, The Fiction of Legal Counsel in Immigration Proceedings, CHI. B. A. REC., Mar. 22, 2013, at 32.

36. Hernandez-Gil v. Gonzales, 476 F.3d 808 (9th Cir. 2007).

37. Zwick, supra note 35.

38. Id.

the short comings of the INA may only be fulfilled by the Fifth Amendment's due process clause.

2. Constitutional Procedural Due Process: Fifth Amendment

The Fifth Amendment of the U.S. Constitution articulates that the federal government cannot allow one to be "deprived of life, liberty or property without due process of law."[39] To understand when this protection is applicable to a non-citizen's case, it must first be established that the non-citizen is physically present in the United States. It is well-settled that procedural due process rights do not protect non-citizens outside U.S. territories. The Court in *Chae Chan Ping v. United States* held that even if a plaintiff has the requisite certificate for re-entry into the United States, sovereign powers hold an absolute right to exclude him or her since that right is, "revocable at any time, at [the government's] [p]leasure."[40]

Moreover, the Supreme Court clarified "at the government's pleasure" meant that Congress maintained the right to "exclude [non-citizens] of a particular race . . . without judicial intervention . . . ."[41] Those outside of the United States borders can be turned away without cause, explanation or entitlement to U.S. laws, procedural protection and are therefore openly deprived of "life, liberty, or property without due process of law."[42] Conversely, if a non-citizen is physically present, he or she may be able to assert procedural due process rights pursuant to the Fifth Amendment after a case-by-case analysis. This includes non-citizens whose presence is "unlawful, involuntary, or transitory."[43]

Although the application of pre-*Eldridge* due process tests, such as the "no prejudice," "fundamental fairness" and "harmless error" analyses should be abandoned in their entirety for both U.S. citizens and non-citizens within the United States in civil cases, for non-citizens who are physically present, the *Eldridge* test "is applied less rigorously and less consistently."[44] In practice, immigration courts utilize the outdated "no prejudice," "fundamental fairness" and "harmless error" tests. The "no

39. U.S. CONST. amend. V.

40. 130 U.S. 581, 609 (1889).

41. Yamataya v. Fisher, 189 U.S. 86, 97 (1903).

42. See Mathews v. Dias, 426 U.S. 67, 77 (1976) (providing that those within the United States, even those here unlawfully, have Fifth Amendment rights) (citations omitted).

43. Id.

44. Nimrod Pitsker, Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers, 95 CALIF. L. REV. 169, 174 (2007).

prejudice" rule evaluates whether inadequate procedural safeguards caused prejudice that was "likely to impact the results of the proceedings."[45]

The "fundamental fairness" test examines the plaintiff's case to conduct a hindsight examination of the process a non-citizen received to determine if, with additional procedural safeguards, the outcome of the case would have been entirely different.[46] The "harmless error" examination means that an error in a procedure is deemed harmless if it can be established that without the specific error (which must be pointed to), the outcome of the case would be totally different (the non-citizen would not be ordered deported). All the pre-*Eldridge* tests require a much higher burden of proof since it is extraordinarily difficult to demonstrate that a judge, who has discretionary review, would have decided the case differently had there been counsel and potential alternative arguments or forms of relief asserted.

The *Eldridge* test is more generous in its due process application, affording a greater breadth of fundamental rights to more individuals. All of the Federal Circuit Court decisions examined in the *Montes-Lopez* decision utilized either the "no prejudice" rule, "fundamental fairness" or "harmless error" test without any social, economic or legal justification. Although the Second, Third, Seventh, Ninth, and D.C. Circuits held decisions worthy of praise, guaranteeing the right to counsel, the means in which they reached their respective conclusions are obsolete. Since 1976, binding case law clearly states, "the *Eldridge* factors [are] the touchstone due process test and theoretically should have replaced the…fundamental fairness standard."[47] Also, "no court has declared that *Eldridge* is inapplicable to [non-citizens] who are not permanent residents . . ."[48] Therefore, immigration courts' deceptive practice of "routinely [applying] the fundamental fairness criterion or one of its cousins (such as the no prejudice and harmless error tests) in determining constitutionally sufficient procedures" is improper.[49] Adopting the prevailing procedural due process test of first, determining if there is a deprivation of life, liberty or property and then weighing the *Eldridge* factors, would foster the complete transition from the Plenary Power Doctrine to mainstream constitutional principles in U.S. Immigration Law.

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45. Jacinto v. INS, 208 F.3d 725, 728 (9th Cir. 2000).
46. Pitsker, supra note 45, at 176.
47. Id. at 177.
48. Id.
49. Id.

PART II**:** *MONTES-LOPEZ V. HOLDER*

In *Montes-Lopez*, Mario Montes-Lopez, a citizen and native of El Salvador fled his country in early 2011 to escape gang-related recruitment and harassment.[50] Soon after his arrival in the United States, he was detained by ICE officers and placed in removal proceedings in San Francisco, California.[51] On the day of Mario's hearing on his petition for asylum, his attorney failed to appear since his law license had been temporarily suspended.[52] Mario presented a letter from his attorney, Mr. Peña, which articulated that he was not present because of his recent bar suspension and requested that the Immigration Judge continue the matter until September of that year when Mr. Peña's suspension would end or to allow Mario to seek new counsel.[53]

The Immigration Judge, without counsel present, proceeded with Mario's hearing on the merits of his case subsequently denying Mario's application for asylum and withholding of removal.[54] Without a proper legal or factual argument, this ruling meant that the Immigration Judge found, at his or her own discretion, Mario could not meet his burden of proving if he returned to his country of origin, he had a well-founded fear of persecution on account of his race, religion, nationality, membership of a particular social group or political opinion.[55] As a result of denial of Cancellation of Removal, the defendant must return to his or her country of origin, effective immediately.

Mario appealed the decision to the Board of Immigration Appeals (BIA) who affirmed the Immigration Judge's decision holding that Mario could not establish that he was prejudiced by the denial of counsel.[56] Accordingly, Mario sought review of the decision with the Ninth Circuit Court of Appeals, where the court faced a divided issue among Federal Circuit Courts: whether an unrepresented non-citizen must demonstrate prejudice to their case due to lack of counsel in order to successfully appeal their decision. The Fourth, Fifth, and Tenth Circuits had all held that a showing of prejudice was required for a successful appeal, while the

50. Montes-Lopez, 694 F.3d at 1086-88.
51. Id. at 1086.
52. Id. at 1087.
53. Id. at 1085.
54. Id. at 1088.
55. 8 U.S.C. § 1158(b)(1) (2009); 8 C.F.R. § 208.13 (2013).
56. Montes-Lopez, 694 F.3d at 1088

Second, Third, Seventh, and D.C. Circuits had all held such a showing was not needed for a successful appeal. [57] The Ninth Circuit, consistent with the Third, Seventh and D.C. Circuit Courts, held that appeals could be successful without a showing of prejudice. Among these Circuits, two arguments supported reaching such a decision: 1) the need for federal agency compliance for interests of judicial economy, and 2) the protection of important procedural benefits upon individuals when, "alleged regulatory violations implicate fundamental statutory or constitutional rights." Although the former argument is strong, this Comment purports the latter argument as being essential to the achievement of a short-term solution for immigrant representation in removal proceedings.[58] Although the argument for regulatory compliance is sound; providing such does not necessarily establish a means to provide a *per se* right to counsel. On the other hand, the latter argument about the protections of procedural benefits is true, and once established, is in itself a means to providing a *per se* right to counsel for non-citizens.

The Third, Seventh and D.C. Circuit Courts join in promoting procedural protections; however, their arguments fall short due to use of

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57. According to Chicago-based immigration attorney Tejas N. Shah, the question of right to counsel should be solved by the Supreme Court granting certiorari and hearing the Montes-Lopez case in order to "finally resolve the dispute between the eight federal circuits that disagree about where a showing of prejudice is required". See SCOTUS Could Reconcile Conflicting Federal Rulings on Immigrants' Right to Counsel: The Ninth Circuit Joins the Seventh in Ruling That an Immigrant Who is Denied the Right to Counsel in Removal Proceedings Need Not Show Prejudice to Successfully Appeal That Denial, 101 ILL. B.J. 175 (2013). Shah, an attorney with Kriezelman Burton & Associates LLC states that,

> "I think this would be a good issue to be resolved in the Supreme Court because it would be another opportunity for the court to affirm that the consequences of deportation and other immigration proceedings have such a significant impact on the life and liberties of the parties . . . I agree they shouldn't have to show prejudice if that right to counsel is violated."

See id. However, getting a writ of certiorari is a long-term solution while this Comment offers short term, immediate solutions by pushing for proper legal due process analyses which would result in the same effect in all circuits.

58. By way of Montilla v. INS, the Second Circuit concluded that an immigration judge had violated applicable regulations by failing to notify a non-citizen of his right to counsel and the availability of free legal services offered by the INA. 926 F.2d 162, 169 (2d Cir. 1991); Agreeing with "the long-settled principle that the rules promulgated by a federal agency, which regulate the rights and interests of others, are controlling upon the agency." Id at 166 (citing Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 422 (1942)); a demonstration of prejudice would only allow INS to violate its own rules and regulations which would discourage overall agency compliance. Id. Additionally, without adherence to agency rules and regulations, the interests of judicial economy would be in jeopardy. Id.

outdated analyses. The Third Circuit joined the Second Circuit in *Leslie v. Attorney General*, eloquently adding to the statutory argument that a constitutional right must be acknowledged as well. The Third Circuit reasoned that Fifth Amendment due process rights were enacted to protect "particularly important procedural safeguards" implanted to stop the government from infringing on individual rights.[59]

Applying the outdated "harmless error" due process test, the Seventh Circuit concluded that statutes and regulations granting the right to representation "would be eviscerated by the application of the harmless error doctrine . . . ."[60] *Castaneda-Delgado v. INS* solidified the Seventh Circuit's observation of the right to counsel as "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[61] In *Cheung v. INS*, the D.C. Circuit court also utilized pre-*Eldridge* tests to reach a similar decision, deciding that, for specific rights, such as the right to counsel, a prejudice inquiry is unnecessary, inappropriate and inconsistent since it is a right "so basic to a fair trial that their infraction can never be treated as harmless error."[62]

Montes-Lopez also utilized the "harmless error" test, concluding "the denial of such a fundamental right cannot be deemed a 'harmless error' and therefore, the BIA incorrectly concluded that Plaintiff needed to demonstrate actual prejudice as a result of absence of counsel."[63] *Montes-Lopez* makes waves, allowing for the Ninth Circuit to join the Third, Seventh and D.C. Circuit Courts in preserving procedural safeguards for non-citizens. Although these landmark decisions are vital stepping stones to reforming procedural law in immigration, this Comment argues that if a slightly different analysis was used, these Circuit Courts could not only abolish the need to demonstrate prejudice but could pave the way for a *per se* right to counsel for indigent unrepresented immigrants. These Circuit Courts are commended for drawing much needed attention by way of their split Circuit decision; yet, with a tweak in analysis, the Plenary Power Doctrine can be annihilated so that Immigration Law can finally comport with prevailing mainstream constitutional principles.

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59. Montes-Lopez, 694 F.3d at 1091.
60. Castaneda-Delgado v. INS, 525 F.2d 1295, 1302 (7th Cir. 1975).
61. Id. at 1300 (citation omitted).
62. 418 F.2d 460, 464 (D.C. Cir. 1969) (citation omitted).
63. See Montes-Lopez, 694 F.3d at 1086.

PART III: CONSTITUTIONAL RIGHT TO COUNSEL IN IMMIGRATION PROCEEDINGS

A. Utilizing Appropriate Legal Tests

1. Deprivation of Life and Liberty

Fifth Amendment procedural due process prohibits the federal government from depriving an individual of life, liberty or property without providing: (1) notice and (2) the opportunity to be heard.[64] In order to demonstrate that a *per se* right to counsel in deportation hearings exists, it must first be established that without counsel, a non-citizen will likely be deported and thus deprived of life, liberty or property. Once this deprivation is proven, the *Eldridge* factors will ultimately determine if the benefits of providing counsel outweigh the burdens. The following demonstrates how an immigrant in removal proceedings faces a deprivation of life and liberty.

In *Lassiter v. Department of Social Services*,[65] the Supreme Court rejected the argument that due process required appointed counsel for indigent parents in proceedings to terminate their parental rights because the deprivation of liberty was non-physical.[66] In contrast, this physical deprivation existed in *Gideon* when a man was at risk of being sentenced to prison for five years.[67] Although this is an example drawn from a criminal proceeding, it was the defendant's interest in physical freedom that triggered the right to counsel. *Gagnon v. Scarpelli* held that a probation revocation, like a parole revocation, is a non-criminal hearing but nevertheless, results in a deprivation of liberty, entitling a probationer to due process and the government's obligation to appoint counsel.[68] *Gagnon* established that the "nature" of the revocation proceeding was "significantly and detrimentally" altered if counsel was to be provided to the probationer and as a result counsel was provided.[69]

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64. See Goldberg v. Kelly, 397 U.S. 254 (1970).

65. 452 U.S. 18, 18-19 (1981).

66. See 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, 410 (1984).

67. Gideon, 372 U.S. at 336-45.

68. See *Gagnon*, 411 U.S. at 789-91.

69. See id.

Although this ruling did not establish a *per se* right to counsel in probation revocation hearings, it arguable redefined deprivation of life and liberty. The decision hints that a physical limitation on one's personal freedom may not be the only means to establish deprivation of life and liberty. Instead, if one can prove that the "nature" of their proceeding would be "significantly and detrimentally" altered if counsel were provided, then this creates a slightly lower standard of proving a deprivation of life and liberty. Nevertheless, immigrants in removal proceedings can surpass this presumptively lower standard established in *Gagnon* because deportation and pending deportation both result in a physical limitation on the freedom of movement which is five times as likely to occur without counsel present.

Deportation is a physical limitation on personal freedom because it results in a physical removal from U.S. territories to another country. When immigrants await hearings and are held on bond or are picked up by ICE officers, they are held in detention facilities. Even when non-citizens are ordered removed, unless they are given an Order of Supervision or allowed to remove themselves, their physical removal is facilitated by ICE officers while the non-citizen is held in detention awaiting a flight and escorted in handcuffs onto the plane. Since every immigrant (not just those in removal proceedings) can be placed into detention, it is clear that his or her liberty, even before the ultimate physical deportation, is potentially open to being constrained in a physical sense. Detention is in all its forms akin to criminal imprisonment. It has already been held that imprisonment or the threat of such is a physical deprivation of life and liberty. In addition to these analogies, case law has already deemed deportation as a deprivation of life and liberty.[70]

In 1945, long before "Gideon's Promise," it was held that an immigrant in removal proceedings[71] has his or her individual liberty at stake.[72] Early on, this Supreme Court decision stated that, "[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and *[sic]* live and work in this land of freedom. That deportation is a penalty—at

70. See Bridges, 326 U.S. at 154.

71. Removal proceedings allow a non-citizen to voluntarily remove themselves or sometimes, the government will remove the non-citizen back to their country of origin, no matter what they may face in their return. There are no petitions or ability to consult/travel to other countries which would be more willing to accept them.

72. See Bridges, 326 U.S. at 154.

times a most serious one—cannot be doubted. Meticulous care must be exercised . . . ."[73] Thus, "the consequences of deportation are often fully as grave as those of imprisonment."[74] Deportation has the effect of "wrenching a person from his home since childhood, separating him from his wife and children, who may be American citizens, and sending him to a strange land or, even worse, leaving him with no country at all to which to return."[75]

Many immigrants come to the United States as children,[76] and many may not remember their native country, culture, or language. Additionally, family ties to their homeland may be minimal, and therefore returning to their home country is the equivalent of being sent to a foreign country. Further, immigrants facing deportation may face physical harm. This is especially evident when examining the factual basis for petitioners seeking relief by way of Temporary Protective Status (TPS), Violence against Women Act (VAWA), Convention Against Torture (CAT), asylum and refugee status.

As a result, the deprivation of life and liberty in a removal proceeding is overpowering. Immigrants in removal proceedings surpass the lesser requirements in *Gagnon* but can also illustrate a deprivation of life and liberty that is physical in nature. Thus, the dispositive question that remains "is whether the three *Eldridge* factors, when weighed against the presumption that there is no right to appointed counsel in the absence of a least a potential deprivation of physical liberty, suffice to rebut that presumption and thus lead to the conclusion that the Due Process Clause requires the appointment of counsel . . . ."[77]

2. Eldridge *Factors Analyzed*

The court in *Eldridge* articulated that procedural due process is required by the government when a deprivation of life, liberty or property exists and the followed are balanced in favor of the appointment of counsel:

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73. Id.

74. Beth J. Werlin, Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings, 20 B.C. THIRD WORLD L.J. 393, 401 (2000).

75. William Haney, *Deportation and the Right to Counsel,* 11 HARV. INT'L L.J. 177, 185 (1970).

76. See Werlin, supra note 75, at 405 n.92 (citing OFFICE OF POLICY AND PLANNING, STATISTICS BRANCH, INS, U.S. DEP'T OF JUSTICE, NO. 2, LEGAL IMMIGRATION, FISCAL YEAR 1998, at 7 (1999)).

77. Lassiter, 42 U.S. at 31.

(1) interest of the individual; (2) risk of error that deprives the individual of a liberty or interest; and (3) interest of the state government, including administrative and financial burdens. [78] As described above, deportation results in a deprivation of life and liberty, and therefore it closely follows that the interest of the individual immigrant in avoiding such a deprivation is great. Further, "deportation is a drastic measure and at times the equivalent of banishment of exile."[79]

An immigrant's interest in remaining in the United States is akin to losing a child to state custody absent any evidence of child abuse or neglect. If deported, a non-citizen's standard of living, employment, home, education, community and family ties will be broken, and often the immigrant is barred for at least ten years without the ability to return to the United States for any period however short.[80] "Each year, thousands of U.S. citizen children in this country are effectively removed from, or abandoned, in the United States when the government deports their immigrant parent or parents."[81] Drawing from *Lassiter*, it is well settled that a parent's desire for and right to "the companionship, care, custody and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection."[82] Moreover, "the State has sought not simply to infringe upon this interest but to end it."[83] This exemplifies solely one personal interest—keeping a family together—to demonstrate the myriad of individual personal interests immigrants may seek to protect.

Additionally, it has been argued that lawful permanent residents (LPR) have a greater private interest in removal proceedings compared to non-citizens. At first glance, the argument in favor of LPRs may seem compelling because the path to citizenship is typically much shorter and thus their deprivation and private interest is said to be accordingly greater. However, this private interest of remaining in the United States, whether it is to keep your family together, to be with your established community,

78. Eldridge, 424 U.S. at 335.

79. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (citation omitted).

80. Typically, deportation hearings, depending on the immigrant's situation, have ten-year bars where the immigrant cannot return, even if a viable claim is established for ten years as punishment for illegal entry. INA § 212(a)(9)(ii)(II), 8 U.S.C. § 1182(a)(9)(ii)(II) (2013).

81. Kevin R. Johnson, An Immigration Gideon for Lawful Permanent Residents, 122 YALE L.J. 2394, 2405 (2013) (citations omitted).

82. Lassiter, 452 U.S. at 27 (citation omitted).

83. Id.

retain your standard of living or to keep employment, does not belong anymore to an LPR than to a non-citizen (a term inclusive of LPRs). The mere fact that an LPR has a lawful presence in the United States and therefore the timing to naturalization is often shorter; this does not in itself validate their entitlement to remain within the United States and to seek freedom from persecution as well as greater opportunities for their families and themselves. A mere status is in no way indicative of a greater legal entitlement. The amount of time one must wait to become a citizen does not equate to the amount of life and liberty one will be deprived of as a result of the deportation.

Presuming greater personal interest is contrary to the necessity of our legal system. It is each petitioner's substantive and procedural right to have their respective application and corresponding facts and circumstances evaluated by an Immigration Judge, consulate office, National Visa Center or other appropriate department to be evaluated for legal entitlement. The evaluation process is especially paramount in deciding legal entitlement with cases that allow for a fair trial. Non-citizens are able to hear the evidence presented against them and to argue/defend their case before it is judged on its merits. Therefore, by merely stating that LPRs have a more compelling private interest is to rob the justice system of its procedural and substantive function. As a result, all non-citizens, including LPRs, equally have a well-established private interest in remaining in the United States.

Secondly, the *Eldridge* test evaluates "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards . . . ."[84] In other words, this factor questions whether the absence of a certain procedure (the right to counsel) will generally, instead of seldom, affect the outcome of a particular adjudication process (removal proceedings). Statistical data overwhelmingly demonstrates that without counsel, the outcome of a removal proceeding is drastically affected.

Without government-provided legal services to indigent immigrants, populations between eleven and twelve million undocumented immigrants will go without representation.[85] According to Migration Policy Institute's

84. Eldridge, 424 U.S. at 335.

85. This statistic focuses on solely undocumented immigrants. It does not include all lawful permanent residents who are not entitled to government provided legal services neither. See Donald M. Kervin, Revisiting the Need for Appointed Counsel, MIGRATION POL'Y INST. (Apr. 2005), http://www.migrationpolicy.org/research/revisiting-need-appointed-counsel.

statistical evidence, 84% of detained immigrants do not have attorneys, and studies show that representation in removal proceedings improves "an aspiring American's ability to defend against deportation by a magnitude of six."[86] By examining solely asylum cases, "without counsel, only 3% prevail in their asylum cases, compared to 10% who have legal counsel.[87] Even empirical data from government asylum statistics point to stark disparities in the outcomes of asylum cases based on whether the asylum seeker had representation.[88] Additionally, the United States Commission on International Religious Freedom demonstrates that asylum seekers who were represented by an attorney were granted relief 25% of the time while asylum seekers representing themselves were granted relief just 2% of the time.[89] Since asylum seekers with counsel are "far more likely to receive asylum than *pro se* asylum applicants,"[90] the same can be inferred for other applicants who strive to represent themselves in removal proceedings.

The reason statistics demonstrate that non-citizens without counsel are overwhelmingly at risk of erroneous deprivation of life and liberty is because attorneys possess obvious qualities to navigate the complexity of the immigration process. They have legal knowledge (rules of evidence, civil procedure, current law, access to legal research, etc.) and courtroom presence. However, there are two additional reasons that highlight why the risk of error in deportation proceedings without counsel is great. The first reason is the discretionary nature of immigration proceedings. Second, the risk of error is exasperated since the large Latino immigrant population is preyed on as victims of fraud.

Immigration proceedings consist of discretionary review by Immigration Judges and there is no right to a jury. The nature of these proceedings lends itself to racially disparate practices and discretionary abuse. Also, Immigration Law is complex because it is forever changing from various authorities, such as, Executive Orders, Memos from the Department of Homeland Security, consular offices, legislation, case law and so forth. It is unfair to expect immigrants, who may already be facing daily limitations by way of our foreign laws, language and culture, to navigate the court system with competency. Not only will immigrants face

86. Id.
87. Id.
88. Pitsker, supra note 45, at 189.
89. U.S. COMM'N INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 59 (2005).
90. Pitsker, supra note 45, at 190.

difficulty in navigating the basics of Immigration Law but will face what is deemed for Immigration attorneys an upward battle of recognizing and fighting against rampant abuses that come along with discretionary review.

For example, petitioners for Cancellation of Removal must prove to an immigration court, upon reviewing the record as a whole, that "adverse factors evidencing an alien's undesirability . . . [balanced] with the social and humane considerations presented on his behalf [is] . . . in the best interests of this country" in order to stay in the United States.[91] In *Matter of Marin* and *Matter of Wadud,* the court addressed the following as positive factors that weigh in favor of granting a respondent's application for Cancellation of Removal:

> "Family ties within the United States, residence of long duration in [the United States] . . . , evidence of hardship to the respondent and family if deportation occurs, service in [the] Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character . . . ."[92]

In addition, factors that weigh against an alien's claim for Cancellation of Removal include the nature and underlying circumstances of grounds of removal, additional significant immigration violations, existence of a criminal record, and other evidence of bad character or undesirability.[93] Without counsel present, it would be nearly impossible for a non-citizen to discover these factors or possess the legal craft to write a compelling brief with proper documentation as evidence in favor of such factors. Further, not only are immigrants strangers to the "complicated maze of immigration laws," [94] if they are detained by ICE, obtaining necessary documentation (often from abroad), filing proper documents or preparing briefs in support of their cases would be impossible.

In addition to facing the complexity of Immigration Law, immigrants without representation are particularly vulnerable to the growing phenomena of *notarios* (notaries) fraud. *Notarios* are both lawyers and

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91. See Matter of Marin, 16 I. & N. Dec. 581, 584 (B.I.A. 1978).

92. Id. at 584-85; Matter of Wadud, 19 I. & N. Dec. 182, 186-87 (B.I.A. 1984).

93. Id.

94. See Robert A. Katzmann, The Legal Profession and the Unmet Needs of the Immigrant Poor, 21 GEO. J. LEGAL ETHICS 3, 5-8 (2008) (reviewing empirical data on the immigration caseload in the immigration agencies and the courts).

non-lawyers who target Latino immigrants, exploiting them by charging high fees for low quality or fraudulent immigration, criminal or tax assistance.[95] The affects of the schemes fundamentally influence an immigrant's chances of attaining citizenship. For example, a *notario* will offer to prepare an immigrant's taxes, pretending he is a tax attorney when in reality he only owns an online tax "do-it-yourself" system like TuboTax. The *notario* will take all of the non-citizen's personal information in hopes of later using it for threats of deportation when his falsities are discovered by the immigrant.

By manipulating numbers, the *notario* can ensure that the immigrant's tax return is as high as possible. This is favorable for the *notario* since he or she is being compensated by way of a percentage of the immigrant's tax return. However, when the immigrant begins any immigration process, he may discover that he is guilty of tax fraud and thus barred from any immigrant relief. In fact, if an immigrant tax return is manipulated, he or she may not fulfill certain immigration requirements because he or she does not fit within U.S. poverty guidelines required for petitioners who must demonstrate the ability to financially support beneficiaries.

Although there are advocacy groups that are dedicated to putting an end to immigration fraud, such as the A.B.A.'s "The Fight *Notario* Fraud Project," it is a problem that is usually identified after the fact. Only when an immigrant has already suffered an adverse immigration result because of the consultant's services does he or she then seek the assistance of a licensed immigration attorney.[96] Without immigration attorneys being readily available to immigrants, the risk that victims permanently loose opportunities to pursue immigration relief because a *notario* has damaged their case is far too great and entirely real.[97] In conclusion, the risk of error is great for a non-citizen who goes through the immigration process without proper representation not only for obvious reasons, but also for exceptional reasons, such as *notorios* fraud and abuse of discretionary review.

Lastly, the *Eldridge* test weighs the government's interest, including the fiscal and administrative burdens that providing indigenous

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95. See Careen Shannon, To License or Not To License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers, 33 CARDOZO L. REV. 437, 446-47 (2011).

96. Fight Notario Fraud, A.B.A., http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud.html (last visited Apr. 22, 2014).

97. Id.

representation includes.[98] In order to evaluate the government's fiscal burden, a pre-existing model program must be examined to determine projected costs. In 1974, Congress created Legal Services Corporation (LSC), a federally funded civil legal services for the poor.[99] The LSC is a good example of what indigent immigration representation in removal proceedings may look like. Although repeated budget cuts have left LSC "woefully underfunded and unable to fulfill its mission of creating equal access to justice for those who face economic barriers,"[100] it is a program that is pre-existing and could be revitalized for immigrant representation.

Additionally, the New York Immigrant Family Unity Project (NYIFUP), a one-year pilot program, is a more conducive model program since it is the first of its kind to provide free, high-quality indigent representation for immigrants facing deportation at New York's Varick Street Immigration Court.[101] NYIFUP is funded by the New York City Council, Vera Institute of Peace in collaboration with Northern Manhattan Coalition for Immigrant Rights, the Center for Popular Democracy, Brooklyn Defender Services and more.[102] This program serves as both a theoretical and practical model program for indigent immigrant representation for other jurisdictions. Although programs like LSC and NYIFUP demonstrate that the government can also create similar programs, the cost to fund such programs is troublesome.

The A.B.A. has estimated that roughly 400,000 indigent non-citizens are removed annually, and when proposing guaranteed counsel to each with viable claims in removal proceedings, the cost is roughly between $53 and $111 million dollars.[103] It is clear that costs and resources for such a program are tremendous. Nevertheless, there are short-term and long-term benefits that could offset the costs of funding such a program. As a result

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98. Eldridge, 424 U.S. at 335.

99. See LEGAL SERVS. CORP., FACT BOOK 2011 (June 2012), *available at* http://lsc.gov/sites/default/files/Grants/RIN/Grantee_Data/fb11010101.pdf.

100. Jessica K. Steinberg, In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services, 18 GEO. J. POVERTY L. & POL'Y 453, 453 (2011); see DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, LEGAL SERVS. CORP. (Sept. 2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

101. NORTHERN MANHATTAN COALITION FOR IMMIGRANT RIGHTS, http://www.nmcir.org/organizing.html (last visited Jan. 2014).

102. Id.

103. See A.B.A, ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS 5-16 (2008), available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/immigration/2008dec_immigration.authcheckdam.pdf.

of unrepresented immigrants requiring much more administrative and court time due to additional "effort by a conscientious judge than a represented [petitioner],"[104] a government funded right to counsel could provide judicial economy.[105] With representation, immigration courts could function more efficiently and fairly.[106] Without burdensome backlog, there would be a reduction in costs of detention during the pendency of removal proceedings.[107] In the long-term, there will be an increase in lawful U.S. population, which has collateral effects on our society and economy. General projections show that with an increased legally recognized work force there will be a boost in U.S. economy, a U.S. deficit reduction, increased national security and entrepreneurship.[108]

Even if additional costs for indigent representation are insurmountably demanding, the three *Eldridge* factors must nevertheless be weighed in relation to one another. In doing so, the first two *Eldridge* factors, private interest of the immigrant of not being deported and the risk of error to adjudicating a deportation hearing without counsel, together outweigh potential costs to the government brought on by a program that funds representation. Also, it is speculative yet possible that as a result, government costs can be recovered in the short and long term. Therefore, after establishing that a deprivation of life and liberty results from deportation, *Eldridge* factors are weighed to determine that a non-citizen has the right to appointed counsel.

*B. Pre-*Eldridge *Tests Guarantee Right to Counsel*

Alternatively, if Federal Circuit Courts refuse to adopt the *Eldridge* test, and instead apply the "fundamental fairness," "harmless error" or "prejudice test," there is no need to demonstrate that but for a specific

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104. ARNOLD & PORTER LLP, A.B.A COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES, EXECUTIVE SUMMARY 13 (2010).

105. See TRAC IMMIGRATION, IMMIGRATION COURT BACKLOG TOOL (2012), http://trac.syr.edu/phptools/immigration/court_backlog. (offering statistical data on the backlog in immigration courts).

106. See id.

107. NORTHERN MANHATTAN COALITION FOR IMMIGRANT RIGHTS, supra note 102.

108. Diana Furchtgott-Roth, Four Benefits of Immigration Reform—Commentary: Bringing the Best and Brightest to America, MKT. WATCH—WALL ST. J. (Aug. 16, 2013, 6:01A.M.), http://www.marketwatch.com/story/4-benefits-of-immigration-reform-2013-08-16?pagenumber=2.

prejudice that occurred without counsel, the defendant would have won his or her case. Recognized by the opinion in *Montes-Lopez,* it is inconsistent to make prejudice a requirement for the denial of counsel in an immigration proceeding when prejudice is an innate element of ineffective assistance of counsel in immigration proceedings.[109]

Absence of counsel is much more detrimental to a non-citizen's case than ineffective representation. The absence of counsel can "change a [non-citizen's] strategic decisions, prevent him or her from making potentially-meritorious legal arguments, and limit the evidence the [non-citizen] is able to include in the record."[110] Thus, because the denial of counsel is more detrimental and prejudicial than ineffective assistance of counsel, if Federal Circuit Courts do not apply the *Eldridge* test, even pre-*Eldridge* tests must, by way of consistency, recognize prejudice as an innate quality of lack of representation. [111] By doing so, every analysis on appeal would find an immigrant was prejudiced without counsel and therefore be entitled to a new trial.

CONCLUSION

For non-citizens who are physically present in the United States, process is due. A historically disenfranchised population, when non-citizens are placed in removal proceedings their vulnerabilities only multiply. In a deportation hearing, a non-citizen is defending him or herself against a loss of life and liberty, a hardship only equivalent to banishment or exile that deprives one of everything worth living.[112] A non-citizen, vulnerable to fraud and facing linguistic and cultural barriers, must defend him or herself against foreign laws in a foreign country in front of a federal judge and up against a federal prosecutor.

Moreover, the characteristics of Immigration Law, specifically discretionary review, ensure that a *pro se* litigant is doomed for deportation without a fair trial. In fact, without government-provided legal services to indigent immigrants, populations between eleven and twelve million undocumented immigrants will go without representation and those whom

109. *Montes-Lopez*, 694 F.3d at 1092.
110. Id.
111. Id.
112. See *Fong Haw Tan*, 333 U.S. at 10; Bridges v. Wixon, 326 U.S. 135, 158 (1945).

are not represented are five times as likely to lose their deportation case.[113] Without immigrant representation there is no oversight of discretionary review. No means for detecting and preventing systematic failures that often lead to racially disparate results currently exists.

In response to Immigration Law's flawed procedural practices resembling Civil and Human Rights violations, there are Federal Circuit Courts that have rendered monumental decisions that help end procedural inequalities. Recently, *Montes-Lopez* ruled among split Federal Circuit Courts that the Ninth Circuit does not recognize a need for a non-citizen to prove prejudice in order to win on a claim for right to counsel. Although the Second, Third, Seventh, D.C. and now Ninth Circuit Courts held decisions that make the right to counsel more easily attainable for non-citizens after a case-by-case analysis, these Federal Circuit Courts should have gone a step further. The INS outlines a statutory right to counsel for immigrants and case law further defines the importance of such a right; yet, the INA does nothing further to create a government-funded indigent representation program. To fulfill the INA's deficiency is the Fifth Amendment. If the above mentioned Federal Circuit Courts addressed the right to counsel by analyzing the Fifth Amendment procedural due process clause, as mainstream constitutional principles require, these courts would find a *per se* right to counsel in every case. As demonstrated by this Comment, non-citizens can meet the Fifth Amendment's requirements of procedural due process by first demonstrating that deportation would result in a deprivation of life and liberty and second, by weighing the factors in *Eldridge*.

As described in the Fifth Amendment, procedural due process is a right of each *person*. The framers' conscious decision to use the word "person" instead of "citizen," as distinguished from other constitutional texts, demonstrates that procedural due process was intended for all persons physically present in the United States.[114] With holdings like *Montes-Lopez,* the judicial system continues to honor the framers' belief in a living and breathing U.S. Constitution, relevant to guiding American legal culture even today. This same notion is mirrored by John F. Kennedy who once wrote, "immigration policy should be generous; it should be fair; it should

113. This statistic focuses on solely undocumented immigrants. It does not include all lawful permanent residents who are not entitled to government provided legal services neither. Kervin, supra note 86.

114. This can be contrasted with the Privileges and Immunities Clause where "citizens" are referred to as having privileges and immunities. U.S. CONST. amend. XIV, § 1.

be flexible. With such a policy we can turn to the world, and to our own past, with clean hands and a clear conscience."[115]

115. KENNEDY, supra note 26.