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## Unaccompanied Minors, Statutory Interpretation, and Due Process

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## INTRODUCTION

In recent years, there has been a massive influx of unaccompanied minors (UMs)<sup>1</sup> crossing the southern border.<sup>2</sup> Under the Trump administration, migrant children are being held in detention centers at unprecedented levels, with a five-fold increase in the last year alone.<sup>3</sup> Without legal representation, UMs have little to no capability to defend against removal charges and to advocate for any existing statutory rights that they might have to remain in the United States.<sup>4</sup> UMs need legal advocates to safeguard their constitutional and statutory rights. The need for counsel is arguably greater now than ever as the Trump administration experiments with the hostile immigration practice—characterized as immoral by many religious leaders and inhumane by a bipartisan group of former US attorneys<sup>5</sup>—of separating children from families at the border. The

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1. In the United States, an unaccompanied minor is known as an “unaccompanied alien child” (UAC) and is defined by Title 6 of the U.S. Code (“Domestic Security”) as a child who:

- a) has no lawful immigration status in the United States;
- b) has not attained 18 years of age; and
- c) with respect to whom – (i) there is no parent or legal guardian the in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody. 6 U.S.C. § 279(g)(2) (2018).

2. See Caitlin Dickerson, *Detection of Migrant Children Has Skyrocketed to Highest Levels Ever*, N.Y. TIMES (Sept. 12, 2018), [https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html?ref=collection%2Fbyline%2Fcaitlin-dickerson&action=click&contentCollection=undefined&region=stream&module=stream\\_unit&version=latest&contentPlacement=54&pgtype=collection](https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html?ref=collection%2Fbyline%2Fcaitlin-dickerson&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=latest&contentPlacement=54&pgtype=collection) [https://perma.cc/3X3B-D559]; Jeff Mason, *A Snapshot of Immigration at the Border as of June 2017*, BIPARTISAN POL’Y CTR. (June 29, 2017), <https://bipartisanpolicy.org/blog/a-snapshot-of-immigration-at-the-border-as-of-june-2017> [https://perma.cc/FSV4-8LQ9].

While total numbers of UM apprehensions are down from their peak of close to 50,000 in 2014, numbers remain historically high, reaching 31,096 in 2017. See also Mason, *supra*. According to the Office of Refugee and Resettlement (ORR), roughly thirty percent of UMs in Fiscal Year 2017 were fourteen or under, and a growing percentage since 2012—now almost one third—are female. OFFICE OF REFUGEE RESETTLEMENT, FACTS AND DATA, <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> [https://perms.cc/D7TF-GNUR].

3. See Dickerson, *supra* note 2.

4. For a humanitarian perspective analyzing the importance of counsel to the outcome of removal proceedings against UMs, see Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. LEGIS. 332, 332–33 (2013). King cites to relevant scholarship that exposes the numerous reasons why counsel is so crucial to the plight of UMs: the vulnerability of children and their unfamiliarity with the legal process, their unfamiliarity with the nature and consequences of immigration proceedings, the complexities of immigration law, counsel’s ability to help minors navigate a complicated process, the increased likelihood of success when UMs are represented, and the conditions of detention. *Id.* at 332–33, n. 3–8.

5. The Pope voiced agreement with U.S. Catholic Bishops who have termed the practice “immoral.” Philip Pulella, *Exclusive: Pope Criticizes Trump Administration Policy on Migrant Family Separation*, WORLD NEWS (June 20, 2018), <https://www.reuters.com/article/us-pope-interview/exclusive-pope-criticizes-trump-administration-policy-on-migrant-family-separation-idUSKBN1JG0YC> [https://perma.cc/79S8-WDB9]. Recently, Cardinal Sean O’Malley stated that the United States “now openly before the world [is] using children as pawns to enforce a hostile immigration policy. This strategy is morally unacceptable and denies the clear danger weighing upon those seeking our assistance.” See Travis Anderson, *Cardinal O’Malley Criticizes Trump Immigration Policies, Says Family Separation ‘Terrorizes’ Children*, BOS. GLOBE (June 13, 2018), <https://www.bostonglobe.com/metro/2018/06/13/cardinal-malley-decries-trump-immigration-policies->

administration has classified children separated from their families under this policy as UMs.<sup>6</sup> While the administration has since terminated this policy, largely due to nearly uniform global public outrage,<sup>7</sup> hundreds of UMs remain separated from their families, even after a reunification deadline imposed under a federal court order.<sup>8</sup> Unfortunately, the Trump administration has routinely

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says-family-separation-terrorizes-children/a0GpZ6Zomjbdx0nzDG3w4N/story.html [https://perma.cc/75PP-MFPT]. Religious leaders from many faiths, including a coalition of white evangelical groups previously supportive of President Trump's policies, have uniformly denounced the policy of separating children from families at the border. See Laurie Goodstein, *Conservative Religious Leaders are Denouncing Trump Immigration Policies*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/us/trump-immigration-religion.html> [https://perma.cc/5V4X-8A4Z]. In addition, a bipartisan group of former U.S. attorneys, in a letter to U.S. Attorney General Jeff Sessions, urged Sessions to end the policy of separating children from families. See Alan Bersin et al., *Bipartisan Group of Former United States Attorneys Call on Sessions to End Family Separation*, MEDIUM (POLITICS) (June 18, 2018), <https://medium.com/@formerusattorneys/bipartisan-group-of-former-united-states-attorneys-call-on-sessions-to-end-child-detention-e129ae0df0cf> [https://perma.cc/4XKA-C576] ("It is time for you to announce that this policy was ill-conceived and that its consequences and cost are too drastic, too inhumane, and flatly inconsistent with the mission and values of the United States Department of Justice.").

6. See Sarah Pierce, *Far from a Retreat, the Trump Administration's Border Policies Advance its Enforcement Aims*, MIGRATION POL'Y INST. (June 2018), <https://www.migrationpolicy.org/news/far-retreat-trump-border-policies-advance-enforcement-aims> [https://perma.cc/X963-9TA2].

We know that at least 2,342 children were forcibly separated from their parents between May 5 and June 9. Undoubtedly hundreds more were taken from their parents before and since then. These children have been reclassified as unaccompanied child migrants and as such, have been placed into a special system, which includes being transferred to the custody of the Office of Refugee Resettlement . . .

*Id.*

7. A 2018 Quinnipiac survey found that 66% to 27%, voters oppose the policy of separating children from their parents when families illegally cross the border into the United States. Among Independents, only 24 % favor the policy, while 68% oppose it. Among whites without college degrees, the heart of President Trump's coalition, support stands at only 37%, with 52% opposed. See *Stop Taking the Kids, 66 Percent of U.S. Voters Say, Quinnipiac University National Poll Finds*, QUINNIPAC UNIV./ POLL (June 18, 2018), <https://poll.qu.edu/national/release-detail?ReleaseID=2550> [https://perma.cc/THH3-ZXTM]; see also Nick Cumming-Bruce, *Taking Migrant Children from Parents is Illegal, U.N. Tells U.S.*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html> [https://perma.cc/2KQN-NJVS] (discussing U.N. criticism of Trump policy to separate policies and terming it "illegal"); William A. Galston, *As Trump's Zero-Tolerance Immigration Policy Backfires, Republicans are in Jeopardy*, BROOKINGS INST. (FIXGOV) (June 18, 2018), <https://www.brookings.edu/blog/fixgov/2018/06/18/trumps-zero-tolerance-immigration-policy-puts-republicans-in-jeopardy> [https://perma.cc/S3LG-B3EZ] (discussing the political backlash over Trump's zero-tolerance immigration policy among both Democrats and Republicans); Devon Sanders, *Amnesty International Blasts Trump Administration's Family Separations: "This is Nothing Short of Torture,"* CNN POLITICS (June 18, 2018), [https://www.cnn.com/politics/live-news/immigration-border-children-separation/h\\_808b0bd4caf0341d0db1547a29cb47bc](https://www.cnn.com/politics/live-news/immigration-border-children-separation/h_808b0bd4caf0341d0db1547a29cb47bc) [https://perma.cc/4HRJ-QXKA] (noting that Amnesty International called President Trump's immigration policy and implementation of such policy "nothing short of torture").

8. See Daniel Gonzalez, *416 Migrant Children Remain Separated Weeks After Deadline to Reunite Families*, USA TODAY (Sept. 13, 2018), <https://www.usatoday.com/story/news/nation-now/2018/09/13/separated-migrant-children-remain-united-states/1287860002> [https://perma.cc/DLG5-H488].

disregarded the humanity of arriving young migrants, subverting the concept of due process in favor of mass detention and deportation. For example, President Trump recently tweeted:

We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order. Most children come without parents . . .<sup>9</sup>

The mistreatment of UMs by the executive branch highlights a crucial need for greater judicial safeguards. For UMs in removal hearings,<sup>10</sup> a shift in focus is needed in the search for appointed counsel—away from the statutory provisions that guarantee the right to counsel, and toward the provision which guarantees the right to a fair hearing. Recent scholarship has furthered constitutional due process arguments in favor of appointing counsel for immigrants in removal hearings,<sup>11</sup> but courts have not yet accepted a

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9. Ellen Cranley, *Trump Tweets He Wants to Deport Illegal Immigrants 'with no Judges or Court Cases'—A Move that Would Violate Due Process*, BUS. INSIDER (June 24, 2018), <https://www.businessinsider.com/trump-tweets-deport-illegal-immigrants-no-judges-court-cases-2018-6> [<https://perma.cc/URB7-ZENT>].

10. Our focus in this article is on unaccompanied minors who are placed in removal proceedings. Throughout this article, the terms “exclusion” and “deportation” appear, but these terms were replaced with the term “removal” in 1996 with the passage of the Illegal Immigration Reform and Responsibility Act of 1996 (IIRIRA). See 8 U.S.C. § 1362 (2018). Thus, when we cite decisions or authorities that discuss representation for minors in deportation or exclusion proceedings, these should be understood as being equivalent to current removal proceedings.

Unaccompanied minors from non-continuous countries who are apprehended or present at a port of entry are always placed in removal proceedings. 8 U.S.C. § 1232. Unaccompanied minors who are from Mexico or Canada face a process somewhat analogous to expedited removal, and can be removed without being placed before a judge unless they (1) have a possible asylum claim, (2) are potential victims of trafficking, or (3) cannot make an independent decision to return to their country. *Id.* If any of these conditions are satisfied, these children are processed as if they are from non-contiguous countries. *Id.*

Also, per the Trafficking Victims Protection Reauthorization Act (TVPRA), because unaccompanied minors are not currently provided with counsel in removal proceedings, unaccompanied minors from continuous countries who apply for asylum do so in a process that is more appropriate for children and is conducted by Asylum Officers who have received training on child interviewing and the adjudication of children’s issues. Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1232 (2012).

Importantly, the TVPRA’s authors understand that administrative proceedings, whether done in lieu of or in parallel with removal hearings, may be just as complex, consequential, and challenging for a minor to navigate as a contested hearing itself. Thus, while beyond the scope of this article, many of the arguments presented herein apply to representation in encounters with immigration authorities outside of the context of the removal hearing.

For a comprehensive review of the right to counsel outside of the removal context, see Emily Creighton & Robert Pauw, *Right to Counsel Before DHS*, 32ND ANNUAL IMMIGRATION LAW UPDATE SOUTH BEACH (2011), reprinted in Am. Immigration Lawyers Ass’n (2011 ed.), <https://www.americanimmigrationcouncil.org/sites/default/files/right-to-counsel-before-dhs.pdf> [<https://perma.cc/7BAY-MG3C>].

11. See, e.g., Benjamin Good, *A Child’s Right to Counsel in Removal Proceedings*, 10 STAN. J. C.R. & C.L. 109, 127–48 (2014). For an analysis of the argument that unaccompanied children have a

constitutional or statutory argument that appointed counsel is required for groups of noncitizens or noncitizen minors to vindicate their right to a fair hearing in immigration court.<sup>12</sup> The courts have nonetheless dropped very real hints that UMs, who are particularly vulnerable and impotent as a group, may prevail using an argument grounded in the fair hearing provision of the Immigration and Nationality Act (INA or 1952 Act).<sup>13</sup>

Statutory arguments that suggest that the McCarran-Walter Immigration and Nationality Act of 1952's right to counsel provisions could have been intended to include a right to appointed counsel have largely been overlooked due to the statute's phrasing. This Article, however, proposes a novel statutory argument in favor of finding a categorical right to appointed counsel for UMs using the INA's fair hearing provision as the basis for this right. We provide the historical framework behind the enshrinement of these two rights and then argue that Congress never intended to preclude appointed counsel. We further propose that the Trafficking Victims Protection Reauthorization Act (TVPRA) grants UMs a positive liberty interest,<sup>14</sup> and we use this statutory interest as the basis of an original means of surmounting the *Lassiter* presumption that only a loss of physical liberty requires appointed counsel. We conclude by positioning UM removal hearings within the current landscape of the appointment of counsel doctrine (appointment doctrine) to demonstrate an increased likelihood of success in finding a categorical right to appointed counsel using the fair hearing provision and the TVPRA as a positive liberty interest.

Part I lays the foundation for the rest of the Article: we propose that, for particularly vulnerable groups like UMs, who cannot obtain a fair hearing in any other way, the source of the right to appointed counsel emerges, counterintuitively, from the full and fair hearing provision (rather than the right to counsel provisions) of the INA.<sup>15</sup> Tracing the statutory development of these two due process provisions reveals that they were intended to strengthen due process rights of undocumented immigrants. Indeed, Congress enacted the provisions for wholly different reasons, and likely intended them to operate and function independently. Thus, the best construction of the "right to counsel (at no expense to government)" provision can best be understood as a minimum

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due process right to counsel, see Linda Kelly Hill, *The Right to be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Children*, 31 B.C. THIRD WORLD L.J. 41 (2011). For a similar argument under international law, see King, *supra* note 4; Brian Rowe, Note, *The Child's Right to Legal Assistance in Removal Proceedings under International Law*, 10 CHI. J. INT'L L. 747 (2010).

12. See, e.g., *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2018).

13. See Michael Kagan, Essay, *Toward Universal Deportation Defense: An Optimistic View*, 2018 WIS. L. REV. 305, 306 (2018); see also *C.L.G.J.*, 880 F.3d at 1151 (Owens, J., concurring) (agreeing with the majority's decision to deny petitioner's claim that the INA or the Due Process Clause required appointed counsel to satisfy petitioner's right to a full and fair hearing, but explicitly proposing the possibility for a different outcome in the case of UMs).

14. Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1232 (2012).

15. See Immigration and Nationality Act of 1952, Pub. L. No. 414, ch. 477, 66 Stat. 163 (1952) [hereinafter 1952 Act or INA].

threshold for the majority of undocumented immigrants. This language in no way limits the implementation of additional safeguards—including appointment of counsel—if needed to secure a fair hearing for vulnerable groups like UMs.<sup>16</sup> Using the fair hearing provision as the vehicle for acquiring this right removes the statutory stumbling block courts have grappled with since the inception of the modern-day immigration framework: specifically, that the government is statutorily precluded from appointing counsel.

In Part II, we embark on a plain text statutory analysis of the two due process provisions at issue—the right to counsel and the right to a fair hearing—and present two plain text arguments that build upon each other: first, that the right to counsel provision does not preclude appointing counsel at government expense when necessary; second, that the right to a fair hearing actually *requires* that vulnerable groups like UMs be appointed counsel to vindicate their statutory right to a fair hearing. We provide examples of unenumerated rights, such as translation services and notice of certain other rights, that have been found by courts to be integral in safeguarding other enumerated due process rights under the INA.

Part III examines the appointment doctrine and its operation in criminal, quasi-criminal, and civil cases. It discusses the importance of a physical liberty interest in acquiring a categorical right to appointed counsel. It demonstrates how a positive liberty interest, derived mainly from statutes rather than constitutional law,<sup>17</sup> may substitute for the loss of physical liberty normally required under *Lassiter*—specifically, incarceration—to compel heightened due process protection.

Finally, Part IV situates removal hearings for UMs within the landscape of the modern-day appointment doctrine in an effort to offer a clear statutory path for obtaining a categorical right to appointed counsel under the fair hearing provision. If the courts interpret the right to counsel provisions as intended, the fair hearing provision can likewise operate as *it* was intended: to provide the flexibility inherent in the concept of fairness and to allow appointed counsel to guarantee that fairness for vulnerable groups of litigants during a removal hearing.

## I.

### THE ENSHRINEMENT OF TWO DUE PROCESS PROVISIONS

The INA, codified under Title 8, Chapter 12 of the U.S. Code, governs immigration to and citizenship in the United States. Section 1229a governs

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16. See *J.E.F.M. v. Holder*, 107 F. Supp. 3d 1119, 1124 (W.D. Wash. 2015). The argument that the fair hearing provision required the court to appoint counsel for compromised groups was proposed in *J.E.F.M.*, although the court declined to hear statutory arguments for lack of jurisdiction.

17. We have borrowed from Professor Ann Woolhandler's definition of "positive liberty interest." Ann Woolhandler, *Procedural Due Process Liberty Interests*, 43 HASTINGS CONST. L.Q. 811, 845 (2016).

removal proceedings under the INA. Although this section contains a number of important provisions, this Article will focus on the history of two enumerated, independently operating, due process rights: the right to counsel, and the right to a full and fair hearing. The latter right requires appointed counsel in the case of UMs. These statutory due process provisions, however, are best understood in the context of the normative constitutional due process rights of noncitizens more generally.

While the Constitution distinguishes between the rights of citizens and noncitizens in some respects (for example, the right to be free from racial discrimination in voting and the right to run for federal elective office are expressly reserved to citizens),<sup>18</sup> all other rights in the Constitution were drafted without citizenship restriction. The rights to due process and equal protection, found in the Fifth and Fourteen Amendments, extend to all “persons.”<sup>19</sup> The Supreme Court has repeatedly stated that the Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>20</sup> Due process rights apply with equal force in removal hearings.<sup>21</sup> James Madison himself, a proponent of natural law theories, recognized that noncitizens had a duty to abide by the laws of the United States and, in return, benefited from the protections offered under the Constitution.<sup>22</sup> Indeed, human rights laws have paralleled this prerogative.<sup>23</sup> Thus, citizens and noncitizens alike have strong constitutional due process rights, particularly in criminal cases, but also in civil cases when liberty interests are jeopardized in ways akin to criminal cases. However, courts have not yet accepted a constitutional due process argument to justify appointing counsel to entire groups of litigants. With that understanding, we turn now to the meaning of the two due process statutory provisions in question with the goal of

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18. U.S. CONST. art. I, §§ 2, 3; *id.* art. II, § 1; *id.* amend. 15. States or localities, however, can enfranchise noncitizen residents. In contrast, the right to hold federal elective office is expressly reserved to citizens alone.

19. *Id.* amend. 5, 14. Likewise, the Sixth Amendment, which outlines rights attaching in criminal trials, and includes the right to an attorney, also extend broadly to “the accused.” *Id.* amend. 6.

20. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States . . .”) (citations omitted).

21. *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (holding that a noncitizen may not “be taken into custody and deported without giving him all opportunity to be heard” because “[n]o such arbitrary power can exist where the principles involved in due process of law are recognized”). Although we focus our efforts on removal hearings in this Article, it is possible that the arguments we present apply with equal force to UMs in removal hearings as well, since the TVPRA—in contrast to the INA—does not distinguish between arriving aliens and those already present in the United States.

22. Honorable Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 807 (2013) (discussing Judge Madison’s views on noncitizen rights under the Constitution and its continuing impact on the due process rights of noncitizens today).

23. *See, e.g.*, Universal Declaration of Human Rights, pmb., art. 7–11, 19, 20(1); *see also* G.A. Res. 217A(III), at 71, U.N. Doc. A/810 (1948). (extending the right to due process, among others, to nationals and non-nationals alike).

identifying a novel statutory argument for appointed counsel in UM removal hearings.

*A. The Right to Counsel*

This right is currently codified under Section 1229a(b)(4)(A), which states that in a removal proceeding “the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.” Section 1362 reiterates this right, stating that:

In 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.

The most recent set of provisions providing this right has been in effect since January 5, 2006. However, these provisions have a long history, dating back to the early 1900s. Further, these provisions have not always existed in their current form but have developed substantially over time.

The starting point of this historical analysis is the Immigration Act of 1907 (1907 Act).<sup>24</sup> Under this Act, any time a ship carrying undocumented immigrants entered the United States, the ship and its passengers were subject to an inspection by immigration officers.<sup>25</sup> If an immigration officer determined that an undocumented immigrant was not “clearly and beyond a doubt entitled” to enter into the United States, then that immigrant would be subject to an examination before a board of special inquiry.<sup>26</sup> If the board reached an unfavorable decision, the undocumented immigrant was thereafter permitted to appeal “through the commissioner of immigration at the port of arrival and the Commissioner-General of Immigration to the Secretary of Commerce and Labor.”<sup>27</sup> Although the 1907 Act does not provide for the right of counsel during such proceedings, these proceedings are the ancestral roots of removal proceedings as we know them today.

The next significant successor to the 1907 Act was the Immigration Act of 1917 (1917 Act), which modified the appeals process.<sup>28</sup> The 1917 Act left the proceedings described in the 1907 Act largely unchanged, but it explicitly provided that if an undocumented immigrant appealed to the Secretary of Labor

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24. An Act to Regulate the Immigration of Aliens into the United States, Pub. L. No. 96, ch. 1134, 34 Stat. 898 (1907) [hereinafter 1907 Act].

25. *Id.* § 16.

26. *Id.* § 24.

27. *Id.* § 25.

28. See An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, Pub. L. No. 301, ch. 29, 39 Stat. 874 (1917) [hereinafter 1917 Act].

after an unfavorable result from the board of special inquiry, they would “have the right to be represented by counsel or other adviser on such appeal.”<sup>29</sup>

Thus, a comparison of the 1907 and 1917 Acts suggests that the right to counsel during removal proceedings was developed at some point between those years. One method of determining whether that is the case and if so, why—would be to consider the legislative materials that led to the creation of the 1917 Act. Fortunately, such materials are in existence: the 1907 Act provided for the creation of a Joint Commission on Immigration to “make full inquiry, examination, and investigation . . . into the subject of immigration.”<sup>30</sup> The Commission’s reports, published in 1911, directly paved the way for the 1917 Act.<sup>31</sup>

The more-than-400-page report contains a number of statements from a diverse group of organizations, both proponents and opponents to immigration, outlining a variety of topics relating to immigration law at the time, including the right to counsel.<sup>32</sup> A quick glance at the table of contents reveals a statement pertaining to the right to counsel issue: the “Statement of the American Jewish Committee, the Board of Delegates on Civil Rights of the Union of American Hebrew Congregations, and the Independent Order B’nai B’rith.” This statement contains a relevant heading titled “The immigrant entitled to due process of law,” with a subheading which reads in part, “The right of the immigrant to counsel before boards of special inquiry should not be denied. . . .”<sup>33</sup>

The subheading does not contain any substantive text in its body; however, it does point the reader to Point VII of exhibit B, a brief from *In the Matter of Hersch Skuratowski*. The brief, which was prepared for argument before the Honorable Learned Hand, U.S. District Judge for the Southern District of New York, aims to support the petitioner’s case in a Habeas Corpus proceeding after he had received a decision of exclusion by a board of special inquiry.<sup>34</sup> In doing so, the brief challenges a number of rules and practices used by the board of special inquiry in the case.<sup>35</sup> Point VII of the brief deals specifically with the fact that “[c]ounsel was improperly denied before the board of special inquiry and on appeal.”<sup>36</sup>

Under Point VII, the brief makes a number of important revelations, the first of which is that the right to counsel was already in existence at that time.<sup>37</sup>

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29. *Id.* § 16.

30. 1907 Act, Pub. L. No. 96, § 39, 34 Stat. 898 (1907).

31. H.R. REP. NO. 82-1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1664.

32. IMMIGRATION COMM’N, STATEMENTS AND RECOMMENDATIONS SUBMITTED BY SOCIETIES AND ORGANIZATIONS INTERESTED IN THE SUBJECT OF IMMIGRATION, S. Doc. No. 61-764 (1911) [hereinafter COMMISSION REPORT 764].

33. *Id.* at 142.

34. *Id.* at 160.

35. *See id.*

36. *Id.* at 173.

37. *Id.*

Specifically, the brief cites “the Secretary’s regulations (Rule 18).”<sup>38</sup> This rule can be found in the Immigration Regulations and is titled “Appearance of Attorneys.”<sup>39</sup> Although the rule deals primarily with regulating the fees provided to attorneys in immigration proceedings, the brief cites the rule in order to argue that the rule’s existence clearly demonstrates that undocumented immigrants had the right to some form of representation in these hearings.<sup>40</sup> As such, the brief argues that Section 25 of the Immigration Act of 1907, which states that “[a]ll hearings before boards shall be separate and apart from the public,” cannot be understood to mean that undocumented immigrants are not entitled to counsel.<sup>41</sup>

The brief makes two further arguments in support of the right to counsel at immigration proceedings. First, the brief considers the fact that the 1907 Act provides that the boards of special inquiry are required to keep records of “all such testimony as may be produced before them,” and that it places the burden of proof on the undocumented immigrant.<sup>42</sup> According to the brief, because of these two provisions, it is reasonable to assume that the drafters of the 1907 Act intended for undocumented immigrants to have attorneys presenting such testimony to meet this burden.<sup>43</sup> Second, the brief cites a report by the Ellis Island Commission of 1903, which expressly recommends that boards of special inquiry “admit to their sessions . . . the representatives of the immigrant.”<sup>44</sup>

It is uncertain whether or not this brief, and the statement within which it was contained, was the decisive factor in providing for the right to counsel in immigration proceedings. Nevertheless, it certainly acts as a relevant source of information for the development of this right and indicates that it was a contentious issue at the time. Further, given that the 1917 Act included the right to counsel<sup>45</sup> only six years after the Immigration Commission Reports were published indicates that this brief might explain how the right came to be enshrined. Notably, while the 1917 Act allowed for the retention of counsel of one’s choosing on appeal, another provision of the Act explicitly stated that the right to counsel was prohibited in the underlying exclusion hearing.<sup>46</sup>

However, Congress, through the INA, would by midcentury attempt to repeal the rule that barred legal representation at exclusion hearings. The INA can be considered the foundation upon which the current immigration statutes are

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38. *Id.*

39. DEP’T OF COMMERCE & LABOR, IMMIGRATION LAWS AND REGULATIONS OF JULY 1, 1907, at 39 (1910), [hereinafter 1907 REGULATIONS].

40. *See* COMMISSION REPORT 764, *supra* note 32, at 173.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *See* the 1917 Act, Pub. L. No. 301, ch. 29, 39 Stat. 874, 886–87 (1917).

46. Immigration Rules of May 1, 1917, r. 15, subd. 2 (1917), *in* BUREAU OF IMMIGRATION, IMMIGRATION LAWS 67–68 (6th ed. 1921) [hereinafter Immigration Rules of May 1, 1917], <https://babel.hathitrust.org/cgi/pt?id=mdp.39015049811485&view=1up&seq=4> [https://perma.cc/4GXH-99FA].

based; this becomes particularly evident when comparing the language in the original Act with the language existing in the statutes today.

Under the 1952 version of the INA, removal proceedings were governed by section 242(b). Subsection 242(b)(2) expressly provided for the right to counsel, stating that “the alien 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.” Section 292 further provided for the right to counsel, stating that:

In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney general from any such exclusion or deportation 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.

As with the 1917 Act, one method of determining how these provisions came to be enshrined is to consider legislative history behind the 1952 Act. In this case, such legislative history is provided by House Report No. 1365, dated February 14, 1952.<sup>47</sup> The report does not provide a pretext or reasoning for implementing a right to counsel in removal proceedings, but it does provide an interesting consideration.

The report states that the INA would bring seven “significant changes” to immigration and naturalization laws.<sup>48</sup> Among these seven changes, the report notes under listed change seven that the Act “[s]afeguards judicial review and provides for fair administrative practice and procedure.”<sup>49</sup> Further, this listed change specifically cites section 242, the section of the INA which deals with deportation of aliens, and which delineates the right to counsel.<sup>50</sup> Thus, although the report does not explain why the drafters included these provisions in the Act, it does identify that they constituted a major change to immigration law at the time. Since then, the provision providing the right to counsel has only undergone superficial changes, making minor alterations to the language.

Since the INA of 1952 was the first act to affirmatively state the privilege to be represented by counsel, the “major change” to immigration law most sensibly refers to the expansion of the right to counsel to immigrants in removal hearings, rather than in reference to who shoulders the expense of representation.<sup>51</sup>

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47. H.R. REP. NO. 82-1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1653.

48. *Id.* at 1679.

49. *Id.*

50. *Id.*

51. *See, e.g.,* *Demore v. Kim*, 538 U.S. 510, 538 (2003) (“[F]ederal immigration laws from 1891 until 1952 made no express provision for judicial review . . .”). In contrast to this apportionment of additional due process rights, vestiges of the 1917 Act’s rule, which prohibited retaining counsel in certain proceedings, persist today in border inspections where the government still recognizes no privilege of counsel. *Service Upon and Action by Attorney or Representative of Record*, 8 C.F.R.

The INA also codified for the first time the right to counsel in removal hearings. Prior to the 1952 Act, the privilege of being represented by retained counsel had been guaranteed by regulation only.<sup>52</sup> Thus, rather than viewing the Act as a prohibition on Federal funding for counsel, it is better thought of as an expansion and codification of the right to counsel in removal hearings.<sup>53</sup>

### B. *The Right to a Full and Fair Hearing*

The right to a full and fair hearing is currently codified under section 1229a(b)(4)(B), which states that in a removal proceeding:

[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter . . . .

The historical development of the right to a full and fair hearing follows a much more gradual path than that of the right to counsel. In fact, traces of this right can be found as early as the Immigration Act of 1891 (hereinafter the "1891 Act").<sup>54</sup> Under that act, undocumented immigrants entering the United States were subject to examination by inspection officers.<sup>55</sup> The 1891 Act explicitly provided that, during such examinations, the inspection officers had the power "to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record."<sup>56</sup> However, the Act did not directly afford this right to undocumented immigrants, but rather described it as a power held by inspection officers.<sup>57</sup>

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§ 292.5(b) (exempting "any applicant for admission in either primary or secondary inspection [from] the right to representation," except in certain specified circumstances); CUSTOMS & BORDER PROTECTION, INSPECTOR'S FIELD MANUAL ch. 17.1(e) (2005) (applying 292.5(b) to individuals in deferred inspections).

52. See Immigration Rules of May 1, 1917, *supra* note 46, at r. 22, subd. 5(b) ("The alien shall be required then and there to state whether he desires counsel or waives the same . . . . If counsel be selected, he shall be permitted to be present during the conduct of the hearing . . . .").

53. Prior to 1996, deportation and exclusion were separate removal procedures, but the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) combined these procedures into one proceeding called "removal." Until this change, exclusion had been the formal term for denial of an alien's entry into the United States. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.). As referenced above, we are discussing removal in this piece and all references to deportation and exclusion should be understood to refer currently to removal. See *supra*, note 10.

54. See Pub. L. 51-551, ch. 551, 26 Stat. 1084a (1891) [hereinafter 1891 Act].

55. See *id.* § 8.

56. *Id.*

57. See *id.*

The next step in the development of the right to a full and fair hearing is the Immigration Act of 1903, which altered the records requirements.<sup>58</sup> Unlike the 1891 Act, where all evidence was to be entered of record, under the 1903 Act a written record of testimony before immigrant inspectors was only made “where such action may be necessary.”<sup>59</sup> Additionally, the appellate procedure was altered, with the 1903 Act providing for an appeal to a board of special inquiry.<sup>60</sup> Further, the Act provided that “[a]ll hearings before boards shall be separate and apart from the public, but the said boards shall keep complete permanent records of their proceedings and of all such testimony as may be produced before them . . . .”<sup>61</sup>

Once again, the Act did not describe the provisions regarding testimony and evidence as affirmative rights provided to undocumented immigrants, but rather described them as powers held by the relevant authorities.<sup>62</sup> As such, the provisions do not discuss whether the undocumented immigrants were permitted to present evidence or examine evidence and cross examine witnesses provided by the government. However, the Immigration Regulations of 1907 later provided some clarity on these issues.<sup>63</sup>

Rule 35(e) of the Immigration Regulations pertains specifically to the procedure of removal hearings. According to the rule, during such hearings the undocumented immigrants were “allowed to inspect the warrant of arrest and all the evidence on which it was issued.”<sup>64</sup> The rule also explains that if permitted by the person before whom the hearing was being held, the undocumented immigrant could be represented by counsel.<sup>65</sup> Such counsel then had the right “to inspect and make a copy of the minutes of the hearing so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government.”<sup>66</sup> Whether this rule would be equally afforded to the undocumented immigrant himself were counsel not permitted to appear is unclear. Nevertheless, despite the fact that such provisions are not present in the 1907 Act itself, the regulations indicate that the presenting and examining of evidence was a right that began to be afforded to undocumented immigrants at the time.<sup>67</sup>

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58. See An Act to Regulate the Immigration of Aliens into the United States, Pub. L. No. 57-162, ch. 1012, 32 Stat. 1213 (1903) [hereinafter 1903 Act].

59. *Id.* § 24.

60. *Id.* (“The decision of any such officer . . . shall be subject to challenge by any other immigration officer, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investigation.”).

61. *Id.* § 25.

62. See *id.* §§ 24–25.

63. See 1907 REGULATIONS, *supra* note 39.

64. *Id.* at 60.

65. *Id.* at 60–61.

66. *Id.* at 61.

67. *Id.* at 60–61.

However, even though these regulations were in force in 1907, ten years later the 1917 Act did not affirmatively provide for any of these rights.<sup>68</sup> In fact, the 1917 Act left the relevant provisions of the 1907 Act largely unchanged. The only substantial change under the 1917 Act was that commissioners of immigration, and inspectors in charge, now had an explicit power to subpoena witnesses and evidence.<sup>69</sup>

Following the 1917 Act, the next most significant step in the development of these rights was the INA, enacted in 1952.<sup>70</sup> As mentioned earlier, this Act can be considered the foundation upon which the current INA is based. Under the 1952 Act, the right to a full and fair hearing was found in Section 242(b)(3), which provided that “the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government . . . .”

Unfortunately, House Report No. 1365 does not provide a pretext or reasoning for implementing the right to a full and fair hearing. However, as indicated earlier under the right to counsel analysis, the House Report indicates that the section within which this provision was included constituted a “significant” change to immigration law at the time.<sup>71</sup> The fair hearing requirement found in the 1952 Act was likely a response to the fact that the law had, until then, been largely silent on proceedings for removal hearings<sup>72</sup> and that the Supreme Court had long recognized that the Due Process Clause requires fair hearings in removal proceedings.<sup>73</sup> The Senate Judiciary Committee report of the 1952 Act noted that the “constitutional guaranty” of due process had given rise to

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68. See 1917 Act, Pub. L. No. 301, ch. 29, 39 Stat. 874 (1917).

69. *Id.* § 16 (“Any commissioner of immigration or inspector in charge shall also have power to require by subpoena the attendance and testimony of witnesses . . . and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States . . .”).

70. See 1952 Act, Pub. L. No. 414, ch. 447, 66 Stat. 163 (1952).

71. H.R. REP. NO. 82-1365 (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1679.

72. See S. REP. NO. 81-1515, at 624 (1950) (Judiciary Committee report noting that the deportation procedure “is not specified in the law”).

73. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950) (holding that the Administrative Procedure Act (APA) was, in fact, intended to cover to deportation hearings and that, although deportation statutes did not specifically provide for hearings, hearings were required to save the statute from constitutional invalidity). The Court states:

When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.

*Id.* at 50–51; see also *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903) (holding that the Fifth Amendment requires a hearing before an impartial tribunal before an individual alleged to be in the United States illegally can be deported).

several fair process regulations in immigration proceedings, and that the agency's failure to provide fair process "might invalidate the entire hearing."<sup>74</sup>

Since then, Congress has left the provision largely unchanged, with only minor changes made to the wording and the addition of a provision stating that undocumented immigrants would not be entitled to national security information.<sup>75</sup>

### C. *The INA Expanded Due Process Rights*

Since the enactment of the INA, courts have used the right to counsel provisions as evidence that Congress intended to preclude appointed counsel altogether.<sup>76</sup> But while the right to counsel "at no expense to government" provision, at first glance, appears to serve as a limitation to the allocation of federal funds for appointing counsel, it is better understood as creating a "floor" that provides *all* people in removal proceedings the right to *private* counsel at their own expense. The right to counsel in removal hearings had previously only been found in regulation, and for the first time, it was explicitly codified in statute.<sup>77</sup> The elements of a fair hearing in a removal hearing—a reasonable opportunity to testify on one's own behalf, to cross-examine witnesses, and to prepare a strategic defense—were itemized for the first time in the INA. Moreover, the INA was passed after the Administrative Procedure Act (APA), which had been enacted just six years earlier.<sup>78</sup> Introduced by Senators Pat McCarran and Francis Walter, the INA was intended to provide the same underlying administrative protections that the APA had afforded to litigants.<sup>79</sup>

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74. See S. REP. NO. 81-1515, at 624.

75. 8 U.S.C. § 1229a(b)(4)(B) (2018) (inserting the gender-neutral term "alien" in place of "him" and changing the word "in" to "on," presumably for clarity).

76. See *El Rascate Leg. Serv. v. EIOR*, 959 F. 2d 742, 749, 751 (9th Cir. 1991) ("Congress chose not to pay for the alien's representation, however, so the Attorney General cannot ensure protection of the alien's § 1252(b)(3) opportunities by appointing counsel," and "Congress expressly instructed the Attorney General not to provide appointed counsel."). But see *Escobar Ruiz v. INS*, 813 F. 2d 283, 289 (9th Cir. 1987); *Franco-Gonzalez v. Holder*, 2013 U.S. Dist. LEXIS 186258, CV-10-02211 DMG, at \*28 (C.D. Cal. Apr. 23, 2013) ("The Court agrees that [8 U.S.C. §§ 1229a(b)(4) and 1362] cannot reasonably be interpreted to forbid the appointment of a Qualified Representative to individuals who otherwise lack meaningful access to their rights in immigration proceedings . . .").

77. See generally discussion *supra* Part I.A.

78. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 500–96 (2018)). The stated purpose of the APA is "to improve the administration of justice by prescribing fair administrative procedure." *Id.*

79. See Daniel Kanstroom, *The Long, Complex and Futile Deportation Process of Carlos Marcello*, in *IMMIGRATION STORIES*, 113–46 (David A. Martin & Peter H. Schuck eds., 2005). One year after Congress adopted a rider that explicitly exempted exclusion and deportation hearings from the requirements of the APA in response to *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), which found that the APA controlled in deportation hearings, Congress passed the INA, which contained language that it be the "sole and exclusive" procedure for deportation proceedings. Kanstroom, *supra*, 121–23 (citing 1952 Act Pub. L. No. 414, § 242(b), 66 Stat. 163 (1952)). Three years later, the Supreme Court got the opportunity to address whether Congress had intended for the INA to function independently from the procedural requirements of the APA. *Id.* at 125 (citing *Marcello v. Bonds*, 349 U.S. 302 (1955)). The Court found that, indeed, Congress had so intended, relying on the following

The procedural underpinnings of the rights to counsel and to a fair hearing have both been found to echo those protections afforded under the APA—further evidence that these provisions were intended to expand, rather than restrict, the due process rights of immigrants.<sup>80</sup>

Further, these rights evolved independently<sup>81</sup> from one another, suggesting that they have an independent function and operation, and creating an opportunity for a right to appointed counsel.<sup>82</sup> Notably absent from the statute is language restricting appointment of counsel where necessary, and nowhere does the statute prohibit federal funding for appointed counsel. The language of the fair hearing requirement, on the other hand, provides greater protection for certain individuals who may require appointed counsel to safeguard their right to a fair hearing. The Ninth Circuit has been the front runner in testing the validity of this argument and in endorsing the need for enhanced due process protections for litigants with diminished capacities.<sup>83</sup>

#### D. The Current Litigation Landscape

A small but significant subset of cases has begun to generate support for the idea that appointed counsel for vulnerable groups is a precondition to fairness. In *Matter of M-A-M*, the Board of Immigration Appeals laid out a 3-part test for establishing the fairness of a hearing in the case of a litigant with an intellectual disability.<sup>84</sup> Determining competency required that the individual in question be able to (1) have a rational and factual understanding of the nature and object of the proceedings, (2) consult with the attorney or representative if there is one, and (3) have a reasonable opportunity to examine and present evidence and cross-examine witnesses.<sup>85</sup> While *M-A-M* addressed adults, it nevertheless provided a starting point for determining the need for additional protections as a function of competency.<sup>86</sup>

Just a few years later, *Franco-Gonzalez v. Holder* expanded on the idea that a vulnerable class of immigrants could require heightened due process

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factors to support its conclusion: the analogous and converging nature of APA and various INA provisions, the laborious adaptation of the APA to the deportation process and specific points where deviations were made, the legislative history which confirmed this adaptive technique and the specific deviations therefrom, and the statutory verbiage which prescribed that the INA should be the “sole and exclusive” procedure used for deportation proceedings. *Id.* at 125.

80. See *Marcello*, 349 U.S. at 306–08.

81. See generally *supra* Parts I.A, I.B.

82. See generally *supra* Parts I.A, I.B.

83. *But see* C.J.L.G. v. Sessions, 880 F.3d 1122, 1151 (9th Cir. 2018) (rejecting the argument for immigrant children in removal hearings generally but specifically suggesting in the concurrence that this argument could succeed in the case of UMs).

84. *Matter of M-A-M*, 25 I. & N. Dec. 474, 479 (B.I.A. 2011).

85. *Id.*

86. While the suggestion here is that the case law applicable to adults with intellectual disabilities has applicability to children, an important caveat is that we do not mean to equate adults with intellectual disabilities with children. Rather, we focus here on the ability to observe, remember, and communicate in a legal proceeding.

protections to ensure their right to a fair hearing.<sup>87</sup> The American Civil Liberties Union (ACLU) brought a class action lawsuit on behalf of immigration detainees in California, Arizona, and Washington who suffered from severe intellectual disabilities and argued the class members were entitled to appointed counsel for a variety of reasons. The court used the Rehabilitation Act<sup>88</sup> as the basis for requiring the government to appoint a Qualified Representative<sup>89</sup> to all class members to assist in immigration proceedings. The court rejected the argument that statutes preclude the use of government funds for appointed counsel. In doing so, the court relied on language from the General Counsel of the Department of Homeland Security that supported a plain text reading of the INA's right to counsel provisions.<sup>90</sup> The court never reached the constitutional and statutory arguments made by plaintiffs that an unenumerated right (appointed counsel) was a prerequisite to vindicating plaintiffs' right to a fair hearing. However, the court addressed the concern in dicta, advocating strongly for the merit of the argument in response to the government's contention that providing a Qualified Representative would alter the fundamental nature of the immigration statutory framework:

Plaintiffs do not seek relief from removal or automatic termination of their proceedings. They seek only the ability to meaningfully participate in the immigration court process, including the rights to "examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presenting by the Government." 8 U.S.C. 1229a(b)(4)(B). Plaintiffs' ability to exercise these rights is hindered by their mental incompetency, and the provision of competent representation able to navigate the proceedings is the only means by which they may invoke those rights.<sup>91</sup>

The district court issued an order requiring the U.S. Government to implement a comprehensive system for mental health screening of detainees upon arrival to detention centers in California, Arizona, and Washington, a

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87. *Franco-Gonzalez v. Holder*, CV-02211-DMG, 2013 U.S. Dist. LEXIS 186258, at \*1 (C.D. Cal. Apr. 23, 2013).

88. The Rehabilitation Act, 29 U.S.C. § 701–97b (2018), prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors.

89. "Qualified Representative" was defined by the court as "(1) an attorney, (2) a law student or law graduate directly supervised by a retained attorney, or (3) an accredited representative, all as defined in 8 C.F.R. Section 1292.1." *Franco-Gonzalez*, 2013 U.S. Dist. LEXIS 186258, at \*20 n.4 (citing *Franco-Gonzalez v. Holder*, 828 F. Supp. 2d 1133, 1147 (C.D. Cal. 2011)).

90. *Franco-Gonzalez*, 2013 U.S. Dist. LEXIS 186258, at \*27–28. The court stated: [W]riting on behalf of the Office of the General Counsel for the DHS, David P. Martin, Principal Deputy General Counsel, confirmed that the plain language of Section 1362 does not lend itself to the interpretation that it "prohibits the provision of counsel at government expense" . . . The court agree[d] that these statutes cannot reasonably be interpreted to forbid the appointment of a Qualified Representative to individuals who otherwise lack meaningful access to their rights in immigration proceedings as a result of "mental incompetency."

*Id.*

91. *Id.* at \*21–22.

competency evaluation system for members of the Class and an information sharing system between DHS and Executive Office of Immigration Review (EOIR) of mental health information of Class members.<sup>92</sup> If individuals are found to be “mentally incompetent” to represent themselves, the EOIR must, in these three states, arrange for a Qualified Representative to assist them.<sup>93</sup>

In the wake of *Franco-Gonzalez*, Plaintiffs in *J.E.F.M. v. Holder* presented similar arguments on behalf of a class of unrepresented child plaintiffs, arguing that government immigration agencies violated their Fifth Amendment Due Process rights and their statutory right to a fair hearing under the INA.<sup>94</sup> The UM class contended that they were unable to exercise their statutory right to present evidence and cross-examine witnesses because they could not retain counsel and were thus denied their constitutional right to due process of law.<sup>95</sup> The court determined that it had jurisdiction over constitutional but not statutory claims for the limited purpose of denying defendants’ motion to dismiss, and engaged in a cursory effort to balance the *Mathews* factors used to assess due process claims.<sup>96</sup> The first *Mathews* factor, the nature of the liberty interest, weighed in favor of plaintiffs because removal or a return to one’s homeland could be “the same or worse than incarceration for some minor aliens.”<sup>97</sup> The court decided the second factor in favor of plaintiffs as well, suggesting that the risk of erroneous deprivation was high for plaintiffs. The court relied on the improper removal order for at least one named plaintiff as evidence for a high risk of error. Further, it rejected the government’s assertion that plaintiffs’ ability to appeal was a sufficient substitute for assistance of counsel in removal proceedings.<sup>98</sup> The court rejected this circular reasoning, noting that appeals are limited to the administrative record, and the absence of an attorney greatly impacts the shape and scope of that record.<sup>99</sup>

While the *J.E.F.M.* court did not rule on the merits of plaintiffs’ constitutional claim, it did suggest that UMs might have a better chance at securing appointed counsel than other litigants have in recent civil appointment cases decided by the Supreme Court. The *J.E.F.M.* court astutely noted that the

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92. *Id.* at \*62–69.

93. *Id.*; see also M. ARYAH SOMERS, PRACTICE ADVISORY: CHILDREN IN IMMIGRATION PROCEEDINGS: CHILD CAPABILITIES AND MENTAL HEALTH COMPETENCY IN IMMIGRATION LAW AND POLICY 7 (2015), [https://cliniclegal.org/sites/default/files/children\\_in\\_immigration\\_proceedings\\_-\\_child\\_capabilities\\_and\\_mental\\_competency\\_in\\_immigration\\_law\\_and\\_policy.pdf](https://cliniclegal.org/sites/default/files/children_in_immigration_proceedings_-_child_capabilities_and_mental_competency_in_immigration_law_and_policy.pdf) [<https://perma.cc/CR83-HFN2>].

94. *J.E.F.M. v. Holder*, 107 F. Supp. 3d 1119 (W.D. Wash. Apr. 13, 2015).

95. *Id.* at 1124.

96. See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (providing courts with a set of factors to be balanced in ascertaining the adequacy of due process protections in administrative hearings); *infra* discussion at Part III.C.

97. *J.E.F.M.*, 107 F. Supp. 3d at 1140.

98. *Id.* at 1140–41.

99. *Id.*

Supreme Court had left open two issues in a previous case:<sup>100</sup> whether an individual is owed more process when (1) the government is represented by counsel and (2) the issues in the case are unusually complex. The court stated:

The right-to-counsel claim asserted by plaintiffs in this case falls squarely within the intersection of the questions unanswered in *Turner*. The removal proceedings at issue in this case pit juveniles against the full force of the federal government . . . Moreover, courts have repeatedly recognized “[w]ith only a small degree of hyperbole” that the immigration laws are “second only to the Internal Revenue Code in complexity.”<sup>101</sup>

The Ninth Circuit ultimately found that the district court lacked jurisdiction over all claims since the claims were not raised under the appropriate petition for review (PFR) of a removal order.<sup>102</sup> However, the court acknowledged the improbability of a child adequately protecting their legal rights in a removal hearing without representation and advocated that Congress has a “moral obligation” to address the problem of children lacking counsel in removal hearings.<sup>103</sup> Jurisdictional issues aside, the prevailing legacy of *J.E.F.M.* is that UMs have a good shot at prevailing under *Mathews*, and that the facts of a UM removal case may create just the right factual scenario for a civil-*Gideon* challenge<sup>104</sup> after *Turner*.

Cases like *J.E.F.M.* have nudged UMs even closer to victory by espousing arguments that a fair hearing cannot occur without appointed counsel. Based largely on the enshrinement history in Part I, Part II accordingly proceeds under the assumption that the right to counsel was not intended to qualify or limit the right to a fair hearing for vulnerable groups who cannot secure a fair hearing without legal advocacy. Part I unearthed and analyzed new evidence that the right to appointed counsel for vulnerable groups like UMs can be found within the fair hearing provision. Part II will now walk through a reading of the two due process provisions to assess the feasibility of making a successful statutory argument that UMs have a right to appointed counsel embedded within the fair hearing provision of the INA.

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100. In *Turner v. Rogers*, the issue presented was whether a defendant in a civil contempt case (facing up to one year of prison time) should categorically be appointed counsel if he could not afford one. The Court ultimately decided that a categorical right to counsel is not required under the Due Process Clause, but hinted that scenarios presenting a legal power imbalance or a highly complex legal issues might justify a different conclusion. *Turner v. Rogers*, 564 U.S. 431 (2011).

101. *J.E.F.M.*, 107 F. Supp. 3d at 1139 (quoting *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004)).

102. *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1039, 1041 (9th Cir. 2016) (concurrences of Judges McKeown and Kleinfeld).

103. *Id.*

104. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that states must, under the Sixth Amendment, provide attorneys to those accused of a crime to the extent they cannot otherwise afford them).

## II.

PLAIN TEXT STATUTORY READING SUPPORTS APPOINTING COUNSEL WHEN  
REQUIRED TO ENSURE A FAIR HEARING

Scholars have argued that there is a constitutional basis for the right to appointed counsel to apply in removal proceedings, at least case-by-case.<sup>105</sup> Some of the same scholars, though, have expressed deep skepticism regarding a statutory basis for this right.<sup>106</sup> The following Part challenges this general cynicism: is it accurate to assume that an argument relying on a statutory basis for the right to appointed counsel will necessarily suffer legal defeat? Moreover, could knowledge of their independent histories and purposes assist in strengthening a statutory argument? We use *Jennings v. Rodriguez* and *Zadvydas v. Davis* as tools to guide statutory interpretation for the right to counsel and fair hearing provisions.<sup>107</sup> This section will show, first, that the INA's right to counsel (at no expense to the government) provisions *do not preclude* the use of government funds to appoint counsel when necessary. Second, it is intended to propose a workable statutory argument that UMs have a due process right to appointed counsel subsumed within the fair hearing provision.

A. Supreme Court Guidance: *Zadvydas* and *Jennings*

The *Zadvydas* Court applied the doctrine of constitutional avoidance to interpret an immigration detention statute, § 1231(a)(6), which authorizes the detention of individuals who have already been ordered removed from the United

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105. Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting Franco-Gonzalez*, 90 ST. JOHN'S L. REV. 921–26 (2016). Fatemi's analysis concludes that the right to counsel under the Sixth Amendment stops short of requiring that immigrants qualify for appointed counsel because their circumstances are not the same as those facing federal criminal charges. Fatemi offers more hope for a Fifth Amendment basis for a right to appointed counsel, discussing the existence of a circuit split. The Sixth Circuit was joined by the Third, Seventh, and D.C. Circuits in adopting the "fundamental fairness" test under *Anguilera-Enriquez v. INS*, which predicated appointment on whether "the assistance of counsel would be necessary to provide 'fundamental fairness[,] the touchstone of due process.'" *Anguilera-Enriquez v. INS*, 516 F.2d 565, 568–70 (6th Cir. 1975) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)). The Fourth, Fifth, Tenth, and Eleventh Circuits use a higher "harmless error" test and ask whether the existing procedural safeguards resulted in prejudice that likely impacted the results of the proceedings. *See Rageevan v. U.S. Att'y Gen.*, 151 F. App'x 751, 753–54 (11th Cir. 2005); *Farrokhi v. INS*, 900 F.2d 697, 701 (4th Cir. 1990); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990); *Patel v. INS*, 803 F.2d 804, 805–07 (5th Cir. 1986).

106. Fatemi, *supra* note 105, at 919–21 (citing *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigration Rev.*, 959 F.2d 742, 749 (9th Cir. 1991)) (observing congressional intent not to pay for the immigrant's representation); *see Escobar Ruiz v. INS*, 813 F.2d 283, 285 (9th Cir. 1987) (concluding that "the parenthetical in [§] 292 means only that the government has no obligation to appoint and pay for the representation of aliens in deportation proceedings"), *rev'd on other grounds by Rueda-Menicucci v. INS*, 132 F.3d 493 (9th Cir. 1997). Thus, Fatemi provides a good summary of the statutory scope of—and limitations on—the right to counsel provisions of the INA, as well as the additional protections afforded by the TVPRA (which stops short of providing appointed counsel) and § 504(c) of the INA (Alien Terrorist Removal Court), which has not been used to date but explicitly provides for appointed counsel. *See Hill, supra* note 11.

107. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

States.<sup>108</sup> When an individual is ordered removed, the Attorney General, as a general matter, “shall” remove the individual from the United States within a period of 90 days.<sup>109</sup> After this time period elapses, certain individuals “may” be detained beyond the removal period, under 1231(a)(6).<sup>110</sup> The *Zadvydas* court held that a statute which allowed for indefinite detention would violate the Due Process Clause, after finding that the word “may” in § 1231(a)(6) created ambiguity, suggesting discretion but not necessarily unlimited discretion as to the length of detention.<sup>111</sup> The Court also pointed to the absence of any explicit statutory limit on the length of permissible detention as further evidence of ambiguity.<sup>112</sup>

More recently, in *Jennings v. Rodriguez*, the Supreme Court undertook an intensive analysis of another detention statute, involving the detention of certain individuals potentially subject to removal.<sup>113</sup> The Court used a strict textualist reading of the statutes to overrule the Ninth Circuit’s holding that the doctrine of constitutional avoidance necessitated an interpretation of the detention statutes that required bond hearings every six months.<sup>114</sup> The Supreme Court found, however that the Ninth Circuit’s interpretation was not supported by the statute and that the court of appeals had therefore misapplied the doctrine of constitutional avoidance.<sup>115</sup> Contrary to the Ninth Circuit’s interpretation that detention was indefinite, and therefore constitutionally bereft, the Court found that § 1225(b)(1) and (2) contained explicit text that limited detention periods. In the case of the former provision, individuals “shall be detained for further consideration of the application for asylum,” and in the latter, individuals “shall be detained for a [removal] proceeding.”

The respondents argued that a “reasonableness limit” on the length of detention<sup>116</sup> must be read into the statute in order to save these provisions from constitutional attack, but the Supreme Court firmly admonished this reading, as well as their application of the doctrine of constitutional avoidance:

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108. *Zadvydas*, 533 U.S. at 689.

109. 8 U.S.C. § 1231(a).

110. *Id.*

111. *Zadvydas*, 533 U.S. at 690, 697.

112. *Id.*

113. *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). INA §§ 1225(b), 1226(a) and 1226(c) were at play in *Jennings*. These provisions outline the government’s authority to detain certain categories of individuals who are either seeking to enter the country (under § 1225(b)) or who are already in the country (under § 1226(a) and (c)). 1952 Act, Pub. L. No. 414, 66 Stat. 163 (1952).

114. *Id.* at 837.

115. *Id.* at 836. The doctrine is a canon of statutory construction that attempts to “save” statutes from constitutional problems. It reflects the concern that constitutional issues should not needlessly be confronted, and also recognizes that members of Congress, like Justices of the Supreme Court, are bound by their oath to uphold the Constitution. See LARRY M. EIG, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 24–25 (2014).

116. The respondents argued an alternative statutory construction: that a six-month limit on detention must be imposed in order to save the statute from constitutional attack. *Jennings*, 138 S. Ct. 830 at 837.

Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases. Instead, the canon permits a court to “choos[e] between competing *plausible* interpretations of a statutory text. . . .” To prevail, respondents must thus show that § 1225(b)’s detention provisions may plausibly be read to contain an implicit 6-month limit. And they do not even attempt to defend that reading of the text.<sup>117</sup>

The Court chastised the court of appeals for “all but ignor[ing] the statutory text” and instead reading the *Zadvydas v. Davis* precedent to “grant[] a license to graft a time limit onto the text of § 1225(b).”<sup>118</sup> Although characterizing *Zadvydas* as a “generous application of the constitutional avoidance canon,”<sup>119</sup> the Court justified *Zadvydas*’s holding and application by surgically distinguishing the statutory scheme there from the provisions at play in *Jennings*.

According to the Court, notable differences existed between the statutory language in *Zadvydas* and *Jennings*. The Court highlighted the distinction between the use of the word “shall” and “may” in the text, as well as the presence or absence of language defining—and therefore limiting—the permissible length of detention in each statutory scheme. Further, express exemptions to the detention provisions at issue in *Jennings* provided additional justification for the court to infer that there were no other circumstances under which individuals detained under 1225(b) could be released.<sup>120</sup>

In light of *Zadvydas* and *Jennings*, questions remain about the right to counsel and fair hearing provisions. Specifically, what is the plain text reading of these provisions given evidence that both provisions independently evolved and function? Second, and more importantly, can a plain text reading of these provisions support an argument that subgroups, like UMS, require the assistance of counsel to ensure UMs’ right to a fair hearing?

#### B. 1229a(b)(4)(A) Is Unambiguous

##### 1. The Right to Counsel Provisions Do Not Refer to Appointed Counsel

The source of the right to appointed counsel is not found in the INA’s right to counsel provisions at all. The INA twice refers to the right to counsel: under 8 U.S.C. Section 1229a(b)(4)(A) and again in 8 U.S.C. Section 1362. Both have remarkably similar language and refer to the right to counsel as both a right (in the statutory sub-heading) and a privilege (in the actual statutory text underneath the sub-heading). Putting aside, for a moment, the classification as a right or a privilege, the two sections are transcribed, respectively, below:

“the alien shall have the privilege of being represented, at no expense to

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117. *Id.* at 843 (parenthetical omitted).

118. *Id.*

119. *Id.*

120. *Id.* at 844.

the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings"; and

"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."

While it is not surprising that one would look to such provisions as the source of a right to appointed counsel, as they both explicitly discuss the right to an attorney, this overlooks that the text is focused on *chosen* representation. The plain text makes it abundantly clear that this provision is not intended to be the source of a right to appointed counsel and therefore it cannot operate to prohibit appointed counsel at government expense where it is needed. Both provisions make explicit reference to representation by counsel that is *chosen* by the individual (in relevant part, Section 1229a(b)(4)(A) recites "counsel of the alien's choosing," and Section 1362 similarly references "counsel . . . as he shall choose"). Appointed counsel, as the Supreme Court has repeatedly upheld, involves no choice on the part of the defendant.<sup>121</sup> The element of choice in both provisions plainly signals that neither provision can refer to appointed counsel.<sup>122</sup>

If the provisions intended to provide for appointed counsel, they would have communicated such a constitutional mandate with "right" instead of "privilege." This suggests that the enumerated right of chosen representation does not refer to "appointed counsel" but rather serves as a clarification that individuals are entitled to have chosen representation in removal proceedings, such as border inspections, where attorneys are deliberately and explicitly disallowed.<sup>123</sup> That is to say, scholars may disagree on exactly what conditions justify appointing counsel under due process standards, but once appointment is deemed to apply, it certainly would be classified as a "right" rather than "privilege."

Finally, there is no merit to the argument that having a right to private counsel without government expense somehow supports a sweeping prohibition against government-funded appointed counsel. The *Jennings* Court warned against reading limitations into a statute where no such limitations exist, referring to this practice as "textual alchemy."<sup>124</sup> In fact, the Court provided a lengthy counterargument to Justice Breyer's dissent, which posited an alternative meaning for the term "detain." Referring to Justice Breyer's meaning as a "legal

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121. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) ("[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them."); see also *Wheat v. United States*, 486 U.S. 153, 159 (1988).

122. The Alien Terrorist Removal Court, which has not been used to date, however, does provide for appointed counsel explicitly: "Any alien financially unable to obtain counsel shall be entitled to have counsel assigned to represent the alien." 8 U.S.C. § 1534(c)(1) (2018).

123. See 8 C.F.R. § 292.5(b) (2019) ("[N]othing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.").

124. *Jennings*, 138 S. Ct. 830 at 846.

equivalent of a sleight-of-hand trick,” the majority explicitly identified Breyer’s interpretation of ‘detain’ as a “non sequitur,” stating: “Just because a person who is initially detained may later be released, it does not follow that the person is still ‘detained’ after his period of detention comes to an end.”<sup>125</sup> Likewise, limiting government expenses for legal representation in certain circumstances does preclude the use of government funds for appointed counsel in others. In fact, §§ 1229a(b)(4)(A) and 1332 make no mention of appointed counsel at all. This interpretation would be tantamount to a re-writing of the statute.

## 2. *Rights Under 1229a(b)(4)(A), (B), and (C) Are Distinct*

As the Supreme Court and scholars have repeatedly noted, immigration law is a complex legal specialty of its own.<sup>126</sup> Congressional enactments relating to immigration are replete with cross-references, making the body of law precise but confusing. As an example, the criminal grounds for removal in the immigration statutes is complex and contains multiple subsections, oftentimes cross-referencing other statutory provisions which themselves contain multiple subsections.<sup>127</sup> With little doubt, Congress’s use of the cross-reference is frequent and intentional. If Congress had intended to graft any funding limitations from 1229a(b)(4)(A) upon 1229a(b)(4)(B), it could have readily done so, as it frequently does elsewhere in the statutory scheme.<sup>128</sup> The Court has recognized that Congress speaks explicitly on issues when it has the intent to do so, and applied an assumption that Congress will legislate on major issues directly, rather than “hid[ing] . . . elephants in mouseholes.”<sup>129</sup> If Congress had intended for the government-funding limitation in subsection (A) to apply in subsection (B), it would have explicitly so stated or used language to unequivocally link the sections together.

Moreover, the three rights listed in Section 1229a(b)(4) contain no link or cross-reference to one another, allowing an important inference to be drawn: limitations found within the statutory text of one provision have no impact on—or connection to—the statutory text of another and, accordingly, have no ability to constrain its operation. Thus, with respect to Section 1229a(b)(4), subsection

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125. *Id.* at 849.

126. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); *Castro-Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (referring to the INA as “second only to the Internal Revenue Code in complexity”) (citing ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 107 (1985)); Beth J. Werlin, *Renewing the Call: Immigrants’ Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 414–17 (2000).

127. Rebecca Sharpless, *Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It’s Hard to Get Them*, 92 DENV. U.L. REV. 933, 941–42 (2015).

128. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1571 (2017) (noting that the INA explicitly cross-referenced certain federal criminal statutes to define certain terms in the statute, but did not cross-reference criminal statutes to define the age of consent for sex abuse of a minor; thus, the federal criminal statute could not be relied upon exclusively to define the term).

129. *EIG, supra* note 115, at 18 (quoting *Whitman v. Adm’r. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001)).

(B) operates independently from subsection (A). The two subsections are grouped together only as a list of required rights for individuals in a removal proceeding. Subsection (A)'s limitation that the government will not be obligated to pay for an individual's choice of a private attorney does not similarly restrict any other listed provisions. Thus, accommodations potentially required to ensure an individual's right to a fair hearing under subsection (B), such as the appointment of counsel, are not constrained by subsection (A).

As an alternative to the cross-reference technique, Congress could have organized the statute differently. Had Congress intended government funding restrictions from subsection (A) to be superimposed on subsection (B), it could have organized the statute in a way to make this apparent. Congress could have easily changed the organization slightly by incorporating the right to counsel provision as a subsection of the right to a fair hearing, instead of as a standalone right, distinguishable from and unrelated to the others.<sup>130</sup> On its face this appears trivial, but it would have yielded significant interpretative differences. Notwithstanding the fact that the language still would reference private, not appointed, counsel, perhaps a better argument could be made that Congress had intended to create a substantive limitation on the parameters of the fair hearing. But this is not how the text is arranged or drafted; as such, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," and thus "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"<sup>131</sup> Further, the provision and the statute's general purpose—to broaden the due process protections for noncitizens—is consistent with the interpretation that Congress did not intend to limit government funding for appointed counsel to ensure a fair hearing.<sup>132</sup>

### 3. Use of the Word "Shall" Supports Unambiguous Reading

*Jennings* and *Zadvydas* can be distinguished, in large part, due to Congress's word choice: the use of the word "shall" in *Jennings* evidenced a clear congressional intent to detain all individuals falling within a certain category until a certain event occurred ("further consideration of the application for asylum" under 1225(b)(1), or "a [removal] proceeding" under 1225(b)(2)).<sup>133</sup>

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130. Thus, a hypothetical statute could read:

(4) Alien's Rights in Proceeding . . .

(A) the Alien shall have a reasonable opportunity to examine . . . the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government . . .

(1) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings, and

(B) a complete record shall be kept of all testimony and evidence at the proceeding.

131. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted).

132. *See, e.g.*, S. REP. 81-1515, 624 (1950).

133. *Jennings*, 138 S. Ct. at 837 (2018).

The implication was that detention *must* continue until the end of the specified event. In *Zadvydas*, on the other hand, use of the word “may” suggested a degree of discretion.<sup>134</sup> 1231(a)(6) states that, after a removal order has been issued, the Attorney General has 90 days to effectuate this removal, during which time the individual *must* be detained.<sup>135</sup> After this period, however, certain individuals (falling within 1231(a)(6)) *may* be detained if they meet certain criteria.<sup>136</sup> The ambiguity in *Zadvydas* thus ensued largely from the use of the word “may,” which suggests discretion, but not unlimited discretion. Conversely, the provisions at issue here consistently make use of the word “shall,” which “usually connotes a requirement.”<sup>137</sup> The Attorney General thus has no discretion but is instead *required* to provide all individuals in removal hearings a fair hearing under 1229a(b)(4)(B). Since a textual reading has shown that no similar federal funding limitations exist for Section 1229a(b)(4)(B) as exist for Section 1229a(b)(4)(A), appointment of counsel is one plausible way of satisfying the fair hearing requirement for subgroups who cannot get a fair hearing any other way. Further, Congress envisioned only one exception to the rights listed under the fair hearing provision, restricting the right to examine evidence against a noncitizen that relates to national security information. Under the doctrine of “*expressio unis est exclusio alterius*,” the enumerated exception to the fair hearing requirement seems to suggest no other exemptions were intended.

C. “Reasonable Opportunity” Under 1229a(b)(4)(B) Presents the Only Potential for Ambiguity

Having established that the plain text of the statutory provisions at play places no funding limitations on the fair hearing requirement, the only question that remains is this: What constitutes a “reasonable opportunity” for UMs to obtain a fair hearing? At this juncture, congressional intent becomes less obvious. To be certain, the addition of the word “reasonable” before “opportunity” provides some clue as to Congress’s intent: a degree of flexibility according to individual circumstances must have been envisioned, or the standalone term “opportunity” would have sufficed.<sup>138</sup>

A cardinal rule of construction for textualist analysis is that the whole statute should be used as necessary, with various provisions being interpreted within its broader statutory context in a manner that furthers statutory purposes.<sup>139</sup> One could try to infer Congress’s intent by looking to other

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134. *Id.* at 843.

135. *Id.*

136. *Id.* at 844.

137. *Id.* at 16 (quoting *Kingdomware Tech. Inc. v. United States*, 136 S.Ct. 1969, 1977 (2016)).

138. *See, e.g., Bailey v. United States*, 516 U.S. 137, 146 (1995) (“We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.”) (rejecting interpretation that would have made “uses” and “carries” redundant in statute penalizing using or carrying a firearm in commission of offense).

139. *See* EIG, *supra* note 115, at 4.

provisions of the statute: did Congress provide additional safeguards for vulnerable groups elsewhere within the statute?<sup>140</sup> Under section 1229a, individuals with intellectual disabilities are given special accommodations when they cannot be physically present at their removal hearings, and this provision instructs the “Attorney General [to] prescribe safeguards to protect the rights and privileges of the [mentally incompetent] alien.”<sup>141</sup> Congress certainly recognized that individuals with minimal capability to understand and utilize their rights may require additional accommodations. Courts have likewise considered Congress’s instruction regarding the limited proficiencies of compromised groups and have in turn answered the call to provide additional due process to accommodate such deficiencies.<sup>142</sup>

As in *Zadvydas*, legislative research to determine congressional intent underlying the term “reasonable opportunity” would help to inform this inquiry.<sup>143</sup> The judicial contours of “reasonableness” have, as the next Part considers, been sculpted throughout the years and, in the process, courts have expanded the scope of due process by incorporating unenumerated rights as a means of ensuring fundamental fairness. After all, the *sine qua non* of due process is the flexibility to dispense “such procedural protections as the particular situation demands.”<sup>144</sup> This procedural flexibility was arguably codified by Congress’s choice of the term “reasonable opportunity.”

Here, that flexibility creates a lower limit with room for more protections when needed. Section 1229a(b)(4)(A) describes legal representation as a “privilege” and makes it clear that it applies to all people in removal proceedings (and in appeals as well). However, nothing in this text precludes other sections of the Act from affording greater protections for certain subgroups of noncitizens. In other words, the right to counsel provision creates a lower limit for *all* litigants in removal proceedings, and the right to a fair hearing provision creates supplemental due process rights for certain vulnerable groups who need more protection in the form of appointed counsel. When an entire class of litigants is unable to make use of their right to a fair hearing because they cannot

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140. In fact, courts have suggested as much. In *Matter of M-A-M*, 25 I. & N. Dec. 474, 481–82, & n.2 (B.I.A. 2011), the Board of Immigration Appeals suggested that UMs have limited capacities and may, as a group, fall within the category of “incompetent” and thus require additional safeguards in the form of altered courtroom procedure. It states, “Immigration Judges already alter or tailor the conduct of hearings in response to a respondent’s limited capacity, such as in proceedings involving unaccompanied minors.” *Id.*

141. 28 U.S.C. 1229a(b)(3) (2012).

142. See, e.g., *Matter of M-A-M*, 25 I. & N. Dec. at 481–82 & n.2 (acknowledging that children may have limited capacities and that Immigration Judges have discretion to accommodate children’s limited capacities by adjusting hearing procedures); see also *Franco-Gonzalez v. Holder*, CV-02211-DMG, 2013 U.S. Dist. LEXIS 186258, at \*12–13 (C.D. Cal. Apr. 23, 2013).

143. See *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). In *Zadvydas*, the Court relied on *United States v. Witkovich*, 353 U.S. 194 (1957), which discussed legislative history indicating Congress had expressed doubts regarding the constitutionality of detention for longer than six months. Thus, the court inferred that Congress intended a “reasonable” length of detention to mean six months or fewer.

144. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

understand the proceedings against them and therefore cannot present any meaningful defense to charges brought, the hearing cannot be deemed “fair” under Section 1229a(b)(4)(B), and other accommodations must be made to level the playing field and provide them access to this right.<sup>145</sup> The guarantee of a fair hearing is reduced to a hollow charade for UMs who cannot leverage this right without assistance: their impotence parallels the plight of paraplegic plaintiffs in *Tennessee v. Lane* who had a Fourteenth Amendment due process right of access to the courts but could not physically get to the higher levels of the courthouse because they were wheelchair-bound and the building had no elevator.<sup>146</sup> UMs cannot understand proceedings against them to sufficiently advocate on their own behalf and therefore require appointed counsel to ensure their statutory right to a fair hearing.

Grafting heightened requirements onto the fair hearing provision has certainly been done before and, in practice, gives meaning to the concept of a “reasonable opportunity” in the context of a removal hearing. Thus, §1229a(b)(4)(A) has been found to contain unenumerated rights when these rights are necessary to vindicate enumerated rights. For example, while the fair hearing provision of the INA does not mention translation services per se, immigration courts and federal courts alike have found that a hearing requires some translation services to ensure fairness.<sup>147</sup> In *Perez-Lastor v. INS*, the court created a threshold for the fairness calculus, stating that, for the proceeding to be fair, it “must be translated into a language the alien understands.”<sup>148</sup> Chronologically paralleling the *Perez-Lastor* decision, the Clinton administration in the late 1990s concluded a major initiative to provide Limited

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145. See, e.g., *Oshodi v. Holder*, 729 F.3d 883, 888–94 (9th Cir. 2013) (finding that an asylum applicant who is not allowed to testify as to the contents of his application, detailing the abuse he endured in his home country, did not receive a fair hearing); see also *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926–27 (9th Cir. 2007) (“Where an alien is given a full and fair opportunity . . . to present testimony and other evidence in support of the application, he or she has been provided with due process.”); *Shoaira v. Ashcroft*, 377 F.3d 837, 842 (8th Cir. 2004) (“For a deportation hearing to be fair, an IJ must allow a reasonable opportunity to examine the evidence and present witnesses.”).

146. See *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding Congress did not exceed congressional authority under U.S. CONST. amend XIV, § 5 when it enacted Title II of the Americans with Disabilities Act, and therefore affirming the denial of the state’s claim of sovereign immunity). Two paraplegics sued the state of Tennessee when it failed to make the state court system equally accessible to all. The Supreme Court found that the right of access to the courts was a fundamental due process right under the Fourteenth Amendment. See generally *Americans with Disabilities Act*, 42 U.S.C. § 12101(b)(1) (2018) (stating its purposes as: “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”). The ADA Amendments of 2008 stated Congress’s finding that “physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.” Pub. L. No. 110-325, § 2, 122 Stat. 3553 (2009).

147. See *Matter of Tomas*, 19 I. & N. Dec. 464, 465 (B.I.A. 1987) (“The presence of a competent interpreter is important to the fundamental fairness of a hearing.”); see also *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000).

148. *Perez-Lastor*, 208 F.3d at 778.

English Proficiency (LEP) individuals meaningful access to government agencies and federally funded services. This initiative culminated in an Executive Order requiring federal agencies to draft guidelines to ensure compliance with Title VI requirements of the Civil Rights Act of 1964, which prohibited recipients of federal funding from engaging in discrimination on the basis of race, religion, color, or national origin.<sup>149</sup> Since language is typically a proxy for national origin, Title VI has been held to protect LEP individuals from discrimination on the basis of language.<sup>150</sup>

Although translation services offer some protection to demystify proceedings, the scope of this protection is surprisingly limited. Most jurisdictions require interpreters in immigration proceedings to translate only questions asked directly to—and answers given by—respondents;<sup>151</sup> the rest of

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149. Exec. Order No. 13166, 65 Fed. Reg. 50, 121 (Aug. 11, 2000). The Executive Order is based on Title VI of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000d to -d7 (2018). The DOJ was tasked with implementing this order and issued guidance to other agencies identifying four factors to be used in determining the nature and scope of Title VI obligations with respect to LEP individuals: (1) the number or proportion of LEP individuals who are eligible to be served by the program; (2) the frequency of contact that LEP individuals have with the program; (3) the nature and importance of the program to LEP beneficiaries; and (4) the resources available to accommodate these needs. Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency: Policy Guidance, 65 Fed. Reg. 50, 123 (Aug. 16, 2000). Following further revision, final DOJ guidance was issued on June 18, 2002. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41, 455 (June 18, 2002). For a discussion of the scope and limits of President Clinton's LEP initiative, see Muneer Ahmed, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1016–19 (2007).

150. See *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that the San Francisco Unified School District violated Title VI by failing to provide adequate instruction for LEP children of Chinese descent). *But cf.* *Franklin v. District of Columbia*, 960 F. Supp. 394, 432 (D.D.C. 1997) (dismissing Title VI claims of Hispanic inmates who were disqualified from certain prison programs because disqualification was the result of limited English proficiency rather than race, color, or national origin). For further discussion of related caselaw, see JANE PERKINS, KAISER COMM'N ON MEDICAID & THE UNINSURED, ENSURING LINGUISTIC ACCESS IN HEALTH CARE SETTINGS: LEGAL RIGHTS AND RESPONSIBILITIES 4 n.19 (2d ed. 2003).

151. The practice of providing partial interpretation in immigration court proceedings, unless the immigration judge determines that full interpretation is necessary, has survived due process challenges. See *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742 (9th Cir. 1991) (holding that the policy of partial interpretation is facially constitutional under the Due Process Clause but remanding for other reasons). At least one court has implicitly found the practice of partial interpretation to violate due process, but it refused to order any relief for the violation. See *Tejeda-Mata v. INS*, 626 F.2d 721, 726–27 (9th Cir. 1980) (holding implicitly that the immigration judge's refusal to permit simultaneous interpretation of testimony against a noncitizen in deportation proceedings violated the Due Process Clause, but that the violation constituted harmless error). The Board of Immigration Appeals has revealed pragmatic concerns regarding the provision of translation services:

Although an alien in exclusion or deportation proceedings is entitled to a fair hearing, we do not find that due process requires translation of the entire hearing. In most cases, all that need be translated are the immigration judge's statements to the alien, the examination of the alien by his counsel, the attorney for the [Immigration and Naturalization Service], and the immigration judge, and the alien's responses to their questions. However, the immigration judge may determine, in the sound exercise of his discretion, that the alien's understanding of other dialogue is essential to his ability to assist in the presentation of his case. For

the proceeding is largely a mystery to individuals whose very lives often lie in the balance. Individuals in immigration proceedings need accommodation beyond literal statutory boundaries to ensure a fair hearing.

Under 1229a(b)(4)(B), courts have also found that timely production of adverse evidence is an implicit aspect of the right to a fair hearing. The *Bondarenko* court found that a “reasonable opportunity to examine the evidence” presumed that evidence must be disclosed to individuals in immigration proceedings to ensure their right to a fair hearing.<sup>152</sup> Immigration regulations also require that notice of the right to counsel be given to individuals in removal hearings.<sup>153</sup> Effectively, where there had been only one enumerated right under the INA (the right to counsel), regulations have created an additional unenumerated due process right—the right to be made aware that one has a right to counsel. This regulation reflects an implicit understanding that a right is ineffective without knowledge that one possesses it.

The right to a fair hearing is similarly impaired when individuals cannot effectively participate in it. Just as the rights to a fair hearing and to asylum have narrow use and little value without additional due process protections such as adequate notice procedures and interpretation services, the right to a fair hearing for UMs goes wholly unclaimed without the right to appointed counsel when necessary. A hearing is inherently unfair without proper accommodations where (1) an unaccompanied child lacks cognitive and emotional skills due to their young age, and (2) because of this cannot exercise statutory rights, including the

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example, where a witness testifies regarding factual matters which specifically relate to the alien’s own testimony, effective cross-examination may necessitate translation of the witness’s testimony. On the other hand, arguments presented by counsel and the rulings of the immigration judge are primarily legal matters, the translation of which generally would not be required where the alien is represented and the protection of his interests is ensured by counsel’s presence.

Matter of Exilus, 18 I. & N. Dec. 276, 281 (B.I.A. 1982) (citations omitted); *accord* Matter of Tomas, 19 I. & N. Dec. 464 (B.I.A. 1987) (finding that, where respondents are not fluent in English, the presence of a competent interpreter is essential to assure fundamental fairness, particularly in phases of the proceeding that require the respondents’ meaningful participation).

152. *Bondarenko v. Holder*, 733 F.3d 899, 907 (9th Cir. 2013) (citing *Cinapian v. Holder*, 567 F.3d 1067, 1075 (9th Cir. 2009)) (holding that DHS’s failure to disclose forensic reports in advance of a hearing or to make the author available for cross-examination and the IJ’s subsequent consideration of the reports denied the petitioners a fair hearing). *But cf.* *Lyon v. ICE*, 171 F. Supp. 3d 961, 977 (N.D. Cal. 2016) (“[T]he INA does not expressly address the process of gathering . . . evidence. Neither the language of the statute (which provides only for the reasonable opportunity to *present* evidence) nor any existing case precedent cited . . . supports [an] expansive reading of the INA that would provide for a general right to investigate and gather evidence in advance of and in preparation for a removal hearing.”) (emphasis in original).

153. 8 C.F.R. §§ 1240.10(a)(1)–(3) (2019) (“[T]he immigration judge shall: (1) Advise the respondent of his or her right to representation . . . and require the respondent to state then and there whether he or she desires representation; (2) Advise the respondent of the availability of free legal services . . . located in the district where the removal hearing is being held; (3) Ascertain that the respondent has received a list of such programs.”).

rights to testify, cross-examine witnesses, and execute strategic determinations necessary in a case.<sup>154</sup>

There are other instances where courts have effectively created a previously unrecognized and unenumerated right to vindicate an enumerated statutory right. DHS was recently ordered to adopt and implement uniform procedural mechanisms to give individuals in DHS custody adequate notice of a one-year asylum time limit to ensure that they could file for asylum in a timely manner.<sup>155</sup> In a decision reminiscent of *Miranda v. Arizona*,<sup>156</sup> the Western District of Washington in *Mendez Rojas v. Washington* effectively grafted an unenumerated right directly onto asylum statutory provisions, safeguarding the right to asylum by mandating explicit and uniform notice procedures for a vulnerable group of litigants.<sup>157</sup>

The examples above illustrate that noncitizens in removal proceedings have very real due process rights, that these rights extend far beyond the bare statutory rights itemized in the INA, and that the accompanying rights to notice and access are often implied in statutory due process rights. An enumerated statutory right without the power to access it or the notice that one indeed possesses it has little practical value, but instead frustrates congressional intent by denying UMs the very statutory rights conferred upon them under the INA and the TVPRA.<sup>158</sup>

For UMs as a class of noncitizen, the right to a fair hearing guaranteed under § 1229a(b)(4)(B) cannot be vindicated *without* appointed counsel paid for, when necessary, by the government. This right to appointed counsel is the only means of ensuring that UMs' opportunity to defend against removal charges rises to the standard of *reasonableness* created by Congress. This need for appointed counsel could be mitigated by the holding, adopted by some circuits, that Immigration Judges have an affirmative obligation to fully and fairly develop the

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154. Even though the Ninth Circuit ultimately denied a minor petitioner's claim that the fair hearing provision of the INA or the Due Process clause create a categorical right to appointed counsel for minors as a group, Judge Owens, concurring, contemplated the likelihood of a different outcome resulting from the special circumstances faced by UMs. *See C.J.L.G. v. Sessions*, 880 F.3d 1122, 1151 (9th Cir. 2018).

155. *Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176, 1188 (W.D. Wash. Mar. 29, 2018). With limited exceptions, an individual must apply for asylum within one year of the date of the immigrant's arrival in the United States. 8 U.S.C. § 1158 (a)(2)(B) (2018).

156. *Miranda v. Arizona*, 384 U.S. 436, 468, 498 (1966) (holding that notice of one's Fifth Amendment rights must be given prior to police interrogation to adequately safeguard these rights, and discussing the "fundamental" nature of one's Fifth Amendment right to the system of constitutional rule, as compared with the simplicity of providing adequate notice of that right).

157. In *Mendez*, the court explicitly relied on the vulnerable nature of those applying for asylum in requiring a uniform procedure for providing asylum rights. The court stated that the compromised nature of those seeking asylum was an important consideration in this case, since litigants "ha[d] suffered severe trauma, d[id] not speak English, [we]re unfamiliar with the United States' complicated immigration legal system, and d[id] not have access to counsel." *Mendez*, 305 F. Supp. 3d at 1185.

158. William Wilberforce Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1232 (2018) (strengthening federal human trafficking laws and adding provisions to govern and protect unaccompanied children entering the United States).

record for appeal, particularly for *pro se* litigants.<sup>159</sup> Nevertheless, the expectation that one individual could simultaneously play the role of advocate, factfinder, and arbitrator seems questionable at best.<sup>160</sup> No amount of impartiality on behalf of a decision maker could overcome the many disadvantages faced by UMs: their young age; their unfamiliarity with the English language and U.S. customs more generally; the complexity of immigration law; the lack of an advocate, family member, or friend; and the reality that many UMs have experienced a high degree of physical or psychological trauma.

Considering the severity of the consequence for those affected, UMs deserve every opportunity to pursue and potentially succeed in each claim they can advance.<sup>161</sup> Part III will therefore be guided by the following inquiry: When does a hearing require appointed counsel in order to make it fundamentally fair? Part III traces the development of the appointment doctrine over the past century,

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159. See *Jacinto v. INS*, 208 F.3d 725, 734 (9th Cir. 2000) (holding that immigration judges are obligated to fully develop the record in those circumstances where applicants appear without counsel); see also 8 U.S.C. § 1229a(b)(1) (providing that the IJ “shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses”).

160. See Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 VILL. L. REV. 787, 812–15 (outlining how the role of the IJ has evolved over time in an effort to imbue the role with additional impartiality, but acknowledging the lingering questions that persist in spite of these attempts); *id.* at 814 n.145 (compiling related scholarship addressing the need for further reform relating to the impartiality of IJs).

161. The constitutional and statutory due process rights of UMs should be thought of distinctly and be parsed liberally in order to fully explore and exhaust all distinct claims for fair process. Failure to bifurcate statutory and constitutional lines of argument and to dissect differences that result from each line may result in critical miscarriages of justice, particularly in the case of vulnerable groups like UMs who have heightened statutory rights under the TVPRA. For UMs, given their inherent vulnerabilities and the congressionally fortified statutory scheme designed to protect them, an independent examination of the statutory and constitutional underpinnings of a right to a fair hearing has the potential to yield real differences in outcome. Even if INA provisions were designed to be exactly coextensive with constitutional due process protections, UMs’ unique circumstances—in conjunction with real differences in circuit-court approaches, constitutional interpretations, and eventual outcomes—result in patchy, conflicting holdings and uncertainty for litigants. This state of uncertainty is likely to persist while appeals courts wait for the Supreme Court to take on a case which will create more uniform standards and guidelines. At least one recent case has engaged in the multifaceted and thornier process of teasing out statutory and constitutional arguments; in so doing, the court acknowledged, first, the singularity of arguments originating in statutory versus constitutional rights, and, second, that distilling these distinct lines of argument can truly be outcome-determinative. *Lyon v. ICE*, 171 F. Supp. 3d 961 (N.D. Cal. 2016). The court construed the statutory language under both Section 1229a(b)(4)(A) and (B) narrowly, refusing to hold that limitations on detainees’ ability to make phone calls to attorneys amounted to a denial of counsel under the statute, or that the right to a reasonable opportunity to present evidence included a more expansive right to *gather* evidence. *Id.* at 974–77. However, the court found that noncitizen detainees had a Fifth Amendment right to a full and fair hearing, which included the right of *access* to counsel. This access was found to be implicated by government regulations that limited telephone calls to counsel, particularly for detainees in *Lyon*, who were not in close physical proximity to their attorneys. *Id.* at 981 (“Plaintiffs contend that phone conditions have impaired their right to gather and present evidence in *defending themselves* against the government’s effort to deport them. In this context, detainees have a Fifth Amendment guarantee to a full and fair hearing and this includes access to counsel (of their own choosing).”) (emphasis in original).

creating a “roadmap” to help identify the trends and factual scenarios that justify appointing counsel to ensure a hearing’s fairness in cases arising under the Fifth, Sixth, or Fourteenth Amendments. Finally, Part IV positions removal hearings for UMs on this roadmap, even though they do not seem to fit comfortably into any one approach or factual scenario. These parts provide what we deem to be the best way of arriving at a categorical statutory right to appointed counsel based on a positive liberty interest and the weighing of the factors identified and repeatedly stressed in the caselaw.

### III.

#### WHEN DOES A HEARING REQUIRE APPOINTED COUNSEL TO ENSURE FUNDAMENTAL FAIRNESS?

The appointment doctrine first emerged in the context of criminal trials, mainly because of concerns relating to an imbalance of power and knowledge at trial combined with the potential for a significant impairment of personal liberty in the form of prison time. The doctrine has evolved over the past century, gradually expanding into the realm of the modern administrative state, where the rules for its application, under the Fifth or Fourteenth Amendments, are considerably more blurred.<sup>162</sup> Part III examines caselaw in the criminal, quasi-criminal, and civil contexts to identify the factors that sway a court to justify a holding that a categorical right to appointed counsel is warranted. As this part will show, the Sixth Amendment rights have traditionally been easier for the court to rationalize since the loss of a liberty interest (due to penal institutionalization) is clear. Even cases that fall outside of the purview of the Sixth Amendment use the same general criteria to determine whether a hearing requires appointed counsel to ensure fairness. However, courts grapple extensively with the *scope* of this right under the 5th Amendment.

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162. While immigration statutes deal exclusively with federal issues and are therefore unequivocally subject to federal law, cases included in the following discussion address rights emerging from the Fifth, Sixth, and Fourteenth Amendments. Under federal law, these rights arise directly from the text of the Sixth Amendment; under state law, the right finds its origins in the Due Process clause of the Fourteenth Amendment. The Fourteenth Amendment caselaw is included for a number of reasons. First, and most generally, we attempt to illustrate the Supreme Court’s evolving view of the centrality of the right to fair criminal and quasi-criminal process. Second, it allows for a more complete and thorough understanding of how the doctrine might be applied to a wider array of criminal and quasi-criminal factual scenarios. The Fourteenth Amendment caselaw is also useful simply because there is more of it. Further, it presents more opportunities to refine the outer edges of the doctrine, since much of the caselaw originates in state statutes addressing topics like delinquency proceedings, termination of parental rights, failure to pay child support resulting in civil contempt, and transfer of prisoners to mental health facilities. These are exactly the “shades of gray” factual scenarios that help to define and refine the doctrine’s exact boundaries, both in terms of what qualifies as civil or criminal and in terms of how expansive and inclusive the term “liberty interest” is. Finally, the inclusion of the entire body of Supreme Court caselaw allows for a more expansive search to find a set of facts that parallel the actual circumstances faced by UMs in a removal hearing, which, though termed “civil,” is better understood as an amalgamation of civil and criminal components.

*A. Criminal Cases Almost Always Require a Categorical Right*

UMs, a class of children whose plight closely parallels the dire conditions faced by indigent criminal defendants, would derive the most benefits from a categorical right to appointed counsel, a right which has taken many decades to evolve even in criminal cases. At the time that the INA was passed in 1952, the idea of the judiciary requiring appointed counsel to criminal defendants who could not otherwise afford it was a relatively new concept.<sup>163</sup> A criminal defendant's right to appointed counsel under the Sixth Amendment—applied to the States through the Due Process Clause of the 14th Amendment—first emerged and later was expanded to entire categories of defendants in the Supreme Court jurisprudence of the 1930s.<sup>164</sup>

*Powell v. Alabama* was the Supreme Court's first opportunity to consider whether due process requires the State to appoint counsel under the Sixth and Fourteenth Amendments.<sup>165</sup> The *Powell* court held that State courts have a duty to appoint counsel to criminal defendants charged with a capital offense who are unable to make their own defense.<sup>166</sup> Relying on, among other things, defendants' youth, illiteracy, ignorance, and distance from families and friends, the court stated:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge to prepare his own defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.<sup>167</sup>

The Court underscored the importance of the right to be heard by counsel even in civil cases, finding that the elements of a fair hearing would not be met if a litigant were denied the right to be heard by counsel.<sup>168</sup>

If *Powell* alluded to the severe imbalance of knowledge, experience and power that can often result for an unrepresented defendant in a criminal trial,

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163. See Good, *supra* note 11, at 115–20 (summarizing the history of the source of the right to appointed counsel in the criminal context).

164. *Id.*

165. *Powell v. Alabama*, 287 U.S. 45 (1932).

166. *Id.* at 71.

167. *Id.* at 68–69.

168. *Id.* at 69 (“If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.”).

*Johnson v. Zerbst* elucidated the injustice of having a trained and experienced State attorney pitted against an untrained and unrepresented defendant:

[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious.<sup>169</sup>

Relying on the discrepancy of power and knowledge between unrepresented defendants and prosecuting attorneys, the Court thus held that *all* defendants in federal criminal prosecutions have a Sixth Amendment right to court-appointed counsel.<sup>170</sup>

The categorical expansion of the right to appointed counsel was short-lived. In the early 1940s, *Betts v. Brady*,<sup>171</sup> since overruled, adopted a case-by-case approach to whether the Sixth Amendment should be applied to the States, citing federalism concerns:

The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth [Amendment].<sup>172</sup>

*Betts* made clear that the decision of whether to appoint counsel to criminal defendants should be left to the States as a matter of legislative policy.<sup>173</sup> Absent a categorical mandate, courts over the next two decades employed a “special circumstances” approach under *Betts* for determining whether appointed counsel was necessary to ensure fundamental fairness in a criminal proceeding.<sup>174</sup>

The *Betts* court began carving out the nature of these special circumstances in more detail. The defendant in *Betts* was accused of robbery and requested to have counsel appointed for him for lack of funds. This request was denied, as was custom in Maryland since appointment of counsel was reserved for cases of murder and rape.<sup>175</sup> In reaching the conclusion that the circumstances of the case did not offend the Due Process Clause’s requirement of fundamental fairness, *Betts* reasoned that the accused defendant’s age and average intellect, as well as his previous experience of having been convicted of larceny in criminal court,

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169. *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938).

170. *Id.* at 463.

171. *Betts v. Brady*, 316 U.S. 455 (1942).

172. *Id.* at 461–62.

173. *Id.* at 471.

174. See Good, *supra* note 11, at 118.

175. *Betts*, 316 U.S. at 456–57.

constituted the special circumstances that did not warrant state appointment of counsel.<sup>176</sup> Further, the defendant's case was based on an alibi defense, and "[t]he simple issue was the veracity of the testimony for the State and that for the defendant."<sup>177</sup>

The *Betts* approach prevailed for the next two decades, allowing States to avoid having to categorically assign counsel to indigent defendants so long as "special circumstances" were present. The "special circumstances" inquiry allowed for a case-by-case application of the appointment doctrine in criminal cases and was focused largely on two factors: the complexity of the issues at play and the capability of the defendant.

This approach prevailed until the Warren Court had the opportunity to expand the scope of appointment doctrine under the Sixth Amendment to a categorical right. The Warren Court breathed life into the Fourteenth Amendment's Equal Protection and Due Process Clauses by applying them, as had been intended, to the States.<sup>178</sup> Warren believed it was the judiciary's responsibility to enforce constitutional liberties and guarantees, and to take on cases that addressed the social inequalities Americans were experiencing at the time.<sup>179</sup> He was clear in his position that the Constitution should be interpreted in light of the "evolving standards of decency that mark the progress of a maturing society."<sup>180</sup>

In 1963, *Gideon v. Wainwright* expanded the application of the Fourteenth Amendment to individual states. It found that the Sixth Amendment mandates a

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176. *Id.* at 472–73.

177. *Id.*

178. In 1953, President Eisenhower appointed Earl Warren as Chief Justice of the Supreme Court, where he remained until he retired in 1969. Chief Justice Warren presided over the Court during a period of great unrest and uncertainty in the United States. The Fourteenth (and Fifteenth) Amendments had created a series of rights and guarantees for African Americans that had been largely unfulfilled in many Southern States, resulting in policies of systemic, institutionalized racism. The demand for justice coalesced into a unified civil rights movement across the country. The Cold War and the nuclear arms race were causing escalating tensions between Russia and the United States, and McCarthyism had reached its heyday as congressional committees tried to root out communists and communist sympathizers with little regard to civil liberties. For historical perspective on the Warren Court, see generally Michael Anthony Lawrence, *Justice-as-Fairness as Judicial Guiding Principle: Remembering John Rawls and the Warren Court*, 81 BROOK. L. REV. 673 (2016).

The 14th Amendment was intended, among other things, to apply the protections of the individual rights found in the 5th Amendment to the States, and to ensure that the Bill of Rights would apply to state or local law and to all government actors. *Id.* at 707. "Yet by the time Earl Warren joined the Court in 1953, only a handful of Bill of Rights provisions had been applied to the states. In the 18-year span from when Earl Warren became Chief Justice until two year after his 1969 retirement, by contrast, the Court incorporated an additional dozen provisions (mostly involving criminal procedure)." *Id.*

179. *See id.* at 692.

180. *Id.* at 697.

categorical right to appointed counsel for indigent defendants accused of a felony in all state criminal cases:<sup>181</sup>

Not only [pre-*Betts* precedents] but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.<sup>182</sup>

*Gideon* notably defined a trial's "fairness" directly in terms of the defendant's right to counsel. In other words, in a criminal setting at least, a trial would not be deemed "fair" *unless* counsel were present to protect against the defendant's potential loss of liberty. Fairness had been functionally tied to the presence of counsel for the purpose of leveling the playing field in adversarial situations when an individual's personal liberty was at stake. Despite officially coupling its reasoning to the Sixth Amendment, *Gideon* nevertheless advanced some support for an argument in favor of appointed counsel under the Fifth Amendment due to both amendments' concern for the underlying notion of fairness.<sup>183</sup>

*Argersinger v. Hamlin*, decided just two years after Warren retired as Chief Justice, was the highwater mark for the expansion of the right to appointed counsel under the Sixth Amendment. In that case, the Court held that appointment of counsel for indigent defendants applied not just for felonies but for petty and misdemeanor offenses as well.<sup>184</sup> The *Argersinger* court reiterated some of the factors it deemed paramount to securing a fair trial justifying the appointment of counsel, including the prejudice that can accompany trials where defendants are unrepresented, the deprivation of liberty involved, and the accompanying harms to the individual that may result after imprisonment.<sup>185</sup>

The shift from a case-by-case approach in *Betts* to the categorical right to appointed counsel established by *Gideon* illustrates one way that due process

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181. *Gideon v. Wainwright*, 372 U.S. 335 (1963). For a discussion of using and extending the logic of *Gideon* as an essential starting point to ensure fairness for removal hearings, particularly for vulnerable groups, see generally Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation and the Right to Counsel*, 39 HUM. RTS. 14 (2013).

182. *Gideon*, 372 U.S. at 344.

183. See, e.g., Werlin, *supra* note 126, at 400 ("Although the Sixth Amendment did not apply to deportation proceedings, the reasoning adopted by the Supreme Court in *Gideon* lends support to a right to appointed counsel under the Fifth Amendment since both Amendments encompass underlying concerns about fairness."); see also William Haney, *Deportation and the Right to Counsel*, 11 HARV. INT'L L.J. 177, 184-85 (1970).

184. *Argersinger v. Hamlin*, 407 U.S. 25, 34-37 (1972) (discussing the importance of and concern for fairness, especially when considering the volume of cases and the need for speediness in the misdemeanor docket).

185. *Id.*

rights can evolve: categorical rights sometimes find their origins in the hard-fought battles of highly vulnerable groups or individual defendants.<sup>186</sup> What begins as a right for some, can blossom into a right for all. As Justice Harlan noted in the concurrence in *Gideon*, “The Court has come to recognize . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.”<sup>187</sup>

Just three years after *Gideon*, the Supreme Court had the opportunity to again address the importance of fairness to the appointed counsel determination, but this time in a civil context for precisely the group of particularly vulnerable defendants whose rights are in question here: children.

*B. Quasi-Criminal Cases, Especially for Vulnerable Classes, Sometimes Require a Categorical Right*

When civil hearings jeopardize the physical liberty of children in the same way criminal hearings do, and the hearings are both adversarial and imbalanced, appointed counsel is the only means of ensuring due process. Just four years after *Gideon* was decided, the Warren Court extended the appointment doctrine even further when it decided in *Gault* that children in state civil delinquency proceedings should be afforded the same right to appointed counsel,<sup>188</sup> not under the Sixth Amendment but under the Due Process clause of the Fourteenth Amendment instead. Even though the Sixth Amendment limits the scope of the right to counsel to *criminal* defendants, the Supreme Court seemed to suggest that if a civil proceeding implicated the same liberty interests as a criminal proceeding, the same rights afforded to a criminal defendant must be provided in order to comport with the minimal constitutional requirements of Due Process:

A proceeding where the issue is whether the child will be found to be “delinquent” and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. 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. The child requires “the guiding hand of counsel at every step in the proceedings against him.”<sup>189</sup>

The facts of *Gault* involved a fifteen-year-old boy named Gerald who, while on probation for another offense, was accused of making lewd comments via telephone to a neighbor.<sup>190</sup> Gerald was immediately brought to a detention

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186. See Good, *supra* note 11, at 119 (“The transition from *Betts* to *Gideon* indicates also that the rights of particularly vulnerable defendants sometimes constitute the seeds from which a more robust categorical right to counsel later sprouts.”).

187. *Gideon*, 372 U.S. at 351 (Harlan, J., concurring).

188. See *In re Gault*, 387 U.S. 1, 4 (1967).

189. *Id.* at 36 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

190. *Id.* at 4.

home and held for at least three days.<sup>191</sup> After determining that he was “delinquent,” a judge committed Gerald to a juvenile detention home for a period of six years until he was twenty-one.<sup>192</sup> Appellants, Gerald’s parents, challenged the constitutionality of the Juvenile Code of Arizona, asserting that Gerald’s due process rights to receive notice of the charges, have the assistance of counsel, confront and cross-examine witnesses against him, and refrain from self-incrimination were abrogated under the circumstances.<sup>193</sup>

*Gault* provides a succinct history of the development of the civil delinquency system for juveniles. The delinquency system was developed on the notion that children are “essentially good” and should not be made to feel that they are under arrest or on trial in the same way that an adult would; in fact, the rules of criminal procedure do not even apply in juvenile court.<sup>194</sup> Instead, the court was intended to act as a parent, and the child was to be “treated” and “rehabilitated” rather than punished. Due process rights for the child did not exist because the child had no right to liberty, but rather only a right to “custody,” which the state could take over if the child’s actual parent had failed in their duties and allowed the child to become delinquent.<sup>195</sup>

Throughout the opinion, the Court suggests that the touted differences between civil juvenile delinquency proceedings and adult criminal proceedings may be little more than lip service to a gentler, rehabilitative justice system that never existed. In fact, the Court minimized the significance of the civil characterization of delinquency proceedings, referring to this endeavor as “[a] feeble enticement of the ‘civil’ label-of-convenience which has been attached to juvenile proceedings.”<sup>196</sup> The Court noted that the judge’s interactions with Gerald were hardly distinguishable from a judge’s interaction with a criminal defendant.<sup>197</sup> Further, the deprivation of liberty involved with commitment to a delinquency home closely resembled a penal sentence in an adult penitentiary.<sup>198</sup> Where defendants are highly vulnerable and a hearing is virtually

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191. *Id.* at 6 n.2.

192. *Id.* at 7–8.

193. *Id.* at 9–10.

194. *Id.* at 15.

195. *Id.* at 17.

196. *Id.* at 49–50 (discussing the Fifth Amendment’s applicability to civil delinquency proceedings and holding that the right against self-incrimination applies to children in such proceedings).

197. *Id.* at 28 (“Indeed, so far as appears in the record before us, except for some conversation with Gerald about his school work and his ‘wanting to go to the . . . Grand Canyon with his father,’ the points to which the judge directed his attention were little different from those that would be involved in determining any charge of violation of a penal statute.”).

198. *Id.* at 27 (“The fact of the matter is that, however euphemistic the title, a ‘receiving home’ or an ‘industrial school’ for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time . . . Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and ‘delinquents’ confined with him for anything from waywardness to rape and homicide.”).

indistinguishable from a criminal proceeding,<sup>199</sup> due process will require appointed counsel to protect the right to liberty, at least in the absence of a knowing and intelligible waiver. In fact, just twenty-five years earlier, the court had recognized that the vulnerability of certain defendants “by reason of age, ignorance, or mental capacity” could compel heightened due process protections like appointed counsel.<sup>200</sup>

Furthermore, while the premise of juvenile delinquency proceedings rests on the assumption that the child is handed over to the State because parents have failed in their duty to effectively perform their custodial functions, this clearly was not the case in *Gault*. Appellants in *Gault* were Gerald’s parents, even though the due process rights they sought to enforce belonged to their son. Unlike in *Powell*, where family and friends were too distant to be of any help,<sup>201</sup> Gerald’s parents were not just present but were closely involved and supportive of Gerald at his hearings. Yet, parental availability and even Mrs. Gault’s *actual* knowledge that she could have appeared with counsel at the juvenile hearing were no substitute for the minimal requirements of due process:

Mrs. Gault testified that she knew that she could have appeared with counsel at the juvenile hearing. This knowledge is not a waiver of the right to counsel which she and her juvenile son had, as we have defined it. They had a right to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel they were entitled, in view of the seriousness of the charge and the potential commitment, to appointed counsel, unless they chose waiver. Mrs. Gault’s knowledge that she could employ counsel was not an “intentional relinquishment or abandonment” of a fully known right.<sup>202</sup>

Mrs. Gault’s knowledge of her son’s right to counsel did not suffice to satisfy her or her son’s due process right. Even in a civil context and absent a knowing waiver, children and parents must be notified that counsel will be appointed to those who cannot afford it if the juvenile’s liberty may be severely curtailed.

The opinion also discusses the value of adversary methods in fact-finding and distillation of the truth:

[T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation

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199. The Court says as much prior to reaching its holding that there is a right to appointed counsel in delinquency cases: “There is no material difference in this respect between adult and juvenile proceedings of the sort here involved.” *Id.* at 36.

200. See *Wade v. Mayo*, 334 U.S. 672, 684 (1948). The facts and circumstances in *Wade* led the Supreme Court to hold that the district court made no clear error when it found that the failure to appoint counsel for an eighteen-year-old when he was an inexperienced youth incapable of representing himself, even when there were no complicated legal questions, was a denial of due process under the Fourteenth amendment.

201. See *supra* discussion of *Powell* Part III.A.

202. *In re Gault*, 387 U.S. at 41–42.

of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data.<sup>203</sup>

Where liberty interests at stake are vital and litigant capability is low, the integrity of the fact-finding process is especially important.

The decision sharply criticized the Arizona Supreme Court's argument that parents and probation officers may be relied upon to protect the child's best interest.<sup>204</sup> The court discarded the notion that a probation officer could ever play such a role when they act as arresting officers, bring delinquency charges against the child, and act as witness against the child.<sup>205</sup> The court likewise dismissed the judge as a potential child advocate since the adjudicatory procedure is in line with adult criminal proceedings.<sup>206</sup> Interestingly, the Court never addressed whether Gerald Gault, who, in the court's own words, "appear[ed] to have a home, a working mother and father, and an older brother,"<sup>207</sup> could have effectively used his parents as advocates for his best interests. The Court's holding implicitly rejected this notion, however.

Under the facts of *Gault*, even when dedicated, supportive parents are available to act as a child's advocate, constitutional mandates of due process require that attorneys alone are qualified to advocate on behalf of children in civil hearings resembling criminal ones. In other words, *Gault* stands for the proposition that a civil hearing that closely approximates a criminal proceeding, in the magnitude of its physical liberty consequences, adversarial nature, and serious imbalance of power and knowledge between state attorneys and a lone defendant, must afford the same due process protections. This is particularly true in quasi-criminal scenarios, where appointed counsel is required to level the playing field to restore the element of fairness to the trial when the capacities of the litigants are restricted.

### C. Civil Cases Require a Categorical Right Much Less Frequently

The modern-day appointment doctrine and the requirements of a fair hearing in the civil setting developed alongside the rise of the modern administrative state, as an effort to guide courts in determining what procedural process was due to individuals being deprived of a government entitlement or a liberty interest.<sup>208</sup> The doctrine is guided largely by *Goldberg v. Kelly* and *Mathews v. Eldridge*, cases that dealt with the application of the Fifth

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203. *Id.*

204. *Id.* at 34–37.

205. *Id.* at 36.

206. *Id.*

207. *Id.* at 28.

208. See Jason Parkin, *Due Process Disaggregation*, 90 NOTRE DAME L. REV. 283, 288–89 (2014).

Amendment Due Process Clause in the contexts of welfare and Social Security disability benefits respectively.<sup>209</sup>

While not dealing with the appointment doctrine per se, *Mathews* nevertheless addressed the need for and the timing of evidentiary hearings in disability cases.<sup>210</sup> Further, it solidified a set of factors to be weighed and balanced in ascertaining the adequacy of due process in administrative hearings.<sup>211</sup> Courts do not uniformly adopt and apply *Mathews* in appointment cases, however, and the analysis in immigration cases often proceeds under the Sixth Circuit test outlined in *Aguilera*,<sup>212</sup> which relies heavily on *Gagnon v. Scarpelli*, a Supreme Court case addressing the due process rights of a probationer.<sup>213</sup> A mix of approaches ensued, yet definite themes have emerged. This Part identifies and integrates common strands running between distinct factual circumstances and distills factors required to warrant a categorical right to appointed counsel.

1. *Gagnon, Aguilera, Mathews, and Lassiter: A Categorical Right Hinges on a Loss of Physical Liberty*

At issue in *Gagnon v. Scarpelli* was whether a man whose probation was revoked required appointed counsel to ensure the fundamental fairness of the hearing. The Court declined to find that the State was constitutionally obligated to categorically appoint counsel, but instead adopted a case-by-case standard because it was more flexible and because the Court found that the need for counsel was the exceptional case rather than the rule.<sup>214</sup> The Court provided guidance to help identify those exceptional situations where counsel might be required, stressing that counsel should be appointed in cases where the probationer either denied violating probation or claimed circumstances that might justify or mitigate the violation. The Court directed the decision-making agency to take into consideration the complexity of—or difficulty in presenting—the subject matter and probationers’ capability of speaking effectively for themselves.<sup>215</sup> The *Gagnon* decision supports an ancillary, albeit implied, conclusion: if typical litigants in probation revocation hearings do not require appointed counsel because the issues are not highly complex and they are able to speak effectively for themselves, would a *categorical* right to appointed counsel be justified if typical litigants in a group could *not* effectively speak for themselves with respect to characteristically complex issues?

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209. See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

210. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (summarizing *Mathews v. Eldridge*).

211. *Id.*

212. *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975).

213. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

214. *Id.* at 790.

215. *Id.* at 790–91.

The Sixth Circuit in *Aguilera* adopted the logic of *Gagnon*'s case-by-case approach in the removal context, holding that, for an indigent immigrant, the test for due process "is whether, in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness, the touchstone of due process.'"<sup>216</sup> Ultimately, the court found that an attorney could have done nothing to change the final result that *Aguilera* should be deported because of his prior narcotics conviction. The court, however, dropped a footnote of great significance, stating that "[w]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense . . . Otherwise, 'fundamental fairness' would be violated."<sup>217</sup>

Just two years later, *Mathews* directed courts to weigh three factors to determine the sufficiency of due process in administrative hearings:

- (1) the private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards;
- and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.<sup>218</sup>

Where the procedural protection at stake is appointed counsel, *Lassiter v. Department of Social Services* adds a wrinkle to the *Mathews* calculus. Under *Lassiter*, to find that an entire group of litigants has a categorical right to appointed counsel, "[a court] must balance [the *Mathews*] elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom."<sup>219</sup> *Lassiter* was certainly controversial in its holding that an indigent, uneducated woman at risk of having her child permanently taken away from her, in an adversarial setting and pitted against the state's attorneys, has no right to an appointed lawyer.<sup>220</sup> However, it reflects the Court's underlying views about appointed counsel—physical liberty is key to the Court's analysis when appointing counsel to entire groups of litigants in a civil context.<sup>221</sup>

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216. *Aguilera-Enriquez*, 516 F.2d at 568 (quoting *Gagnon*, 411 U.S. at 790).

217. *Id.* at 568 n.3.

218. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

219. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981).

220. *See generally id.*

221. *See, e.g.,* Beverly Balos, Edward v. Sparer *Symposium: Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context: Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. CIV. RTS. L. REV. 557, 593 ("In withholding appointed counsel from the petitioner in *Lassiter*, the Court relied on a limited definition of physical liberty. The Court cited selected cases which implied that, for due process purposes, the deprivation of one's physical liberty and personal freedom is generally associated with instances of incarceration or civil commitment.") (arguing in favor of a broader definition of physical liberty to include bodily integrity and autonomy in the case of domestic violence victims).

Textually, the right to counsel is enumerated only in the Sixth Amendment in the criminal arena. Even there, the idea that criminal defendants have a right to *appointed* counsel has arisen over the course of many decades as a *judicial* interpretation of what fairness requires. Looking at the state of the appointment doctrine from a textualist perspective, then, it becomes more apparent why a loss of physical liberty is required before the Court will create a categorical right to appointed counsel in civil cases, even if the facts of *Lassiter* were the wrong opportunity for the Court to create this standard. Just like in *Gault*, the more closely a civil case approximates a criminal one—*vis-à-vis* the loss of physical liberty—the more apt the Court is to find the existence of a categorical right to appointed counsel. Vulnerable litigants, complex legal issues, and adversarial hearings characterized by gross power imbalances will provide more evidence of a need to appoint counsel in a civil case.

Appointing counsel in a civil case is an uphill and, thus far, unprecedented battle, as Justice Thomas recognized in the Court’s most recent appointment doctrine case:

Despite language in its opinions that suggests it could find otherwise, the Court’s consistent judgment has been that fundamental fairness does not categorically require appointed counsel in any context outside of criminal proceedings. The majority is correct, therefore, that the Court’s precedent does not require appointed counsel in the absence of a deprivation of liberty. But a more complete description of this Court’s cases is that even when liberty is at stake, the Court has required appointed counsel in a category of cases only where it would have found the Sixth Amendment required it—in criminal prosecutions.<sup>222</sup>

Nevertheless, statutes can independently create an expectation of a liberty interest. Stepping outside the scope of a purely criminal Sixth Amendment context, we next address the treatment of state-created liberty interests and evaluate the possibility of garnering a categorical right to appointed counsel in such instances.

## 2. *When a Positive Liberty Interest Is at Play*

If a direct loss of physical liberty is difficult for a particular group of litigants to establish, there may be another approach to elevate due process standards required: by arguing for the existence of a positive liberty interest. For the purpose of this article, we will define “positive liberty interest” in the same way Professor Ann Woolhandler has, as “a liberty interest that derives from nonconstitutional law, and particularly from statutes.”<sup>223</sup> As Professor Woolhandler correctly recognizes, the majority of the caselaw expounding on the creation of positive liberty interests has been in the prison context, but she

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222. *Turner v. Rogers*, 564 U.S. 431, 454–55 (2011) (Thomas, J., dissenting) (internal citations omitted).

223. *See* Woolhandler, *supra* note 17, at 845.

astutely identifies immigration statutes as having the potential to create positive liberty interests as well.<sup>224</sup>

Courts have developed general guidelines for determining whether a particular statute has created a positive liberty interest for prisoners where no constitutional due process right had existed before.<sup>225</sup> In *Wolff*, for example, the Court found that prisoner have a state-created liberty interest in “good-time credits” (credits for good behavior that can lead to shortening of the prisoner’s sentence), which may not be revoked without appropriate due process protection.<sup>226</sup> Cases following *Wolff* have emphasized that, in order for a liberty interest to be created, regulations should contain “specific directives to the decisionmaker that if the substantive predicates are present, a particular outcome must follow.”<sup>227</sup> In *Sandin v. Conner*, the Supreme Court reiterated the requirement that state-created liberty interests generally should be limited to regulations that contain language that guide discretion; going still further, the Court required that the curtailment of liberty imposed by a prison regulation “impose[] atypical and significant hardship on [the] inmate in relation to the ordinary incidents of prison life.”<sup>228</sup>

Thus, even prisoners can have significant liberty interests. Most often, a successful positive liberty interest argument is rooted in penal regulations or state laws that alter prisoners’ expectations with respect to heightened restrictions placed on their bodies or the terms of their confinement. *Vitek v. Jones* presented a case highly analogous to the circumstances of UMs in removal hearings. The Court considered a Nebraska statute that allowed prison officials to involuntarily transfer prisoners to a psychiatric hospital upon a showing by a prison-designated

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224. *See id.* at 846–48.

225. Addressing the validity of a positive liberty interest in the immigration context is in no way intended to diminish the argument that a constitutional due process right exists for a recognized subclass of unaccompanied minors.

226. *Wolff v. McDonnell*, 418 U.S. 539, 556–57 (1974); *see also Morrissey v. Brewer*, 408 U.S. 471 (1972) (suggesting that a positive liberty interest relating to the conditions of prisoners’ parole results in elevated constitutional due process protections).

227. *See, e.g., Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 463 (1989).

228. *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Two different approaches have coexisted in the prison setting, which has confused the liberty analysis somewhat. The first approach looks at the nature of the liberty deprivation and its importance to the individual prisoner, while the second looks to the expectations created by state law to determine whether a liberty interest exists. *Id.* at 481. Despite this inconsistency, *Sandin v. Conner* made both of these approaches more difficult to establish. In finding that no liberty interest existed for a prisoner transferred to 30 days of segregated confinement, which would have triggered due process prior to *Sandin*, the Court elevated the standard for finding a positive liberty interest. *See id.* at 479. For a discussion of state-created liberty interests in the prisoners’ rights setting, *see, e.g., Deana Pollard Sacks, Elements of Liberty*, 61 S.M.U. L. REV. 1557, 1567–68 (2008). The guidance of *Wolff*, however, remains good law even after *Sandin*. *See Donna H. Lee, The Law of Typicality: Examining the Procedural Due Process Implications of Sandin v. Conner*, 72 FORDHAM L. REV. 785, 809–34 (2004) (providing a comprehensive analysis of caselaw after *Sandin*, contending that states have been left to consider state positive law without a thorough framework for determining what constitutes an unconstitutional compulsion in the prison context, and stating that the Ninth, Tenth, and Eleventh Circuits have applied a broad, if inconsistent, method of identifying positive state liberty interests.).

physician or psychologist that the prisoner suffered from an intellectual disability.<sup>229</sup> While a prisoner should perhaps expect to be transferred between facilities at the prison's discretion,<sup>230</sup> the Court reasoned that a transfer to a mental hospital would go beyond the expectations of an ordinary prisoner.<sup>231</sup> The Court was one Justice away from appointing counsel for an entire group of litigants due to the need for enhanced due process protections required by a positive liberty interest.<sup>232</sup> Justice Powell concurred in judgment but modified the final order to require a categorical right to qualified assistance in the form of mental health counselors, rather than attorneys, before inmates could be transferred to a psychiatric hospital where they might be subject to involuntary intrusions on their bodies as well as the stigma associated with commitment in a psychiatric hospital.<sup>233</sup> The Court relied heavily on the district court opinion,<sup>234</sup> which found the statute unconstitutional for lack of adequate due process protections under the Fourteenth Amendment after applying *Mathews* to evaluate the competing private and public interests at stake.<sup>235</sup>

*Vitek* is instrumental in a number of important respects. First, it showed that positive liberty interests can afford litigants—even convicted felons, who have diminished liberty interests by nature of their imprisonment—heightened due process rights. Second, it dealt with a vulnerable class of defendants (those with potential intellectual disabilities). Third, it came painstakingly close to requiring a categorical right to appointed counsel for indigent prisoners, instead requiring appointment of qualified mental health professionals because the inquiry turned on a medical question: whether the prisoner had mental health problems or disorders. Finally, it expanded the scope of what the Court considers a “liberty interest” for the purposes of the appointment doctrine beyond the traditional concept of incarceration to encompass alternative concepts.<sup>236</sup> *Lassiter*, while creating a new presumption that a litigant's physical liberty must be at risk to justify categorical mandates for appointed counsel, does nothing to diminish the

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229. *Vitek v. Jones*, 445 U.S. 480 (1980); see also *Miller v. Vitek*, 437 F. Supp. 569, 571 (D. Neb. 1977) (quoting relevant language from Nebraska statute).

230. See *Meachum v. Fano*, 427 U.S. 215, 216 (1976) (holding that transferring inmates between prisons does not implicate the Due Process Clause, even if the conditions of the second prison are substantially less favorable).

231. *Vitek v. Jones*, 445 U.S. at 489–91 (“[I]f the State grants a prisoner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, ‘the determination of whether such behavior has occurred becomes criminal and the minimum requirements of procedural due process appropriate for the circumstances must be observed.’”) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

232. *Id.* at 496–97.

233. *Id.* at 500.

234. *Miller*, 437 F. Supp. at 569.

235. *Vitek*, 445 U.S. at 494–97 (discussing district court opinion in *Miller*, 437 F. Supp. at 573–75).

236. See *id.* at 493–94 (involving the stigma arising from being classified as “mentally ill” as well as accompanying involuntary psychiatric treatment).

implication in *Vitek* that a loss of physical liberty (1) is not solely limited to incarceration and (2) can arise from positive liberty interests.

Notwithstanding judicial reluctance to expand the appointment doctrine, the courts have thus made clear that statutes can create protected liberty interests where none existed before, resulting in additional due process protection for an entire group.<sup>237</sup> Once a liberty interest attaches, due process protections are required to “insure that the state-created right is not arbitrarily abrogated.”<sup>238</sup> The Supreme Court has yet to hear a case raising the issue of whether a categorical right to appointed counsel can be based solely on a statutorily created “positive” liberty interest. However, it remains clear that constitutional due process rights can nevertheless be triggered and enhanced by such interests.<sup>239</sup> A categorical right to mental health counselors may have been the appropriate remedy for prisoners contesting a mental health issue and standing opposite a medical expert looking to institutionalize them. A categorical right to a legal advocate is certainly the correct solution for UMs who expect protection under the TVPRA from the dangers they face in returning to their homeland, and who stand alone opposite government attorneys looking to remove them.

#### IV.

#### POSITIONING UM REMOVAL HEARINGS WITHIN THE APPOINTMENT DOCTRINE LANDSCAPE

With the statutory bar to appointed counsel, now removed UMs as a group require a categorical right to appointed counsel to preserve their right to a fair hearing. Part IV will distill general themes from case law and present what we

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237. See, e.g., *id.* at 488 (holding that a state statute created a liberty interest for a prisoner threatened with transfer to a psychiatric hospital); see also *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 12 (1979) (finding that a state law created a sufficient expectancy of parole to give rise to a constitutionally protected liberty interest with regard to parole decisions in a particular context); *Morrissey v. Brewer*, 408 U.S. 471, 479 (1972) (finding that a liberty interest was created by the proper adherence to parole restrictions).

238. *Vitek*, 445 U.S. at 488–89 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)). *Wolff* held that a statute created a liberty interest protected under the Due Process Clause for prisoners whose “good-time credits” could be taken away only for serious misbehavior. *Wolff*, 418 U.S. at 555.

239. Assuming, *arguendo*, that a statute created a liberty interest that implicated the physical liberty of similarly situated members of a group, the statute could hypothetically meet the *Lassiter* presumption in the following way: just as a statute might fail due process scrutiny by not providing minimal due process protections under the Constitution, so too could a statute bolster a liberty interest for a group of people. Once liberty interests are legislatively bolstered, supplemental due process protection must be provided before those interests can be taken away. In other words, the statute has spawned a previously unrecognized due process right that could fairly be characterized as a “springing” interest. See generally *Vitek*, 445 U.S. 480 (explaining that the statute created an elevated expectation that prisoners would not be stigmatized and transferred to a mental health facility without supplementary due process, and finding a categorical right to a qualified mental health professional to represent and advocate for the prisoner); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (explaining statutorily conferred property interest of welfare benefits triggered the issue of what process was due once the state decided to confer these benefits).

consider to be the best argument for securing a categorical right to appointed counsel under the fair hearing provision.

*A. Hearings Are Quasi-Criminal in Nature*

Although removal hearings are classified as civil, they share substantive similarities with criminal proceedings and carry comparable consequences. A child suspected of being undocumented is placed under arrest and taken into custody by Immigration and Customs Enforcement (ICE) officials or Customs and Border Patrol (CBP) inspectors. The child is then processed in a similar fashion to someone arrested for a crime—the child is fingerprinted, photographed, and officially “charged” with violations of immigration law.<sup>240</sup> The unaccompanied child, who is on average eleven years old,<sup>241</sup> is informed of their rights, including the right to counsel at no expense to the government. Occasionally, payment of bond money is a condition of release. After the child receives a notice to appear, which includes the charges brought against them, they are expected to show up for a master calendar hearing. During this hearing, the immigration judge decides, based on a series of questions and whether the child admits to sufficient facts, if the child should be immediately removed or if they are entitled to an individual hearing.<sup>242</sup> Assuming they receive an individual hearing, they are expected to prepare an opening statement, cross-examine witnesses, prepare exhibits, and prepare a defense as to why removal is not appropriate. In short, unaccompanied children are treated like adults in criminal hearings that masquerade as civil hearings, but with no promise of legal assistance.

A removal hearing lurks somewhere in the space between the civil and the criminal.<sup>243</sup> A good example of the quasi-criminal nature of a removal hearing lies in the burden of proof required. The government must prove removability by “clear, unequivocal, and convincing evidence.”<sup>244</sup> This shows the unique character of a removal hearing and its potentially harsh consequences, which teeter somewhere between the criminal “beyond a reasonable doubt” and the

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240. See generally *The Removal Process*, FINDLAW.COM, <http://immigration.findlaw.com/deportation-removal/overview-of-removal-procedures.html> [<https://perma.cc/PA3T-AKHP>].

241. NAT’L CONFERENCE OF STATE LEGISLATURES, CHILD MIGRANTS TO THE UNITED STATES (Oct. 28, 2014), <http://www.ncsl.org/research/immigration/child-migrants-to-the-united-states.aspx#trends> [<https://perma.cc/X9DG-3TP9>].

242. IMMIGRANT LEGAL RES. CTR. ATTORNEYS, REPRESENTING CLIENTS AT THE MASTER CALENDAR HEARING 1 (2018), [https://www.ilrc.org/sites/default/files/resources/rep\\_clnts\\_mstr\\_cal\\_hearing-20181220.pdf](https://www.ilrc.org/sites/default/files/resources/rep_clnts_mstr_cal_hearing-20181220.pdf) [<https://perma.cc/EUF6-6M54>].

243. See generally Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011) [hereinafter Kanstroom, *The Right to Deportation Counsel*].

244. *Woodby v. INS*, 385 U.S. 276, 277 (1966) (later codified under 8 C.F.R. § 1240.8(a) 2019).

civil “preponderance of the evidence” standard. As the Supreme Court noted in *Woodby v. INS*:

To be sure, a deportation proceeding is not a criminal prosecution . . . But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.<sup>245</sup>

Here, the court seems to wrestle with the idea that immigration hearings change lives so drastically but still yields to civil practice standards.

Throughout the years, courts have recognized removal as a very serious consequence, characterizing it as a loss that extinguishes life and property.<sup>246</sup> Relatively recently, the Supreme Court had an opportunity to characterize the consequences of removal in *Padilla v. Kentucky*, further identifying the difficulties that have plagued the courts in classifying the consequences that immigrants face under the statutory scheme.<sup>247</sup> The *Padilla* court reiterated the severity of removal as a consequence, and, as a result, held that the right to effective counsel requires an attorney to affirmatively provide advice related to the deportation consequences of a criminal conviction.<sup>248</sup> The Court used the harsh consequences of deportation as a way to justify its holding, stating, “The severity of deportation—‘the equivalent of banishment or exile’—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.”<sup>249</sup> Some have heralded *Padilla* as a breakthrough in the Court’s rigid, formalistic characterization of removal as a purely civil and nonpunitive consequence, and, at least for certain types of removal, as a signal that the Court may be moving closer to recognizing the material similarities between removal and criminal consequences.<sup>250</sup>

245. *Id.* at 285.

246. *See, e.g.*, *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (“[D]eportation may result in the loss of all that makes life worth living.”) (internal quotation marks omitted); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (“To deport one who so claims to be a citizen obviously deprives him of liberty . . . [I]t may result also in loss of both property and life; or of all that makes life worth living.”).

247. *See Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

248. *Id.* at 373–74.

249. *Id.* at 374–75 (quoting *Delgado v. Carmichael*, 332 U.S. 388, 390–91 (1947)); *see also Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963) (“[D]eportation is a drastic sanction, one which can destroy lives and disrupt families.”).

250. Compare Kanstroom, *The Right to Deportation Counsel*, *supra* note 243, at 1475 (proposing, in light of *Padilla*, an “Amendment V1/2” model to bridge the divide between the more flexible due process standard used in Fifth Amendment jurisprudence used for civil cases and the more specific guarantees of the Sixth Amendment to more fully recognize the reality that deportation consequences—which are tied directly to the criminal justice system and are highly punitive in nature—require an appropriate mix of the fundamental fairness required by the Fifth Amendment with certain specific constitutional protections (like appointed counsel) due to criminal defendants), with Terri Day & Leticia Diaz, *Immigration Policy and the Rhetoric of Reform: “Deport Felons not Families”* Moncrieffe v. Holder, *Children at the Border, and Idle Promises*, 29 GEO. IMMIGR. L.J., 181, 197–98

To the extent *Padilla* has eroded the formal distinction between the civil and the criminal in removal proceedings, courts have more room for flexibility, the epitome of due process. As the Supreme Court has duly noted with respect to the notion of due process:

Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results . . . What is fair in one set of circumstances may be an act of tyranny in others.<sup>251</sup>

It is difficult, if not impossible, to imagine an eleven-year-old child who is capable of taking advantage of the due process protections afforded to them, such as notice to prepare a defense, the opportunity to speak on their own behalf, and the right to cross-examine witnesses: each and every one of the “procedural protections” afforded under the INA is meaningless to a child, who is incapable of taking advantage of those protections without the assistance of counsel.<sup>252</sup> The “right to counsel (at no expense to government)” provision in the INA would operate, in practice, to deprive unaccompanied minors of any *possibility* of a fair hearing unless that phrase is interpreted as a “minimum” standard for all immigrants without precluding the possibility for heightened safeguards under the fair hearing provision in special cases or for certain subgroups.<sup>253</sup> Congress has explicitly provided for special protection of individuals who are unable to take advantage of the enumerated due process rights without additional assistance, evidencing intent to level the playing field for those incapable of taking advantage of these rights on their own.<sup>254</sup>

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(2015) (“Although [Padilla’s holding that noncitizens have the right to effective assistance of counsel regarding the immigration consequences of a criminal conviction] is a far cry from incorporating the holding in *Gideon v. Wainwright* to immigration proceedings, the holding in *Padilla* clearly recognizes that deportation is not merely a civil matter.”).

251. *Snyder v. Massachusetts*, 291 U.S. 97, 116–17 (1934) (affirming the lower court’s decision that defendant’s absence when jury was shown the crime scene did not violate his due process rights under the Fourteenth Amendment).

252. Studies have shown that unaccompanied minors represented by attorneys are five to six times more likely to obtain a favorable outcome allowing them to stay in the United States. See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW, 12, tbl.1 (2017) (summarizing outcomes for UAC initial case completion for period between July 2014 through June 2016); see also SYRACUSE UNIVERSITY, TRAC IMMIGRATION, REPRESENTATION FOR UNACCOMPANIED CHILDREN IN IMMIGRATION COURT (2014) [hereinafter TRAC IMMIGRATION, REPRESENTATION FOR UNACCOMPANIED CHILDREN], <http://trac.syr.edu/immigration/reports/371> [<https://perma.cc/NG4C-8EDR>] (citing 73 percent chance that unaccompanied minors represented by attorneys between FY 2012–2014 were allowed by immigration judge to remain in the United States, compared with 15 percent of those who remained unrepresented).

253. Apposite here is *Franco-Gonzalez v. Holder*, which lays necessary groundwork for this argument, by intrinsically connecting appointed counsel (or at least an appointed “qualified representative”) to plaintiff vulnerability and reinforcing the need for greater degrees of equity, stratification, and nuance in relation to the appointment doctrine. *Franco-Gonzalez v. Holder*, CV-10-02211-DMG, 2013 U.S. Dist. LEXIS 186258, at \*1 (C.D. Cal. Apr. 23, 2013).

254. See 8 U.S.C. § 1229a(b)(3) (2018) (providing deference to the Attorney General to supplement due process protections to “mental[ly] incompet[ent]” individuals whose presence at a removal hearing is “impracticable,” and indicating a legislative understanding of individuals with

The *Gault* court aptly revealed that a civil hearing that is de facto criminal both in practice and in effect cannot hide behind a “civil label-of-convenience” for purposes of the Sixth and Fourteenth Amendments.<sup>255</sup> Nevertheless, although *Padilla* helped to recharacterize removal hearings somewhat by acknowledging the severity of removal consequences, courts have generally been averse to expanding the scope of a civil right to appointed counsel beyond the limits set in *Gault*, which addressed a juvenile delinquency proceeding.<sup>256</sup> The framework of the TVPRA has, however, extended to UMs a statutorily conferred liberty interest designed to protect minors against certain crimes intended to do bodily harm.<sup>257</sup> Before statutory protections can be withdrawn, heightened due process protection must be afforded to those whom the TVPRA was designed to protect.

### B. UMs Have Been Granted a Positive Liberty Interest

Scholars have argued persuasively for a constitutional right to appointed counsel for UMs. This argument is supported by jurisprudential developments favoring a right to counsel for unaccompanied minors,<sup>258</sup> the expansion of a noncitizen’s constitutional interest in remaining in the United States,<sup>259</sup> the enactment of the TVPRA,<sup>260</sup> and recent studies correlating the likelihood of

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intellectual disabilities and a willingness to adjust due process protections discretionarily for such subgroups).

255. *In re Gault*, 387 U.S. 1, 49–50, 62 (1967); see also Kanstroom, *The Right to Deportation Counsel*, *supra* note 243, at 1502 (“Formal categories . . . have long been in some tension with vital interests and basic human rights in deportation cases.”).

256. See *Turner v. Rogers*, 564 U.S. 431, 453–55 (2011) (Thomas, J., dissenting) (discussing application of *Gault*, and concluding that Supreme Court decisions narrowly tailored the application of *Gault* only to civil proceedings that are functionally equivalent to criminal ones, and to situations where there is a clear deprivation of physical liberty under the Sixth Amendment).

257. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(a)(4), 122 Stat. 5044 (codified as amended at 8 U.S.C. § 1232 (2018)).

258. In *A Child’s Right to Counsel in Removal Proceedings*, Good uses *Mathews v. Eldridge* as a framework to explore how the evolution of Supreme Court doctrine has made a strong case for the right to counsel for unaccompanied minors. Specifically, Good explains how the Supreme Court has effectively elevated the private interests of unaccompanied minors over the fiscal and administrative burden to the government in a way that provides significant support for a due process right to counsel argument for unaccompanied minors under *Mathews v. Eldridge*. See Good, *supra* note 11, at 127–48; see also *Turner*, 564 U.S. at 447 (holding that asymmetry of representation increases the risk of erroneous deprivation of rights and militates in favor of appointed counsel); *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (recognizing right to counsel in deportation proceedings due to similarity between criminal punishment and deportation); *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 35 (1981) (holding that both direct and indirect deprivations of liberty are private interests that weight the *Mathews* scales in favor of enhanced procedural rights).

259. See *Padilla*, 559 U.S. at 360; see also *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (the “right to remain in the United States may be more important to the [noncitizen] than any jail sentence”) (quoting 3 BENDER, CRIMINAL DEFENSE TECHNIQUES §§ 60A.01–.02[2] (1999)).

260. The Trafficking Victims Protection Reauthorization Act of 2008 was meant to create basic procedures to ensure the appropriate treatment of children in the immigration system and to enhance the ability of our legal system to process these children in an orderly and efficient manner. See *What are the TVPRA Procedural Protections for Unaccompanied Children?*, KIDS IN NEED OF DEF. (Apr. 1, 2019),

success in immigration court with the presence or absence of counsel.<sup>261</sup> Scholarship has converged mainly on a Fifth Amendment argument for assigning counsel to guarantee due process protections.<sup>262</sup> To date, however, courts have been leery of accepting a purely constitutional argument that the type of liberty deprivation associated with removal in the case of UMs is of a magnitude required to justify a categorical right to appointed counsel.<sup>263</sup> At least for a well-defined “subgroup” of immigrants, the *Lassiter* presumption may be overcome by identifying a positive liberty interest, in spite of how courts characterize the loss associated with deportation.

We propose that the TVPRA created a positive liberty for certain UMs who enter the United States, and that UMs can find hope in overcoming *Lassiter* by analogizing to the line of prisoners’ rights cases, particularly *Vitek v. Jones*. Prisoners or parolees may have limited liberty interests due to convictions, confinement, or parole, but liberty interests can be expanded by statute. UMs could likewise make such an argument: federal statutes have created positive

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<https://supportkind.org/resources/what-are-the-tvpra-procedural-protections-for-unaccompanied-children> [<https://perma.cc/pl66-qyb8>].

261. For a cohesive and complete summary of recent Supreme Court case law and an argument for greater recognition of the right to appointed counsel in removal hearings, particularly for child immigrants, see Good, *supra* note 11, at 127–48. See also Matt Adams, *Symposium Issue: Civil Legal Representation and Access to Justice: Breaking Point or Opportunity For Change: Advancing the “Right” to Counsel in Removal Proceedings*, 9 Seattle J. Soc. Just. 169, 172–75 (arguing that grave physical liberty interests at stake and the compromised nature of vulnerable groups such as UMs require appointing counsel); Hill, *supra* note 11. See generally Johan Fatemi, A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting *Franco-Gonzalez*, 90 ST. JOHN’S L. REV. 915 (2016) (finding a constitutional right to appointed counsel after reanalyzing *Franco-Gonzalez* under the Mathews and Turner due process balancing test). And, for recent studies correlating the likelihood of success in immigration court with the presence or absence of counsel, see Stacy Caplow et al., *Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings: New York Immigrant Representation Study Report*, 32 CARDOZO L. REV. 357 (2011–2012) (representation increases success rates for non-detained immigrants in removal proceedings from 13% to 74%); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 376 (2007) (finding that represented asylum applicants “win their cases at a rate that is about three times higher than the rate for unrepresented [[applicants]]”).

262. See, e.g., Robert N. Black, *Due Process and Deportation—Is There a Right to Assigned Counsel?*, 8 U.C. DAVIS L. REV. 289 (1975); Robert S. Catz & Nancy Lee Frank, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARV. C.R.-C.L. L. REV. 397, 445 (1984); Haney, *supra* note 183, at 179; Kanstroom, *The Right to Deportation Counsel*, *supra* note 243, at 1502–03 (“[M]ost scholarship, cases, and much litigation strategy have tended to focus more on the Fifth than on the Sixth Amendment right to counsel in deportation matters.”); Werlin, *supra* note 126, at 400.

263. See, e.g., Order Granting Motion to Dismiss, *Gonzalez Machado v. Ashcroft*, No. CS-01-0066-FVS, at 10–11 (E.D. Wash. June 18, 2002); see also *Perez-Funez v. Dist. Dir.*, 619 F. Supp. 656, 659 (C.D. Cal. 1985). In *Perez-Funez*, the court found that unaccompanied minors had “substantial constitutional and statutory rights . . . in spite of the minors’ illegal entry into the country.” *Id.* INS procedures violated these due process rights because the procedures coerced unaccompanied minors into choosing voluntary departure without first providing procedural safeguards to ensure that the waiver of the right to a removal hearing, which accompanies voluntary departure, was valid. *Id.* at 664–65. The court, however, flatly rejected the argument that unaccompanied minors have the due process right to appointed counsel. *Id.* at 665.

liberty interests that require heightened due process safeguards prior to their abrogation.

The INA draws a distinction between “admission” and “entry” into the United States. “Admission” hinges upon lawful entry—inspection and authorization by immigration officials<sup>264</sup>—whereas the INA originally defined entry as the “coming of an alien into the United States.”<sup>265</sup> Assuming that this distinction continues to be recognized, various provisions of the TVPRA and the INA could be construed as implicitly allowing certain groups of UMs to “enter” the United States.<sup>266</sup> Beyond the “right to entry,” a detailed statutory scheme creates a system for classifying and then transferring groups of UMs into government custody, giving rise, once custody attaches, to a statutory liberty interest.<sup>267</sup> Further, courts have held that the TVPRA controls where it would offer greater due process protection to UMs than the INA does, even in the case of UMs who are apprehended at the border.<sup>268</sup> This provides additional support for the idea that Congress intended the TVPRA to augment UMs’ liberty interests.

First, the INA contains a provision that could be construed as allowing UMs to enter the United States. Section 212(d)(5)(A) permits the Secretary of Homeland Security to *parole* individuals into the United States “for urgent humanitarian reasons or significant public benefit” on a case-by-case basis.<sup>269</sup> This provision has been used to allow entry to undocumented immigrants seeking asylum in the United States.<sup>270</sup> Unaccompanied minors often arrive having escaped living conditions that could readily fall under the category of “urgent humanitarian reasons”: high poverty, unemployment, and crime rates; structural weakness in government; inequality; and risks posed by trafficking and

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264. Act of 1952, Pub. L. No. 414, § 212(a)(7)(A)(i), 66 Stat. 163 (1952) (codified as amended 8 U.S.C. § 1182(a)(7)(A)(i) (2018)).

265. Act of 1952, § 101(a)(13). The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 struck the term “entry” from the INA. Courts, however, have continued to interpret the term “entry” similarly to the original definition. *See, e.g.* *Matter of Rosas-Ramirez*, 22 I. & N. Dec. 616 (1999) (discussing whether adjustment of status while within the United States constitutes an admission for the purposes of Section 237(a)(2)(A)(iii) of the INA, and noting that admission is defined, in part, in terms of “entry”).

266. *See* KATE MANUEL & MICHAEL GARCIA, CONG. RESEARCH SERV., R43623, UNACCOMPANIED ALIEN CHILDREN—LEGAL ISSUES: ANSWERS TO FREQUENTLY ASKED QUESTIONS 6–7 (2016) (pointing to § 212(d)(5) of the INA and § 235 of the TVPRA as ways for UMs to lawfully enter the United States).

267. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044 (codified as amended at 8 U.S.C. § 1232 (2018)).

268. *See Santos v. Smith*, 260 F. Supp. 3d 598, 610–11, 615–16 (W. D. Va. 2017) (finding that the due process rights of an unaccompanied minor who was apprehended at the border had been violated, in part because the TVPRA covered his claim, and the TVPRA does not distinguish between arriving immigrants and those who are already present).

269. 8 U.S.C. § 1182(d)(5)(A).

270. MANUEL & GARCIA, *supra* note 266, at 7.

smuggling operations, among others.<sup>271</sup> The types of evidence USCIS provides as examples used to establish parole often parallel the very reasons UMs are fleeing their home countries: credible third-party sources outlining the imminent harm applicants would face in their home country (or other documentation attesting to this), evidence of particular vulnerabilities, or evidence of living conditions in UMs' home countries.<sup>272</sup>

Second, and potentially more compelling, the TVPRA pledges to protect victims of child trafficking, acknowledging the unique vulnerability of children in removal proceedings and indicating an intention to afford certain categories of noncitizen children enhanced due process protection with respect to legal representation.<sup>273</sup> Congress intended the TVPRA to extend enhanced protections to a vulnerable population of children, above and beyond what the INA provides. To the extent that there is any conflict between the two statutes, the TVPRA should prevail to offer the UM augmented protection.<sup>274</sup> Under the TVPRA, the Secretary of Health and Human Services (HHS) must provide appointed counsel for *all* children who are victims of mistreatment, exploitation, and trafficking and must “to the greatest extent practicable . . . make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.”<sup>275</sup> The relevant provision states that Section 235 of the TVPRA must be read in conjunction with Section 292 of the INA (the “privilege of counsel” provision), but the TVPRA nevertheless appears to confer greater due process protections to a group of UMs it has recognized as requiring additional protection.

Section 235 of the TVPRA also creates a difference in treatment for UMs from contiguous countries and noncontiguous countries. It requires that UMs from noncontiguous countries be transferred to the custody of the Secretary of HHS within seventy-two hours, after which the Department of Homeland

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271. PAMELA LIZETTE CRUZ & TONY PAYAN, *ALONE AND VULNERABLE: UNACCOMPANIED MINORS IN THE UNITED STATES AND MEXICO* 4 (2018), <https://www.bakerinstitute.org/media/files/research-document/382e8fca/bi-report-100918-mex-immigrantchildren.pdf> [<https://perma.cc/24HS-SY3U>].

272. U.S. CITIZENSHIP & IMMIGRATION SERVS., *GUIDANCE ON EVIDENCE FOR CERTAIN TYPES OF HUMANITARIAN OR SIGNIFICANT PUBLIC BENEFIT PAROLE REQUESTS* (Nov. 23, 2016), <https://www.uscis.gov/humanitarian/humanitarian-parole/guidance-evidence-certain-types-humanitarian-or-significant-public-benefit-parole-requests> [<https://perma.cc/7C9R-69DR>] (listing examples of evidence that can be presented to prove that an individual qualifies to be paroled).

273. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(c)(5), 122 Stat. 5044 (codified as amended at 8 U.S.C. § 1232 (2018)) (“[T]o the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children . . . have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.”).

274. *See, e.g., Santos v. Smith*, 260 F. Supp. 3d 598, 610–11, 615–16 (W.D. Va. 2017) (finding that the due process rights of an unaccompanied minor who was apprehended at the border had been violated, in part because the TVPRA covered his claim, and the TVPRA does not distinguish between arriving immigrants and those who are already present).

275. 8 U.S.C. § 1232(c)(5).

Security's Office of Refugee Resettlement (ORR) is responsible for placing children in state-licensed facilities.<sup>276</sup> Even children from contiguous countries may end up in such facilities if such a determination has not been made within forty-eight hours.<sup>277</sup> These facilities "provide the children with classroom education, health care, socialization/recreation, vocational training, mental health services, family reunification, access to legal services, and case management."<sup>278</sup> Congress has further tasked the ORR with either reuniting these children with family members or sponsors in the United States, or removing these children to their countries of origin using DHS immigration officials.<sup>279</sup> By allowing entry to UMs via statute, and then by entrusting the custody and welfare of this group of children to the Department of Health and Human Services, the government has created a positive liberty interest. UMs are entitled to additional due process safeguards before this interest can be taken away.

The TVPRA goes on to further separate treatment of UMs from the "average" undocumented immigrant. Acknowledging that less adversarial hearings are a more appropriate way of resolving asylum claims for UMs,<sup>280</sup> the TVPRA gives initial jurisdiction of children's asylum claims to DHS asylum officers rather than immigration courts.<sup>281</sup> In fact, the TVPRA includes a

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276. See generally 6 U.S.C. § 279 (2018) (discussing the transfer of certain UMs from the custody of immigration officials to ORR custody).

277. See 8 U.S.C. § 1232(a)(4); see also 6 U.S.C. § 279(a) ("There are transferred to the Director of the Office of Refugee Resettlement of the Department of Health and Human Services functions under the immigration laws of the United States with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the effective date specified in subsection (d)."). The Homeland Security Act of 2002 transferred the care and custody of unaccompanied minors from INS to the HHS Director of ORR. Hill, *supra* note 11, at 45. This statutory mandate prompted ORR to create a new division called the Department of Unaccompanied Children's Services, which provided for the care and custody of UMs by contracting with private facilities. For a review of care, custody, and representation under the TVPRA, see *id.* at 45–52.

278. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF REFUGEE RESETTLEMENT, DIVISIONS—UNACCOMPANIED CHILDREN'S SERVICES (Oct. 3, 2012), <https://www.acf.hhs.gov/orr/resource/divisions-unaccompanied-childrens-services> [<https://perma.cc/Q8AM-8S9P>]. The recent surge of unaccompanied minors has resulted in such overcrowding that DHHS has found it difficult to meet even its own stipulated requirements. See Camilo Montoya-Galvez, *New Pictures Show 'Dangerous Overcrowding' at Border Patrol Facilities in Texas*, CBS NEWS (July 2, 2019), <https://www.cbsnews.com/news/dhs-inspector-general-report-reveals-squalid-conditions-at-migrant-detention-centers> [<https://perma.cc/9Q26-7DP4>] (describing the grim living conditions found in inspected detention facilities—among other things, a lack of clean clothes, hot meals and showers for UMs—and multiple violations of maximum detention periods).

279. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF REFUGEE RESETTLEMENT, *supra* note 278.

280. Recent studies have shown that the average UM is just eleven years old. See *supra* note 252.

281. See 8 U.S.C. § 1158 (b)(3)(C). Unfortunately, however, these children are still made to appear before an immigration court to express an intent to apply for asylum prior to going before a DHS asylum officer. Wendy Young & Meghan McKenna, *The Measure of a Society: The Treatment of*

statutory provision on “[s]pecialized needs of unaccompanied alien children” that recognizes and addresses the highly compromised nature of UMs in removal proceedings and suggests an alternative set of regulations to govern a UM’s claim for asylum or other relief from removal:

Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children’s cases.<sup>282</sup>

The provision again sets UMs apart from other undocumented immigrants, providing authority for special treatment given their special needs.

In spite of the courts’ reluctance to characterize removal as a deprivation of physical liberty under *Lassiter*, a positive liberty interest nonetheless exists for UMs directly through federal statute. Additional due process protections are necessary before these interests can be abrogated, just as heightened due process protections extend to prisoners whose “good-time credits” have been revoked.<sup>283</sup> Instead of “good time credits,” restrictions on parole, or transfer to a psychiatric hospital, however, the state-created liberty interest in this case is the guarantee that these children, of whom the state has now assumed custody, will be protected from the evils from which many of them had escaped. The federal government has undertaken to protect and has, in fact, taken into custody a group of children with no ability to protect themselves.

The Department of Health and Human Services has an affirmative obligation to safeguard the best interests of these children by not returning them to situations where they will be victimized or harmed.<sup>284</sup> The TVPRA and accompanying regulations have created a reasonable expectation that UMs will be protected from further bodily harm and abuse.<sup>285</sup> Reconceptualizing the nature of the liberty interest at stake is a fundamental step in shifting outcomes under *Mathews*; indeed, courts have begun to acknowledge that the consequence of removal could present a more egregious loss of liberty than incarceration.<sup>286</sup> But at least for UMs, a positive liberty interest under the TVPRA can only be assured if the government provides counsel to ensure that UMs have a “reasonable opportunity” to present their case under Section 1229a(b)(4)(B). Under *Vitek*, a categorical right can emerge from a positive liberty interest; a mental health representative was sufficient in *Vitek* due to the medical nature of the inquiry,

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*Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 259 (2010).

282. 8 U.S.C. § 1232(d)(8).

283. See *Wolff v. McDonnell*, 428 U.S. 539, 554–55 (1974).

284. See 6 U.S.C. § 279 (2018).

285. 8 U.S.C. § 1232(d)(8); U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 278.

286. See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 374–75 (2011).

but UMs require a legal representative due to the intensive legal inquiry inherent in the removal process.

*C. Even if Civil in Nature, Hearings Are Fundamentally Unfair*

Especially with respect to UMs, who understand less but are offered greater protection under immigration laws, legal assistance is required to navigate complex and convoluted immigration system. This is particularly true when an entire administration has openly and recurrently expressed antagonism toward immigrants. The Trump administration's 2017 Justice Department guidance to immigration judges does not contain a section from a 2007 memorandum that instructed judges to employ child-sensitive questioning tactics, like using short, clear, and age appropriate questions and avoiding technical legal terms in lines of questioning. The new guidance no longer cautions the court to be aware of factors like post-traumatic stress, age, race, gender, and cultural sensitivity issues when dealing with children.<sup>287</sup> Guidance under the Trump administration instead reminds immigration judges to expedite requests for voluntary departures of UMs (departures from the United States without an order of removal) and cautions immigration judges about the incentives children have to misrepresent themselves as UMs, citing widespread fraud and abuse within the system.<sup>288</sup> Within this political climate, the right to appointed counsel to protect a UM's right to a fair hearing is more critical than ever before.

The fairness of a hearing is predicated on factors discussed at length above in Part III. Under Fifth or Sixth Amendment analysis alike, general factors can be distilled and are frequently emphasized in both the criminal and civil context. In addition to the nature of the liberty interest at play, these factors include: (1) a high degree of issue complexity set against a low degree of litigant capability,<sup>289</sup> (2) the adversarial nature of and power imbalances characterizing the hearing,<sup>290</sup> and (3) the change in outcome that additional due process

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287. Nicole Einbinder, *How the Trump Administration is Rewriting the Rules for Unaccompanied Minors*, FRONTLINE (THE GANG CRACKDOWN) (Feb. 13, 2018), <https://www.pbs.org/wgbh/frontline/article/how-the-trump-administration-is-rewriting-the-rules-for-unaccompanied-minors> [<https://perma.cc/J5HP-C4YM>].

288. U.S. DEP'T OF JUSTICE, OPERATING POLICIES AND PROCEDURES MEMORANDUM 17-03, GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING JUVENILES, INCLUDING UNACCOMPANIED ALIEN CHILDREN 7–8 (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppml17-03/download> [<https://perma.cc/U95H-LCWR>].

289. See, e.g., *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31–32 (1981) (factors to be considered in determining whether indigent parents in termination proceedings must have right to appointed counsel for due process include “the complexity of the proceeding and the incapacity of the uncounseled parent”).

290. Matt Adams, *Advancing the “Right” To Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169, 175 (“In any other context, the enormous liberty interests at stake, the adversarial framework of the of the immigration court system, the complexity of the law, and the extreme imbalance of power would almost certainly lead for case law providing for the right to assigned counsel.”); Amit Jain, *Bureaucrats in Robes: Immigration “Judges” and the Trappings of “Courts,”* 33 GEO. IMMIGR.

requirements would yield weighed against the accompanying burden on government that additional requirements would create.<sup>291</sup> UMs can make a good showing that each of these factors supports a finding for appointed counsel.

### 1. *Highly Complex Procedures and Low Capability Litigants*

Immigration cases are more complex than most civil cases, and cases involving children are inherently sensitive, as even the Trump administration's Justice Department has acknowledged.<sup>292</sup> Navigating immigration statutes; understanding the interplay between the TVPRA and the INA; and identifying claims for amnesty, Special Immigrant Juvenile Status,<sup>293</sup> or other forms of relief requires finesse, legal knowledge, and experience. Typical UMs have no understanding of the legal claims or remedies available to them.<sup>294</sup> Immigration judges cannot substitute as advocates, particularly when they are directed to be suspicious of UMs from the outset.<sup>295</sup> Merging a high degree of complexity and a low level of litigant capability generates the types of concerns that typically trouble the courts in both criminal and civil cases.<sup>296</sup>

### 2. *Hearings Are Adversarial and Exhibit Extreme Power Imbalances*

Asymmetry in representation can engender a one-sided procedural advantage for the represented party and arises frequently when assessing the fairness of a civil or criminal proceeding.<sup>297</sup> The lopsidedness of the hearing in

L.J. 261, 311 (“[I]n light of the power disparities between non-citizens and the federal government, a non-adversarial process may be a better fit for removal hearings than an adversarial model.”).

291. See *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (discussing due process rights: “In evaluating the procedures in any case, the courts must consider . . . the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures”); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

292. See U.S. DEP’T OF JUSTICE, *supra* note 288, at 2 (“Immigration cases involving children are complicated and implicate sensitive issues beyond those encountered in adult cases.”).

293. See 8 U.S.C. § 1232(d) (2018) (amending eligibility requirements of INA 101(a)(27)(J) and status eligibility requirements of 245(h)).

294. See, e.g., TRAC IMMIGRATION, REPRESENTATION FOR UNACCOMPANIED CHILDREN IN IMMIGRATION COURT, *supra* note 252.

295. See U.S. DEP’T OF JUSTICE, *supra* note 288.

296. See, e.g., *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31 (1981) (highlighting the centrality of issue complexity and litigant competence as primary factors in the Court’s decision whether to appoint counsel); *Gagnon v. Scarpelli*, 411 U.S. 778, 790–91 (1973) (same); *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938) (same); *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) (same).

297. See, e.g., *Turner v. Rogers*, 564 U.S. 431, 446–47 (2011) (“[S]ometimes, as here, the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un*represented by counsel. A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would ‘alter significantly the nature of

the case of an unaccompanied child is as absurd as it is pitiful. In one corner, government attorneys present evidence that the accused should be removed, and an immigration judge hears evidence to determine the immigrant's "inadmissibility;" in the other corner, a fearful and confused child, who may not even understand the charges they face, is expected to find an affirmative defense to removal on his own. The burden rests squarely upon the child's shoulders to identify and develop any legal argument for remaining in the United States—the equivalent of formulating factual and legal defenses, without being able to understand the rules. Litigants are similarly situated to litigants in *Franco-Gonzalez v. Holder*, incapable of formulating a defense without assistance.<sup>298</sup>

### 3. *Risk of Erroneous Decision as a Function of Representation and Accompanying Burden on Government*

The hardship imposed on the government by adopting additional due process protections and procedures for UMs has become a more difficult argument for the government to make since the 1970s when *Mathews* was decided. While the argument against appointing counsel because of government cost has some validity, the TVPRA offsets this expense by allocating the costs of representation to pro bono organizations whenever possible.<sup>299</sup> The argument that it is too burdensome for the government to identify UMs as a group deserving special procedural accommodations has been significantly tempered with advances in information technology since the 1970s.<sup>300</sup> Storing, accessing, and sharing data is commonplace not just in making eligibility determinations for government benefits but for collecting and sharing information about detainees in the immigration context as well.<sup>301</sup> The Law Enforcement

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the proceeding' . . . [M]ak[ing] the proceedings less fair overall.") (citing *Gagnon*, 411 U.S. at 787 (emphasis in original)); *Johnson*, 304 U.S. at 462–63 ("[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.").

298. See *Franco-Gonzalez v. Holder*, CV-10-02211-DMG, 2013 U.S. Dist. LEXIS 186258, at \*1 (C.D. Cal. Apr. 23, 2013).

299. 8 U.S.C. § 1232(c)(5) (2018) (noting that pro bono resources should be utilized "to the greatest extent practicable" in providing counsel to UMs); see also VERA INST. OF JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM 24 (2012), [https://www.vera.org/downloads/Publications/the-flow-of-unaccompanied-children-through-the-immigration-system-a-resource-for-practitioners-policy-makers-and-researchers/legacy\\_downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf](https://www.vera.org/downloads/Publications/the-flow-of-unaccompanied-children-through-the-immigration-system-a-resource-for-practitioners-policy-makers-and-researchers/legacy_downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf) [<https://perma.cc/7BY4-273J>]. As Good has noted, even assuming, *arguendo*, that the federal government picked up the entire cost of providing representation (which it is not legally required to do under the TVPRA counsel provisions), the cost would be 0.1 percent of the annual case burden under *Gideon*. See Good, *supra* note 11, at 140 (noting that between 6,000–8,000 UMs are placed in removal proceedings each year, some of whom obtain counsel through pro bono organizations).

300. See Parkin, *supra* note 208, at 314–18.

301. In fact, there is an entire initiative ("Law Enforcement Information Sharing Initiative") devoted to expanding collaboration and information sharing between agencies responsible for enforcing immigration law. The initiative uses a web-based data exchange platform to rapidly and efficiently share

Information Sharing Service platform—currently used for sharing investigative information between agencies to quickly identify patterns, connections, and relationships between individuals and criminal organizations<sup>302</sup>—could without much additional expense be used to identify UMs for the purpose of providing them the additional due process accommodation of appointed counsel that they so desperately need.

Alongside the diminished government burden accompanying recent technological advances, the change in outcome as a function of legal representation is evident. Studies have repeatedly shown that UMs fare far better with a lawyer: according to Syracuse University’s TRAC data from the most recent surge in UMs arrival to the United States (FY 2012 - FY 2014), 73 percent of UMs represented by counsel were allowed to stay in the United States versus 15 percent of those unrepresented by counsel.<sup>303</sup> These statistics make clear the obvious benefits representation can have on removal case outcomes for UMs. While cases that started in 2015 showed some promise in terms of numbers of represented children (only three of ten children went unrepresented), cases that started in 2017 were comparatively abysmal (three of every four children went unrepresented).<sup>304</sup>

In both *Turner* and *Lassiter*, two of the leading precedents on the appointment doctrine, the Court found that there was limited risk of erroneous decisions due to the procedures used.<sup>305</sup> In both cases, the Court noted that the outcome might have been different if the facts had demonstrated a special need for an attorney.<sup>306</sup> UMs present the court with the set of facts that did not exist in *Turner* or *Lassiter*—proceedings that are highly complex, governed by

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and access data relating to, *inter alia*, immigration patterns and cases. See *Law Enforcement Information Sharing Initiative*, U.S. IMMIGR. OF CUSTOMS ENFORCEMENT, <https://www.ice.gov/le-information-sharing> [<https://perma.cc/P854-MU93>].

302. See *id.*

303. TRAC IMMIGRATION, REPRESENTATION FOR UNACCOMPANIED CHILDREN IN IMMIGRATION COURT, *supra* note 252; see also Good, *supra* note 10, at 145–46. Good provides recent studies that identify success rates of represented versus unrepresented UMs as evidence that the risk of erroneous decisions is extremely high for UMs who are unrepresented by counsel.

304. See SYRACUSE UNIVERSITY, TRAC IMMIGRATION, CHILDREN: AMID A GROWING COURT BACKLOG MANY STILL UNREPRESENTED (2017), <http://trac.syr.edu/immigration/reports/482/> [<https://perma.cc/JX9G-7PHN>].

305. See Good, *supra* note 11, at 142 (citing *Turner v. Rogers*, 564 U.S. 431, 447–49 (2011); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 28–29 (1981)).

306. *Turner*, 564 U.S. at 449 (holding that “[n]either do we address what due process requires in an unusually complex case where a defendant can be fairly represented only by a trained advocate.” (internal quotation marks omitted)); *Lassiter*, 452 U.S. at 31 (“If, in a given case, the parent’s interests were at their strongest, the State’s interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.”).

subjective standards,<sup>307</sup> characterized by an adversarial fact-finding process,<sup>308</sup> and reflective of egregiously disparate outcomes in represented versus unrepresented populations.<sup>309</sup>

#### CONCLUSION

If the provisions in the INA were interpreted as intended, they would not raise such serious due process concerns or need to be redrafted. Read in conjunction with the TVPRA and alongside applicable case law, a “reasonable opportunity” for UMs to present a case against removal necessarily requires appointed counsel. Congress drafted the INA to embrace the flexible notion of due process, and UMs have been granted a positive liberty interest to remain free from abuse and bodily harm under the TVPRA. Given their inherent vulnerabilities—combined with the adversarial and lopsided nature of the hearing, the complexity of immigration statutes, and the disparate outcomes with and without representation—a fair hearing requires nothing less than appointed counsel to ensure that UMs have a reasonable opportunity to present their case against removal.

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307. Immigration courts face numerous challenges to objectivity, including lack of judicial independence, high barriers to obtaining judicial review, politicized hiring of immigration judges, widespread inconsistencies in decision-making, and the imposition of case load quotas favoring speed over substance in case resolution. The American Bar Association has made a series of recommendations to remedy many of these problems, but the subjectivity that currently penetrates the immigration courts further underscores the need for greater due process protections generally. *See generally* AMERICAN BAR ASSOCIATION, 2019 UPDATE: REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES, pts. 2, 4 (2019), [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/2019\\_reforming\\_the\\_immigration\\_system\\_volume\\_2.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf) [<https://perma.cc/7N8P-8c95>].

308. *See Franco-Gonzalez v. Holder*, , CV-10-02211 DMG, 2013 U.S. Dist. LEXIS 186258 (C.D. Cal. Apr. 23, 2013).

309. *See* Good, *supra* note 11, at 142–47. Good distinguishes the facts of *Turner* from the those of a typical UM, noting the complexity of issues in an immigration case as compared to a typical civil contempt case. Good also describes the binary lopsidedness of removal proceedings as compared to *Turner*, where the Court was concerned that categorically appointing counsel could sometimes give an advantage to a litigant opposing a custodial parent who is unrepresented by counsel.