

MAKING RIGHTS REAL: EFFECTUATING THE DUE PROCESS RIGHTS OF PARTICULARLY VULNERABLE IMMIGRANTS IN REMOVAL PROCEEDINGS THROUGH ADMINISTRATIVE MECHANISMS

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Immigration removal proceedings provide insufficient due process protections to certain immigrants. Vulnerable immigrants who cannot adequately represent themselves are expected to do so even if they cannot afford an attorney or qualified Board of Immigration Appeals (BLA) representative. This Note argues that the Department of Justice’s (DOJ) Executive Office of Immigration Review (EOIR) can and should pass regulations that safeguard particularly vulnerable immigrants’ due process rights. These regulations should instruct immigration judges (IJ) to affirmatively determine whether due process requires that a qualified legal representative—either an attorney or BLA representative—advocate for a particularly vulnerable immigrant in a removal proceeding before an IJ decides the case on its merits. The rules would constitute an administrative framework that safeguards immigrants’ due process rights. This proposed administrative framework is rooted in a reading of current common and statutory law that allows the Attorney General to delegate the necessary authority to IJs to effectuate the suggested regime.

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I. INTRODUCTION

The 2012 presidential election and its outcome placed the immigration debate front and center on the nation's policy agenda. President Obama, who received seventy-one percent of the Latino votes cast in the election as compared to twenty-seven percent for Mitt Romney,¹ promised to tackle what has

¹ Mark Hugo Lopez & Paul Taylor, *Latino Voters in the 2012 Election*, PEW RESEARCH: HISPANIC CENTER (2012), <http://www.pewhispanic.org/2012/11/07/latino-voters-in-the-2012-election/>.

so far proved elusive—comprehensive immigration reform.² To date, the national conversation about immigration reform has centered on reforming the substantive laws regarding admission into the American polity.³

Although the debate and efforts to reform the substantive laws that govern the criteria and process for admission into the American body politic are critical, another essential and intimately related aspect of our immigration system is often overlooked—immigration removal proceedings.⁴ These proceedings are the adjudicative forums in which individual decisions about an immigrant's expulsion from or ability to lawfully remain in the United States are made.⁵ For many years, these hearings have been rife with significant problems. Proposals to reform these proceedings have “fallen victim to structural impediments, funding priorities, and vast political chasms.”⁶ Of particular concern is the fact that immigration removal proceedings face deep and systemic issues that threaten their legitimacy, such as not allowing individuals to meaningfully present their case with others' assistance when they are unable to do so on their own.⁷ Academic commentators and immigrants' rights advocates have called for changes to this system for many years.⁸ Beyond being overburdened with massive caseloads,⁹ serious due process concerns cast a dark shadow on the decisions made by immigration judges (“IJ”).¹⁰

² See, e.g., Elise Foley & Sam Stein, *Obama Promises Swift Action on Immigration in Meeting with Progressives*, HUFF POST: POLITICS (Nov. 13, 2012, 7:59 PM), http://www.huffingtonpost.com/2012/11/13/obama-immigration-action_n_2125625.html (detailing President Obama's plans for immigration reform as expressed in a meeting with progressive leaders); THE WHITE HOUSE, BUILDING A 21ST CENTURY IMMIGRATION SYSTEM (2011), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf (outlining the Obama administration's vision for immigration reform).

³ See, e.g., Brett LoGiurato, *Marco Rubio Blasts Obama's Leaked Immigration Proposal As "Dead on Arrival,"* BUSINESS INSIDER: POLITICS (Feb. 17, 2013, 12:42 PM), <http://www.businessinsider.com/marco-rubio-obama-immigration-reform-2013-2> (detailing the communication between the White House and some members of Congress on the main contours of proposed reforms to the immigration laws, primarily dealing with a pathway to citizenship for undocumented immigrants, enhanced border security, and a guest worker program).

⁴ Although the President's immigration reform blueprint recognizes the need for improving the immigration courts, BUILDING A 21ST CENTURY IMMIGRATION SYSTEM, *supra* note 2, at 10, it does not address the serious due process issues that arise in some proceedings. Moreover, media accounts about immigration reform hardly, if ever, discuss these procedural concerns. See, e.g., Foley, *supra* note 2; LoGiurato, *supra* note 3.

⁵ 8 U.S.C. §1229a(a)(3) (2006).

⁶ Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1639–1640 (2010).

⁷ Federal Article III judges have decried the quality of the decisions made by immigration judges. *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (2005) (“In the year ending on the date of the argument, different panels of this court reversed the Board of Immigration Appeals in whole or in part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits . . . This tension between judicial and administrative adjudicators is . . . due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”) (emphasis added).

⁸ See, e.g., Legomsky, *supra* note 6 (advocating for a complete redesign of the immigration adjudication system that would remove the adjudicatory function from the Department of Justice and transfer it to an independent tribunal within the Executive Branch, convert immigration judges into administrative law judges, and create a dedicated Article III appellate review court for cases decided by the new administrative tribunal).

Particularly troubling is the fact that the majority of immigrants facing removal hearings proceed *pro se* in immigration court.¹¹ This is, in part, a result of the lack of a right to appointed counsel for immigrants facing removal proceedings.¹² The latest figures available from the Department of Homeland Security (“DHS”) show that Immigration and Customs Enforcement (“ICE”) detained 477,523 foreign-nationals in 2012, a record number.¹³ In 2008, sixty percent of all immigrants in the immigration court system and eighty-four percent of detained immigrants had no legal representation.¹⁴ Given that the laws regarding government appointed counsel in immigration removal proceedings have not changed since 2008, it is likely that the number of unrepresented immigrants is similarly high today.

Several commentators have argued that a right to appointed counsel should, at a minimum, be extended to certain classes of immigrants facing removal proceedings.¹⁵ They often call for asylum

⁹ Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 391 (2011) (“Because of the volume of cases they confront, IJs [immigration judges] must decide approximately four cases a day, roughly twice as many as Social Security Judges.”).

¹⁰ Benslimane, 430 F.3d at 829–830.

¹¹ Stacy Caplow et al., *Assessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings*, CARDOZO L. REV. 4–5 (Dec. 2012), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf (“In 2010, 57.3 percent of all respondents in removal proceedings nationwide (detained and nondetained) (a total of 164,742 people) appeared in immigration court without counsel.”). The Department of Homeland Security defines the “detention” of an immigrant as, “[t]he physical custody of an alien in order to hold him/her, pending a determination on whether the alien is to be removed from the United States or awaiting return transportation to his/her country of citizenship, after a final order of removal has been entered.” JOHN SIMANSKI & LESLEY M. SAPP, DEPARTMENT OF HOMELAND SECURITY, ANNUAL REPORT IMMIGRATION ENFORCEMENT ACTIONS: 2012, 2 (Dec. 2013), available at https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf. Interestingly, this definition changed in the span of a year. The 2011 report defined “detention” as “[t]he seizure and incarceration of an alien in order to hold him/her while awaiting judicial or legal proceedings or return transportation to his/her country of citizenship.” JOHN SIMANSKI & LESLEY M. SAPP, DEPARTMENT OF HOMELAND SECURITY, ANNUAL REPORT IMMIGRATION ENFORCEMENT ACTIONS: 2011, 2 (Sept. 2012), available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

¹² There currently exists no right to appointed counsel, at government expense, in the immigration context. See Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 113, 124 (2008) (citing section 292 of the Immigration and Nationality Act).

¹³ Simanski 2012 Report, *supra* note 11, at 5. This is an increase of 48,276 detentions over 2011. See *id.*; see also Simanski 2011 Report, *supra* note 11, at 5.

¹⁴ ANN BADOUR ET AL., TEXAS APPLESEED, JUSTICE FOR IMMIGRATION’S HIDDEN POPULATION: PROTECTING THE RIGHTS OF PERSONS WITH MENTAL DISABILITIES IN THE IMMIGRATION COURT AND DETENTION SYSTEM 14 (2010), available at http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313&Itemid=.

¹⁵ See, e.g., Clapman, *supra* note 9; Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585 (2011); Matt Adams, *Advancing the “Right” to Counsel in Removal Proceedings*, 9 SEATTLE J. SOC. JUST. 169 (2010); Sharon Finkel, Note, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105 (2001); Elizabeth Glazer, Note, *The Right to Appointed Counsel in Asylum*

seekers, unaccompanied immigrant minors, and mentally ill immigrants to have a categorical right to appointed counsel in removal proceedings.¹⁶ Ensuring that competent, qualified representatives¹⁷ zealously represent a particularly vulnerable immigrant's interests is of the utmost importance. Securing representation would safeguard countless individuals' due process rights. Due process protections—particularly the ability and opportunity to be heard by a decision maker—are central tenets to American notions of freedom, liberty, and justice.¹⁸ These protections are also critical in defending against unfair and potentially abusive government action. The Fifth and Fourteenth Amendments' due process protections apply to individuals—citizens and non-citizens alike—facing governmental action affecting or depriving them of life, liberty, or property.¹⁹ Currently, our immigration courts often fail to ensure that every individual's due process rights are indeed effectuated.²⁰

Given the due process rights at stake and the grave consequences that can result, procedural changes to our immigration removal system should be undertaken. This Note argues that the Department of Justice's ("DOJ") Executive Office of Immigration Review ("EOIR") can and should take action by passing regulations that safeguard particularly vulnerable immigrants' due process rights.²¹ These regulations should instruct IJs to affirmatively determine whether due process requires that a qualified representative advocate on behalf of a particularly vulnerable immigrant in a removal proceeding before an IJ decides her case on the merits. In making this determination, IJs should be guided by the Supreme Court's decisions in *Mathews v. Eldridge* and *Turner v. Rogers*. Should an IJ determine that a qualified representative is necessary, every effort should be made to secure one. If a qualified representative is not obtained, then the IJ should administratively close the case. This case closure should then trigger ICE to conduct its own review of the case and decide whether they too will

Proceedings, 85 COLUM. L. REV. 1157 (1985); Nimrod Pitsker, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CAL. L. REV. 169 (2007).

¹⁶ *Id.* At least one commentator has called for a right to counsel for refugee seekers. John R. Mills et al., *"Death is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361 (2009).

¹⁷ This Note uses the term "qualified representative" and variations thereof to refer to legal counsel and/or Board of Immigration Appeals (BIA) accredited representatives who are authorized to represent immigrants in immigration court. The BIA recognizes organizations throughout the country, attorneys, and non-attorney professionals trained in immigration law within those organizations, as entities and persons, respectively, capable and authorized to represent immigrants in immigration court. See DEPARTMENT OF JUSTICE, *Executive Office of Immigration Review: Recognition & Accreditation Program Overview*, http://www.justice.gov/eoir/ra/RA_Overview_2014-03.pdf (last updated March 2014).

¹⁸ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. . . .' *The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'*") (emphasis added).

¹⁹ Faiza W. Sayed, Note, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1866 (2011) (quoting *Mathews v. Diaz*, 426 U.S. 67, 77 (1976)) ("There are literally millions of [noncitizens] within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.").

²⁰ *Benslimane*, 430 F.3d at 829–30.

²¹ This Note defines as particularly vulnerable those immigrants who are detained and mentally ill, are unaccompanied minors, or who affirmatively claim asylum as a defense against removal from the United States.

close the case and therefore cease efforts to remove the immigrant. This Note argues that these changes can and should be made through rulemaking.²²

In advancing this argument, Part II summarizes the current law regarding the right to appointed counsel in the immigration context and explains the courts' case-by-case approach to deciding due process claims. It also details and subscribes to a vision espoused by one commentator on the role that Executive Branch actors can play in resolving issues of constitutional import. Part III identifies the categories of vulnerable immigrants that are more likely to experience an abridgment of their due process rights in removal proceedings. Part IV examines efforts to address concerns about the lack of qualified representatives available to detained immigrants going through removal proceedings. It concludes that, although these efforts are steps in the right direction, they are insufficient. Part V details the administrative framework introduced above and argues for its implementation. This section demonstrates that, through administrative mechanisms, the EOIR can begin to safeguard particularly vulnerable immigrants' due process rights by effectuating the case-by-case approach already adopted by the federal judiciary. As part of the proposed framework, Part V argues that IJs should consider the factors discussed in *Turner v. Rogers* and *Mathews v. Eldridge* in deciding whether an individual immigrant requires representation. This section further argues that, should immigration reform be enacted with the recent Senate version's language regarding access to counsel in immigration proceedings, this "*Eldridge* with a *Turner* gloss" test should be used to determine whether a qualified representative must represent an individual immigrant.

Although this Note argues that administrative mechanisms should be brought to bear to safeguard particularly vulnerable immigrants' due process rights vis-à-vis access to qualified representatives when necessary, this should not be read as a critique of efforts that seek to advance a categorical right to counsel in the immigration context. The approach presented in this Note merely identifies a way in which Executive Branch actors can use available tools to address serious constitutional

²² The DOJ and EOIR have initiated a rulemaking regarding the procedures that should be followed in removal cases involving mentally ill immigrant detainees. Daniel M. Kowalski, *Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders*, LEXISNEXIS LEGAL NEWSROOM, Immigration (Jan. 1 2014), <http://www.lexisnexis.com/legalnewsroom/immigration/b/insideneews/archive/2014/01/01/phase-i-of-plan-to-provide-enhanced-procedural-protections-to-unrepresented-detained-respondents-with-mental-disorders.aspx>. The DOJ has also issued guidelines offering "enhanced procedural protections" to this population of immigrant detainees. DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders* (Aug. 2013), available at <https://dl.dropboxusercontent.com/u/27924754/EOIR%20Protections.pdf>. Moreover, after the Bush and Obama administrations' differing approaches to ineffective assistance of counsel claims in the immigration context, Attorney General Eric Holder articulated his view that sensitive questions of constitutional import are best dealt with through the rulemaking process. *Matter of Compean II*, 25 I&N Dec. 1, 2 (A.G. 2009), available at <http://www.justice.gov/eoir/vll/intdec/vol25/3643.pdf> ("Establishing an appropriate framework for reviewing motions to reopen immigration proceedings based on claims of ineffective assistance of counsel is a matter of great importance. *I do not believe that the process used in Compean resulted in a thorough consideration of the issues involved, particularly for a decision that implemented a new, complex framework in place of a well-established and longstanding practice that had been reaffirmed by the Board in 2003 after careful consideration. The preferable administrative process for reforming the Lozada framework is one that affords all interested parties a full and fair opportunity to participate and ensures that the relevant facts and analysis are collected and evaluated.*") (emphasis added). As it relates to the subject matter discussed in this Note, rulemaking would allow all perspectives to be taken into account in deciding what a new, final administrative framework would look like and the Obama administration would likely favor this process.

concerns present in the immigration removal proceedings they oversee. As such, efforts to extend a categorical right to counsel in the immigration context through the courts, legislature, and elsewhere should not be deterred by the approach presented here.

II. THE CURRENT LEGAL LANDSCAPE AND ADMINISTRATIVE CONSTITUTIONALISM

Part II provides an overview of the current statutory and common law framework that governs right to counsel jurisprudence in the civil context generally and in immigration proceedings specifically. It also details a view of the role that Executive Branch actors can play in resolving issues of constitutional import.

A. *Aguilera-Enriquez's Case-by-Case Approach*

The Immigration and Nationality Act (“INA”) is the central body of law that governs the country’s immigration system.²³ With regards to the adjudication of removal proceedings in immigration court and immigrants’ right to representation by counsel within them, the INA states: “the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”²⁴ Therefore, as a matter of statutory right, the government is currently under no affirmative obligation to provide an immigrant with an attorney or qualified legal representative.

²³ Liliana Zaragoza, Note, *Delimiting Limitations: Does the Immigration and Nationality Act Impose a Statute of Limitations on Noncitizen Removal Proceedings?*, 112 COLUM. L. REV. 1326, 1330 (2012) (“Since 1952, the INA has been the foremost body of law regulating immigration and citizenship in the United States.”).

²⁴ 8 U.S.C. §1229a(b)(4)(A) (2006). However, at least one commentator argues that this statutory language does not present an absolute bar to the use of discretionary federal funding for purposes of appointing counsel to immigrants. Amelia Wilson & Natalie H. Prokop, *Applying Method to the Madness: The Right to Court Appointed Guardians Ad Litem and Counsel for the Mentally Ill in Immigration Proceedings*, 16 U. PA. J. L. & SOC. CHANGE 1, 30 (2013) (“Specifically, in a December 2010 memo entitled ‘Views Concerning Whether It Is Legally Permissible to Use Discretionary Federal Funding for Representation of Aliens in Immigration Proceedings,’ DHS states: ‘The courts have understandably determined that section 292 does not provide an affirmative right to appointed counsel. None of those decisions, however, directly address whether INA section 292 prohibits the provision of counsel at government expense. In our view, the plain language of section 292 does not lend itself to such interpretation.’ The memorandum finishes with, ‘We conclude that nothing in INA section 240(b)(4), INA section 292, or 5 U.S.C. section 3106 prohibits the use of discretionary federal funding for representation of aliens in immigration proceedings.’ Thus, it would be inconsistent for the Department of Homeland Security to stand in the way of IJs appointing counsel for the mentally ill in order to guarantee due process.”) (citations omitted). Moreover, this view has been adopted by a federal district court, *see* Order Re Plaintiffs’ Motion for Partial Summary Judgment and Plaintiffs’ Motion for Preliminary Injunction on behalf of Seven Class Members, *Franco-Gonzalez v. Holder*, 767 F.Supp.2d 1034 (C.D. Cal. 2010) (No. CV 10-02211 DMG (DTBx)), *available at* <http://www.aclu-sc.org/franco-injunction/>. The EOIR has since moved to provide “enhanced procedural guidelines” to detained mentally ill immigrants. See *Enhanced Procedural Protections*, *supra* note 22.

Nevertheless, legal scholarship and other literature urge the advancement of a right to counsel in certain civil proceedings.²⁵ As a matter of constitutional right, the Supreme Court has only addressed the issue of right to counsel in various civil contexts in a few cases.²⁶ Indigent litigants have a right to be represented by appointed counsel in civil proceedings when their physical liberty is at risk,²⁷ when they are in “juvenile delinquency” proceedings,²⁸ and in proceedings that determine whether or not a prison inmate can be transferred to state hospitals for the mentally ill.²⁹

Similarly, the federal courts have, to date, refused to find a categorical right to counsel in the immigration context. The leading case on this question is *Aguilera-Enriquez v. Immigration and Naturalization Service (INS)*,³⁰ a Sixth Circuit decision from 1975.³¹ This case provides a conditional right to counsel in immigration cases. In that case, an IJ ordered Aguilera-Enriquez, a legal permanent resident, deported. Aguilera-Enriquez challenged his deportation order by claiming that he was unconstitutionally denied government appointed counsel at his hearing.³² The court held that the appointment of counsel is required where counsel is necessary “to provide ‘fundamental fairness.’”³³ The approach announced by the court necessitates that a case-by-case determination be undertaken to determine when a “fundamentally fair” hearing requires that counsel represent an immigrant.³⁴ The Supreme Court denied *certiorari* in this case on January 12, 1976.³⁵ The denial of *certiorari*, along with the adoption of the Sixth Circuit’s approach by other federal courts of appeal around the country suggests that this case-by-case approach is the governing framework.³⁶

²⁵ See e.g., Robert E. Stein et al., *ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings*, AMERICAN BAR ASSOCIATION (2010) available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf (advocating for “federal, state, and territorial governments . . . [to] provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.”); John Pollock & Michael S. Greco, *It’s Not Triage if the Patient Bleeds Out*, 161 U. PA. L. REV. 40 (2012) (responding to another article that champions a case-by-case approach to appointing counsel in the civil context and rejects a categorical right to counsel, this article advocates for a civil right to counsel).

²⁶ *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011) (stating that the Supreme Court has only considered right to counsel challenges in the civil context relating to juvenile delinquency proceedings, in proceedings to decide whether a prison inmate should be transferred to a state hospital for the mentally ill, and where the loss of physical liberty is threatened).

²⁷ *Id.* (citing *Lassiter v. Dep’t. of Soc. Servs. of Durham Cnty.*, 452 U.S. 18 (1981)).

²⁸ *Id.* (citing *In re Gault*, 387 U.S. 1 (1967)).

²⁹ *Id.* (citing *Vitek v. Jones*, 445 U.S. 480 (1980)).

³⁰ *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975).

³¹ Kaufman, *supra* note 12, at 136 (“*Aguilera-Enriquez v. INS* is a leading case on the due process right to appointed counsel in removal proceedings.”).

³² *Aguilera-Enriquez v. INS*, 516 F.2d at 568.

³³ *Id.*

³⁴ *Id.* (“The test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness, the touchstone of due process.’”).

³⁵ *Aguilera-Enriquez v. INS*, 423 U.S. 1050 (1976).

³⁶ See *Michelson v. INS*, 897 F.2d 465, 468 (10th Cir. 1990) (“The Fifth Amendment guarantee of due process speaks to fundamental fairness. . .”); *Escobar Ruiz v. INS*, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986) (“The fifth amendment guarantee of due process applies to immigration proceedings”) *withdrawn by* *Escobar Ruiz v. INS*, 818 F.2d 712 (9th Cir. 1987); *Barthold v. INS*, 517 F.2d 689, 691 (5th

However, at least one commentator has presented a more nuanced account of the current state of the law regarding the right to appointed counsel in the immigration context.³⁷ Nimrod Pitsker argues that: (1) the *Aguilera-Enriquez* framework adopts the “fundamental fairness” standard from a pre-*Eldridge* case, *Gagnon v. Scarpelli*³⁸; (2) *Aguilera-Enriquez* accepts *Gagnon’s* case-by-case approach to due process analysis³⁹; and (3) the *Eldridge* factors “should have replaced the . . . fundamental fairness standard [in the immigration context].”⁴⁰ Yet, it is not clear that the *Eldridge* factors have completely replaced the “fundamental fairness” standard and many commentators treat *Aguilera-Enriquez* as the leading case in this area.⁴¹ This Note does as well and uses it as the guiding framework.

Some commentators have argued that the *Aguilera-Enriquez* case-by-case approach results in “effectively no right at all.”⁴² Yet, since *Aguilera-Enriquez*, there have not been many cases arguing for a right to counsel in civil contexts, including in immigration removal proceedings.⁴³ Indeed, the federal courts have consistently held that immigration removal proceedings are civil in nature.⁴⁴ As such, the Sixth Amendment’s right to counsel protection afforded in the criminal context does not apply in the

Cir. 1975) (“We analyze the proceedings in terms of their fundamental fairness on a case-by-case basis.”). See also Kaufman, *supra* note 12, at 136 (discussing the *Aguilera-Enriquez* holding that due process requires the appointment of counsel in cases in which counsel would be necessary to provide fundamental fairness); Adams, *supra* at note 15, at 176 (relying on *Aguilera-Enriquez* as the case that establishes the current legal framework for discussing arguments related to right to counsel in removal proceedings).

³⁷ Pitsker, *supra* note 15, at 178 (“In sum, courts have found myriad violations of the statutory right to counsel of one’s choosing [in the immigration context], but have not once applied the [*Aguilera-Enriquez*] ‘fundamental fairness’ standard to constitutionally require appointed counsel under the Due Process Clause.”).

³⁸ *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

³⁹ Pitsker, *supra* note 15, at 176.

⁴⁰ *Id.* at 177.

⁴¹ Kaufman, *supra* note 12, at 136 (“*Aguilera-Enriquez v. INS* is a leading case on the due process right to appointed counsel in removal proceedings.”). Additionally, multiple commentators treat the case-by-case framework in *Aguilera-Enriquez* as the governing approach. See e.g., Adams, *supra* note 15; Clapman, *supra* note 15; Kaufman, *supra* note 12.

⁴² Pitsker and Kaufman both state the proposition that the case-by-case approach leads to no right at all in practice. Kaufman, *supra* note 12, at 137; Pitsker, *supra* note 15, at 178 (“[Courts] have not once applied the ‘fundamental fairness’ standard to constitutionally require appointed counsel under the Due Process Clause.”).

⁴³ Adams, *supra* note 15, at 177 (“The few other courts that have addressed right to counsel challenges in related contexts have also recognized that fundamental fairness may require the appointment of counsel.”). However, it is worth noting that not all scholars agree that immigration detention, as currently conceived and operationalized, is in fact a civil matter. See César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (arguing that currently, immigration detention constitutes punishment and that it should instead become a truly civil system, rather than imposing constitutional safeguards into the existing punitive system).

⁴⁴ Adams, *supra* note 15, at 171 (citing *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (“Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual . . .”). Although immigration removal proceedings are not currently considered criminal proceedings, and therefore civil proceedings, the Supreme Court has held deportation to be a “severe ‘penalty.’” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010). See also, *Accessing Justice II*, *supra* note 11, at 9; Sayed, *supra* note 19, at 1872.

immigration context.⁴⁵ Yet, it is undeniable that present immigration policy and procedures are increasingly blurring the line between the civil and criminal distinction, at least regarding immigration cases.⁴⁶ The clearest example of this can be seen in the treatment of noncitizen detainees who are being housed in immigrant detention centers in increasing numbers, for longer periods of time, and with procedural protections that fall short from those in the traditional criminal context.⁴⁷

Moreover, as a matter of constitutional right, the federal courts have left the door open to potentially find that in at least some instances legal representation is necessary to ensure a fundamentally fair adjudicatory process.⁴⁸ Therefore, the statutory bar against appointed counsel found in the INA is not necessarily an absolute impediment to finding a right to counsel in, at least, a subset of immigration removal proceedings.⁴⁹

Notwithstanding the Sixth Circuit's holding in *Aguilera-Enriquez* no court has held that a removal proceeding's procedures—particularly vis-à-vis an immigrant lacking representation—were so deficient that “fundamental fairness” was violated.⁵⁰ Michael Kaufman offers the following explanation for this state of affairs: “[I]t takes an attorney to identify the sorts of complex constitutional or statutory claims that only an attorney can ‘adequately’ present.”⁵¹ As such, a court has yet to hear a case meeting the *Aguilera-Enriquez* criteria not because such a case does not exist but because the way a federal court would review such a case—as a result of a legal challenge identified and brought by an attorney—prevents it from being heard.

⁴⁵ Accessing Justice II, *supra* note 11, at 9.

⁴⁶ Daniel Kanstroom, *Padilla v. Kentucky and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?*, 45 NEW ENG. L. REV. 305, 306 (2011) (“That alone makes [*Padilla*] one of the more interesting and important Supreme Court cases we have ever seen in the (rapidly converging) fields of immigration and criminal law.”). However, the Court declined to extend *Padilla*'s impact too far. In February 2013 the Court limited *Padilla*'s reach in *Chaidez v. United States*, 133 S. Ct. 1103 (2013), by holding that the protections afforded in *Padilla* do not apply retroactively to criminal cases already in final review. In doing so, the Court somewhat cabined *Padilla*'s reach. As such, it is unclear whether the Court would extend procedural protections for immigrants in removal proceedings in a future case. *Chaidez* may prove to temper some of initial optimism over *Padilla*'s impact on the prospects of expanding immigrant's procedural protections.

⁴⁷ Sayed, *supra* note 19, at 1843–44 (arguing that noncitizen immigrant detainees, particularly those categories of immigrants—including those with a criminal record—mandated to be in detention in the United States receive less procedural protections than enemy combatants in executive detention at Guantánamo Bay but should receive more. This includes providing them legal representation).

⁴⁸ *Aguilera-Enriquez*, 423 U.S. at 568.

⁴⁹ Indeed, courts have found violations to the conditional statutory right to counsel provision in some instances. Pitsker, *supra* note 15, at 178–79 (“Courts have also found violations of the statutory right to obtain counsel based on INS practices that effectively impede communication between indigent aliens and their lawyers, such as transferring aliens to remote facilities without notifying the attorney of record, preventing aliens from consulting with counsel before signing voluntary departure forms, and denying aliens meaningful access to basic written legal materials. Similarly, courts have also held that a prejudicial denial of counsel occurred when a judge denied a motion to change venue to allow retention of counsel and denied relief when the defendant did not competently and understandingly waive his right to counsel . . . It is ironic that when an alien can afford a lawyer there are a plethora of holdings protecting his ability to hire and effectively utilize the attorney of his choosing, but when he cannot pay for an attorney there exists, for all intents and purposes, no constitutional right to counsel.”).

⁵⁰ Kaufman, *supra* note 12, at 160–61.

⁵¹ *Id.*

B. Administrative Actors and the Safeguarding of Constitutional Rights

Having established that the case-by-case approach adopted by the federal judiciary is the governing—though rarely successful—framework for deciding constitutional due process claims in the immigration context, this section details the role that administrative actors can and should play in safeguarding constitutional protections. Although it may not always be explicitly recognized, administrative agencies and the actions they take are often where constitutional rights and protections come into contact with ordinary individuals.⁵² At least one commentator, Gillian Metzger, has argued that there should be more recognition of the role administrative agencies can and should play in ensuring that constitutional requirements and protections are met.⁵³ Indeed, she notes that the “[i]nitial responsibility for addressing constitutional questions frequently falls to agencies.”⁵⁴

Administrative actors play an especially salient role in addressing constitutional questions within immigration removal proceedings. As discussed in Part II.A, current constitutional common law establishes that a case-by-case analysis must be undertaken to determine when legal counsel is required to appropriately safeguard a person’s due process rights. The Executive Branch can take steps now to ensure that constitutional safeguards are effectuated in individual immigrants’ cases. Given that Congress, by housing the immigration courts within the Executive Branch, has: 1) invested that branch with the responsibility to ensure that an immigrant’s due process rights are protected during removal proceedings; and 2) the fact that such rights are currently sometimes jeopardized, it is appropriate for the Executive Branch to seize upon current law that provides it the authority to act.

Guaranteeing that an immigrant’s due process rights are not infringed upon is intimately tied to the policies and procedures set by the DOJ and EOIR, along with how these policies and procedures are executed by individual IJs.⁵⁵ These administrative actors’ actions and decisions have the effect of determining whether or not constitutional protections—in this case due process safeguards through legal representation—are realized.⁵⁶ These actors can and should refashion their administrative policies and

⁵² See Gillian Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010) (analyzing the interrelationship between constitutional law and ordinary administrative law as it applies to the debate over the legitimacy of constitutional common law and the appropriate role of administrative agencies in the constitutional order).

⁵³ *Id.* at 535.

⁵⁴ *Id.* at 500.

⁵⁵ See Letter from Merrill Rotter, M.D., Assoc. Clinical Professor of Psychiatry, Albert Einstein College of Medicine, et al., to Eric Holder, Attorney General of the United States (July 24, 2009), *available at* <http://documents.nytimes.com/letter-to-attorney-general-holder-regarding-mentally-disabled-respondents#p=1>; <http://s3.amazonaws.com/nytdocs/docs/160/160.pdf> (arguing for the appointment of counsel for mentally disabled people in immigration court as a matter of protecting constitutional rights); *Benslimane v. Gonzales*, 430 F.3d 828 (2005) (holding that an alien could not be removed on the basis that he did not submit his application for adjustment of status to immigration judge).

⁵⁶ See Metzger, *supra* note 52, at 504–05 (noting that scholars have documented a number of instances where administrative agencies have been at the forefront of developing new understandings of constitutional rights).

procedures in order to more fully alleviate the potential for harm.⁵⁷ This would give life to the case-by-case approach articulated in *Aguilera-Enriquez*.

A recent example displaying the role Executive Branch actors play in safeguarding constitutional protections is seen in the *Matter of Compean* and *Matter of Compean II*.⁵⁸ On January 7, 2009, then Attorney General Michael Mukasey chose to set an administrative policy regarding a serious constitutional question—claims brought by immigrants alleging ineffective assistance of counsel—through adjudication instead of rulemaking by overruling a Board of Immigration Appeals (BIA) decision in *Matter in Compean*.⁵⁹ In his decision, Attorney General Mukasey made significant administrative decisions and interpretations with constitutional import. He held, in relevant part, that though immigrants do enjoy due process protections under the Fifth Amendment, this does not encompass the right to counsel or its corollary, the effective assistance of counsel.⁶⁰ Moreover, Attorney General Mukasey’s decision instituted a new administrative framework making it much more difficult, if not impossible, for noncitizens to present an ineffective assistance of counsel defense as had been the case prior to *Matter in Compean*. However, on June 3, 2009, Attorney General Eric Holder vacated Mukasey’s decision.⁶¹ Moreover, in Attorney General Holder’s judgment, Mukasey’s decision did not adequately consider all views on the matter.⁶² As such, he reinstated the policy and administrative framework in existence prior to January 7, 2009 and directed the EOIR to initiate a rulemaking process to address this issue.⁶³ The rulemaking process on this issue is ongoing with no final rule issued as of this writing.⁶⁴

⁵⁷ EOIR is beginning to do so as seen through the new enhanced procedures. As I will argue below, though this is a promising step in the right direction, it is insufficient. *See* Enhanced Procedural Protections *supra* note 22.

⁵⁸ *Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009), available at <http://www.justice.gov/eoir/vll/intdec/vol24/3632.pdf>; *Matter of Compean II*, 25 I&N Dec. 1 (A.G. 2009), available at <http://www.justice.gov/eoir/vll/intdec/vol25/3643.pdf>.

⁵⁹ *See Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009), available at <http://www.justice.gov/eoir/vll/intdec/vol24/3632.pdf>.

⁶⁰ *Id.*

⁶¹ *Matter of Compean II*, 25 I&N Dec. 1 (A.G. 2009), <http://www.justice.gov/eoir/vll/intdec/vol25/3643.pdf>.

⁶² *Id.*

⁶³ *Id.* (“Establishing an appropriate framework for reviewing motions to reopen immigration proceedings based on claims of ineffective assistance of counsel is a matter of great importance. I do not believe that the process used in *Compean* resulted in a thorough consideration of the issues involved, particularly for a decision that implemented a new, complex framework in place of a well-established and longstanding practice that had been reaffirmed by the Board in 2003 after careful consideration. *The preferable administrative process for reforming the Lozada framework is one that affords all interested parties a full and fair opportunity to participate and ensures that the relevant facts and analysis are collected and evaluated.*”) (emphasis added). Attorney General Holder’s sentiment that rulemaking is the preferable administrative procedure for instituting a new framework for reviewing motions to reopen immigration proceedings suggests that instituting the administrative framework put forth in this Note is also best accomplished through rulemaking.

⁶⁴ The DOJ has initiated a rulemaking regarding the procedures that should be followed when a motion to reopen a removal proceeding is made based on a claim of ineffective assistance of counsel. *See* The Department of Justice’s Regulatory Agenda for Fall 2013, <http://resources.regulations.gov/public/component/main?main=UnifiedAgenda> (choose “DOJ” as agency; then search “EOIR”; then click on RIN “1125-AA68” entitled “Motions to Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel”). As of April 13, 2014, no final

The back and forth between the Bush and Obama administrations' approach on this issue—particularly regarding the administrative tool of choice, rulemaking versus adjudication—is instructive. The episode demonstrates that administrative agencies regularly impact the scope and dimensions of individual's constitutional rights. Moreover, given that Attorney General Holder himself has acknowledged the “fundamentally fair” standard for due process protections in removal proceedings, this standard should be used in immigration removal proceedings.⁶⁵ Since the EOIR is already taking regulatory action with regards to effective assistance of counsel, this agency should likewise take action with respect to providing qualified representatives in removal proceedings involving vulnerable immigrants, if those cases are to be adjudicated. Additionally, the back and forth in *Matter of Compean* demonstrates that a unilateral decision by the Attorney General runs the risk of being overturned. This, and the fact that issues related to the due process rights of vulnerable immigrants is important, suggests that contested views will be more fully heard through a rulemaking process and likely have longer staying power. As such, in taking action regarding access to qualified representatives in the immigration removal proceedings arena, the rulemaking process should be pursued.

III. AT RISK IMMIGRANT GROUPS

Having detailed the current state of the law regarding access to counsel in removal proceedings and the role that administrative and Executive Branch actors can and do play in defining the scope and realization of constitutional rights, Part III identifies the categories of immigrants with a high risk of having their due process rights abridged when in removal proceedings.⁶⁶

A. Categories of Detained and Particularly Vulnerable Immigrants

1. Mentally Incompetent Non-Citizens

Immigrant rights advocates have mobilized to ensure that all constitutional and procedural protections are indeed effectuated for arguably the most vulnerable immigrant group—detained mentally ill persons.⁶⁷ In July 2009, a group of advocates wrote Attorney General Eric Holder—a little under six months after he assumed office—urging him to implement new regulations, policies, and procedures to

rule has been adopted. The action timetable does not reflect a final rule posted there is, as of this date, no legal deadline. 8 C.F.R. 1003; 8 C.F.R. 1208.

⁶⁵ Speaking before a Senate Committee hearing regarding *Matter of Compean*, Attorney General Holder stated: “The Constitution guarantees due process of law to those who are the subjects of deportation proceeding. I understand Attorney General Mukasey’s desire to expedite immigration court proceedings, but the Constitution requires that those proceedings be fundamentally fair. For this reason, I intend to reexamine the decision should I become Attorney General.” *Hearings on the Nomination of Eric Holder to be Attorney General before the Senate Judiciary Committee*, 111th Cong. (2009) (statement of Eric Holder in response to questions submitted by Sen. Orrin Hatch and Sen. Russ Feingold), available at https://www.aclu.org/pdfs/immigrants/ailf_letterinsupportofreconsideration.pdf.

⁶⁶ Undoubtedly, there are other immigrant groups in detention who are also vulnerable and would benefit greatly from representation. This Note highlights the three groups in this section because they are the ones most often cited in the literature. It does not mean, however, that they are the only groups meriting this protection. In this spirit, a section below suggests how the proposed framework could be extended to other immigrants.

⁶⁷ This Note uses the terms “mentally incompetent,” “mentally ill,” and variations thereof interchangeably.

safeguard mentally ill immigrants' due process rights.⁶⁸ Moreover, the DOJ faced litigation—brought by the ACLU of Southern California and other advocates from across the country in 2010—seeking to safeguard mentally ill immigrants' constitutional and procedural rights.⁶⁹ Beyond the actions taken by advocates, the EOIR, perhaps spurred by advocates' actions, is undertaking a rulemaking process to address the problems this immigrant population faces in removal proceedings; it also recently announced a new procedural policy affecting this population.⁷⁰

In recent months, much progress has been made in shifting the EOIR's procedures. Indeed, the EOIR issued a "Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders."⁷¹ In it, the EOIR instructs IJs to make a determination as to an immigrant's mental competency to go through removal proceedings prior to reaching a case's merits, as many advocates and scholars have urged.⁷² Moreover, it states that the EOIR will provide any alien determined to be mentally incompetent and incapable of representing himself with legal counsel.⁷³ The policy change also provides the IJ with much more room to maneuver in providing a more robust process for a mentally incompetent immigrant to meaningfully participate in the case against him; details how such competency determinations are to be made; and how mental health professionals will be used to aid in making the determination.⁷⁴ These changes, along with the Immigration Judge Benchbook's

⁶⁸ Rotter, *supra* note 55.

⁶⁹ *Franco-Gonzalez v. Holder*, 767 F.Supp.2d 1034 (C.D. Cal. 2010). On April 23, 2013, Federal District Court Judge Dolly M. Gee ordered that defendants in this case—namely the DOJ and the DHS—provide “qualified representatives” (defined as attorneys or other qualified representatives, like BIA accredited non-attorneys) to mentally ill detainees in Arizona, California, and Washington states. She ordered this action because, to not do so, in her judgment, would be a violation of Section 504 of the Rehabilitation Act. The Act mandates that disabled persons must be able to meaningfully participate in federally funded programs. She also ordered that mentally ill detainees included in the plaintiff class must be granted a bond hearing. She declined to reach the constitutional due process arguments on either issue. *See* Order Re Plaintiffs' Motion for Partial Summary Judgment and Plaintiffs' Motion for Preliminary Injunction on behalf of Seven Class Members, *Franco-Gonzalez v. Holder*, 767 F.Supp.2d 1034 (C.D. Cal. 2010) (No. CV 10-02211 DMG (DTBx)), *available at* <http://www.aclu-sc.org/franco-injunction/>.

⁷⁰ *See* The Department of Justice's Regulatory Agenda for Fall 2013, <http://resources.regulations.gov/public/component/main?main=UnifiedAgenda> (choose “DOJ” as agency; then search “EOIR”; then click on RIN “1125-AA73” entitled “Procedures for Cases Involving Mentally Incompetent Aliens”). As of April 13, 2014, no final rule has been adopted. Additionally, a fairly recent BIA decision allows IJs to provide heightened safeguards when they determine that an immigrant lacks sufficient competency to proceed. *Matter of M-A-M*, 25 I&N Dec. 474 (BIA 2011), *available at* <http://www.justice.gov/eoir/vll/intdec/vol25/3711.pdf>; *see also* Dep't of Justice, Dep't of Justice and the Dep't of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorder or Conditions, *available at* <http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html>. Most recently, EOIR has offered Enhanced Procedural Protections for this population. Dep't of Justice and Executive Office for Immigration Review, *supra* note 22.

⁷¹ Dep't of Justice and Executive Office for Immigration Review, *supra* note 22.

⁷² *Id.*

⁷³ *Id.* at 3.

⁷⁴ *Id.*

(“Benchbook”) guidance in cases involving mentally ill immigrants are positive developments.⁷⁵ However, the new policy and the Benchbook only provide non-legally binding guidance.⁷⁶

The fact remains that no rule yet exists grounding these policy changes. Nevertheless, the enhanced procedural protections go a long way in providing substantial protections to this vulnerable population. The changes will also play a role in the rules to come:

The proposed regulations will be informed, in part, by the policy announced by EOIR on April 22, 2013, in which EOIR committed to provide enhanced protections to unrepresented immigration detainees with serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings.⁷⁷

Two areas, however, that remain unaddressed by the changes are what happens when a qualified representative cannot be secured or when issues involving the maximum length of detention are implicated. Although these are issues that should be addressed in the forthcoming rules, this policy change is very important. First, it demonstrates the EOIR’s ability to marshal administrative resources and authority to address a constitutionally significant procedural infirmity. Second, it is an instance where a portion of the proposed framework in Part V below has been effectuated, thus demonstrating the viability of the suggested approach.

2. Unaccompanied Non-Citizen Minors

The treatment of immigrant children has sometimes elicited a different approach by government authorities.⁷⁸ Unaccompanied minors who do not have relatives or other adults responsible for their care at their side through immigration detention and attendant removal proceedings also merit particular attention.⁷⁹ This group of immigrants is defined by statute. Termed an “unaccompanied alien child,” a minor child in this category is someone who “has no lawful immigration status in the United States . . .

⁷⁵ See Dep’t of Justice, Executive Office of Immigration Review, *Mental Health Issues*, Immigration Judge Benchbook, <http://www.justice.gov/eoir/vll/benchbook/tools/MHI/index.html> (last visited April 13, 2014) (“In a recent Immigration Law Advisor article, Immigration Judge Mimi Tsankov observes that one of the great challenges facing immigration courts today involves respondents who are incompetent.”).

⁷⁶ *Id.* Similarly, an agency’s policy is not yet a rule or legal precedent.

⁷⁷ See Dep’t of Justice Regulatory Agenda, Procedures for Cases Involving Mentally Incompetent Aliens, *supra* note 70.

⁷⁸ See *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that a Texas law prohibiting undocumented immigrant children from attending public schools violated the Equal Protection Clause of the 14th Amendment because discriminating on the basis of immigration status was not a sufficiently compelling state interest).

⁷⁹ See Ann Farmer, *Under Age and Alone, Immigrants See a Softer Side of Detention*, N.Y. TIMES, July 14, 2009, at A22 (reporting on the challenges minors face in the immigration detention system). The article also notes that the care of detained immigrants who are unaccompanied minors resides with the Department of Health and Human Services (HHS) and when in detention, they reside in separate facilities from adult detainees. As such, unaccompanied minors already are treated differently from the general population by the relevant authorities. See also Sonia Nazario, *Child Migrants, Alone in Court*, N.Y. TIMES, Apr. 11, 2013, at A23 (arguing that unaccompanied minors in immigration removal proceedings should be provided with appointed counsel).

has not attained 18 years of age . . . and . . . (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.”⁸⁰

The DOJ and EOIR have already recognized this group of immigrants as particularly vulnerable and have identified some unique challenges agency actors face in adjudicating their cases.⁸¹ Some of these challenges include recognizing a minor’s comprehension of the removal proceedings, whether a minor can effectively represent himself, and issues such as an IJ being able to accurately determine the child’s age.⁸² EOIR has also acknowledged that the complexity of immigration cases militates toward making a special effort for finding *pro bono* counsel to represent unaccompanied minors.⁸³ The agency has even established specialized “juvenile dockets” across the country “to facilitate consistency, encourage child-friendly courtroom practices, and promote *pro bono* representation for unaccompanied alien children.”⁸⁴ These measures and guidelines for IJs who adjudicate removal cases involving unaccompanied minors highlight the need for particularized attention to this group of immigrants in order to safeguard their due process rights. These measures also strongly signal that the *status quo* is inadequate.

3. Detainees Who Raise Asylum as a Defense Against Removal

Commentators have also acknowledged that asylum seekers, who are by definition fleeing specific kinds of persecution in their native countries, are also a particularly vulnerable group.⁸⁵ One commentator, Nimrod Pitsker, calls for the extension of a categorical due process right to legal counsel to asylum seekers.⁸⁶ He argues that the *Eldridge* factors should be the “foundational test for asylum-seeker[s] due process rights.”⁸⁷ He carefully outlines how the Fifth Amendment Due Process Clause’s protections apply to immigrants physically in the United States⁸⁸ and why, by using the *Eldridge* factors as the test, asylum-seekers are entitled to legal representation. This Note, unlike Pitsker, does not argue for

⁸⁰ 6 U.S.C. § 279(g) (2012).

⁸¹ See Dep’t of Justice Office of the Director, Executive Office of Immigration Review, *Unaccompanied Alien Children in Immigration Proceedings* (2008), available at <http://www.aila.org/content/default.aspx?docid=25282> (reporting that immigration judges face profound questions in adjudicating cases involving unaccompanied alien children; additionally, legal issues such as determining a child’s age in the absence of birth documents or parents and determining if a child qualifies to remain in the United States make proceedings even more complicated).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Pitsker outlines what conditions an asylum seeker must satisfy in order to be granted that status: “To qualify for asylum under U.S. law, an asylum seeker must be outside his or her country and have a well-founded fear of persecution based on one of the five enumerated grounds [race, religion, nationality, membership in a particular social group, political opinion]; refugees fleeing civil wars, natural disasters, and generalized violence do not qualify.” Pitsker, *supra* note 15, at 179; see also UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *Asylum*, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=f39d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD> (last visited Apr. 13, 2014) (stating that people come to the United States seeking protection because they have suffered persecution or fear that they will suffer persecution due to race, religion, nationality, membership in a particular social group, or political opinion).

⁸⁶ Pitsker, *supra* note 15.

⁸⁷ *Id.* at 171.

⁸⁸ *Id.* at 173.

a categorical right to counsel for asylum seekers, or any other immigrant—but does not disagree with that normative value. This Note does, however, extend Pitsker’s analysis of the *Eldridge* factors to discuss how *Turner v. Rogers* affects the due process analysis and suggests that the Attorney General’s delegates, immigration judges, should make a due process analysis. As such, this Note includes some asylum seekers—those who affirmatively raise asylum as a defense to deportation and who are also currently in detention—within the category of vulnerable immigrants whose cases should receive a “front end” due process analysis to determine if they need to be represented. Asylum seekers are arguably the immigrants who face the grimmest consequences should they be removed from the United States.⁸⁹ Therefore, they should receive more procedural protections.

IV. CURRENT EFFORTS TO EXTEND ACCESS TO QUALIFIED LEGAL REPRESENTATIVES TO DETAINED IMMIGRANTS

The acute challenges faced by the particularly vulnerable immigrants identified above are no secret. These realities have inspired advocates to assist them in presenting their cases to IJs. Many scholarly commentators, immigrants’ rights advocates, and other stakeholders continue to press for increased use of qualified representatives on two fronts: 1) providing *pro bono* attorneys or BIA accredited representatives from available resources and 2) achieving a right to counsel in removal proceedings.⁹⁰ This section details some of these efforts but concludes that they are insufficient to address the needs of vulnerable immigrants. Consequently, a more robust approach is necessary.

A. The Department of Justice

At the moment, the DOJ facilitates the provision of legal assistance to detained immigrants in a variety of ways that help ameliorate, but do not fully address, the problem of insufficient access to qualified representatives. DOJ regulations allow Board of Immigration Appeals (“BIA”) accredited representatives—who can be but need not be attorneys—to represent immigrants in removal proceedings.⁹¹ In order for someone to become a BIA-accredited representative, they must meet certain criteria and be employed by an organization recognized by the BIA.⁹² Additionally, since 2003 the EOIR has been providing legal information and referrals through the Legal Orientation Program (LOP).⁹³ This program provides legal information, training, and an avenue to potential—though not guaranteed—representation provided either at no cost or low cost through BIA accredited organizations.⁹⁴ Although this program helps, it does not come close to providing sufficient access to critical legal services for all immigrants. EOIR also runs a *pro bono* representation program with the assistance of several non-profit organizations throughout the country.⁹⁵

⁸⁹ *Id.* at 170 (“Asylum seekers occupy a unique position as arguably the most vulnerable litigants in the civil system: an erroneous outcome can cause a noncitizen to be returned to persecution, torture, or death.”).

⁹⁰ Stacy Kaplow et al., *supra* note 11, at 9.

⁹¹ *Supra* note 17; Sayed, *supra* note 19, at 1874–75.

⁹² 8 C.F.R. § 292.1 (2011); 8 C.F.R. § 292.2 (2010).

⁹³ Arnold & Porter LLP, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Proceedings*, AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION 5.6 (2010), available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.

⁹⁴ *Id.*

⁹⁵ *Id.* at 5.7.

The most robust, and likely most effective, effort to date that DOJ has undertaken is the policy change whereby EOIR has committed itself to providing counsel to mentally incompetent immigrants. This policy change is discussed above. That is a step in the right direction. However, the policy's successes and the challenges it will face have yet to be determined. Additionally, the policy only applies to a discrete population and not to other vulnerable immigrants.

B. The New York Deportation Defense Project

Within the constraints of the current legal regime, a comprehensive, local, and practical effort to provide detained immigrants representation is taking place in New York City. Launched by Judge Robert A. Katzmann of the United States Court of Appeals for the Second Circuit, the New York Immigrant Study “seeks to facilitate adequate counsel for immigrants in the service of the fair and effective administration of justice.”⁹⁶ This study proposes the creation of what it calls The New York Deportation Defense Project (“Project”).⁹⁷ Among other things, the proposed Project would provide universal representation to low-income immigrants, giving priority to detained immigrants. It would also provide services beyond legal representation (such as mental health assessment, translation/interpretation, among others) and work in conjunction with the DHS and EOIR.⁹⁸ Should this program become a reality, it would go a long way toward alleviating the due process shortcomings present in the current system. However, as the report itself and this Note acknowledge, a permanent nationwide solution requires federal action.⁹⁹ A system like the one proposed by the Project is not feasible everywhere, but it could certainly become a model.¹⁰⁰

C. The American Bar Association

The American Bar Association (ABA) has also weighed in on the issue of improving access to representation for immigrants in removal proceedings. The organization passed a resolution supporting “the due process right to counsel for all persons in removal proceedings.”¹⁰¹ The ABA and others have pushed for a categorical right to counsel in removal proceedings to be recognized because they believe the case-by-case approach is unworkable.¹⁰² Although a categorical right to counsel may be the end goal, figuring out a way to work within the current case-by-case framework—which the courts themselves have already provided—will go a long way to provide procedural protections until a long-term, permanent solution is reached. Additionally, and tellingly, the very fact that the ABA suggests a wholesale restructuring of the immigration court system suggests the massive failings of the current regime.¹⁰³

⁹⁶ Stacy Kaplow et al., *supra* note 11.

⁹⁷ *Id.* at 2.

⁹⁸ *Id.* Relatedly, the Immigrant Justice Corps has been established and is “dedicated to meeting the need for high-quality legal assistance for immigrants seeking citizenship and fighting deportation.” IMMIGRANT JUSTICE CORPS, www.justicecorps.org (last visited May 15, 2014).

⁹⁹ *Id.* at 1.

¹⁰⁰ *Id.* at 6.

¹⁰¹ Commission on Immigration, *Report to the House of Delegates: Recommendation*, AMERICAN BAR ASSOCIATION (2006), available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf (last visited April 13, 2014).

¹⁰² Arnold & Porter LLP, *supra* note 93, at 5.4 (citing the 2006 ABA’s Report to the House of Delegate: Recommendation).

¹⁰³ See Arnold & Porter LLP, *supra* note 93.

The initiatives and programs described above, and others like them, can work in conjunction with the framework proposed in Part V to provide vulnerable immigrants with qualified representatives. Together, these efforts can assist vulnerable immigrants present their cases. However, given the limited number of qualified representatives, this approach will not be available in all cases. As described below, an additional administrative safeguard—the closure of cases by IJs when a qualified representative is not secured in a given case—is a necessary component to the framework.

V. MOVING BEYOND UNWORKABLE: REALIZING THE CASE-BY-CASE APPROACH

Part III identified the categories of vulnerable immigrants that should receive heightened protections and Part IV demonstrated that current efforts to provide qualified representatives to these immigrants are insufficient to safeguard their due process rights. Responding to these circumstances, Part V puts forth an administrative solution. This Part argues that the *Mathews v. Eldridge* framework—which provides a multifactor test to determine whether a specific legal proceeding satisfies due process requirements—should be supplemented by a recent case, *Turner v. Rogers*, and applied in the immigration context.¹⁰⁴ Moreover, Part V argues for the adoption of the administrative framework proposed herein. This framework would direct IJs to use the *Turner* supplemented due process test to determine whether qualified representatives must represent vulnerable immigrants in removal proceedings. In this proposed framework, an IJ—acting under authority delegated by the Attorney General and using the *Turner* supplemented test—would make an initial determination about whether a vulnerable immigrant must be represented in order to ensure a “fundamentally fair” removal hearing, as required by *Aguilera-Enriquez*. If an IJ determines that an individual immigrant must be represented, then a continuance—for up to six months—should be granted until a qualified representative is obtained through a program like the Project, LOP, or through other means.¹⁰⁵ If representation cannot be secured within the specified timeframe, then that case should not proceed. If it is determined that a case should not proceed, the IJ should immediately close it.¹⁰⁶ After the IJ administratively closes the case, DHS, through ICE, should

¹⁰⁴ *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

¹⁰⁵ In *Zadvydas v. Davis*, 533 U.S. 678 (2001) the Supreme Court held that detention of immigrants without a determination of what to do with their case for up to six months was permissible. Given that the Supreme Court gave this timeframe as the upper limit, this Note adopts that timeframe as the upper time limit. *See also* Sayed, *supra* 19, at 1841–42 (discussing *Zadvydas* and the six month presumptive limit created by the Court). However, in the context of mentally incompetent immigrants, EOIR has committed itself to provide representation. As such, in at least that area, the IJ is instructed, as a matter of policy, to obtain representation.

¹⁰⁶ Brian M. O’Leary, Chief Immigration Judge with the EOIR, released a memorandum in March 2013 providing guidance to IJs on when to grant continuances and when to administratively close cases. In it, O’Leary states that absent “good cause” no more than two continuances should be granted. However, he specifically highlights an immigrant’s efforts at securing legal representation as an example of a potentially valid reason to grant a continuance. Moreover, as to administrative closures, the memo highlights a Second Circuit decision where the Court approved of the use of administrative closure as a tool to remove low priority cases from the immigration court’s docket where the government would likely not “effect the petitioner’s removal.” Additionally, the memo states that the BIA allows the administrative closure of cases even if one party does not agree. As such, an IJ can make that decision unilaterally. Although, the memo’s purpose is to provide IJ’s with guidance on how to use continuances and administrative closure as tools to promptly decide cases, it is instructive for this Note’s purposes as well. The memo upholds the use of both administrative tools available to IJs and supports a broad, and discretionary, approach to using the tools for case volume management. Brian M. O’Leary, *Operating*

also make a determination as to whether they will cease to pursue the immigrant's removal. It can make such a determination by exercising its prosecutorial discretion. Either party could appeal the decision to the BIA and, if necessary, the federal courts, should it determine that an IJ's decision was reached in error. Moreover, current common and statutory law provides sufficient legal authority for this proposed administrative scheme to be enacted. The following sections detail the underlying legal authority, discuss the envisioned *Turner* supplemented due process test, and lay out the proposed administrative framework.

A. Statutory Authority for the Proposed Administrative Framework

Since 1952, the Immigration and Nationality Act (INA) has governed who is eligible to legally enter the United States. It also contains the criteria for admitting individuals into the American body politic through citizenship.¹⁰⁷ In short, it constitutes the “basic body of immigration law.”¹⁰⁸ Relatedly, the INA and related regulations also govern how immigration removal proceedings are administered. Through the INA and relevant regulations Congress has delegated the day-to-day execution of removal proceedings to the EIOR, which is housed within the DOJ.¹⁰⁹

However, the responsibility for enforcing the immigration laws and for affirmatively seeking an immigrant's removal through the prosecution of immigrants who violate immigration laws resides with ICE, which is part of the DHS.¹¹⁰ This statutory scheme and the resulting enforcement and adjudicatory structure, as commentators have suggested, creates problems of legitimacy for the entire immigration system and risks compromising the system's impartiality.¹¹¹ Placing the responsibility to enforce the immigration laws and to fairly adjudicate removal proceedings within the Executive Branch—albeit in two separate agencies—is cause for concern.¹¹² As currently structured, the Executive Branch is charged with simultaneously seeking to remove those immigrants that run afoul of current immigration laws and, in an impartial manner, adjudicating an immigrant's case when the government seeks their removal.

Given the high stakes at issue in removal proceedings and the legitimacy questions the current immigration system raises, the Executive Branch should provide robust protections in IJ presided hearings that comport with constitutional due process requirements. In this regard, the fact that the INA explicitly states that the immigration courts constitute the “exclusive proceedings” that decide removability questions is critically important.¹¹³ Since there is no other forum with the power to determine an immigrant's removability, ensuring that all necessary constitutional safeguards are followed during this initial fact-finding setting is of paramount importance.

Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure, DEP'T OF JUSTICE, EXEC. OFFICE OF IMMIGRATION REVIEW (Mar. 7, 2013), available at <http://www.justice.gov/eoir/efoia/ocij/oppm13/13-01.pdf>.

¹⁰⁷ Zaragoza, *supra* note 23, at 1330.

¹⁰⁸ Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2006).

¹⁰⁹ 8 C.F.R. §1003.0 (2007).

¹¹⁰ Zaragoza, *supra* note 23, at 1331–32 (discussing how after the September 11, 2001 terrorist attacks, and the ensuing Homeland Security Act of 2002, the immigration enforcement and adjudicatory schemes were reformed such that the DOJ no longer has enforcement capacities but maintains its adjudicatory function while ICE and other agencies now carry out law enforcement functions).

¹¹¹ See Legomsky, *supra* note 6.

¹¹² *Id.*

¹¹³ 8 U.S.C. §1229a(a)(3) (2006).

The INA makes clear that immigration court is the exclusive venue in which removal proceedings can take place. Therefore, understanding the internal structure of these administrative proceedings is important. Within an individual removal proceeding, an IJ is the actor with the authority to determine, as a matter of law, whether an immigrant is to remain in the country or is to be removed.¹¹⁴ Only attorneys can be appointed as IJs.¹¹⁵ The INA also invests IJs with the authority to exercise powers delegated to them from the AG.¹¹⁶ As such, as long as the AG's directions and instructions to IJs are consistent with 1) his delegated powers and 2) are within the INA's scope, IJs can perform duties delegated and prescribed by the AG. Given that the AG's delegated authority is very

¹¹⁴ Both 8 U.S.C. § 1229a (2006)—which governs removal proceedings—and the federal regulations implementing this section delineate an IJ's delegated powers and responsibilities. Section 1229a(c)(1) authorizes IJs to make decisions on the removability of aliens at the end of a hearing. 8 U.S.C. §1229a(c)(1) (2006). Section 1229a(a)(1) states that an IJ is the official who “shall conduct proceedings for deciding the inadmissibility or deportability” of an immigrant. 8 U.S.C. §1229a(a)(1) (2006).

¹¹⁵ 8 C.F.R. §1003.10(a) (2006) (“Appointment. The immigration judges are attorneys whom the Attorney General appoints as administrative judges within the Office of the Chief Immigration Judge to conduct specified classes of proceedings, including hearings under section 240 of the Act. Immigration judges shall act as the Attorney General's delegates in the cases that come before them.”). The Attorney General derives his or her authority from 28 U.S.C. §510 (2006) (“The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.”). Additionally, 8 C.F.R. §1003.10(b) (2006) delineates the scope of an IJ's power:

(b) Powers and duties. In conducting hearings under section 240 of the Act and such other proceedings the Attorney General may assign to them, immigration judges shall exercise the powers and duties delegated to them by the Act *and by the Attorney General through regulation*. In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases. Immigration judges shall administer oaths, receive evidence, and interrogate, examine, and cross-examine aliens and any witnesses. Subject to §§1003.35 and 1287.4 of this chapter, they may issue administrative subpoenas for the attendance of witnesses and the presentation of evidence. In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.

8 C.F.R. §1003.10(b) (2006) (emphasis added).

¹¹⁶ 8 U.S.C. §1101(b)(4) (2006) (emphasis added) defines an IJ:

The term ‘immigration judge’ means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title. *An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe*, but shall not be employed by the Immigration and Naturalization Service.

broad,¹¹⁷ he can, in his judgment, choose to delegate “any function” of his authority to “any other officer, employee, or agency of the Department of Justice.”¹¹⁸

In addition to the broad powers of delegation afforded to the AG, he also has specific powers related to immigration proceedings. Indeed, the INA technically places much of the burden, and discretion, of running immigration removal proceedings on the AG’s shoulders. 8 U.S.C. §1103(g)(2) provides the critical language regarding the AGs power and responsibilities in this area:

The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.¹¹⁹

This language provides the AG with a broad base of allowable actions that he can take—at his discretion—to carry out his immigration related duties. The last clause—“and perform such other acts as the *Attorney General determines to be necessary for carrying out this section*”¹²⁰—is particularly relevant. This language invests him with the authority to determine what discrete acts he will take, and by extension the agencies and employees he directs, in order to effectively perform his duties as related to immigration and nationality. As such, in carrying out his official duties regarding immigration issues, this statute invests the AG with broad capabilities and powers.

Moreover, it is apparent from the INA’s language, that Congress contemplated and indeed expects the AG to balance his duties with protecting immigrants’ “rights and privileges.”¹²¹ 8 USC § 1229a(b)(3) allows the AG to “prescribe safeguards to protect the rights and privileges of the alien” if the person cannot appear before an IJ for reasons of “mental incompetency”.¹²² This demonstrates that legislators believed that the AG is capable of determining what safeguards are necessary to protect a vulnerable immigrant’s rights and privileges.

However, the statute only explicitly addresses an immigrant’s “rights and privileges” in cases where an immigrant is mentally incompetent. As such, a possible counterargument to expanding protections in removal proceedings to other immigrant groups is that since Congress specifically authorized the AG to take countervailing measures in a very specific context—when an immigrant cannot appear before an IJ because of mental incompetency—the statute, by failing to mention other exceptions, does not permit increased due process protections in other contexts. Congress knows how to and in fact did specify protections for certain immigrants but not others. Therefore, the argument would continue, extending protections to other immigrants is not allowable under the statute.

¹¹⁷ 28 U.S.C. §510 (2006) (“The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.”).

¹¹⁸ *Id.*

¹¹⁹ 8 U.S.C. §1103(g)(2) (2006) (this is within Chapter 12 of Title 8, which deals with Immigration and Nationality; this specific section deals with the AGs powers in Immigration and Nationality).

¹²⁰ *Id.* (emphasis added).

¹²¹ 8 U.S.C. §1229a(b)(3) (2006) (directing the AG to prescribe procedural safeguards if a noncitizen cannot be present at a hearing because of mental incompetency).

¹²² *Id.*

Two points are particularly relevant to such an argument. First, it is true that 8 U.S.C. §1229a(b)(3) deals with the specific circumstance where immigrants are not “present” as a result of mental incompetency. Yet, had Congress remained silent on circumstances where a person’s due process protections could be abridged, the resulting process would be open to substantial criticism. As such, this section should not be construed as proof that immigrants suffering from mental competency issues should be the sole beneficiaries of heightened procedural protections. Rather, it should be viewed as recognition of the particular challenges their cases present.

Moreover, 8 U.S.C. §1229a(b)(3) is written in broad language, authorizing the AG to handle cases where an immigrant is mentally incompetent in the manner he best sees fit. This broad delegation of authority to the AG to deal with issues that deviate from the norm and are “necessary” to carry out his functions is a theme throughout the statute. Congress’s favoring of expansive language when vesting the AG with the power to act in the immigration context demonstrates a willingness to allow the AG to address particularly problematic issues in a manner consistent with his best judgment. The fact that the AG is generally entrusted with substantial discretion should weigh in favor of allowing the AG to take the actions he feels are necessary and reasonable to address issues as they arise.

Second, as a matter of statutory construction and interpretation, we assume that the statutes that govern how immigration proceedings are administered do not run afoul of constitutional safeguards and principles.¹²³ Given the discussion above regarding the AG’s broad powers to execute immigration laws, including those dealing with removal proceedings, there is a presumption that he can use his powers to prevent a constitutional conflict. Should a conflict arise, he can and should take actions to prevent or address it. Indeed, this was what both then Attorney General Michael Mukasey and Attorney General Eric Holder did—albeit through competing visions of constitutional interpretation—regarding an immigrant’s right to effective assistance of legal counsel.¹²⁴ Given that 1) it is appropriate for the AG to interpret the Constitution;¹²⁵ 2) the EOIR handles a volume of cases too numerous for the AG to personally make decisions regarding appropriate due process protections in individual cases; and 3) the AG can delegate any function he deems necessary to carry out his responsibilities, the AG has the authority to instruct IJs to consider what due process requires in individual cases.

Having established that the AG’s powers in the immigration arena are broad and allow for much discretion, the following sections discuss how the AG could and should mobilize his powers to address the current procedural deficiencies specific immigrant groups face in removal proceedings. Particularly, the AG should immediately initiate a rulemaking to install the administrative framework put forth in Part V.C. This framework would ensure that the due process rights of particularly vulnerable immigrants are not violated. A critical component of this proposal is a supplemented *Mathews v. Eldridge* test. Part V.B argues that the *Eldridge* test, with a *Turner* gloss, should be used by IJs to decide whether a particularly

¹²³ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 28 (Epstein et al. eds., 2d ed. 2002) (“[L]egislators—federal, state, and local—are obliged to consider the constitutionality of bills before ratifying them.”). This statement—and sentiment—is commonly shared: there is a presumption that all laws ratified by a legislative body were passed in good faith and without the intention to cause a constitutional conflict.

¹²⁴ Matter of Compean, 25 I&N Dec. 1, 2 (A.G. 2009) (see *supra* note 58); Matter of Compean II, 24 I&N Dec. 710 (A.G. 2009) (see *supra* note 58). Regarding the propriety of a non-judicial government actor making constitutional interpretations, see ERWIN CHERMERINSKY, *supra* note 123, at 28 (“Regardless of the method of interpretation, who should interpret the Constitution? The correct answer is that all government officials and institutions are required to engage in constitutional interpretation.”).

¹²⁵ ERWIN CHERMERINSKY, *supra* note 123.

vulnerable immigrant must have a qualified representative in a removal proceeding. The AG can direct IJs to use this test given his ability to interpret the Constitution and his authority to delegate functions to IJs. This initial determination is critical to deciding whether a vulnerable immigrant's case should go forward without violating the immigrant's due process rights.

B. The *Eldridge* Test With a *Turner* Gloss

Both *Mathews* and *Turner* form part of the Supreme Court's jurisprudence on the right to appointed counsel in civil proceedings. In order to determine whether a qualified representative is necessary to safeguard a particularly vulnerable immigrant's due process rights, this section first explores the circumstances under which courts have already held that representation is necessary outside of the criminal context. As discussed in Part II.A, *supra*, the Supreme Court has only occasionally addressed the issue of right to counsel in civil contexts.¹²⁶ Indigent litigants have a right to be represented by appointed counsel in civil proceedings when they are at risk of being deprived of physical liberty,¹²⁷ when they are in "juvenile delinquency" proceedings,¹²⁸ and in proceedings held to decide whether or not to transfer prison inmates to state hospitals for the mentally ill.¹²⁹ In recounting the Court's right to appointed counsel jurisprudence, Justice Breyer, writing for the Court in *Turner v. Rogers*, states: "the Court previously had found a right to counsel 'only' in cases involving incarceration, not that a right to counsel exists in *all* such cases."¹³⁰ Thus, in evaluating its jurisprudence, the Court rejected a categorical *per se* rule mandating a right to counsel. Yet, the Court also left the door open for courts to find that representation by counsel is required in some, albeit limited, instances where the loss of physical liberty is at stake.¹³¹

Justice Breyer made the above statement in a case regarding the right to appointed counsel in a civil context. *Turner v. Rogers* originated in a South Carolina family court and was a civil contempt case regarding unpaid child support.¹³² Turner could not pay the child support he owed.¹³³ The South Carolina family court found him to be in contempt of its order directing him to pay his debt.¹³⁴ Turner, in turn, challenged the court's contempt order claiming that the fact that an attorney did not represent him at his contempt hearing violated his Fourteenth Amendment Due Process rights.¹³⁵

Presented with Turner's claim, the Court turned to answer the question of whether "the Due Process Clause grants an indigent defendant, such as Turner, a right to state-appointed counsel at a civil contempt proceeding, which may lead to his incarceration."¹³⁶ In answering this question, the Court summarized its right to counsel jurisprudence in civil contexts¹³⁷ and stated that these "precedents

¹²⁶ *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011) (stating that the Supreme Court has only considered right to counsel challenges in the civil context relating to juvenile delinquency proceedings, in proceedings to decide whether a prison inmate should be transferred to a state hospital for the mentally ill, and where the loss of physical liberty is threatened).

¹²⁷ *Id.* (citing *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18 (1981)).

¹²⁸ *Id.* (citing *In re Gault*, 387 U.S. 1 (1967)).

¹²⁹ *Id.* (citing *Vitek v. Jones*, 445 U.S. 480 (1980)).

¹³⁰ *Id.* at 2517.

¹³¹ *Id.* at 2516.

¹³² *Turner*, 131 S. Ct. at 2513.

¹³³ *Id.* (quoting Mr. Turner as saying that he had a drug problem which caused him to fall behind on his child support payments).

¹³⁴ *Id.*

¹³⁵ *Id.* at 2514.

¹³⁶ *Id.* at 2515–16.

¹³⁷ *Turner*, 131 S. Ct. at 2516.

provide no definitive answer to that question.”¹³⁸ However, in answering the question, the Court framed its approach by engaging with and applying the factors it outlined in *Mathews v. Eldridge* as relevant to determining “what specific safeguards the Constitution’s Due Process Clause requires in order to make a civil proceeding fundamentally fair.”¹³⁹ Given that *Turner* is the most recent example of how the Court evaluates these factors, it is instructive to study the Court’s reasoning for clues that shed light on how it might evaluate future right-to-counsel arguments.

The three *Eldridge* factors are: “(1) the nature of the ‘private interest that will be affected,’ (2) the comparative ‘risk’ of an ‘erroneous deprivation’ of that interest with and without ‘additional or substitute procedural safeguards,’ and (3) the nature and magnitude of any countervailing interest in not providing ‘additional or substitute procedural requirement[s].”¹⁴⁰ In *Turner*, the Court attempted to balance these factors, in addition to identifying mitigating factors that, in the Court’s judgment, ameliorated *Turner*’s concerns. First, the Court acknowledged that the “‘private interest [the liberty interest in being free from incarceration] . . . ’ argues strongly for the right to counsel” *Turner* requested.¹⁴¹ However, the Court found that the threat of incarceration does not require that counsel always represent a party in civil proceedings.¹⁴² Moreover, Justice Breyer identified four mitigating safeguards that ease challenges that parties face in proceeding *pro se*.¹⁴³ The United States Government, through an *amicus* filing, highlighted these safeguards to the Court. These factors influenced the Court’s finding that a categorical right to counsel in civil contempt hearings is not required by the Fourteenth Amendment’s Due Process Clause¹⁴⁴: “We consequently hold that the [Due Process Clause] does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year).”¹⁴⁵

Although the Court held against *Turner*’s constitutional claim, the decision is limited because it only applies to civil contempt proceedings.¹⁴⁶ Moreover, the opinion itself narrows the possible effects of this decision in other contexts. Particularly, the Court went out of its way to state that it was not passing judgment on cases that are legally complex and where there is a power asymmetry—meaning cases where an attorney represents one party and the other party proceeds *pro se*.¹⁴⁷ As such, the Court left the door open to claims with different circumstances where appointed counsel might be necessary.¹⁴⁸

¹³⁸ *Id.*

¹³⁹ *Id.* at 2517.

¹⁴⁰ *Id.* at 2518.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Turner*, 131 S. Ct. at 2519 (“Those safeguards include (1) notice to the defendant that his ‘ability to pay’ is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.”).

¹⁴⁴ *Id.* (“In presenting these alternatives, the Government draws upon considerable experience in helping to manage statutorily mandated federal-state efforts to enforce child-support orders . . . this Court’s cases suggest, for example, that sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient.”).

¹⁴⁵ *Id.* at 2520 (emphasis in original).

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* at 2512 (“We conclude that where as here the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide the support). *But we attach an important caveat, namely, that the State must nonetheless have in*

Whether implicitly or purposefully, the Court in *Turner* invoked the language, spirit, and intent of *Aguilera-Enriquez's* concern with the constitutional imperative of providing a “fundamentally fair” proceeding in a civil context. Had an attorney represented the custodial parent, the Court’s holding in *Turner* may have been different. In highlighting the fact that the custodial parent was unrepresented by counsel, the Court appears to be concerned with providing a level playing field and avoiding fairness asymmetries in adversarial proceedings.

Moreover, the dynamics identified by the Court—the legal complexity of the civil proceeding and the representation or non-representation of one or both parties by counsel—are present in all immigration removal proceedings. Attorneys always appear on behalf of ICE—the government’s prosecuting arm in removal proceedings—and immigration laws are very complicated. Although it is unclear whether the Court would consider the fairness asymmetry regarding attorney representation between parties or a case’s legal complexity dispositive in a future case, these two factors would likely play out differently under different factual circumstances. As such, *Turner* advances our understanding of what adequate safeguards would be necessary to ensure that a person’s due process rights are not violated. The case also provides clues regarding what factors the Court might consider important in determining whether, as a constitutional matter, the government must provide counsel to an indigent litigant in a different civil proceeding in a future case.¹⁴⁹

Additionally, the *Eldridge* multifactor test with a *Turner* gloss should be used by IJs in individual cases. This is allowable as an exercise of the AG’s authority to delegate and direct his employees to carry out necessary functions, as discussed in Part V.A. As such, IJs should use the *Turner*-supplemented *Eldridge* test discussed above to determine whether or not a qualified legal representative is required to ensure that a removal proceeding does not run afoul of an immigrant’s due process rights.¹⁵⁰

place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order.”) (emphasis added); see also *id.* at 2520 (“Neither do we address what due process requires in an unusually complex case where a defendant ‘can fairly be represented only by a trained advocate.’”) (emphasis added).

¹⁴⁸ As to the disposition of *Turner's* case itself, the Court vacated the South Carolina Supreme Court’s judgment because *Turner* received “neither counsel nor the benefit of alternative procedures” like the ones the Court described in its decision. *Id.* at 2520.

¹⁴⁹ Other commentators also use *Turner* to advance arguments for providing immigrants in removal proceedings with legal representation. See e.g., Daniel Curry, Current Development, *The March Toward Justice: Assessing the Impact of Turner v. Rogers on Civil Access-to-Justice Reforms*, 25 GEO. J. LEGAL ETHICS 487 (2012) (arguing that the Supreme Court’s opinion in *Turner v. Rogers* requires court reforms ensuring that everyone, regardless of income, can seek justice in civil courts); Shane T. Devins, Comment, *Using the Language of Turner v. Rogers to Advocate for a Right to Counsel in Immigration Removal Proceedings*, 46 J. MARSHALL L. REV. 893 (2013) (arguing for the right to appointed counsel for indigent noncitizens in removal proceedings and calling for a revision of the statutory language of the Immigration and Nationality Act). They argue for a broader right to counsel. In contrast, this Note marshals *Turner*, other cases, and current statutory law that collectively provide sufficient legal authority to create a framework in which the “fundamental fairness” standard can be effectuated through a case-by-case regime.

¹⁵⁰ Although it goes without saying, this section does not suggest that this framework should lead to a specific outcome in a given case. It merely purports to put forth a set of criteria to consider when determining whether an individual immigrant needs to be represented.

C. The Administrative Framework

Having 1) established that statutory authority exists for the Attorney General to direct IJs to make determinations regarding due process requirements and 2) argued that *Turner* should inform the *Eldridge* due process test, this section puts forth an administrative framework to effectuate *Aguilera-Enriquez's* case-by-case approach. This framework would apply to cases involving the three immigrant categories identified in Part III.A. It also suggests that, should a version of immigration reform along the lines that the Senate has proposed pass, the *Eldridge* test with a *Turner* gloss should be used to determine who obtains representation. This section assumes that an immigrant is an unaccompanied minor, is an immigrant in detention who raises asylum as a defense to removal, or is mentally ill.¹⁵¹ As relates to mentally ill immigrant detainees, providing recommendations for procedures to accurately determine whether an individual immigrant is, in fact, mentally incompetent is beyond the scope of this Note.¹⁵² However, given the recent policy changes related to this population, qualified representatives should represent those deemed mentally incompetent going forward even absent this framework.

This section details a recommendation for giving IJs the primary role in determining whether a qualified representative must represent an immigrant who falls into one of the categories discussed above going through removal proceedings. This section argues that procedures should be adopted that direct IJs to utilize the test discussed in Part V.B in individual cases.¹⁵³ However, it does not argue that the INA mandates the government to unilaterally provide federally funded appointed counsel.¹⁵⁴ There are other

¹⁵¹ Given that as a result of the EOIR's policy change detained immigrants who are deemed mentally incompetent will have qualified representatives made available to them, that population is not the focus here. However, to the extent that the policy change does not lead to increased representation by qualified representative of mentally incompetent immigrant detainees, this framework can and should also apply to that population, if implemented.

¹⁵² For detailed proposals on competency hearings, see Letter from Merrill Rotter, M.D., *supra* note 55; Clapman, *Hearing Difficult Voices*, *supra* note 9. These can still inform the final rules. Also, and most importantly, the EOIR has issued a policy for determining whether an immigrant is mentally incompetent which is now being used in practice. The resulting field experience will also inform the final rule as well.

¹⁵³ STRAUSS ET AL., ADMINISTRATIVE LAW: CASES AND COMMENTS 699 (Clark et al. eds., 11th ed. 2011) (citing Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319 (2001)) (arguing that when Congress delegates power to an executive official, it also is delegating power to the President.). As such, the Obama Administration should support giving IJs the responsibility of ensuring particularly vulnerable immigrants' due process rights since that would lend further credence to the proposed framework. Indeed, it likely cannot happen without the White House's support.

¹⁵⁴ This, however, should not be understood to mean that the DOJ and/or DHS could not choose, in their discretion, to use federal funds to provide qualified representatives. The government can provide qualified representatives to vulnerable immigrants using federal funds. However, this would be a policy choice. This Note argues that if they choose not to provide representation, or cannot procure representation through other means, the case should be closed. See Order Re Plaintiffs' Motion, *supra* note 24, at 12 ("Yet, writing on behalf of the Office of the General Counsel for the DHS, David P. Martin, Principal Deputy General Counsel, confirmed that the plain language of Section 1362 does not lend itself to the interpretation that it 'prohibits the provision of counsel at government expense' 'Nothing in [8 U.S.C. §§ 1229a(b)(4), 1362] or 5 U.S.C. §3106 prohibits the use of discretionary federal funding for representation of aliens in immigration proceedings' and '[w]hether any particular expenditure would be permissible . . . depends on a fiscal law analysis of the specific proposed funding source.' *This Court agrees that these statutes cannot reasonably be interpreted to forbid the appointment of a Qualified*

mechanisms that the Executive Branch can employ to safeguard immigrants' due process rights up to, and including, administrative closure of an individual case.

As discussed above, commentators have addressed how the *Eldridge* factors should be used to determine if an immigrant facing removal proceedings is being denied her due process rights.¹⁵⁵ Moreover, at least one author has discussed how he believes the *Turner* factors would impact due process analysis in the immigration removal context.¹⁵⁶ The next necessary step to take in order to ensure the effectuation of particularly vulnerable immigrants' due process rights is to incorporate those considerations in the adjudicatory process that IJs conduct in removal proceedings. That is, procedures in individual removal proceedings must allow IJs to take affirmative actions that will ensure due process protections. IJs should—as a threshold question before the merits of a particular immigrant's case are evaluated—consider whether legal representation is necessary to safeguard the “fundamental fairness” of removal proceedings for the three groups identified in Part III.A.

Reimagining removal proceedings to allow IJs to consider whether a legal representative is necessary to safeguard a vulnerable immigrant's rights is critical. Requiring IJs to ask themselves the above question may seem anathema to some given the enormous pressures, large caseloads, and other constraints that IJs currently face.¹⁵⁷ However, ensuring the “fundamental fairness” of the proceedings is also exceedingly important.¹⁵⁸ Thus, ensuring that qualified representatives represent vulnerable immigrants in removal proceedings is of paramount importance. Given the complexity of the proceedings, the fact that an ICE prosecutor always represents the government, and that immigrants in the identified groups face unique challenges in effectively representing themselves, their need for legal representation cannot be overstated.

Moreover, within the new proposed procedures, an IJ should determine as soon as he or she receives a case, whether the immigrant in question falls into one of three categories—mentally incompetent persons, unaccompanied minors, or one who asserts that she is seeking asylum as an affirmative defense to removal. If a person falls into one of these three categories, the IJ should send that file down a different administrative path to be created by EOIR.

Representative to individuals who otherwise lack meaningful access to their rights in immigration proceedings as a result of mental incompetency.” (emphasis added).

¹⁵⁵ See Pitsker, *supra* note 15, at 171.

¹⁵⁶ See Curry, *supra* note 149.

¹⁵⁷ See Clapman, *supra* note 9, at 391.

¹⁵⁸ See Federal Article III judges on the fairness of immigration hearings, *supra* note 7; *Benslimane v. Gonzales*, 430 F.3d 828, 829–30 (2005). See also Order Re Plaintiffs' Motion, *supra* note 69, at 34–35 (“The record in this case demonstrates that delaying relief for the class members [mentally ill immigrant detainees in Arizona, California, and Washington] results in an inability to fairly participate in removal proceedings and may result in prolonged detention without adequate representation or a bond hearing for an ever-increasing number of class members.”). See also Unaccompanied Alien Children in Immigration Proceedings, *supra* note 81 (acknowledging the complexity of immigration law and the possibility that unaccompanied children do not understand the legal proceedings against them, thus heavily implying the potential for an unfair proceeding); Pitsker, *supra* note 15, at 197 (“[B]oth the expanded practice of detaining asylum seekers and financial, social, and cultural restraints often hamper the meaningful exercise of [the right to counsel at no expense to the government].”).

Precedent already exists for the creation of a separate procedural route that cases follow under special circumstances.¹⁵⁹ As such, this suggestion is not a radical departure from existing practice. For example, the DOJ suggests that IJs maintain a separate docket of unaccompanied minors.¹⁶⁰ The stated purpose for these “juvenile dockets” is to “facilitate consistency, encourage child-friendly courtroom practices, and promote *pro bono* representation for unaccompanied alien children.”¹⁶¹ As of 2008, there were ten immigration courts throughout the country that maintained separate “juvenile dockets.”¹⁶²

Secondly, an IJ should ask: will the lack of representation prevent the immigrant before me from adequately presenting his or her case? In answering this question—before moving onto the merits—an IJ should endeavor to consider the *Eldridge* factors but with a *Turner* gloss, as argued in Part V.B. In addition to considering the three *Eldridge* factors,¹⁶³ an IJ should also consider whether: 1) one or both parties are represented by counsel and 2) the complexity of the legal case against the immigrant. Justice Breyer pointed out these latter two factors in the *Turner* decision and, in doing so, signaled that these factors are important to determining the “fundamental fairness” of a civil proceeding.¹⁶⁴

After taking these factors into account, if an IJ determines that continuing with the removal proceedings while the immigrant is unrepresented by a qualified representative imposes too great a risk for a due process violation, the IJ should make every effort to secure representation. If, however, no representation is obtained for the detained immigrant within six months,¹⁶⁵ the IJ should move to administratively close the case, assuming that the immigrant is not a risk to the community and that the immigrant’s removal is a low priority for the government.¹⁶⁶ Given that 8 U.S.C. §1229a(b)(4) states that legal representation cannot be provided at the government’s expense, it is unlikely that the DOJ or DHS would choose to provide representation at their expense, even though a federal district court in California recently stated that the government could choose to use federal funds in this manner.¹⁶⁷

As an alternative to providing counsel, ICE can cease prosecuting a case against an immigrant who poses no threat to the community and who can be released into the custody of responsible adults (in the case of unaccompanied minors) or family members and friends. In this proposed framework, an IJ’s decision to administratively close a case would trigger a review of that case by ICE. ICE, in turn, should decide whether or not to exercise its prosecutorial discretion and cease pursuing that immigrant’s

¹⁵⁹ See Unaccompanied Alien Children in Immigration Proceedings, *supra* note 81 (discussing, in part, a separate “juvenile docket” for unaccompanied noncitizen minors).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Turner*, 131 S. Ct. at 2518. (“(1) the nature of the ‘private interest that will be affected,’ (2) the comparative ‘risk’ of an ‘erroneous deprivation’ of that interest with and without ‘additional or substitute procedural safeguards,’ and (3) the nature and magnitude of any countervailing interest in not providing ‘additional or substitute procedural requirement[s].’”).

¹⁶⁴ *Id.* at 2520.

¹⁶⁵ See Discussion in the footnote, *supra* note 105.

¹⁶⁶ O’Leary, *supra* note 106 (discussing, *inter alia*, IJ’s ability to administratively close cases).

¹⁶⁷ See Order Re Plaintiffs’ Motion, *supra* note 24. This order was issued by a federal district court and will likely be challenged. As such, it is unclear whether the government will indeed follow the order and use federal funds in this manner.

removal. In effect, this would emulate the process ICE is currently undertaking in its exercise of prosecutorial discretion under its Deferred Action for Childhood Arrivals (“DACA”) initiative.¹⁶⁸

Moreover, as discussed above, IJs could be given the authority to take the proposed actions through regulation.¹⁶⁹ Together, 8 U.S.C. §1103(g)(2), 8 U.S.C. §1101(b)(4), and 28 U.S.C. §510 provide sufficient authority for the AG to make a determination of the due process requirements necessary to safeguard an immigrant’s rights in an individual case and to, in turn, delegate that function to IJs.¹⁷⁰ Additionally, given the IJ’s hands-on role in developing the record throughout the proceedings, extending the IJ’s functions to consider whether an immigrant can adequately make her case for herself without assistance, though difficult, would not be impossible.¹⁷¹ In effect, an IJ is currently tasked with both developing the record in a given case and adjudicating it; that is deciding whether or not an immigrant will remain or be removed from the country. As such, given the high level of responsibility and interpretive ability that they are already given and the level of independent discretion and substantive legal analysis required to perform their duties, having the AG delegate limited and constrained constitutional interpretive authority to IJs is within his prerogative and something IJs could handle.

Given the important nature of the concerns, it makes sense to consider these constitutional protections in individual cases in immigration court. Since each case is appealable to the BIA, reviewable by the AG himself, and judicial review by Article III courts is also available, there are sufficient checks on IJ decisions. Nevertheless, some may believe that the framework advanced here is unnecessary. They may wonder how IJs, some of whom currently make poor decisions,¹⁷² could possibly be up to this task. That is a fair concern. Others may have deeper concerns. In *Angov v. Holder*, Judge Kozinski articulates serious reservations with what he terms the “constitutionalization” of administrative law.¹⁷³ He argues

¹⁶⁸ Janet Napolitano, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, DEPARTMENT OF HOMELAND SECURITY (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. In the proposed administrative framework, ICE would be directed to cease the prosecution in removal proceedings of immigrants whose case requires that they be represented by counsel but for whom a qualified representative could not be secured within six months. ICE’s review of a specific case would begin once the IJ on the case administratively closes a case in the immigration court’s docket, effectively placing ICE in the position of deciding whether or not to continue to prosecute the case. ICE’s review would be important because it is their decision that would provide finality to an immigrant since the agency would no longer be seeking the immigrant’s removal.

¹⁶⁹ 8 U.S.C. §1101(b)(4) (“The term ‘immigration judge’ means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 1229a of this title. An immigration judge shall be subject to such supervision and shall *perform such duties as the Attorney General shall prescribe*, but shall not be employed by the Immigration and Naturalization Service”) (emphasis added). *See also* 28 U.S.C. §510; 8 C.F.R. §1003.10(b).

¹⁷⁰ For the statute’s relevant language, see, *supra* notes 114, 115, 116, 117.

¹⁷¹ 8 U.S.C. §1229a(b)(1) (2006) (“The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this chapter.”).

¹⁷² *See* Discussion Regarding Federal Article III judges, *supra* note 7.

¹⁷³ *Angov v. Holder*, 736 F.3d 1263, 1272 (9th Cir. 2013) (holding that an immigrant’s due process rights were not violated when, in seeking immigration relief, he was not allowed to cross-

that whatever process Congress provides is sufficient.¹⁷⁴ He is particularly concerned with the notion that administrative processes are meant to be informal and flexible.¹⁷⁵ In his view, to push for increased formal protections would transform immigration removal proceedings from flexible forums to overly rigid ones, upending the benefits of situating these proceedings within an administrative framework.

However, allowing for the possibility of qualified representatives to properly present an immigrant's case could just as likely increase the quality of removal proceedings and speed up the adjudicatory process. This would help alleviate the concerns over potentially losing the efficiencies gained from informal procedures. In short, facilitating increased involvement by legally trained advocates could also lead to efficiencies and higher quality outcomes, which could lead to savings in the long run. Even in cases where qualified representatives cannot be secured, having a low-priority case dismissed at the end of six months would reduce caseloads and prevent bad decisions. As such, were this framework implemented, IJs would not make decisions on the merits until the particular due process safeguard of having a qualified representative present when necessary is considered and a determination made on that procedural question. Finally, having the current regime persist, where the necessity of legal representation is never raised or considered anywhere by anyone, would result in ongoing harm.

D. Immigration Reform and Potential Application of the *Eldridge* Test with a *Turner* Gloss

Although comprehensive immigration reform has not passed, the version of immigration reform that cleared the Senate includes language that would provide counsel to unaccompanied minors and mentally incompetent immigrants in removal proceedings.¹⁷⁶ This version would also allow the Attorney General to “appoint or provide counsel to aliens in immigration proceedings conducted under section 240 of [the INA]” in his “sole and unreviewable discretion.”¹⁷⁷ It also provides funding to cover the costs of these added procedures.¹⁷⁸

The proposed *Eldridge* test with a *Turner* gloss detailed in Part V.B would map onto this, or a similar, legislative regime delegating explicit authority to the AG to appoint counsel as well. Although, as

examine the underlying sources of information that provided material information in evidence presented against him). However, several other circuits, in substantially similar circumstances, have held that an immigrant's constitutional and/or due process rights were violated. *See* *Pouhova v. Holder*, 726 F.3d 1007 (7th Cir. 2013) (holding that admission of two hearsay documents denied an immigrant her procedural rights). *See also* *Ezeagawuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003); *Anim v. Mukasey*, 535 F.3d 243, 256–58 (4th Cir. 2008); *Alexandrov v. Gonzales*, 442 F.3d 395 (6th Cir. 2006); *Banat v. Holder*, 557 F.3d 886, 892–93 (8th Cir. 2009). *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 269 (2d Cir. 2006) (holding the same as its sister circuits but on statutory, not constitutional, grounds: “Although we find the logic of these cases persuasive, we do not reach the constitutional issue because the *statutory* standard of review requires *vacatur*.”). As such, courts around the country have extended constitutional due process protections to immigrants in certain circumstances.

¹⁷⁴ *Id.* at 1273.

¹⁷⁵ *Id.*

¹⁷⁶ S. 744, 113th Cong. §3502(c) (2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s744es/pdf/BILLS-113s744es.pdf>.

¹⁷⁷ S. 744, 113th Cong. §3502(a)(4)(b) (2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s744es/pdf/BILLS-113s744es.pdf>.

¹⁷⁸ S. 744, 113th Cong. §3502(d) (2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s744es/pdf/BILLS-113s744es.pdf>.

argued above, the AG can provide additional procedural safeguards to certain groups under current law, should language like the one proposed in the Senate's version of immigration reform become law, the AG could extend these protections to anyone in his discretion, beyond the groups identified in this Note. In effect, Congress would be mandating that the AG develop a process to determine which immigrants should receive legal representation. The test proposed in Part V.B along with the administrative framework proposed in Part V.C would be an effective way to operationalize such a directive. As such, should this or similar language become law, the AG should direct IJs to conduct an *Eldridge* test with a *Turner* gloss inquiry, along the lines proposed by this Note, whenever there is reason to believe that a person would require representation in their immigration case in order to comport with due process.

VI. CONCLUSION

This author readily acknowledges that the optimal solution to the fairness deficit currently present in the adjudication of immigration removal proceedings is for Congress to make wholesale systemic reforms that ensure due process protections. Other commentators have repeatedly called for a complete rethinking and redesign of the system. Such a move, of course, would require Congressional action. However, to allow the *status quo* to persist is untenable. The current state of affairs too often calls into question the integrity and fairness of the decisions coming out of immigration courts, particularly as these impact vulnerable immigrant groups. Given that current common and statutory law supports the creation of an administrative response, the Executive Branch should act to realize the promise of due process protections within the immigration context.

To date, the Department of Justice and the Department of Homeland Security have taken promising steps to address the situation by making significant policy changes, initiating rulemaking on these issues, and exercising prosecutorial discretion to terminate removal proceedings in certain low-priority cases, principally through DACA. Moreover, a federal district court in California has issued an unprecedented order directing the government to provide qualified representatives to certain mentally incompetent immigrant detainees.¹⁷⁹ Clearly, much has been done yet more is required. Initializing and finalizing a rulemaking to implement the framework put forth in this Note would allow for all interested parties to be heard and lend the resulting administrative framework greater legitimacy. Additionally, utilizing the test put forth in this Note in deciding which immigrants would receive representation in connection with the language in the Senate's version of immigration reform, would also effectuate immigrants' due process rights should that language become law. To do nothing, however, should not be an option. It would not be in keeping with our collective national values regarding the provision of justice or our obligations under the Constitution's due process protections. More importantly, it would allow a sorry state of affairs to persist unnecessarily.

¹⁷⁹ See Order Re Plaintiffs' Motion, *supra* note 24.