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USING THE LANGUAGE OF *TURNER V. ROGERS* TO ADVOCATE FOR A RIGHT TO COUNSEL IN IMMIGRATION REMOVAL PROCEEDINGS

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I. INTRODUCTION

> Like many compromises in law and life, the one at the highest level of [*Turner v. Rogers*[1]] only delays to some near-future Court Term the resolution of the tough questions about how far the Sixth Amendment, or the due process clause, ought to extend into these hybrid cases.[2]

In *Turner v. Rogers*, the Supreme Court of the United States declined to extend the right of appointed counsel to an indigent defendant held in contempt for violating a child support order.[3] At first glance, this holding is a seemingly detrimental blow to the hope for appointed counsel in civil proceedings for indigent parties.[4] However, a closer reading of the dictum in *Turner* may very well create the right to appointed counsel in other civil proceedings.[5] This Comment demonstrates how the Supreme

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

2. Andrew Cohen, *Turner's Trumpet: Child Support and the Right to Counsel*, ATLANTIC (June 21, 2011), http://www.theatlantic.com/national/archive/2011/06/turners-trumpet-child-support-and-the-right-to-counsel/240753.

3. *Turner*, 131 S. Ct. at 2520.

4. *See* Mark Walsh, *A Sour Note from Gideon's Trumpet*, A.B.A. J., Sept. 2011, at 16, *available at* http://www.abajournal.com/magazine/article/a_sour_note_from_gideons_trumpet/ (interviewing various legal scholars on their views regarding the holding of *Turner*); *Archive for the "Symposium (Turner v. Rogers)" Category*, CONCURRING OPS., http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers (last visited Feb. 3, 2013) (discussing the implications of the holding in *Turner* to the cause of appointed counsel in civil proceedings).

5. The Court specifically stated that it would not address due process concerns that arise in a complex case where fairness requires appointed

Court has effectively given new life to the argument for a right to appointed counsel in immigration removal proceedings.

It has long been established that immigration removal proceedings are solely civil proceedings.[6] As such, the protections of the Sixth Amendment do not apply in removal proceedings.[7] Nonetheless, noncitizens have a right to procedural due process[8] under the Fifth and Fourteenth Amendments.[9]

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counsel. *Turner*, 131 S. Ct. at 2520. Further, the Court would not address proceedings in which a parent owed child support to the state because the government would be represented by skilled counsel. *Id.* Also, it did not address child support proceedings in which counsel represented the custodial parent herself. *Id.* The fact that the Court did not address these areas is relevant because it means the Court must find these areas or circumstances significant and thus possibly requiring appointed counsel. This language is further analyzed in Section III of this Comment.

6. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (explaining that immigration removal proceedings are civil actions that determine whether a noncitizen is eligible to remain in the United States, but that the proceedings are not meant to punish unlawful entry into the United States).

7. *See Turner*, 131 S. Ct. at 2516 (stating that "the Sixth Amendment does not govern civil cases"). The Court explained that a state may provide fewer procedural protections in civil proceedings than in criminal proceedings because procedural due process governs civil proceedings, not the Sixth Amendment. *Id.*; *see also* United States v. Ward, 448 U.S. 242, 248 (1980) (stating that the protections of the Sixth Amendment are only available in criminal prosecutions); *Lopez-Mendoza*, 468 U.S. at 1038 (explaining that the various protections afforded in criminal cases do not apply in immigration removal proceedings because those proceedings are civil and not criminal); Xu Yong Lu v. Ashcroft, 259 F.3d 127, 131 (3d Cir. 2001) (holding that the Sixth Amendment guarantee of appointed counsel does not apply to immigration removal proceedings); Baires v. I.N.S., 856 F.2d 89, 90 (9th Cir. 1988) (holding that noncitizens in removal proceedings do not have a Sixth Amendment right to appointed counsel but do have a right to procedural due process under the Fifth Amendment).

8. 16C C.J.S. *Constitutional Law* § 1446 (2011) (noting that "[t]he phrase 'due process of law' has the same meaning in both the Fifth and the Fourteenth Amendments"). The Fourteenth Amendment merely applies the same principles of due process to states as is applied to the federal government by the Fifth Amendment. *Id.* While they are both "coextensive," the due process protection under the Fifth Amendment is not necessarily coextensive to the Fourteenth Amendment in all situations, such as when the federal government has some overriding interest that justifies legislation that would be impermissible as a state level action. *Id.* According to C.J.S., substantive due process analyses are the same under both the Fourteenth and Fifth Amendments. *Id.* Thus, the line of cases involving the right to appointed counsel under the Fourteenth Amendment can be applied to federal causes of action under Fifth Amendment due process and vice versa. *Id.*

9. *See* Am.-Arab Anti-Discrimination Comm. v. Reno, 883 F. Supp. 1365, 1372 (C.D. Cal. 1995) (recognizing that noncitizens have a right to due process once they have entered the United States); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (explaining that the Due Process Clause applies to all people in the United States, including aliens, regardless of their current status as documented or undocumented); Demore v. Kim, 538 U.S. 510, 523 (2003) (citing Reno v. Flores, 507 U.S. 292, 306 (1993)) (confirming that the Fifth

While this Comment, like others,[10] argues for the right to appointed counsel for indigent noncitizens in removal proceedings, it approaches this argument through a post-*Turner* lens in order to demonstrate how the Court's analysis of procedural due process and the dictum in its opinion advance pre-*Turner* arguments on this point. Others have also argued for a right to appointed counsel using the language of *Turner*, but this Comment creates a more complete argument by using examples of removal proceedings and other civil right-to-counsel holdings.[11] In addition, it calls for a revision of the statutory language of the Immigration and Nationality Act.

Section II of this Comment first discusses how procedural due process rights for noncitizens have been established and also provides a history of the case law governing a right to appointed counsel in civil proceedings, specifically immigration removal proceedings. Section III then offers an in-depth analysis of the language in *Turner* to illustrate how it may be utilized to advance the argument for appointed counsel for indigent noncitizens in immigration removal proceedings. Section IV proposes that advocates for the right to appointed counsel in immigration removal proceedings use the language of *Turner* and other court holdings[12] to argue that it is a right the Constitution guarantees. Lastly, this Comment proposes that the language of the Immigration Nationality Act ("INA") be modified to statutorily implement indigent noncitizens' right to appointed counsel in immigration removal proceedings.

Amendment entitles all aliens to due process of law in removal proceedings before a final removal order can be entered); United States v. Barraza-Leon, 575 F.2d 218, 220 (9th Cir. 1978) (holding that an alien subject to removal must be afforded due process).

10. *See generally* Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C. R. & C. L. 113 (2008) (arguing for the right to appointed counsel in removal proceedings under due process and case law); Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169 (2010) (arguing for the right to appointed counsel in removal proceedings and showing the harm caused in the absence of counsel).

11. *See* Mark Noferi, *"Turner" Could Support Appointed Counsel for Immigrants*, N.Y. L.J., July 22, 2011, at 1; Cyrus D. Mehta, *Right to Appointed Counsel in Removal Proceedings? The Supreme Court May Have Opened the Door in* Turner v. Rogers, INSIGHTFUL IMMIGR. BLOG (June 29, 2011, 9:16 PM), http://cyrusmehta.blogspot.com/2011/06/right-to-appointed-counsel-in-removal.html; Daniel Curry, *The March Toward Justice: Assessing the Impact of* Turner v. Rogers *on Civil Access-to-Justice Reforms*, 25 GEO. J. LEGAL ETHICS 487, 493-94 (2012) (all arguing that the analysis in *Turner* supports a right to appointed counsel for noncitizens).

12. The other holdings involve courts tackling appointed counsel and procedural due process issues not necessarily in the context of immigration removal proceedings. They are discussed in Section II.

II. BACKGROUND

Arguments are abundant in the legal community for the right to counsel in the context of immigration removal proceedings.[13] This section therefore discusses a noncitizen's right to procedural due process protections and also provides the historical development of case law, regarding the right to appointed counsel, both inside and outside the context of immigration removal proceedings.

A. Noncitizens Have a Constitutional Guarantee of Due Process

The Supreme Court holds that procedural due process must be afforded to citizens and noncitizens alike.[14] Due process rights for noncitizens are triggered once they enter the United States.[15] In *Zadvydas v. Davis* the Court asserted that noncitizens are afforded due process, whether they are "lawful, unlawful, temporary, or permanent."[16] Therefore, a noncitizen placed in removal proceedings can bring a claim for violation of his constitutional right to procedural due process just as if he is a citizen of the United States.[17]

To analyze an alleged procedural due process violation, a court must apply the factors established in *Mathews v. Eldridge*:[18]

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13. Kaufman, *supra* note 10.

14. *See Zadvydas*, 533 U.S. at 693 (holding that "once an alien enters the country, the legal circumstance changes, for the Due Process clause applies to all 'persons' within the United States, including aliens").

15. *Am. Arab*, 833 F. Supp at 1372. "[T]he critical distinction is not whether the alien is applying for an immigration benefit that requires a showing of admissibility, but simply whether the alien has entered the United States." *Id.*; *see also* Landon v. Plascencia, 459 U.S. 21, 32 (1982) (stating, in dicta, that once an alien has entered the border of the United States they have established enough ties with the country to be afforded due process of law).

16. *Zadvydas*, 533 U.S. at 679 (2001).

17. *Am.-Arab*, 883 F. Supp. at 1372. The District Court in *American Arab* stated that in cases where a noncitizen claims that procedural due process rights have been violated, courts consistently use the *Mathews* balancing factors. *Id.* (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)); *see also Landon*, 459 U.S. at 34; Rafeedie v. INS, 880 F.2d 506, 523 (D.C. Cir. 1989) (applying *Mathews* factors in immigration procedural context).

18. *Turner*, 131 S. Ct. at 2517. "[W]e consequently determine the 'specific dictates of due process' by examining the 'distinct factors' that this court has found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair." *Id.* (citing *Mathews*, 424 U.S. at 335). In any case concerning a procedural due process violation, the Court has turned to the *Mathews* factors. *See e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (using the *Mathews* factors to determine whether a due process violation occurred when the plaintiff was detained indefinitely due to his classification as an "enemy combatant"); Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18, 31 (1981) (applying the *Mathews* factors in order to determine whether a right to appointed counsel existed for indigent parents in a proceeding that could

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal administrative burdens that the additional or substitute procedural requirement would entail.[19]

Accordingly, the following subsection discusses how the *Mathews* factors have been used to argue for a right to appointed counsel in immigration removal proceedings.

B. No Definitive Answer by the Courts

The language of the Immigration and Nationality Act ("INA") is the starting point and the source of a right to counsel in immigration removal proceedings, but noncitizens currently must pay for their legal representation.[20] The INA states that noncitizens "shall have the privilege of being represented, at no expense to the government,[21] by counsel of the alien's choosing who is authorized to practice in such proceedings."[22] Nonetheless, courts have held that there are circumstances[23] in which a right to

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result in the termination of parental rights).

19. *Mathews*, 424 U.S. at 335.

20. Immigration and Nationality Act § 292, 8 U.S.C. § 1362 (2006) [hereinafter INA § 292].

21. Even in situations where the noncitizen is able to retain counsel at his or her own expense, the right to counsel (at government expense) safeguard fails. *Baltazar Alcazar* involved a noncitizen couple that had each individually secured counsel and petitioned for suspension of removal. Baltazar Alcazar v. I.N.S., 386 F.3d 940, 941 (9th Cir. 2004). The couple primarily spoke Spanish and had a sixth grade education. *Id.* at 943. On the day of the hearing, an attorney did not appear for the husband, but one did for the wife. *Id.* at 942. The judge set a new date for the hearing to allow for the husband to retain new counsel. *Id.* However, the judge also banned the entire firm that had originally represented the husband from doing so for the rest of the proceedings. *Id.* When the same firm represented the husband and wife at a later proceeding, the judge refused to allow the attorney to represent the husband. *Id.* The judge then told the wife she could either proceed pro se with her husband, or separate their trials and continue with her attorney. *Id.* at 943. The couple decided to proceed together pro se. *Id.* The immigration court held that the couple had waived their right to counsel and did not sufficiently establish eligibility for suspension of deportation. *Id.* at 944. The Ninth Circuit, on appeal, remanded the decision and held that there had to have been "a knowing and voluntary waiver of the right to counsel" in order for the waiver to have been sufficient. *Id.* at 945, 949. The court held that their lack of understanding of their role in the proceedings or their burden severely prejudiced them. *Id.* at 948.

22. INA § 292.

23. Lack of counsel can lead to detrimental consequences, such as the erroneous detention of even legal permanent residents. In *Casas-Catrillon v. Department of Homeland Security*, the plaintiff filed a writ of habeas corpus after being detained for three years while awaiting the court's review of a final

appointed counsel exists in immigration removal proceedings.[24]

For instance, in *Aguilera-Enriquez v. I.N.S.*, a petitioner argued that his right to due process had been violated because he was not afforded assistance of counsel during his removal proceedings.[25] The Sixth Circuit ultimately held that he was not entitled to appointed counsel, but first articulated a test to determine whether appointed counsel was necessary in his case.[26] The court's test for "whether due process requires the appointment of counsel for" a noncitizen in removal proceedings considers whether the "assistance of counsel would be necessary to provide 'fundamental fairness the touchstone of due process.'"[27]

In *United States v. Campos-Asencio*, the Fifth Circuit stated that a noncitizen "has a right to counsel if the absence of counsel would violate due process under the Fifth Amendment."[28] The court did not offer a test in order to determine whether the absence of counsel would violate due process for the noncitizen, but it clearly indicated that there are circumstances under which appointed counsel is necessary.[29]

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removal order. Casas-Catrillon v. Dep't. of Homeland Sec., 535 F.3d 942, 944-45 (9th Cir. 2008). The plaintiff was a legal permanent resident of the United States and was imprisoned for a burglary charge. *Id.* The Department of Homeland Security served the plaintiff with a notice to appear and the immigration judge found that he was a removable alien due to his commission of two crimes of "moral turpitude." *Id.* Originally, the plaintiff filed the petition for habeas corpus with the district court because he was a pro se litigant unfamiliar with the process. *Id.* at 946. After nearly three more years of detention, the plaintiff's petition was finally heard, but only because of a Congressional decision to move all pending habeas corpus petitions to the Federal Circuit Court of Appeals. *Id.* at 947. The Ninth Circuit was finally able to hear his petition and reversed and remanded the case to determine whether bond-hearing requirements had been met—but this was only after the erroneous seven-year detention period. *Id.* at 952.

24. *See* Aguilera-Enriquez v. I.N.S., 516 F.2d 565, 568 (6th Cir. 1975) (applying a test of "fundamental fairness" to determine whether appointed counsel was necessary in immigration removal proceedings); United States v. Campos-Asencio, 822 F.2d 506, 509 (5th Cir. 1987) (stating that although there is no Sixth Amendment right to counsel in immigration removal proceedings, there can be a right to counsel if absence of counsel would violate procedural due process under the Fifth Amendment).

25. *Aguilera-Enriquez*, 516 F.2d at 568.

26. *Id.* The court stated that courts have been "vigilant to ensure that aliens" are afforded their constitutional rights. *Id.* It explained that the test as to whether due process requires the appointment of counsel in an immigration removal proceeding is based on fundamental fairness. *Id.* The court articulated this test instead of the *Mathews* test because, simply enough, *Mathews v. Eldridge* would not be decided until the following year. However, this "fundamental fairness" test is part of the basic framework of the *Mathews* factors and a due process analysis.

27. *Aguilera-Enriquez*, 516 F.2d at 568 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).

28. *Campos-Asencio*, 822 F.2d at 509.

29. *Id.* The court in *Campos* explicitly stated that there are circumstances

C. Cases Outside of Immigration Removal Proceedings

The Supreme Court long ago established the right to appointed counsel in criminal and criminal contempt proceedings.[30] However, the Court has never definitively and explicitly answered the question of when due process requires a right to appointed counsel in civil proceedings. Nonetheless, the Court's language in decisions regarding a right to counsel in civil proceedings has left the door open. The Court seemingly admits that there are circumstances in which due process requires counsel be provided to an indigent defendant in civil proceedings.[31] Moreover, Court holdings in a few landmark cases outside the criminal realm have found the right to appointed counsel.

For instance, the Supreme Court held, in *In re Gault*, that juveniles in delinquency proceedings are entitled to appointed counsel under the Due Process Clause because of the similarity to criminal proceedings.[32] In the context of civil proceedings,[33] the

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under which the Fifth Amendment would require a right to appointed counsel in immigration removal proceedings. *Id.* However, the court did not establish any test. *Id.*

30. *See* Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963) (holding that the federal right to counsel applies to states through incorporation under the Fourteenth Amendment); Powell v. Alabama, 287 U.S. 45, 65 (1932) (establishing a federal requirement for the right to appointed counsel in criminal cases).

31. *See generally Lassiter*, 452 U.S. 18 (continuing the trend and using the *Mathews* factors in determining the right to appointed counsel on a case-by-case basis instead of creating a hard-and-fast rule).

32. *In re Gault* involved a fifteen-year-old boy, already on probation, who was arrested after making lewd remarks to a neighbor over the phone. In re Gault, 387 U.S. 1, 4 (1967). No notice was given to the parents that the juvenile had been arrested. *Id.* at 5. After about three or four days in custody, the child was released and soon received a notice about further hearings on his "juvenile delinquency." *Id.* at 6-7. The child was charged with "lewd phone calls" and was sentenced as a delinquent to the State Industrial School until he turned twenty-one "unless sooner discharged by due process of law." *Id.* at 7-8. A writ of habeas corpus was then filed with the Supreme Court of Arizona, which dismissed the writ. *Id.* at 10. In the writ, the child asserted that he had a right to counsel under the Fourteenth Amendment in juvenile proceedings when taken from the custody of his parents and put in a state institution. *Id.* The Supreme Court of the United States stated that the juvenile proceedings are like criminal proceedings, and that the child was not afforded the same due process rights as an adult. *Id.* at 29. If the child had been over eighteen, he would not have been in juvenile court and would have received the procedural protection of the Sixth Amendment in criminal court for the charges of lewd conduct. *Id.* The Court ultimately held that the assistance of counsel is necessary for the determination of delinquency in juvenile proceedings due to the possibility of incarceration in a state institution until the juvenile reaches the age of twenty-one. *Id.* at 37.

33. In *Lassiter*, Abby Gail Lassiter was found to have neglected her child for not providing proper medical care. *Lassiter*, 452 U.S. at 20. A year later, she was convicted of second-degree murder of an adult and sentenced to twenty-five to forty years imprisonment. *Id.* The Department of Social

Supreme Court stated that a right to appointed counsel can "exist only where the litigant may lose his physical liberty."[34] According to the Court, determining whether appointed counsel is necessary will be made on a case-by-case basis.[35]

Most recently, in *Turner v. Rogers*, the Supreme Court addressed the issue of whether counsel should be appointed when an indigent party faces incarceration due to civil contempt.[36] In *Turner*, a father was held in contempt of court for violating a child support order.[37] Turner had been held in contempt on five previous occasions for failure to pay child support.[38] In two of the prior contempt holdings, he spent a few days in jail before paying the child support and being released.[39] However, by the fifth time, the Court sentenced Turner to six months in jail due to his repeated failure to make child support payments.[40] Following his sentence, Turner appeared at a sixth contempt hearing in which the Court sentenced him to another twelve months imprisonment for his failure to pay.[41] With the help of a pro bono attorney, Turner appealed his sentence. On appeal, he claimed that he was entitled to have appointed counsel at the contempt hearing.[42] After the Supreme Court of South Carolina ruled that he had no such right, the Supreme Court of the United States granted certiorari.[43]

In analyzing whether Turner had a right to appointed

Services then petitioned the court to terminate her parental rights. *Id.* at 21. In the parental right termination proceedings, Lassiter proceeded without counsel and did not claim that she was indigent. *Id.* at 22. Lassiter appeared pro se in the proceedings, and the Court ultimately terminated her parental rights. *Id.* at 24. On appeal, Lassiter argued that, due to her indigence, she was entitled to appointed counsel under the Due Process Clause of the Fourteenth Amendment. *Id.* The North Carolina Court of Appeals denied Lassiter's arguments, and the North Carolina Supreme Court denied the application for review. *Id.* The Supreme Court of the United States granted certiorari, and held that the Due Process Clause requires a determination about what "fundamental fairness" is in a particular situation by looking at precedent and the interests at stake. *Id.* at 25. The Court then used the *Mathews* factors in order to determine whether counsel should have been appointed for Lassiter. *Id.* at 27. The Court ultimately held that an indigent litigant only has a right to appointed counsel when there is a possibility of deprivation of physical liberty. *Id.* at 26-27. Therefore, Lassiter was not entitled to appointed counsel because she did not face loss of physical liberty. *Id.* at 33.

34. *Lassiter*, 452 U.S. at 25.
35. *Id.* at 26, 31.
36. *Turner*, 131 S. Ct. at 2512.
37. *Id.* at 2513.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 2514.
43. *Id.*

counsel,[44] the Supreme Court used the factors in *Mathews v. Eldridge* to determine whether his right to procedural due process was violated.[45] The Court found that, because of the additional procedural safeguards available, there was no necessary right to appointed counsel.[46] However, in Turner's case, the Court found that the judge had failed to follow these additional procedural safeguards.[47] Due to this failure, the Court remanded the case to determine whether Turner could make the child support payments.[48]

The Court's holding that there is no right to appointed counsel in cases like *Turner* is detrimental to the argument for the right to appointed counsel in any civil proceeding.[49] However, the Court in *Turner* emphasized that its holding was narrowly tailored

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44. In analyzing Turner's argument that the Due Process Clause of the Fourteenth Amendment incorporated a right to counsel for indigent defendants that may face incarceration, the Court determined the minimum due process required for a defendant in Turner's position. *Id.* at 2518. This issue was technically outside of what the writ of certiorari granted, which was whether a civil right to counsel exists under the Due Process Clause of the Fourteenth Amendment. *Id.* at 2524 (Thomas, J., dissenting). The dissent in *Turner* criticizes the majority for this action. *Id.*

45. *Id.* at 2517-18. The Court held that it must use the "distinct factors" that the Supreme Court has previously used in deciding what procedural due process requires. *Id.*

46. *Id.* at 2518-19. The Court stated that an inquiry into the defendant's ability to pay is determined prior to providing the defendant with counsel when these additional procedures are followed:

> [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 status; [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.

Id. The Court held that these safeguards were enough protection and therefore, there was no need for appointment of counsel. *Id.* at 2520.

47. *Id.* The judge at the contempt proceedings made no finding concerning Turner's ability to pay nor did he ask any follow up questions on this issue. *Id.* at 2513-14. Further, the judge left the prewritten financial form blank and did not mark whether Turner had the ability to pay or not. *Id.* This failure to address the ability to pay is why the Supreme Court ultimately remanded the case to determine whether Turner had the ability to pay. *Id.* at 2520.

48. *Id.*

49. *Id.* Many of those in the "Civil Gideon" movement, the movement arguing for a right to appointed counsel in civil proceedings, saw *Turner* as a great chance for the Supreme Court to finally rule for civil appointed counsel. CONCURRING OPINIONS, *supra* note 4. When the ruling was issued in June 2011, many of those scholars were upset that the Court skated the issue and did not ultimately decide the larger question of when civil appointed counsel is a constitutional right. *Id.* Other scholars recognized that there were potential positive changes that could arise out of the decision, and that the language itself could eventually help argue for a right to appointed counsel in other circumstances. *Id.*

to circumstances involving an indigent defendant held in contempt for violating a child support order when the opposing party also does not have counsel.[50] This holding, therefore, does not apply to other civil proceedings.[51] Rather, the dictum in *Turner* and the Court's specific language aids the argument for a right to appointed counsel in immigration removal proceedings.[52] It does so by seemingly creating three separate categories that the Court deems areas where appointed counsel may be necessary. As the next section demonstrates, these categories can all be directly applied to the circumstances of indigent defendants that are involved in immigration removal proceedings.

III. ANALYSIS

As provided, *Turner* ultimately held that there is no automatic right to appointed counsel in civil cases found in the Due Process Clause.[53] However, the Court explicitly stated that its narrow holding only applied to civil contempt proceedings instigated for failure to pay child support when the opposing party does not have counsel.[54] Thus, advocates can utilize the dictum in *Turner* to argue that due process requires appointment of counsel for an indigent noncitizen in immigration removal proceedings.[55]

A. The Dictum of Turner

By narrowly tailoring its holding in *Turner*, the Court explicitly provided the exact circumstances in which the Due

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50. *Turner*, 131 S. Ct. at 2520. "We do not address civil contempt proceedings where the underlying child support payment is owed to the state . . . nor do we address what due process requires in an unusually complex case where a defendant 'can fairly be represented only by a trained advocate.'" *Id.*

51. *Id.* The Court narrowly tailored its ruling to:

> [T]he provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the state provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute relevant information, and court findings).

Id.

52. Section III elaborates on this argument using the dictum of the holding and its specific language narrowing the application of the holding to show that an argument can be made for the necessity of appointed counsel in immigration removal proceedings.

53. *Turner*, 131 S. Ct. at 2520.

54. *Id.*

55. Legal scholars have previously proposed using the language of *Turner* in order to advocate for a right to appointed counsel in immigration removal proceedings. *See supra* text accompanying note 11. This Comment furthers these proposals by combining case law and precedent to produce a more complete argument and, unlike the other articles, this Comment also proposes alteration to the language of the INA.

Process Clause does not require appointed counsel: a "civil contempt proceeding to an indigent individual who is subject to a child support order, even if that individual faces incarceration" in which counsel does not represent the opposing party to whom the funds are owed, and the state provides additional procedural safeguards for the indigent individual.[56] Under the *Mathews* test, while the Court found Turner's interest compelling, he nonetheless lost on the remaining *Mathews* factors.[57] Because the Court found that "additional procedural safeguards" were available during the contempt proceedings, it concluded that Turner was adequately protected without appointed counsel.[58]

Turner's holding qualified that it does not apply to: (1) civil contempt proceedings where the government is a party because "the government is likely to have counsel or some other competent representative;" or (2) "an unusually complex case where a defendant 'can fairly be represented only by a trained advocate.'"[59]

The following subsection considers this concept of "additional procedural safeguards" available in certain civil proceedings, but demonstrates that these safeguards are minimal in immigration removal proceedings.

B. The Additional Procedural Safeguards in Turner *Are Not Available in Immigration Removal Proceedings*

When the Court in *Turner* analyzed the *Mathews*'s factor of "additional procedural safeguards," it also provided a list of examples of what these potential procedural safeguards could be.[60] Those potential safeguards are:

> [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; and [4] an express finding by the court that the defendant has the ability to pay.[61]

According to the Court, as long as the state institutes these procedural safeguards or their equivalent, then there is no need for appointed counsel in civil proceedings.[62] Clearly, these precise examples of procedural safeguards do not apply directly to immigration removal proceedings. However, as illustrated below, even an equivalent of *Turner*'s procedural safeguards cannot be

56. *Turner*, 131 S. Ct. at 2520.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 2519.
61. *Id.*
62. *Id.*

found in removal proceedings.[63]

As discussed in Section II, the protections of the Sixth Amendment do not apply in immigration removal proceedings because they are civil proceedings and not criminal.[64] Therefore, the procedural safeguards attending criminal proceedings do not apply.[65] Courts have held that the procedural safeguards in immigration removal proceedings are minimal because noncitizens "do not have a constitutional right to enter or remain in the United States."[66] Thus, the procedural safeguards to which noncitizens are entitled are the right to notice, the opportunity to present evidence and cross-examine witnesses, and the right to assistance of counsel at their own expense.[67] Under the Code of Federal Regulations—portions of which implement the INA—an immigration judge is also required to inquire whether the noncitizen wishes to have counsel, advise the noncitizen of available free legal services, and ensure respondent has a list of those legal services and his rights on appeal.[68]

These minimal procedural safeguards may disadvantage[69] a

63. For example, in *Barthold v. INS*, the immigration judge asked a noncitizen whether he wanted to be represented by an attorney in his immigration removal proceedings. Barthold v. I.N.S., 517 F.2d 689, 691 (5th Cir. 1975). The noncitizen responded by asking whether the government could give him an attorney. *Id.* The judge replied that an attorney could represent the noncitizen if he paid for it. *Id.* The noncitizen informed the judge that he could not afford an attorney, to which the judge asked if he wished to call Legal Services to see if it would provide him with an attorney. *Id.* The noncitizen responded that he would then just continue without an attorney. *Id.* The judge then informed him that he would adjourn the case at any time that the noncitizen felt he needed an attorney. *Id.* Although a generous offer by the judge, this is a useless safeguard for an indigent unable to afford an attorney. It is not in line with the safeguards available (and required) in *Turner*.

64. *Lopez-Mendoza*, 468 U.S. at 1038. *See supra* text accompanying notes 6-7 (explaining the civil nature of immigration removal proceedings).

65. *See* Schroeck v. Gonzales, 429 F.3d 947, 951 (10th Cir. 2005) (revealing that because immigration removal proceedings are civil, only minimal procedural safeguards apply and noncitizens are not eligible for the safeguards of the Sixth Amendment); Lara-Torres v. Ashcroft, 383 F.3d 968, 973 (9th Cir. 2004) (stating that since immigration removal proceedings are civil, noncitizens in those proceedings are not entitled to the procedural safeguards that are available under the Sixth Amendment).

66. *Schroeck*, 429 F.3d at 951-52 (citing Aguilera v. Kirkpatrick, 241 F.3d 1286, 1292 (10th Cir. 2001)).

67. Immigration and Nationality Act § 240A, 8 U.S.C. § 1229a (2006) [hereinafter INA § 240A]. This section explicitly lists these as the only rights available to noncitizens during removal proceedings. *Id.*

68. 8 C.F.R. § 1240.10(a)(1)-(3) (2012).

69. In *Aguilera-Enriquez*, dissenting District Judge DeMascio discussed the importance of appointed counsel in immigration removal proceedings. *Aguilera-Enriquez*, 516 F.2d at 572 (DeMascio, J., dissenting). Looking at *In re Gault*, the judge argued that absence of counsel directly violates the noncitizen's right to "fundamental fairness" at his proceedings. *Id.* He further

noncitizen who is incarcerated for an indefinite duration, depending upon the charges for removal, while he awaits hearing before the immigration judge.[70] They can also lead to improper removal from the United States, especially when the noncitizen either waives his right to counsel or receives ineffective assistance of counsel during removal proceedings.[71] Further, judicial review of removal proceedings is significantly limited, which provides little chance that errors will be corrected.[72] The cases below, although not an exhaustive list, highlight the lack of procedural safeguards.

Schroeck v. Gonzales illustrates the detrimental impact the lack of safeguards can have to a noncitizen seeking adjustment of status.[73] *Schroeck* concerned a noncitizen with previous charges

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stated that deportation proceedings parallel the punishments in criminal proceedings. *Id.* at 573. Therefore, the noncitizen must be afforded the right to appointed counsel so that he can make all claims that can be made on his behalf. *Id.*

70. In *Demore*, a legal permanent resident was detained awaiting removal proceedings after the Attorney General deemed him removable for the commission of two crimes: petty theft and burglary. *Demore*, 538 U.S. at 513. The resident did not dispute the crimes or the grounds for removal, but argued that being detained because of his previous crimes while awaiting his removal proceedings violated his due process rights. *Id.* at 514. The government, however, claimed that detention of a noncitizen charged with committing a crime was the only way to prevent the commission of additional crimes while awaiting removal proceedings. *Id.* at 515. The Court, therefore, held that an indefinite detention while the noncitizen awaits trial is permissible and does not violate due process. *Id.* at 531. The Court did limit its holding to only the detention of a criminal alien who has conceded his removability. *Id.*

After that case, a noncitizen in *Nadarajah v. Gonzales* was incarcerated for about five years despite never being charged with a crime. Nadarajah v. Gonzales, 443 F.3d 1069, 1071 (9th Cir. 2006). The noncitizen admitted his removability but requested asylum during his removal hearing. *Id.* at 1073. The court granted the noncitizen asylum, but the government reopened the proceedings to introduce more evidence. *Id.* The court, however, granted the noncitizen asylum in the second hearing as well. *Id.* at 1074-75. Nonetheless, he remained in custody and was denied bond. *Id.* at 1075. The court ultimately found that the detention was unreasonable and ordered the immigrant to be released after five years of erroneous incarceration. *Id.* at 1084.

71. *See generally Casas-Castrillon*, 535 F.3d 944 (reversing a decision that allowed a noncitizen to be held in detention for seven years awaiting judicial review of his removability); Partible v. I.N.S., 600 F.2d 1094 (5th Cir. 1979) (involving an order of removal that the court reversed due to an improper waiver of counsel elected by a judge); United States v. Jimenez, 921 F. Supp. 1054 (S.D.N.Y. 1995) (reversing an immigration judge's order of removal after determining that the judge had effectively threatened the noncitizen to waive counsel by telling him he would be placed in prison if he fought the removal proceedings).

72. Immigration and Nationality Act § 242, 8 U.S.C. § 1252 (2005) [hereinafter INA § 242]. This section of the Act lists the cases in which judicial review is impermissible. *Id.*

73. In *Schroeck*, the noncitizen attempted to apply for adjustment of status based on his marriage to a United States citizen, but had overstayed the

for sexual assault that a criminal court dismissed with prejudice.[74] Despite the dismissal, however, the government presented evidence of the sexual assault charges as a criminal conviction during the noncitizen's removal proceedings.[75] When the noncitizen raised the issue of double jeopardy, the immigration court stated that because he was only entitled to the due process protection of the Fifth Amendment during his proceedings, he was not entitled to protection from double jeopardy.[76]

Additionally, in *Lara-Torres v. Ashcroft*, the Ninth Circuit held that a noncitizen who followed inaccurate advice of his attorney regarding the suspension of his deportation under the newly enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")[77] did not suffer a violation of his due process rights.[78] The court reasoned that "[r]emoval proceedings do not become constitutionally unfair simply because they are precipitated in part by an attorney's advice . . . or because the [noncitizen] might believe that he could avoid detention until eligible for another form of relief."[79]

While courts find that the "procedural safeguards" given to immigrants in removal proceedings are substantial enough to protect their due process rights, these "safeguards" nonetheless consistently fail or are not administered by courts.[80] For instance, in *United States v. Jimenez*, the court determined that the

length of time his visa permitted him to remain in the United States. *Schroeck*, 429 F.3d at 949. Because his past crimes rendered him removable from the United States, the noncitizen requested that the immigration judge overlook his past crimes and grant his adjustment of status application. *Id.* The immigration judge agreed to overlook the noncitizen's three past criminal convictions, but would not ignore the allegations of sexual assault. *Id.* While the sexual assault charges had been dismissed with prejudice in the criminal proceedings, the immigration judge allowed testimony from the alleged victim. *Id.* Ultimately, the judge found that the noncitizen did commit rape and therefore was not eligible for adjustment of status to that of a permanent resident. *Id.* The noncitizen was then held removable. *Id.* at 952. The Court of Appeals for the Tenth Circuit affirmed the decision. *Id.*

74. *Id.* at 949-50.

75. *Id.* at 950.

76. *Id.* at 951-52.

77. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 304(a)(3), 110 Stat. 3009-594 to 3009-596, 8 U.S.C. §1229b (2008).

78. *Lara-Torres*, 383 F.3d at 974.

79. *Id.*

80. *See generally Partible*, 600 F.2d at 1094 (reversing removal decision because of error of immigration judge due to improper waiver of counsel); *Campos-Ascencio*, 822 F.2d at 510 (reversing removal decision to determine whether the noncitizen had in fact been informed of his right to counsel and whether he had competently waived that right); *Jimenez*, 921 F. Supp. at 1058 (finding the immigration removal proceedings to be "procedurally infirm" despite lack of prejudicing the defendant); Gjeci v. Gonzales, 451 F.3d 416 (7th Cir. 2006) (reversing removal decision after immigration judge refused to allow continuance so noncitizen could retain counsel).

noncitizen had waived his right to counsel after the judge told the defendant during his criminal proceedings that he had every right to "fight" removal from the U.S., but that if he did, the government was "gonna lock [him] up again and it will be up to [the government] how much time [the noncitizen would] have to spend [in jail]."[81] Although it was a criminal case, the court examined the problems with the defendant's previous removal proceedings.[82] Ultimately, the removal decision was upheld despite a finding that no waiver had been made because the court deemed that the noncitizen was not prejudiced.[83]

Further, courts frequently find that noncitizens waived their right to counsel even when they did not understand the waiver.[84] For example, in *Leslie v. Attorney General of the United States*, the immigration judge failed to advise the noncitizen of the availability of free legal services and did not confirm the noncitizen's receipt of a list of those free services.[85] The noncitizen proceeded without counsel and the court eventually ordered him to be removed.[86] Although the Third Circuit Court of Appeals ultimately reversed the decision because of the judge's failure to advise the noncitizen of his rights in that case,[87] violations of immigration regulations occur regularly, further diminishing the already minimal safeguards available.

Claims of lack of waiver and ineffective assistance of counsel are procedural and, as a result, courts have disagreed as to whether prejudice is a necessary component in order to reverse an order of removal in those situations.[88] This disagreement only

81. *Jimenez*, 921 F. Supp. at 1057. Despite this obvious lack of adherence to the procedural safeguards, the court held that because it did not prejudice the noncitizen it was not reversible error. *Id.* at 1058.

82. *Id.* at 1055.

83. *Id.* at 1058.

84. In *Jimenez*, for example, after the court asked the noncitizen whether he wanted to waive his right to counsel, he responded, "I just want to leave." *Id.* at 1057; *see also* United States v. Polanco-Gomez, 841 F.2d 235, 237 (8th Cir. 1988) (holding that a court asking all fifty-two noncitizens at once whether they wished to waive counsel was effective waiver); *Baltazar*, 386 F.3d at 949 (reversing removal due to improper waiver of counsel attributed to lack of understanding because the noncitizens did not speak English and had only a sixth grade education).

85. Leslie v. Att'y Gen. of the U.S., 611 F.3d 171, 173-74 (3d Cir. 2010).

86. *Id.*

87. *Id.* at 182-83.

88. *See id.* at 178 (holding that violations of an agency regulation protecting fundamental rights would invalidate the challenged action without a need to consider prejudice); *but see* Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970) (holding that the removal decision is only reviewable with "a showing of substantial prejudice to the complaining party"); United States v. Calderon-Medina, 591 F.2d 529, 532 (9th Cir. 1979) (holding that violation of procedure can only render removal reversible when the interests of the noncitizen are prejudiced).

increases the lack of procedural safeguards and the chance of erroneous removal of noncitizens because it creates a lack of consistency in the decisions of the court. The following subsection examines the other two situations in which *Turner*'s holding does not apply: complex proceedings and proceedings involving the government as a party.[89]

C. Complexity and Government as a Party Exceptions Also Apply to Removal Proceedings

In *Turner*, the Court explicitly stated that it did not want to address proceedings in which the government is the opposing party[90] because the government "is likely to have counsel or some other competent representative."[91] Further, the Court mentioned that it did not want to address an "unusually complex case" in which a defendant would need representation by counsel for the proceedings to be fair.[92]

The first scenario, in which the government is the opposing party, is clearly applicable to immigration removal proceedings. The Department of Homeland Security ("DHS") administers and enforces United States immigration laws and oversees removal proceedings.[93] In every removal proceeding, the United States is the opposing party attempting to remove the noncitizen.[94]

With regard to complexity, the courts have consistently agreed that the immigration laws[95] and their application in proceedings are extremely complex, especially procedurally.[96]

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89. *Turner*, 131 S. Ct. at 2520.

90. *Id.*

91. *Id.*

92. *Id.*

93. 8 U.S.C. § 1103 (2009). The United States government created the Department of Homeland Security in the Homeland Security Act of 2002, 6 U.S.C. § 111 (2004).

94. 8 U.S.C. § 1103 (2009).

95. "This complexity is compounded by the frequency with which the INA has been amended in recent years. In the past two decades, the INA has been subject to a number of substantial revisions and amendments." Kaufman, *supra* note 10, at 122.

96. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) (explaining that immigration law is a complex legal specialty and can therefore be confusing to those who are not legal professionals in the immigration field); Ram v. Mukasey, 529 F.3d 1238, 1242 (9th Cir. 2008) (quoting Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005)) (stating that the complexity of immigration trials make them like a "labyrinth that only a lawyer could navigate"); United States v. Juan Vasallo-Martinez, No. 08cr2965-BEN, 2008 U.S. Dist. LEXIS 105434, at *4-5 (S.D. Cal. Dec. 30, 2008), *rev'd*, No. 09-50324, U.S. App. LEXIS 28023 (9th Cir. Dec. 21, 2009) (examining other courts' decisions and recognizing the consistent notion that immigration removal proceedings are complex); *Lara-Torres*, 383 F.3d at 974 (explaining that noncitizens unfamiliar with the laws can find the procedures to be intricate and complex); Saakian v. I.N.S., 252 F.3d 21, 24-25 (1st Cir. 2001) (discussing how the right to counsel

Further, the "high stakes of a removal proceeding and the maze of immigration rules and regulations make evident the necessity of the right to counsel."[97] The complexity of the proceedings has led the courts to already determine that a right to counsel at the noncitizen's expense is imperative to a fair trial.[98] However, those noncitizens that cannot afford to pay for counsel themselves are left to navigate this confusing area of law alone.[99] To appoint counsel will guarantee that the noncitizens are able to understand their rights and ensure that a fair trial will occur.[100]

IV. PROPOSAL

A. Could Turner *Be the Missing Piece?*

Turner may be the missing piece of the puzzle in the argument for appointed counsel in immigration removal proceedings. The Court, although not explicitly, named the possible areas where appointed counsel may be necessary.[101] When

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is a necessary part of procedural due process but not discussing appointed counsel); Castro-O'Ryan v. I.N.S., 847 F.2d 1307, 1312 (9th Cir. 1987) (discussing the complexity of immigration laws and stating that a lawyer is typically the only one able to understand the procedures). As a side note, the language in the *Padilla* holding has also been used to argue for a right to appointed counsel in immigration removal proceedings also. *See generally* Duncan Fulton, *Emergence of a Deportation Gideon?: The Impact of* Padilla v. Kentucky *on Right to Counsel Jurisprudence*, 86 TUL. L. REV. 219 (2011) (analyzing the language of *Padilla* and arguing that it indicates a willingness to recognize a "deportation Gideon" right).

97. *Ram*, 529 F.3d at 1242 (citing *Biwot*, 403 F.3d at 1098).

98. *See* Iturribarria v. I.N.S., 321 F.3d 889, 901 (9th Cir. 2003) (stating that the reason noncitizens want to have legal counsel is so that they can abide by the complex procedural requirements that are involved in immigration removal proceedings); Monjaraz-Munoz v. INS, 327 F.3d 892, 897 (9th Cir. 2003) (discussing the "special role" of attorneys helping noncitizens who have entered immigration removal proceedings); *Ram*, 529 F.3d at 1242 (citing *Biwot*, 403 F.3d at 1098) (explaining that immigration law and regulations make the necessity of counsel self-evident).

99. After a noncitizen has been deemed to have waived the right to counsel at the proceeding, they must then proceed without counsel. *See generally* Cobourne v. I.N.S., 779 F.2d 1564, 1566 (11th Cir.) (finding that after the noncitizen had made an effective waiver of counsel he was required to proceed without counsel for the remainder of the removal proceedings); *Barraza-Leon*, 575 F.2d at 222 (finding that the noncitizen had made an effective waiver of counsel and thus had to proceed without counsel and could not challenge the waiver after a ruling adverse to his interest).

100. In *Aguilera-Enriquez*, Judge DeMascio discusses the unconscionability of terminating a noncitizens right to remain the United States without appointed counsel to an indigent noncitizen. *Aguilera-Enriquez*, 516 F.2d at 572 (DeMascio, J., dissenting). He further discusses that the deportation is a "lasting punishment" that requires appointed counsel to satisfy due process. *Id.* Indigent defendants need assistance in these proceedings. *Id.*

101. *Turner*, 131 S. Ct. at 2520; *see also supra* text accompanying note 4

Turner is used in conjunction with the other precedent regarding a right to counsel in civil proceedings, advocates can argue for this right in removal proceedings. As addressed in Section II, the Court developed a strategy of a case-by-case analysis using the *Mathews* factors when addressing the right to appointed counsel in civil proceedings.[102] Further, according to *Lassiter,* only in cases of loss of physical liberty can appointed counsel be found.[103] By tying this in with *Gault*, advocates can show that the Court developed a per se rule for juvenile proceedings calling for a right to appointed counsel because of the similarity those proceedings have to criminal proceedings. Advocates for a right to appointed counsel have used *Gault* for the argument that immigration removal proceedings are also similar to criminal proceedings.[104] *Gagnon* also provided advocates the ability to argue that appointed counsel is necessary whenever "fundamental fairness" calls for it.[105] *Aguilera* applied this principle to immigration removal proceedings explicitly, and by testing whether appointed counsel was necessary in *Aguilera*, the Court agreed that a right to appointed counsel must exist in some immigration removal proceedings. Lastly, the dicta in *Turner* shows that there are certain cases that the Supreme Court of the United States believes may call for the right to appointed counsel.

By using these cases, advocates for a right to appointed counsel in immigration removal proceedings can show that due process for noncitizens calls for the right to appointed counsel for indigent defendants during immigration removal proceedings. *Lassiter*'s holding that the potential loss of physical liberty necessitates a right to counsel for an indigent defendant is easily satisfied in removal proceedings, as noncitizens are frequently

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(noting *Turner*'s potential effect on counsel appointments in civil proceedings).

102. *See Lassiter*, 452 U.S. at 26-27, 31 (adopting the case-by-case approach and using the *Mathews* factors to any case involving a right to appointed counsel in civil proceedings).

103. *Id.*

104. *See Gault*, 387 U.S. at 28-29 (stating that because juvenile proceedings resembled criminal proceedings, a right to appointed counsel was necessary). Thus, advocates argue that due to the similarities of immigration removal proceedings and criminal proceedings, a right to appointed counsel is necessary there also.

105. *Gagnon*, 411 U.S. at 790. In *Gagnon*, the Court developed the case-by-case approach in determining whether appointed counsel is necessary in civil proceedings. *Id.* Advocates have used the language of *Gagnon* requiring fundamental fairness in order to argue that fundamental fairness necessitates a right to appointed counsel in removal proceedings because of the large risks of loss of physical liberty, as was required in *Lassiter*. *Id.*; *see also Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 402-04 (2000) (analyzing the language of *Gagnon*, *Gault*, and *Aguilera-Enriquez* in examining the necessity for counsel in immigration removal proceedings).

detained for indefinite amounts of time. *Gault*'s holding that proceedings that are extremely similar to criminal proceedings call for a right to appointed counsel is also satisfied because noncitizens, like juveniles, need assistance of counsel in order to understand the law, to be able to intelligently analyze the facts, and to determine whether a defense to removal exists. *Gagnon*'s requirement of appointed counsel when fundamental fairness dictates is also satisfied in removal proceedings because indigent noncitizens face the ultimate loss of forcible removal from the United States and from their family, possessions, and employment.

Turner, as shown in Section III, requires additional procedural safeguards that, in removal proceedings, are minimal and fail quite often. Further, the government is always a party to the removal, and understanding the complex removal proceedings far exceeds the knowledge of the average layperson.

The Court in *Turner* analyzed all of the cases discussed above, except *Aguilera-Enriquez*, in order to determine whether appointed counsel was necessary under due process for an indigent defendant held in contempt for violating a child support order.[106] Analyzing these cases is the reason that the Court ultimately tailors its holding so that it will not apply to situations where the government is a party, where there are no additional procedural safeguards, and where the proceedings are complex. Therefore, by satisfying the elements that the Court has laid out in these decisions, a strong argument can be made to show that immigration removal proceedings necessitate a right to appointed counsel by simply using the language of the above-mentioned decisions.

B. INA Revision

As stated previously, the language of the INA, under the "Right to Counsel" heading, states that noncitizens have a right to counsel but at no expense to the government (the "at no expense" restriction).[107] Although it does not necessarily prohibit a right to appointed counsel,[108] it has created a roadblock for advocates of appointed counsel in these proceedings and has left very little case law to review regarding the right to appointed counsel.[109] This

106. *Turner*, 131 S. Ct. at 2516.

107. INA § 242.

108. *See* Richard Pena, *The Quest to Fulfill Our Nation's Promise of Liberty and Justice for All: ABA Policies on Issues Affecting Immigrants and Refugees,* A.B.A. 1, 5 (Feb. 2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/publicserv/immigration/107b_comprehensive_immig_reform.authcheckdam.pdf (discussing how the INA does not preclude a right to counsel but "merely affirms that counsel need not be provided").

109. *See* Adams, *supra* note 10, at 175 (explaining how "at no expense to the

impedes "the government's interest in the most informed decisions being made under its laws."[110] Further, it has caused courts to focus on the requirements of the INA and neglect to look at when appointed counsel is necessary.[111] There are very few federal cases that actually challenge the lack of appointed counsel, whether under the INA or under a constitutional-right attack.[112] The "at no expense" restriction has survived many amendments since it was originally created in 1952.[113] It has still allowed the government to offer legal assistance,[114] but they may not fund any sort of actual legal representation.[115]

Despite the restriction on appointed counsel, however, courts like *Aguilera-Enriquez* have shown that there can be circumstances under which legal counsel needs to be appointed in immigration removal proceedings.[116] Therefore, the "at no

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government" has deterred any sort of right for appointed counsel in immigration removal proceedings); and Kaufman, *supra* note 10, at 126-27 (arguing that because the INA does not allow the government to pay for counsel, indigent noncitizens are unable to afford representation). Further, confinement of noncitizens impairs their ability to attempt to raise money to retain counsel because they obviously cannot work while they are confined. *Id.* Despite the help from nonprofit organizations that exist to provide legal services to indigent noncitizens, such services are not able to keep up with the demand and have limited resources. *Id.*

110. Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MIGRATION POL'Y INST. INSIGHT 1, 17 (Apr. 2005), *available at* http://www.migrationpolicy.org/in sight/Insight_Kerwin.pdf.

111. *See* Adams, *supra* note 10, at 175-76 (explaining that the "at no expense" provision has caused case law to focus on whether immigration judges have informed noncitizens of their rights in trial and effective assistance of counsel instead of whether counsel should be appointed to indigent noncitizens who are vulnerable to removal because of it).

112. *See id.* at 176 (showing that the INA has reduced the courts' willingness to examine the right to appointed counsel through the lens of a constitutional violation, especially in the Supreme Court).

113. *Kerwin*, *supra* note 110, at 7-8.

114. For instance, the Immigration Representation Project (IRP) was created to offer low cost legal services to indigent noncitizens in New York. *Id.* at 13. Also, the Department of Justice has an Executive Office for Immigration Review that provides education to noncitizens regarding removal proceedings. *Id.* at 14. However, because it is government funded, it cannot provide legal representation. *Id.* Still, these legal programs are inadequate replacements. Adams, *supra* note 10, at 178-79. This is because programs administered by the EOIR are limited to only those noncitizens who are detained and ultimately only ten percent of those detained noncitizens are able to actually obtain legal representation. *Id.*

115. *Kerwin*, *supra* note 110, at 7-8.

116. In *Aguilera-Enriquez*, the Court administered a test to determine whether appointed counsel was necessary for the circumstances presented in that case. *Aguilera-Enriquez*, 516 F.2d at 568. The mere use of a test in order to determine this showed that the Sixth Circuit must believe that there is some circumstance under which appointed counsel would be necessary for a noncitizen in immigration removal proceedings. *Id.*

expense" language must be removed from the INA in order to allow for appointed counsel in necessary circumstances.[117] The American Bar Association has called for the removal of this language because it is a barrier to not only representation of noncitizens, but also any sort of legal assistance for them.[118] Removing this language will allow the courts to consider the individual circumstances and appoint counsel when due process requires. The concerns of "opening the floodgates" to appointed counsel in all circumstances will remain implausible in this proposal because the court will still determine when the circumstances are appropriate on a case-by-case basis.[119]

C. Cost to the United States

Opponents to appointed counsel for immigration removal proceedings will likely argue that the cost of implementing this program will make it impossible and outweigh its benefits. However, studies have shown that appointing counsel can actually make the system more efficient and less costly.[120] For instance,

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117. Some have argued that by not allowing for appointed counsel, the entire "Right to Counsel" provision of the INA is useless for indigent noncitizens. *See* David A. Robertson, *An Opportunity to Be Heard: The Right to Counsel in a Deportation Hearing*, 63 WASH. L. REV. 1019, 1026-27 (1988) (explaining how a noncitizen who makes a claim has an interest in having the assistance of counsel but an indigent alien automatically loses this supposed statutory right to counsel unless he is able to search for and find free legal services). However, many times indigent noncitizens are not able to find free legal aid and are left with a "meaningless and unequally applied right." *Id.* at 1035-36.

118. Pena, *supra* note 108, at 5. The ABA adopted the recommendations set forth by Pena. *Id.* at 1. The ABA explicitly "supports the due process right to [appointed] counsel . . . in [immigration] removal proceedings." *Id.* Even though the "at no expense" provision does not specifically prohibit appointed counsel in removal proceedings, the ABA proposes overturning this legislation so that access to appointed counsel will be easier, and the courts will not be able to use the language to claim that it is bound to only offer counsel at no expense to the government. *Id.* at 10.

119. *See* Kaufman, *supra* note 10, at 149 (explaining that "the burdens of instituting such a system would be substantially outweighed by the benefits that counsel can provide to noncitizens facing deportation and to the smooth and efficient administration of the immigration system").

120. Kerwin, *supra* note 111, at 14. Ninety-three percent of removal cases resulted in relief when counsel under the IRP program represented the noncitizen. *Id.* The benefits extend to both the federal government and the noncitizen. *See Recommendations for Reforming Our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings*, CONST. PROJECT 1, 8, http://www.constitutionproject.org/pdf/359.pdf (last visited Feb. 3, 2013) (explaining that noncitizens benefit from legal representation because their "basic due process rights are upheld" with regards to removal). The federal government benefits because it allows for a more efficient removal process as attorneys can be adequately prepared before going before the Immigration Judge leading to faster proceedings. *Id.* Further, the increased

evidence shows that noncitizen representation in removal proceedings benefits the government financially because of improved appearance rates, fewer continuances, and shorter detention periods.[121] It also leads to financial savings through a reduction in frivolous claims.[122]

Additionally, the cost of implementing the program would not be as extensive as one would think due to the already existing legal aid provided by non-profits.[123] The government would thus only need to "merely . . . fill in the gaps" to help noncitizens not already helped by these nonprofits.[124]

V. CONCLUSION

In conclusion, *Turner* strengthens the argument that can be made by advocates for a right to appointed counsel in removal proceedings because it is another precedent set by the Supreme Court pointing to its belief that there are areas under which appointed counsel is necessary in civil proceedings. By using the above-mentioned cases, a strong argument can be made for appointed counsel, especially once the financial and civil-liberty benefits of appointed counsel for indigent noncitizens are discovered.

As it will take time to bring these arguments to the Supreme Court, advocates can preliminarily lobby for changes to the INA that will remove the "at no expense" provision. This change will allow better access for noncitizens to legal advice for now, and will eventually lead to the ultimate goal of access to appointed counsel for indigent noncitizens.

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efficiency could reduce detention and lower the costs of that as well. *Id.*

121. CONST. PROJECT, *supra* note 120, at 16-17.

122. *Id.* at 17.

123. Robertson, *supra* note 117, at 1036.

124. *Id.*