Alleviating the "Drastic Sanction": A Call to Recognize a Right to Effective Assistance of Counsel in Removal Proceedings

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I. INTRODUCTION

The Supreme Court has long recognized the devastating impact that removal proceedings may have on the lives of aliens facing deportation from the United States,\(^1\) calling deportation "a drastic measure [which is] at times the equivalent of banishment or exile."\(^2\) Unfortunately, the fear and anxiety that typically accompanies removal proceedings is compounded by the complexity of immigration law and, specifically, the deportation process itself.\(^3\) As the Court of Appeals for the Ninth Circuit has observed, "[w]ith only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'\(^4\) Accordingly, the presence of counsel has become essential to ensuring that aliens understand the nature of the proceedings in which they are participating, as well as their rights and responsibilities.\(^5\) In a number of cases, courts have even considered the presence of counsel the decisive factor in preventing injustice.\(^6\) Simply put, navigating the labyrinth that is the Immigration and Nationality Act (the "INA") requires the aid of a lawyer.

Be that as it may, it is equally as clear that individuals do not have a Sixth Amendment right to counsel in removal proceedings, as they are considered "civil" in nature.\(^7\) "But where the courts declined to see a constitutional remedy, Congress saw a dictate of

\(^1\) See Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963) (explaining that "deportation is a drastic sanction, one which can destroy lives and disrupt families"); Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (describing deportation as a "penalty" and a "punishment").


\(^4\) Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) (citation omitted).

\(^5\) Id.

\(^6\) Id. ("Over fifty years ago it was observed that in many cases a lawyer acting for an alien would prevent a deportation which would have been an injustice but which the alien herself would have been powerless to stop.") (Internal quotation marks and citation omitted).

\(^7\) See, e.g., United States v. Perez, 459 F. App'x 191, 196 (3d Cir. 2012) ("[T]he Sixth Amendment's right to counsel does not apply in administrative removal proceedings. . ."); United States v. Reyes-Bonilla, 671 F.3d 1036, 1045 (9th Cir. 2012) ("[T]here is no Sixth Amendment right to counsel in an immigration hearing . . . ").
humanity” by creating a statutory privilege which guarantees that aliens facing removal may retain counsel, though not at the expense of the government. Nonetheless, in 2010, just 122,465 out of 287,207 (43 percent) individuals, many of whom are indigent and unable to afford an attorney, had legal representation in front of the immigration courts.

For those capable of retaining lawyers, the parameters of the statutory right to counsel have yet to be clearly delineated. Specifically, it remains unsettled whether the Constitution supports a claim of ineffective assistance of counsel in removal proceedings. A majority of the federal appellate courts currently recognize the validity of such a claim. Similarly, the Court of Appeals for the Fifth Circuit has “repeatedly assumed without deciding that an alien’s claim of ineffective assistance may implicate due process concerns under the Fifth Amendment.”

On the other hand, panels of the Seventh Circuit Court of Appeals have conflicted in their approach to the question. Similarly, Fourth and Eighth Circuit Courts of Appeals have expressly held that there is no constitutional right to effective counsel in the context of removal proceedings. Compounding matters further, successive United States Attorneys General have adopted divergent views on whether such a right exists, leaving the official Department of Justice (the “Department” or “DOJ”) position in a state of flux.

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[i]n any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

11. See, e.g., Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008); Zeru v. Gonzales, 503 F.3d 59, 72 (1st Cir. 2007); Dakane v. Atl’y Gen., 399 F.3d 1269, 1273-74 (11th Cir. 2005); United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003); Denko v. Immigration & Naturalization Serv., 351 F.3d 717, 723-24 (6th Cir. 2003); Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003).
The disagreement among, and within, the federal courts of appeals on the existence of a constitutional right to effective assistance of counsel in removal proceedings is significant for several reasons. The INA precludes courts from reviewing claims arising from decisions of the Board of Immigration Appeals ("BIA") based on the denial of discretionary relief and final orders of removal against aliens convicted of designated criminal offenses.\footnote{Immigration and Nationality Act of 1965 § 242, 8 U.S.C. § 1252(a)(2)(B)-(C).} The statute, however, creates an exception for review of constitutional claims or questions of law raised upon a petition for review filed in an appropriate federal appellate court.\footnote{Id. § 1252(a)(2)(D).} Thus, if a claim of ineffective assistance of counsel is a constitutional claim, as a majority of the federal appellate courts have held, the courts may review it.\footnote{Munro v. Mukasey, 293 F. App'x. 804 (2d Cir. 2008). As a result, immigrants who would generally be unable to seek judicial review because their claim involves issues of fact, discretionary decisions, or one of the enumerated criminal convictions often attempt to obtain review by arguing that their claim involves a constitutional claim, i.e. that they have been denied effective assistance in violation of the Fifth Amendment. See, e.g., Recinos v. Holder, 404 F. App'x 173 (9th Cir. 2010).} Conversely, courts in jurisdictions in which the right has not been recognized have generally dismissed petitions for review alleging ineffective assistance of counsel.\footnote{Massis v. Mukasey, 549 F.3d 631 (4th Cir. 2008), cert. denied, 130 S. Ct. 736, 175 L. Ed. 2d 513 (2009).}

This Comment will begin by briefly examining the implications of the Supreme Court's precedent establishing that removal and deportation proceedings are civil with regard to the Sixth Amendment right to effective assistance of counsel. It will then address the substantive and procedural framework for establishing a claim for ineffective assistance of counsel adopted in a majority of the federal judicial circuits and contrast that to the position embraced by the Courts of Appeals for the Fourth and Eighth Circuits. Following a review of the principal cases, the BIA's evolving stance on the subject will be explored. In particular, the focus will be on the Department's proposed amendments to the regulations of the Executive Office for Immigration Review (EOIR) establishing procedures for handling motions to reopen immigration proceedings based on a claim of ineffective assistance of counsel developed after Attorney General Holder's decision vacating Compean. Finally, this Comment will consider the practical effects on the immigration process of incompetent representation—or no representation at all—and argue that fundamental fairness
requires the nation's highest court to finally resolve this important issue by recognizing that aliens have a right to receive effective counsel when facing removal from this country.

II. LEGAL BACKGROUND

A. Removal Proceedings as Civil in Nature

A concise review of the historical treatment of deportation and its antecedents, along with the Supreme Court's jurisprudence on the nature of removal proceedings, is necessary to place the current circuit split on the right to effective assistance of counsel in context. The concept of "deportation" is a relatively recent legal invention. However, its early ancestor, banishment, has existed in one form or another for thousands of years, and the law relevant to banishment most likely informed the early views on deportation in this country. Although questions exist as to whether the power could be exercised solely through civil means or required the use of the criminal process, there is no doubt that banishment was used primarily as a punishment for crimes in common law England. This view was exported to the United States with the colonists, and banishment remained a valid punishment for serious crimes well into the Nineteenth Century. Indeed the founders never adopted any civil method for expelling noncitizens; instead, they relied solely on the criminal penalty of banishment.

The case of Chae Chan Ping v. United States (the "Chinese Exclusion Case"), decided in 1889, marked a sea change in the Supreme Court's approach to immigration law. The Chinese Exclusion Case centered on an act of Congress that prohibited Chinese laborers from reentering the United States, even though they had departed the country before the act's passage and carried with them valid reentry permits. The Court refused to even consider the criminal constitutional rights at issue, namely the prohibition

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21. Id.
22. Id. at 1309.
23. Id.
24. Id. at 1309-10.
25. 130 U.S. 581 (1889).
26. Id. at 589. The act was challenged "as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of congress." Id.
against *ex post facto* laws. Instead, it reasoned that the power to exclude aliens is one of the inherent powers held by all sovereign nations, thereby exempting it from constitutional protections applicable to criminal proceedings.

Four years later, the Court extended that logic to the deportation context in *Fong Yue Ting v. United States*. In that case, three Chinese citizens living in the United States challenged the validity of the statutes under which they were arrested, detained and eventually deported, claiming that they were subjected to criminal penalties without due process of law. Rejecting the constitutional challenge, the Court concluded that “the power to exclude aliens, and the power to expel them . . . are supported by the same reasons, and are in truth but parts of one and the same power.” That is, exclusion is a power inherent in the nature of sovereignty. Accordingly, because deportation is not a punishment for a crime, but rather an administrative determination that an alien is no longer fit to remain in the country, “the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application.”

In the years since *Fong Yue Ting*, the Supreme Court has consistently reiterated that removal proceedings are civil, and not criminal, in nature.

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27. Markowitz, *supra* note 20, at 1311 n.50. Markowitz posits that although the Court never expressly labels exclusion proceedings as civil, “its refusal to even address the criminal procedure claim is strong evidence that it conceived of exclusion as a civil proceeding.”

28. *Chinese Exclusion Case*, 130 U.S. at 603-04. As the Court explained: “That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of its independence.”

29. *Id.* at 703.

30. *Id.* at 713.

31. *Id.* at 730. This holding drew a strong dissent, in which Justice Field argued that the majority ignored the well-established distinctions between the power to exclude aliens and the power to expel aliens who have been living in the country for long periods of time with the government’s consent without affording some constitutional protections. *Id.* at 756 (Field, J., dissenting). Further, disagreeing with the majority’s conclusion that deportation is not a criminal sanction, the dissenters argued “that if a banishment of the sort described be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.” *Id.* at 759.

32. *See, e.g.*, Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (explaining that “[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . .”); Mahler v.
As a consequence of designating removal proceedings as civil rather than criminal, the Sixth Amendment's procedural protections, including the right to appointed counsel, do not apply. Although the Supreme Court has from time to time expressed concern about the practical implications of this continuing distinction, it has not chosen to reconsider the issue and continues to employ the civil label. Thus, the federal appellate courts have been forced to reconcile the Supreme Court's consistent refusal to apply the Sixth Amendment's safeguards to removal proceedings with a desire to ensure adequate representation for those aliens able to hire attorneys in accordance with their statutorily created right to retain counsel. The result reached by a majority of the federal courts of appeals, which will be explored in detail immediately below, has been described as an oddity.

Eby, 264 U.S. 32, 39 (1924) (concluding that "the right to expel aliens is a sovereign power, necessary to the safety of the country, and only limited by treaty obligations in respect thereto entered into with other governments"); Johannessen v. United States, 225 U.S. 227, 242 (1912) (holding that civil nature of removal proceedings allows for the retroactive application of a law which invalidated fraudulently obtained naturalization certificates).

34. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); see also Watson v. Moss, 619 F.2d 775, 776 (8th Cir. 1980) ("There is no constitutional or statutory right for an indigent to have counsel appointed in a civil case. It of course follows there is no constitutional or statutory right to effective assistance of counsel in a civil case.") (Internal citations omitted).

35. See, e.g., Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 285 (1966) (describing the "drastic deprivations" that follow deportation and applying criminal law's burden of proof requirement to removal proceedings); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) (calling rationale for civil classification "debatable" but nonetheless refusing to reconsider the question); Bridges v. Wixon, 326 U.S. 135, 154 (1945) (recognizing that deportation "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom" and cautioning that "care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness").

36. See Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (reiterating that "removal proceedings are civil in nature.") (Internal citations omitted). Interestingly, the Supreme Court has continued to consider removal proceedings civil in nature even though the "inherent powers theory," which the Court originally employed to rationalize the civil label, has long since been repudiated as a theory of congressional power. See Afroyim v. Rusk, 387 U.S. 253, 257 (1967) (explaining that the United States does not have "any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot . . . be sustained as an implied attribute of sovereignty possessed by all nations."); Reid v. Covert, 354 U.S. 1, 5-6 (1957) (plurality) (reasoning that "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source.").

37. Markowitz, supra note 20, at 1320 ("The oddity of a right to effective assistance, without the corresponding right to any assistance at all, is perhaps the clearest example of doctrinal incoherence in the courts' treatment of the nature of removal proceedings.").
B. The Fifth Amendment Right to Fundamentally Fair Removal Proceedings

Because of the well-settled Supreme Court precedent regarding the civil nature of removal proceedings, the courts of appeals have had to look beyond the Sixth Amendment to ground their decisions upholding a right to effective assistance of counsel for aliens facing deportation. The end product of their inquiry is somewhat counterintuitive and, in part, difficult to square with prior Supreme Court holdings. 38

To understand why that is so, it is important first to understand the approach taken by a minority of the courts of appeals. Traditionally, in other settings where a general right to counsel is not recognized, the Supreme Court has been unwilling to recognize claims for ineffective assistance of counsel. 39 As these cases seem to make clear, for an attorney's incompetence to constitute a constitutional violation, it must be fairly attributable to the state. 40 In the immigration setting, this would mean that because there is no right to state-appointed counsel, there is no constitutional right to effective counsel.

Curiously, only three courts of appeals have ever embraced that logic. 41 Afanwi v. Mukasey, 42 out of the Fourth Circuit, is perhaps

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40. See Glen, supra note 38, at 4.
41. See, e.g., Afanwi v. Mukasey, 526 F.3d 788 (4th Cir. 2008); Ghaffar v. Mukasey, 551 F.3d 651, 656 (7th Cir. 2008); Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008). As noted above, different panels of the Seventh Circuit Court of Appeals have issued conflicting decisions on whether a claim for ineffective assistance of counsel exists. See supra, note 13 and 15 and accompanying text. The Court of Appeals for the Fourth Circuit has also at times assumed that a claim for ineffective assistance of counsel exists. See Sene v. U.S. Immigration & Naturalization Serv., 103 F.3d 120 (4th Cir. 1996) (affirming BIA's decision denying motion to reopen deportation proceedings because petitioner failed to comply with BIA's procedural requirements for bringing claim for ineffective counsel). Further, in Obleshchenko, the Court of Appeals for the Eighth Circuit expressed "serious doubts . . . that a fifth amendment right to counsel exists" but nonetheless assumed that it did because other courts had so held and the government did not make a counter argument. 392 F.3d 970, 971-72 (8th Cir. 2004). Since Obleshchenko, however, the Eighth Circuit has "squarely reject[ed] an absolute constitutional right to effective assistance of counsel" in removal cases. Habchy v. Gonzales, 471 F.3d 858, 886 (8th Cir. 2006).
the most thorough and well-reasoned decision in which a court has
done so. In Afanwi, the Fourth Circuit Court of Appeals began by
conceding that a number of its sister courts have held that an at-
torney can be so inept as to deprive an alien of his Fifth Amend-
ment right to a fair hearing. However, emphasizing that the
Fifth Amendment applies only to action by the government, the
court explained there must be state action in order to imbue the
ineffectiveness of the alien’s counsel to the federal government.
Because a private actor who performs a public function is not au-
tomatically engaged in state action, the court held that

Afanwi’s counsel was not a state actor, nor is there a suffi-
cient nexus between the federal government and counsel’s in-
effectiveness such that the latter may fairly be treated as a
governmental action. To the contrary, Afanwi’s counsel was
privately retained pursuant to 8 U.S.C. § 1362, and his al-
leged ineffectiveness—namely his failure to check his mailbox
regularly and to file a timely appeal—was a purely private
act.

Despite the seeming inconsistency with Supreme Court prece-
dent, a majority of the courts of appeals have found a way to ex-
tend the guarantee of effective representation to removal proceed-
ings. Their rationale has been firmly rooted in traditional notions
of due process. Specifically, it is well settled that immigrants
facing removal are entitled to due process. So, too, is the opinion
that removal proceedings are somehow different from everyday
civil cases, primarily because an alien’s life is effectively on the
line. As a result, in the view of these courts, the traditional rule

42. 526 F.3d at 788.
43. Id. at 797-98.
44. Id. at 798. According to the court,
the standard for finding federal government action under the Fifth Amendment is
the same as that for finding state action under the Fourteenth Amendment, namely
whether there is a sufficiently close nexus between the [federal government] and the
challenged action of the [private actor] so that the action of the latter may be fairly
treated as that of the [federal government].

Id. (internal citation and quotation marks omitted).
45. Id. at 799.
46. Id.
47. See, e.g., Paul v. U.S. Immigration and Naturalization Service, 521 F.2d 194, 197-98
(5th Cir. 1975).
U.S. 86, 100-01 (1903)) ("It is well established that the Fifth Amendment entitles aliens to
due process of law in deportation proceedings.").
enunciated in cases such as *Torna* and followed in *Afanwi* is not clearly applicable to claims of ineffective assistance of counsel arising from removal proceedings.  

The Court of Appeals for the Fifth Circuit became the first court to apply that logic in *Paul v. United States Immigration and Naturalization Service*, a case in which nine Haitian nationals sought to reopen a removal proceeding so they could further develop their case, alleging that their privately retained attorneys made several costly blunders.  

Smartly, the petitioners in *Paul* did not argue that the Sixth Amendment right to counsel applied to their cases, but instead contended that their representation was so lacking as to violate the due process clause's requirement of fundamental fairness. The Court of Appeals for the Fifth Circuit agreed. It explained, however, that "[a] claim of the denial of due process because of ineffective assistance of counsel must allege sufficient facts to allow this court to infer that competent counsel would have acted otherwise."  

Eleven years later, the Court of Appeals for the Ninth Circuit tweaked the *Paul* standard slightly in *Magallanes-Damian v. Immigration and Naturalization Service*. That case involved seven Mexican nationals who were deported for entering the United States without inspection. They sought to reopen their deportation proceedings, contending that bad advice from counsel caused them to concede their deportability when they otherwise should not have. The court acknowledged that the Fifth Amendment encompasses a right to counsel, but, citing *Paul*, it explained that proof of a violation requires a "heavier burden of proof. Petitioners must show not merely ineffective assistance of counsel, but assistance which is so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the [Fifth Amendment]."

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49. See Glen, supra note 38, at 6.  
50. *Paul*, 521 F.2d at 197-98.  
51. Id. at 198.  
52. Id.  
53. Id. at 199. According to the court, the petitioners failed to meet that standard. *Id.*  
54. 783 F.2d 931 (9th Cir. 1986). Although the Ninth Circuit Court of Appeals had previously acted under the assumption that a claim for ineffective assistance of counsel is cognizable in immigration cases, it did not set forth the standard for assessing such claims until *Magallanes-Damian*. See generally, Thorsteinsson v. Immigration & Naturalization Serv., 724 F.2d 1365 (9th Cir. 1983) (recognizing claim but denying that attorney's conduct amounted to constitutional violation), *cert. denied*, 467 U.S. 1205 (1984); Rodriguez-Gonzalez v. Immigration & Naturalization Serv., 640 F.2d 1139 (9th Cir. 1981) (same).  
55. Id. at 932.  
56. Id. at 932-33.
[A]mendment due process clause.”57 In other words, absent egregious circumstances, “[p]etitioners are generally bound by the conduct of their attorneys, including admissions made by them.”58

Since Paul and Magallanes-Damian, the federal appellate courts that recognize a right to effective counsel in immigration cases have all employed the Fifth Amendment’s fundamental fairness standard. However, minor variations exist as to the application of this standard. For instance, the Court of Appeals for the First Circuit has held that petitioners must show only “a reasonable probability of prejudice” in order to prevail on claims of ineffective counsel.59 Both the Second and Third Circuit Courts of Appeals employ a familiar two-part test, under which an alien must prove that (1) competent counsel would have acted differently and (2) the alien was prejudiced.60 To that test, the Third Circuit adds that the prejudice suffered must be substantial, i.e., there must be a “significant likelihood” that the immigration judge would have ruled differently absent the attorney’s ineffectiveness.61 Minor distinctions in language notwithstanding, the standard is applied fairly consistently throughout the federal judicial circuits and, as one commentator has put it, “functions similarly to the facially lower standard of reasonable performance required under the Sixth Amendment.”62

C. BIA’s Evolving Stance on Ineffective Assistance of Counsel Claims

1. BIA’s Historical Approach

Like the majority of federal appellate courts, the BIA has recognized a right to effective assistance of counsel in removal proceedings for more than twenty years. Prior to Compean I, the leading

57. Id. at 933 (citing Paul, 521 F.2d at 198).
58. Id. at 934 (internal citations omitted).
61. Contreras, 665 F.3d at 584-85.
62. Markovitz, supra note 20, at 1320 (compiling cases applying highly deferential standard to claims of ineffective assistance of counsel under the Sixth Amendment) (internal citations omitted). Courts have consistently found ineffective assistance of counsel in a number of scenarios, such as failing to contact an alien client or to inform her of hearing dates, failing to attend a removal hearing, failing to argue certain issues or raise certain defenses, or failing to appeal an unfavorable decision. See generally, Emmanuel S. Tiron, Annotation, Comment Note: Ineffective Assistance of Counsel in Removal Proceedings—Particular Omissions or Failures, 60 A.L.R. FED. 2d 59 (2011).
administrative case on ineffective assistance of counsel claims in immigration cases was *Matter of Lozada*, which established the procedural framework for bringing such claims. In *Lozada*, a lawful permanent resident was found deportable after being convicted of a crime of moral turpitude. He appealed the immigration judge's decision to the BIA and gave notice that he would file a written brief to support his appeal. However, his attorney never filed any such brief, and his appeal was summarily dismissed. After obtaining new counsel, Lozada sought to reopen his proceedings, alleging ineffective assistance of counsel in that his first attorney negligently failed to submit the required brief.

Citing *Paul* and *Magallanes-Damian*, the BIA first acknowledged that the Fifth Amendment may afford aliens a right to counsel in deportation proceedings if the proceedings are fundamentally unfair. The second part of the Board's holding addressed the procedural requirements for reopening removal proceedings based on a claim of ineffective assistance of counsel. Under what have come be called the "Lozada requirements," a removal proceeding will be reopened only if a party (1) submits an affidavit attesting to the relevant facts, such as the nature of attorney-client agreement; (2) notifies former counsel of the allegations of ineffective assistance and allows for an opportunity to respond; and (3) files a complaint with the proper disciplinary authorities or at least explains why no such complaint was filed, when the allegations involve ethical or legal lapses.

Fifteen years later, the Immigration and Naturalization Service ("INS") sought a reversal of *Lozada*, arguing that it conflicted with the Supreme Court's decisions in *Wainwright v. Torna* and *Coleman v. Thompson*, but the BIA declined. While acknowl-

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64. Id.
65. Id. at 638
66. Id.
67. Id.
68. Id. (internal citations omitted).
69. Id. at 639; see also Patrick J. Glen, *The Death Knell for Constitutional Ineffective Assistance of Counsel Claims in Immigration Proceedings*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1409409 (last visited June 12, 2012) ("Since *Lozada*, these requirements have been broadly adopted in the federal courts of appeals, along with the notion that aliens enjoy a constitutional due process right to the effective assistance of counsel.").
71. 501 U.S. 722 (1991) (holding that where there is no right to appointed counsel, there is concomitantly no right to effective assistance of counsel).
edging the existence of seemingly inconsistent Supreme Court precedent and "some ambiguity in the basis set forth in [Lozada] for respondents to assert ineffective assistance claims," the BIA determined that it was bound by the weight of decisions from the courts of appeals recognizing ineffective assistance of counsel as violative of due process. Holding otherwise, the Board explained, would amount to a pronouncement that the majority of the courts of appeals had reached the wrong result—an act that would have exceeded the BIA’s authority.

Notwithstanding the INS’s effort to overturn Lozada, the federal courts that recognize a right to effective counsel have embraced the Lozada requirements, finding them necessary to “screen out frivolous, stale, and collusive claims.” However, these courts have applied the Lozada with varying degrees of rigor. Some courts have required “strict compliance.” In other jurisdictions, “substantial compliance” with Lozada is sufficient.

2. Matter of Compean and the Pullback from Lozada

In the past four years, the BIA’s legal standards regarding claims of ineffective assistance of counsel have been in a state of change. The change began on August 7, 2008, when, in the final weeks of the Bush Administration, then-Attorney General Robert Mukasey directed the BIA to refer to him three cases for review, each of which involved an attempt to reopen removal proceedings on the basis of incompetent representation. The question the Attorney General wished to consider was simple: "whether the Constitution entitles an alien who has been harmed by his lawyer’s deficient performance in removal proceedings to redo those proceedings."

73. Id. at 558-60. Notably, the BIA pointed out that most of those appellate court decisions were handed down after Coleman in 1991, which "suggests that the courts of appeals have not viewed the Supreme Court’s pronouncements in the criminal context as requiring a reexamination of the due process underpinnings of ineffective assistance of counsel claims in the immigration context." Id. at 559.
74. Id. at 560.
75. Beltre-Veloz v. Mukasey, 533 F.3d 7, 10 (1st Cir. 1988).
76. See, e.g., Rong v. Holder, 367 F. App’x. 579, 538 (6th Cir. 2010).
77. See, e.g., Debeatham v. Holder, 602 F.3d 481, 485 (2d Cir. 2010); Morales Apolinar v. Mukasey, 514 F.3d 893, 896 (9th Cir. 2008); Habchy v. Gonzales, 471 F.3d 858, 863 (8th Cir. 2006).
79. Id.
The Attorney General concluded that it did not,\textsuperscript{80} upending the weight of authority from the courts of appeals and twenty-five years of the BIA's own precedents, including \textit{Lozada}. Critical to the Attorney General's decision was the line of Supreme Court cases holding that there is no constitutional right to effective assistance of counsel under the Fifth Amendment where there is no constitutional right to counsel to begin with, as is the case in most civil proceedings.\textsuperscript{81} While the Attorney General acknowledged that this view conflicted with the opinion taken by a majority of the courts of appeals, he noted that "a growing number of Federal courts" had started to embrace it.\textsuperscript{82} He further noted that the early decision in \textit{Paul v. United States Immigration and Naturalization Service}, had been largely misconstrued and, as a result, the majority position "rest[s] on a weak foundation."\textsuperscript{83} Therefore, the Attorney General held that the government could not be held responsible for the ineffectiveness of a privately retained attorney, and the Fifth Amendment could not provide the basis for an ineffective counsel claim.\textsuperscript{84}

Despite so holding, the Attorney General conceded that in rare circumstances, the BIA may choose to reopen removal proceedings on account of an attorney's incompetence, because the DOJ's discretion is not limited by the Constitution.\textsuperscript{85} To aid the BIA and the immigration courts, he then established a new framework for reopening removal proceedings for deficient representation, while acknowledging that the immigration judge and BIA should be left with considerable discretion in this area.\textsuperscript{86} Attorney General Mukasey's "deficient performance of counsel" test contained three elements, which were similar but not identical to the \textit{Lozada} requirements. First, the alien must demonstrate an egregious mistake on the part of his or her lawyer.\textsuperscript{87} Second, if the alien attempts to reopen his or her case after the 90-day time limit, the

\begin{itemize}
  \item \textsuperscript{80} Id. at 714.
  \item \textsuperscript{81} Id. at 714. Thus, under this logic, it follows that although the Fifth Amendment's Due Process Clause applies in removal proceedings, as it does in any civil lawsuit or in any administrative proceeding, that Clause does not entitle an alien to effective assistance of counsel, much less the specific remedy of a second bite at the apple based on the mistakes of his own lawyer.
  \item \textsuperscript{82} Id. at 713-15.
  \item \textsuperscript{83} Id. at 719.
  \item \textsuperscript{84} Id. at 720-21.
  \item \textsuperscript{85} Id. at 714.
  \item \textsuperscript{86} Id. at 730.
  \item \textsuperscript{87} Id. at 732.
\end{itemize}
BIA may toll the period only if the alien shows that he or she exercised due diligence. Third, the alien must show that he or she was prejudiced by the attorney's error. With respect to the third element, Attorney General Mukasey attempted to settle the confusion by reigning in the federal circuits on the meaning of prejudice and instructing that an alien must show that it is more likely than not that he or she would have obtained the desired relief were it not for the attorney's missteps.

3. Attorney General Holder Vacates Matter of Compean

Attorney General Mukasey's decision in Compean I was less than one year old when, on June 3, 2009, President Obama's newly appointed Attorney General, Eric Holder, vacated the decision and directed the BIA and immigration judges to again apply the Lozada requirements until new rules could be formulated. According to Attorney General Holder, Compean I was brashly decided, "particularly for a decision that implemented a new, complex framework in place of a well-established and longstanding practice that had been reaffirmed by the Board in 2003 after careful consideration." Not only that, the decision in Compean I also overreached by definitely deciding that the Constitution affords no right to effective counsel for aliens facing removal from the United States. Instead of taking a top-down approach and merely dictating a new standard to the BIA and the courts, Attorney General Holder explained that it would be preferable to establish a process that gave all interested parties a seat at the table.

In view of that, the Attorney General directed the Executive Office for Immigration Review to evaluate the Lozada requirements and decide whether modifications should be made. A period of public comment, which has just concluded, was scheduled to fol-

88. Id.
89. Id. at 733.
90. Id. at 733-34. The Attorney General also held that certain documents must be attached to a claim in order to succeed on a claim to reopen removal proceedings based on bad lawyering. Id. at 735-39.
92. Id. at 2.
93. Id. at 3.
94. Id. at 2.
95. Id.
low. After soliciting comments, the DOJ could establish a definitive framework for going forward.

III. ANALYSIS

A. The Right to Effective Assistance of Counsel in Removal Proceedings is Solidly Grounded in the Constitution

1. Effective Representation has Historically Been Viewed as a Component of Due Process

Several scholars, judges, and attorneys have criticized the approach adopted by the majority of the federal appellate courts, arguing that their recognition of a right to effective assistance of counsel in removal proceedings has no basis in the Constitution. The Seventh Circuit Court of Appeals has gone so far as to call the majority's reasoning "distinctly perfunctory." According to this view, the court in Paul did not actually hold that a right to effective representation existed. Instead, it simply indicated "in dictum 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." This argument, however, ignores the federal judiciary's historical approach to addressing claims of ineffective assistance of counsel and the string of Supreme Court decisions affording a right to counsel in civil proceedings.

The Due Process Clause of the Fourteenth Amendment provides individuals with both substantive and procedural rights. As the Supreme Court has explained, "[b]y requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions." That fairness is

96. Id.
97. Id.
98. See, e.g., Compean I, 24 I. & N. Dec. 710; Glen, supra note 38, at 3.
99. Stroe v. Immigration & Naturalization Serv., 256 F.3d 498, 500 (7th Cir. 2001).
100. Compean I, 24 I. & N. Dec. at 719-20 (emphasis in original) (internal quotation omitted).
101. U.S. CONST. amend. XIV.
secured by affording an individual with notice and opportunity to
be heard by a competent tribunal.\textsuperscript{104}

For years, the right to effective counsel was grounded in the
Fifth Amendment's requirement of due process, considering it an
essential component of a defendant's right to be heard.\textsuperscript{105} Indeed,
in a number of early cases, the Fifth Amendment was seen as an
independent source of the guarantee of effective representation,
apart from the Sixth Amendment's right to counsel provision. For
example, in \textit{Powell v. Alabama}, not only did the Supreme Court
hold that the government may have a duty to appoint counsel in
certain cases, but it also recognized that the failure of appointed
counsel to provide "effective aide in the preparation and trial of
the case" could deny a capital defendant due process of law.\textsuperscript{106}
Likewise, in another early seminal case, \textit{Diggs v. Welch}, the United
States Court of Appeals for the District of Columbia Circuit
explained that "[c]arelessness of counsel" may be "one of the
evidentiary facts which, coupled with others, show a violation of the
Fifth Amendment."\textsuperscript{107} There is thus strong precedent for analyzing
ineffective assistance of counsel claims against the require-
ments of the Fifth Amendment.

Furthermore, the fact that the Supreme Court has extended the
right to counsel to certain "hybrid" or "quasi-criminal" civil pro-
ceedings, much like removal proceedings, undercuts the view that
the Due Process Clause does not provide an independent source of
the right to effective representation. In \textit{In re Gault}, the Supreme
Court first held that the right to counsel may extend to unique
civil proceedings.\textsuperscript{108} That case involved a juvenile delinquency
hearing, after which a teenager was civilly committed in a state
industrial school.\textsuperscript{109} Because juvenile delinquency proceedings are

\begin{thebibliography}{99}

\bibitem{104} See Holden v. Hardy, 169 U.S. 366, 389-90 (1898) (explaining that "there are cer-
tain immutable principles of justice, which inhere in the very idea of free government,
which no member of the Union may disregard, as that no man shall be condemned in his
person or property without due notice, and an opportunity of being heard in his defense.").

\textsuperscript{105} See James A. Strazzella, \textit{Ineffective Assistance of Counsel Claims: New Uses, New

\textsuperscript{106} Powell v. Alabama, 287 U.S. 45, 71 (1932).

\textsuperscript{107} Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir. 1945). The landmark case of \textit{Gideon v.
Wainwright}, in which the Supreme Court incorporated the Sixth Amendment's require-
ment of court-appointed counsel for indigent defendants against the states, marked a
change in the way courts handled claims of ineffective representation. 372 U.S. 335, 342
(1963). In the wake of \textit{Gideon}, courts began to test ineffectiveness claims against the Sixth
Amendment instead of the Due Process Clause. \textit{See} Strazzella, \textit{supra} note 105, at 450. At
the same time, they lost sight of the historical underpinnings of such claims.

\textsuperscript{108} In re Gault, 387 U.S. 1 (1967).

\textsuperscript{109} Id. at 4.

\end{thebibliography}
civil in nature, the Sixth Amendment right to counsel does not apply.110 Nevertheless, the Court held that based on the special nature of delinquency proceedings, due process required that juveniles in such proceedings be afforded the right to effective counsel.111

Similarly, the Supreme Court extended the right to counsel to parole revocation proceedings in Gagnon v. Scarpelli, despite their civil character.112 Acknowledging that parole revocation hearings are considered “civil” proceedings and are different from criminal trials, the Court nonetheless concluded that the special nature of certain parole revocation cases might make the presence of trained counsel essential.113 As the Court explained, “the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.”114 Moreover, although parole hearings are generally not adversarial in nature, they can become so when a parole officer recommends revocation—a recommendation that, like deportation, threatens to turn a parolee’s life upside down. Accordingly, the Court held that there are instances “in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.”115

These cases demonstrate that, not only was the right to effective assistance of counsel historically rooted in the Due Process Clause, but also that the assistance of counsel may still be an essential component of due process, even in civil proceedings. Thus, although the federal appellate courts that have recognized a right to effective representation may not have explicitly addressed the Supreme Court precedent regarding the right to counsel in this context, their view is nonetheless firmly rooted in the Constitution.

110. Id. at 17.
111. Id. at 41. “The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.” Id. at 36.
113. Id. at 787.
114. Id.
115. Id. at 785.
116. Id. at 790.
2. The “State Actor” Argument is Misguided

There is not only ample support in the Constitution and Supreme Court precedent for recognizing a right to effective assistance of counsel in removal proceedings, but the argument advanced by those courts that have refused to recognize such a right is suspect. In Afanwi, the Court of Appeals for the Fourth Circuit held that because a privately retained attorney was not a state actor under the Due Process Clause, an alien facing removal cannot be denied her Fifth Amendment right to a fair hearing when her attorney commits a grievous error.117 The Eighth Circuit Court of Appeals has expressed a similar view.118 This argument, however, is largely without merit because the government’s conduct of removal proceedings is itself sufficient to constitute state action for purposes of Due Process.

In Cuyler v. Sullivan, the Supreme Court rejected the argument that the missteps of retained counsel at a criminal trial could not give rise to federal habeas corpus relief, because there was a lack of state action.119 In other words, according to the Court, the Sixth Amendment protects not only against incompetent state-appointed attorneys, but also against the incompetence of privately retained attorneys. Specifically, the Court explained that “[w]hen a State obtains a criminal conviction through [a trial tainted by ineffective counsel], it is the State that unconstitutionally deprives the defendant of his liberty.”120 In fact, “the State's conduct of a criminal trial itself implicates the State in the defendant's conviction.”121

Admittedly, Cuyler involved a challenge to the conduct of a privately retained attorney at a criminal trial. Nevertheless, in many cases, deportation proceedings are merely an extension of the criminal process. In addition, they involve many of the same procedural elements as traditional trials. As a result, the State is just as much implicated in such proceedings as in criminal prosecutions. The State established an elaborate appeals process through which immigrants may challenge the charges leveled against them.122 It fashioned the rules governing the right to seek

118. See Rafiyev v. Mukasey, 536 F.3d 853, 861 (8th Cir. 2008).
120. Id. at 343.
121. Id. at 344-45.
review of the initial decisions of the immigration judges. Finally, its deportation orders are the final word, with the power to remove immigrants from this country for the rest of their lives. Under these circumstances, the state-actor requirement is clearly satisfied, just as it was in *Cuyler*.

**B. Practical Considerations Support Recognizing a Right to Effective Counsel in Removal Proceedings**

Not only is there a strong Constitutional basis for recognizing that the Fifth Amendment Due Process Clause encompasses a right to effective assistance of counsel in removal proceedings, but there are also several practical considerations that weigh in favor of affording added procedural protections to immigrants facing deportation. A number of these considerations were alluded to in Section I, and they will be explored in greater detail in this Section.

This country's legal tradition has placed a strong emphasis on securing the rights of the most vulnerable among us, and few segments of society today are as disadvantaged as the foreign born. According to the Federal Bureau of Labor Statistics, immigrants have a higher unemployment rate and earned more than $170 per week less than their native-born counterparts. Not only are there socioeconomic forces at play, they are also far less educated. In addition, the heated debate over the nation's immigration policy and harsh crackdown by some states on their immigrant populations illustrates that nativist sentiments have also been on the rise, which has led to increased anxiety and fear.

123. See, e.g., Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax."); *Griffin*, 351 U.S. at 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.").


126. See Suro et al., supra note 124, at 1.
of government in the foreign-born population.\textsuperscript{127} Accordingly, as Circuit Judge Katzmann of the Second Circuit Court of Appeals has explained, removal proceedings typically involve “a vulnerable population of human beings who come to this country in the hopes of a better life, who enter often without knowing the English language and culture, in economic deprivation, often in fear.”\textsuperscript{128} These factors alone are sufficient to warrant providing greater procedural safeguards to aliens in removal proceedings.

Moreover, removal proceedings are fundamentally unlike any other type of civil proceeding. Some scholars have suggested that in reality they “straddle the divide” between criminal and civil proceedings.\textsuperscript{129} For example, a growing body of research indicates that the norms of the “criminal enforcement model,” i.e. the “theories, methods, perceptions, and priorities of the criminal enforcement,” have largely been incorporated into removal proceedings.\textsuperscript{130} On a more basic level, the hearings themselves have come to look and feel like criminal proceedings. Local law enforcement officers are often involved in immigration enforcement and called to testify at hearings before immigration judges.\textsuperscript{131} Those hearings follow the filing of a notice to appear outlining the alleged charges, which the alien or his or her attorney must contest orally or in writing.\textsuperscript{132} At one counsel table is the alien, and at the other is an attorney representing the government and prosecuting the charges.\textsuperscript{133} In sum, removal proceedings have all of the trappings of a traditional criminal hearing.

Of course, an unfavorable decision by an immigration judge, just like that of a criminal judge, also triggers enormous repercussions to the party involved that vastly differ from those associated with traditional civil proceedings. While the typical civil suit might result in a large damages award, the stakes in immigration pro-


\textsuperscript{129} See Peter L. Markowitz, Straddling The Civil-Criminal Divide, 43 HARV. C.R.-C.L. L. REV. 289 (2008).

\textsuperscript{130} Id. at 472.

\textsuperscript{131} Markowitz, supra note 20, at 1315.


\textsuperscript{133} Id. at 56.
ceedings are far greater. As the Supreme Court has recently observed, deportation is now virtually “an automatic result for a broad class of noncitizen offenders.” And for that class of individuals, deportation is in essence a life sentence—permanent banishment from the home, family, and country that they spent years building. Worse yet, these individuals can be deported to places they have not been in years, countries where they have no connections, where they might struggle with the language, and where they can face persecution, imprisonment, or even death. Furthermore, many of the countries to which American immigrants are deported are ridden with internal conflict and strife, which only compounds things further.

Not only are the stakes of removal proceedings high, but they can also be far disproportionate to the conduct that initially brought the alien into the legal system. Title 8 U.S.C § 1227(a)(2)(A) provides for the deportation of individuals convicted of crimes involving moral turpitude. Although “moral turpitude” may sound like a demanding description, reserved for only the most egregious of offenses, in operation it is anything but. Immigrants can be deported for even the most minor of offenses, including petty theft and neglecting to pay a subway fare. In fact, more than 18 percent of the criminal aliens removed from the United States in 2010 were merely involved in routine traffic stops. Though many of those individuals were eventually con-

135. Markowitz, supra note 20, at 1301-02; Werlin, supra note 3, at 405.
136. For example, according to the Department of Homeland Security, Mexican nationals account for the vast majority of all aliens removed from the United States. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2010 4 (2011). Mexico has been in the throes of a violent drug war for much of the last decade, with hundreds being murdered each month. See Alfred Corchado, Mexico’s Drug War Undiminished in Some Areas Close to Texas, Authorities Say, DALLAS MORNING NEWS (Jan. 12, 2013), http://www.dallasnews.com (noting that 1,000 persons have been murdered across Mexico since December 1, 2012).
137. See Mendoza v. Holder, 623 F.3d 1299, 1303 n.6 (9th Cir. 2010) (noting that petty theft is categorically a crime of moral turpitude for purposes of immigration laws); Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997) (explaining that “a legal permanent resident convicted of . . . two misdemeanor petty theft or public transportation fare evasion charges – turnstile jumping in the New York City subway system leading to a “theft of services” misdemeanor conviction is considered a crime of ‘moral turpitude’ – is now subject to automatic deportation without any opportunity to present to an Immigration Judge any mitigating equities”).
victed of drunk driving, 13,028 were convicted and deported for less serious traffic law violations.\textsuperscript{139}

The complexity of immigration law, when added to this already unfortunate mix—a poor, vulnerable population swept up in proceedings with all of the trappings and stakes of criminal proceedings with few, if any, of the Constitutional protections—makes things far worse for the immigrant population. Immigration law is a tangled maze of statutes and administrative rules.\textsuperscript{140} The grounds for deportation, for example, are broken down into six broad categories, each of which contains a dizzying array of parts, sub-parts, elements, exceptions and waivers.\textsuperscript{141} Even a trained immigration attorney needs to consult the INA's extensive definition section to make any sense of this labyrinthine structure.\textsuperscript{142}

Not surprisingly, research indicates that immigrants have a greater chance of success before an immigration judge when they have counsel present.\textsuperscript{143} Anecdotal evidence from appellate judges supports that research. Based on his experiences on the Second Circuit Court of Appeals, for example, Judge Katzmann has argued that it is absolutely critical to obtain counsel as early in the proceedings as possible.\textsuperscript{144} "What is filed and what is said have enduring effects," he has written.\textsuperscript{145} "Often times, the reviewing appellate judge, who is constrained at the time the case comes before him or her, is left with the feeling that if only the immigrant had secured adequate representation at the outset, the outcome might have been different."\textsuperscript{146}

\textsuperscript{139} Deportations of Immigrants Hits Record Number Under Obama Administration, HUFFINGTONPOST (July 22, 2011), http://www.huffingtonpost.com/2011/07/22/deportations-obama-immigration-n_906676.html.

\textsuperscript{140} See, e.g., Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) (describing complexities of immigration law).

\textsuperscript{141} See Immigration and Nationality Act of 1965 § 267, 8 U.S.C §1227 (2006); see also Werlin, supra note 3, at 414-15.

\textsuperscript{142} Werlin, supra note 3, at 415. As just one example, Werlin explains that the INA employs the word "conviction" in setting forth the grounds for deportation. \textit{Id.} Its use of the term, however, has a far broader meaning than is typically associated with the term. \textit{Id.}

\textsuperscript{143} Katzmann, supra note 128, at 4 (discussing in the context of immigrants seeking asylum). According to Judge Katzmann, "quality legal representation in gathering and presenting evidence in a hearing context and the skill in advocacy as to any legal issues and their preservation for appeal can make all the difference between the right to remain here and being deported." \textit{Id.} at 7.

\textsuperscript{144} \textit{Id.} at 7.

\textsuperscript{145} \textit{Id.} at 9.

\textsuperscript{146} \textit{Id.}
At the same time, the effects of ineffective representation can be just as devastating. Unfortunately, evidence of attorneys offering inadequate and incompetent legal services to immigrants abounds. As members of such a vulnerable population, they are the perfect prey for unscrupulous elements of the legal profession. Indeed, because of their limited experience with the legal system, lack of means, and limited grasp of English, many immigrants struggle to find competent counsel, turning instead to travel agents or unlicensed notarios for advice. Judge Katzmann has observed that the quality of representation in removal proceedings "varies widely." A number of the filings on immigration appeals that reach his chambers "are barely competent, often boilerplate submissions." One New York City immigration attorney has been referred to the Second Circuit's disciplinary board more than six times for copying old briefs and resubmitting them to the court without editing them to account for the distinct facts of each new case. Further, the effects of bad lawyering reverberate through all facets of the removal process, as the failure to take necessary steps in the lead-up to a hearing with an immigration judge can make all the difference in an appeal.

This combination of factors makes it imperative to guarantee immigrants a Fifth Amendment right to effective assistance of counsel in removal proceedings. Navigating the maze of immigration laws is difficult for anyone—let alone those with a limited grasp of English, whose lives in this country are on the line. In those relatively rare cases where immigrants facing deportation are able to obtain counsel before their removal proceedings, they come to rely on the advice they receive, even more so than the typical litigant because of language barrier, the sense of uncertainty surrounding their futures, and the confusion about the complex proceedings in which they have been swept up. They come to trust that the person they have hired to represent their interests

147. Id. at 8. According to Judge Kazmann, "[t]hese unauthorized practitioners, sometimes known, misleadingly as "notarios", charge immigrants for their services in filing documents and preparing applicants for relief and benefits, but often lead the immigrants astray with incorrect information and terrible advice with lasting, damaging consequences..." Id.

148. Id. at 10.

149. Id.; see also Aris v. Mukasey, 517 F.3d 595, 596 (2d Cir. 2008) (noting that [w]ith disturbing frequency, this Court encounters evidence of ineffective representation by attorneys retained by immigrants seeking legal status in this country").


151. See Katzmann, supra note 128, at 9.
will know what is best for them and their families. Accordingly, when an immigrant hires an attorney who turns out to be incompetent, she must be afforded the Constitutional right to reopen the proceedings. Otherwise, as Judge Katzmann has observed, “[u]nlike a person in the United States who can sue a lawyer for malpractice, or file a bar complaint, a deported immigrant is unlikely to pursue such recourse because of financial, geographic or other constraints,” will be left with virtually no recourse when her counsel errs.\textsuperscript{152} The Constitution, and this Country’s commitment to looking after the most downtrodden among us, demands more.

IV. CONCLUSION

The majority of federal courts of appeals are correct in recognizing that due process requires that noncitizens be given an opportunity to reopen removal proceedings when their attorneys render incompetent assistance. First, despite the contention of the minority of the federal appellate courts and a number of commentators, the Constitution—and well-reasoned Supreme Court precedent—supports this view. As that precedent has established, the Due Process Clause of the Fifth Amendment may at times operate as an independent source for asserting violations of rights stemming from an attorney’s conduct. Second, the state actor argument advanced by opponents of recognizing a right to effective assistance of counsel in removal proceedings does not categorically foreclose the recognition of such a right, as state action has been found in analogous types of proceedings in the past.

In addition, removal proceedings are fundamentally unlike any other type of civil proceeding. In many ways, they have come to mirror criminal trials. And, as the Supreme Court recently explained, even though deportation is technically regarded as civil in nature, it “is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century.”\textsuperscript{153} Indeed, it is virtually impossible “to divorce the penalty from the conviction in the deportation context.”\textsuperscript{154} Not only do removal proceedings blur the traditional distinctions between criminal and civil proceedings, but they also have devastating consequences for a historically helpless group of people. Families and lives can be destroyed. Unfortu-

\textsuperscript{152} Id. at 9.
\textsuperscript{153} Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).
\textsuperscript{154} Id.
nately, individuals facing removal are also quite vulnerable to unscrupulous people and are unlikely to seek redress through malpractice actions or the like when something goes wrong.

There must therefore be some form of constitutionally guaranteed recourse when an attorney's conduct falls below the professional standards and prevents a noncitizen from effectively presenting his or her case. Attorney General Holder's decision vacating Matter of Compean and instituting proceedings for drafting regulations governing ineffective assistance of counsel claims is a step in the right direction. The results of the rulemaking process are as yet unknown, but hopefully the new regulations will overcome the perceived deficiencies of the Lozada requirements, and establish a workable, lasting framework for addressing these claims.

It is not enough, however, that the Department of Justice recognizes the validity of claims of ineffective assistance of counsel. As evidenced by Attorney General Mukasey's decision in Matter of Compean, the federal government can merely eliminate all available remedies with a single decision at will. Instead, the Supreme Court should intervene and address the constitutional issues, finally resolving the split among the federal courts of appeals. If it chooses to do so, it will have sufficient legal, moral and practical bases for recognizing what a majority of the federal appellate courts have recognized for more than thirty years—namely, that the Constitution firmly secures an immigrant's right to reopen her removal proceedings when her attorney commits a costly error.