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TAINTED FROM THEIR ROOTS: THE FUNDAMENTAL UNFAIRNESS OF DEPRIVING FOREIGN NATIONALS OF COUNSEL IN IMMIGRATION COURT

Jehanzeb Khan

I. INTRODUCTION

"This seems to us to be an obvious truth."[1] In *Gideon v. Wainwright*, Justice Hugo Black stated that people haled into court by virtue of a criminal charge who are too poor to afford a lawyer cannot be assured a fair trial unless counsel is provided to them.[2] Importantly, this "obvious truth" exists as a right afforded to criminal defendants under the Sixth Amendment of the Constitution.[3] However, there is no similar Constitutional protection for individuals in immigration removal proceedings, including immigrants who are apprehended while attempting to enter the United States and individuals who are already in the United States and facing deportation.[4] Although various federal statutes have provided for individuals in removal proceedings to secure counsel, only thirty-seven percent of all individuals in removal proceedings are actually able to do so.[5]

While the consequences of an immigration proceeding are akin to those in a criminal proceeding, their rights are ostensibly limited because foreign nationals are not protected by the Sixth Amendment in removal proceedings. Specifically, while a criminal defendant need only demonstrate that their right to counsel was violated, certain circuits have found that foreign nationals must demonstrate that they were prejudiced by the lack of counsel—particularly, that the lack of counsel resulted in removal or deportation.[6]

This Note evaluates the circuit split of whether or not pro se individuals who are subject to removal proceedings in immigration courts must separately demonstrate that the absence of counsel leads to prejudice. Section II provides detail about the right to counsel in criminal proceedings, how a Constitutional right provides greater protection than a right protected by a federal statute, and the history and background of 8

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1. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
2. *Id.*
3. INGRID EAGLY & STEVEN SHAFER, ACCESS TO COUNSEL IN IMMIGRATION COURT, (American Immigration Counsel eds., 2016).
4. *Id.*
5. *Id.*
6. These circuits conflate prejudice with the "harmless error doctrine." Namely, that despite a legal error by a judge (like denying a foreign national of their statutory right to counsel), the foreign national would have be removed anyway, thus nullifying the need to appeal.

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U.S.C. § 1362, a statute which provides respondents in removal proceedings a right to counsel. Section II also outlines the caselaw from circuits that have ruled on the circuit split and whether a foreign national needs to demonstrate how a lack of counsel in their immigration proceeding resulted in prejudice. Section III explains why federal courts should not require foreign nationals to demonstrate prejudice when they are denied their right to counsel in immigration proceedings. Finally, Section IV concludes with framing the current legal landscape and reaffirming why federal courts should not require foreign nationals to demonstrate prejudice.

II. BACKGROUND

Part A of this Section will begin with a history of immigration policies by the United States government beginning in the late 1700s and leading to the present day. Part A will also outline the American immigration court system and what current immigration proceedings in the United States look like. Finally, Part A will discuss what the right to counsel looks like for foreign nationals in immigration court, how it differs from the right to counsel provided to criminal defendants, and the ramifications of the distinction. Parts B and C will outline the circuit split at issue—whether a foreign national in immigration court must show prejudice to demonstrate that their right to counsel was violated.

A. Immigration In America

1. Immigration Policy Through the History of the United States

The history of immigration in the United States begins near the conception of the United States as a nation. Citizenship in 1790 was a privilege limited to free white people of "good moral character" who had lived in the United States for at least two years.[7] Beginning in 1875, numerous restrictions were placed on who could enter the United States, with the immigration system excluding criminals, people with contagious diseases, beggars, and eventually, immigrants from most Asian countries.[8] Through the late 1800s and into the early 1900s, most immigrants coming into the United States were from northern and western Europe.[9] Eventually, more immigrants began coming from southern and

7. D'Vera Cohn, *How U.S. immigration laws and rules have changed through history*, PEW RES. CENTER (Sept. 30, 2015), https://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/.

8. *Id.*

9. *Id.*

eastern Europe. In response, in the 1920s the United States passed a series of laws imposing numerical quotas to favor northern and western European immigrants over southern and eastern Europeans.[10]

By the mid-20th Century, these restrictions began to crumble, allowing for more visas for Asians and the eventual removal of race as a ground for exclusion altogether.[11] In 1965, the Immigration and Nationality Act created a system favoring family reunification and skilled immigrants.[12] Eventually, immigration law began to focus on refugees, with a 1990 law creating the "temporary protective status" that shielded immigrants from deportation to countries facing armed conflicts, disasters, and other conditions.[13]

In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA"). The IRCA granted legal status to unauthorized immigrants who met certain conditions.[14] However, subsequent laws going into the 21st Century put an emphasis on border control and tighter admission eligibility requirements.[15] Eventually, in 2012, President Barack Obama enacted the Deferred Action for Childhood Arrivals ("DACA") policy through executive action. This allowed young adults and children who had been brought to the country illegally to apply for a work permit and deportation relief.[16] President Obama expanded the policy in 2014 to certain foreign national parents of U.S. born children.

President Donald Trump, after being elected in 2016, introduced various policies curtailing the governance of immigration in the United States. In 2017, President Trump put in place a permanent travel restriction on all nationals from Iran, Libya, Somalia, Syria, Yemen, and North Korea, as well as officials from Venezuela.[17] The order blocked most people from permanent residency in the United States and was upheld by the United States Supreme Court in *Barr v. East Bay Sanctuary Covenant*.[18]

In 2017, President Trump lowered the admissions ceiling for the refugee admission program from 110,000 to 50,000.[19] In 2018, the cap

10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Priyanka Boghani, *A Guide to Some Major Trump Administration Immigration Policies*, FRONTLINE (Oct. 22, 2019), https://www.pbs.org/wgbh/frontline/article/a-guide-to-some-major-trump-administration-immigration-policies/. This was the third version of the travel ban after two prior versions of the ban had been put on hold by various federal courts.
18. 140 U.S. 3 (2019).
19. Boghani, *supra* note 17.

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was lowered to 45,000; and in 2019, the cap was again lowered to 30,000.[20] In 2020, President Trump further lowered the cap to 18,000, reportedly the lowest number of refugees settled in the United States in a single year since 1980.[21]

Also in 2017, the Trump administration ended Temporary Protected Statuses ("TPS") for many individuals in the United States.[22] TPS is a form of relief that allows for foreign nationals to stay in the United States if they cannot return safely to their home countries due to extraordinary circumstances.[23] Specifically, Trump ended TPS for foreign nationals from El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, putting at risk foreign nationals of those countries who had been living in the United States since as early as the 1990s.[24]

In 2018, then-Attorney General Jeff Sessions announced a "zero tolerance" policy that criminally prosecuted anyone who crossed the southern border into the United States illegally.[25] The policy became known as the Trump administration's "family separation policy," separating foreign national children from their parents as they were put into the custody of the Department of Health and Human Services ("HHS") while their parents were put in jail.[26] In 2019, HHS identified at least 2,730 children that had been separated from their parents.[27] As of October 21, 2020, there were at least 545 children who had not found their parents due to the family separation policy.[28]

The Trump administration also changed many asylum policies, including implementing the Migrant Protection Protocols ("MPPs") in 2019, which required asylum seekers and other individuals looking to seek entry into the United States from the southern border to wait in Mexico (as opposed to the United States) until their day in court.[29] In that same year, the Trump administration barred individuals attempting to seek asylum in the United States if they first crossed through another nation, effectively blocking all asylum seekers at the southern border

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id. See also* Baker et. al, *Jeff Sessions is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html.

26. Boghani, *supra* note 17.

27. *Id.* The report of the HHS did note that that number was perhaps more due to an influx of children being separated in 2017. President Trump eventually ended family separation in June of 2018.

28. Armus & Sacchetti, *The Parents of 545 children separated at the border still haven't been found. The pandemic isn't helping.*, WASH. POST (Oct. 21, 2020, 6:28 PM), https://www.washingtonpost.com/nation/2020/10/21/family-separation-parents-border-covid/.

29. Boghani, *supra* note 17. The MPP is currently facing legal challenges.

except those from Mexico.[30]

As a candidate for President of the United States, Joe Biden affirmed that he planned to overturn many of the decisions made by the Trump administration, including eliminating the family separation policy, reinstating DACA, and reviewing TPS.[31] After winning the 2020 presidential election and taking office on January 20, 2021 President Biden issued a slew of executive orders pertaining to various immigration policies.[32]

Some of the orders included revising civil immigration enforcement policies, ceasing construction on the southern border wall, preserving and fortifying DACA, requiring agencies to conduct a review on their policies that set up barriers to the legal immigration system, establishing a task force to reunite families that were separated under the Trump administration, implementing a comprehensive plan to allow orderly migration across the southern border, reviewing the MPPs, and enhancing refugee resettlement programs.[33] As of the writing of this Note, it is too early to suggest what the impact of these new measures will be.

2. Immigration Proceedings and Immigration Court

Lawfully permanent foreign nationals, foreign nationals who have overstayed their visas, and foreign nationals who have been admitted into the United States through some other manner can be subjected to mandatory detention and a removal proceeding if they have committed two Crimes Involving Moral Turpitude ("CIMT"): an aggravated felony, a crime of domestic violence, a controlled substance offense, or a firearms offense.[34] Once a foreign national is detained by Immigration and Customs Enforcement ("ICE"), a Notice to Appear ("NTA") is served to the foreign national, explaining that they should be removed from the

30. *Id.*

31. *The Biden Plan for Securing our Values as a Nation of Immigrants*, BIDEN HARRIS, ,https://joebiden.com/immigration/# (last visited Feb. 24, 2021).

32. Press Release, White House Briefing Room, FACT SHEET: President Biden Outlines Steps to Reform our Immigration System by Keeping Families Together, Addressing the Root Causes of Irregular Migration, and Streamlining the Legal Immigration System (Feb. 2, 2021), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/02/fact-sheet-president-biden-outlines-steps-to-reform-our-immigration-system-by-keeping-families-together-addressing-the-root-causes-of-irregular-migration-and-streamlining-the-legal-immigration-syst/.

33. *Featured Issue: First 100 Days of the Biden Administration*, AM. IMMIGR. LAW. ASS'N (Feb. 24, 2021), https://www.aila.org/advo-media/issues/all/first-100-days.

34. BRYAN LONEGAN, IMMIGRATION LAW UNIT OF THE LEGAL AID SOCIETY, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES, (Feb. 2006), *available at* https://www.nilc.org/wp-content/uploads/2015/12/detentionremovalguide_2006-02.pdf. There are also various grounds for deportability mentioned in § 237 of the Immigration and Nationality Act. CIMTs usually include murder, manslaughter, rape, kidnapping, etc.

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United States.[35] Depending on the nature of the crime and the foreign national's immigration status and criminal record, they may be eligible for bond. If they are not eligible for bond, or cannot afford bond, foreign nationals are left to prepare for their removal proceeding from the confines of an immigration detention center holding unit.[36]

On the NTA, the foreign national will be given their first court date called the Master Calendar Hearing ("MCH").[37] An immigration judge will usually have many cases as a part of their master calendar day, so each hearing is relatively short. Each hearing is designed for the immigration judge to take the pleadings, identify whether the foreign national is eligible for any type of relief, and, ultimately, determine if they can be subjected to removal. [38]

At the MCH, foreign nationals who appear by themselves are supposed to be told that they have the right to seek an attorney at their own cost, and are supposed to be given a continuance to seek an attorney if they so choose.[39] In theory, the immigration judge should then provide foreign nationals with a list of resources, and a means to contact organizations that could provide an attorney at little to no cost.[40] If a continuance is granted, a foreign national can then attempt to secure an attorney at their own expense. Some foreign nationals are held in ICE detention while they attempt to find an attorney.[41] Even if a foreign national is unable to find an attorney for their removal hearing, or they decide to proceed without one, the immigration judge can still decide to proceed with the hearing.[42]

3. The Right to Counsel

Gideon v. Wainwright, a landmark United States Supreme Court case, affirmed that the Sixth Amendment of the Constitution requires defendants in criminal cases to be provided an attorney by the government if they are unable to afford one on their own.[43] To reinforce this position, Justice Black noted that all levels of government are well-funded and well-established to try those who are accused.[44] Further, Justice Black highlighted that individuals who are tried with crimes rarely can hire top

35. *Id.*
36. *Id.*
37. Immigration Equality, *Immigration Court Proceedings*, ASYLUM MANUAL (2006), https://immigrationequality.org/asylum/asylum-manual/immigration-court-proceedings/.
38. LONEGAN, *supra* note 34.
39. Immigration Equality, *supra* note 37.
40. LONEGAN, *supra* note 34.
41. *Id.*
42. *Id.*
43. Gideon v. Wainwright, 372 U.S. 335, 355 (1963).
44. *Id.* at 344.

lawyers to represent them and prepare their defense.[45] Thus, because the laws in the United States are designed to ensure fair trials, the need for lawyers is essential. It is particularly fundamental for those who are accused of crimes and who may, as a result, be deprived of life or liberty to be represented by counsel.[46] However, because removal and deportation are considered civil sanctions, as opposed to criminal, and do not result in incarceration as punishment, individuals in immigration courts do not have the Constitutional protection of the Sixth Amendment.[47]

Nevertheless, the lack of counsel in immigration proceedings can be viewed through a due process lens.[48] The Fifth Amendment's Due Process Clause states that "no person shall be . . . deprived of life, liberty or property, without due process of law."[49] The Supreme Court in *Mathews v. Eldridge* clarified what due process considerations a court must consider in determining the adequacy of certain administrative procedures.[50] The Supreme Court stated that in an evaluation of procedural due process, a court must consider three factors: (1) the private interests that could be affected by a governmental action; (2) the risk of an erroneous deprivation of those private interests and what the probative value of any supplemental safeguards to cure the deprivation would be; and (3) the government's interest and burden in providing those possible safeguards.[51]

Congress enacted the Immigration and Nationality Act ("INA") in 1952.[52] Under 8 U.S.C. § 1362, which is titled "Right to Counsel," individuals going through a removal proceeding or any immigration appeal proceeding are afforded the privilege of representation by counsel.[53] There is a circuit split as to whether a violation of Section 1362 should allow a foreign national petitioner who was deemed removable to win on appeal automatically. This split has arisen because certain circuits have decided that the violation of the federal statute alone is not sufficient. Thus, unlike a criminal defendant, a petitioner in certain circuits in an immigration proceeding who was denied their statutory right to counsel

45. *Id.*

46. *Id.*

47. EAGLY & SHAFER, *supra* note 3. Importantly, immigration detention, while a form of incarceration, is *not* viewed as a form of punishment, even with its many similarities to prisons. *See* Matthew Groves, *Immigration detention vs Imprisonment: Differences Explored,* 29 ALTERNATIVE L.J. 228 (2004).

48. Ogbemudia v. INS, 988 F.2d 595, 598 (5th Cir. 1993).

49. U.S. CONST. amend. V.

50. 424 U.S. 319, 335 (1976).

51. *Id.*

52. Cohn, supra note 7.

53. 8 U.S.C. § 1362 (2020). INA § 292 was codified into U.S.C. § 1362.

would have to demonstrate how that denial resulted in prejudice— in violation of their due process right under the Fifth Amendment.

B. Jurisdictions where Petitioners Need Not Demonstrate Prejudice

The Second, Third, Seventh, Ninth, and D.C. Circuits have all affirmed that petitioners in immigration removal proceedings who were not represented by counsel need not demonstrate prejudice upon appeal. Some of the rationales of these circuits include how the right to counsel in immigration proceedings is protected by statute, how a denial of counsel is inherently prejudicial, how immigration proceedings are complex and require the knowledge of counsel for legal strategy, and how the consequences that can arise from immigration court can be quite grave. This Part will address each rationale in turn.

1. Statutory Protection

Some of the circuits that do not require petitioners to demonstrate prejudice argue that because a foreign national's right to counsel is statutorily protected by Section 1362, a foreign national should not need to demonstrate prejudice.

i. Ninth Circuit

In *Montes-Lopes v. Holder,* the Ninth Circuit Court of Appeals held that the specific law that gives foreign nationals the right to be represented by the attorney of their choice is protected by a specific statute.[54] Prior to the Ninth Circuit decision, the petitioner in *Montes-Lopes* had been denied a continuance in his removal hearing by the immigration judge because he had lied prior to the hearing.[55] Specifically, the petitioner's attorney did not appear at his removal hearing due to being suspended by the local bar; and when the immigration judge questioned the petitioner as to when he communicated with his attorney, the petitioner perjured himself.[56] Thus, the immigration judge denied the petitioner a continuance, made the petitioner proceed with his hearing without counsel, and effectively had him removed.[57] After the Ninth Circuit found that the immigration judge had not correctly applied the controlling law,

54. 694 F.3d 1085, 1092 (2012); it should be noted that the Ninth Circuit use the term "alien" instead of the term "foreign national." This Note will refrain from using the term "alien," even when it is used by the courts, and will instead use the term "foreign national" and other synonymous terms.

55. *Id.* at 1088.

56. *Id.*

57. *Id.*

and because the immigration judge had violated the petitioner's right to counsel as protected by Section 1362, the court determined that it had to remand the case in spite of any possible harmless error.[58]

ii. Third Circuit

The Third Circuit has held that if an agency has promulgated a regulation that protects a fundamental statutory or constitutional right, and one of these rights is violated by that agency, the individual affected by the agency's action need not show prejudice in order to invalidate the action of the agency.[59] When questioned about whether he was seeking an attorney during his removal hearing by the immigration judge, the petitioner in *Leslie v. Attorney General of the United States* stated that he did not have any money.[60] However, the immigration judge did not explain that free legal services were available, and eventually ordered the petitioner removed.[61] The Third Circuit in *Leslie* later affirmed that the statutory right to counsel for foreign nationals in removal hearings from Section 1362 is a derivative of the Fifth Amendment Due Process right to a fundamental and fair hearing.[62] Thus, the right for a foreign national to have their choice of counsel in removal proceedings was indeed a fundamental right under both a federal statute and the Constitution; and if violated, a foreign national would not be required to demonstrate prejudice.[63]

iii. Second Circuit

The Second Circuit Court of Appeals in *Montilla v. Immigration and Naturalization Service* insisted that agency regulations must be scrupulously adhered to when the rights and interests of individuals are regulated and controlled by the agency.[64] In his initial appearance before the immigration judge, the petitioner in *Montilla* appeared without counsel and stated that he was unsure how he should proceed, or even if he should proceed, without an attorney moving forward.[65] At the two subsequent hearing dates, the immigration judge made no notation of the petitioner appearing without counsel before eventually having the

58. *Id.* at 1092.
59. Leslie v. AG, 611 F.3d 171, 180 (3d Cir. 2010).
60. *Id.* at 174.
61. *Id.*
62. *Id.* at 180-81 (citing Borges v. Gonzales, 402 F.3d 398, 408 (3d Cir. 2005)).
63. *Id.*
64. 926 F.2d 162, 166 (citing Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 422 (1942)).
65. *Id.* at 164.

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petitioner deported.[66] The petitioner appealed the decision to the Board of Immigration Appeals before it reached the Second Circuit Court in *Montilla.*[67] The Second Circuit noted that the fundamental notions of fair play underlying due process emphasize that agencies must abide by their own regulations closely or face remand, regardless of harmless error.[68] The court elected to apply this doctrine (also known as the *Accardi* doctrine), as opposed to a prejudice demonstration requirement, because the *Accardi* doctrine would allow the court to avoid deciding the case on constitutional grounds and would put pressure on agencies to comply with their own regulations.[69] Thus, the Second Circuit stated that a foreign national need only show that the regulation that provides a right to counsel was not adhered to by the Immigration and Naturalization Service ("INS"), and they need not show that the lack of counsel resulted in prejudice.[70]

iv. Seventh Circuit

In *Castaneda-Delgado v. INS*, the Seventh Circuit held that various sections of the Immigration and Nationality Act provide foreign nationals the right to counsel, and a harmless error doctrine would eviscerate that statutory right.[71] On their initial appearance for their removal hearing, the petitioners in *Castaneda-Delgado* asked to be represented by an attorney, which prompted the immigration judge to issue a continuance of two days.[72] Two days later, the petitioners appeared without an attorney again, stating that their attorney was unable to attend, but that they would look for another attorney.[73] The immigration judge refused to issue another continuance, proceeded with the hearing without an attorney for the petitioners, and effectively had them deported.[74]

2. Inherently Prejudicial

Some of the circuits who do not require foreign nationals to demonstrate prejudice also argue that the denial of a foreign national's statutory right is inherently prejudicial, and thus does not require an

66. *Id.* at 165.

67. *Id.*

68. *Id.* at 167.

69. *Id.* at 168-69. The Second Circuit cited to a principle of the Supreme Court that if a case can be decided on non-constitutional grounds, it should be. *See* Jean v. Nelson, 372 U.S. 846, 854 (1985).

70. *Montilla*, 926 F.2d at 169.

71. 525 F.2d 1295, 1302 (7th Cir. 1975).

72. *Id.* at 1298.

73. *Id.*

74. *Id.*

additional demonstration of prejudice.

i. Seventh Circuit

The Seventh Circuit in *Castaneda-Delgado* determined that a denial of a foreign national's right to counsel is inherently prejudicial, so there is no need to demonstrate prejudice or apply the harmless error doctrine.[75] The Seventh Circuit, while citing themselves in a previous case, affirmed that when a defendant has their request for legal representation denied, the proceedings are "tainted from their roots," leaving no room for calculations of prejudice that may flow from the denial of counsel.[76]

ii. D.C. Circuit

In *Cheung v. INS*, the D.C. Circuit affirmed that the assistance of counsel is so fundamental to a fair trial that lack of counsel can never be treated as harmless error.[77] At the initial removal hearing, the petitioner in *Cheung* stated that he would proceed in his hearing without an attorney.[78] Nevertheless, the D.C. Circuit determined that even if the petitioner had waived his right to counsel, his waiver was undercut by the failure of the immigration judge to inform the petitioner of the time to which the petitioner was entitled to reflect on the decision.[79] The court further stated that even if deportation is seemingly clear in a proceeding, an attorney can still advise their client as to where to be deported, how they may seek more time for a voluntary departure, how to process a claim for preference, how they could depart to another country to seek lawful entry, or even arrange interim bail.[80] Therefore, even in a case where removal was inevitable, the presence of counsel is a fundamental right in immigration proceedings.

3. Legal Strategy and Complexity

Some of the circuits who do not require a demonstration of prejudice also state that legal proceedings in general, especially immigration proceedings, require an attorney due to their complex nature. According to these courts, with the assistance of counsel, foreign nationals will be better able to formulate legal strategies that go beyond removability.

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75. *Id.* at 1300. (citing Chapman v. California, 386 U.S. 18, 43 (1967)).
76. *Id.* at 1301 (quoting United States v. Robinson, 502 F.2d 894, 896 (7th Cir. 1974)).
77. 418 F.2d 460, 464 (D.C. 1969).
78. *Id.* at 460.
79. *Id.* at 463.
80. *Id.* at 464.

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i. Ninth Circuit

The Ninth Circuit claimed in *Montes-Lopes* that the absence of counsel can impact the legal decisions that are made in an immigration proceeding.[81] Specifically, a petitioner on their own may be prevented from making potentially meritorious arguments, may not be able to alter strategic decisions during the legal process, and may not be able to limit the evidence that is included in the record when necessary.[82]

ii. Third Circuit

The Third Circuit Court of Appeals opined in *Leslie* that immigration laws in the United States create a complex adjudication process for individuals to navigate.[83] The intricacy of legal proceedings is often compounded for foreign nationals, which makes the right to counsel even more vital in order for one to reasonably present their case.[84]

4. Severe Consequences

Lastly, courts also emphasize that the consequences of immigration court, like being deported, are extremely severe and thus require the statutory right of counsel for foreign nationals to be protected without a demonstration of prejudice.

i. Third Circuit

In *Leslie*, the Third Circuit mentioned that the right to counsel is a procedural safeguard, given the grave consequences that can arise from a removal proceeding in immigration court.[85] The Third Circuit articulated how removal predicated on an aggravated felony could result in a near-total preclusion from returning to the United States.[86] As such, removal can result in the deprivation of an individual to live and work in the United States, putting the individual's liberty at stake.[87]

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81. Montes-Lopes v. Holder, 694 F.3d 1085, 1092 (2012).
82. *Id.*
83. Leslie v. AG, 611 F.3d 171, 181 (3d Cir. 2010).
84. *Id.* (quoting Bernal-Vallejo v. INS, 195 F.3d 56, 63 (1st Cir. 1999)).
85. *Id.*
86. *Id.* (citing 8 U.S.C. § 1227(a)(2)(A)(iii)).
87. *Id.* (quoting Ponce-Leiva v. Ashcroft, 331 F.3d 369, 381 (3d Cir. 2003)).

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ii. Seventh Circuit

In *Castaneda-Delgado*, the Seventh Circuit Court of Appeals noted that in spite of a deportation hearing not being a criminal proceeding, proceedings in immigration court still can have serious consequences.[88] The Seventh Circuit further cited the Supreme Court, noting that deportation is a serious penalty, and the procedure that may lead to depriving a foreign national of their liberty cannot occur if it does not meet the standards of essential fairness.[89]

C. Jurisdictions where Petitioners Must Demonstrate Prejudice

The Fourth, Fifth, Eight, and Tenth Circuits have held that petitioners in immigration removal proceedings who were not represented by counsel must demonstrate prejudice upon appeal. Actual prejudice is defined by the various circuits as a defect in the deportation proceeding that "may well have resulted in a deportation that would not otherwise have occurred."[90] The rationale of these courts stems almost exclusively from due process concerns.

1. Due Process Concerns

The main argument propounded by the courts who require a demonstration of prejudice is that the only recourse foreign nationals have is through the Due Process Clause, which partially and inherently requires a demonstration of prejudice.

i. Eight Circuit

The Eight Circuit in *Njoroge v. Holder* raised the issue that a violation of due process requires a demonstration of prejudice.[91] The court emphasized that within the Eight Circuit, even if it could be said that a foreign national's statutory right to counsel was violated, the petitioner must demonstrate that the error resulted in prejudice.[92] Specifically, in *Njoroge,* because neither the petitioner nor her attorney had provided evidence that proved that she was entitled to the relief that she sought, she

88. Castaneda-Delgago v. INS, 525 F.2d 1295, 1302 (7th Cir. 1975).

89. *Id.* (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945)).

90. Njoroge v. Holder, 753 F.3d 809, 812 (8th Cir. 2014) (quoting United States v. Torres-Sanchez, 68 G.3d 227, 230 (8th Cir. 1995)).

91. *Id.*

92. *Id.* (quoting Lopez v. Heinauer, 332 F.3d 507, 512 (8th Cir. 2003)).

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had not demonstrated prejudice.[93]

ii. Fifth Circuit

In *Ogbemudia v. INS*, the Fifth Circuit Court of Appeals held that to prevail on a claim of deprivation of counsel in immigration proceedings under the Fifth Amendment, the petitioner must demonstrate prejudice.[94] In *Ogbemudia,* the Fifth Circuit refused to find a due process violation because the petitioner had only contacted two attorneys, even though he had been given a list of attorneys to contact, and had ample time in detention to contact the rest of them.[95] Furthermore, the petitioner had knowledge of deportation proceedings, had outside help available to him, and had been educated in the United States.[96] Thus, the Fifth Circuit found that any failure to obtain counsel was entirely the fault of the petitioner.[97]

iii. Fourth Circuit

In *Farrokhi v. INS*, the Fourth Circuit Court of Appeals found that a foreign national's only ability to seek relief when denied their statutory right to counsel arises from the Fifth Amendment due process clause.[98] The Fourth Circuit identified that a foreign national's right to counsel can only be challenged under the Fifth Amendment, because the statutory right to counsel comes at the expense of the petitioner, and not the government.[99] Additionally, the court identified that the petitioner had explicitly waived his right to counsel by stating to the immigration judge at his hearing, "[a]t this point, I would like to speak for me[,] for myself."[100] Furthermore, the Fourth Circuit noted that, notwithstanding the petitioner's waiver, he also could not demonstrate that the lack of counsel resulted in any prejudice against him.[101] Specifically, the petitioner's non-immigrant status as a student was violated after he stopped attending school. The court therefore held that presence of counsel could not have changed that outcome, which meant that the petitioner was not prejudiced.[102]

93. *Id.* at 813.
94. 988 F.2d 595, 598 (5th Cir. 1993).
95. *Id.*
96. *Id.*
97. *Id.*
98. 900 F.2d 697, 701 (4th Cir. 1990).
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

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iv. Tenth Circuit

In *Michaelson v. INS*, the Tenth Circuit identified due process concerns, but explicitly stated that due process does not automatically equate to a right to counsel in immigration proceedings.[103] Thus, the petitioner would need to demonstrate prejudice in order to cast doubt on the fairness of the removal proceeding.[104]

III. DISCUSSION

This Section will discuss why foreign nationals should not be required to demonstrate prejudice if they are denied their right to counsel in immigration proceedings. Part A will begin by discussing how the circuits who require a demonstration of prejudice incorrectly liken an inevitable outcome for a foreign national with prejudice or harmless error. Part B will outline how those same circuits who require a demonstration of prejudice ignore the burden on the government that needs to be analyzed when considering whether an individual's due process right was violated. Part C will highlight the double standard that exists for foreign nationals in immigration court, as compared to criminal defendants. Further, Part C will argue that foreign nationals should be provided counsel at the government's expense, making the need for a foreign national to demonstrate prejudice wholly irrelevant.

A. Equating Prejudice or Harmless Error with Inevitable Outcome

The Fourth, Fifth, Eight, and Tenth Circuits have all determined that the petitioners who appeared in front of them on appeal could not demonstrate how a statutory denial of counsel in their removal proceeding led to prejudice. Specifically, the aforementioned circuits pointed out that the respective petitioners were inevitably going to be deported, and that having counsel would not have changed that outcome. However, equating an inevitable deportation with prejudice or harmless error is a mischaracterization.

Although deportation may well have occurred with or without the presence of counsel, the circuits who require prejudice fail to recognize that a removal proceeding is not exclusively about deportation. In fact, from the time a foreign national may have been detained until their official court appearance, there are many notable instances where having an attorney is vital and necessary.

If a foreign national is put in jail for a criminal offense, an ICE agent

103. 897 F.2d 465, 467 (10th Cir. 1990).

104. *Id.*

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is allowed to interview the foreign national about their immigration status.[105] A prosecutor could, in theory, question a foreign national in jail, and they would have a right to an attorney at the government's expense as protected by the Sixth Amendment. However, there would be no equivalent protection when being interviewed by an ICE agent. Furthermore, under federal law, after a foreign national has served their time in jail, ICE is only able to detain that foreign national in ICE custody for forty-eight hours.[106] If ICE holds a foreign national for longer, without an attorney, they would have no way of knowing that they were being held for an impermissible length of time, and would also not know how to file a writ of habeas corpus and demand release.[107]

ICE also has adopted thirty-eight standards for what the immigration detention system is supposed to provide to detainees.[108] These standards include funds and personal property, space for religious practices, food services, and personal hygiene products, to name just a few.[109] When a standard has been violated, a grievance must be filed within five days of the event.[110] However, a foreign national (particularly one who does not speak English) may have no way of knowing how to file a grievance, or even if a standard was violated, without the help of counsel. Some foreign nationals may be eligible for release from detention on bond as well, which would require the need to set up and prepare for a bond hearing—another process which has no Sixth Amendment protection.[111]

Furthermore, the D.C. Circuit in *Cheung* stated that an attorney could still advise a foreign national subject to removal as to where to be deported, how to seek more time for a voluntary departure, how to process a claim for preference, how to depart to another country to seek lawful entry, or even arrange interim bail, which are all distinct benefits of legal representation, even if deportation is seemingly clear.[112] Thus, the inevitability of deportation despite a lack of counsel should not be the sole measure of whether a foreign national faced prejudice.

There are many steps and procedures amidst a full removal process, beyond deportation, many of which need the assistance of counsel. From an immigration judges' perspective, ignoring the multitude of options that may exist for a foreign national through an immigration process, even if

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105. Lonegan, *supra* note 34.

106. *Id.*

107. *Id.*

108. *Id.*

109. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES (2019), *available at*https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf.

110. Lonegan, *supra* note 34.

111. *Id.*

112. Cheung v. INS, 418 F.2d 460, 464 (D.C. 1969).

deportation is inevitable, is prejudicial. The exclusive focus on inevitable deportation by some of the circuits is misguided, considering the many other steps within an immigration process where a foreign national could be prejudiced. Ultimately, a foreign national's only ability to seek such recourse, or any recourse at all, is with the assistance of counsel.

B. Ignoring the Government's Burden

As mentioned, some of the circuits discuss how a foreign national's ability to seek retribution for being denied their statutory right to counsel exists exclusively under the Fifth Amendment Due Process Clause. Thus, according to some circuits, a foreign national must demonstrate that they were prejudiced by denial of their right to counsel. Critically, however, these circuits fail to consider the third factor of the *Mathews* due process test upon which they rely: what the government's interest and burden is in providing possible safeguards for the erroneous deprivation of a private interest by governmental action. [113]

The Eight Circuit in *Njoroge* stated that in order for there to be a due process violation, a foreign national "must demonstrate both a fundamental procedural error and that the error resulted in prejudice."[114] The Fifth Circuit in *Ogbemudia* stated that in order for there to be a due process violation, the violation must "impinge upon the fundamental fairness of the hearing in violation of the fifth amendment," and there must be substantial prejudice.[115] Additionally, the Tenth Circuit in *Michelson* mentioned that a petitioner must demonstrate prejudice that implicates the fundamental fairness of the proceeding in order for a due process violation to be found.[116] However, the Eight, Fifth and Tenth Circuits fail to mention how the determination of a due process violation under *Mathews v. Eldrige* also requires analyzing the burden of the government as the third factor. It should be noted that the Fourth Circuit in *Farokhi* stated that because neither party provided any data describing what the government's burden would be and because the procedure in place amply protected the petitioner to begin with, the court did not need to consider the last factor of the Due Process Analysis.[117]

It is also not unduly burdensome for governments and immigration judges to provide a possible safeguard for foreign nationals. *Mathews*

113. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

114. Njoroge v. Holder, 753 F.3d 809, 812 (8th Cir. 2014) (citing Al Khouri v. Ashcroft, 362 F.3d 461, 464 (8th Cir. 2004)).

115. Ogbemudia v. INS, 988 F.2d 595, 598 (5th Cir. 1993) (citing Paul v. U.S. Immigration & Naturalization, 521 F.2d 194, 197 (5th Cir. 1975).

116. Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990).

117. Farrokhi v. INS, 900 F.2d 697, 703 n.6 (4th Cir. 1990). The purported burden of the government would have been to providing instructions for applying for asylum in writing.

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discusses, in part, that the probable additional financial cost and administrative burden must be considered in analyzing a due process claim.[118] Here, it is not likely that it would be an additional financial burden for immigration judges to simply comply with the statutorily protected right to counsel for foreign nationals. More importantly, unlike the Sixth Amendment right to counsel, which provides criminal defendants the right to counsel *at the government's expense*, the statutory right to counsel for foreign nationals in removal proceedings under 8 U.S.C. § 1362 is only *at the foreign national's expense.*[119] So while there is a financial burden to provide counsel to criminal defendants, in order to comply with Section 1362, immigration judges need only provide a list of free and low-cost counsel options for foreign nationals, how they can be in contact with them, and possibly a continuance to seek out counsel if necessary prior to one's hearing—an almost negligible and nominal government cost.[120]

In spite of the circuit split concerning whether a foreign national needs to demonstrate prejudice when they are denied their statutory rights, an admission that the statutory right can be provided at a negligible government cost makes the prejudice argument a moot point. To reiterate, the Supreme Court in *Mathews* notes that a Due Process Analysis requires the evaluation of not just private interests and how a deprivation of the private interest resulted in prejudice, but also the government's burden in curing that deprivation. Unfortunately, the circuits who require a demonstration of prejudice fail to even mention, let alone analyze, the critical third factor of *Mathews*. This is particularly unfortunate, since the government has next to no burden in satisfying a foreign national's statutory right under Section 1362, given that the true cost of obtaining counsel is on the foreign national to begin with. Whether a foreign national was potentially prejudiced in their removal proceeding is inconsequential when all an immigration judge needed to do was provide a foreign national with a list of resources that could have effectively avoided all the litigation that is covered by the circuits discussed in this Note.

C. The Double Standard Between Criminal Defendants and Foreign Nationals

A criminal defendant going through a criminal proceeding unquestionably faces severe consequences. This is ostensibly why there is an enormous burden for the government to overcome before depriving

118. *Id.* at 347.

119. 8 U.S.C. § 1362 (2020).

120. 8 U.S.C. § 1362 (2020).

someone of their life or liberty in a criminal proceeding. Without minimizing the consequences suffered by criminal defendants, foreign nationals in removal proceedings often have equally severe consequences in their legal battle. Although this Note concerns whether foreign nationals need to demonstrate prejudice if they are denied a statutory right to counsel, it should be noted that foreign nationals should unquestionably have a right to counsel, at the government's expense, akin to that of criminal defendants.

Some of the aforementioned circuits contend and acknowledge how the very severe and real consequences of a removal proceeding should provide a procedural safeguard for foreign nationals.[121] The consequence of being deported, and perhaps even uprooted from the United States, is a harsh consequence, and to insist that it is still a civil charge that requires fewer procedural safeguards than a criminal charge is a legal fiction.

Even if one were to say that incarceration *as the punishment* is what truly distinguishes foreign nationals and other civil cases from criminal defendants and criminal cases would also be arguing an incorrect distinction. For example, civil contempt cases, which concern an individual failing to satisfy a court order, can also lead to incarceration in a civil context.[122] Regardless, the Supreme Court in *Turner v. Rogers* held that even for individuals who are facing civil contempt charges, where incarceration is a possible consequence, the Constitution does not automatically provide a right to counsel as it does in criminal proceedings.[123]

Nevertheless, the current rhetoric surrounding immigrants and foreign nationals, some of which was perpetuated by former President Trump, would lead one to think that foreign nationals who are allegedly within the United States improperly are indeed "criminals." In addition to referring to undocumented Mexican immigrants as "rapists" and "criminals" at rallies and public speeches without any empirical data to support that assertion, Trump posted a slew of tweets on Twitter that emphasize an anti-immigrant rhetoric and a need to keep "illegal immigrants" out of the United States.[124] Trump also reportedly referred

121. *See* Leslie v. AG, 611 F.3d 171, 181 (3d Cir. 2010) and Castaneda-Delgago v. INS, 525 F.2d 1295, 1302 (7th Cir. 1975).

122. Cornell Law School, *Contempt of Court, Civil,* LEGAL INFO. INST., https://www.law.cornell.edu/wex/contempt_of_court_civil (last visited Apr. 4, 2021).

123. *Turner v. Rogers* was concerning a petitioner who was held in contempt after failing to make child support payments and was sentenced to a 90-day imprisonment. Although the Supreme Court held that the petitioner was not entitled to counsel, the Court also found that petitioner's incarceration violated the Due Process clause on other grounds. 564 U.S. 431, 449 (2011).

124. Emily Dai, *How Anti-Immigrant Rhetoric Shapes the Supreme Court*, WASH. SQUARE NEWS (Apr. 28, 2020), https://nyunews.com/opinion/2020/04/28/supreme-court-anti-immigrant/. *See also* Brenna Williams, *Trump's immigrant policy (or what we know about it) in 13 illuminating tweets*, CNN (Aug. 26, 2016, 7:18 PM), https://www.cnn.com/2016/08/26/politics/donald-trump-immigration-

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to Haiti and various African nations as "shithole countries," while also tweeting at Representatives Alexandria Ocasio-Cortez, Ilhan Omar, Rashida Tlaib, and Ayanna Pressley to "go back" to the "places from which they came."[125] In spite of a societal view of criminals as inferior, criminals are still given extraordinary constitutional protections. Yet, foreign nationals, who Trump and others may view as "criminals," do not get the same luxury.

In citing back to Justice Black's "obvious truth," a criminal defendant who cannot hire an attorney on their own would be subjected to an unfair trial if the government does not provide an attorney themselves. Ostensibly, the Supreme Court in *Gideon* felt a desire to level the proverbial playing field for indigent defendants who would have no chance of defending themselves against a seasoned prosecutor. And yet, there is seemingly no rush or pressure to level the playing field for "criminal" foreign nationals, some of whom who may speak English as a second language or who may not speak English at all.[126] In fact, the question of a right to counsel is not even a discussion of merit in some jurisdictions where foreign nationals instead have the burden of demonstrating that they were prejudiced in a game where the odds were never in their favor to begin with. Apparently, Justice Black's "obvious truth" is too precious for those not born in the United States.

IV. CONCLUSION

The Sixth Amendment to the Constitution of the United States provides all criminal defendants with the right to an attorney at the government's expense if the defendant is not able to afford one. However, foreign nationals who face the threat of removal from the United States do not have a similar Constitutional protection. Instead, foreign nationals have a right to an attorney that is instead protected by federal statute (as opposed to the Constitution) and is also at the expense of the foreign national (as opposed to being free of charge). This distinction is important

tweets/index.html.

125. Vitali et. al, *Trump referred to Haiti and African nations as 'shithole' countries*, NBC NEWS (Jan. 11, 2018, 5:19 PM), https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946. It should be noted that Representatives Ocasio-Cortez, Omar, Tlaib, and Pressley are all women of color. Furthermore, Representative Omar is the only one of the four born outside of the United States, namely in Somalia, while the other three are natural-born United States citizens. Representative Omar eventually became a United States citizen herself in 2000. Brian Taylor, *Lawmakers Respond to Trump's Racist Comments: We Are Here To Stay*, NAT'L PUB. RADIO (July 15, 2019, 11:03 AM), https://www.npr.org/2019/07/15/741771445/trump-continues-twitter-assault-on-4-minority-congresswomen.

126. Some of the petitioners at issue in this Note are mentioned as either speaking English as a second language or not being able to speak English at all. *See* Castenada-Delgado v. INS, 525 F.2d 1295, 1296 (7th Cir. 1975) and Cheung v. INS, 418 F.2d 460, 461 (D.C. 1969).

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because certain circuits have determined that a mere violation of the federal statute may not on its own provide foreign nationals with recourse if that statutory right is denied.

Thus, the question exists as to whether a foreign national who is denied their statutory right to counsel only has recourse through the Fifth Amendment Due Process Clause. For circuits who believe that is the case, foreign nationals must demonstrate how a denial of counsel resulted in prejudice that violated their due process rights under the Fifth Amendment. Conversely, other circuits rationalize that prejudice does not need to be demonstrated because the right to counsel in immigration proceedings is protected by statute, a denial of counsel is inherently prejudicial, immigration proceedings are complex and require the knowledge of counsel for legal strategy, and the consequences that can arise from immigration court can be quite severe.

Ultimately, foreign nationals who are denied their statutory right to counsel should not need to demonstrate prejudice. Circuits that require a demonstration of prejudice incorrectly liken an inevitable outcome for a foreign national with prejudice or harmless error. Furthermore, a true due process analysis requires considering the burden of the government which is minimal when it comes to the statutory right foreign nationals have. If anything, foreign nationals should be protected in the same Constitutional fashion as criminal defendants when it comes to a right to counsel. Although the right to counsel in immigration proceedings may not be a mandatory right under the Constitution, to require foreign nationals to separately demonstrate prejudice runs contrary to the fundamental aims of the American legal system. As foreign nationals are already delegitimized, marginalized, and oppressed by that legal system, a denial of a right to counsel is unconscionable.

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