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Prisoners in the Face of Gladiators: Providing a Sword and Shield to Aliens in Removal Proceedings Through Court-Appointed Counsel

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**PRISONERS IN THE FACE OF GLADIATORS: PROVIDING A
SWORD AND SHIELD TO ALIENS IN REMOVAL
PROCEEDINGS THROUGH COURT-APPOINTED COUNSEL**

*Kevin Gardner**

I.	Introduction	1189
II.	History of Immigration in the United States	1192
III.	Problems Arising from Lack of Access to Counsel	1201
IV.	Recommendations	1205
	A. Proposal I: Expand on Programs that Have Already Succeeded	1208
	1. New York Immigrant Family Unity Project (NYIFUP), Funded by the Vera Institute of Justice	1208
	2. Incorporating Immigration Representation into Public Defense Offices	1210
	3. Office of Legal Access Programs	1212
	B. Proposal II: Creating the Right Through a New Rule in Case Law	1214
	C. Proposal III: Creating the Right by Amending the INA	1219
V.	Conclusion	1220

I. INTRODUCTION

“A nation without borders is not a nation. There must be a wall across the southern border.”¹ When President Donald Trump issued this

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statement on his campaign website in 2015, it triggered a variety of reactions, ranging from fervent support² to outright condemnation.³ Within days of his inauguration, President Trump ordered the construction of a wall along the Mexican border.⁴ This triggered a national debate about the wall's morality, feasibility, cost, and detriments.⁵ President Trump also issued immigration policies that sought to expand partnerships with local law enforcement agencies to apprehend undocumented aliens, hired thousands of new Immigration and Customs Enforcement (ICE) officers and Border Patrol agents, and broadened expedited deportations.⁶ This likewise triggered strong reactions.⁷

President Trump has not given up the fight for his signature border wall: on February 15, 2019, he declared a national emergency at the

1. Donald Trump, *Immigration Reform That Will Make America Great Again*, DONALDTRUMP.COM, <https://assets.donaldjtrump.com/Immigration-Reform-Trump.pdf> [<https://perma.cc/D2CX-D7S5>].

2. See, e.g., Ian Tuttle, *Donald Trump's Immigration Plan—A First Impression*, NAT'L REV. (Aug. 16, 2015 2:49 PM), <http://www.nationalreview.com/corner/422604> [<https://perma.cc/CD5W-LDNZ>]; Matthew Boyle, *Donald Trump Releases Immigration Reform Plan Designed To Get Americans Back To Work*, BREITBART (Aug. 16, 2015), <http://www.breitbart.com/big-government/2015/08/16/donald-trump-releases-immigration-reform-plan-designed-to-get-americans-back-to-work/> [<https://perma.cc/K9CD-2KTZ>].

3. See, e.g., Daniel W. Drezner, *Grading Donald Trump*, WASH. POST (Aug. 17, 2015), https://www.washingtonpost.com/posteverything/wp/2015/08/17/grading-donald-trump/?utm_term=.ecde4f6b2f78 [<https://perma.cc/7SBS-BTG6>]; Steven Hahn, *America Is Better Without Borders*, TIME (Nov. 1, 2016), <http://time.com/4551609/america-borders-donald-trump/> [<https://perma.cc/4DZS-XGKF>].

4. Jeremy Diamond, *Trump orders construction of border wall, boosts deportation force*, CNN (Jan. 25, 2017, 11:44 PM), <http://www.cnn.com/2017/01/25/politics/donald-trump-build-wall-immigration-executive-orders/index.html> [<https://perma.cc/R5WC-UU7D>]; John Roberts & The Assoc. Press, *Trump orders construction of border wall, targets sanctuary cities*, FOX NEWS (Jan. 25, 2017), <http://www.foxnews.com/politics/2017/01/25/trump-orders-construction-border-wall-targets-sanctuary-cities.html> [<https://perma.cc/S33C-UM54>].

5. See, e.g., *Should the United States Continue to Build a Fence or Wall along the US/Mexico Border?*, PROCON.ORG, <https://immigration.procon.org/view.answers.php?questionID=000778> [<https://perma.cc/WR5Y-R4F5>].

6. David Nakamura, *Trump administration issues new immigration enforcement policies, says goal is not 'mass deportations'*, WASH. POST (FEB. 21, 2017), https://www.washingtonpost.com/politics/trump-administration-seeks-to-prevent-panic-over-new-immigration-enforcement-policies/2017/02/21/a2a695a8-f847-11e6-bf01-d47f8cf9b643_story.html?utm_term=.f143257b6ca6 [<https://perma.cc/6TYA-RBGU>].

7. See, e.g., Ron Hosko, *Trump's law enforcement policies are a welcome improvement from Obama's*, FOX NEWS (Dec. 25, 2017), <http://www.foxnews.com/opinion/2017/12/25/trumps-law-enforcement-policies-are-welcome-improvement-from-obamas.html> [<https://perma.cc/MWM8-C9H4>] (praising President Trump's immigration policies); Julia G. Young, *Mass deportation isn't just inhumane. It's ineffective.*, WASH. POST (July 18, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/07/18/mass-deportation-isnt-just-inhumane-its-ineffective/?utm_term=.5ca75a54d3e4 [<https://perma.cc/LGC5-6865>] (condemning President Trump's immigration policies).

United States and Mexico border to secure funding for the wall.⁸ Congress and over a dozen states have challenged his declaration.⁹ The outcome of that battle remains to be seen.

But that fight is a tree amidst the forest of debates surrounding immigration in general.¹⁰ There are those who favor stricter immigration policies for the sake of national security and the good of the American economy.¹¹ On the flipside, there are those who favor more lenient immigration policies for humanitarian reasons, pointing to aliens' contributions to the economy, and the negative correlation between immigration and crime.¹² Debates also rage about mass deportations.¹³ Even though such discussions have been pushed to the forefront under the administration of President Trump, it is an important cultural and political issue that goes back to the country's founding.¹⁴

Yet people of all political persuasions may be surprised to learn that aliens in removal proceedings (i.e. deportation) often do not have a lawyer.¹⁵ "Unlike people held on criminal charges, immigrant detainees are not afforded the Sixth Amendment right to legal counsel. Since deportation is not formally considered a punishment, but an administrative

8. Kat Armstrong, *What President Trump's National Emergency Announcement Really Means*, BRIT + CO (Feb. 15, 2019), <https://www.brit.co/what-president-trumps-national-emergency-announcement-really-means/> [https://perma.cc/Q578-H8Q6].

9. Elizabeth King, *The House Voted to Block Trump's National Emergency, But Trump Still Has the Upper Hand* YAHOO! NEWS (Feb. 27, 2019), <https://news.yahoo.com/house-voted-block-trump-national-213327155.html> [https://perma.cc/T68N-DV9M].

10. See, e.g., *Top 10 Pro & Con Arguments, Should the Government Allow Immigrants Who Are Here Illegally to Become US Citizens?*, PROCON.ORG, <https://immigration.procon.org/view.resource.php?resourceID=000842#6> [https://perma.cc/2BDG-9FX3] (last updated Feb. 28, 2017, 12:00:22 PM).

11. *Id.*

12. *Id.* See also Scott R. Baker, *Effects of Immigrant Legalization on Crime*, 105 AM. ECON. REV. 210 (2015) (study finding that increased legal immigration leads to decreased crime rates); Kirk Semple, *Deportations Have 'No Observable Effect' on Crime Rate, Study Concludes*, N.Y. TIMES (Sept. 3, 2014), <https://mobile.nytimes.com/2014/09/04/us/deportations-dont-lower-crime-rates-study-says.html> [https://perma.cc/TMT4-8DJC].

13. See, e.g., *Are Mass Deportations a Good Method to Address Illegal Immigration?*, PROCON.ORG, <https://immigration.procon.org/view.answers.php?questionID=000774> [https://perma.cc/8MCF-36EU] (last updated Aug. 15, 2017 9:33:21 AM).

14. *Historical Timeline: History of Legal and Illegal Immigration to the United States*, PROCON.ORG, <https://immigration.procon.org/view.timeline.php?timelineID=000023> [https://perma.cc/Y2Z2-GCJD] (last updated Jan. 30, 2017, 12:01:55 PM) [hereinafter "*Historical Timeline*"].

15. Fernanda Echavarrí, *If You Can't Afford a Lawyer, One Won't Be Appointed to You*, LATINO USA (Aug. 4, 2017), <http://latinousa.org/2017/08/04/cant-afford-lawyer-one-wont-appointed/> [https://perma.cc/55KE-KKT2].

consequence for violating a civil law—crossing the border—they have no right to an attorney.”¹⁶

This urgent issue needs to be addressed, because “immigration prosecutions and convictions make up two of the most frequently pursued types of crime in the federal court system, competing with drug offenses for the top spot.”¹⁷ In fact, arrests for immigration crimes have been growing faster than any other type of federal crime in recent years, with no sign of abating.¹⁸ Furthermore, federal prosecutors are spending so much time on immigration cases, that nearly half of the legal matters concluded at the federal level involve an immigration crime.¹⁹ And because aliens are not guaranteed counsel in removal proceedings, many aliens are at a serious risk of legal harm, including pleading to convictions that could result in removal.²⁰

This comment will outline the direness of the situation. To help the reader better understand the origins and evolution of this issue, this comment will provide a brief historical background of immigration in the United States, including a discussion of case law that has given aliens certain limited rights. Then this comment will describe the benefits of legal counsel, and contrast it with the overwhelming lack of access to counsel for aliens in removal proceedings. Lastly, this comment will propose three solutions: expanding on programs that have already had success; creating the right to counsel in removal proceedings through a new rule in case law; and amending the Immigration and Nationality Act (INA).²¹

II. HISTORY OF IMMIGRATION IN THE UNITED STATES

The United States’s “first 100 years was ‘a period of unimpeded immigration.’”²² Additionally, “the borders that were agreed upon were remarkably porous.”²³ Notably, until the nineteenth century, aliens “could

16. Seth Freed Wessler, *Dispatch From Detention: A Rare Look Inside Our ‘Humane’ Immigration Jails*, COLORLINES (Jan. 4, 2012 9:19 AM), <https://www.colorlines.com/articles/dispatch-detention-rare-look-inside-our-humane-immigration-jails> [https://perma.cc/6NRY-PUVU].

17. CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 11 (2015).

18. *Id.*

19. *Id.*

20. *Id.* at 115-16.

21. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1537 (2017).

22. *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (citing C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 1.2a, 5 (1959)).

23. Steven Hahn, *America Is Better Without Borders*, TIME (Nov. 1, 2016), <http://time.com/4551609/america-borders-donald-trump/> [https://perma.cc/K8GD-Y6SM].

come and go at will.”²⁴ Aliens could “even participate in electoral politics if they simply declared an intention to become citizens.”²⁵ Indeed, for decades it was unclear who was considered a citizen of the United States.²⁶

This approach to immigration changed with the Chinese Exclusion Act,²⁷ the Chinese Exclusion Case,²⁸ and the Chinese Deportation Case.²⁹ These established the federal government’s “plenary power” to regulate immigration.³⁰ This change coincided with American animosity towards Chinese aliens, who had immigrated to the United States in droves during the Gold Rush.³¹ The animosity toward Chinese aliens was a result of cultural misunderstandings, religious differences, and economic competition. “[E]uropean Americans did not understand Chinese culture, habits, and religion.”³² Additionally, “depletion of the gold mines and an economic depression in the 1870s caused greater competition for jobs and a growing resentment toward Chinese workers.”³³ This resentment manifested itself in violence against Chinese settlements.³⁴ Additionally, the general public pushed for laws limiting economic opportunities for Chinese aliens and stopping Chinese migration to the United States.³⁵

These factors gave rise to the Chinese Exclusion Act in 1882.³⁶ This Act allowed the government to refuse entry to Chinese immigrants, even if they had legal documentation. One such immigrant, Chae Chan Ping, was detained pursuant to the Chinese Exclusion Act, and he petitioned for habeas corpus. The court denied Ping’s petition, and Ping appealed all the way to the Supreme Court.³⁷ Ping had left the United States in 1875, and he returned in 1888 (after the Act was passed), bringing a certificate

24. *Id.*

25. *Id.*

26. *Id.*

27. Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (repealed 1943).

28. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

29. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

30. KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 124 (2d ed. 2015).

31. *Historical Timeline*, *supra* note 14; Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in IMMIGRATION LAW STORIES 2 (David Martin & Peter Schuck eds., 2005).

32. Laura Leddy Turner, *Chinese Immigrants in the 19th Century*, CLASSROOM, <http://classroom.synonym.com/chinese-immigrants-19th-century-10527.html> [https://perma.cc/U5DB-2Z9G].

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Chae Chan Ping v. United States*, 130 U.S. 581, 581-582 (1889).

allowing him to return to the United States.³⁸ Immigration authorities refused to let him enter, and they detained him.³⁹ The Supreme Court held that even though the Act in question violated a U.S. treaty with China, the Act was valid, because “to preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.”⁴⁰ The Court held that this was true, even if there were no hostilities between the countries in question.⁴¹

A few years later, the Supreme Court decided a case known as the Chinese Deportation Case.⁴² Section 6 of the act of May 5, 1892 (1892 Act) required Chinese aliens in the United States to obtain certificates of residency, and allowed for the arrest and deportation of Chinese nationals who had failed to obtain these certificates, even if they had not violated the law.⁴³ To make the 1892 Act even more unjust, it allowed for the arrest and deportation of Chinese nationals who did not carry their residency certificates with them.⁴⁴ The 1892 Act was also overtly racist: one of the requirements to avoid deportation under that statute was to obtain the testimony of at least one white witness that the Chinese national was a U.S. resident when the act was passed.⁴⁵ Yet the Supreme Court upheld this unquestionably bigoted statute.⁴⁶ The Court held that the country’s “right to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace” is an inherent and inalienable right of every sovereign nation.⁴⁷ The Court further held that “act[s] of Congress, passed in the exercise of its constitutional authority, must, if clear and explicit, be upheld by the courts, even in contravention of stipulations in an earlier treaty.”⁴⁸

These cases show that the passage of the Chinese Exclusion Act “can now be seen as a nodal point in the history of American immigration policy.”⁴⁹ Furthermore, “it marked the moment when the golden doorway of admission to the United States began to narrow.”⁵⁰ Sadly, the Supreme

38. *Id.*

39. *Id.*

40. *Id.* at 606.

41. *Id.*

42. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

43. *Id.* at 698, 703.

44. *Id.* at 727.

45. *Id.*

46. *Id.* at 732.

47. *Id.* at 711.

48. *Id.*

49. *Historical Timeline*, *supra* note 14.

50. *Id.*

Court has not significantly altered its position on immigration since these cases.⁵¹ In fact, the Chinese Exclusion and Chinese Deportation cases have been relied on for over a hundred years to justify many U.S. immigration policies,⁵² even though scholars have criticized the plenary power as “inconsistent with modern constitutional law.”⁵³ The Court’s line of reasoning was followed throughout the twentieth and twenty-first centuries.⁵⁴

For example, in *Shaughnessy v. United States ex rel. Mezei*, the Supreme Court relied on the Chinese Exclusion Case in its holding.⁵⁵ In that case, Mezei was detained for a total of twenty-one months at Ellis Island after being denied entry at more than a dozen countries.⁵⁶ The Court held that the respondent’s twenty-one-month detention did not deprive him of any statutory or constitutional right.⁵⁷ Citing the Chinese Exclusion Case, the Court held that the federal government’s power to exclude aliens was a “fundamental sovereign attribute. . . largely immune from judicial control.”⁵⁸ The Court also cited national security concerns,⁵⁹ presumably because this case was decided in 1953, during the height of the Cold War,⁶⁰ and Mezei “remained behind the Iron Curtain for 19 months.”⁶¹

Then, in *Fiallo v. Bell*, the Supreme Court relied on both *Shaughnessy* and the Chinese Exclusion Case to reach its holding that Congress’s power to exclude aliens is “largely immune from judicial control.”⁶² The section of the INA at issue gave “special preference immigration status to aliens who qualified as the ‘children’ or ‘parents’ of United States citizens or lawful permanent residents.”⁶³ The INA definition of “child” did *not* include an illegitimate child seeking preference through his relationship with his natural father.⁶⁴ Likewise, the

51. GARCÍA HERNÁNDEZ, *supra* note 17, at 4-8.

52. JOHNSON ET AL, *supra* note 30, at 545.

53. See, e.g., Kevin Johnson, *Argument preview: The constitutionality of mandatory and lengthy immigrant detention without a bond hearing*, SCOTUSBLOG (Sep. 26, 2017, 1:37 PM), <http://www.scotusblog.com/2017/09/argument-preview-constitutionality-mandatory-lengthy-immigrant-detention-without-bond-hearing/> [<https://perma.cc/XH5L-7R8H>].

54. *Historical Timeline*, *supra* note 14.

55. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

56. *Id.* at 208-09.

57. *Id.* at 215.

58. *Id.* at 210.

59. *Id.* at 216.

60. *Cold War*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/event/Cold-War> (last updated Jan. 23, 2018) [<https://perma.cc/RS2L-S9HZ>].

61. *Shaughnessy*, 345 U.S. at 214.

62. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

63. *Id.* at 788.

64. *Id.* at 789.

INA definition of “parent” did *not* include the natural father of an illegitimate child who was either a U.S. citizen or a permanent resident.⁶⁵ Even though the Court acknowledged the potential hardships of this statute, it held that Congress’s decision to not accord preferential status to that particular class of aliens was Congress’s sole responsibility, “wholly outside the power of the Court to control.”⁶⁶ “In any event, it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decisions.”⁶⁷

Then, in 2003, the Attorney General relied on *Shaughnessy* and *Fiallo* to deny bond to a group of undocumented aliens, holding that the “authority to [remove] aliens is meaningless without the authority to detain those who pose a danger or a flight risk” while removal proceedings are pending.⁶⁸

The “spectre” of the Chinese Exclusion Case has even manifested itself in the arguments challenging President Trump’s executive orders banning immigration from a list of Muslim countries.⁶⁹ And as recently as January 2018, the Ninth Circuit reaffirmed Congress’s plenary control over the U.S. immigration system, holding that “its determinations are owed an exceedingly high level of deference.”⁷⁰

That deference has historically led to the circumvention of rights, including constitutional rights, for aliens living in the United States.⁷¹ The most notorious example of this was when President Franklin Delano Roosevelt ordered the internment of Japanese-Americans during World War II, made even worse by the fact that many of the internees were American citizens.⁷² The Supreme Court upheld the President’s order in *Korematsu v. U.S.*⁷³ And even though the U.S. government has apologized, *Korematsu* has never been overruled.⁷⁴ That case has been described “as a grin without a cat, an emergency power in search of an

65. *Id.*

66. *Id.* at 798-799 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952)).

67. *Id.* at 799.

68. *In re D— J*, 23 I. & N. Dec. 572 (B.I.A. April 17, 2003).

69. Michael Kagan, *Is The Chinese Exclusion Case Still Good Law? (The President Is Trying To Find Out)*, 1 Nev. L. J. F. 80 (2017).

70. *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1136 (9th Cir. 2017). For more regarding this case, see *infra*, Section IV.B.

71. James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 A.J.I.L. 804 (1983).

72. *Historical Timeline*, *supra* note 14.

73. *Id.*; *Korematsu v. United States*, 323 U.S. 214, 223 (1944).

74. Garrett Epps, *The Ghost of Chae Chan Ping*, ATLANTIC (Jan. 20, 2018), [https://www.theatlantic.com/politics/archive/2018/01/ghost-haunting-immigration/551015/?utm_source=fb](https://www.theatlantic.com/politics/archive/2018/01/ghost-haunting-immigration/551015/?utm_source=fb&https://perma.cc/G335-VHYN) [https://perma.cc/G335-VHYN].

emergency.”⁷⁵ It embodies the idea that Congress can do as it pleases regarding immigration law, “Constitution be damned.”⁷⁶

Another notorious example is the U.S. government’s mass expulsion of Mexican-Americans in the 1930s.⁷⁷ In the early 1900s, Mexicans immigrated to the United States in droves because U.S. factory and farm owners needed their labor.⁷⁸ The vast majority were able to immigrate legally because it was easy and cheap to do so.⁷⁹ However, when the U.S. economy crashed in 1929, U.S. officials tightened visa rules, and enacted harsh measures to expel thousands of people of Mexican descent, including many U.S. citizens.⁸⁰ The measures included forced departures, raids, withholding employment, and withholding public aid.⁸¹ Deportees were moved by trains, cars, “closed-body school buses”, or “Mexican gun boats.”⁸² The vehicles were often guarded to ensure that the deportees left the United States; and the deportees (many of them small children) were left without food or water during the journey.⁸³ The racial undertones of American immigration policy in those days were apparent: jobs were given to white Americans, not Mexican-Americans.⁸⁴ One city official in Los Angeles said that the city’s slogan was “employ no Mexican while a white man is unemployed,” and concluded that the city’s policies were a question of pigment, not nationality or citizenship.⁸⁵

Nevertheless, the dissenting opinions of the Chinese Deportation case show that not all of the Supreme Court justices supported the plenary power as articulated by the majority.⁸⁶ Justice Brewer noted that the people targeted by deportation laws were persons lawfully residing within the United States pursuant to a treaty between the United States and China.⁸⁷ Their lawful status meant that they were expressly protected by the U.S. Constitution, especially the Bill of Rights.⁸⁸ Consequently, in his

75. *Id.*

76. *Id.*

77. *Historical Timeline*, *supra* note 14.

78. Wendy Koch, *U.S. urged to apologize for 1930s deportations*, USA TODAY (Apr. 5, 2006 6:57 AM), https://usatoday30.usatoday.com/news/nation/2006-04-04-1930s-deportees-cover_x.htm [<https://perma.cc/J9SB-S2LJ>].

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Fong Yue Ting v. United States*, 149 U.S. 698, 732-64 (1893).

87. *Id.* at 733 (Brewer, J., dissenting).

88. *Id.* at 737.

constitutional analysis, Justice Brewer held that the Chinese Exclusion Act violated the Fourth, Fifth, Sixth, and Eighth Amendments.⁸⁹ The Act deprived legal Chinese aliens of “life, liberty, and property without due process of law,”⁹⁰ violating the Fifth Amendment’s due process protection.⁹¹ Justice Brewer’s opinion underscores the fact that aliens, with or without lawful status, are included in the Fifth Amendment’s usage of “person.”⁹²

The Act also “imposed punishment without a trial,”⁹³ violating the Sixth Amendment’s right to a trial by jury in criminal prosecutions.⁹⁴ The punishment that the Act imposed was “cruel and severe,”⁹⁵ violating the Eighth Amendment’s protection against cruel and unusual punishment.⁹⁶ Lastly, the Act allowed the government to deport Chinese aliens who did not have their certificates of residence (even if they were in the country legally), without a trial or examination of evidence.⁹⁷ This violated the Fourth Amendment’s protection against searches and seizures without evidence.⁹⁸

Justice Field, in a separate dissenting opinion, held that when people from a country at peace with the United States enter the United States with the consent of the U. S. government, they “become[] subject to all their laws, [are] amenable to their punishment and entitled to their protection” and that “[a]rbitrary and despotic power can no more be exercised over them with reference to their persons and property, than over the persons and property of native-born citizens.” Crucially, he held that such people are “protected by all the guaranties of the constitution.”⁹⁹

Despite these passionate and eloquent opinions, it took more than six decades for the law to formally grant aliens the right to counsel. This came through the INA, passed in 1952.¹⁰⁰ The INA is a “comprehensive federal

89. *Id.* at 733.

90. *Id.* at 739.

91. U.S. CONST. amend. V.

92. AM. IMMIGRATION LAWYERS ASS’N, REPRESENTING CLIENTS IN IMMIGRATION COURT 19 (Michele N. Nendez, ed., 4th ed. 2016) [hereinafter REPRESENTING CLIENTS IN IMMIGRATION COURT]. For a list of cases, see n.110.

93. *Fong Yue Ting*, 149 U.S. at 739 (Brewer, J., dissenting).

94. U.S. CONST. amend. VI.

95. *Fong Yue Ting*, 149 U.S. at 739 (Brewer, J., dissenting).

96. U.S. CONST. amend. VIII.

97. *Fong Yue Ting*, 149 U.S. at 741-42. See also *id.* at 755 (Field, J., dissenting).

98. U.S. CONST. amend. IV.

99. *Fong Yue Ting*, 149 U.S. at 754 (Field, J., dissenting).

100. Immigration and Nationality Act of 1952, 8 U.S.C. §§1101-1537 (2017).

law regulating immigration, naturalization, and the exclusion of aliens.”¹⁰¹ Regarding the right to counsel, the INA provides:

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.¹⁰²

Crucially, the “at no expense to the government” clause in this statute has been the main impediment for aliens to obtain court-appointed counsel in removal proceedings.¹⁰³

Fortunately, the law continued to evolve. In *Landon v. Plasencia*, the Supreme Court reaffirmed the country’s plenary power, but showed a more nuanced attitude than it did in the Chinese Exclusion case.¹⁰⁴ The Court stated that “an alien seeking initial admission has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.”¹⁰⁵ Later, a federal district court in *Orantes-Hernandez v. Smith* ordered immigration authorities to properly advise detained Salvadorans of their rights.¹⁰⁶ In that case, immigration authorities had egregiously violated the rights of detained Salvadorans, including the use of coercive tactics to get the detained Salvadorans to sign voluntary departure agreements.¹⁰⁷ Finally, the court in *Franco-Gonzales v. Holder* called for counsel for immigration detainees with mental handicaps or conditions that may render them mentally incompetent to represent themselves in immigration proceedings.¹⁰⁸

While the right to counsel in immigration law evolved, the right to counsel in criminal law also evolved. When examining the history of the right to counsel in criminal law, one discovers that “the right to counsel touches some of the worst moments in the history of the United States’ criminal justice system and some of the best moments in our

101. *Immigration and Nationality Act*, BLACK’S LAW DICTIONARY (10th ed. 2014).

102. 8 U.S.C. § 1362 (2017) (emphasis added).

103. For more on this, see discussion *infra*, Part III.

104. 459 U.S. 21 (1982).

105. *Id.* at 32.

106. 541 F. Supp. 351, 386 (C.D. Cal. 1982).

107. *Id.* at 354.

108. 828 F. Supp. 2d 1133 (C.D. Cal. 2011).

Constitution's constant evolution."¹⁰⁹ Immigration law and criminal law converged into the most instructive case for the purposes of aliens' right to counsel in *Padilla v. Kentucky*.¹¹⁰ Padilla, a criminal defendant, pled guilty to criminal charges, relying on his counsel's incorrect advice that it would not lead to his deportation.¹¹¹ After pleading guilty, Padilla was put in removal proceedings.¹¹² Padilla brought suit against the state, claiming that his counsel failed to advise him of this consequence prior to his entering the plea.¹¹³ The Supreme Court recognized the injustice of this situation and held that deportation is intimately related to the criminal process, and that counsel must inform the client whether his plea carries a risk of deportation.¹¹⁴

Padilla is a landmark case in immigration law because, before this, "prominent immigration scholars ha[d] dismissed the idea that the Sixth Amendment could require appointment of counsel in immigration matters."¹¹⁵ Crucially, the Court held that changes to U.S. immigration law have "dramatically raised the stakes" of an alien's criminal conviction.¹¹⁶ "The importance of accurate legal advice for noncitizens accused of crimes has never been more important."¹¹⁷ This is because immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.¹¹⁸ The "drastic measure" of removal is now "virtually inevitable" for a vast number of aliens convicted of crimes.¹¹⁹ *Padilla*, just like Justice Brewer's dissenting opinion in the Chinese Deportation Case, gives reason to "question the conventional rejection of the Sixth Amendment's place in the immigration context."¹²⁰

One scholar argued that "what drives *Padilla* is the unfairness of a deportation based on an unwitting guilty plea in a criminal case."¹²¹ Furthermore, "immigrants charged with crimes implicating deportation

109. GARCÍA HERNÁNDEZ, *supra* note 17, at 112.

110. 559 U.S. 356 (2010).

111. *Id.*

112. *Id.*

113. *Id.* at 359.

114. *Id.* at 365, 374.

115. Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2300 (2013).

116. *Padilla*, 559 U.S. at 364.

117. *Id.*

118. *Id.* at 360.

119. *Id.* at 356.

120. Eagly, *supra* note 115, at 2301; Fong Yue Ting v. United States, 149 U.S. 698, 732-44 (1893) (Brewer, J., dissenting).

121. Christopher N. Lasch, "Crimmigration" and the Right to Counsel at the Border Between Civil and Criminal Proceedings, 99 IOWA L. REV. 2131, 2149 (2014).

should be well-informed about their available options; a guilty plea under such circumstances should be knowing, intelligent, and voluntary. *Padilla*, and the cases it relied upon, thus should be understood as expressing a constitutional norm that is protective against unwitting deportation.”¹²² In other words, in order to ensure fair removal proceedings, aliens need to know what they are getting themselves into, and the best way to ensure that is through counsel.¹²³ It may be too early to assess the full impact of *Padilla*.¹²⁴

But even with the growing affirmation of aliens’ right to counsel in removal proceedings, access to counsel for aliens in removal proceedings is still woefully inadequate.¹²⁵ “The reality is that the current provision of civil immigration legal services is clearly deficient. One in-depth survey found that almost half of immigration representation falls below basic competency standards and about fourteen percent is ‘grossly inadequate.’”¹²⁶ Legislators and adjudicators must address this issue.

III. PROBLEMS ARISING FROM LACK OF ACCESS TO COUNSEL

Removal, otherwise known as deportation, is the legal process of expelling an alien from the United States.¹²⁷ Typically, deportation occurs either because an individual is in the country illegally (i.e. without the required documentation) or because the person has violated the terms of his or her lawful status.¹²⁸ If the alien has allegedly done something to merit deportation, the government will send him or her a Notice to Appear in federal immigration court.¹²⁹ Oftentimes, an alien who is charged as removable is placed in detention, where the conditions can be atrocious and inhumane.¹³⁰ In ICE detention centers, “barbed-wire surrounds [the

122. *Id.* at 2151; see also *Brady v. United States*, 397 U.S. 742, 748 (1970) (“[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences”).

123. Dara Lind, *A New York courtroom gave every detained immigrant a lawyer. The results were staggering.*, VOX (Nov 9, 2017, 9:10 AM), <https://www.vox.com/platform/amp/policy-and-politics/2017/11/9/16623906/immigration-court-lawyer> [<https://perma.cc/G47W-R9BM>].

124. JOHNSON ET AL., *supra* note 30, at 566.

125. Eagly, *supra* note 115, at 2311.

126. *Id.*

127. Ilona Bray, *What Happens During the Deportation Process?*, LAWYERS.COM, <https://www.lawyers.com/legal-info/immigration/deportation/what-happens-during-the-deportation-process.html> [<https://perma.cc/7FNG-8EDA>].

128. *Id.*

129. *Id.*

130. Seth Freed Wessler, *Dispatch From Detention: A Rare Look Inside Our ‘Humane’ Immigration Jails*, COLORLINES (Jan. 4, 2012 9:19AM), <https://www.colorlines.com/articles/dispatch-detention-rare-look-inside-our-humane-immigration-jails> [<https://perma.cc/V3PU-VD4Z>].

detainees], movement by detainees and visitors is severely restricted, and they tend to be located in remote locations far removed from legal services. Guards, meanwhile, constantly watch detainees, physical abuse is rampant, and medical care remains lamentable.”¹³¹ To make this even more egregious, ICE has detained increasing numbers of non-criminals under the Trump administration.¹³² That is because all it takes to be classified as a “deportable alien” is the expiration of a visa.¹³³ But overstaying a visa is a civil violation, not a criminal offense.¹³⁴

On top of all that, the alien then has to face off in court against a government attorney to challenge their grounds for removal.¹³⁵ Having an attorney gives the alien the best chance of getting bond and staying in the country.¹³⁶ And as stated above,¹³⁷ even though the INA gives aliens the right to counsel in removal proceedings, the “at no expense to the government” clause significantly diminishes their access to legal counsel. That is because:

[The INA] makes clear that persons are only entitled to legal representation when they are fortuitous enough to retain counsel at “no expense to the government.” Given this law, only those who can afford to retain a private attorney, or have the good fortune to obtain pro bono counsel, receive legal representation. The rest are forced to forge through the complex immigration system without an attorney. Consequently, the majority of persons charged as deportable. . . are obligated to stand alone in immigration court. Even though the majority of respondents are unrepresented, removal proceedings are extremely adversarial: in each case, the respondent must face off against a U.S. trial attorney.¹³⁸

The American Immigration Council conducted a study of aliens’ access to legal counsel in immigration court. It concluded that there is an “urgent portrait of the lack of counsel in immigration courts” and that addressing the barriers to obtaining legal counsel is important because

131. GARCÍA HERNÁNDEZ, *supra* note 17, at 14.

132. Maria Sacchetti, *ICE immigration arrests of noncriminals double under Trump*, WASH. POST (Apr. 16, 2017), https://www.washingtonpost.com/local/immigration-arrests-of-noncriminals-double-under-trump/2017/04/16/98a2f1e2-2096-11e7-be2a-3a1fb24d4671_story.html?utm_term=.e70641efc58d [<https://perma.cc/E5FP-KTMA>].

133. 8 U.S.C. § 1227(a)(1)(B) (2017).

134. IMMIGRANTS’ RIGHTS PROJECT, AMERICAN CIVIL LIBERTIES UNION, *CRIMINALIZING UNDOCUMENTED IMMIGRANTS I* (2010).

135. Bray, *supra* note 127.

136. *Id.*

137. *See supra*, Part I.

138. Matt Adams, *Advancing the “Right” to Counsel in Removal Proceedings*, 9 SEATTLE J. SOC. JUST. 169 (2010).

“having an attorney was strongly associated with positive outcomes.”¹³⁹ It listed the positive outcomes as follows:

Represented immigrants were more likely to be released from detention. Represented immigrants were more likely to have their cases terminated, to seek relief from removal, and to obtain the relief they sought. In fact, detained immigrants with counsel, when compared to detained immigrants without counsel, were ten-and-a-half times more likely to succeed; released immigrants with counsel were five-and-a-half times more likely to succeed; and never detained immigrants with counsel were three-and-a-half times more likely to succeed.¹⁴⁰

Despite the advantages of having counsel, there are many obstacles to obtaining it. For example, most aliens cannot pay for legal representation.¹⁴¹ To make matters worse, aliens who are detained are unable to work to pay for counsel.¹⁴² Although some pro bono or reduced fee services are available, there are not nearly enough to meet the demand of indigent aliens.¹⁴³ According to national representation data, only a very small proportion of aliens actually receive some form of pro bono representation.¹⁴⁴

Another study of access to counsel in immigration court discovered that there is a “scarcity of free legal services for low-income aliens.”¹⁴⁵ Nonprofit organizations, law school clinics, and large firms provide pro bono representation to low-income aliens.¹⁴⁶ “Yet these three forms of representation combined accounted for only 7% of overall representation.”¹⁴⁷ Only 37% of aliens obtained representation, which means that just under 2% of all aliens facing removal obtained pro bono legal services from nonprofit organizations, law school clinics, or large firms.¹⁴⁸

139. INGRID EAGLY & STEVEN SHAFER, AM. IMM. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016).

140. *Id.*

141. *Id.* at 6.

142. *Id.*

143. *Id.*

144. *Id.*

145. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 27 (2015).

146. *Id.*

147. *Id.*

148. *Id.*

Another problem is location of counsel.¹⁴⁹ This problem is exacerbated if the alien is in detention. If the alien is in detention, his or her likelihood of obtaining counsel plummets.¹⁵⁰ “Immigrants in detention were the least likely to obtain representation. Only 14 percent of detained immigrants acquired legal counsel, compared with two-thirds of nondetained immigrants.”¹⁵¹ There are many reasons for this troubling pattern.¹⁵² First, detention inherently limits one’s ability to travel, including the ability to travel to an attorney’s office. Even though most facilities allow for phone calls, the use of the phones is regimented, and sometimes phones may not be available.¹⁵³ Attorneys wishing to visit clients in detention facilities must adhere to strict visitation rules, encumbering vital communication with counsel.¹⁵⁴ To make matters worse, many detention facilities are located in remote areas, and the immigration system allows aliens to be transferred to detention centers located far from where they reside or were apprehended.¹⁵⁵ “This means that they are far from their families, lawyers, and the evidence they need to support their cases.”¹⁵⁶

Finally, lack of access to counsel disproportionately impacts the people who comprise the majority placed in removal proceedings.¹⁵⁷ “Immigrants of different nationalities had very different representation and detention rates. Mexican immigrants had the highest detention rate (78 percent) and the lowest representation rate (21 percent) of nationalities examined. In contrast, Chinese immigrants had the lowest detention rate (4 percent) and highest representation rate (92 percent).”¹⁵⁸ The reasons for this disparity are unclear. Nevertheless, it is urgent to address this because of what is at stake for the aliens, including loss of liberty, property, employment, and separation from loved ones.

As stated above, the INA states that aliens in removal proceedings have the right to an attorney, but they do not have the right to court-appointed counsel if they cannot afford one.¹⁵⁹ It is not uncommon for

149. EAGLY & SHAFER, *supra* note 139, at 7-10 (showing that representation rates differ vary dramatically across different court jurisdictions and aliens with hearings in small cities face additional barriers).

150. *Id.* at 2.

151. *Id.*

152. *Id.* at 6.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 2.

158. *Id.*

159. Echavarri, *supra* note 15.

lawful permanent residents and valid visa holders to be put in removal proceedings.¹⁶⁰ In fact, immigration authorities are so aggressive that hundreds of U.S. citizens are placed in removal proceedings each year.¹⁶¹ Some get deported without seeing an immigration judge.¹⁶² The risk of accidentally deporting a U.S. citizen should be reason enough to provide court-appointed counsel in removal proceedings, especially since proving one's citizenship is harder than one might expect. The process can require tracking down decades-old paperwork or affidavits from parents, grandparents, and others with intimate knowledge of family members' naturalization ceremonies, family trees, births, weddings, and divorces in the United States and abroad.¹⁶³ Less than half of those with citizenship claims receive legal help.¹⁶⁴ Deportation of citizens, or those with valid citizenship claims, is occurring more under the administration of President Trump.¹⁶⁵ This is despite the fact that it is illegal for immigration authorities to hold U.S. citizens in detention.¹⁶⁶ This shows that court-appointed counsel would protect U.S. citizens from unlawful removal, thus providing a counterweight to aggressive enforcement of immigration laws.

Fortunately, there is enough groundwork in the law to formulate workable solutions to this issue. The following section will discuss these solutions.

IV. RECOMMENDATIONS

First and foremost, immigration offenses should stop being treated as purely civil matters. Since deportation implies deprivation of the rights of those residing in the United States, the law should recognize that there is an overlap between criminal law and immigration law. After all, the

160. Camila Domonoske, *U.S. Citizen Who Was Held By ICE For 3 Years Denied Compensation By Appeals Court*, NAT'L PUBLIC RADIO (Aug. 1, 2017, 5:03 PM), <http://www.npr.org/2017/08/01/540903038/u-s-citizen-held-by-immigration-for-3-years-denied-compensation-by-appeals-court?sc=tw> [<https://perma.cc/YV4N-T8DG>].

161. Lise Olson, *Hundreds of American citizens end up in removal proceedings each year, immigration data shows*, HOUSTON CHRONICLE (Aug. 2, 2017), <http://www.houstonchronicle.com/news/houston-texas/houston/amp/Hundreds-of-citizens-end-up-in-deportation-11719324.php> [<https://perma.cc/R3WQ-2DBE>].

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Eyder Peralta, *You Say You're An American, But What If You Had To Prove It Or Be Deported?*, NAT'L PUBLIC RADIO (Dec. 22, 2016, 12:29 PM), <https://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported> [<https://perma.cc/XVM5-AXVM>].

Court in *Padilla* said that “deportation is intimately related to the criminal process.”¹⁶⁷ In fact, some scholars use the term “crimmigration” to signify the overlap between these two areas of law.¹⁶⁸

This makes sense given that banishment, the precursor to deportation, was historically used as a criminal punishment;¹⁶⁹ and Congress moved to expand the criminal grounds for removal in the 1980s.¹⁷⁰ Furthermore, several scholars have criticized treating deportation as non-punishment.¹⁷¹ They are in good company: Justice Brewer, in his dissenting opinion in the Chinese Deportation Case, emphatically characterized deportation as punishment.¹⁷² He said it was common knowledge that being forcibly taken away from home, family, friends, business, and property, and being sent across the ocean to a distant land, is punishment (oftentimes a cruel one).¹⁷³ James Madison, the “Father of the Constitution,”¹⁷⁴ felt similarly:

If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness, a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary, kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; . . . if, moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his immigration itself may have provoked,-if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.¹⁷⁵

A thorough argument addressing the overlap between criminal and civil law is beyond the scope of this comment. But it is important that the law recognize what is at stake for aliens in removal proceedings due to

167. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

168. See, e.g., GARCÍA HERNÁNDEZ, *supra* note 17; Lasch, *supra* note 121.

169. Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 161 (1999).

170. JOHNSON ET AL., *supra* note 30, at 547.

171. For a list of scholars making this criticism, see *id.* at 576 n.17 (citing Beth Caldwell, Michael J. Wishnie, and Daniel Kanstroom).

172. *Fong Yue Ting v. United States*, 149 U.S. 698, 739-40 (1893) (Brewer, J., dissenting).

173. *Id.*

174. James Madison, HISTORY.COM (2009), <https://www.history.com/topics/us-presidents/james-madison> [hereinafter *James Madison*].

175. *Fong Yue Ting*, 149 U.S. at 740-41..

the overlap between immigration law and criminal law. One scholar noted that “noncitizens are exposed to decidedly second-class criminal justice” because the immigration system is “largely unconstrained by the Constitution.”¹⁷⁶ She also noted such injustices as detention without bond, interrogation without *Miranda*, arrest without probable cause of a crime, and sentencing without probation due to the “peculiar interaction between the criminal justice system and the administrative arm of immigration.”¹⁷⁷ She illustrates the fact that “the civil immigration system and the criminal justice system are a single, intertwined regulatory bureaucracy that moves between criminal and civil enforcement mechanisms in a manner that blurs and reshapes law enforcement power, prosecutorial incentives, and the aims of the criminal law.”¹⁷⁸ In short, the line between criminal law and immigration law “has grown indistinct,” and the two areas of law “are merely nominally separate.”¹⁷⁹

In addition to recognizing this overlap, it is crucial to remember that while some free or low-cost legal services are available (such as non-profit organizations, pro bono representation, and law school legal clinics), their resources are severely limited, which means they fall short of adequately addressing this issue.¹⁸⁰ This is part of a larger and chronic problem in the United States, in which “only a fraction of the legal problems experienced by low-income individuals is addressed with the help of an attorney.”¹⁸¹ It would be unreasonable to believe that these free or low-cost legal services can adequately alleviate this problem, since “only one legal aid attorney is available to serve 6,415 low-income people,” compared to “one private attorney providing personal legal services for every 429 individuals in the general population.”¹⁸²

176. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U.L. REV. 1281, 1288 (2010).

177. *Id.*

178. *Id.*

179. Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56. AM. U.L. REV. 367, 376 (2006).

180. Eagly, *supra* note 115, at 2290-93.

181. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 27 (2009).

182. *Id.*

A. *Proposal I: Expand on Programs that Have Already Succeeded*

1. New York Immigrant Family Unity Project (NYIFUP), Funded by the Vera Institute of Justice

The Vera Institute of Justice, an organization dedicated to tackling “the most pressing injustices of our day,”¹⁸³ funded grants to cities who wanted to start funding immigration representation as part of the Safe Cities Network.¹⁸⁴ The grants funded legal representation for detainees who couldn’t afford lawyers. Vera selected twelve cities and counties: Atlanta; Austin; Baltimore; Chicago; Columbus; Dane County; New York City; Oakland and Alameda County; Prince George’s County; Sacramento; and Santa Ana. This program was astoundingly successful. “With guaranteed legal representation, up to 12 times as many immigrants have been able to win their cases: either able to get legal relief from deportation or at least able to persuade ICE to drop the attempt to deport them this time.”

The reason for this success is simple. When aliens have time to build cases, they are more likely to qualify for relief. Guaranteed counsel provides the expertise to figure out what relief an alien might qualify for, as well as the time to pull together the strongest case. Without representation, only 4% of aliens had been able to win their cases at the New York Immigration Court. Of the cases that NYIFUP closed during its first three years, it won 24% of the time. Encouragingly, there may be even more successes than that, because the cases that succeed often take the longest to finish, and therefore were not finished during Vera’s study. In fact, Vera researchers built a model of what made an alien most likely to prevail in court, and then ran the pending cases through that model. It found that 77% of the pending cases were likely successes. “If that projection is correct, NYIFUP cases result in immigrant victories 48 percent of the time.” That means that of every twelve aliens who are winning at the New York immigration court, eleven would have been deported without the representation of a lawyer.

This program will have positive ripple effects in immigration law. “If New York is any indication, the effects of legal representation will end up trickling down even to immigrants in cities that aren’t providing free lawyers — by creating precedents in federal court that are informed by what’s actually going on in immigration court.” This is important because

183. *About*, VERA INSTITUTE OF JUSTICE, <https://www.vera.org/about> [<https://perma.cc/J786-6D43>].

184. Lind, *supra* note 123 (Material on pages 25-26 is all derived from this same source.)

another solution this comment proposes, as discussed below, is creating the right to counsel in removal proceedings through a new rule in case law.¹⁸⁵

The federal government should seriously consider funding a similar project to NYIFUP. If there are concerns about the costs of such programs, it is vital to remember that the cost of the program would be offset by reducing need for the “enormous energy and money” that is devoted to boosting ICE’s detention capacity.¹⁸⁶ And not only will litigation costs be reduced, but the American economy will receive a boost by deporting fewer aliens. Even *Forbes* business magazine published an article explaining that immigrants are “key” to economic growth.¹⁸⁷ Immigration supplies workers, which increases the gross domestic product.¹⁸⁸ Immigration provides much of the entrepreneurship that provides new businesses and inventions.¹⁸⁹ Immigration also provides the human capital that boosts the nation’s capacity for innovation and technological change.¹⁹⁰ Thus, the cost of mass deportations is not confined to the cost of detention, litigation, and removal. By expelling large numbers of aliens, the government is incurring a greater cost on the country: stunting the growth of its labor force, diminishing a significant source of its entrepreneurship, and depriving a significant portion of its human capital. Thus, the government would do well to invest in a program that mitigates that cost.

Also, the Ninth Circuit recently addressed the government’s estimated costs for providing court-appointed counsel for alien minors.¹⁹¹ The government estimated that court-appointed counsel for the more than 100,000 juveniles apprehended at or near the border would cost \$276.1 million per year.¹⁹² The government alleged that would consume roughly 68% of the Executive Office for Immigration Review’s (EOIR) total budget. The court responded that the government’s assumption that all eligible minors would take advantage of free court-appointed counsel was “speculative.”¹⁹³ Therefore, even though the court ultimately found that

185. *See infra*, Section IV.B.

186. GARCÍA HERNÁNDEZ, *supra* note 17, at 14.

187. Stuart Anderson, *3 Reasons Why Immigrants Are Key To Economic Growth*, *FORBES* (OCT. 2, 2016, 10:32 AM), <https://www.forbes.com/sites/stuartanderson/2016/10/02/3-reasons-why-immigrants-key-to-economic-growth/#b214e4a7dabd> [<https://perma.cc/QE53-V7AV>].

188. *Id.*

189. *Id.*

190. *Id.*

191. *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1144-45 (9th Cir. 2017).

192. *Id.*

193. *Id.*

the costs would increase government spending on immigration matters, it made it clear that the consequences are not as dire as the government predicted.¹⁹⁴

Furthermore, such a program would be worth government resources because criminologists have found that aliens generally commit less crime than U.S. citizens, and there is evidence that immigration lowers crime rates.¹⁹⁵ These findings call into question the perception that aliens increase crime.¹⁹⁶ Consequently, such a program would help achieve President Trump's stated policy of reducing crime in America.¹⁹⁷

2. Incorporating Immigration Representation into Public Defense Offices

The federal government has already approved immigrant legal services under the Criminal Justice Act (CJA), which governs the use of federal funds for the public defender system.¹⁹⁸ That law provides that "federal judges have the discretion to appoint counsel in several areas that go beyond the core trial function in a criminal case."¹⁹⁹ As a result, "the federal defender offices in Los Angeles, San Diego, and Seattle are known for their work on behalf of noncitizens detained for prolonged periods in immigration custody."²⁰⁰ Notably, CJA funding allows for representation on "ancillary matters," which often includes immigration matters.²⁰¹ Examples of this include obtaining bond if the client would otherwise remain detained pending a criminal case, moving to vacate an earlier conviction based on ineffective assistance of counsel, or obtaining visas designed to protect crime victims.²⁰² The nature of criminal defense now demands significant immigration expertise, and the law already has some steps in place to accommodate that, through the CJA.²⁰³ Thus, if nothing else, the federal government at least has an interest in ensuring that public defenders are versed in immigration law. "The defense attorney's role in

194. *Id.* For more regarding this case, see *infra*, Section IV. B.

195. Graham C. Ousey & Charis E. Kubrin, *Exploring the Connection between Immigration and Violent Crime Rates in U.S. Cities, 1980–2000*, 56 SOC. PROBS. 447, 447 (2009).

196. *Id.*

197. Exec. Order No. 13776, 82 Fed. Reg. 10699, 10699 (Feb 9, 2017).

198. 18 U.S.C. § 3006A (2010).

199. Eagly, *supra* note 115, at 2298.

200. *Id.* at 2299.

201. *Id.*

202. *Id.* at 2299–2300.

203. *Id.* at 2300.

immigration crime is one that integrates immigration counsel and advice.”²⁰⁴

Additionally, several public defender offices have come up with their own creative solutions for providing immigration counsel to criminal defendants. For example, Brooklyn Defender Services has an in-house Immigration Unit that employs multiple staff attorneys who tailor their criminal defense advice from an immigration perspective, and, crucially, “defend against their immigration detention and deportation in immigration court and with detention officers.”²⁰⁵ But the Immigration Unit’s representation does not end there. “For those clients who might be eligible for citizenship or lawful permanent residency, Brooklyn Defender immigration attorneys assist in obtaining such benefits.”²⁰⁶

Additionally, “the Bronx Defenders established a Center for Holistic Defense, which includes comprehensive immigration legal services.”²⁰⁷ Their philosophy is that “contact with the criminal justice system is a matter of circumstance, not character.”²⁰⁸ Their criminal defense attorneys work alongside other advocates on their “holistic teams” to identify the causes of clients’ criminal justice involvement, to protect them from the enmeshed penalties associated with their cases, and to craft legal defenses uniquely tailored to each client’s case.²⁰⁹ Their approach to immigration related criminal cases includes “early intervention and mitigation advocacy” (such as helping aliens navigate criminal proceedings to mitigate immigration consequence); benefits advocacy (which means affirmatively applying for immigration benefits); and deportation defense.²¹⁰ Incidentally, this office serves as one of three institutional providers of free representation to detained aliens in removal proceedings at the New York immigration court, as part of the highly successful NYIFUP, referenced above.²¹¹

In Los Angeles, county public defenders counsel juvenile defendants “regarding a unique form of immigration relief for unaccompanied minors, known as Special Immigrant Juvenile Status (SIJS).”²¹² SIJS is a

204. *Id.* at 2297.

205. *Id.* at 2298.

206. *Id.*

207. *Id.*

208. *Our Work, Criminal Defense*, BRONX DEFENDERS, <https://www.bronxdefenders.org/our-work/> [<https://perma.cc/NJ8T-LTJF>].

209. *Id.*

210. *Our Work, Immigration Defense*, BRONX DEFENDERS, <https://www.bronxdefenders.org/our-work/immigration-defense/> [<https://perma.cc/5YW4-7SD5>].

211. *Id.*; Lind, *supra* note 123; *see supra* Part III.

212. Eagly, *supra* note 115, at 2298.

classification that provides the ability to seek lawful permanent residence to certain children who have been subject to state juvenile court proceedings related to abuse, neglect, abandonment, or a similar basis under state law.²¹³ As a result, “some county defenders not only assist their young clients in identifying their eligibility to remain legally in the country, but also fill out and file the necessary paperwork.”²¹⁴ This greatly facilitates young aliens’ navigation of the complex legal system at little or no cost to them.

There is also an “embedded” approach to providing legal counsel under *Padilla*, used in public defense offices in Brooklyn and the Bronx.²¹⁵ This model has in-house immigration attorneys working alongside criminal trial attorneys in courthouses and jailhouse lockups to provide simultaneous criminal and immigration counsel.²¹⁶

Other defender programs have even partnered with nonprofit organizations specializing in immigration law.²¹⁷ One example is the Florence Immigrant and Refugee Rights Project in Arizona.²¹⁸ It serves as a “backup center,” meaning that public defenders throughout the state can turn to them for counsel in immigration matters.²¹⁹ Given the ingenuity of these methods, the federal government should seriously consider funding and/or adopting them.

3. Office of Legal Access Programs

To its credit, the EOIR has taken some steps to improve access to counsel in immigration court pursuant to federal regulations through its Office of Legal Access Programs (OLAP).²²⁰ These steps include:

- The Recognition & Accreditation (R&A) Program, allowing qualified non-attorneys to provide representation in immigration matters through approved organizations;²²¹

213. *Green Card Based on Special Immigrant Juvenile Classification*, U.S. CIT. & IMM. SERVS., <https://www.uscis.gov/green-card/sij> [<https://perma.cc/5N3G-G8KY>].

214. Eagly, *supra* note 115, at 2298.

215. *Id.* at 2295.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. 8 C.F.R. § 1003.0(f) (2017); Office of Legal Access Programs, U.S. Dep’t Just., EXEC. OFF. IMM. REV., <https://www.justice.gov/eoir/office-of-legal-access-programs> [<https://perma.cc/8VVB-RXTQ>] [hereinafter *OLAP*].

221. Legal Orientation Program, U.S. DEP’T JUST., EXEC. OFF. IMM. REV., <https://www.justice.gov/eoir/legal-orientation-program> [<https://perma.cc/85N3-RBAD>].

- Providing a list of pro bono legal service providers;²²²
- The Legal Orientation Program, and Legal Orientation Program for Custodians of Unaccompanied Alien Children, which provide group and individual orientations to help individuals make more informed legal decisions;²²³
- Self-Help Legal Centers for pro se respondents;²²⁴
- The Model Hearing Program, which gives pro bono representatives training in practice law at the immigration court;²²⁵
- The BIA Pro Bono Project, which identifies potentially meritorious cases on appeal and notifies pro bono representatives of these cases, which has been reported as successful;²²⁶
- The National Qualified Representative Program for mentally incompetent respondents.²²⁷

The Department of Justice says that independent analysis has shown that the OLAP “has positive effects on the immigration court process: detained individuals make better informed and more timely decisions and are more likely to obtain representation; and cases are completed faster, resulting in fewer court hearings, less time spent in detention, and cost savings.”²²⁸ A ten-year review of the BIA Pro Bono Project found counsel willing to accept 87% of cases selected by the screeners.²²⁹ The Department of Justice does not appear to have published statistics for any of the other programs listed above.

It should be noted that these programs rely heavily on partnerships with nonprofits and pro bono representatives,²³⁰ which means that their reach is limited by the resources of the organizations that are willing to help. Thus, while the OLAP helps, it is not nearly enough to meet the need. More needs to be done if representation is to be sufficiently

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *BIA Pro Bono Project*, U.S. DEP’T JUST., EXEC. OFF. IMM. REV., <https://www.justice.gov/eoir/bia-pro-bono-project> [<https://perma.cc/LE3H-V2VQ>].

227. *OLAP*, *supra* note 221.

228. *Fact Sheet*, U.S. DEP’T JUST., EXEC. OFF. IMM. REV., <https://www.justice.gov/eoir/file/882786/download> [<https://perma.cc/BZ9Q-M6WJ>].

229. *Id.*

230. *OLAP*, *supra* note 221.

accessible under *Padilla*. One way is by creating the right to counsel through case law.

B. Proposal II: Creating the Right Through a New Rule in Case Law

As established previously, the right to counsel in removal proceedings has slowly but surely evolved in case law, culminating in *Padilla*.²³¹ *Padilla* mandates that counsel advise an alien client of the adverse immigration consequences of criminal convictions.²³² There are other important Supreme Court cases from which new rules can be applied to aliens in removal proceedings.

In *Gideon v. Wainwright*, the Supreme Court held that indigent persons in criminal proceedings facing deprivation of physical liberty had a right to court-appointed counsel.²³³ This was important in the context of criminal law because, even though the Court had recognized that defendants are usually ill-equipped to represent themselves, it did nothing to remedy the problem until this case, which is the Court's best known "right to counsel" decision."²³⁴ In *Gideon*, an indigent criminal defendant appeared in state court and requested appointed counsel.²³⁵ The court denied his request, and the defendant represented himself pro se, losing his case.²³⁶ The Supreme Court reversed, finding that having a lawyer in criminal courts, whether federal or state, is a necessity, not a luxury.²³⁷ The Court noted that even an intelligent layman often has no skill in the science of law, cannot adequately prepare his own defense, and "though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."²³⁸

This case matters tremendously because of how naturally it applies to immigration law. First, "deportation is punishment," as Justice Brewer illustrated so poignantly.²³⁹ Thus, aliens in removal proceedings have a deep interest in securing a fair proceeding. But they are often ill-equipped to represent themselves. After all, if intelligent U.S. citizens face the danger of conviction because they don't know how to establish their innocence, how much worse is it for aliens? Especially considering they

231. *Padilla v. Kentucky*, 559 U.S. 356 (2010); *see supra*, Part II.

232. *Padilla*, 559 U.S. at 357.

233. 372 U.S. 335 (1963).

234. GARCÍA HERNÁNDEZ, *supra* note 17, at 113.

235. *Gideon*, 372 U.S. at 336-37.

236. *Id.* at 337-38.

237. *Id.* at 344.

238. *Id.* at 345.

239. *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting).

often encounter a language barrier and are unaccustomed to the laws and culture of the United States. Thus, as the Court in *Gideon* found, adjudicators should likewise find that having access to counsel in removal proceedings is a necessity, not a luxury.

Another case to draw on is *Mathews v. Eldridge*.²⁴⁰ This case dealt with the constitutional validity of the administrative procedures for disability benefits under the Social Security Act.²⁴¹ The procedure at issue in the case required that individuals granted disability benefits be periodically screened by a monitoring state agency.²⁴² If the state agency found that the individual was no longer disabled, it reported its findings to the Social Security Administration.²⁴³ The administration would then terminate the disability benefits, but the recipient had a right to seek administrative review, and then judicial review.²⁴⁴ Eldridge, whose benefits had been terminated under this scheme, challenged the constitutionality of the administrative procedures.²⁴⁵ The Supreme Court rejected his claim, finding that the administrative procedures were constitutional because they fully comported with due process.²⁴⁶

This case is crucial for purposes of this comment because of the balancing test that the Court created to reach its conclusion. The test requires an evaluation of three factors: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest.”²⁴⁷

It is easy to see how the rules from these cases can apply in removal proceedings. First, in removal proceedings, the private interest at stake is the freedom to associate with loved ones in the United States or the freedom to work.²⁴⁸ Second, removal proceedings involve a serious risk that a person will be unjustly ripped apart from family and employment. To paraphrase James Madison, if this is not a severe punishment, it will be difficult to imagine the doom to which the name can be applied.²⁴⁹ Third, there is a government interest because the government is

240. 424 U.S. 319 (1976).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 323-25.

246. *Id.* at 349.

247. *Id.* at 335.

248. *Fong Yue Ting v. United States*, 149 U.S. 698, 739-41 (1893) (Brewer, J., dissenting).

249. *Id.* at 741 (citing James Madison).

constitutionally required to ensure a fair proceeding, consistent with the Fifth Amendment right to due process²⁵⁰ and the Sixth Amendment right to be represented by counsel.²⁵¹ As established previously, this requirement is not limited to U.S. citizens.²⁵² Thus, generally speaking, the three-prong *Mathews* test is satisfied in removal proceedings, meaning that they already meet the Supreme Court's rules for court-appointed counsel. In light of the overlap between criminal and immigration law, it is reasonable to expand these rules to deportation cases. Thus, as a general rule, the Supreme Court should find that aliens in removal proceedings should have the right to court-appointed counsel.

Nevertheless, courts may be understandably averse to giving *all* aliens the right to court-appointed counsel in removal proceedings. In fact, one scholar noted that *Padilla* is not concerned with protecting *all* aliens against all deportations.²⁵³ Accordingly, it is worth mentioning which classes of aliens to whom the rule might apply, but with an important caveat: a comprehensive evaluation of the aliens to whom this right should apply to would require complex analysis that could take up the space of another full-fledged comment. That is because there are a broad range of categories with which to classify aliens. Broadly speaking, "alien" refers to a person who is not a citizen or national of the United States.²⁵⁴ This can be further broken up into two main categories: 1) nonimmigrant; and 2) immigrant.

The non-immigrant category includes unlawfully present aliens, and aliens that enter or remain in the United States without authorization.²⁵⁵ It also includes recipients of deferred action, including those who received Deferred Action for Childhood Arrivals (colloquially known as "DACA"), because DACA does not provide lawful status.²⁵⁶ Rather, it *temporarily* shields qualified individuals from removal.²⁵⁷ The non-immigrant category also includes unaccompanied alien children (UAC), who are aliens under the age of eighteen with no immigration status, and with respect to whom; "1) there is no parent or legal guardian in the United

250. U.S. CONST. amend. V.

251. U.S. CONST. amend. VI.

252. AM. IMMIGRATION LAWYERS ASS'N, *supra* note 92, at 19. For a list of cases, see n.110.

253. Lasch, *supra* note 121, at 2151.

254. *Glossary, Alien*, U.S. CIT. AND IMM. SERVS., <https://www.uscis.gov/tools/glossary> [<https://perma.cc/9G78-AB48>].

255. *Alien*, RANDOM HOUSE WEBSTER'S POCKET LEGAL DICTIONARY (3d ed. 2007).

256. *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CIT. & IMM. SERVS., <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/Z3Y9-S234>].

257. *Id.*

States; or 2) no parent or legal guardian in the United States is available to provide care and physical custody.”²⁵⁸ This category also includes people with valid nonimmigrant visas, issued to aliens wishing to be in the United States on a temporary basis for tourism, medical treatment, business, temporary work, or study.²⁵⁹ “There are more than 20 different categories of nonimmigrant visa classifications.”²⁶⁰

The immigrant category is comprised of individuals who are authorized to live and work permanently in the United States, including those who have adjusted their nonimmigrant status to lawful permanent resident status, and who have received a “green card.”²⁶¹ There is a long, complex list of what it takes to be eligible for a green card.²⁶² This includes eligibility based on: family relationships to U.S. citizens or permanent residents; employment; “special immigrant” status; refugee or asylee status; status as the victim of human trafficking, crime, or abuse; and the Diversity Visa.²⁶³

Clearly, there is a spectrum of people who may be colloquially referred to as “immigrants.” And another category for consideration is “detained aliens,” because aliens’ access to counsel plummets when they are detained.²⁶⁴ In any case, the principle that should guide adjudicators when considering whom to grant court-appointed counsel is this: *give priority to classes of aliens who are the most vulnerable when placed in removal proceedings.*²⁶⁵

A recent Ninth Circuit case is worth discussing here.²⁶⁶ The court reviewed the asylum claim of C.J.L.G., a Honduran minor who argued, on appeal, that he was entitled to court-appointed counsel when he

258. *Who We Serve - Unaccompanied alien children*, OFF. REFUGEE RESETTLEMENT (Oct. 2, 2012), <https://www.acf.hhs.gov/orr/resource/who-we-serve-unaccompanied-alien-children> [https://perma.cc/QU5T-6QZB].

259. *What is the difference between an Immigrant Visa vs. Nonimmigrant Visa?*, U.S. CUSTOMS & BORDER PATROL, https://help.cbp.gov/app/answers/detail/a_id/72/~/-/what-is-the-difference-between-an-immigrant-visa-vs.-nonimmigrant-visa-%3F [https://perma.cc/WU56-L57E].

260. *Id.*

261. *Green Card*, U.S. CIT. & IMM. SERVS., <https://www.uscis.gov/tools/glossary> [https://perma.cc/YD74-TJGL].

262. *Green Card Eligibility Categories*, U.S. CIT. & IMM. SERVS., <https://www.uscis.gov/greencard/eligibility-categories> [https://perma.cc/R4YB-TRAF].

263. *Id.*

264. Eagly & Shafer, *supra* note 145, at 2.

265. For a discussion of which classes of aliens may be the most vulnerable, see Stephen Lee et al., *These Are The 4 Most Vulnerable Groups Of Immigrants Right Now*, GOOD (Jan. 29, 2017), <https://www.good.is/articles/trump-policies-legal-explainer-undocumented-immigrants> [https://perma.cc/A7GD-PDHL].

266. *C.J.L.G. v. Sessions*, 880 F.3d 1122 (9th Cir. 2017).

presented his case to the immigration judge.²⁶⁷ The court upheld the rejection of his asylum claim, and it rejected his claim for appointment of counsel.²⁶⁸

The Ninth Circuit's holding is not as detrimental to this comment as it may seem, especially when one takes a closer look at the court's reasoning. The court followed the balancing test of *Mathews v. Eldridge*.²⁶⁹ The court held that the first prong was met because C.J.L.G. had a private interest at stake: his life and liberty were at risk.²⁷⁰ That is because C.J.L.G. stood to be forcefully recruited into Honduran gangs at gunpoint.²⁷¹

To evaluate whether there was an erroneous deprivation of the private interest, the court made a separate asylum analysis.²⁷² It then incorporated the asylum analysis into its analysis of the second *Mathews* prong because it was critical to determining if the alien was prejudiced by any procedural deficiencies.²⁷³ It held that because C.J.L.G.'s asylum claim was a losing case anyway, he was not prejudiced by not having court-appointed counsel.²⁷⁴ Therefore, the court held that this prong was not met based on three factors.²⁷⁵ First, the court held that even though C.J.L.G. did not experience past persecution, he had a well-founded fear of future persecution because of the gangs' credible death threats.²⁷⁶ Second, the court rejected C.J.L.G.'s claim that the feared persecution would be on account of a statutorily protected ground (his relationship with his family).²⁷⁷ That is because the court found that threats against him by the gangs were not derivative of any persecution against members of his family.²⁷⁸ Finally, the court held that C.L.J.G. failed to establish that the Honduran government was unable or unwilling to control the gangs, because a 2014 state department country conditions report stated that Honduran security forces severely punished gang members.²⁷⁹

The court held that, even though it probably would not be as high as the government estimated, the cost of requiring government-funded

267. *Id.* at 1128-29.

268. *Id.* at 1150-51.

269. *Id.* at 1136; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

270. *C.J.L.G.*, 880 F.3d at 1137.

271. *Id.*

272. *Id.* at 1139.

273. *Id.*

274. *Id.* at 1143-44.

275. *Id.* at 1144.

276. *Id.* at 1139-41.

277. *Id.* at 1141-42.

278. *Id.* at 1142.

279. *Id.* at 1142-43.

counsel would significantly increase the funds expended on immigration matters.²⁸⁰ Therefore, the court held that the third *Mathews* prong was not in favor of C.J.L.G.²⁸¹ However, the court hastened to note that its conclusion on the third prong rested on its decision on the second prong.²⁸² Had the second prong favored C.J.L.G., the third probably would have, as well.²⁸³

By unravelling its reasoning, it becomes clear that the Ninth Circuit did not mandate a blanket ban on court-appointed counsel for minor aliens in removal proceedings. In fact, the court made clear that the weakness of the alien's case was the deciding factor. The fact that his case was so weak meant that no court-appointed counsel was not prejudicial. In other words, C.J.L.G. would have lost his case anyway, and court-appointed counsel would not have changed the outcome. With a different fact pattern (i.e. a stronger asylum claim), the court would have reached a different conclusion regarding the rights of alien minors to court-appointed counsel. More importantly, as Justice Owens's concurring opinion pointed out, the majority did not discuss whether the Due Process clause of the Fifth Amendment mandates counsel for unaccompanied minors.²⁸⁴ "That is a different question that could lead to a different answer."²⁸⁵

C. *Proposal III: Creating the Right by Amending the INA*

The INA was originally passed in 1952,²⁸⁶ but it has been amended dozens of times.²⁸⁷ These changes include the abolishment of immigration criteria based on nation of origin and race, the Armed Forces Naturalization Act allowing veterans to become U.S. citizens, the Refugee Act of 1980 allowing persecuted individuals to seek asylum in the United States, and the REAL ID Act deporting terrorists.²⁸⁸

280. *Id.* at 1145-46.

281. *Id.* at 1145.

282. *Id.*

283. *Id.*

284. *Id.* at 1151 (Owens, J., concurring).

285. *Id.*

286. *Immigration and Nationality Act*, U.S. CIT. & IMM. SERVS, <https://www.uscis.gov/laws/immigration-and-nationality-act> [<https://perma.cc/P2NS-4NHK>].

287. *Public Laws Amending the INA*, U.S. CIT. & IMM. SERVS, <https://www.uscis.gov/laws/public-laws-amending-ina> [<https://perma.cc/HS2E-HK2P>]; *Public Laws Amending the INA*, U.S. CIT. & IMM. SERVS, <https://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-1.html> [<https://perma.cc/LUB3-7HCZ>].

288. *Historical Timeline*, *supra* note 14. See also *Immigration and Nationality Act of 1952*, BALLOTPEDIA, https://ballotpedia.org/Immigration_and_Nationality_Act_of_1952 [<https://perma.cc/2T6H-J9NN>].

Furthermore, Senate republicans introduced a bill in 2017 proposing an amendment to the INA.²⁸⁹ This bill “died” because Congress did not enact it before the end of its term on January 3, 2019.²⁹⁰ But even this “dead” bill demonstrates that proposals to amend the INA are nothing new. It is therefore reasonable to propose yet another amendment to the INA. This amendment should strike the “at no expense to the government clause” from 8 U.S.C. §1362.

Granted, a bill amending the INA would have significant hurdles to overcome before it becomes a law (passing committee, then passing both houses, then being signed by the president), but fortunately the only change would be a simple one: striking one clause from an existing statute. That should facilitate its passage as a law.

Like the courts, Congress may also be understandably averse to giving the right to counsel to *all* aliens in removal proceedings. Accordingly, the INA should also be amended to give the right to certain classes of aliens. As stated above, this is a complex issue in and of itself, and cannot be adequately addressed here.²⁹¹ Nevertheless, the principle that should guide legislators when considering whom to grant court-appointed counsel is this: *give priority to classes of aliens who are the most vulnerable when placed in removal proceedings.*²⁹²

V. CONCLUSION

Immigration has long been a controversial topic in the United States, and the U.S. government has wrestled with it in many ways. Many of these ways of addressing immigration have resulted in laws and policies that are often questionable at best, and reprehensible at worst. President Trump’s policies have thrust those controversies to the forefront, making the issues more relevant than ever.

This comment touches on the tip of the politically-charged iceberg that is immigration. More importantly, this comment has shed light on a lesser-known, but vitally important, crisis in immigration law: access to counsel in removal proceedings. By creating a right to court-appointed counsel, more aliens will be shielded from being sacrificed like “unarmed

289. *S. 354 — 115th Congress: RAISE Act.*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/115/s354/summary> (last updated Jan 17, 2018) [<https://perma.cc/9MX7-PR6J>] (proposing to end the diversity visa program, reduce the number of family-sponsored immigrants, and limit U.S. acceptance of refugees).

290. *Id.*

291. *See supra*, Section IV.B.

292. For a discussion of which classes of aliens may be the most vulnerable, see Lee et al., *supra* note 265.

prisoners to gladiators.”²⁹³ Access to court-appointed counsel will also ensure that aliens in removal proceedings can get a fair shake by having an advocate that can act as both offensive “sword” and defensive “shield.”²⁹⁴

The law is currently less-than-favorable to aliens in removal proceedings. Aliens stand to lose much, and their access to counsel is less than ideal. But there is hope for positive change. In fact, as a result of *Padilla*, the path has already been paved for a right to counsel in removal proceedings. *Padilla* has been implemented in the creative solutions described above.

This makes the proposed changes reasonable: expanding on programs that have already worked; creating the right through case law; and amending the INA. But more important than the proposal’s reasonability is the urgency for change. Over 300,000 people are removed each year,²⁹⁵ and even James Madison, the “Father of the Constitution,” recognized that deportation is a harsh punishment.²⁹⁶ Not only that, but the country stands to lose tremendously in terms of gross domestic product, labor force, entrepreneurship, and human capital by removing large numbers of aliens.²⁹⁷ It is therefore is urgent to address the lack of access to counsel for aliens in removal proceedings.

293. *United States v. Cronin*, 466 U.S. 648, 657 (1984).

294. GARCÍA HERNÁNDEZ *supra* note 17, at 112 (citing JAMES K. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 49 (2002)).

295. BRYAN BAKER & CHRISTOPHER WILLIAMS, *IMMIGRATION ENFORCEMENT ACTIONS: 2015* 8-9 (JULY 2017).

296. *Fong Yue Ting v. United States*, 149 U.S. 698, 740-41 (1893) (Brewer, J., dissenting) (citing James Madison); *James Madison*, *supra* note 174 (noting that James Madison was nicknamed the “Father of the Constitution”).

297. Anderson, *supra* note 187.