TRIED AND (INHERENTLY) PREJUDICED: DISPOSING OF THE PREJUDICE REQUIREMENT FOR LACK OF COUNSEL IN REMOVAL PROCEEDINGS

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ABSTRACT

Every year, hundreds of thousands of immigrants appear before the immigration courts in removal proceedings. Removal proceedings have long raised issues regarding due process and an immigrant's rights. The statutory right to counsel is one such right that inspires such questions of due process. Although noncitizens have a statutory right to counsel in immigration courts, the government has no obligation to provide an attorney to those who cannot afford one.

The problem is that immigration judges are denying the statutory right to counsel in removal proceedings; therefore, noncitizens are appearing before immigration judges without a crucial procedural safeguard. Noncitizens with counsel are more likely to seek relief from removal and actually win their case. There is a circuit split as to whether federal circuit courts should require a noncitizen to show that they were prejudiced by lack of counsel in removal proceedings.

This Comment argues that the federal circuit courts should not require prejudice when the immigrant has been denied their right to counsel because, under the *Accardi* Doctrine, an agency must abide by its own regulations when those regulations pertain to a party's rights. The consequences of removal are similar in severity to those in criminal law. Therefore, immigrants must have the right to counsel if they have not expressly waived it in order to effectuate a meaningful hearing. Not only are the consequences of removal severe, but the immigration

system is already so inherently prejudicial to immigrants that proving prejudice would be a waste of resources. Immigration laws are complex and filled with subjective standards; the immigration system is not an impartial tribunal; and immigration courts have become increasingly weaponized over the past few years. Therefore federal circuit courts should not require an immigrant to show that lack of counsel prejudiced their proceedings.

INTRODUCTION

The procedural and substantive rights and safeguards most Americans enjoy are nothing but a false promise to many immigrants facing deportation. Among these noncitizens are individuals seeking asylum who have survived torture, human trafficking, and sexual violence.[1] Not only are these individuals facing deportation, but they are often forced to leave their families and return to the place they were first fleeing.[2]

Removal proceedings have been scrutinized when it comes to ensuring that immigrants who go through the immigration courts are afforded their rights—with good reason.[3] Over the past few years, the immigration courts have been facing an existential crisis and have been dysfunctional, compromising the effectiveness of the court system.[4] As a result, there has been a flood of cases backlogging the system that have "negatively impact[ed] the fairness and effectiveness of the immigration system."[5] For example, in 2011 about 50,000 cases backlogged the system; however, when Donald Trump took office in 2017, those numbers increased to about 1,000,000 with an average wait time of almost two years before an immigrant was afforded a hearing.[6] As a result, immigration judges often prioritize efficiency over ensuring that noncitizens are

[1] *Blazing a Trail: The Fight for Right to Counsel in Detention and Beyond*, NAT'L IMMIGR. L. CTR. 1, [specific page number] (Mar. 2016), https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016–03.pdf.

[2] *Id.*

[3] Ramon Gomez & Gilberto Lopez, *Deportation Proceedings: There Must be a Right to Appointed Counsel*, 3 CHICANA/O LATINA/O L. REV. 195, 195 (1976).

[4] Nolan Rappaport, *Immigration Courts Irredeemably Dysfunctional and on the Brink of Collapse*, THE HILL (Sept. 23, 2019), https://thehill.com/opinion/immigration/462577-immigration-courts-irredeemably-dysfunctional-and-on-the-brink-of.

[5] *Id.*

[6] *Growth in the Immigration Court Backlog Continues in FY 2019*, TRAC IMMIGR. (Dec. 18, 2018), https://trac.syr.edu/immigration/reports/542.

afforded a meaningful day in court.[7] This process jeopardizes—among other rights—their right to counsel.[8]

The right to counsel is codified in the Immigration and Nationality Act; however, it is clear that immigrants are only given this right if they have the means to pay for an attorney.[9] Immigration proceedings are considered to be civil matters—the Supreme Court has yet to extend the right to appointed counsel housed in the Sixth Amendment to these proceedings.[10] As a result, thousands of individuals are forced to represent themselves in removal proceedings.[11] In Texas, less than 30 percent of immigrants that go through removal proceedings have the assistance of an attorney to advocate for them.[12] About 70 percent of those cases where an immigrant was forced to appear *pro se* ended with a deportation order.[13] These numbers illustrate the importance of counsel to noncitizens' cases and how the denial of counsel can affect their chances at relief from removal.

The current system is inadequate and fails to give these noncitizens a fair and meaningful hearing. The problem is that, unless an immigrant expressly waives the right to counsel, an immigration judge must take reasonable steps and give reasonable time to consult and retain counsel.[14] The reality is that immigration judges are not granting continuances for these individuals to find counsel for the sake of efficiency of the docket.[15] As previously mentioned, not granting continuances has negative implications on the individuals who are improperly denied counsel because individuals who have counsel are significantly less likely to be ordered

[7] *See* David J. Brier, *Immigration Courts' Lower Productivity Explains Backlog of Cases*, Cato Inst. (Aug. 9, 2016), https://www.cato.org/blog/immigration-courts-lower-productivity-explains-backlog-cases.

[8] *See Id.*

[9] 8 U.S.C. § 1362 (1996).

[10] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[11] *State and County Details on Deportation Proceedings in Immigration Court*, TRAC Immigr., https://trac.syr.edu/phptools/immigration/nta (last visited Nov. 3, 2020).

[12] Julian Aguilar & Darla Cameron, Immigrants in Texas are Among the Most Likely to Get Deported, The Tex. Trib. (Apr. 12, 2018), https://www.texastribune.org/2018/04/12/trump-charges-forward-immigration-enforcement-texas-detainees-are-leas.

[13] *State and County Details on Deportation Proceedings in Immigration Court*, *supra* note 11.

[14] *See, e.g.*, United States v. Ramos, 623 F.3d 672, 682 (9th Cir. 2010); Tawadrus v. Ashcroft, 364 F.3d 1099, 1103 (9th Cir. 2004).

[15] *Id.*

removed.[16] Some federal circuit courts require a showing of prejudice in order to vacate removal orders for lack of counsel, but the majority of circuits have held no prejudice is necessary because it is fundamentally unfair to deprive an individual of this right.

This Comment presents a new argument and analysis for the proposition that the federal circuit courts should adopt a no-prejudice standard when reviewing the immigration court's decision to deny the right to counsel. This Comment also presents a novel collection of cases on both sides of the circuit split, which present three different means to conclude whether or not a noncitizen must show prejudice when denied the right to counsel. The prejudice standard should be rejected because the *Accardi* Doctrine does not require prejudice to be shown when rules and regulations of an agency are violated, and those regulations are fundamental to the fairness of a case.[17] Also, the consequences of removal are similar to that of criminal proceedings,[18] and the immigration system is so inherently prejudicial to an immigrant that requiring prejudice would require time and resources that are already scarce.[19]

Part I.A. of this Comment will introduce a background of the immigration system and how a removal proceeding moves through the court.[20] Part I.B. will talk about the three sources of the right to counsel applicable to a hearing before the Department of Homeland Security and the immigration courts.[21] Part II will present a novel collection of cases regarding the issue of prejudice and the statutory right to counsel.[22] Part III further argues that the federal circuit courts[23] should adopt a no-prejudice standard when an immigrant lacks counsel in removal proceedings.[24] It further analyzes immigration courts not following the right to counsel conferred to the immigrant in the Immigration and Nationality Act under the *Accardi* Doctrine, draws a comparison between the

[16] *State and County Details on Deportation Proceedings in Immigration Court*, *supra* note 11.

[17] *Infra* Part A(discussing the application of the *Accardi* Doctrine).

[18] *Infra* part B (discussing the similarities between criminal and immigration proceedings).

[19] *Infra* Part C (arguing that the immigration system is impartial towards noncitizens).

[20] *Infra* Part A (discussing immigration court procedure and structure).

[21] *Infra* Part B (introducing statutes that confer the right to counsel).

[22] *Infra* Part II (presenting examples of cases on both sides of the circuit split).

[23] This Comment argues that the federal circuit courts should adopt a no-prejudice standard because immigration cases are heard more frequently at the federal court level rather than before the Supreme Court of the United States.

[24] *Infra* Part III (proposing the adoption of a no-prejudice standard).

consequences of removal and the consequences of criminal law, and elaborates on the inherently prejudicial nature of immigration proceedings against noncitizens.[25]

I. The Immigration System

The immigration system in the United States is made up of sixty-seven courts located throughout the country.[26] The Department of Justice's (DOJ) Executive Office of Immigration Review (EIOR) operates these immigration courts.[27] In 1983, the Attorney General established the EIOR in order to administer the immigration court system in the United States.[28] Under the direction of the Attorney General, the EIOR "conducts immigration proceedings, appellate reviews, and administrative hearings."[29] Because the immigration courts and the EIOR are located within the DOJ, they are considered part of the executive branch and not an independent judicial body.[30] Although judges in immigration courts are called immigration judges, they are not analogous to a judge in a federal or state court.[31] Their authority does not come from Article III of the Constitution, which established other court systems and the judicial branch in general.[32] Immigration judges are only career attorneys who the Attorney General appoints and employs.[33] This means that the immigration judges must perform their jobs as delegates of the Attorney General.[34]

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[25] *Infra* Part III (advocating for the adoption of a no-prejudice standard).

[26] *Office of the Chief Immigration Judge*, U.S. Dep't of Just., https://www.justice.gov/eoir/office-of-the-chief-immigration-judge (last visited May 27, 2020).

[27] *Fact Sheet: Immigration Courts*, Nat'l Immigr. Forum (Aug. 7, 2018), https://immigrationforum.org/article/fact-sheet-immigration-courts.

[28] *Evolution of the U.S. Immigration Court System: Pre-1983*, U.S. Dep't of Just., https://www.justice.gov/eoir/evolution-pre-1983 (last updated Apr. 30, 2015).

[29] *About the Office*, U.S. Dep't of Just., https://www.justice.gov/eoir/about-office (last updated Aug. 14, 2018).

[30] Marissa Estimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?*, Migration Pol'y Inst. (Oct. 3, 2019), https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point.

[31] *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, S. Poverty L. Ctr. (June 25, 2019), https://www.splcenter.org/20190625/attorney-generals-judges-how-us-immigration-courts-became-deportation-tool.

[32] *Id.*

[33] *Id.*

[34] *Id.*

A. *Immigration Court Procedure*

Removal proceedings begin with the Department of Homeland Security (DHS)[35] serving a noncitizen a notice to appear.[36] After receiving a notice to appear, the noncitizen goes before an immigration court, which serves as a trial-level court.[37] While a noncitizen is under the jurisdiction of an immigration court, the noncitizen may seek relief from removal.[38] Once an immigration judge has issued a final order, the party that did not prevail may appeal the decision to the Board of Immigration Appeals (BIA).[39]

The BIA,the appellate body of the immigration courts, is the "highest administrative body for interpreting and applying immigration laws" and is housed in the DOJ.[40] There are twenty-three Appellate Immigration Judges, including a Chief Appellate Immigration Judge and one or two Deputy Chief Judges.[41] Members of the BIA are lawyers that the Attorney General appoints, and they act under the Attorney General's direction and supervision.[42] They typically do not hear courtroom proceedings; however, on rare occasions they may hear oral arguments at their headquarters in Falls Church, Virginia.[43] Because the BIA rarely hears oral arguments, most of their decisions come from "paper reviews" of cases.[44] When the BIA conducts paper reviews, it simply receives briefs from each party, reads them, and hands down a decision when it is ready.[45] The BIA reviews legal issues and facts under a "clearly erroneous" standard of review.[46]

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[35] DHS is an enforcement agency that enforces the United States immigration laws.

[36] *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1641 (2010).

[37] *Id.*

[38] *Id.* at 1642.

[39] *Id.* at 1643–44.

[40] *About the Office*, *supra* note 29.

[41] *Board of Immigration Appeals*, U.S. DEP'T OF JUST., (last updated December 7, 2020, https://www.justice.gov/eoir/board-of-immigration-appeals.

[42] *See The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, *supra* note 31.

. *Id.*

[43] *Board of Immigration Appeals*, *supra* note 41.

[44] *Id.*

[45] Felipe de la Hoz, *The Shadow Court Cementing Trump's Immigration Policy*, THE NATION (June 30, 2020), https://www.thenation.com/article/society/trump-immigration-bia.

[46] Lawrence Baum, *Fortieth Annual Administrative Law Symposium: Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1513–14 (2010).

A large amount of cases the BIA hears and decides pertain to removal and relief from deportation.[47] The BIA has the jurisdiction to hear cases brought before immigration judges and DHS.[48] All decisions made by the BIA are binding on all immigration judges unless the Attorney General or a federal court overrule them.[49] If an individual loses an appeal the BIA has reviewed, such as final orders from removal, the individual can file a petition for review in the federal court of the federal circuit where the case was first filed.[50] If an individual petitions for a review in federal court, it must be filed no more than thirty days after the BIA's decision.[51] The distinction between an appeal to the BIA and an appeal to a federal court is that for a federal court appeal, an individual can be ordered removed prior to the court hearing the case; therefore, their legal representative must seek a stay of removal that would last through the appeals process.[52]

If a federal court is able to review a case, it only has a limited ability to do so.[53] For example, when a federal court reviews an appeal that comes from the BIA, it may not find new facts and must consider only what is "on the administrative record."[54] The only way a federal court can further fact-find is if "any reasonable adjudicator would be compelled to conclude to the contrary."[55] Upon review of a decision from the BIA, the courts can "remand the case to the BIA with instructions or can reject the BIA ruling."[56]

B. *Sources of the Statutory Right to Counsel*

The right to counsel in the immigration context is not a constitutional right, but it is statutorily conferred.[57] The statutes that confer this

[47] *Board of Immigration Appeals*, *supra* note 41.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] Rebecca Baibak, *Creating an Article I Immigration Court*, 86 U. Cin. L. Rev. 997, 1000 (2018).
[54] 8 U.S.C. § 1252(b)(4)(A) (2017).
[55] 8 U.S.C. § 1252(b)(4)(B) (2005); Joel D. Kuperberg, *The Administrative Record*, Presented at League of Cal. Cities 2001 Ann. Conf. Joint City Att'y/ City Clerks Session (2001), https://www.cacities.org/getattachment/56f61e74-52fa-4ce4-b8f6-df98087d4cf5/The-Administrative-Record_v1.aspx.
[56] Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. No.1, 26 (2013).
[57] *Legal Standards*, Hum. Rts. Watch, https://www.hrw.org/legacy/reports98/ins2/

right include the Immigration and Nationality Act, the Administrative Procedures Act, and the U.S. Code of Federal Regulations.

1. *IMMIGRATION AND NATIONALITY ACT*

Section 292 of the Immigration and Nationality Act (INA) is one of the primary sources of the right to counsel in the Act.[58] It confers the "privilege" of representation in removal proceedings before an immigration judge.[59] The Act states that in removal proceedings "the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."[60] Despite conferring the right to counsel, the portion that states "at no expense to the Government" has led courts to decide questions of whether a noncitizen was informed of their right to seek counsel at their own expense, whether there was sufficient time for the noncitizen to look for said counsel, and whether a noncitizen received effective assistance of counsel.[61]

Although noncitizens have the right to counsel in removal proceedings, this section of the INA does not confer the right during other stages of immigration proceedings outside of removal proceedings like interviews.[62] Other sections in the INA also mention the right to counsel and essentially repeat the privilege of counsel at no expense to the government during removal proceedings.[63] These other sections also do not discuss mention or confer access to counsel in other scenarios when the right would attach outside of removal proceedings.[64]

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berks98d-01.htm (last visited Jan. 26, 2020).

[58] Emily Creighton & Robert Pauw, AM. IMMIGR. COUNCIL, RIGHT TO COUNSEL BEFORE DHS 1 (2011), https://www.americanimmigrationcouncil.org/sites/default/files/right-to-counsel-before-dhs.pdf.

[59] 8 U.S.C. § 1362; INA § 192.

[60] 8 U.S.C. § 1362; INA § 192; References to the right to counsel are also found in the INA at § 208(d)(4), 238(a)(2), 238(b)(2)(B), 239(a)(1)(E), 239(a)(2)(A), 239(b), 240(b)(4)(A)))))))) and 504(c)(1). These references reiterate a privilege of representation at no expense to the government in removal proceedings.

[61] Matt Adams, Advancing the "Right" to Counsel in Removal Proceedings, 9 SEATTLE J. FOR SOC. JUST., 169, 175–76 (2010).

[62] Creighton & Pauw, *supra* note 58.

[63] *Id.*

[64] *Id.*

2. *ADMINISTRATIVE PROCEDURES ACT*

Next, Under the Administrative Procedures Act (APA), an individual receives the right to counsel before an agency under 5 U.S.C § 555(b).[65] Section 555 states "[a] person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."[66] There are three requirements that have to be met in order for the right to counsel to apply under the APA: (1) The agency proceedings must be the kind of proceeding to which the provision applies; (2) the government entity must be an "agency" as defined in the APA; and (3) the person must be compelled to appear.[67]

This provision of the APA has a broad application to all agency proceedings, except as noted in the APA.[68] The legislative history of the APA reiterates the broad application of this section and describes it as "a statement of statutory and mandatory right of interested persons to appear themselves or through or with counsel before any agency in connection with any function, matter, or process whether formal, informal, public, or private."[69] Some courts have held the right to counsel under the APA may only apply in adjudicatory proceedings, and the difference between adjudicatory proceedings and investigatory proceedings lies in due process.[70] Adjudicatory proceedings directly affect legal rights of an individual; therefore, agencies must stick to judicial processes that are traditionally used.[71] Investigatory proceedings are merely fact-finding proceedings; therefore, it is not necessary for full judicial processes to be used.[72] Other courts, however, have held that the right to counsel is broader than due process rights.[73]

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[65] *Id.*

[66] 5 U.S.C. § 555.

[67] Creighton & Pauw, *supra* note 58.

[68] Fed. Commc'n Com. v. Schreiber, 329 F.2d 517, 535 n.30 (9th Cir. 1964) (noting that § 555 applies broadly "without qualification as to the type of agency proceeding which may be involved").

[69] *Id.*

[70] Hannah v. Larche, 363 U.S. 420, 442 (1960).

[71] *Id.*

[72] *Id.*

[73] *See* Backer v. Comm'r, 275 F.2d 141, 143 (5th Cir. 1960) ("It is clear that the right to counsel guaranteed under the Administrative Procedure Act is much broader than the right to have an attorney to advise him relative to his rights under the Fifth Amendment.").

In order to satisfy the requirements to qualify for the right to counsel under the APA, an individual "must be compelled to appear in person before an 'agency.'"[74] Under the APA, an agency includes "each authority of the Government of the United States, whether or not it is within or subject to review by another agency."[75] Federal courts have held that DHS and the DOJ meet this requirement.[76] Not only must the entity be an agency, but an individual also must be "compelled to appear."[77] Although the definition of "compelled to appear" is not expressly stated in the APA, Black's Law Dictionary defines "compel" as "caus[ing] or bring[ing] about by force or overwhelming pressure."[78] The Attorney General has stated that "[i]t is clear, of course, that this provision [of counsel] relates only to persons whose appearance is compelled or commanded, and does not extend to persons who appear voluntarily or in response to mere request by an agency."[79] Courts have looked to whether an appearance was "voluntary" to determine if an individual has been compelled.[80] For example, in *Suess v. Pugh*, the Court held that an individual was not "compelled to appear" after receiving a notice that he had the opportunity to appear at a hearing for the termination of his employment.[81]

3. *TITLE 8 OF THE CODE OF FEDERAL REGULATIONS § 292.5(B)*

Section 292.5(b) of Title 8 in the Code of Federal Regulations states when someone is entitled to representation.[82] This regulation states "a person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit

[74] Creighton & Pauw, *supra* note 58.

[75] 5 U.S.C. § 551 (exempting several components from the definition of agency, including Congress, the courts, and certain military authorities).

[76] *See* Blackwell Coll. of Bus. v. Att'y Gen., 454 F.2d 928, 933 (D.C. Cir. 1971).

[77] Creighton & Pauw, *supra* note 58.

[78] *Compel*, BLACK'S LAW DICTIONARY, (7th ed. 1999).

[79] Creighton & Pauw, *supra* note 58, at 6.

[80] *Id.*

[81] Suess v. Pugh, 245 F. Supp. 661, 665–66 (N.D. W. Va. 1965).

[82] Creighton & Pauw, *supra* note 58, at 7.

briefs."[83] Under § 292.5(b), there are not many cases that interpret or apply the right to counsel.[84]

Although there are not many cases that interpret the right to counsel, there are a couple of cases where the Court addressed that there was a right to counsel, but that right was not violated in those instances.[85] In *Boukhris v. Perryman*, the Court recognized this right in an interview involving a marriage petition and held that § 292.5(b) "grants the person involved in an examination under that chapter 'the right' to be represented by an attorney or representative."[86] Although the Court did not find a violation of the right to representation, it stated that if it the presence of an attorney was requested or had INS told her she could not have counsel, she probably would have been able to state a claim that she was improperly denied counsel.[87] In *Ali v. INS*, the Court held that the regulation "is promulgated under the general delegation of authority to the Attorney General to enforce 8 U.S.C. § 1103, and specifically implements [the] portion which grants the right to be represented by counsel, at no expense to the government, at . . . deportation hearings."[88] Similarly, in *Sidhu v. Bardini*, the court indicated that 8 C.F.R. § 292.5(b) implements INA § 292, which provides a statutory right to counsel in removal proceedings.[89]

II. THE CIRCUIT SPLIT: PREJUDICE VERSUS NO-PREJUDICE

Federal courts differ on what an immigrant must show in order to have a removal order vacated and remanded. When an immigrant has been denied counsel at a removal hearing and the immigration judge orders deportation, the noncitizen may appeal to the BIA.[90] If the trial court's decision is affirmed, the decision can be appealed to a federal court.[91] There is currently a circuit split where a majority of the circuits do not require immigrants to show prejudice when they lack counsel in

[83] 8 C.F.R. § 292.5(b).

[84] Creighton & Pauw, *supra* note 58, at 7.

[85] *Id.*

[86] Boukhris v. Perryman, No. 01–3516, 2002 U.S. Dist. LEXIS 1913, 1913 (N.D. Ill. Feb. 7, 2002).

[87] *Id.* at 1915.

[88] Ali v. I.N.S., 661 F. Supp. 1234, 1248-49 (D. Mass. 1986).

[89] *Sidhu v. Bardini*, No. C 08-05350 CW, 2009 U.S. Dist. LEXIS 48808, at *16-17 (N.D. Cal. June 10, 2009).

[90] *Board of Immigr. Appeals*, *supra* note 41.

[91] *Id.*

removal proceedings, and a minority of circuits believe this lack of counsel is a general due process violation requiring prejudice.

A. *Five Circuits Do Not Require Prejudice*

Although five circuits have held that no prejudice is required for lack of counsel in removal proceedings, they reached this consensus on two different grounds. The first group of courts has reached its decision on the notion of fundamental fairness in removal proceedings.[92] The second group of courts has used the *Accardi* Doctrine, a principle from administrative law, to justify the rejection of a prejudice standard.[93]

1. *Fundamental Fairness*

In *Castaneda-Delgado v. INS*, the Seventh Circuit held that the statutory right to counsel granted to noncitizens in removal proceedings "is too important and fundamental a right to be circumscribed by a harmless error rule."[94] The Castanedas were Mexico natives residing in Chicago and did not speak or understand English.[95] The Chicago Police took Raudel Castaneda into custody and turned him over to the Immigration and Nationality Service (INS).[96] The Castanedas appeared before the immigration judge and were questioned and stated that they wanted to wait for a lawyer before they proceeded.[97] Later, they appeared again without a lawyer, and the Castanedas admitted they were deportable.[98] The immigration judge proceeded despite a lawyer not being present and rendered them deportable.[99] The Castanedas then appealed the removal order to the BIA, and BIA found that the noncitizens were not prejudiced when counsel was not present at the hearing.[100]

Although immigration proceedings are not criminal, the Seventh Circuit compared the consequences of removal to criminal proceedings.[101] The court concluded that denial of counsel in immigration proceedings has similar consequences to the consequences in criminal

[92] *See* Castaneda-Delgado v. I.N.S., 525 F.2d 1295 (7th Cir. 1975).
[93] *See* Montilla v. I.N.S., 926 F.2d 162 (2d Cir. 1991).
[94] Castaneda-Delgado, 525 F.2d at 1300.
[95] *Id.* at 1296.
[96] *Id.* at 1296.
[97] *Id.* at 1296.
[98] *Id.* at 1297.
[99] *Id.*
[100] *Id.* at 1298.
[101] *Id.* at 1300 (citing Glasser v. United States, 315 US 60, 76 (1942)).

proceedings, and lacking counsel is so inherently prejudicial that courts should not have to calculate the amount of prejudice a noncitizen faces.[102] The court held that the Castanedas were arbitrarily denied their right to counsel as the result of an abuse of discretion on the part of the immigration judge, and the immigration judge had no reason to deny a continuance for the couple to find counsel.[103] The court also held that the INA unambiguously confers noncitizens the right to counsel of their choice in deportation proceedings; therefore, the importance of these provisions would be "eviscerated" by applying the harmless-error doctrine.[104] The decision of the BIA ordering deportation was reversed and remanded.[105]

In *Montez-Lopez v. Holder*, the Ninth Circuit held that a noncitizen who shows he has been denied his right to counsel "need not also show that he was prejudiced by the absence of the attorney" because denying that right affects the proceedings so much that prejudice may be assumed.[106] Montez-Lopez was a native of El Salvador when he entered the United States.[107] DHS detained him and initiated his removal proceedings.[108] His attorney failed to show up at his merits hearing because his law license had been suspended, and the immigration judge found that Montez-Lopez may have learned about the attorney's suspension prior to his hearing.[109] The immigration judge denied a continuance to find counsel and proceeded to try Montez-Lopez.[110] Both the immigration judge and the BIA agreed that the petitioner could not establish he was subject to prejudice at the merits hearing.[111]

The Ninth Circuit found that denial of the statutory right to counsel does not require a showing of prejudice, unlike an ineffective assistance of counsel claim, because it affects the whole proceeding more than ineffective assistance of counsel.[112] It also reasoned that a claim for denial of counsel is different because it is rooted in "specific law and regulations

[102] *Id.*
[103] *Id.* at 1300.
[104] *Id.* at 1302.
[105] *Id.*
[106] Montez-Lopez v. Holder, 694 F.3d 1085, 1092 (9th Cir. 2012).
[107] *Id.* at 1085.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 1092.

that give aliens a right to be represented by an attorney of their choice."[113] Finally, the court stated that because the presence of an attorney affects the strategy of a case, it is more likely that a noncitizen's case would have tuned out differently had they retained counsel.[114]

2. *ACCARDI DOCTRINE*

The Second and Third Circuits took a different approach, relying on the principle that an "agency's non-compliance with its own regulations can be so serious" that the denial of counsel can be a reversable error without needing to show prejudice.[115] The *Accardi* Doctrine, derived from *United States ex rel. Accardi v. Shaughnessy*, requires an administrative agency to abide by its own rules and regulations.[116] Therefore, the *Accardi* Doctrine requires that DHS and the immigration courts follow their own regulations regarding the right to counsel in a removal proceeding, and a noncitizen is not required to show prejudice for lack of counsel in their removal proceedings.[117] In *Accardi*, the court vacated a deportation order and held that the DOJ deciding not to follow its own procedures was a reversible error because the procedure that resulted in the deportation order did not follow the relevant agency regulations.[118] Although the holding of the case rested on faulty procedure and did not involve a fundamental right, such as the right to counsel, the vital consideration was that the interests of the party in the case were implicated.[119] An agency that fails to abide by its regulations and, as a result, fails to afford procedural safeguards required under its regulations risks having the action invalidated if challenged in court.[120]

The courts have applied the *Accardi* Doctrine both broadly and narrowly. In *Montilla v. I.N.S.*, the court held that as long as the right for which the regulation was promulgated is for a party's benefit, the agency must follow it and reject a prejudice requirement.[121] All that needs to be shown is that the subject regulations were adopted for the noncitizen's

[113] *Id.* at 1092.
[114] *Id.* at 1092.
[115] Lara v. Barr, 962 F.3d 45, 60 n. 15 (1st Cir. 2020).
[116] United States *ex rel.* Accardi v. Shaughnessy 347 U.S. 260, 267 (1954)
[117] Montilla v. I.N.S., 926 F.2d 162, 169 (2d Cir. 1991).
[118] *Accardi*, 347 U.S. at 266–67.
[119] *See* Montilla v. I.N.S., 926 F.2d at 167.
[120] *Richardson v. Joslin*, 501 F. 3d 415 (2007).
[121] *Montilla*, 926 F.2d at 166 (citing Colum. Broad. Sys., Inc. v. United States, 316 U.S. 407, 422 (1942)).

benefit and that the INS failed to adhere to them.[122] *Waldron v. I.N.S.* construed the doctrine more narrowly and held that the regulation must have been promulgated for the benefit of the party at issue, and it needed to advance the fairness of the proceeding.[123] Although *Waldron* is not a part of the circuit split, it has important implications for how the *Accardi* Doctrine can be applied. In that case, "Waldron ha[d] neither claimed nor demonstrated that the INS's failure to notify him of the privilege to communicate with consular authorities prejudiced him in his preparation of a defense to the deportation charges."[124] INS's failure to notify Waldron was not a fundamental right that was derived from the Constitution or a statute, like the right to counsel, but rather was just an agency-created privilege.[125] As a result, the court held that not all instances where an agency does not abide by a regulation should be invalidated—only those that do not confer fundamental rights.[126]

Although an agency is required to follow its own regulations, there are instances where it may deviate without violating the *Accardi* Doctrine. For example, in *United States v. Lockyer*, the lawsuit was based on the Internal Revenue agent who conducted a criminal trial and had not warned the appellee of his rights, which violated the internal and unpublished regulation contained in one of the Revenue Service Manuals.[127] The provision in question required a revenue agent to suspend his investigation when he discovers an indication of fraud.[128] According to the court, the purpose of this provision was so the Chief of the Intelligence Division would be able to evaluate it.[129] The court held that this was just a procedural regulation for the efficiency of the agency and had nothing to do with the fairness of the case or the rights of the party; therefore, it did not fall under the *Accardi* Doctrine.[130]

In *Leslie v. Attorney General*, the Third Circuit held that no prejudice has to be shown when a rule is intended to confer important procedural benefits or when alleged regulatory violations infringe fundamental

[122] *Montilla*, 926 F. 2d at 166.
[123] Waldron v. I.N.S., 17 F.3d 511, 518–19 (2d Cir. 1993).
[124] *Id.*
[125] *Id.* at 518.
[126] *Id.*
[127] United States v. Lockyer, 448 F.2d 417, 418 (10th Cir. 1971).
[128] *Id.*
[129] *Id.* at 420.
[130] *Id.* at 421.

statutory or constitutional rights.[131] Leslie, a native of Jamaica and permanent United States resident, pled guilty to a felony of conspiracy to distribute cocaine and was subjected to deportation.[132] When Leslie appeared before an immigration judge at York County Prison, the judge asked if Leslie was seeking an attorney. Leslie said that he could not afford it; however, the immigration judge did not inform Leslie of free legal resources.[133] The judge ordered removal, and Leslie's appeal to the BIA was dismissed.[134]

The court stated that "rules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency."[135] It recognized that the Supreme Court required prejudice to be shown when cases involved a mere procedural rule adopted for the transaction of business.[136] The court reasoned that the regulation requiring immigration judges to tell noncitizens about the availability of free legal services is an important procedural safeguard.[137] As a result, the immigration judge violated more than a mere procedural rule for the transaction of business. He violated the fundamental right to counsel at removal hearings; therefore, Leslie was not required to show prejudice, and the court remanded the BIA's decision.[138]

In *Montilla v. I.N.S.*, the Second Circuit came to a similar conclusion and held that no prejudice is required because rules promulgated by an agency control the agency.[139] Rafael Montilla was a citizen of the Dominican Republic who entered the United States as a lawful permanent resident and resided in the U.S. continuously for seventeen years.[140] He was convicted for conspiracy to possess cocaine and sentenced to six years in prison.[141] The INS served him a notice of hearing and rendered him deportable as a result of his conviction.[142]

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[131] Leslie v. Att'y Gen., 611 F.3d 171, 176 (3d Cir. 2010) (quoting Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970)).

[132] *Id.* at 173.

[133] *Id.* at 174.

[134] *Id.*

[135] *Id.* at 175.

[136] *Id.* at 176 (citing Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538–39 (1970)).

[137] *Id.* at 180–81.

[138] *Id.*

[139] Montilla v. I.N.S, 926 F.2d 162, 166 (2d Cir. 1991) (citing Colum. Broad. Sys., Inc. v. United States, 316 U.S. 407, 422 (1942)).

[140] *Id.* at 164.

[141] *Id.*

[142] *Id.*

During Montilla's first deportation hearing, the immigration judge informed him of his right to counsel and presented a list of attorneys who might be able to represent him.[143] Montilla told the judge that he did not know what to do, and the judge allowed him more time to consider.[144] When the judge resumed the proceedings about a month later, there was never any mention or even a question as to whether Montillawanted counsel.[145] Montilla still did not have counsel during his next hearing.[146] Regardless of Montilla's wishes pertaining to counsel, which the judge never asked about again after the first hearing, the judge ruled that deportation had been established by clear and convincing evidence.[147] Montilla appealed and argued that he had unknowingly waived his right to counsel, and the BIA dismissed the appeal.[148]

The federal court applied the *Accardi* doctrine and held that even if Montilla did not have a large probability of succeeding in his case, "[it] must remand because Montilla's right to counsel was obviously affected by the [agency's failure] to comply with its own regulation."[149] The court refused to require prejudice because automatic reversal of an agency's failure to comply with a regulation would encourage the agency to "serve the interests of judicial economy."[150] The court concluded that all that needed to be shown was that the regulation in question needed to be for the noncitizen's benefit and that the agency did not adhere to them.[151]

B. *Four Circuits Require a Showing of Prejudice for Generic Due Process Violations*

The Fourth, Fifth, Eighth, and Tenth Circuits have required noncitizens to show that they were prejudiced when they lacked counsel in removal proceedings for the immigration judge's decisions to be remanded or vacated.[152] None of these circuits have refuted or engaged with the areas of law the majority of circuits have relied on, such as the *Accardi*

[143] *Id.*
[144] *Id.*
[145] *Montilla v. I.N.S*, 926 F.2d 162, 164 (2d Cir. 1991)..
[146] *Id.* at 165.
[147] *Id.*
[148] *Id.*
[149] *Id.* at 170.
[150] *Id.*
[151] *Montilla v. I.N.S*, 926 F.2d 162, 169 (2d Cir. 1991).
[152] Njorge v. Holder, 753 F.3d 809, 812 (8th Cir. 2014); Ogbemudia v. I.N.S., 988 F.2d 595, 598 (5th Cir. 1993); Farrokhi v. U.S. I.N.S., 900 F.2d 697, 702 (4th Cir. 1990); Michelson v. I.N.S., 897 F.2d 465, 468 (10th Cir. 1990).

doctrine.[153] Instead, these circuits have reasoned that the denial of the statutory right to counsel is a generic due process violation, guaranteed by the Fifth Amendment, which requires prejudice.[154]

For example, the Fifth Circuit held in *Ogbemudia v. I.N.S.* that prejudice is required for a due process claim for lack of counsel.[155] Ogbemudia was a native of Nigeria who first entered the United States as a student.[156] He was convicted of theft and assault and was later deported.[157] He later reentered the United States illegally and was convicted for possessing a counterfeit driver's license.[158] As a result, INS charged him as being deportable under the INA.[159] Ogbemudia appeared before the immigration judge, who granted a continuance so Ogbemudia could find counsel.[160] Ogbemudia appeared again and explained that he was unable to find counsel; however, the immigration judge granted another continuance but warned it would be the last.[161] The third time Ogbemudia appeared before the immigration judge, he still had no counsel but explained that he had contacted two lawyers and neither were able to represent him.[162] One of the attorneys requested Ogbemudia see him when he was out on bond—which the immigration judge refused to grant.[163] After Ogbemudia informed the judge that he had received nothing other than a business card from the attorney, the immigration judge forced him to proceed *pro se*.[164] Ogbemudia admitted his convictions, and the immigration judge held that he was not eligible for relief from deportation.[165] One day after the immigration judge rendered his decision, Ogbemudia filed a notice of appeal and claimed that he would be killed if he returned to Nigeria.[166] Now represented by an attorney, he filed a motion to reopen for consideration his request for asylum or

[153] Lara v. Barr, 962 F.3d 45, 59 (1st Cir. 2020).
[154] *E.g.* Farrokhi v. U.S. I.N.S., 900 F.2d 697, 701–02 (4th Cir. 1990).
[155] Ogbemudia v. I.N.S., 988 F.2d 595, 599 (5th Cir. 1993).
[156] *Id.* at 596.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.* at 597.
[161] *Ogbemudia v. I.N.S.*, 988 F.2d 595, 597 (5th Cir. 1993).
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*

withholding of deportation.[167] The BIA rejected his claim and appealed to the Fifth Circuit.[168]

The Fifth Circuit held that the absence of an attorney may create a due process violation if the defect "'impinged upon the fundamental fairness of the hearing in violation of the Fifth Amendment,' and there was substantial prejudice."[169] Ogbemudia claimed that because the immigration judge refused to grant bond, he was prevented from finding counsel which resulted in a due process violation.[170] The court found his argument to be without merit because of his several advantages, such as being able to speak English, being educated in the United States, and having knowledge of the deportation proceedings. His failure to obtain counsel did not rise to a due process violation because he could not show that he was prejudiced.[171]

III. THE FEDERAL CIRCUIT COURTS SHOULD ADOPT A NO-PREJUDICE STANDARD FOR LACK OF COUNSEL IN REMOVAL PROCEEDINGS

The federal circuit courts should adopt a no-prejudice standard when an immigrant lacks counsel in removal proceedings. First, under the *Accardi* Doctrine, an agency must follow its own regulations when such regulations are promulgated for the benefit of the party at issue.[172] Next, no prejudice should be required due to of the similarity of the consequences imposed in immigration law to those in criminal law.[173] Not only are the consequences of removal severe, but the immigration system is inherently unfair and prejudicial to the immigrant.[174]

A. *No Prejudice is Required Under the Accardi Doctrine When an Agency Does Not Follow its Own Regulations.*

Under the *Accardi* Doctrine, no prejudice needs to be shown when an immigration judge violates the statutory right to counsel because an agency must follow its own rules and regulations when such rules are promulgated for the protection of rights for the party at issue.[175] The

[167] *Id.*
[168] *Id.* at 598.
[169] *Id.*
[170] *Id.*
[171] *Id.* at 599.
[172] Montilla v. I.N.S., 926 F.2d 162, 169 (2d Cir. 1991).
[173] Bridges v. Wixon, 326 U.S. 135, 154 (1945).
[174] *See The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, *supra* note 31.
[175] *About the Office*, *supra* note 29.

immigration courts in the United States are housed within the EIOR, which is a sub-agency of the Department of Justice—an agency to which the *Accardi* Doctrine applies.[176] The Immigration and Nationality Act (INA) governs the immigration courts, and the act contains a provision bestowing a right to counsel during removal proceedings.[177] It also does not matter if the internal rules or regulations of an agency are more restrictive than the law requires or even if it is not yet registered in the Federal Register.[178]

When an immigration judge denies a continuance resulting in the denial of counsel that the INA confers, the EIOR and DOJ should be required to follow their own statute and regulations because the right to counsel heavily affects the rights of potential deportees.[179] This is more than simply a procedural pitfall within an agency.[180] Not only are the rights of immigrants affected, but the right to counsel also affects the course of their removal proceedings as a whole—a critical stage.[181] A court must enforce an agency's regulation when federal law or the Constitution mandates it,[182] and the statutory right to counsel is not only in the INA, but it is also in the Administrative Procedure Act which is also applicable to the DOJ.[183] This may mean that agencies may be unconstitutionally depriving potential deportees of this right to counsel.

Under the broad application of the *Accardi* Doctrine, an agency has to follow its own rules and regulations when those rules are promulgated for the benefit of a party.[184] Therefore, it is applicable to the statutory right to counsel because this right to counsel was promulgated for the benefit of the immigrants undergoing the removal process. In *Montilla v. I.N.S.*, the Second Circuit court rejected the use of the prejudice test and applied the *Accardi* Doctrine in determining whether denying

[176] 6 U.S.C. § 521 (2012) (recognizing the Executive Office for Immigration Review).

[177] Morton v. Ruiz, 415 U.S. 199, 235 (1974).

[178] *Id.* (declining to address constitutional issues because the case was disposed of on a statutory basis).

[179] See *id.*

[180] *Id.*

[181] Ilona Bray, *What to Expect During Your Individual Deportation (Removal) Hearing*, NOLO, https://www.nolo.com/legal-encyclopedia/what-to-expect-during-your-individual-deportation-removal-hearing.html (last visited Jan. 26, 2020).

[182] United States v. Caceres, 440 U.S. 741, 741–42 (1979).

[183] 5 U.S.C. § 555.

[184] Montilla v. I.N.S., 926 F.2d 162, 166 (2d Cir. 1991).

right to counsel was improper.[185] Application of this doctrine is necessary because rules and regulations are promulgated for a reason, and allowing federal agencies to ignore them would render those statutes superfluous.[186] This is true especially when the rule in question pertains to something that is so crucial, such as the right to counsel during removal proceedings. Not only does denying counsel significantly affect the course of the immigrant's removal proceedings, but it also ensures fairness in this administrative proceeding.[187] Immigrants often do not speak English, or do not speak English fluently, and have no knowledge of the United State's legal system, so it would not be a fair or meaningful hearing if they are required to represent themselves in removal proceedings.[188]

An agency's failure to follow its own rules does not mean that the decisions of the agency are automatically set aside—the regulation has to benefit of the noncitizen.[189] The difference in treatment of the regulation in question, which involves a right to counsel, comes from the fact that, in cases where the decisions were not vacated, the rules in question governed internal procedures of an agency rather than rights of the party that has been allegedly wronged.[190] The violation that occurred in *United States v. Lockyer* is different from that of *Montilla* because in *Lockyer*, the deficiency on the part of the agency to follow the internal regulation was not conferring any right.[191] In *Lockyer*, "only the efficiency of I.R.S. operations would be harmed."[192] Cases that involve the right to counsel contained in the statute, such as *Montilla*, differ because the rights of people are at stake and those rights could significantly affect the outcome of their case, unlike the internal effect experienced in *Lockyer.*[193]

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[185] *Id.* at 168.

[186] *See* Corley v. United States, 556 U.S. 303, 314 (2009) (statutes should be interpreted to avoid superfluity) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004) ("[([O]ne of the most basic interpretive canons is that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .")))).

[187] Montilla, 926 F.2d at 168–69.

[188] Samantha Balaban, Sophia Alvarez Boyd & Lulu Garcia-Navarro, *Without a Lawyer, Asylum-Seekers Struggle With Confusing Legal Processes*, NPR (Feb. 25, 2018, 2:10 PM), https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes.

[189] *Montilla*, 926 F.2d at 169.

[190] *Id.*

[191] United States v. Lockyer, 448 F.2d 417, 421 (10th Cir. 1971).

[192] *Id.*

[193] *Montilla*, 926 F.2d at 169.

The *Accardi* Doctrine has both a narrow and broad interpretation. Under the narrow application of the *Accardi* Doctrine, where the right in question must be fundamental to the fairness of a case, the right to counsel should still be strictly followed because its importance as a procedural safeguard to help level the playing field in court.[194] Although it is important to consider if an agency regulation has been promulgated to benefit an a non-citizen, opponents of the no-prejudice standard may claim that the "for the benefit of an alien" language in *Montilla* is too broad and encompasses too many possible circumstances. The root of this concern is likely from the burden extra cases would put on the immigration courts when less fundamental rights are at stake.[195] Having to remand a case in every single situation where the immigration courts do not strictly comply with their rules may further contribute to the already backed-up case load.[196] Although this may be true, the right to counsel is not just a mere procedural technicality which can be ignored for the sake of efficiency when a person's future in the United States is at stake.

In situations where the INS fails to comply with its own regulations, it should merit invalidation of the immigration judge's actions without regard to whether the alleged violation has prejudiced the immigrant.[197] When the immigration judge denies the right to private counsel through denial of a request for a continuance to find said counsel, the proceedings are already tainted.[198] In *Waldron v. I.N.S.*, the court held that it was not necessary to remand the case because the INS' deviation from merely a technical procedure did not affect the fairness of the proceeding.[199] This outcome cannot be the same for a right as important to fairness as the right to counsel. This holding implies that the standard set out in *Waldron* is narrower than that of *Montilla*, where the court held that the relevant criteria to consider was whether the right conferred was for the benefit of the party at issue.[200] *Waldron* takes it a step further, holding that the right conferred also has to be one that is fundamental to fairness of the proceeding, like the right to counsel.[201] Whether the federal circuit courts

[194] *See* Waldron v. I.N.S. 17 F.3d 511, 518 (2d Cir. 1993).
[195] *Id.* at 518.
[196] *Id.*
[197] Leslie v. Att'y Gen., 611 F.3d 171, 182 (3d Cir. 2010).
[198] United States v. Robinson, 502 F.2d 894, 895 (7th Cir. 1974).
[199] *Waldron*, 17 F.3d at 519.
[200] *Id.*
[201] *Id.*

apply the broad holding of *Montilla* or the narrower holding in *Waldron*, the right to counsel should be afforded under both interpretations. The right to counsel in removal proceedings satisfies both *Montilla*'s "benefit to the party" standard and the narrow holding of *Waldron* that the right must affect the fairness of the proceeding. Even the court in *Waldron* stated that the right to counsel is fundamental because it has roots in due process; the noncitizen, therefore, must not show prejudice for lack of counsel in removal proceedings.[202]

1. *PRACTICAL BENEFITS OF APPLYING THE ACCARDI DOCTRINE*

Not only does the application of the *Accardi* Doctrine make sense from a fairness standpoint, but it also serves practical purposes. The prejudice test should be rejected for the sake of ensuring agency compliance with its own rules and regulations.[203] Rejecting the need to show prejudice when an agency violates its own rules, such as the statutory right to counsel, would encourage the immigration courts to strictly abide by their rules and regulations.[204] When an agency is allowed to overlook its own administrative processes, it may lead to a perception that the agency can make ad hoc decisions and apply its own rules and regulations in an inconsistent manner.[205] The reason lawyers follow precedent is for the sake of consistently applying law to reach similar outcomes.[206] If prejudice is required, the consistency of a court's decisions will be in jeopardy.[207]

Administrative agencies must also follow their own rules because doing so leaves little room for arbitrary decisions.[208] Decreasing the instances of arbitrary decisions can be particularly important in the immigration context because of the involvement of the DOJ and the EIOR in the immigration court system.[209] Immigration Judges are

[202] *Id.* at 518.

[203] *See* Henriques v. I.N.S., 465 F.2d 119, 120–21 (2d Cir. 1972).

[204] Montilla v. I.N.S, 926 F.2d 162, 169 (2d Cir. 1991).

[205] *See id.*

[206] Edward Richards, *The Importance of Precedent*, PUB. HEALTH L. MAP, https://biotech.law.lsu.edu/map/TheImportanceofPrecedent.html#:~:text=The%20Importance%20of%20Precedent&text=In%20a%20common%20law%20system,decisions%20on%20the%20same%20subject.&text=Each%20case%20decided%20by%20a,subsequent%20decisions%20involving%20similar%20disputes (last updated Apr. 19, 2009).

[207] *See id.*

[208] *See* Morton v. Ruiz, 415 U.S. 199, 232 (1974).)

[209] *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, *supra* note 31.

subject to evaluations from the DOJ which can interfere with their decisions for political reasons.[210] Not only are judges' political views a factor, but there is also no accountability in the immigration courts to a neutral, outside authority.[211] Even the appeals process does not ensure uniformity because the Attorney General, who oversees the immigration courts, has the possibility to influence the BIA's decisions.[212] By requiring agencies, such as the DOJ and the EIOR, to follow their governing statutes, it leaves less room for arbitrary decisions, especially when discretionary standards are prevalent in the immigration statutes.[213] It also allows for uniformity and consistency when courts are faced with the issue of whether a continuance was improperly denied or even when a removal order should be vacated. Implementing a prejudice standard would allow immigration judges to have the discretion to decide that, although they blatantly violated an immigrant's right to counsel, it does not matter because it did not affect the outcome of the proceeding. Allowing judges to arbitrarily make these decisions contravenes the notions of due process. The immigration courts and the DOJ being careless in abiding by their own regulations would also put the credibility of the immigration system in question.[214]

2. *QUESTIONS OF CONSTITUTIONALITY SHOULD BE AVOIDED*

The prejudice standard should also be rejected because, with the application of the *Accardi* Doctrine, the court can adhere to the "fundamental rule of judicial restraint" and avoid deciding cases on constitutional grounds.[215] The long history of the theory of constitutional avoidance has its basis in Supreme Court case law.[216] Over seventy years ago, Justice Frankfurter stated that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality . . . . unless such adjudication is unavoidable."[217]

. *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *See* Montilla v. I.N.S., 926 F.2d 162, 169 (2d Cir. 1991).
[215] *See* Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 103 (1944).
[216] *See id.*
[217] *Id.*

Before the federal court reaches a question of constitutionality, it must first consider resolution on non-constitutional grounds.[218] In *Jean v. Nelson*, the court stated that because current statutes and regulations provided the petitioners with the relief they sought through their constitutional arguments, so there was no need to address constitutionality.[219] The same is true when discussing the right to private counsel in immigration courts.[220] If a constitutional claim is brought, it is just a means to an end—finding that the denial of the right to counsel was improper. The statute already confers the right, so there is no need to reach the question as to whether due process rights were violated in that case.[221] As an administrative matter, requiring an immigrant to show prejudice because the case is being litigated on constitutional grounds would add to the backload in cases. This no-prejudice standard promotes the most efficient use of judicial resources, which are already notoriously scarce.[222]

B. *Consequences of Removal Proceedings Are Similar to Those in Criminal Law*

The severity of the consequences of removal proceedings for an immigrant are similar to that in criminal law, therefore, a no-prejudice standard should be adopted.[223] In criminal proceedings, an absolute right to counsel exists during federal prosecutions under the Sixth Amendment, which was later extended to the states in *Gideon v. Wainwright*.[224] The idea behind the absolute right to counsel, regardless of whether there was prejudice, in criminal proceedings is that because an attorney is so important when considering the consequences at stake, denying their right to counsel is fundamentally unfair.[225] Because denying counsel to a criminal defendant creates a large disparity between the prosecutor and defendant having to appear *pro se*, courts view the proceedings as being "tainted at its roots."[226] Consequently, the judge

[218] Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981)
[219] Jean v. Nelson, 472 U.S. 846, 854-55 (1985).
[220] *See id.* at 854.
[221] *Id.*
[222] Montilla, 926 F.2d at 169.
[223] Castaneda-Delgado, 525 F.2d at 1301.
[224] *Historical Practice*, Legal Info. Inst., https://www.law.cornell.edu/constitution-conan/amendment-6/absolute-right-to-counsel-at-trial (last visited Dec. 9, 2020).
[225] *Id.*
[226] U.S. v. Robinson, 502 F.2d 894, 895 (7th Cir. 1974).

should not have discretion to determine the amount of prejudice that resulted from the denial.[227]

Just like in the criminal law context, removal in immigration proceedings has consequences that greatly affect the immigrant's life.[228] The Supreme Court has recognized that removal proceedings and deportation "visi[t] great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom . . . Meticulous care must be exercised lest the procedure by which [an alien] is deprived of that liberty not meet the essential standards of fairness."[229] Immigrants often come to the United States because their home country poses danger to the immigrant and their families.[230] Not only are immigrants going to have to face dangers like gang violence, but some immigrants, such as females, are forced to return to a place where they have to face dangers such as sexual violence.[231] These immigrants also often have families whose children may be citizens and spouses who cannot leave the country; therefore, they are also leaving behind the most important people in their life.[232] Similarities can be drawn between the consequences of removal and a criminal defendant facing deprivation of life, liberty, or property.[233] In the immigration context, life-threatening dangers are often what an immigrant may be forced to return to if a removal order is rendered; therefore, the courts need to make sure that they proceed with care in these proceedings to ensure an immigrant's day in court is a meaningful one.[234]

Although immigration proceedings are considered civil proceedings, immigration law is significantly more analogous to a criminal proceeding. In *Turner v. Rogers*, a father facing civil contempt charges for failure to comply with a child support order argued that he had a right to counsel at his hearing.[235] Although facing imprisonment, the court found that the defendant did not have a right to counsel for three reasons: (1) contempt proceedings have no adjudication complex enough to warrant a

[227] *Id.*

[228] Bridges, 326 U.S. at 154.

[229] *Id.*

[230] *See generally* Allison W. Reimann, *Hope for the future? The Asylum claims of women fleeing sexual violence in Guatemala*, 157 U. PA. L. REV. 1200 (2009).

[231] *Id.*

[232] Adams, *supra* note 61, at 169.

[233] *See* Hernandez Lara v. Barr, 962 F.3d 45, 59 (1st Cir. 2020) (Lipez, J., concurring).

[234] *NAT'L IMMIGRATION L. CTR*, *supra* note 1.

[235] *See Turner v. Rogers*, 564 U.S. 431, 446–48, (2011).

right to counsel; (2) because the procedures were not complicated, there were other procedural safeguards to protect pro se defendants, and (3) the person opposing the defendant is not a government attorney, but it is another unrepresented individual.[236] Immigration proceedings are much more complex and do not have those "procedural safeguards" like the ones in the civil cases like *Turner*.[237] When immigrants go unrepresented in complex adversarial proceedings, they are forced to represent themselves against a system that is constantly working against them without these "procedural safeguards."[238]

Proponents of requiring prejudice may argue that a denial of the statutory right to counsel should be given the same standard as an ineffective assistance of counsel claim which requires prejudice. This is not the correct comparison because the two scenarios are distinguishable from each other.[239] During an ineffective assistance of counsel claim, defendants have an attorney present during the proceedings.[240] However, for an ineffective assistance of counsel claim, courts have also held that just because "a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command."[241] If the Supreme Court has held that just because an attorney is present at the proceeding on its own is not enough to fulfill a constitutional right, it does not follow that wholly denying the statutory right to counsel in immigration proceedings fulfills the notion of fairness rooted in due process.

Immigration proceedings are adversarial in nature, just like criminal trials, where two parties present their case in front of a judge who ultimately makes the final decision on the merits presented.[242] Requiring an immigrant, or even a criminal defendant, to show prejudice when she has been denied access to counsel goes against "the basic notion that

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[236] *Id.*

[237] *See id.* at 447–48.

[238] *See The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, *supra* note 31.

. *Id.*

[239] *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

[240] *See id.*

[241] *Id.* at 685.

[242] *Immigration Court Proceedings*, Immigr.ImmigrationImmigr Equal., https://immigrationequality.org/asylum/asylum-manual/immigration-court-proceedings (last visited Dec. 9, 2020).9, 2020).9, 2020).9, 2020).9, 2020).9, 2020).9, 2020) (describing the procedural nature of immigration court hearings). 9, 2020).

the assistance of counsel in adversary proceedings is essential."[243] In the criminal context, it likely would not be expected that a criminal defendant represent themselves in a high-stakes criminal trial. How can we expect to do the same to an immigrant whose well-being and future in our country is on the line?

When dealing with an adversarial system like the American criminal court system, the role of an attorney is crucial; this is why criminal defendants have a right to counsel that is constitutionally conferred.[244] In any adversarial proceeding, such as removal proceedings, the goal of any party is to win the case.[245] This goal of winning motivates each party to "seek out, develop, and offer evidence and to bring persuasive legal doctrines and precedents to a decision maker's attention."[246] In order to prevail in an adversarial proceeding parties are required to gather the best evidence that they can, present the most viable legal theories and doctrines, and develop arguments that will enable them to respond to opposing counsel.[247] This is why counsel plays such an important role in criminal proceedings and it is no less important in removal proceedings.

In removal proceedings, a potential deportee likely does not know the law; therefore, it is hard to expect that they can prevail appearing *pro se*. It is not likely that immigrants can effectively gather a case, structure an argument, and present the relevant evidence needed to prevail during a removal proceeding on their own. It is probably not completely impossible, but it is highly improbable that they can do so without any help from counsel. There is a saying that "a man who is his own lawyer has a fool for a client."[248] This means that a case is likely to end unfavorably when a defendant has to represent himself—even more so when it is a noncitizen that does not understand their proceedings or their rights.

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[243] United States v. Cronic, 466 U.S. 648, 659 (1984).

[244] *See The Adversary System: Who Wins? Who Loses?*, JRANK, https://law.jrank.org/pages/4120/Adversary-System.html JRANK, https://law.jrank.org/pages/4120/Adversary-System.html(last visited Dec. 9, 2020).

[245] *See id.*

[246] Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L.REV. 647,650 656650 (1986).

[247] *Id.*

[248] Rachel Brooks, *The Reasons Why We Need Criminal Lawyers*, ATT'Y AT L. MAG. (July 17, 2019), https://attorneyatlawmagazine.com/the-reasons-why-we-need-criminal-lawyers. https://attorneyatlawmagazine.com/the-reasons-why-we-need-criminal-lawyers.

Like in the criminal justice system, immigration lawyers are not simply servants to their clients.[249] Immigration lawyers are key assets to their client's case.[250] The Ninth Circuit held that "the absence of counsel can change [a respondent's] strategic decisions, prevent him or her from making potentially-meritorious legal arguments, and limit the evidence the [respondent] is able to include in the record."[251] It is so likely that not being afforded the right to counsel would change the outcome of the proceeding, calculating the amount of prejudice that would result from such a case would be too time consuming and likely would not be worth the hassle.[252]

C. *The Immigration Courts Are Filled with Systematic Hurdles Inherently Prejudicial to Immigrants*

The United States immigration courts are plagued with systematic hurdles inherently putting immigrants at a significant disadvantage and requiring them to prove prejudice is a waste of scarce time and resources that worsen this disadvantage.[253] In immigration cases, because there is no right to appointed counsel, immigrants often go unrepresented because of the scarcity of access to counsel.[254] This is a concern because when immigrants have counsel, there are higher success rates of relief from removal and detention.[255] Studies conducted by the National Study of Access to Counsel have determined that, "detained people who have a lawyer are 10.5 times more likely to be allowed to stay in the U.S. than if they do not have one."[256]

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[249] *See* Samuel L. Alito, *The Role of the Lawyer in the Criminal Justice System*, The Federalist Soc'y (Dec. 1, 1998), https://fedsoc.org/commentary/publications/the-role-of-the-lawyer-in-the-criminal-justice-system. https://fedsoc.org/commentary/publications/the-role-of-the-lawyer-in-the-criminal-justice-system.

[250] *Id.*

[251] Montez-Lopez v. Holder, 694 F.3d 1085, 1092 (9th Cir. 2012).

[252] Strickland v. Washington, 466 U.S. 668, 692 (1984).

[253] Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, Am. Immigration. Councils. (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[254] *Id.*

[255] *Id.*

[256] Nat'l Immigr. L. Ctr. 1, *supra* note 1.

1. *IMMIGRATION LAW IS COMPLEX WITH ROOM FOR JUDICIAL DISCRETION*

Immigration proceedings are some of the most complex matters one can go through, and the complexity is exacerbated without the help of counsel.[257] Many courts have recognized that "our immigration statutory framework is notoriously complex." [258] Some courts have gone as far as vividly elaborating on the complexity:

> Tax Laws and the Immigration and Nationality Acts [INA] are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges . . . Congress, . . . apparently confident of the aphorism that human skill, properly applied, can resolve any enigma that human inventiveness can create, has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle.[259]

The complexity of removal proceedings renders the assistance of counsel practically vital for the immigrant to have a chance at relief from removal.[260] Immigrants who are forced to fare without an attorney have to go through complex immigration proceedings on their own with no knowledge of the legal system.[261] Immigrants are often not even aware of possible legal claims or potential relief available because they do not know how to handle their own case, much less state their case in front of a judge.[262] Not only do immigrants often have no knowledge of the legal system, but they also often do not speak English.[263] This makes it even harder to be able to communicate with the different officials in the legal system and navigate through their proceedings even though a translator may be available.[264] This is the epitome of an unfair proceeding and prejudice should be presumed.

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[257] *Removal and Deportation Lawyers in New York City*, MY ATT'Y USA, http://myattorneyusa.com/deportation-and-removal (last visited Dec. 9, 2020).

[258] *See* I.N.S. v. Nat'l Ctr. for Immigr. Rights, Inc., 502 U.S. 183, 195 (1991) (referencing our "complex regime of immigration law").

[259] Lok v. I.N.S., 548 F.2d 37, 38 (2d Cir. 1977).

[260] *See id.*

[261] *Id.*

[262] Alicia Fullard, *Facing Deportation: My Story About the Promise of Having a Lawyer in Immigration Court*, VERA INST. OF JUST. (Mar. 6, 2020), https://www.vera.org/blog/facing-deportation-my-story-about-the-promise-of-having-a-lawyer-in-immigration-court.

[263] *Id.*

[264] *Id.*

Not only are immigration laws and the court system complex, but a plethora of standards in the immigration courts are largely discretionary; therefore, there is room for subjectivity.[265] Some of these standards require an immigration judge to make decisions based on factors such as strength of "family ties within the United States," "evidence of hardship to the respondent and his family if deportation occurs," and "other evidence attesting to a respondent's good character."[266] This is where the significance of having an attorney or some kind of legal representation is crucial.

Attorneys, or any kind of legal representation, can help combat the complexity and subjectivity issues that are inherent in immigration proceedings.[267] When an attorney represents the government, legal representation may also restore accuracy by arguing and bringing forth issues in a more balanced way.[268] Having an attorney is therefore "indispensable when proceedings present complex issues of law, unusual risks of factfinding error, or the binary lopsidedness that has been the cardinal concern in right-to-counsel jurisprudence for centuries."[269] Prejudice is so likely under these circumstances that requiring immigrants to show this will exacerbate the backload in cases moving through the court system.

2. *The Immigration Courts Are Not an Impartial Tribunal*

In any court system, the judges should be impartial adjudicators, which is the cornerstone of our justice system; however, the immigration courts are far from being an impartial tribunal.[270] This seemingly basic principle seems to conflict with the looming threat of retaliation from the Attorney General who may be displeased with a decision.[271] The fact that the immigration courts are entities of the DOJ already presents a conflict of interest—political overlap.[272] Impartiality is also undermined

[265] S. Poverty L. Ctr., *supra* note 31.

[266] In re C-V-T, No. 3342, 1998 WL 151434, at *11 (B.I.A. 1998) (order granting cancellation of removal).

[267] Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005) (stating that lack of counsel may serve to "'magnify the risk of erroneous factfinding"' (quoting Santosky v. Kramer, 455 U.S. 745, 762 (1982))).

[268] Benjamin Good, *A Child's Right to Counsel in Removal Proceedings*, 10 Stan. J. Civ. Rts. & Civ. Liberties 109 (2014).

[269] *Id.* at 143.

[270] *See The Attorney General's Judges, supra* note 31.

[271] *Id.*

[272] *Id.*

because immigration judges are often hired and fired according to their ideological beliefs rather than professional ability because they are supervised by the Attorney General.[273]

Previous Attorney Generals, such as William Barr, have allowed immigration judges to violate immigrants' rights through a systemic manner which also undermines the integrity of the immigration courts.[274] Immigration judges have failed to provide consistent, fair trials and hearings because of the influence the Attorney General has on their job performance.[275] Attorneys can help make sure that immigration judges are not prosecuting from the bench for the sake of job evaluations and that the proceedings are as impartial as possible.[276] This is why immigrants represented are far more likely to succeed in removal proceedings, more likely to be granted relief from detention, and more likely to show up to court hearings which are crucial to their case.[277] The right to an attorney is an important procedural safeguard to ensure that the immigration judges do not abuse those discretionary standards and do not fall prey to the looming disciplinary actions of the Attorney General.[278] This is especially important when judges seem to be " faithful to bias to the government, but not faithful to the law."[279]

If immigrants are denied counsel and forced to proceed *pro se*, they will have to face a prosecutor that works for the entity trying to remove them, which is unfair at the outset.[280] The attorney arguing on behalf of the government is a representative of the Immigration and Customs Enforcement—an entity of DHS. To say that whoever is representing the government is more prepared to present their case is an understatement.[281] By denying immigrants their right to counsel, the government is stripping their chance to having counsel who has been educated and trained to argue in these proceedings. The legal representative of the immigrant understands how immigration proceedings work and is able

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Advancing Universal Representation*, VERA INST. JUST., https://www.vera.org/advancing-universal-representation-toolkit (last visited Dec. 9, 2020).

[278] *See The Attorney General's Judges, supra* note 31.

[279] *Id.*

[280] *See Attorney*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/careers/attorney (last updated Jan. 7, 2021).

[281] *Id.*

to thoroughly inform an immigrant of their rights. When mixing subjectivity, complexity, and an unequal balance of power, it cannot follow that depriving an immigrant of a crucial procedural safeguard to navigate their proceedings is not unfair to begin with. Prejudice is so likely in the immigration context due to language barriers, little knowledge of the law, and the complexity of the system that applying a bright line no-prejudice standard would promote judicial efficiency.[282]

3. *THE IMMIGRATION COURTS HAVE BECOME INCREASINGLY WEAPONIZED*

Under the Trump administration, immigration courts have become weaponized as a tool to produce more removal orders. Adopting a no-prejudice standard would provide a check in enforcement of a crucial procedural safeguard.[283] Through numerous public statements and policy decisions, it has been clear that Trump's administration had the goal of becoming enforcers of deportation rather than impartial adjudicators.[284] The United States boasts about the right to due process because of its implications to fair proceedings, but just recognizing that in criminal law is not enough. A former immigration judge even stated, when speaking about the Trump administration's Attorney General, that there had been "no interest whatsoever in fairness, impartiality, and due process. Their only interest has been in producing more removal orders and jiggering the system to do that . . . "[285]

In order to keep the integrity of the justice system in the United States, this notion of fundamentally fair proceedings needs to expand to immigration proceedings. Immigration courts should not be able to arbitrarily pick and choose when it will afford fairness and when it will not. If we let the immigration courts strip away a crucial line of defense for immigrants in these proceedings, weaponization of the immigration courts will continue because of the chances of deportation without counsel.[286] Decisions like this will be seen as a way to cut corners in deportation proceedings if the federal courts allow the immigration courts to continue to infringe on the right to counsel; therefore, the federal courts need to adopt a no-prejudice standard.

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[282] *See* Strickland v. Washington, 466 U.S. 668, 692 (1984).
[283] *See The Attorney General's Judges*, *supra* note 31.
[284] *Id.*
[285] *Id.*
[286] *State and County Details, supra* note 11.

CONCLUSION

When a noncitizen is facing removal, denying the right to counsel should not implicate a prejudice requirement to have the deportation order vacated and remanded with the assistance of counsel. The statutory right to counsel is so important that it should not be subject to a harmless error standard. Regardless of how a noncitizen finds himself in the immigration courts, individuals who do not have an attorney statistically do not fare as well as those who do, resulting in unfavorable outcomes. Under the *Accardi* Doctrine, the courts have recognized the importance of this right. Therefore, immigration judges must follow the rules and regulations set forth in the INA and not deprive noncitizens of their statutory right to counsel in removal proceedings—and when they do deny the right to counsel, prejudice should not be required to vacate a deportation order.

Although immigration proceedings are civil in nature and, therefore, are not extended the constitutional right to appointed counsel, the similarity of consequences to criminal proceedings cannot be denied. Due to the similarity in consequences, such as permanent exile, the federal courts need to recognize the importance of the right and not require the noncitizen to show prejudice. Also, not only is there a great imbalance of power, but the immigration court system and immigration law are complex, highly subjective, impartial, and have become increasingly weaponized. When noncitizens are deprived of this right, they are forced to represent themselves in high-stakes proceedings in a language that they often do not know and without the ability to effectively defend themselves by articulating their claims. The inherent partiality further exacerbates the likelihood of deportation without a meaningful hearing. In a system that consistently dehumanizes those that go through it, protecting this procedural safeguard has become increasingly important to restore procedural justice and to make sure to recognize the distinctiveness of the right.