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## The Right to Court-Appointed Counsel in Removal Proceedings: An End to Wrongful Detention and Deportation of U.S. Citizens.

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## NOTE

### THE RIGHT TO COURT-APPOINTED COUNSEL IN REMOVAL PROCEEDINGS: AN END TO WRONGFUL DETENTION AND DEPORTATION OF U.S. CITIZENS

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I. Introduction.....	568
II. The Wrongful Deportation of U.S. Citizens .....	571
III. The Reasons U.S. Citizens Are Wrongfully Removed From the Country.....	579
A. The Lack of Safeguards in Immigration Laws and Policies Contributes to Wrongful Deportation of U.S. Citizens .....	579
1. The Lack of Constitutional Protections.....	579
2. Mandatory Detention .....	580
3. Expedited Removal .....	581
4. Stipulated Judicial Orders of Removal .....	583
B. ICE's Policies Support Filling the Beds of Private Businesses Who Contract with the Government to Run Detention Centers .....	585
C. The Chance of Wrongful Deportation is Much Higher When Individuals Are Not Represented by Counsel..	587
IV. Analysis.....	588

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A. Removing a U.S. Citizen from the United States, Without Previously Revoking Citizenship, is Punishment Under the Sixth Amendment of the U.S. Constitution and as Such, Immigration Proceedings Are Entitled to Criminal Procedures and Safeguards, Including Court-Appointed Counsel.....	588
B. In Order to Satisfy Due Process, Individuals Facing Removal From the United States Must Be Provided With Government-Appointed Counsel .....	592
1. The Private Interest Affected in Removal Proceedings .....	594
2. The Risk of Wrongful Deportations of U.S. Citizens Through the Procedures Used, and Probable Value, if Any, of Providing Individuals Facing Removal with Government-Appointed Counsel .....	595
3. The Government’s Interest in Providing Counsel to Individuals Facing Removal Based on Fiscal and Administrative Burdens .....	596
V. Recommendation .....	599
VI. Conclusion .....	600

I. INTRODUCTION

“When ICE came and detained me, I told the officer I was a citizen. They told me they didn’t want to hear it, that I was going to get deported.”<sup>1</sup> Experiences like Ramirez Lopez’s are making headlines.<sup>2</sup> The

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1. Tyche Hendricks, *Suits for Wrongful Deportation by ICE Rise*, S. F. GATE (July 28, 2009, 4:00 AM), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/07/27/MNH618NPM6.DTL>.

2. See Marie Diamond, *Officials Investigate Wrongful Deportation of Texas Teen Sent to Colombia*, THINK PROGRESS (Jan. 6, 2012, 11:00 AM), <http://thinkprogress.org/justice/2012/01/06/399075/officials-investigate-wrongful-deportation-of-texas-teen-sent-to-colombia/> (reporting that a Texas teen, an American citizen, were wrongfully deported to Bogota, Colombia).

U.S. immigration officials say they’re investigating the case of Jakadrien Lorece Turner, a Dallas teen who ran away from home and gave a fake name to police—only to find herself being deported to Colombia. Turner, an American citizen, has been missing for a year and was finally discovered in Bogota, Colombia. American officials insist they followed procedure and there was no wrongdoing. But Turner’s grandmother says they should have done more to ascertain her real identity. Not to mention that something obviously must have gone awry for a 14-year old to be sent to a foreign country where she had no history and no family. The U.S. embassy had reportedly submitted the necessary documents for Turner to return to the U.S., but there’s no word yet when she’ll be back in the country.

American anti-immigrant sentiment driven by the concept that “illegal immigration” is “importing poverty and taking jobs away from the poor and the middle-class Americans”<sup>3</sup> has fueled immigration policies that increasingly expand the classifications of removable individuals.<sup>4</sup> As a result, American citizens were “accidentally” removed from the country.<sup>5</sup> Harsh immigration laws coupled with lax procedural safeguards for individuals facing deportation contribute to this phenomenon.<sup>6</sup>

The number of individuals held in detention centers is increasing at an exponential rate.<sup>7</sup> According to the Department of Homeland Security (DHS), in 1995, 50,924 individuals were deported from the United States<sup>8</sup> and in 2010 that number increased eight-fold to 387,242.<sup>9</sup> Yet, according to Immigration and Customs Enforcement (ICE), an agency within DHS, 392,862 individuals were deported in 2010.<sup>10</sup>

With the steeply rising number of detainees, the U.S. government is making mistakes by detaining and forcibly removing U.S. citizens from the country.<sup>11</sup> Jacqueline Stevens, Professor of Political Science at North-

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*Id.*

3. See James Hopkins, *Importing Poverty*, <http://importing-poverty.blogspot.com/> (last visited (Feb. 28, 2013) (proposing “that these are jobs which Americans used to do and still would do if they were offered viable wages. The average middle-class worker would have to stoop down, lowering their living standards in order to accept such wages that the illegal alien accepts.”).

4. See Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 45 (2010) (arguing the growth in immigration detention “has been fueled by enforcement policies that subject ever-larger categories of individuals to removal charges and custody, in many cases without the individualized bond hearings . . .”).

5. See Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL’Y & L. 606, 607 (2011) (“Because agencies ignore the scant protections immigration law provides respondents in deportation proceedings, the government of the United States has been misclassifying its own citizens as aliens and deporting them for over 100 years.”).

6. See *id.* at 608–09 (suggesting the deportation procedures in effect since the 1980s have resulted in the compulsory detention and deportation of hundreds of thousands of individuals without basic due process rights, such as legal representation or administrative hearings).

7. See Kalhan, *supra* note 4 (reflecting an increase from 81,000 persons detained in 1994 to 380,000 in 2008).

8. MARY DOUGHERTY ET AL., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS 2004, 6 (2005), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf>.

9. MARY DOUGHERTY ET AL., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS 2010, 4 (2011), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

10. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE TOTAL REMOVALS 4, (2012), available at <http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf>.

11. See Andrea Nill Sanchez, *Another U.S. Citizen ‘Accidentally’ Deported*, THINK-PROGRESS (June 16, 2009, 4:25 PM), <http://thinkprogress.org/security/2009/06/16/175487/>

western University and an expert on ICE's practices, estimates that one percent of people held by ICE are U.S. citizens,<sup>12</sup> which means that as you read this essay nearly 308 U.S. citizens are likely being wrongfully detained and/or deported.<sup>13</sup> Recent studies suggest that in 2010, over 4,000 U.S. citizens were detained or deported as "aliens," raising the total since 2003 to more than 20,000.<sup>14</sup> Most of the U.S. citizens detained and deported are mistakenly identified as undocumented immigrants solely based on their race, national origin, inability to speak English, or mental illness.<sup>15</sup>

Although U.S. citizens make up a small fraction of the roughly 400,000 people who pass through ICE custody each year,<sup>16</sup> immigrants, including

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immigration-citizen-deportation/ ("The American Civil Liberties Union (ACLU) conservatively estimates that approximately 100 U.S. citizens are accidentally ensnared by the country's broken immigration system each year.").

12. See Stevens, *supra* note 5, at 630 (claiming that if the Professor's estimate holds across facilities and detention centers throughout the country, it will mean that 20,000 United States Citizens have been incarcerated and thousands more will have been deported by ICE since 2003).

13. See IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE TOTAL REMOVALS (2012), available at <http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf> (explaining the calculation: one-percent (estimated percentage of U.S. citizens detained or deported) of 30,885 (average daily population of detainees in 2010) equals 308 U.S. citizens detained and/or deported in 2010).

14. See Stevens, *supra* note 5, at 608 (stating that although this figure might seem high and may strike some as lacking credibility, the immigration laws that have been in place since the 1980's have authorized the detention and deportation of hundreds of thousands of incarcerated persons each year without providing counsel or an administrative hearing).

15. See Suzanne Gamboa, *Citizens Held as Illegal Immigrants*, GUARDIAN (Apr. 12, 2009), <http://www.guardian.co.uk/world/feedarticle/8452034> (explaining that citizens with the fewest resources are targeted); see also Julia Preston, *Immigration Crackdown also Snares Americans*, N.Y. TIMES, Dec. 13, 2011, <http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-citizens.html?pagewanted=all> (describing the experience of Antonio Montejano, age 40, arrested for a minor shoplifting charge, provided his driver's license and other legal identification, but ICE still detained him for four days). Mr. Montejano was finally released after the ACLU sent ICE his passport and birth certificate. *Id.* After the ordeal, Mr. Montejano claimed that the police did not believe him because of his appearance, he said, "I look Mexican 100 percent." *Id.* See also Rania Khalek, *Why Are American Citizens Getting Locked Up and Even Deported by Immigration Authorities*, TRUTHOUT (Dec. 29, 2011), [http://truth-out.org/index.php?option=com\\_k2&view=item&id=5790:why-are-american-citizens-getting-locked-up-and-even-deported-by-immigration-authorities](http://truth-out.org/index.php?option=com_k2&view=item&id=5790:why-are-american-citizens-getting-locked-up-and-even-deported-by-immigration-authorities) (explaining the story of Mark Lyttle, a mentally disabled U.S. citizen, who was born and raised in North Carolina and spent four months in Central America after being deported in 2008; also discussing the story of Pedro Guzman, another mentally disabled U.S. citizen who spent three months in Mexico after being mistakenly deported).

16. See Hendricks, *supra* note 1 (discussing lack of due process and arguing that immigration agents needs to better investigate detainees' claims of citizenship because citizens are being deported).

those in removal proceedings, are permitted to retain counsel, but only at their own expense,<sup>17</sup> and if they cannot afford an attorney, they have to “represent themselves against government trial attorneys in complicated immigration hearings that could have permanent consequences, including deportation, separation from family members, termination of employment and the severing of financial and community ties to the U.S.”<sup>18</sup>

This Note analyzes the constitutional implications of detaining and deporting U.S. citizens within the complex conjunction of “immigration control and criminal enforcement.”<sup>19</sup> Part I identifies the growing problem and its severe consequences. Part II discusses how detention policies and lack of safeguards contribute to the wrongful detention and deportation of U.S. citizens. Part III analyzes the constitutional violations, including denial of due process under the Fifth Amendment and the denial of citizenship rights under the Fourteenth Amendment of the U.S. Constitution, implicated in detaining and removing U.S. citizens. Part IV recommends recognizing a right to counsel for individuals in removal proceedings as a safeguard to ensuring that U.S. citizens receive the full constitutional protections they are entitled to.

## II. THE WRONGFUL DEPORTATION OF U.S. CITIZENS

For over two decades, hundreds of thousands of people were detained and deported each year: Their removal was mandated by immigration laws and regulations.<sup>20</sup> The majority of the people removed from the country appeared without attorneys and, in some cases, were removed

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17. The immigrant’s right to retain counsel at his or her own expense is provided in 8 U.S.C. § 1362, which states in full:

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.

8. U.S.C. § 1362 (2006).

18. Press Release, ACLU, Senate Hears Testimony on Troubled Immigration Court System (May 18, 2011), <http://www.aclu.org/immigrants-rights/senate-hears-testimony-troubled-immigration-court-system>.

19. See Kalhan, *supra* note 4, at 43–44 (exploring the tensions arising from the need to detain noncriminal individuals). The Department of Homeland Security has acknowledged that most of its immigration detainees are held under circumstances that belie the detention’s noncriminal purposes. *Id.* While some degree of detention of removal candidates may be necessary and constitutionally permissible, the duration and circumstances of detention do matter. *Id.* at 44.

20. See Stevens, *supra* note 5, at 608 (citing estimates that between 2003 and 2011, over 20,000 U.S. citizens were misclassified as aliens and either detained or deported).

without administrative hearings.<sup>21</sup> Accordingly, “[i]t would be truly shocking if this did not result in the deportation of U.S. citizens.”<sup>22</sup> Most people do not carry passports or birth certificates, so when citizens are caught up in immigration sweeps or imprisoned for some other reason, they may find it difficult to prove their citizenship.<sup>23</sup>

ICE operates the largest detention program in the country.<sup>24</sup> Nonetheless, “ICE is not required to track when it arrests, detains, or deports citizens[,]”<sup>25</sup> making it extremely difficult to analyze the problem and

21. *Id.* at 609. Immigration law already provides relatively few protections to those in immigration proceedings. *Id.* at 607. To make matters worse, immigration law enforcement agencies frequently ignore the protections that are in place. *Id.* at 609.

22. *Id.* Since 2003 it has been reported that more than 20,000 U.S. citizens have been detained and deported, with well over 4,000 citizens being deported in just 2010. *Id.* at 608–09. Stevens suggests that because legal counsel is not provided to those detained and because the detainees are often not even provided an administrative hearing, many of the people being deported each year, are inevitably U.S. citizens. *Id.*

23. See Andrew Becker, *Observe and Deport*, MOTHER JONES (Apr. 23, 2009, 8:35 AM), <http://motherjones.com/politics/2009/04/observe-and-deport> (referring to the fact that Americans do not typically carry identification, which leads to great complications when immigration sweeps arise). “The federal government does not have a database of citizens for officials to reference. Additionally, immigration lawyers note that some immigration officers who handle citizenship cases lack training or adequate knowledge of the law.” *Id.* One immigration attorney even analogized the lack of experience amongst immigration officials to a person who has never filed a tax return being appointed as a tax judge. *Id.*

24. See generally DORA SCHIRO, DHS, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (Oct. 6, 2009), available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (referencing the vast number of aliens in custody or supervised by ICE). In 2008, ICE held in custody and supervised 378,582 immigrants from 221 countries; the numbers were similarly high in 2009. *Id.* “On September 1, 2009, ICE had 31,075 [immigrants] in detention at more than 300 facilities throughout the United States and territories, with an additional 19,169 [immigrants] in Alternative to Detention programs.” *Id.*

25. Becker, *supra* note 23.

The number of detained or deported citizens is relatively small compared to the number of immigrants deported in the past few years, but some of the cases have been particularly egregious. In March 2006, Ricardo Martinez, a resident of Mercedes, Texas, visited his dying grandmother in Mexico. When he tried to come back into the US in Laredo, Texas, a Customs and Border Protection officer suspected his passport was fraudulent, detained him, and handcuffed him to a chair, according to Martinez’s attorney, Lisa Brodyaga. The officer also threatened him with eight months in prison if he would not admit he was Mexican. Afraid of the threat, Martinez, who was born in Texas, but spent most of his youth in Mexico and doesn’t speak or read English, signed a paper claiming Mexican citizenship. He was sent back to Mexico, where he stayed for nearly two years. Martinez filed a civil lawsuit in 2008 seeking damages and a federal district judge to reaffirm his citizenship. He is back in the United States, but his case is pending.

*Id.*

hold ICE accountable.<sup>26</sup> The Obama Administration's aggressive immigration policies have also significantly contributed to the number of U.S. citizens that have been wrongfully detained.<sup>27</sup>

According to Professor Stevens, "[eighty-two] citizens were held for deportation from 2006 to 2008 at two immigration detention centers in Arizona" alone.<sup>28</sup> In 2008, the Northwest Immigrant Rights Project found approximately a dozen U.S. citizens in immigration lockups.<sup>29</sup> Last year, the Florence Immigrant and Refugee Rights Project in Arizona saw "[forty] to [fifty] jailings a month of people with potentially valid claims to citizenship."<sup>30</sup> Also, the Vera Institute for Justice "found 322 people with citizenship claims in [thirteen] immigration prisons in 2007."<sup>31</sup> While those numbers are indicative of the problem, it is important to keep in mind that there are more than 300 immigration prisons in the nation.<sup>32</sup> It is impossible, and it will continue to be impossible, to know precisely how many citizens are detained or deported unless ICE is required to document those incidents.

Citizens not born in the U.S. and naturalized citizens are more likely to be deported, in part because they may be unaware of their citizenship status.<sup>33</sup> However, naturalized citizens and citizens born in the United States are equal before the law<sup>34</sup> and any unequal treatment based on

26. *See id.* (demonstrating that because of the lack of information gathered by the INS about citizens being arrested, detained, or deported the problem is challenging to approach and prevent). Immigration attorneys, such as Matt Adams, the legal director for the Northwest Immigrant Rights Project, have reported that in the last year, numerous cases have come forward involving citizens who had been locked up by ICE, even though their citizenship claims were valid. *Id.* Adams speculates that many other US citizens were faced with the same dilemma but because there is not right to legal assistance in ICE proceedings, their cases were not fought. *Id.*

27. Teddy Wilson, *ICE Detains, Deports U.S. Citizens, and Their Numbers Don't Add Up*, TEXAS CIVIL RIGHTS REVIEW (Jan. 11, 2012), <http://texascivilrightsreview.org/wp/?p=2191>; *see also* Kalhan, *supra* note 4, at 51 (acknowledging that although Obama's Administration has been ambitious towards alleviating the problem, the proposals have left intact numerous practices that continue to contribute to detention of citizens and noncitizens in excessive numbers).

28. Wilson, *supra* note 27.

29. Becker, *supra* note 23.

30. *Some Citizens Being Held as Illegal Immigrants*, MSNBC (Apr. 13, 2009, 8:05 PM), [http://www.msnbc.msn.com/id/30180729/ns/us\\_news-life/t/some-citizens-being-held-illegal-immigrants/#.T2TWT5i4Lww](http://www.msnbc.msn.com/id/30180729/ns/us_news-life/t/some-citizens-being-held-illegal-immigrants/#.T2TWT5i4Lww).

31. *Id.*

32. *Id.*

33. Wilson, *supra* note 27 (statement from Barbra Hines of the Immigration Clinic at the University of Texas Law School, told to the Texas Independent).

34. U.S. CONST. amend. XIV, § 1, cl. 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").



acquisition of citizenship, whether by birth or naturalization, is unconstitutional.<sup>35</sup> After all, it is unlikely that the framers of the Constitution intended to create two classes of citizens, “one free and independent, one haltered with a lifetime string tied to its status.”<sup>36</sup>

Racial profiling and discriminatory practices may contribute to the problem of detaining and deporting U.S. citizens. In Arizona, from 2006 to 2008, the majority of U.S. citizens in ICE custody were “young men of Mexican descent who had recently completed criminal sentences.”<sup>37</sup> This is not surprising given the “atmosphere of suspicion and hostility, particularly for Mexican-Americans on the border.”<sup>38</sup>

A few cases, usually the most shocking ones, such as the case of Jakadrien Turner, have made headlines. Fourteen-year-old Jakadrien Turner was arrested by Houston police for misdemeanor theft and provided authorities with a fake name—Tika Lanay Cortez—that belonged to a [twenty-two] year-old Colombian with outstanding warrants for her arrest.<sup>39</sup> The county’s sheriff ran through the databases to establish her identity and immigration status with negative results.<sup>40</sup> Nonetheless, an immigration detainer was put on Jakadrien, and upon her release from jail she was turned over to ICE’s custody.<sup>41</sup> ICE officials processed her through the available databases and could not confirm her identity.<sup>42</sup> But, because the teen claimed to be Tika Lanay Cortez during the criminal and subsequent removal proceedings, an immigration judge ordered her deported to Colombia.<sup>43</sup>

Had Jakadrien been represented by counsel, she would unlikely have been faced with deportation to a country to which she had never been.<sup>44</sup>

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35. The Fourteenth Amendment of the U.S. Constitution states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

36. *Schneiderman v. United States*, 320 U.S. 118, 167 (1943).

37. Hilary Hurd Anyaso, *Illegal Deportation of U.S. Citizens*, NORTHWESTERN UNIV. NEWS (Oct. 6, 2011), <http://www.northwestern.edu/newscenter/stories/2011/10/deportation-us-citizens.html>.

38. *Some Citizens Being Held as Illegal Immigrants*, *supra* note 30.

39. Wilson, *supra* note 27.

40. Juan Carlos Llorca & Linda Stewart Ball, *Jakadrien Turner Saga: Texas Teen Deported to Colombia Reunites with Mom*, HUFFINGTON POST (Jan. 7, 2012, 6:22 AM), [http://www.huffingtonpost.com/2012/01/07/jakadrien-turner-saga-tex\\_n\\_1191216.html](http://www.huffingtonpost.com/2012/01/07/jakadrien-turner-saga-tex_n_1191216.html).

41. *Id.*

42. *Id.*

43. *Id.*

44. See Ed Lavandera, *The Harrowing Journey of the Girl Who Called Herself Tika Cortez*, CNN (Jan. 9, 2012, 5:29 AM), <http://www.cnn.com/2012/01/07/us/texas-colombia->

Unfortunately, because the number of unaccompanied minors in ICE's custody increased 225 percent between 2003 and 2009,<sup>45</sup> cases like Jakadrien's are more likely to recur.

Aside from children, another group of people who are extremely vulnerable to being wrongfully deported are mentally disabled individuals. Pedro Guzman, a thirty-year-old mentally disabled man, who hears voices and takes anti-psychotic medication,<sup>46</sup> is a prime example of the lack of safeguards allowing for the wrongful deportation of mentally ill U.S. citizens. Pedro was "born and raised in Southern California."<sup>47</sup> Despite several documents, including an incident report filed in relation to his arrest for trespassing, showing that Pedro was a U.S. citizen, Pedro was deported in 2007 to Tijuana, Mexico, with \$3 in his pocket.<sup>48</sup> He survived by eating garbage and bathing in rivers for nearly three months

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teen-profile/index.html (noting the family attorney's statement that the U.S. government is at fault for her deportation, despite an immigration official's unsupported claim that Jakadrien waived her right to an immigration attorney); *see also* Linda D. Elrod, "Please Let Me Stay": *Hearing the Voice of the Child in Hague Abduction Cases*, 63 OKLA. L. REV. 663, 665 (2011) ("Being heard and having one's views taken into account . . . is one of the main determinants of the perception that the decision making process is fair, even if the outcome is not the one that is wanted." Nonetheless, as this article proceeds to demonstrate, the United States has yet to adopt the United Nations Convention on the Rights of the Child, which requires child representation in all matters relating to the child's custody).

45. *See* WOMEN'S REFUGEE COMM'N, *HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY* 84 n.9 (2009), available at [http://womensrefugeecommission.org/docs/halfway\\_home.pdf](http://womensrefugeecommission.org/docs/halfway_home.pdf) ("ORR [Office of Refugee Resettlement] informed [the Commission] in their comments to the draft of this report that there has been more than a 225 percent increase in unaccompanied children in care since 2003."). In 2002 approximately five thousand unaccompanied minors were in custody, in contrast to an estimated 8,300 in custody in 2007. *Id.*; *see also* Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 45 (2011) (observing the exponential increase in unaccompanied minor detention and noting that this increase "coincided with the passage of the Homeland Security Act of 2002 (HSA) and its transfer of the responsibility for the care and custody of unaccompanied alien children from the Commissioner of the Immigration and Naturalization Service (INS) to the HHS Director of Office of Refugee Resettlement (ORR).").

46. Paloma Esquivel, *Suit Filed over Man's deportation Ordeal*, L.A. TIMES, Feb. 28, 2008, <http://articles.latimes.com/2008/feb/28/local/me-guzman28>; *see also* Hendricks, *supra* note 1 (describing Guzman as a mentally disabled man).

47. Hendricks, *supra* note 1; *see also* Daniel Hernandez, *Pedro Guzman's Return*, L.A. WEEKLY, Aug. 7, 2007, <http://www.laweekly.com/2007-08-09/news/pedro-guzman-s-return/> ("Guzman was born in September 1977 at USC-L.A. County Medical Center on the Eastside.").

48. Esquivel, *supra* note 46; *see also* Hendricks, *supra* note 1 (noting the year of Pedro's deportation).

while his worried mother searched for him.<sup>49</sup> Fortunately, Pedro had legal representation.<sup>50</sup> As his attorney puts it, “our government treated the color of Mr. Guzman’s skin as conclusive, irrefutable evidence that [he] . . . could not be a U.S. citizen.”<sup>51</sup>

Mark Lyttle, deported to Mexico in 2008, is another example of wrongful deportation of mentally ill U.S. citizens.<sup>52</sup> A man with a history of mental illness, Mr. Lyttle, apparently to avoid a confrontation, gave agents conflicting stories about his nationality, claiming at different times to be an American citizen and a Mexican national.<sup>53</sup> ICE apparently ignored records showing that he was born in the United States and deported him.<sup>54</sup>

The issue of appropriate safeguards for mentally ill individuals facing deportation has been a topic of much discussion and academic literature.<sup>55</sup> A report released in July 2010 by the ACLU and Human Rights Watch, “Deportation by Default,” explains the difficulties faced by mentally disabled detainees in immigration proceedings.<sup>56</sup> The report documents cases of noncitizens who could not understand questions, could not

49. See Hendricks, *supra* note 1; Esquivel, *supra* note 46. Pedro’s mother searched for her son in Tijuana by “leaving fliers with his photo at the morgue, hospitals, churches and shelters.” *Id.*

50. See Esquivel, *supra* note 46 (identifying the ACLU and a private law firms as representing Pedro and his family in a suit against the federal government for violation of his civil rights in being wrongfully deported).

51. *Id.* (quoting Mark Rosenbaum, legal director of the ACLU).

52. See Ted Robbins, *In The Rush to Deport, Expelling U.S. Citizens* (WPR), (Oct. 24, 2011), <http://www.npr.org/2011/10/24/141500145/in-the-rush-to-deport-expelling-u-s-citizens> (citing Mark’s story in a larger story on deportation of U.S. citizens by ICE in “the rush to deport record numbers of illegal immigrants” and concluding “the government may also be deporting people who aren’t illegal immigrants at all.”).

53. See *id.* (describing Mr. Lyttle’s confrontations with ICE and Border Patrol); see also Lucy Steigerwald, *Mentally Ill American Citizen Deported to Mexico in 2008 Gets \$175K for His Troubles*, HIT AND RUN REASON (Oct. 5, 2012, 7:18 PM) [http://reason.com/blog/2012/10/05/mentally-illamerican-citizendeported\\_T](http://reason.com/blog/2012/10/05/mentally-illamerican-citizendeported_T). (explaining Mr. Lyttle’s experience with ICE and the eventual resolution of his case).

54. See Stevens, *supra* note 5, at 674–76 (relating the shortcomings of ICE and Border Patrol in properly investigating Mr. Lyttle’s case before arresting him).

55. See, e.g., DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE U[.]S[.] IMMIGRATION SYSTEM, AM. CIVIL LIBERTIES UNION 2 (2010), available at [http://www.aclu.org/files/assets/usdeportation0710\\_0.pdf](http://www.aclu.org/files/assets/usdeportation0710_0.pdf) (showing the actions of the ACLU and the Human Rights Watch in regards to deportation and mental disability); see also Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 377–84 (2011) (describing the current plight of the mentally ill in deportation proceedings); Robbins, *supra* note 52 (describing the performance of ICE and Border Patrol in regards to detainees with mental illness).

56. DEPORTATION BY DEFAULT, *supra* note 55.

tell the date or time and did not understand the concept of deportation—for example, saying they wanted to be “deported ‘to New York.’”<sup>57</sup> “There is no official count of how many mentally disabled people go through immigration courts or detention, though the report extrapolates from statistics to estimate the number at roughly 57,000 in 2008.”<sup>58</sup> It is impossible to say how many are U.S. citizens, but it is safe to assume that more individuals like Pedro are out there.

As previously mentioned, minorities have been targeted by ICE, which could indicate a pattern of racial profiling, as illustrated by the case of Rennison Castillo, who is a Black naturalized U.S. citizen.<sup>59</sup> Rennison, a resident of Washington State, was born in Belize and took his oath of citizenship while serving in the U.S. military in 1998.<sup>60</sup> Rennison was detained for seven months as an undocumented immigrant in 2006, after serving an eight-month jail term for harassing an ex-girlfriend.<sup>61</sup> Even though Rennison insisted he was a U.S. citizen, an immigration judge ordered his deportation.<sup>62</sup> He was released after an appeals board discovered that his name had been misspelled on immigration records.<sup>63</sup>

After his release, Rennison sued the government with the help of the Northwest Immigrant Rights Project in Seattle and settled for \$400,000.<sup>64</sup> Rennison also received a letter of apology from the U.S. Attorney for the Western District of Washington in which his honorable service in the U.S. Army was recognized.<sup>65</sup> In addition, the letter listed several procedures ICE had put in place since his detention in order to avoid similar occurrences, such as: promptly and thoroughly investigating all claims of U.S. citizenship of persons detained by ICE; conducting interviews of detainees making such claims in the presence of a supervisor and recorded as a sworn statement; and releasing an individual from detention if the detainee’s claim is credible on its face or if the investigation results in pro-

57. *Id.* at 6 (describing the class of cases that were investigated by the Human Rights Watch).

58. Editorial, *Detention and the Disabled*, N.Y. TIMES, July 30, 2010, <http://www.nytimes.com/2010/07/31/opinion/31sat3.html>.

59. *Castillo v. Skwarski*, No. C08-5683BHS, 2009 WL 4844801, at \*1 (W.D. Wash. 2009).

60. *Id.*

61. Hendricks, *supra* note 1.

62. *Castillo*, WL 4844801, at \*3.

63. Becker, *supra* note 23. *See Castillo*, WL 4844801, at \*2 (showcasing Castillo’s contention that his first name had been misspelled on his “greencard” when speaking with an ICE officer after his transfer to Washington detention center).

64. Stipulation for Compromise Settlement and Release of All Claims at 2 *Castillo v. Swarski*, (W.D. Wash. 2010) (No. C08-5683-BHS).

65. *Id.* at 7–8.

bative evidence that the detained individual is a U.S. citizen.<sup>66</sup> While these procedures may be helpful, they fall short of requiring counsel, which would be a much better procedural protection against wrongful detention and removal.

Ricardo Martinez is another prime example of ICE's profiling strategies.<sup>67</sup> In March 2006, when Martinez, a resident of Mercedes, Texas, tried to come back into the United States after visiting his dying grandmother in Mexico, a Customs and Border Protection officer suspected his passport was fraudulent, detained him, and handcuffed him to a chair.<sup>68</sup> The officer also threatened him with eight months in prison if he would not admit he was Mexican.<sup>69</sup> The threat worked. Although Martinez was a U.S. citizen by birth, he had lived his youth in Mexico so did not speak or read English—he signed a paper indicating Mexican citizenship and was deported.<sup>70</sup> After two years in Mexico, Martinez filed a civil lawsuit seeking damages and reaffirmation of his U.S. citizenship.<sup>71</sup>

ICE Director of Detention and Removal Jim Hayes has claimed knowledge of only ten cases between 2004 and 2009 of Americans detained on suspicion of being in the country illegally.<sup>72</sup> However, anecdotal stories suggest that those cases are far more common than ICE admits; these stories also imply that minors, mentally disabled individuals, and naturalized citizens are disproportionately detained under the belief that they are undocumented immigrants.<sup>73</sup>

U.S. citizens who are wrongfully detained face barriers in proving their citizenship, largely because they are detained and unable to gather neces-

66. *Id.* at 7.

67. *See Some Citizens Being Held as Illegal Immigrants, supra* note 30 (detailing Ricardo Martinez's difficulty entering back into the United States, despite the fact that he is U.S.-born).

68. Becker, *supra* note 23. *Some Citizens Being Held as Illegal Immigrants, supra* note 30.

69. *Some Citizens Being Held as Illegal Immigrants, supra* note 30.

70. Becker, *supra* note 23.

71. *Id.*

72. *Id.*; *see also Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 4 (2008) (statement of ICE Assistant Dir. of Detention & Removal John Mead, testifying that ICE had not "knowingly or willfully" detailed a U.S. citizen).

73. *See, e.g., Alice Clapman, Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 *NEW ENG. L. REV.* 373, 375 (2011) (describing the plight of Carlos, a Latin American youth, that bolsters the argument that mentally disabled immigrants and citizens have particular legal problems due to their disabilities); Esquivel, *supra* note 46 (reporting on a developmentally disabled U.S. citizen who had been deported).

sary documentation.<sup>74</sup> Detained individuals have limited access to attorneys, which makes it difficult, and at times impossible, to gather evidence.<sup>75</sup> Notwithstanding the difficulty of proving citizenship, once deported, U.S. citizens may never be able to come back to the United States since they will be considered undocumented and therefore inadmissible and subject to permanent banishment.<sup>76</sup> If they are able to come back to the country and prove their citizenship, they may have the option to sue the government.<sup>77</sup> But lawsuits are expensive, and even if they prevail, it doesn't make up for months or years in detention, or in a strange country.<sup>78</sup>

### III. THE REASONS U.S. CITIZENS ARE WRONGFULLY REMOVED FROM THE COUNTRY

#### A. *The Lack of Safeguards in Immigration Laws and Policies Contributes to Wrongful Deportation of U.S. Citizens*

##### 1. The Lack of Constitutional Protections

Many constitutional protections do not apply in deportation proceedings because a deportation proceeding is not a criminal proceeding and has never been held to be punishment.<sup>79</sup> Deportees, regardless of their status or the type of proceeding they face, have neither the right to a jury

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74. See Kalhan, *supra* note 4, at 46 (analyzing the convergence of criminal law and immigration control).

75. *Id.*

76. See Patrik Jonsson, *Deported Teen Returns to U.S. How Many Americans Are Mistakenly Banished?*, CS MONITOR (Jan. 7, 2012, 9:46AM) <http://www.csmonitor.com/USA/2012/0107/Deported-teen-returns-to-US.-How-many-Americans-are-mistakenly-banished> (reporting on the case of 14-year-old Jakadrien Turner who was deported when, upon arrest for shoplifting, she gave law enforcement the name of an illegal alien as her identity); Stevens, *supra* note 5, at 675–76 (citing, among other cases, the hardships of mentally disabled Mark Lyttle and the struggles of his family to overturn his deportation); Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579, 2579 (2007) (discussing the case of Muhammad & Jamail Ismail, two U.S. citizens of Pakistani descent, who were denied re-entry into the United States).

77. See Hendricks, *supra* note 1 (“Lawsuits for wrongful detention or deportation are usually brought under the Federal Tort Claims Act, or via a so-called Bivens Claim, which names not just the U.S. government but individual government employees.”).

78. *Id.*

79. Victoria Cook Capitaine, *Life in Prison Without a Trial: The Indefinite Detention of Immigrants in the United States*, 79 TEX. L. REV. 769, 776–77 (2001).

trial,<sup>80</sup> the right to court-appointed counsel,<sup>81</sup> the right to be present during removal proceedings,<sup>82</sup> nor:

[T]he right to bail (many thousands face mandatory detention every day), the right to have illegally-seized evidence suppressed (unless the agents' conduct was widespread or egregious), or the right against ex post facto laws (a person can be deported for conduct that became a deportable offense since its commission).<sup>83</sup>

The lack of safeguards contributes to the speediness of the removal process, which in turn allows wrongful deportations to occur.

The Immigration and Nationality Act (INA) requires that a person facing removal be provided notice of the charges, have a hearing before an executive or administrative tribunal, and a fair opportunity to be heard.<sup>84</sup> However, the same Act makes these general requirements meaningless. If a detainee makes a credible claim to U.S. citizenship, ICE will ask the detainee to produce any available evidence,<sup>85</sup> and will review the detainee's file and query all relevant databases to support the detainee's claims.<sup>86</sup> There is, however, no national database of U.S. citizens so there is no dependable system to verify claims of citizenship in place. Furthermore, detainees are rarely in possession of their birth certificates, passports, or other evidence of citizenship. Incapacitated detainees struggle to even make such claims and are even less able to produce supporting evidence, thus they are left in a greatly vulnerable position.

## 2. Mandatory Detention

INA Section 236(c) requires immigrants who have been convicted of certain types of crimes, including aggravated felonies, crimes involving moral turpitude, and drug-related crimes to be detained without release,

80. *Carlson v. Landon*, 342 U.S. 524, 537 (1952).

81. *See, e.g., Aguilera-Enriquez v. INS*, 516 F.2d 565, 568–69 (6th Cir. 1975) (holding that the petitioner's due process rights were not violated by the absence of counsel at his deportation hearing).

82. *See* 8 U.S.C. § 1229a (b)(2)(A)(ii) (2006) (permitting removal proceedings to go forth in the absence of the alien where agreed to by the parties).

83. 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, 1466 (2011).

84. 8 C.F.R. § 1534 (2011).

85. *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law on the H. Comm. on the Judiciary*, 110th Cong. 5 (2008) (statement of Gary E. Mead, Deputy Director, Office of Detention and Removal Operations, U.S. Immigration and Customs Enforcement).

86. *Id.*

pending their removal proceedings.<sup>87</sup> The majority of the detainee population is characterized as having a low propensity for violence.<sup>88</sup> Nonetheless, sixty-six percent of them are subject to mandatory detention,<sup>89</sup> which means that nearly 249,864 individuals are detained throughout the entire removal proceeding.<sup>90</sup> Mandatory detention makes evidence gathering extremely difficult because the person is detained and has limited contact with family members, as undocumented relatives may be able to visit, but risk detention as a consequence. Accordingly, mandatory detention imposes severe barriers for detainees, especially pro se detainees, to gather evidence that could establish their citizenship.

### 3. Expedited Removal

INA Section 235 which addresses expedited removal, contributes to making a fair hearing likely unattainable by authorizing Customs and Border Patrol officers to remove foreign nationals who are deemed inadmissible for lack of a valid entry document,<sup>91</sup> fraudulent procurement of an immigration benefit,<sup>92</sup> or a false claim to U.S. citizenship.<sup>93</sup> Individuals subject to expedited removal have no right to counsel and no right to have a hearing before an immigration judge,<sup>94</sup> which makes it nearly impossible for detainees to produce evidence that they are not subject to expedited removal, including evidence of U.S. citizenship. This expedited system, affecting one-third of detained individuals,<sup>95</sup> undermines the ideals of fundamental fairness requirement of due process in immigration proceedings and allows for the deportation of U.S. citizens such as Sharon McKnight.<sup>96</sup>

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87. See 8 C.F.R. § 1226(c) (1996).

88. SCHIRRO, *supra* note 24, at 2.

89. *Id.*

90. Two thirds of 378,582 (number of individuals in custody or supervised in 2009) equals 249,864 (individuals subject to mandatory detention). SCHIRRO, *supra* note 24, at 2.

91. 8 U.S.C. § 1182(a)(7)(A)(i)(I) (2006).

92. *Id.* at § 1182(a)(6)(C)(i).

93. *Id.*

94. 8 C.F.R. § 1225 (2011).

95. The share of expedited removals as a percentage of formal removals fluctuated between 1997 and 2005, peaking in 1999 (forty-nine percent of the 181,194 formal removals) and bottoming out in 1997 (twenty-percent of the 114,432 formal removals). Expedited removals accounted for thirty-five percent (72,911) of formal removals in 2005. Dawn Konet & Jeanne Batalova, *Spotlight on Immigration Enforcement in the United States*, MIGRATION INFORMATION SOURCE (Mar. 2007), <http://www.migrationinformation.org/feature/print.cfm?ID=590>. Expedited removals accounted for more than a third of formal removals in 2005. Dawn Konet & Jeanne Batalova, *Spotlight on Immigration Enforcement in the United States*, MIGRATION INFORMATION SOURCE (Mar. 2007), <http://www.migrationinformation.org/feature/print.cfm?ID=590>.

96. *Hearing on Problems with ICE Interrogation*, *supra* note 85.



In 2000, Sharon McKnight, a developmentally disabled U.S. citizen with the mental capacity of a young child, was subjected to expedited removal upon her return to the United States from Jamaica.<sup>97</sup> She was taken into custody under suspicion of carrying a fraudulent U.S. passport.<sup>98</sup> Despite family members securing a copy of her U.S. birth certificate, she was left overnight in a room at the airport, handcuffed and shackled to a chair, and was not permitted to eat or use the bathroom.<sup>99</sup> She was deported to Jamaica the following morning and was only permitted to return to the United States after Congress intervened.<sup>100</sup>

Section 1228 of Title 8 of the U.S. Code applies to individuals convicted of an “aggravated felony”<sup>101</sup> who are not lawfully admitted for permanent residency, or who are conditional permanent residents.<sup>102</sup> The statute was designed to hasten the removal process of individuals who have been convicted of aggravated felonies,<sup>103</sup> which provides few judicial procedures and means for individual involvement.<sup>104</sup> The code reads, “no alien described in this section shall be eligible for any relief from removal.”<sup>105</sup> The U.S. Court of Appeals for the Eighth Circuit interpreted the statute to mean individuals who fall under this category “may be placed in expedited removal proceedings with no hearing before an immigration judge and no eligibility for any form of discretionary relief from

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97. *See id.* (discussing the removal of Sharon McKnight).

98. *Id.*

99. *Id.*

100. *Id.*

101. Aggravated felonies include many offenses that are neither aggravated nor even felonies. Judith Greene, *Bailing Out Private Jails*, AM. PROSPECT (Dec. 19, 2001), <http://prospect.org/article/bailing-out-private-jails>. *See generally* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007) (discussing the problems with the definition of “aggravated felony” in relation to immigration).

102. 8 U.S.C. § 1228(b)(2) (2006).

103. *Id.* § 1228(a)(1) (2006). *See generally* Jay M. Zitter, Annotation, *Validity, Construction, and Application of 8 U.S.C.A. § 1228 Governing Expedited Removal of Aliens Convicted of Committing Aggravated Felonies*, 32 A.L.R. FED.2d 509 (2008) (discussing the issues surround 8 U.S.C. § 1228 and its implementation on legal permanent residents).

104. *See generally* Jay M. Zitter, Annotation, *Validity, Construction, and Application of 8 U.S.C.A. § 1228 Governing Expedited Removal of Aliens Convicted of Committing Aggravated Felonies*, 32 A.L.R. FED.2d 509 (2008) (discussing the issues surround 8 U.S.C. § 1228 and its implementation on legal permanent residents).

105. 8 U.S.C. § 1228(b)(5) (2006) (“No [immigrant] described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General’s discretion.”).

removal.”<sup>106</sup> Even when there is a hearing, the immigration official is usually the adjudicator,<sup>107</sup> which compromises neutrality.

Deolinda Smith-Willmore is a prime example of a wrongfully expedited removal. Testimony before a Congressional subcommittee revealed that “Deolinda, a partially-blind, seventy-one-year-old U.S. citizen with schizophrenia, was deported in 2001 after [wrongfully] identifying herself as Dominican while serving time in prison for assaulting a neighbor.<sup>108</sup> She was, in fact, born in New York in 1931.<sup>109</sup> According to Deolinda, she informed immigration officers of her U.S. citizenship, but no attempt was made to verify her claim, and she did not see an immigration judge because she was in expedited removal proceedings.<sup>110</sup> Even after admitting to the wrongful deportation, the government refused to issue documents that would allow her to return to the United States until the media took interest in the case.<sup>111</sup>

#### 4. Stipulated Judicial Orders of Removal

Stipulated judicial orders of removal are another way in which the INA violates detained immigrants’ and wrongfully detained U.S. citizens’ due process rights. Stipulated judicial orders allow deportation without a hearing before an immigration judge.<sup>112</sup> Individuals who sign stipulated

106. *See* *Gonzalez v. Chertoff*, 454 F.3d 813, 815 (8th Cir. 2006) (holding that the Attorney General’s use of discretion in ordering the removal of a non-legal permanent resident, who committed an aggravated felony did not violate the Equal Protection Clause component in the Fifth Amendment).

107. *See* *Zitter*, *supra* note 104 (explaining, for example, that in *United States v. Benitez-Villafuerte*, 186 F.3d 651 (5th Cir. 1999), the court chose to disregard an argument related to due process). *Zitter* stated:

The court also rejected a related due process argument, that the INS impermissibly functioned in both a prosecutorial and an adjudicative capacity during the 8 U.S.C.A. § 1228 proceeding. The court reasoned that the alien had pointed to no evidence that showed that in carrying out these dual functions, the INS officers prejudged his case before all facts were known to them to the extent that minds were irrevocably closed to the possibility of him avoiding deportation, and that absent this showing, the court could not say that the commingling of prosecutorial and adjudicative functions in a 8 U.S.C.A. § 1228 proceeding posed a risk of impermissible bias.

*Id.*

108. *Hearing on Problems with ICE Interrogation*, *supra* note 85.

109. *Id.*

110. *Id.*; *see* Marisa Taylor, *Immigration Officials Detaining, Deporting American Citizens*, McClatchy DC (Jan. 24, 2008), <http://www.mcclatchydc.com/2008/01/24/25392/immigration-officials-detaining.html> (“Proving citizenship is especially difficult for the poor, mentally ill, disabled or anyone who has trouble getting a copy of his or her birth certificate while behind bars.”).

111. *Hearing on Problems with ICE Interrogation*, *supra* note 85.

112. *See* 8 U.S.C. § 1229A(d) (2006) (“A stipulated order shall constitute a conclusive determination of the alien’s removability from the United States.”). This provision enables

removal orders “waive their rights to a hearing before an immigration judge and agree to have a removal order entered against them, regardless of whether they are actually eligible to remain in the United States.”<sup>113</sup> Different from mandatory detention and expedited removal, stipulated orders of removal are (technically) the detainee’s choice.<sup>114</sup> In practice, however, many people who have signed these removal orders “do not understand that they have done so, much less the impact these orders have on their right to remain in or reenter the United States lawfully in the future.”<sup>115</sup> Since its inception, over 96,000 stipulated removal orders have been entered, but despite its widespread use, little is known about when and how these orders are being used by immigration officials.<sup>116</sup> “Worse, immigrants have reported being coerced to sign stipulated orders of removal.”<sup>117</sup> Many of these individuals, when given the choice between signing their rights away or remaining in detention, agreed to their removal even though they may have had claims to remain in the United States based on a variety of factors—including citizenship.<sup>118</sup>

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the Department of Justice to promulgate appropriate and relevant regulations. *See* *United States v. Ramos*, 623 F.3d 672, 675–76 (9th Cir. 2010) (surveying briefly the development of federal regulations enacting 8 U.S.C § 1229A(d) (2006). The current regulatory enactment can be found in 8 C.F.R. § 1003.25 (2011). *See* 8 C.F.R. § 1003.25 (2011) (“An Immigration Judge may enter an order of deportation, exclusion[,] or removal stipulated to by the alien (or the alien’s representative) and the Service.”).

113. AM. CIVIL LIBERTIES UNION, *SLAMMING THE COURTHOUSE DOORS* 21 (2010), available at [http://www.aclu.org/files/assets/HRP\\_UPRsubmission\\_annex.pdf#page=3](http://www.aclu.org/files/assets/HRP_UPRsubmission_annex.pdf#page=3). In 2007, for example, immigration officials entered 31,554 stipulated removal orders. *Id.*

114. *See* 8 C.F.R. § 1003.25 (2011) (stating that a stipulated order of removal must include a statement that “the [immigrant] enters the request voluntarily, knowingly, and intelligently”).

115. AM. CIVIL LIBERTIES UNION, *SLAMMING THE COURTHOUSE DOORS*, *supra* note 113.

116. *Immigrants’ Rights Organizations Sue Department of Homeland Security for Public Accountability about Deportation Program that Sidesteps Legal Process for Immigrants*, NEWS CENTER (Nov. 12, 2008), <http://www.law.stanford.edu/news/pr/immigrants%E2%80%99-rights-organizations-sue-department-of-homeland-security-for-public-accountability-about-deportation-program>.

117. AM. CIVIL LIBERTIES UNION, *SLAMMING THE COURTHOUSE*, *supra* note 113.

118. *Immigrants’ Rights Organizations Sue Department of Homeland Security*, *supra* note 116; *see also* AM. CIVIL LIBERTIES UNION, *SLAMMING THE COURTHOUSE DOORS*, *supra* note 113 (stating that defendants are talked into waiving all of their rights).

B. *ICE's Policies Support Filling the Beds of Private Businesses Who Contract with the Government to Run Detention Centers*

The immigration detention operation “is the fastest growing . . . within the Department of Justice,”<sup>119</sup> in part because “federal and state officials are increasingly contracting [with] private companies to run prisons and immigration detention centers.”<sup>120</sup> A 2010 leaked government memorandum demonstrates how agents are under pressure to increase detentions and deportations in order to fill empty beds.<sup>121</sup> In the memo, James M. Chaparro, ICE’s Director of Detention and Removal Operations, urged agents to reach the agency’s goal of 150,000 criminal alien removals and also urged them to overcome a shortfall in the goal of 400,000 deportations by making maximum use of detention slots.<sup>122</sup>

Even though the Obama Administration’s focus was on deporting criminals, the memo ordered agents to “pick up the pace of deportation by detaining more noncitizens suspected only of unauthorized residence.”<sup>123</sup> “Non-criminal removals are falling short of our goal.”<sup>124</sup> Typically, non-criminal undocumented individuals can be deported more quickly than documented immigrants with criminal convictions.<sup>125</sup> This poses a serious problem since U.S. citizens can mistakenly be assumed to be undocumented immigrants.<sup>126</sup>

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119. *INS Reform: Detention Issues: Hearing before the S. Subcomm. on Immigration of the S. Comm. on the Judiciary* (1998) (testimony of Doris Meissner, Comm’r, Immigration and Naturalization Service).

120. NPR Staff, *Who Benefits When a Private Prison Comes to Town?*, NPR, Nov. 5, 2011, <http://www.npr.org/2011/11/05/142058047/who-benefits-when-a-private-prison-comes-to-town>.

121. Memorandum from James M. Chaparro, Dir., ICE Detention and Removal Operations, to Field Office Dirs. and Deputy Field Office Dirs., ICE (Feb. 22, 2010), available at <http://media.washingtonpost.com/wp-srv/politics/documents/ICEdocument032710.pdf>.

122. *Id.*

123. Nina Bernstein, *Disabled Immigration Detainees Face Deportation*, N.Y. TIMES, Mar. 29, 2010, [http://www.nytimes.com/2010/03/30/us/30immig.html?\\_r=1&fta=y](http://www.nytimes.com/2010/03/30/us/30immig.html?_r=1&fta=y).

124. Memorandum from James M. Chaparro, *supra* note 121.

125. *See* Bernstein, *supra* note 123 (explaining that agents were ordered to “pick up the pace” of deportations of immigrants with criminal convictions).

126. An illustration can be found through Philip Hwang’s experience when a U.S.-born woman he represented “received a settlement of \$50,000 after agents at San Francisco International Airport, who didn’t believe her passport and birth certificate were legitimate, shackled her to a chair and held her for hours.” Hendricks, *supra* note 1. *See* Julia Preston, *Immigration Crackdown Also Snares Americans*, N.Y. TIMES, Dec. 13, 2011, <http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-citizens.html?page-wanted=all> (“A growing number of [U.S.] citizens have been detained under Obama administration programs intended to detect illegal immigrants who are arrested by local police officers.”).

Some argue that ICE's internal policies are less a result of tough immigration laws and more a strategy to fill beds and "bail out private jails."<sup>127</sup> In 1996, Congress expanded the list of crimes for which a noncitizen must be deported, thus, putting pressure on federal officials to find and deport troublesome immigrants.<sup>128</sup> Most detained immigrants commit non-violent crimes and since they face deportation at the end of their sentences and do not require the kinds of education and counseling programs available in regular federal prisons, they can easily be held in low-security, privately run prisons.<sup>129</sup> Corrections Corporation of America, the nation's largest private prison company, was on the verge of bankruptcy in 2001, when it partnered with the federal government to detain immigrants, and fill their empty beds.<sup>130</sup> In 2011, the corporation's gross profit was \$1,735,613,000,<sup>131</sup> which suggests a successful bailout.

There is no national database of citizens; consequently, ICE "relies on the person to provide clear and convincing evidence that they are a [U.S.] citizen."<sup>132</sup> The INA and ICE's internal policies, however, impose tremendous barriers for U.S. citizens, especially mentally ill and illiterate individuals, to navigate through immigration laws and prove their U.S. citizenship. ICE's enforcement capacity increased exponentially during the past few years, but the possibility that nearly 4,000 U.S. citizens were

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127. Greene, *supra* note 101.

128. *Id.*

129. *See id.* at 7 (stating that "just 1.5 percent of them were sentenced for violent offenses [as] compared with 15 percent of the U.S. citizens in federal prison"); *see also* NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 4 (2012), available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf> ("From 1996 to 2006, [sixty-five percent] of immigrants who were detained and deported were detained after being arrested for non-violent crimes. In 2009 and 2010, over half of all immigrant detainees had no criminal records. Of those with any criminal history, nearly [twenty percent] were merely for traffic offenses.").

130. *See About BD*, BUSINESS OF DETENTION, [http://www.businessofdetention.com/?page\\_id=2](http://www.businessofdetention.com/?page_id=2) (last visited Nov. 20, 2012) (investigating the business of private detention in America); *see also* Graeme Wood, *A Boom Behind Bars: Private Jail Operators are Making Millions off the Crackdown on Illegal Aliens*, MSNBC, Mar. 25, at A1 (relating Selvin Cardenas' experiences in a private detention facility). Corrections Corporation of America is a publicly traded company that runs "its prison much as the government does[;] [t]he main difference is that CCA locks people up for profit." *Id.* The profits depend on the numbers of inmates and "[t]hose numbers rise and fall in response to specific policies, and CCA has been accused of lobbying for policies that would fill its cells." *Id.* Policies that allow for greater detention numbers would help increase the amount of inmates consequently causing an increase in profits.

131. *Corrections Corporation of America Income Statement*, YAHOO! FINANCE (NOV. 9, 2012 4:01 PM), <http://finance.yahoo.com/q/is?s=CXW&annual>.

132. Hendricks, *supra* note 1 (quoting Cori Bassett, ICE's spokeswoman).

wrongfully detained or deported last year indicates that training and oversight at ICE has lingered far behind.

C. *The Chance of Wrongful Deportation is Much Higher When Individuals Are Not Represented by Counsel*

Most individuals in removal proceedings appear pro se, and the lack of counsel has a pronounced, negative impact on case outcomes.<sup>133</sup> For example, represented asylum seekers are twice as likely to being granted asylum as pro se respondents.<sup>134</sup> Legal representation can also be critical in citizenship cases.<sup>135</sup>

For U.S. citizens who have obtained citizenship upon naturalization of a parent, or “have acquired citizenship at birth abroad from a U.S. citizen parent, the chance of error in a removal proceeding” is much higher, and the need for counsel is great.<sup>136</sup> “Determining whether someone not born in the U.S. acquired citizenship from a parent,” can require substantial factual investigations and in depth legal analysis.<sup>137</sup> After all, as many as seven percent of U.S. citizens—approximately thirteen million people—do not have access to citizenship documents, including U.S. passports, naturalization papers, or birth certificates.<sup>138</sup> Even worse, at least twelve percent of voting age American citizens who earn less than \$25,000 per year are more than twice as likely to lack readily available citizenship documentation than those earning more than \$25,000.<sup>139</sup> This

133. Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MIGRATION POL’Y INST., Apr. 2005, at 1, 5, available at [http://www.migrationpolicy.org/insight/Insight\\_Kerwin.pdf](http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf). Over sixty percent of all respondents in removal proceedings are pro se while ninety percent of the detained respondents are unrepresented. *Id.*

134. See, e.g., ABA COMM’N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 1–8 (2010), available at [http://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/coi\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf) (recommending reforms to address the issues identified in the report).

135. See *id.* (explaining the importance of legal counsel for navigating the immigration system).

136. See *Hearing on Problems with ICE Interrogation*, *supra* note 85 (finding that the chance of error is also high for those who are born in the U.S. but not in a hospital and lack a birth certificate).

137. See *id.* (finding that the chance of error is also high for those who are born in the U.S. but not in a hospital and lack a birth certificate).

138. See BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICAN’S POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2 (2006), available at [http://www.brennancenter.org/page/-/download\\_file\\_39242.pdf](http://www.brennancenter.org/page/-/download_file_39242.pdf) (calculating statistics based on the 2000 census using citizens of voting-age population who were surveyed).

139. *Id.*

is extremely problematic because those who make less than \$25,000 per year are also more likely to linger in detention because they are unable to pay for legal counsel.<sup>140</sup> Legal representation, or the absence thereof, often determines who can remain in the United States.<sup>141</sup> In other words, those who can pay for attorney services have better chances to stay.<sup>142</sup> Instead, legal and fairness standards should determine eligibility to remain in the country.<sup>143</sup>

#### IV. ANALYSIS

##### A. *Removing a U.S. Citizen from the United States, Without Previously Revoking Citizenship, is Punishment Under the Sixth Amendment of the U.S. Constitution and as Such, Immigration Proceedings Are Entitled to Criminal Procedures and Safeguards, Including Court-Appointed Counsel*

Notably, the unfortunate principle that deportation proceedings are civil in nature and therefore subject only to limited due-process requirements has survived for over a hundred years.<sup>144</sup> In 1893, the Supreme Court held that

the order of deportation is not a punishment for crime. It is not banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country . . . .<sup>145</sup>

Accordingly, courts have generally held that the constitutional safeguards that apply in criminal prosecutions do not apply in deportation proceedings.<sup>146</sup> Therefore, individuals facing deportation do not have a

140. See Kerwin, *supra* note 133, at 1 (analyzing the federal government's "no expense" restriction on representation for immigrants facing removal proceedings).

141. See *id.* (arguing for an appointed counsel system in removal proceedings).

142. See *id.* (illustrating that unrepresented immigrants achieve relief in cases far less frequently than immigrants who have obtained legal counsel).

143. See *id.* (presenting alternative models to current removal proceedings).

144. See Clapman, *supra* note 73, at 384 (discussing the challenge judges face with respondents that are mentally impaired).

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

146. See Robert Pauw, *A New Look at Deportation As Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 307-13 (2000) (explaining the reasoning behind the view that deportation is a civil proceeding).

The [deportation] proceeding . . . is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment in the sense in which that word is often applied to the

right to trial by jury or the Sixth Amendment right to the assistance of counsel; as Scholar Robert Pauw notes:

the exclusionary rule under the Fourth Amendment does not apply; the Ex Post Facto Clause does not apply; no limits to deportation are imposed by virtue of the Double Jeopardy Clause; the Eighth Amendment's prohibition against cruel and unusual punishment is not relevant; and the Bill of Attainder Clause does not apply.<sup>147</sup>

Despite the small library of articles claiming that detention is not different from incarceration and deportation is not different from punishment, the Supreme Court has not yet held that deportation is punishment for the purposes of Sixth Amendment rights. Although “[e]very one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel,”<sup>148</sup> the Supreme Court has not yet agreed.

It is well established, however, that deportation is a “severe penalty,”<sup>149</sup> and despite being civil in nature,<sup>150</sup> it is closely related to the criminal process<sup>151</sup> and can include “loss of both property and life; or of all that makes life worth living.”<sup>152</sup> Given that “deportation is a drastic measure and at times the equivalent of banishment or exile,”<sup>153</sup> the Court in *Padilla v. Kentucky*<sup>154</sup> acknowledged, “deportation is intimately related to the criminal process,”<sup>155</sup> and held that “counsel must inform her client whether his plea carries a risk of deportation.”<sup>156</sup> The Court, how-

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expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.

*Id.* at 308–09 (citing *Fong Yue Ting*, 149 U.S. at 730).

147. *Id.* at 309.

148. *Fong Yue Ting*, 149 U.S. at 740.

149. *Id.*

150. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (holding that a deportation is a civil action).

151. See (stating that the Court has long recognized deportation as a severe penalty, “intimately related to the criminal process.”).

152. *Ng Fun Ho v. White*, 259 U.S. 276, 284 (1922).

153. Clapman, *supra* note 73, at 385; see *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947) (“Deportation can be the equivalent of banishment or exile.”).

154. 559 U.S. 356, 130 S. Ct. 1473 (2010).

155. *Padilla v. Kentucky*, 559 U.S. 356, \_\_\_, 130 S. Ct. 1473, 1481 (2010).

156. *Id.* at \_\_\_, 130 S. Ct. at 1486 (2010); see also *Aguilera-Enriquez v. INS*, 516 F.2d 565, 572 (6th Cir. 1975) (DeMascio, R., dissenting) (disagreeing with the majority’s ruling that it did not violate due process to refuse to appoint counsel for the respondent, Justice DeMascio stated that a lawful permanent resident’s due process rights should not depend



ever, neither recognized deportation as a criminal sanction, nor as completely civil. Instead, it concluded that “[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.”<sup>157</sup> Thus, deportation is now neither categorically covered by the Sixth Amendment nor is it removed from the realm of the Sixth Amendment right to counsel.<sup>158</sup>

While deporting, exiling, or banishing a noncitizen from the United States may not be considered punishment for the purpose of triggering constitutional protection, the same cannot be said when the person being removed from the country is a U.S. citizen. The Fourteenth Amendment protects every citizen against the forcible destruction of his or her citizen-

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on “[a] classification of the deportation proceeding as ‘civil,’ ‘criminal,’ or ‘administrative.’ No matter the classification, deportation is punishment, pure and simple.”); Adriane Meneses, *The Deportation of Lawful Permanent Residents For Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 837-38, 839 (2012) (discussing the similarities between “civil” deportation proceedings and criminal proceedings). Meneses notes that,

[d]eportation and removal proceedings seemed to bear stronger resemblance to criminal punishment and prosecution than civil proceedings in other ways, even before the *Padilla* Court admitted difficulty in classifying deportation as civil . . . . As difficult as it was to deny the punitive nature of deportation . . . before *Padilla*, it now seems virtually impossible.

*Id.*

157. *Padilla*, 559 U.S. at \_\_\_, 130 S. Ct. at 1482 (2010); see also Adriane Meneses, *The Deportation of Lawful Permanent Residents For Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 836-37 (2012) (advocating for the end of retroactivity of former crimes leading to removal proceedings for lawful permanent residents). Meneses states that the Court in *Padilla* “directly contradicts the ridiculous assertion in Bugajewitz that deportation for certain conduct and criminal sanctions for the same conduct is a mere ‘coincidence,’ instead making the common-sense observation that the two have been ‘enmeshed’ for as long as the Court previously asserted they weren’t . . . .” *Id.*

158. Kanstroom, *supra* note 83, at 1473. In his article, Kanstroom writes about the effect the *Padilla* case has had on the Sixth Amendment right to counsel in removal proceedings and states that:

[f]or more than a century, courts have formalistically distinguished between two consequences of criminal convictions: the punishment meted out in criminal courts and deportation. The former is, of course, a criminal sanction, while the latter is said to be civil or, at most, quasi-criminal. This Article suggests that *Padilla* has implicitly challenged this model with potentially powerful consequences. *Padilla* cannot be squared with the historical, formalistic relegation of deportation to the realm of civil collateral consequences in which there is no clear constitutional right to counsel.

*Id.*

ship.<sup>159</sup> A U.S. citizen has a “constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.”<sup>160</sup>

There are only two ways in which a citizen can lose U.S. citizenship: expatriation of born or naturalized citizens<sup>161</sup> and revocation of naturalization.<sup>162</sup> One’s citizenship cannot be involuntarily revoked, but there are certain actions<sup>163</sup> a citizen, by birth or naturalization, can take which constitute a voluntary renunciation of citizenship.<sup>164</sup> Whenever the loss of citizenship is an issue, “the burden shall be upon the person . . . claiming that such loss occurred, to establish such claim by a preponderance of the evidence.”<sup>165</sup> Therefore, the government has very few justifications to expatriate a citizen, and being mistakenly identified as an undocumented immigrant is not one of them.

The government can revoke and set aside an order admitting one’s citizenship and cancel the certificate of naturalization when such order is illegally procured “by concealment of a material fact or by willful misrepresentation.”<sup>166</sup> “The test of whether concealments or misrepresentations are ‘material’ is whether they can be shown by clear, unequivocal,

159. *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

160. *Id.* Writing the opinion for the majority, Justice Black stressed that [c]itizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country.  
*Id.* at 267–68.

161. *See* 8 U.S.C. § 1481 (2006) (listing the voluntary acts which will result in the loss of nationality of “a person who is a national of the United States whether by birth or naturalization . . .”).

162. *See id.* § 1481 (2006) (detailing the ways in which the U.S. government may revoke the naturalization of not only a naturalized citizen, but also the citizenship of “[a]ny person who claims [U.S.] citizenship through the naturalization of a parent or spouse . . .”).

163. *See id.* § 1481(a) (2006) (including:  
obtaining naturalization in a foreign state . . . ; taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state . . . ; entering, or serving in, the armed forces of a foreign state if [sic] such armed forces are engaged in hostilities against the United States, or [sic] such persons serve as a[n] . . . officer; . . . [working] under the government of a foreign state . . . , after attaining . . . the nationality of such foreign state[,] or accepting . . . [a] post . . . [requiring] an oath, affirmation, or declaration of allegiance . . . ; making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state . . . ; making in the United States a formal written renunciation of nationality . . . ; or committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States . . . ).

164. *Id.*

165. *Id.* § 1481(b) (2006).

166. *Id.* § 1451(a) (2006).

and convincing evidence to have been predictably capable of affecting, i.e., to have had a natural tendency to affect”<sup>167</sup> the government’s decision to grant naturalization. Therefore, in order to reopen naturalization proceedings or to revoke naturalization, the government must prove by clear, convincing, and unequivocal evidence that the grounds for reopening or revoking naturalization have been met.<sup>168</sup>

**B. *In Order to Satisfy Due Process, Individuals Facing Removal From the United States Must Be Provided With Government-Appointed Counsel***

Critically, the “special status of immigration proceedings has translated into very few procedural protections.”<sup>169</sup> As Craig R. Shagin, an immigration lawyer from York, Pennsylvania puts it, in “[t]hese types of cases, you basically have death-penalty consequences while employing traffic court procedures.”<sup>170</sup> However, *Padilla v. Kentucky*’s requirement that criminal defense attorneys warn their clients of the immigration consequences of a criminal plea<sup>171</sup> shines light on the Court’s concern that the unique nature of immigration consequences requires heightened due process protections.<sup>172</sup>

As noted above, criminal procedural safeguards, including the right to government-appointed counsel, do not apply to removal proceedings be-

167. *Kungys v. United States*, 485 U.S. 759, 760 (1988).

168. *See* Revoking Grants of Naturalization, 65 Fed. Reg. 63, 17127 (Mar. 31, 2000) (to be codified at 8 C.F.R. pt. 340) (establishing the government’s burden of proof for revoking naturalization).

169. Clapman, *supra* note 73, at 386 (indicating that the lack of procedural protection is the result of the “civil-criminal” distinction, which has generally held immigration removal proceedings to be civil rather than criminal, therefore, providing minimal judicial oversight of the government’s decisions).

170. Maryclaire Dale, *Severe Stutter Mars Jamaican’s Asylum Bid*, BOSTON GLOBE, Oct. 17, 2011, [http://articles.boston.com/2011-10-17/news/30290329\\_1\\_immigration-detainees-asylum-bid-immigration-detention-system](http://articles.boston.com/2011-10-17/news/30290329_1_immigration-detainees-asylum-bid-immigration-detention-system) (discussing the reality that although immigrants may hire counsel, many do not have the financial resources to do so and there is not enough nonprofit legal services to meet the needs of the immigration detention system, which has ultimately created a legal and humanitarian crisis).

171. *See Padilla*, 559 U.S. at \_\_\_, 130 S. Ct. at 1476 (2010) (stating defendant’s “counsel engaged in deficient performance by failing to advise defendant that his plea of guilty made him subject to automatic deportation.”).

172. *See* Duncan Fulton, *Emergence of A Deportation Gideon?: The Impact of Padilla v. Kentucky on Right to Counsel Jurisprudence*, 86 TUL. L. REV. 219, 219–20 (2011) (“Rooted in Sixth Amendment precedent, the [Padilla] Court’s new constitutional requirement arose principally out of its concern that the unique nature of immigration consequences required heightened due process protections.”).

cause deportation is a civil matter.<sup>173</sup> Nevertheless, removal proceedings must comply with “constitutional requirements of fundamental fairness and due process”<sup>174</sup> because due process protections “are universal in their application, to all persons within the territorial jurisdiction” of the United States.<sup>175</sup> The Supreme Court in *Mathews v. Eldridge*<sup>176</sup> established a due process balancing test that may create a Fifth Amendment right to counsel in some civil litigation circumstances,<sup>177</sup> such as removal proceedings.

In order to determine whether an individual has suffered a denial of procedural due process, courts must consider three factors: first, the private interest affected by the government action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substantive procedural safeguards; and third, the government’s interest, including financial and administrative burdens that the additional or substitute procedural requirements would entail.<sup>178</sup> Balancing those factors against the “presumption that there is a right to appointed counsel” where the loss of personal freedom is a possible result of litigation,<sup>179</sup> leads one to the conclusion that the additional fiscal and administrative burdens of recognizing a right to court-appointed counsel to individuals facing removal is outweighed by the private interest of having a right to remain a U.S. citizen.<sup>180</sup>

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173. *See id.* at 220 (noting the long-standing principle, although recently updated, that the right to counsel was for criminal cases).

174. Kanstroom, *supra* note 83, at 1465–66.

175. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (declaring that the Fourteenth Amendment extends universally to all persons within the territorial jurisdiction of the United States).

176. 424 U.S. 319, 319 (1976).

177. *See id.* at 335 (requiring that several factors be considered to thoroughly analysis which interests that will be affected by the removal proceedings); *see also* Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 54 (2011) (“*Mathews v. Eldridge* establishes the now well-known due process calculus that may create a Fifth Amendment right to counsel in some civil litigation circumstances.”). Accordingly, “due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972).

178. *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (explaining the three requirements).

179. *See Lassiter v. Dep’t of Soc. Serv. Of Durham Cnty., N.C.*, 452 U.S. 18, 27 (1981) (stating that private interests, government interests, and wrongful conclusions are balanced when deciding whether or not to take away personal freedoms of indigents).

180. *See Simran Bindra & Pedram Ben-Cohen, Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. POVERTY L. & POL’Y 1, 1 (2003) (arguing that legal representation is necessary for an effective defense).

### 1. The Private Interest Affected in Removal Proceedings

Proceedings attempting to exile individuals to foreign lands have resulted in the increased violation of a number of individual liberties.<sup>181</sup> The “mistaken deprivation of citizenship rights effects a legal death,”<sup>182</sup> resulting in “the loss of political rights to brutal physical and emotional hardships lasting months or years.”<sup>183</sup> It is irrefutable that citizens have a private interest in remaining in the country.<sup>184</sup> Forcibly banishing U.S. citizens from the country not only violates their substantive due process rights to life, liberty, and property, but also violates all the protections afforded to U.S. citizens under the law.<sup>185</sup>

The right to liberty is so entrenched as an American value that even noncitizens have maintained a strong liberty interest in remaining in the United States, as embodied by 8 U.S.C. Section 1229b. This statute includes length of residency and family ties in the United States as factors to be considered when deciding whether a noncitizen qualifies for cancellation of removal.<sup>186</sup> A noncitizen’s liberty interest in remaining in the United States was also articulated in *INS v. St. Cyr*,<sup>187</sup> as the Court stated “preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.”<sup>188</sup> If it is well

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The rest of the world has recognized this, with European countries such as England, France, and Switzerland assuming that the only way for the poor to have meaningful access to the courts is to provide representation by counsel. . . . Thus a government schema denying indigent civil defendants a right to appointed counsel deprives them of a fundamental right, and should be subject to the death ray of strict scrutiny.

*Id.*

181. More than 300,000 removal proceedings were received in the 2011 fiscal year. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2011 STATISTICAL YEAR BOOK C3 tbl.3 (2011), available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf>.

182. Stevens, *supra* note 5, at 611–12.

183. *Id.* at 612.

184. See *Azizi v. Thornburgh*, 908 F.2d 1130, 1140 (1990) (asserting that “[t]he private interests at stake are great. This is true not only for the alien seeking immediate relative status, but also for the citizen seeking permission for a spouse to remain in this country.”).

185. See, e.g., 8 U.S.C. § 1229b (2006) (listing as one of the liberties a protected is a person’s right to be free from domestic violence abuse as it is itemized as a safety net to those individuals subject to removal proceedings).

186. See *id.* (outlining the factors that should be considered—including length of time in the United States, moral character, and family ties—when determining whether a person’s removal should be cancelled); see also Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion In The Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 687 (2012) (describing potential effects on families when detainees are removed, including loss of financial stability, and emotional and psychological damages). Such outcomes are antithetical to liberty interests that are encompassed in American values. *Id.*

187. 533 U.S. 289, 289 (2001).

188. *Id.* at 322.

established that immigrants have a “high interest in personal freedom and will suffer from a deprivation of physical liberty upon being forcibly removed from the United States after losing in a deportation proceeding,”<sup>189</sup> the fact that U.S. citizens have a strong private interest to remain in the United States should be irrefutable. At the end of the day, “no citizen with such a threat hanging over his head could be free.”<sup>190</sup>

## 2. The Risk of Wrongful Deportations of U.S. Citizens Through the Procedures Used, and Probable Value, if Any, of Providing Individuals Facing Removal with Government-Appointed Counsel

As Professor Stevens’ study estimates, and statements from attorneys around the country endorse, ICE holds nearly 4,000 U.S. citizens as undocumented or criminal immigrants.<sup>191</sup> Thus, the risk of an erroneous decision is high, in part due to “the traffic-court-like haste” with which removal proceedings are heard.<sup>192</sup> As the number of immigration detainees skyrocketed, immigration judges became overworked and are often forced to choose efficiency over fairness as they “decide approximately four cases a day, roughly twice as many as Social Security judges.”<sup>193</sup> Consequently, U.S. citizens who are wrongfully detained are not only disadvantaged because of the high evidentiary burden they face in order to prove their citizenship, but also because of the swiftness of the process.

The risk of not being able to prove U.S. citizenship and consequently facing removal is heightened for pro se individuals, especially those who are detained. Unrepresented individuals, particularly children, are severely handicapped by the complexity of immigration law and removal proceedings, making the risk of erroneous deportations exceedingly high.<sup>194</sup> Immigration law is so convoluted that “[a] lawyer is often the

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189. Fulton, *supra* note 172, at 231–32; *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (noting the importance of counsel explaining deportation penalty in deportation proceedings as a part of plea bargaining process and to upholding Sixth Amendment principles).

190. *Schneiderman v. United States*, 320 U.S. 118, 167 (1943).

191. *See* Stevens, *supra* note 5, at 608 (affirming that existing data indicates that in 2010, over 4,000 U.S. citizens were either detained or deported as illegal immigrants); *see also* Marisa Taylor, *Immigration Officials Detaining, Deporting American Citizens*, McCLATCHY (Jan. 24, 2008), <http://www.mcclatchydc.com/2008/01/24/25392/immigration-officials-detaining.html> (detailing examples of cases in which U.S. citizens had been detained by Immigration and Customs Enforcement and the legal issues such detainees face).

192. Clapman, *supra* note 73, at 390–91.

193. *See id.* at 390 (comparing the workload of the immigration judges to that of the Social Security judges).

194. *See* Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 60–65 (2011)

only person who could thread the labyrinth[,]”<sup>195</sup> but since having a lawyer is a privilege few can afford, many have to rely on immigration judges to establish the record. After all, an immigration judge, “unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record.”<sup>196</sup> Unfortunately, overworked immigration judges do not have the time to develop all cases before them<sup>197</sup> and as a consequence, U.S. citizens can easily fall through the cracks.

### 3. The Government’s Interest in Providing Counsel to Individuals Facing Removal Based on Fiscal and Administrative Burdens

The final factor to be considered in striking the appropriate due process balance is the public interest, which includes the administrative burden and costs associated with providing, as a matter of constitutional right, a court appointed attorney to individuals facing removal proceedings.<sup>198</sup> In 2011, approximately \$1.08 billion in federal funding was re-

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(emphasizing how denying representation can, in some immigration circumstances, be a denial of liberty and the right to due process).

195. See *Castro-O’Ryan v. U.S. Dept. of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (emphasizing the necessity of lawyers to navigate the judicial system for their client).

196. See *Hasanaj v. Ashcroft*, 385 F.3d 780, 783 (7th Cir. 2004) (quoting *Yang v. McElroy*, 277 F.3d 158, 162 (2nd Cir. 2002)) (explaining the dual roles of an immigration judge to not only act as fact finder and adjudicator, but to also properly establish the record).

197. See EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2011 STATISTICAL YEAR BOOK B2 (2011), available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf> (showing the number of matters received by immigration courts has increased by twenty-eight percent from 2007 to 2011, from 335,923 matters received in 2007 to 430,574 received in 2011); see also Hill, *supra* note 194, at 62 (discussing specifically overworked immigration judges and their lack of time to develop complicated cases of alien children).

198. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (requiring due process assurances to be determined based upon balancing the possible value and the cost). The Supreme Court held the three-part test to be:

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 requirements would entail.

*Id.* See also Sharon Finkel, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1118-19 (2001) (discussing that the balancing test as articulated in *Mathews v. Eldridge* needed to protect constitutional due process rights when providing aliens an adequate opportunity to respond by providing court-appointed counsel).

requested to fund the defender services program,<sup>199</sup> and in the same year federal defender organizations performed 122,813 representations.<sup>200</sup> Applying those numbers to immigration statistics, it is speculated that it would have cost an average of \$3.45 billion<sup>201</sup> to provide legal representation to all the individuals deported in 2011. While a categorical right to counsel for all individuals facing removal proceedings would impose a heavy financial burden on the government due to the high number of annual deportations,<sup>202</sup> “[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision.”<sup>203</sup> Additionally, “the cost of protecting a constitutional right cannot justify its total denial.”<sup>204</sup>

U.S. citizens have a right to remain in the country, but the government also has a duty to “foster the dignity and well-being of all persons within its borders.”<sup>205</sup> Likewise, the government has a strong fiscal interest in appointing counsel to individuals facing removal. As legal representation leads to fewer requests for continuances, shorter periods in detention, and deters frivolous claims of citizenship.<sup>206</sup> It is feasible that at some point the benefit of providing government appointed counsel for individuals facing removal proceedings “may be outweighed by the cost.”<sup>207</sup>

199. ADMIN. OFFICE OF THE U.S. COURTS, THE JUDICIARY FISCAL YEAR 2011 CONGRESSIONAL BUDGET SUMMARY 27 (2010), available at [https://bulk.resource.org/courts.gov/ao/US\\_Judiciary\\_2011\\_Budget\\_Justifications\\_Summary.pdf](https://bulk.resource.org/courts.gov/ao/US_Judiciary_2011_Budget_Justifications_Summary.pdf).

200. THOMAS F. HOGAN, 2011 ANNUAL REPORT OF THE DIR.: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 53 (2012), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

201. This number was calculated as follows: \$1.081 billion divided by 122,813 representations equals \$8,802 per representation, then \$8,802 per representation times 391,953 foreign nationals deported in fiscal year 2011 equals \$3.449 billion; see also JOHN SIMANSKI AND LESLEY M. SAPP, IMMIGRATION ENFORCEMENT ACTIONS: 2011 (Sept. 2012), available at [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement\\_ar\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf) (stating that 391,953 foreign nationals were removed in 2011).

202. See *Fulton*, *supra* note 172, at 231-34 (applying *Mathews v. Eldridge* under *Pardilla* and giving new life to the argument for appointed counsel in deportation proceedings).

203. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976); see *Clapman*, *supra* note 73, at 390-91 (explaining that, despite the cost, appointed counsel is necessary to maintain a fair system).

204. *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

205. *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).

206. See ABA, THE QUEST TO FULFILL OUR NATION'S PROMISE OF LIBERTY AND JUSTICE FOR ALL: ABA POLICIES ON ISSUES AFFECTING IMMIGRANTS AND REFUGEES (2006) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (adopting goals to carry out the ABA's mission of defending liberty).

207. See *Mathews*, 424 U.S. at 348 (explaining that the benefit to the affected individual and to society “may be outweighed by the cost”). “[T]he Government's interest . . . in conserving scarce fiscal and administrative resources is a factor that must be weighed.” *Id.*



The government, nonetheless, has the ability to contain these costs by continuing to fund pro bono projects that resourcefully secure counsel for individuals facing removal.<sup>208</sup>

The risk of erroneous deprivation of U.S. citizens' liberty through wrongful deportations is high enough to overcome the fiscal burden related to supplying attorneys to individuals in deportation proceedings, since the government has options to mitigate the costs, and financial burden alone does not justify the denial of procedural safeguards.<sup>209</sup> Accordingly, because citizens' liberty interest in remaining in the country is high, the risk of erroneous removal under current laws and procedures is excessive; due process requires legal representation of individuals facing removal proceedings in order to reduce the risk of wrongful deportations.<sup>210</sup>

Additionally, with regard to the "fundamental fairness" requirement of the due process clause, the Supreme Court in *Lassiter v. Department of Social Services of Durham County*<sup>211</sup> acknowledged a presumption that an indigent litigant has a right to court-appointed counsel only when deprivation of physical liberty is a possible outcome.<sup>212</sup> This presumption has been successfully applied in the civil context. In *In re Gault*,<sup>213</sup> for example, the Supreme Court held that juveniles in proceedings to determine delinquency have a right to court-appointed counsel even though proceedings are "civil" and not "criminal" because they may result in commitment to an institution, in other words, loss of freedom is at stake.<sup>214</sup> Similarly, in the immigration context, respondents' loss of liberty through mandatory detention and deportation, the ultimate deprivation of freedom, is an evident possibility.

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208. See Hill, *supra* note 194, at 65–68 (stating that the cost of funding pro bono programs and providing legal services does not outweigh the injustice that would occur without these services).

209. See *Matthews*, 424 U.S. at 348 (asserting that the cost of protecting the undeserving may end up being taken away from those that are deserving and that more is implicated by these cases than "weighing the fiscal and administrative burdens against the interest of a particular category of claimants."); see also Hill, *supra* note 194, at 65–68 (stating that "at some point" the benefits of an appointed attorney could conceivably outweigh the costs of that attorney).

210. Hill, *supra* note 194, at 66 (articulating that without fair legal counsel an unaccompanied child can be erroneously deported).

211. 452 U.S. 18 (1981).

212. *Lassiter v. Dep't of Soc. Servs. of Durnham County*, 452 U.S. 18, 26–27 (1981).

213. 387 U.S. 1 (1967).

214. See *In re Gault*, 387 U.S. 1, 1 (1967) ("[J]uveniles have a right to notice of the charges, to counsel, to confrontation and cross examination of witnesses and to privilege against self-incrimination.").

Assistance of counsel is necessary to provide “fundamental fairness[,] the touchstone of due process[,]”<sup>215</sup> as it is an “obvious truth” that “any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>216</sup> Importantly, no fiscal burden borne by the government can outweigh the grievous loss endured by U.S. citizens wrongfully detained and deported by complex and adversarial legal proceedings.

## V. RECOMMENDATION

There should exist a recognition of the right to government-appointed counsel to individuals facing removal proceedings as a safeguard to ensure that U.S. citizens are not wrongfully deported. While the need for counsel remains largely unmet for individuals in the civil litigation context,<sup>217</sup> “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.”<sup>218</sup> “Even the intelligent and educated layman has small and sometimes no skill in the science of law.”<sup>219</sup> The right to representation by counsel, particularly for U.S. citizens facing exile is not merely a procedural requirement but rather reflects the essence of justice.<sup>220</sup> Without it, citizens face the dan-

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215. *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

216. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *see also Powell v. Alabama*, 287 U.S. 45, 68 (1932) (“[T]he right to the aid of counsel is of . . . fundamental character.”).

217. “In September 2009, the Legal Services Corporation (LSC), the country’s largest provider of funding for civil legal services for low-income individuals, issued a report in which it projected that one million people—nearly half of those seeking LSC’s legal assistance—would be turned away in the coming year because of insufficient resources.” *See Hill, supra* note 194, at 53 (asserting that the need for counsel for the indigent in the civil litigation system “remains largely unmet”); Anne R. Traum, Symposium, *Constitutionalizing Immigration Law On Its Own Path*, 33 *CARDOZO L. REV.* 491, 542 (2011). She points out that

[b]ecause immigration proceedings have long been categorized as ‘civil,’ the Sixth Amendment does not apply to them. No similar categorical right to counsel exists under the Due Process Clause. Instead, the Court has recognized that counsel may be constitutionally required in some civil cases to ensure fundamental fairness in light of the private interest at stake and the risk of error.

*Id.*

218. *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

219. *Gideon*, 372 U.S. at 344; *see also United States v. Ash*, 413 U.S. 300, 307 (1973) (acknowledging the concern of the Court “that an unaided layman had little skill in arguing the law or in coping with an intricate procedural system. The function of counsel as a guide through complex legal technicalities long has been recognized by this Court.”).

220. *See Hill, supra* note 194, at 66 (extending a constitutional right to counsel protects not only the interest of the individual being deported but also protects the integrity of the government). Despite the costs associated with providing legal representation to po-

ger of banishment because the system is ill equipped to detect and protect its own citizens. A categorical right to court-appointed counsel would serve the interests of justice, comply with constitutional requirements of due process, enhance efficiency and accuracy of removal adjudications, and consequently, reduce wrongful detentions and deportations of U.S. citizens.<sup>221</sup> While mistakes may occur, assistance of counsel is one of the two most important factors in obtaining a successful outcome in a removal proceeding.<sup>222</sup>

The government can accomplish that through several means, including: (1) recognizing detention and deportation as punishment for the purposes of Sixth Amendment procedural requirements, which embraces court-appointed counsel; (2) acknowledging that in order to protect its own citizen's liberty, due process requires court-appointed counsel to represent individuals facing removal; and (3) at a minimum, the government should provide legal screening to all unrepresented individuals facing removal proceedings in order to detect individuals with potential citizenship claims. The least the government can do is devote resources to the representation of individuals facing deportation in order to protect the rights of its citizens by promoting the legitimacy of the removal process.

## VI. CONCLUSION

With the estimated cost at \$18,310 for each person to be apprehended, detained, legally processed, and transported out of the country, solving the problem of illegal immigration had a price tag of nearly \$158 billion in 2008.<sup>223</sup> Nevertheless, U.S. citizens are paying for tough immigration

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tential deportees, the value of protecting a constitutional right "cannot justify its total denial." *Id.*

221. See Nimrod Pitsker, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, CAL. L. REV. 169, 198 (2007) (explaining that over seventy-one asylum seekers are wrongfully deported each year through the expedited removal process). Empirical and statistical evidence demonstrate that represented asylum seekers are far more likely to receive asylum than non-represented applicants thus the importance of counsel is paramount. *Id.*

222. See KATZMANN IMMIGRANT REPRESENTATION STUDY GRP. & THE VERA INST. OF JUST., THE N.Y. IMMIGRANT REPRESENTATION STUDY: PRELIMINARY FINDINGS 1 (2011), available at <http://graphics8.nytimes.com/packages/pdf/nyregion/050411immigrant.pdf> (explaining that the other important factor in a removal case is being free from detention). According to the study, either factor in a case drops the success rate exponentially. *Id.*

223. See MARSHALL FITZ ET AL., CTR. FOR AM. PROGRESS, THE COSTS OF MASS DEPORTATION: IMPRACTICAL, EXPENSIVE, AND INEFFECTIVE, at i (2010), [http://www.americanprogress.org/issues/2010/03/pdf/cost\\_of\\_deportation.pdf](http://www.americanprogress.org/issues/2010/03/pdf/cost_of_deportation.pdf) (asserting that the high costs associated with mass deportation is not only prohibitively expensive, but could also lead to a devastating impact on economic growth). The authors offer three options for fixing the immigration system in the United States: 1) continue utilizing the current system; 2) in-

laws and practices with much more than money. Cracking down on immigration is putting marginalized Americans at risk of wrongful detention and deportation. In order to offset the lack of safeguards provided to individuals facing removal proceedings and ICE's internal policies to maximize the number of detainees, the right to government-appointed counsel in immigration proceedings must be recognized as a constitutional right to prevent wrongful detention and deportation of U.S. citizens.

Wrongful detention and deportation of even one U.S. citizen is such an egregious violation of the basic and fundamental right to life and liberty ensured to all Americans under the U.S. Constitution, that only a *per se* rule providing government-appointed counsel to individuals facing removal proceeding will guarantee a citizen's right to due process of law.<sup>224</sup> Accepting wrongful deportations of U.S. citizens as an unfortunate collateral consequence of tackling illegal immigration is analogous to acknowledging the Constitution as nothing more than an outdated managerial document.

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crease the enforcement strategy that is already in place in an attempt to remove all current undocumented workers; or 3) combine a rigid enforcement strategy with a program that would eventually allow undocumented workers to earn citizenship as well as create legal channels for future migration flows. *Id.* at 18–20. The first two options are both impractical and inefficient while the last option offers the most comprehensive long-term solution for immigration reform. *Id.*

224. *Aguilera-Enriquez v. Immigration and Naturalization Serv.*, 516 F.2d 565, 573 (6th Cir. 1975) (holding that the refusal to appoint an attorney for an indigent alien in a proceeding before the immigration judge did not deny the individual due process). In his dissent, Justice De Mascio stated that the consequence of deportation paralleled punishment for a crime and the *per se* appointment of counsel would ensure due process of law. *Id.*