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## Discretionary Injustice: Limiting Due Process Rights of Undocumented Immigrants upon Removal after Re-Entry

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**DISCRETIONARY INJUSTICE: LIMITING DUE PROCESS RIGHTS  
OF UNDOCUMENTED IMMIGRANTS UPON REMOVAL AFTER RE-  
ENTRY**

*Brendan Dauscher\**

**I. INTRODUCTION**

Immigration in the United States is cyclical by nature. Attitudes towards immigrating citizens have oscillated throughout our nation's history, shifting from periods of acceptance and embrace to periods of exclusion and neglect.<sup>1</sup> Amidst the humanitarian crisis at the border, there also lies a constitutional one. Specifically, there is great deference given to immigration judges and executive actors in cases involving removal after re-entry.<sup>2</sup> Immigration judges are

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\*Touro College Jacob D. Fuchsberg Law Center, J.D. Candidate 2022; University of Pittsburgh, B.S. in Business Administration, 2014. Thank you to my faculty advisor, Professor Jeffrey Morris, for his guidance and honest critique. Thank you to the Law Review's faculty advisor, Professor Rena Sepowitz for her support and assistance throughout the writing and editing process. Next, thank you to the entire staff and editorial board of the Touro Law Review for being supportive and diligent throughout the drafting process. Additionally, I want to give special thanks to Michael Petridis for his tireless efforts and thoughtful feedback throughout the editing process. This note was inspired by the ongoing immigration crisis and the humanitarian concerns associated with it. This issue highlights the need for expansive due process rights for all people, regardless of citizenship. Finally, I would like to thank my friends and family, especially my mother and father, for their love and support with every goal I set out to achieve. This would not have been possible without them.

<sup>1</sup> History.com Authors, *U.S. Immigration Timeline*, HISTORY.COM, (May 14, 2019), <https://www.history.com/topics/immigration/immigration-united-states-timeline>.

<sup>2</sup> See generally Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611 (2006) ("Discretion permits adjudicators to engage in individualized decision making, considering the full complexity of an applicant's situation rather than reducing it to a checklist of standard factors. It allows the agency to temper the rigidity of statutory rules with attention to exceptional circumstances. . . . The decision on discretionary relief in a removal proceeding is thus a choice of the appropriate disposition of the case by the adjudicating official. The immigration

administrative officials who are tasked with adjudicating removal hearings. The power of immigration judges is vested legislatively through Congress.<sup>3</sup> These judges are housed in administrative courts and determine if immigrants will be removed, allowed to remain in the United States, or granted discretionary relief from deportation.<sup>4</sup>

The narrow issue of whether an immigrant has the constitutional right to be informed of the opportunity to seek discretionary relief typically arises during a removal proceeding after unauthorized re-entry into the United States. The case at issue, *United States v. Estrada*,<sup>5</sup> is one involving a Mexican citizen, Emilio Estrada.<sup>6</sup> Mr. Estrada was a green-card holder but not a citizen of the United States.<sup>7</sup> In 2009, Mr. Estrada was indicted for committing an aggravated felony.<sup>8</sup> He was charged with possession of a firearm by an unlawful user of methamphetamine and was subsequently deported.<sup>9</sup> After his deportation, he was found in the United States in 2015.<sup>10</sup> Estrada was charged with illegal re-entry after removal and scheduled for a hearing before an immigration judge.<sup>11</sup>

During his deportation hearing, the immigration judge did not inform him or his counsel of his opportunity to seek discretionary relief.<sup>12</sup> Discretionary relief offers immigrants a chance to avoid deportation proceedings and remain in the United States if they can show the possibility of a favorable outcome at their hearing.<sup>13</sup> Estrada moved to dismiss the indictment via a collateral attack on the underlying deportation order, arguing that the immigration judge violated his due process rights by “failing to advise him of the possibility of discretionary relief from removal under § 212(h) of the

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judge can choose milder or more rigid sanctions, or may choose to impose no sanction at all, restoring a legally deportable permanent resident to good standing.”)

<sup>3</sup> 8 U.S.C. § 1229a(a)(1) (delegating to immigration judges the power to adjudicate inadmissibility or deportability in removal proceedings).

<sup>4</sup> Catherine Kim, *Article: The President's Immigration Courts*, 68 EMORY L.J. 1, 3 (2018).

<sup>5</sup> 876 F.3d 885 (6th Cir. 2017)

<sup>6</sup> *Id.* at 886.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

Immigration and Nationality Act (INA).”<sup>14</sup> The motion was subsequently denied, and Estrada appealed to the Sixth Circuit Court of Appeals for review.<sup>15</sup> The Sixth Circuit, in a *de novo* review, analyzed the attack on his deportation order.<sup>16</sup> The Sixth Circuit thoroughly analyzed 8 U.S.C. § 1326(d) and specifically the third element, which was the center of Estrada’s appeal.<sup>17</sup> The appellate court focused exclusively on the fundamental fairness element of the appeal.<sup>18</sup> Ultimately, after reviewing other sister circuits’ decisions on this issue, the Sixth Circuit held that counsel’s failure to inform the defendant of his right to assert discretionary relief from deportation, in underlying removal proceedings, did not violate Mr. Estrada’s due process rights.<sup>19</sup> The Supreme Court denied certiorari in the instant case; however, a genuine constitutional issue still exists.<sup>20</sup>

Today, the circuits remain split on the issue of whether an immigrant must be informed of the availability of discretionary relief in a deportation hearing.<sup>21</sup> While the Sixth Circuit joined the majority of circuits that have decided this issue, its decision reinvigorated the debate of whether a national policy needs to be adopted. The minority of the circuits find that an immigrant has a right to be informed of discretionary relief from deportation and the failure to inform amounts to fundamental unfairness under 8 U.S.C. § 1326(d)(3).<sup>22</sup> This Note will argue for the national implementation and adoption of the Second Circuit’s reasonable probability standard through a Supreme Court ruling on the issue to settle the current circuit split or pointed legislative action to provide further guidance in deportation hearings regarding discretionary relief. Preferably, the former would best settle this Circuit split, however, it would require a ripe case and controversy for the court to grant certiorari.

Undocumented immigrants have a protected liberty interest to be informed of their eligibility for discretionary relief from

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<sup>14</sup> *Id.* (citing 8 U.S.C. § 1182(h)).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 887.

<sup>17</sup> *Id.* (“[T]he entry of the order was fundamentally unfair.”).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 888-889.

<sup>20</sup> *United States v. Estrada*, 876 F.3d 885, 886 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2623 (2018).

<sup>21</sup> *See id.* at 888 (explaining the circuit split).

<sup>22</sup> *Id.*

deportation.<sup>23</sup> Suppression of the opportunity to be informed of such relief gives rise to a due process violation regardless of the regardless of the outcome of the hearing.<sup>24</sup> Currently, the circuit courts disagree about an immigrant's right to be informed of discretionary relief.<sup>25</sup> The majority of the circuits follow the statute in a textualist form.<sup>26</sup> However, the minority of the circuits consider other factors when deciding the issue of discretionary relief.<sup>27</sup> The majority of the cases dealing with this issue involve criminal defendants who were deported because of their criminal conviction and found in the United States after re-entry. This Note evaluates the constitutionality of informing immigrants of their opportunity to seek discretionary relief.<sup>28</sup>

Section II of this Note will discuss the relevant constitutional provisions and the legislative history of the broad application of these principles to undocumented immigrants by immigration judges. The goal of broad application of Constitutional principles is to ensure fairness in largely discretionary hearings conducted by one sole arbiter, the immigration judge, as an agent of the executive branch. Section III will discuss the relevant congressional action taken and §§ 1182, 1229, 1326 of the United States Code in detail. Section IV will examine the cases heard before United States Supreme Court that deal with the application of due process rights for noncitizens and illustrate the importance of maintaining defendants' rights during their deportation hearings. Section V will discuss important cases that reflect the Circuit split. Section VI will set forth arguments that illustrate the dichotomous nature of the Circuit Split. Part A will address the stance that failure to consider an immigrant for discretionary relief is not fundamentally unfair. Part B will argue that failure to consider an immigrant for discretionary relief is

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<sup>23</sup> *Japanese Immigrant Case*, 189 U.S. 86, 98 (1903); *see* *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050 (9th Cir. 2003).

<sup>24</sup> *Ubaldo-Figueroa*, 364 F.3d at 1047-48.

<sup>25</sup> *Id.*; *see also* *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004); *United States v. Lopez-Ortiz*, 313 F.3d 225 (5th Cir. 2002).

<sup>26</sup> "Textualism is a legal philosophy that laws and legal documents should be interpreted by considering only the words used in the law or document as they are commonly understood." *Textualism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/textualism> (last visited Mar. 27, 2021).

<sup>27</sup> *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047-48 (9th Cir. 2003); *see also* *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004).

<sup>28</sup> *United States v. Estrada*, 876 F.3d 885, 886 (6th Cir. 2017).

fundamentally unfair. Part C will argue that under the Mathews Test, the failure to consider an immigrant for discretionary relief violates the immigrants' liberty interest and therefore is not in line with the requirements of procedural due process protections. Furthermore, this section will highlight the paramount importance of the individual liberty interest and need for unsuppressed due process protections in contrast with the governments' desire of financial and ministerial efficiency. Finally, Section VII will examine the importance of expansive due process rights for non-citizens. It will also discuss the three-pronged test set forth in § 1326 (d) <sup>29</sup> and its inherent vagueness. It will conclude that the United States should adopt a national standard implementing the reasonable probability standard set forth in the United States Court of Appeals for the Second Circuit decision in *United States v. Copeland*<sup>30</sup> and implement the reasonable probability standard established in that case.<sup>31</sup>

## II. CONSTITUTIONAL PROVISIONS

The Founding Fathers understood that knowledge and education were essential to preserve peace and order among members of our society.<sup>32</sup> As Thomas Jefferson once said, "I know of no safe depository of the ultimate powers of society but the people themselves; and if we think them not enlightened . . . the remedy is not to take it from them, but to inform their discretion by education."<sup>33</sup> Most founders recognized that the Constitution was in fact incomplete and that the Bill of Rights was necessary to preserve individual liberties.<sup>34</sup>

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<sup>29</sup> 8 U.S.C. § 1326 (d).

<sup>30</sup> 376 F.3d 61, 74 (2d Cir. 2004).

<sup>31</sup> The Copeland standard states that if the act of informing an immigrant of the opportunity for discretionary relief would have given a reasonable probability of success then its advisement is required under § 1326 (d). Additionally, this section will address two more issues. First, the discretion provided to immigration judges in § 1326(d) cases. Second, the need to adopt a clear standard that ensures fundamental fairness to all defendants in removal after re-entry proceedings, regardless of where the hearing is located.

<sup>32</sup> Letter from Thomas Jefferson to William Charles Jarvis (1820) (speaking generally about the utmost importance of the respect for the three independent branches of government to avoid tyranny and emphasizing that education and awareness are the ultimate dispositive of constitutional wrongs in society).

<sup>33</sup> *Id.*

<sup>34</sup> *See generally* James Madison, Cong. Register, I, 423-37 "I should advocate greater dispatch in the business of amendments . . . I think we should obtain the

### A. Fifth and Fourteenth Amendments

The entire Bill of Rights, including the Fifth Amendment, applies directly to the federal government. Arguably, the most impactful liberties are those found in the due process clause of the Fifth Amendment which states that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”<sup>35</sup> The drafters of the Constitution were meticulous in their efforts and deliberate in their word choice.<sup>36</sup> The subsequent generations of legislators also had great attention for detail.<sup>37</sup> Of the nearly 7,600 words used in the U.S. Constitution and its twenty-seven amendments, there is only one repeated phrase,<sup>38</sup> which is the eleven-word phrase that appears both in the Fifth Amendment and the Fourteenth Amendment, “deprived of life, liberty, or property, without due process of law.”<sup>39</sup>

Ironically, while the Fifth amendment protects an individuals due process rights it does not require federal government to do so equally. Missing from the Fifth Amendment is the Fourteenth Amendment’s Equal Protection clause. Although the Fourteenth Amendment only applies to the states, the Supreme Court applied it through reverse incorporation to the federal government.<sup>40</sup> The Supreme Court applied the Equal Protection clause to the federal government through a series of cases, through the Fifth Amendment’s due process clause. Prior to reverse incorporation of the Fourteenth Amendment, the Court took notable steps to ensure that no legislature or executive body could impugn the rights of the people by selectively incorporating the protections of the Bill of Rights rendering them applicable to the states.<sup>41</sup> The Court explained that the test for holding an amendment applicable to the states through the

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confidence of our fellow citizens, in proportion as we fortify the rights of the people against the encroachment of the government.” *Id.*

<sup>35</sup> U.S. CONST. amend. V.

<sup>36</sup> *Constitutional Interpretation*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/constitutional-interpretation> (last visited Mar. 15, 2020).

<sup>37</sup> *Id.*

<sup>38</sup> *Due Process*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/due\\_process](https://www.law.cornell.edu/wex/due_process) (last visited Mar. 30, 2020).

<sup>39</sup> U.S. CONST. amend. XIV § 1.

<sup>40</sup> *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

<sup>41</sup> See; *Duncan v. Louisiana*, 391 U.S. 145, *Mapp v. Ohio*, 367 U.S. 643, *Miranda v. Arizona*, 384 U.S. 436.

Fourteenth Amendment is whether the right protected is among those “fundamental principles of liberty and justice that lie at the base of all our civil and political institutions.”<sup>42</sup>

While the Fifth and Fourteenth Amendments are textually different, their protections and promises apply together since the Fifth now ensures the protections of the Fourteenth to the federal government.<sup>43</sup> This guarantee to apply the laws equally, to all persons, and is present in many of the re-entry after removal cases. It is arguably the most important of the many promises made by the federal government to its permanent residents. It is an assurance that the federal government will operate within the law and provide fair procedures as part of its legal obligation to its residents.<sup>44</sup>

Like many provisions in the Constitution the Court’s interpretation in the early years, the due process clause’s legal meaning was consistently interpreted narrowly.<sup>45</sup> In the late nineteenth century, Congress held the unconstrained power to admit or expel immigrants from the country.<sup>46</sup> At this time, the Bill of Rights placed no judicially enforceable barrier to congressional action regarding immigration policies.<sup>47</sup> During this time, the application of the Fifth Amendment was strict, immigration cases, and the Court gave great deference to executive officers such as immigration judges for filling the development and establishment of the record, findings of fact, and prompt adjudication.<sup>48</sup> A party must have demonstrated a fundamental unfairness in the process in order to establish that the government deprived her of sufficient life, liberty, or property interests.<sup>49</sup> The findings of fact were not subject to judicial review unless a court was expressly authorized to do so.<sup>50</sup>

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<sup>42</sup> *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

<sup>43</sup> The equal protection clause prevents the state government from enacting laws that arbitrarily discriminate. The Fifth Amendment due process clause extends this prohibition to the federal government if the discrimination violates due process of law.

<sup>44</sup> *Due Process*, *supra* note 37.

<sup>45</sup> *Barron v. City of Baltimore*, 32 U.S. 243 (1833).

<sup>46</sup> *Neuman*, *supra* note 2, at 618.

<sup>47</sup> *Id.* at 619.

<sup>48</sup> *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004).

<sup>49</sup> *Ashki v INS*, 233 F.3d 913, 921 (6th Cir.2000).

<sup>50</sup> *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892); *see* *The Japanese Immigrant Case*, 189 U.S. 86, 98 (1903).



Recently, courts have held that immigrants who are subject to removal upon initial entry have far fewer rights than immigrants subject to removal after entry.<sup>51</sup> Courts justify this by reasoning that “immigrants possess constitutional rights outside the immigration process and they generally possess constitutional procedural rights within the immigration process. But their substantive constitutional rights may not effectively constrain congressional deportation policy, and courts will apparently not protect them from being deported.”<sup>52</sup>

Furthermore, the Fifth Amendment guarantees immigrants, throughout deportation proceedings, the due process right of procedural fairness by affording them a full and fair hearing.<sup>53</sup> This crucial Amendment ensures the protection of individual rights and prohibits the federal government from abusing its power over individual defendants during legal proceedings. Modern interpretation of the Fifth Amendment by the Supreme Court<sup>54</sup> as it relates to immigration provides for great protections in immigration hearings that are currently not being observed.<sup>55</sup> Informing an immigrant of her right to seek discretionary relief should be protected as a procedural due process right under the Fifth Amendment. The burden on the government to inform the immigrant is not so onerous as to vastly expand the cost of administrative proceedings or timeliness and the benefit to the accused is incomparable. If this procedural right of advisement were not observed, it could lead to unlawful deportation of immigrants, who have legal standing to remain in the United States, at the discretion of the immigration judge. Expanded awareness of discretionary relief to those accused of illegal re-entry will not change the outcome of every removal case but, it will safeguard the due process protections that are guaranteed under the Fifth and Fourteenth Amendments.

A critical procedural right that should never be compromised is the right to be fully informed of discretionary relief. Due process mandates that the federal government should use appropriate methods or procedures to ensure its actions do not deprive an individual of

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<sup>51</sup> *Castro v. U.S. Dept. of Homeland Security*, 163 F.Supp. 3d 157, 158 (E. D. Pa. 2016).

<sup>52</sup> Neuman, *supra*, note 2 at, 620.

<sup>53</sup> *United States v. Estrada*, 876 F.3d 885, 888 (6th Cir. 2017).

<sup>54</sup> Neuman, *supra*, note 2 at, 635.

<sup>55</sup> *Id.*

life, liberty, or property.<sup>56</sup> The Fifth and Fourteenth Amendments—as well as several statutes—guarantee immigrants specific procedural protections in the same way that they do for naturalized U.S. citizens.<sup>57</sup> Any denial of these foundational individual rights could constitute an abuse of discretion by the Executive Branch.<sup>58</sup>

Earlier in the Nineteenth Century, the Supreme Court ruled on seminal due process cases that became known as the *Slaughter-house Cases*.<sup>59</sup> The Court reasoned that due process is purely procedural and that the enactment of the law via the democratic process was itself, due process on its face.<sup>60</sup> The majority opinion, though no longer applicable<sup>61</sup>, took a textualist approach in analyzing the Fourteenth Amendment, stating that the amendment itself makes distinctions between United States citizenship and state citizenship.<sup>62</sup> This distinction supported the Court’s reasoning that the Framers did not design the Amendment to extend the privileges and immunities outlined in the Bill of Rights onto the individual states.<sup>63</sup>

In doing so, this Court changed the course of history and set the United States on the painstaking case by case review to determine if such action by the government offends those canons of decency and fairness, which have come to be known as selective incorporation.<sup>64</sup> However, others believe that the due process clause does include protections of substantive due process. In a dissenting opinion, Justice Field wrote that “the Due Process Clause protected individuals from state legislation that infringed upon their ‘privileges

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<sup>56</sup> U.S. CONST. amend. V.

<sup>57</sup> *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

<sup>58</sup> *Baires v. I.N.S.*, 856 F.2d 89, 91 (9th Cir. 2004). (Holding that immigration judge’s denial of alien’s request for continuance of asylum hearing and change of venue violated alien’s statutory and regulatory procedural rights.)

<sup>59</sup> *Slaughter-house Cases*, 83 U.S. 36, 74 (1872).

<sup>60</sup> *Id.*

<sup>61</sup> Although the Court’s decision in the *Slaughterhouse Cases* has never been explicitly overturned, during the late 19th and early 20th centuries an ideologically conservative Court would adopt Justice Field’s judicial views, interpreting the Fourteenth Amendment as a protection not of civil rights but of economic liberties. Later, these views would blossom to provide many other unenumerated rights ranging from a woman’s right to choose to the right to marry freely regardless of gender or sexual orientation.

<sup>62</sup> *Slaughter-house Cases*, 83 U.S. 36, 74 (1872).

<sup>63</sup> *Id.*

<sup>64</sup> *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

and immunities' under the federal Constitution."<sup>65</sup> In his dissent, Justice Field argued that the Privileges and Immunities Clause set forth in the Fourteenth Amendment protected all privileges and immunities from state encroachment, not just those secured by the federal government.<sup>66</sup> Constitutional scholars view this as one of the first steps toward the modern doctrine of substantive due process, a theory that the Court has developed to defend rights that are not enumerated in the Constitution.<sup>67</sup> The *Slaughter-house Cases*' dissent, which is now seen as the correct legal conclusion, is an example of protection of unenumerated due process rights. The right of discretionary relief should be treated as an unenumerated right and protected right under the due process clause. Providing the person with this protection will ensure a fair hearing before an immigration judge who has quasi-judicial and quasi-executive power and can use them to infringe rights in an effort to promote efficiency and expedite results. Similarly, it is the goal of this Note to promote that unenumerated rights with respect to informing immigrants of discretionary relief are fundamental to immigrants facing deportation and their continued protection is necessary for all persons regardless of citizenship status.

The dissent in the *Slaughter-house Cases* has given rise to many personal liberties that we hold dear today.<sup>68</sup> Justice Field's dissent vehemently argued that the majority's overly narrow interpretation of the Fourteenth Amendment virtually gutted the Amendment of its protections, and this approach disenfranchised individual due process rights.<sup>69</sup> He urged the Court to take a broader view of the amendment and encouraged the presumption in favor of universal individual rights.<sup>70</sup> The language of the Amendment does not explicitly protect the right to same-sex marriage, religious liberties, or female reproductive choice. However, it has been interpreted by the Supreme Court to imply protections for these

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<sup>65</sup> *Slaughter-house Cases*, 83 U.S. at 74 (Field, J., dissenting).

<sup>66</sup> *Id.*

<sup>67</sup> *Magna Carta: Muse and Mentor*, LIBR. OF CONG., <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html> (last visited Sept. 15, 2019).

<sup>68</sup> *Slaughter-house Cases*, 83 U.S. at 74 (Field, J., dissenting).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

essential fundamental liberties that we enjoy as citizens of the United States.<sup>71</sup>

Generally, the right to be informed of discretionary relief at a deportation hearing would fall under the umbrella of procedural due process rights. Procedural due process rights protect a person if the government acts in such a way as to deprive the individual of life, liberty or property interests. Judge Friendly outlined some common types of procedural guarantees, including notice, an opportunity to be heard before an unbiased tribunal, and an opportunity to present reasons why the proposed action should not be taken.<sup>72</sup> Judge Friendly's article both raises and answers many questions regarding the extent of the hearing required and the balance of individual rights versus the expenditure of bureaucracy.<sup>73</sup> The Court has elaborated on the notice requirement and stated that due process is a guarantee and not merely an act of legislative grace.<sup>74</sup> Therefore, since notice is a part of procedural due process and due process is guaranteed by the Constitution and not conferred, informing an immigrant of discretionary relief should become a part of the notice requirement.

Other scholars have compared the practical application of notice requirements to a cost benefit analysis, explaining that the more expensive the additional procedures will be the less likely the Court will require them.<sup>75</sup> Additional aspects of the analysis include weighing the benefit of the interest to the individual.<sup>76</sup> The more important the interest to the individual, the more likely the Court will require procedural safeguards to protect that interest.<sup>77</sup> Finally, the more the Court believes that the additional procedural components will promote more accurate and less erroneous decisions, the more likely it is the Court will require the procedures.<sup>78</sup> An independent tribunal will provide more accurate decisions if it can use all available forms of relief. Since the relative cost of the procedure is minimal, if anything at all, it should be found that this procedural

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<sup>71</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937); *see also Adamson v. California*, 332 U.S. 46, 68 (1947); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>72</sup> Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

<sup>73</sup> *Id.* at 1276.

<sup>74</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

<sup>75</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, § 7.3 at 451; *see Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>76</sup> CHERMERINSKY, *supra* note 73, at 451.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

safeguard is constitutionally protected under procedural due process rights.

Within the entangled web of individual due process issues lies the immigrant, who ultimately wants to remain in the United States. Our nation ideally strives to provide due process rights to those most vulnerable. The founders of the Constitution had certain principles in mind when they created the Constitution. As times have changed, we can now say that even non-citizens are afforded these rights in accordance with the Constitution's principals. Even though this particular issue is confined to immigration courts, the rights infringed upon relate to all the residents of the country. We cannot lose sight of the individual throughout this daunting deportation process. Although, there may have been wrongs committed that brought the immigrant before this court, these wrongs do not give executive officials carte blanche to ignore rights of the people who have their entire life at stake. Further, this is analogous to a criminal conviction for murder of an individual that does not receive their Miranda rights. This individual has admitted wrongdoing much like the immigrant before the immigration court. However, in a criminal context, if this evidence were admitted it would be a constitutional violation and would be grounds for reversal. The principle behind this analogy is not so much the reason the proceeding is happening in the first place but rather the importance of ensuring a fundamentally fair opportunity to be heard before an impartial tribunal. If the immigrant is not afforded this opportunity it could amount to a deprivation which should result in a reversal much like that of a criminal without the opportunity to have been read their Miranda rights. This individual often has the most at stake as she could face deportation, family separation, criminal charges, and a return to the dire situation she originally wanted to escape.<sup>79</sup> The obligation we have as a nation to this particular individual is to ensure their due process rights are continually protected and not to neglect these essential values based on citizenship status.

Procedural due process applies to non-citizens in the United States because the Fifth Amendment applies to "all persons born or naturalized in United States . . . are citizens of the United States."<sup>80</sup> This amendment confers these rights on immigrants who enter the

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<sup>79</sup> U.S. v. Copeland III, 369 F. Supp. 2d 275, 287 (E.D.N.Y. 2005).

<sup>80</sup> U.S. CONST. amend. V § 1.

United States legally or illegally by use of the words “all persons.”<sup>81</sup> Failure to inform an immigrant of the availability of a particular form of relief inherently abridges a privilege to a fair hearing and deprives the defendant of meaningful judicial review. This is because the right is theoretically waived rendering the decision procedurally sound and therefore not subject to appeal. Thus, this process is inherently unfair because there would be no grounds to appeal as there would technically be no erroneous items on the record, yet the process still serves to deprive an individual of rights that should be protected. The lack of judicial review is an egregious violation of her due process rights that are guaranteed and secured by the Fifth Amendment and conferred upon the states through the Fourteenth Amendments due process clause.<sup>82</sup>

### B. Sixth Amendment

*Duncan v. Louisiana*<sup>83</sup> is the landmark case that confers the Sixth Amendment right to a jury trial onto the states through the Fourteenth Amendment.<sup>84</sup> It is not a stretch to analogize a criminal trial to an immigration hearing. In fact, it has been argued that criminal procedure norms have been disproportionately included into these “civil” proceedings.<sup>85</sup> Some commonalities that are beginning to take hold are those increasingly similar to criminal punishment.<sup>86</sup> The Sixth Amendment states explicitly, “the accused shall . . . be informed of the nature and cause of the accusation; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”<sup>87</sup> The injustice that is occurring in many immigration courts is overwhelming, and the concealment of potential defenses and available forms of relief in immigration hearings should be unconstitutional.

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<sup>81</sup> *Id.*

<sup>82</sup> *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047-10 (9th Cir. 2003).

<sup>83</sup> 391 U.S. 145 (1968).

<sup>84</sup> *Id.* at 148.

<sup>85</sup> See generally Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471 (2007).

<sup>86</sup> *Id.* (“The underlying theories of deportation increasingly resemble those of criminal punishment. Preventive detention and plea bargaining, longstanding staples of the criminal justice system, have infiltrated the deportation process.”).

<sup>87</sup> U.S. CONST. amend. VI.

Although deportation is technically a civil proceeding, it is becoming increasingly similar to criminal prosecutions.<sup>88</sup> These proceedings are criminal in nature because the basis for their deportation is a violation of the United States Code. These individuals are detained pending their hearing which is generally never the case with civil proceedings. Further, in these immigration proceedings the government is bringing the case against the immigrant and not an individual which is another similarity to criminal proceeding as opposed to civil. Many view the deportation proceeding merely as a “second bite at the apple” for the government.<sup>89</sup> Some have called this phenomenon the criminalization of immigration law or “crimigration.”<sup>90</sup> This theory suggests that the government has multiple opportunities to prosecute alleged offenders and often if the initial proceeding results in a guilty plea it is seemingly “definite, immediate and largely automatic” that removal will follow.<sup>91</sup> The gap between the criminal proceeding and the administrative proceeding has diminished substantially.<sup>92</sup> The distinct lack of independent administrative review is startling and the melding of the criminal and immigration courts is increasing.<sup>93</sup> After a conviction, there is virtually no independent review and seemingly the deportation order receives its rubber stamp from Department of Homeland Security and the individual may be removed without having a hearing of any kind or be presented with any form of relief.<sup>94</sup> Although these hearings generally do not carry criminal penalties and are seen as civil or “ministerial” they afford the

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<sup>88</sup> See, e.g., Austin T. Fragomen, *The Uncivil Nature of Deportation: Fourth and Fifth Amendment Rights and the Exclusionary Rule*, 45 BROOK. L. REV. 29, 34-35 (1978).

<sup>89</sup> Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. REG. 47, 68 (2010) (“We find that removal in fact functions as punishment and that immigration law and its enforcement infrastructure have changed to such an extent in the past two decades that removal has become a direct consequence of many convictions for noncitizens.”).

<sup>90</sup> See, e.g., Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639, 640 (2004) (noting that a trend toward increased convergence of the criminal justice and immigration control systems has been apparent since the 1980s).

<sup>91</sup> Maureen A. Sweeney, *supra* note 84, at 78 (2010).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

government the same result.<sup>95</sup> Perhaps a worse outcome is that these hearings generally result in the successful punishment of offenders.<sup>96</sup> After the hearing concludes, it is likely the offenders will subsequently be removed from the United States.<sup>97</sup> The intersection of criminal prosecutions and immigration courts are still increasing. The government has begun to attach criminal consequences to immigration violations.<sup>98</sup>

The intersection between criminal proceedings and immigration hearings may be inevitable. However, what is disturbing to many is that only the negatives associated with criminal prosecutions are being imported into immigration hearings.<sup>99</sup> There is a distinct absence of the protections available in a criminal prosecution because the deportation hearings are considered civil proceedings.<sup>100</sup> Some imports from the criminal system that may help the immigrant is the burden proof. The burden is noticeably more difficult in criminal cases, as it lies with the government to prove their case beyond a reasonable doubt. Civil burden lies with the plaintiff to prove their own case against the defendant. In order to ensure due process, we need a to import criminal due process protections into the immigration context. That way the immigrant should be informed of his right to discretionary relief to avoid deportation. This can be likened to that of a criminal being read his Miranda rights. The import of criminal context in immigration courts should not be unilaterally negative for the accused, if the government is going to use criminal procedure in immigration to its advantage it should also import its significant defenses as well. Since there is a current circuit split, the Supreme Court could accept a case and make a ruling to settle the split or, the legislative branch needs to pass legislation ensuring that discretionary relief is disclosed at every case.

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See generally Legomsky, *supra* note 80, at 471-472.

<sup>99</sup> *Id.*; see e.g., Maureen A. Sweeney, *supra* note 84, at 78; Ramanujan Nadadur, *Beyond “Crimigration” and the Civil-Criminal Dichotomy—Applying Mathews v. Eldridge in the Immigration Context*, 16 YALE HUM. RTS. & DEV. L.J. 141, 146-147 (2013).

<sup>100</sup> Legomsky, *supra*, note 80, at 481.



### III. CONGRESSIONAL ACTION

#### A. Immigration and Nationality Act

Since passage of the McCarran-Walter Act of 1952<sup>101</sup>, the United States government enacted federal statutes that have made a number of revisions to immigration law including major overhauls in 1965, 1990, and 1996.<sup>102</sup> This body of legislation is known as the Immigration and Nationality Act (“INA”). Since 1952, there have been multiple pieces of new legislation that have impacted immigration law, such as the INA of 1965 and the INA of 1990.<sup>103</sup> The 1962 amendment ended the use of formulas, which privileged immigrants from those countries that previously dominated immigration in the late nineteenth and early twentieth century. These privileged immigrants generally came from European countries and resulted in a disproportionate entry of European immigrants over other nationalities.<sup>104</sup> The 1965 law was based on reuniting immigrant families and attracting adept newcomers to the United States.<sup>105</sup>

The 1990 law, which has since been superseded by the 1996 amendments to the INA, collected and codified many existing provisions and reorganized the structure of immigration law.<sup>106</sup> The Act covers a wide range of issues from asylum to the discussion of discretionary relief at a removal hearing, which is the central issue of this Note.<sup>107</sup> The Act defines an alien as “any person not a citizen or national of the United States.”<sup>108</sup> The INA sets forth the guidelines in proceedings regarding immigrants and the rights they have at these hearings.<sup>109</sup> The INA is vast and an all-encompassing list of its provisions is beyond the scope of this Note. However, generally an immigrant is entitled to an expeditious public hearing, notice of the

<sup>101</sup> Pub.L. 82–414, 66 Stat. 163, enacted June 27, 1952.

<sup>102</sup> *U.S. Immigration Timeline*, *supra* note 1.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Immigration and Nationality Act*, U. S. CITIZENSHIP & IMMIGRATION SER., <https://www.uscis.gov/legal-resources/immigration-and-nationality-act> (last visited Mar. 27, 2021).

<sup>107</sup> 8 U.S.C. § 1326(d).

<sup>108</sup> *Id.* § 1101 (a)(3).

<sup>109</sup> *Id.* § 1229a (b)(4).

proceeding, a right to counsel, a right to introduce evidence, examine witnesses in an effort to develop a record on which the judge will make the removal decision. The process is exceptionally daunting, even for a person with knowledge of the law and it is virtually impossible for someone with little or no knowledge of the law or the language being spoken in the courtroom to handle the process.<sup>110</sup> Given these inherent disadvantages many defendants face, it is essential that the immigration judge be thorough and aid in the finding of fact.<sup>111</sup>

Since the late 1980s, there have been many developments in the area of immigration law including the Immigration Nationality Act of 1990, which increased immigration into the United States making the use of § 1326(d) by immigration courts more prevalent. This Act expanded the number of immigrants allowed to enter the United States up to 700,000 and introduced various visa programs such as the lottery visa from low admittance countries, family-based visas, and five distinct employment visas.<sup>112</sup> The decades following this decision observed an ever-increasing societal animus toward immigrants in the United States.<sup>113</sup>

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<sup>110</sup> *Cham v. Att’y Gen. of the U.S.*, 445 F.3d 683, 686 (3d Cir. 2006)

The case now before us exemplifies the “severe wound. . . inflicted” when not a modicum of courtesy, of respect, or of any pretense of fairness is extended to a petitioner and the case he so valiantly attempted to present. Yet once again, under the “bullying” nature of the immigration judge’s questioning, a petitioner was ground to bits. That immigration judge’s conduct has been condemned in prior opinions of this court.

*Id.*; see, e.g., *Sukwanputra v. Gonzales*, 434 F.3d 627, 637–38 (3d Cir. 2006) (explaining the behavior of the immigration judge as “intemperate and bias-laden remarks”, “none of which had any basis in the facts introduced, or the arguments made, at the hearing”); *Fiadjoe v. Att’y General*, 411 F.3d 135, 143, 145–46, 154–55 (3d Cir. 2005). The Court of Appeals Judge Debevoise described the immigration judge as “bullying” and “brow beating.” *Id.* at 155. They explained the IJ’s conduct as “continuing hostility towards the obviously distraught [petitioner] and his abusive treatment of her throughout the hearing,” often reducing her “to an inability to respond” *Id.* at 145, 154.

<sup>111</sup> *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004).

<sup>112</sup> *Immigration and Nationality Act*, U. S. CITIZENSHIP & IMMIGRATION SER., <https://www.uscis.gov/legal-resources/immigration-and-nationality-act> (last visited Mar. 27, 2021).

<sup>113</sup> Tisha R. Tallman, *Liberty, Justice, and Equality: An Examination of Past, Present, and Proposed Immigration Policy Reform Legislation*, 30 N.C. J. INT’L L. & COM. REG. 869, 886-887 (2005) (“As a result of the IRCA, California saw

Immigrants are guaranteed the right to representation by counsel, the right to examine the evidence against the immigrant, and present evidence.<sup>114</sup> However, the INA does not entitle an immigrant to an application for discretionary relief.<sup>115</sup> Further, the federal code defines discretionary relief as an Attorney General's authority to waive inadmissibility for certain immigrants with criminal convictions.<sup>116</sup> The Attorney General may exercise a waiver if he is satisfied that denying the immigrant's admission would result in extreme hardship to the immigrant's spouse, children, or parent who is a United States citizen.<sup>117</sup> If the Attorney General has consented to the immigrant's applying or reapplying for a visa, for admission to the United States, or adjustment of status then, at his discretion, the Attorney General may grant the waiver for temporary stay.<sup>118</sup>

Ultimately, the Attorney General enforces federal immigration law through the Executive Office for Immigration Review. Their primary mission is to adjudicate immigration cases by fairly, expeditiously and uniformly interpreting and administering the Nation's immigration laws.<sup>119</sup> The role of the Attorney General or his designee in immigration matters has been significant since the post-World War II era and continues today.<sup>120</sup> In *United States ex rel Knauff v. Shaughnessy*,<sup>121</sup> the Supreme Court defined the Attorney General's crucial role in adjudicating immigration issues.<sup>122</sup> In that post World War II case, the wife of an army veteran was attempting to enter the country but the Assistant Commissioner of Immigration and Naturalization recommended that she be permanently excluded given her affiliation with Germany.<sup>123</sup> The Attorney General followed this recommendation and barred the spouse from entrance

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another wave of anti-immigrant sentiment which manifested with the introduction of more exclusionary legislation, including denial of services to undocumented persons and denial of in-state tuition to undocumented students.”).

<sup>114</sup> 8 U.S.C. § 1229a (b)(4).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* § 1182 (d)(4).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* § 1182 (h)(1-2).

<sup>119</sup> United States Dept. of Justice, <https://www.justice.gov/eoir/about-office> (last visited May 23, 2021.)

<sup>120</sup> *Id.*

<sup>121</sup> *United States ex rel Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

without a hearing.<sup>124</sup> The Court held that the Attorney General was acting lawfully within his congressionally delegated powers and that he had the discretion to carry out the interests of the executive branch.<sup>125</sup> Further, the Court stated that no court could review the determination of the political branch of government to exclude an immigrant, and the decision of the Attorney General is conclusive.<sup>126</sup>

Thus, the interpretation of the INA by the Attorney General and members of the executive branch plays a determinative role in how the statute operates. The statute's interpretation by these participants provides structure to the practical application of the INA.<sup>127</sup> The statute defines what re-entry after removal is and the rights and limitations of immigrants who are present at these hearings.<sup>128</sup> The statute defines a reentrant as a person who "has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and after that enters, attempts to enter, or is at any time found in, the United States."<sup>129</sup> The statute further provides that any immigrant who has been deported and afterwards enters the United States is guilty of a felony.<sup>130</sup> The statute also outlines the limitations of a collateral attack against the deportation order.<sup>131</sup>

The three elements necessary to sustain a collateral attack in a immigration proceeding under § 1326 are: the exhaustion of administrative remedies; deprivation of judicial review; and the entry of the order was fundamentally unfair.<sup>132</sup> The statute explicitly states that an immigrant bears the burden of proving all three of these elements in order to overrule the deportation order and remain in the United States.<sup>133</sup> The current circuit court split, and the premise of this Note, surrounds the issue of whether failure to inform an immigrant of the opportunity for discretionary relief rises to the level

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<sup>124</sup> *Id.* at 540-41.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See generally John O. McGinnis, *Introduction*, 15 CARDOZO L. REV. 21, 21-28 (1993).

<sup>128</sup> 8 U.S.C. § 1229a (b)(4).

<sup>129</sup> *Id.* § 1326(a)(1)(2).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* § 1326(d).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

of being fundamentally unfair under the third prong of the statute.<sup>134</sup> The statute is unclear regarding the level of unfairness required to sustain a collateral attack on an immigration order. The plain language of the statute, makes it clear that the immigrant bears the burden of proof in these matters.<sup>135</sup>

### **B. Antiterrorism and Effective Death Penalty Act and Illegal Immigration Reform and Immigrant Responsibility Acts of 1996**

Congress attempted to deal with immigration issues by enacting the Antiterrorism and Effective Death Penalty Act<sup>136</sup> (“AEDPA”) and Illegal Immigration Reform and Immigrant Responsibility Act<sup>137</sup> (“IIRIRA”). The AEDPA limits the ability of federal courts to grant procedural and substantive habeas corpus relief.<sup>138</sup> Procedurally, it requires all claims of a criminal defendant to be consolidated into one appeal.<sup>139</sup> Substantively, it shrinks the grounds on which a defendant can make a successful habeas claim for convictions contrary to an “unreasonable determination of the facts in light of the evidence.”<sup>140</sup>

The IIRIRA revolutionized the process of immigrant entry into the United States by replacing the term “entry” with “admission” and ultimately expanding government rights to detain and deport

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<sup>134</sup> C. ALLIE SEGREST, IMMIGRATION LAW—THE CURRENT SPLIT ON AN UNDOCUMENTED IMMIGRANT’S CONSTITUTION RIGHT TO BE INFORMED OF DISCRETIONARY RELIEF—UNITED STATES V. ESTRADA, 876 F.3D 885 (6TH CIR. 2017), 41 AM. J. TRIAL ADVOC. 673.

<sup>135</sup> 8 U.S.C. § 1326(d).

<sup>136</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in various sections of §§ 8, 18, 22, 28, 40, 42 U.S.C.).

<sup>137</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in various sections of §§ 8, 18 U.S.C.).

<sup>138</sup> *Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)*, CORNELL L. SCH. LEG. INFO. INST., [https://www.law.cornell.edu/wex/antiterrorism\\_and\\_effective\\_death\\_penalty\\_act\\_of\\_1996\\_\(aedpa\)](https://www.law.cornell.edu/wex/antiterrorism_and_effective_death_penalty_act_of_1996_(aedpa)) (last visited Nov. 10, 2019).

<sup>139</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in various sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

<sup>140</sup> 28 U.S.C. § 2254.

immigrants.<sup>141</sup> The Act strengthened U.S. immigration laws by adding penalties for undocumented immigrants found in the U.S.<sup>142</sup> These amendments ultimately did not have the effect Congress intended. Congress intended to clarify and declutter immigration policy by passing a new law.<sup>143</sup> However, Congress ultimately over-complicated an already complex area of the law by introducing over fifty new deportable offenses and a new form of discretionary relief available to a very narrow class of immigrants.<sup>144</sup>

#### IV. SUPREME COURT CASES

The U.S. Supreme Court has yet to hear a case concerning whether all immigrants have a fundamental right in re-entry after removal hearings to be informed of the availability of discretionary relief.<sup>145</sup> However, the Court has consistently found that the First Amendment, as well as the due process clause of the Fifth and Fourteenth Amendments, extend their protections to all persons, whether citizens or resident immigrants, against any encroachment.<sup>146</sup> The Supreme Court has held that the government must protect an immigrant's due process rights.<sup>147</sup> Specifically, the government must

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<sup>141</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 110 Stat. 3009-546.

<sup>142</sup> *Illegal Immigrant Reform and Immigration Responsibility Act*, CORNELL L. SCH. LEG. INFO. INST., [https://www.law.cornell.edu/wex/illegal\\_immigration\\_reform\\_and\\_immigration\\_responsibility\\_act](https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act) (last visited Nov. 10, 2019).

<sup>143</sup> Anthony Distinti, *Gone but Not Forgotten: How Section 212(c) Relief Continues to Divide Courts Presiding Over Indictments for Illegal Reentry*, 74 *FORDHAM L. REV.* 2809, 2822 (2006);

<sup>144</sup> Anthony Distinti, *Gone but Not Forgotten: How Section 212(c) Relief Continues to Divide Courts Presiding Over Indictments for Illegal Reentry*, 74 *FORDHAM L. REV.* 2809, 2822 (2006); *Illegal Immigrant Reform and Immigration Responsibility Act*, CORNELL L. SCH. LEG. INFO. INST., [https://www.law.cornell.edu/wex/illegal\\_immigration\\_reform\\_and\\_immigration\\_responsibility\\_act](https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act) (last visited Nov. 10, 2019).

<sup>145</sup> *United States v. Estrada*, 876 F.3d 885, 886 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2623 (2018).

<sup>146</sup> See Kim, *supra* note 4.

<sup>147</sup> *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). (Kwong was a seaman who was deported without a hearing pursuant to an Attorney General exclusion order. The Court found the Attorney General did not possess the authority to deny an immigrant the right to be heard in opposition of an order which permanently excluded the immigrant.)

provide notice of the charges against him, a hearing before an impartial executive or administrative tribunal, and a fair opportunity to be heard.<sup>148</sup> The Supreme Court observed that in cases arising out of illegal entry, the entrant is entitled to a fair trial, a fair opportunity to be heard, and that trial must meet the standards of impartiality.<sup>149</sup>

In the last forty years several Supreme Court cases have made an important impact on this very narrow issue of the right to be informed of discretionary relief. Some of these cases eventually changed the course of immigration law in the United States.<sup>150</sup> Two immigration cases that had a particular impact on Congress are the opinions rendered in *United States v. Mendoza-Lopez*<sup>151</sup> and *I.N.S. v. St. Cyr*<sup>152</sup> which were ultimately codified and subsequently superseded by statute. Prior to *Mendoza-Lopez*, § 1326(d) was only recognized in case law. Congress saw its importance and thus worked to draft legislation that essentially mirrored the decision in *Mendoza-Lopez*. In *Mendoza-Lopez*, a Mexican national was arrested and deported after a group hearing and was subsequently found in the United States.<sup>153</sup> He was again arrested and scheduled for a removal after re-entry hearing.<sup>154</sup> The Court held that the unavailability of effective judicial review violated the defendant's due process rights.<sup>155</sup> The Court stated that an immigrant has a due process right to require a collateral review of any deportation order.<sup>156</sup> The Court limited this right, however, finding that the accused cannot collaterally attack the order if the requirements which later became § 1326(d), exhaustion of administrative remedies, deprivation of judicial review, and the order was fundamentally unfair, are not met.<sup>157</sup> Congress amended § 1326(d) to reflect the Courts findings and codify these three requirements.<sup>158</sup> Now, an immigrant seeking collateral attack of a deportation order would rely on § 1326(d) and its elements rather than *Mendoza-Lopez*.

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<sup>148</sup> *Id.* at 597-598.

<sup>149</sup> *Id.*

<sup>150</sup> See Distinti, *supra* note 129.

<sup>151</sup> 481 U.S. 828 (1987).

<sup>152</sup> 533 U.S. 289 (2001).

<sup>153</sup> 481 U.S. 828.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> 8 U.S.C. § 1326(d).

Similarly, in 2001, the Supreme Court heard the case, *INS v. St. Cyr*,<sup>159</sup> which also had a rippling effect in Congress. Prior to *St. Cyr*, in 1996, Congress drafted IIRIRA which limited review of final deportation orders and stated that district courts did not have proper jurisdiction to hear these appeals.<sup>160</sup> Such appeals would need to be heard directly by courts of appeals.<sup>161</sup> However, Congress did not make explicitly clear what would happen if the appeal was brought on habeas corpus grounds. In *St. Cyr*, a permanent resident immigrant filed a petition for habeas corpus, seeking a review of the decision of the Board of Immigration Appeals (B.I.A.).<sup>162</sup> The government ordered the defendant's removal because he pled guilty to an aggravated felony.<sup>163</sup> *St. Cyr* appealed and the Supreme Court granted certiorari.<sup>164</sup> The court found that IIRIRA did not eliminate district court review via habeas corpus of constitutional or legal challenges to final removal orders.<sup>165</sup> Subsequently, The REAL ID Act clarified that final orders of removal may not be reviewed in district courts, even via habeas corpus.<sup>166</sup> Both cases are now superseded by statute.

This unique area of the law simultaneously retains aspects of ministerial proceedings and criminal prosecutions, requires an in-depth review of procedural due process, and the government's role in the safeguard of that constitutional right. The Supreme Court has long held that immigration control has been a key aspect of the sovereignty of the United States.<sup>167</sup> In *Chae Chan Ping v. United States*,<sup>168</sup> the Court held the government may limit procedural rights granted to noncitizens.<sup>169</sup> Since then the Court's decision in *Mathews v. Eldridge*<sup>170</sup> gave much needed guidance on procedural due process

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<sup>159</sup> 533 U.S. 289 (2001).

<sup>160</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in various sections of §§ 8, 18 U.S.C.).

<sup>161</sup> *Id.*

<sup>162</sup> 533 U.S. 289, 293.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Nasrallah v. Barr*, 140 S.Ct. 1683, 1690 (2020).

<sup>166</sup> *Id.*

<sup>167</sup> *Nadadur*, *supra* note 92, at 142-143; *see also* *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

<sup>168</sup> 130 U.S. 581, 606 (1889).

<sup>169</sup> *Id.*

<sup>170</sup> 424 U.S. 319 (1976).



review and infringement of such rights by government entities.<sup>171</sup> In *Mathews*, the state informed Mr. Eldridge that he was no longer eligible for social security disability benefits because according to his medical records his disability ceased in May 1972.<sup>172</sup> Eldridge disputed the claim, and rather than seeking reconsideration by the state agency he filed a federal lawsuit seeking an injunction to retain his benefits.<sup>173</sup> The Fourth Circuit Court of Appeals affirmed the injunction.<sup>174</sup> The Court held that for an administrative procedure to meet constitutional guarantees, the court must apply a three factor balancing test. The court must weigh three factors: (1) the private interest at stake in the administrative action, (2) the risk of an erroneous deprivation of this interest through the procedures used and the probative value, if any, of additional or substitute procedural safeguards; and (3) the government's interest.<sup>175</sup> This includes the function involved and the fiscal and administrative burdens that additional substitute procedural benefit would entail.<sup>176</sup> The Court engaged in a balancing test to determine if the current procedure was adequate compared to the alternative procedure requested.<sup>177</sup> The court noted that additional administrative and societal costs coupled with little to no added value of the additional requirements requested would be too much of a burden.<sup>178</sup>

The balancing of the *Mathews* factors lends itself directly to immigration removal hearings as there are individual interests at stake as well as administrative burdens to consider. Here, the accused faces a significant deprivation of a liberty interest, to be free and live in the United States. Weighed against the interest of the government, the burden and cost of implementation of ensuring discretionary relief is explained in all hearings where it is applicable.<sup>179</sup> Seemingly, the burden is rather small. The burden on the government is to advise all eligible candidates of their right to seek discretionary relief. However, this will undoubtedly increase the number of applications for discretionary relief significantly.

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<sup>171</sup> Nadadur, *supra* note 92, at 142-143.

<sup>172</sup> *Id.* at 324.

<sup>173</sup> *Id.* at 325.

<sup>174</sup> *Id.* at 325-26.

<sup>175</sup> 424 U.S. 319, 334-335.

<sup>176</sup> *Id.* at 335.

<sup>177</sup> *Id.* at 334-335.

<sup>178</sup> *Id.* at 349.

<sup>179</sup> *Id.*

Additionally, the increasing number of applications will directly impact administrative costs and caseloads for already overworked immigration judges. The argument section will discuss how the importance of the immigrant's liberty interest exceeds the cost and burden on the government.

## V. EXAMINING THE CIRCUIT SPLIT

Over the past decade, there has been an intriguing increase in litigation in the federal circuit courts surrounding the fundamental fairness element of § 1326(d).<sup>180</sup> All of the federal circuits courts have a consensus on the criteria constituting what is “fundamentally unfair.”<sup>181</sup> In order “to prove the fundamental unfairness of an underlying deportation order, a defendant must show both a due process violation emanating from defects in the underlying deportation proceeding and resulting prejudice.”<sup>182</sup> Although an agreement exists on the requirements of proving fundamental unfairness, there is a federal circuit split on the issue of whether failure to inform an immigrant of his right to discretionary relief violates the defendant's constitutional rights and renders the proceeding fundamentally unfair under § 1326(d)(3).<sup>183</sup>

The prevailing position for the majority of circuit courts is that immigrants do not have a due process right to be informed of the right to discretionary relief from deportation.<sup>184</sup> The courts go on to further state that the failure to advise does not render the procedure “fundamentally unfair.”<sup>185</sup> Specifically, the Fifth Circuit best outlines the majority view by formulating three distinct but related requirements that must be met by an immigrant wishing to challenge

<sup>180</sup> SEGREST, *supra* note 120, at 676-677.

<sup>181</sup> *Id.*; see also *United States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2003); *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004); *United States v. Estrada*, 876 F.3d 885 (6th Cir. 2017); *United States v. Lopez-Ortiz*, 313 F.3d 225 (5th Cir. 2002); *United States v. Aguirre-Tello*, 353 F.3d 1199 (10th Cir. 2004); *United States v. Torres*, 383 F.3d 92 (3d Cir. 2004); *Smith v. Ashcroft*, 295 F.3d 425 (4th Cir. 2002); *Oguejiofor v. Attorney Gen. of the United States*, 277 F.3d 1305 (11th Cir. 2002); *Escudero-Corona v. INS*, 244 F.3d 608 (8th Cir. 2002).

<sup>182</sup> *Estrada*, 876 F.3d at 888.

<sup>183</sup> SEGREST, *supra* note 120, at 676-677.

<sup>184</sup> *Distinti*, *supra* note 128, at 2825.

<sup>185</sup> *Id.*

the use of a prior deportation or removal order.<sup>186</sup> *In the Fifth Circuit, the immigrant* must establish that (1) the prior hearing was “fundamentally unfair”; (2) the hearing effectively eliminated the right of the immigrant to challenge the hearing by means of judicial review of the order; and (3) the procedural deficiencies caused the immigrant actual prejudice.<sup>187</sup> This three-pronged test established by the Fifth Circuit nearly mirrors the federal code Section 1326(d).

In *United States v. Lopez-Vasquez*,<sup>188</sup> the Fifth Circuit took a hardline procedural approach. Specifically, the court stated that if the Government followed the federal procedure for expedited removal of immigrants, and the immigrant did not raise an allegation that the Government violated his due process rights, his removal was not fundamentally unfair.<sup>189</sup> In *United States v. Benitez-Villafuerte*<sup>190</sup> the Fifth Circuit explained its definition of prejudice. In this connection:

A showing of prejudice means “there was a reasonable likelihood that but for the errors complained of the defendant would not have been deported” [or removed]. In short, “if the defendant was legally deportable, and despite the I.N.S.’s errors, the proceeding ‘could not have yielded a different result,’ the deportation is valid for purposes of section 1326.”<sup>191</sup>

The Fifth Circuit court is attempting to show that even with the INS errors, if there is no other reasonable result that could have developed from the proceedings, the deportation stands.<sup>192</sup> This is most similar to a harmless error argument where although there was some defect in the process it was not egregious and dispositive of the ultimate outcome.<sup>193</sup>

*United States v. Lopez-Ortiz*<sup>194</sup> is the leading case that held that failure to inform an immigrant of discretionary relief does not

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<sup>186</sup> *United States v. Lopez-Vasquez*, 227 F.3d 476, 483 (5th Cir. 2000).

<sup>187</sup> *Id.*

<sup>188</sup> 227 F.3d 476 (5th Cir. 2000).

<sup>189</sup> *Id.* at. 483.

<sup>190</sup> 186 F.3d 651 (5th Cir. 1999).

<sup>191</sup> *Id.* at 658-59 (citation omitted) (quoting *United States v. Galicia-Gonzalez*, 997 F.2d 602, 603 (9th Cir. 1993)).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> 313 F.3d 225 (5th Cir. 2002).

infringe upon the due process rights of the immigrant.<sup>195</sup> In *Lopez-Ortiz*, the defendant, Joel Lopez-Ortiz, who was a citizen of Mexico, was convicted of felony possession of cocaine and sentenced to removal as an aggravated felon.<sup>196</sup> At the removal hearing, the judge failed to advise the defendant he was eligible to apply for § 212(c) discretionary relief.<sup>197</sup>

In *Lopez-Ortiz*, the court stated that the defendant was eligible for a discretionary waiver of removal at the time of his prior removal proceeding.<sup>198</sup> However, the Fifth Circuit Court of Appeals held that the immigration judge's failure to inform the immigrant of his eligibility for that waiver did not render the proceeding fundamentally unfair.<sup>199</sup> The Fifth Circuit in *Lopez-Ortiz* reasoned that § 212(c) discretionary relief is available within the broad and unfettered discretion of the Attorney General, and therefore discretionary relief is not a due process right.<sup>200</sup> This circuit has noted that § 212(c) relief "was couched in conditional and permissive terms. As a piece of legislative grace, it conveyed no rights, it conferred no status," and its denial does not implicate the due process clause.<sup>201</sup> Ultimately, the view of the majority is that § 212(c) does not grant a liberty or property interest.<sup>202</sup> Thus, it cannot qualify as a due process violation amounting to fundamental unfairness.<sup>203</sup>

The court ultimately found that eligibility for § 212(c) relief is not a liberty or property interest warranting due process protection.<sup>204</sup> Instead, the court found that relief is only at the grace of the Attorney General.<sup>205</sup> The Fifth Circuit Court of Appeals held this form of

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 227.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *See Lopez-Ortiz*, 313 F.3d 225.

<sup>201</sup> *Alfarache v. Cravener*, 203 F.3d 381, 383 (5th Cir.2000) (quoting *Cadby v. Savoretti*, 256 F.2d 439, 443 (5th Cir.1956)).

<sup>202</sup> *See Lopez-Ortiz*, 313 F.3d 225; *see also* *United States v. Aguirre-Tello*, 353 F.3d 1199 (10th Cir. 2004); *United States v. Torres*, 383 F.3d 92 (3d Cir. 2004); *United States v. Estrada*, 876 F.3d 885, 888 (6th Cir. 2017).

<sup>203</sup> *Distinti*, *supra* note 122, at 2826-2827.

<sup>204</sup> 313 F.3d at 230-231.

<sup>205</sup> *Id.*; The attorney general is appointed by the President and gives rise to the appearance of bias and impartiality because this decision effects a person's rights and is made by someone at the mercy of the person implementing the policy in the first place.

relief is not a constitutionally protected due process right for two reasons. First, that fundamental fairness is a procedural question.<sup>206</sup> Since deportation hearings are civil matters, immigrants do not have the same protections that would be available to a criminal defendant. *Lopez-Ortiz* presupposes that eligibility for discretionary relief under § 212(c) is an interest warranting constitutional protection, but the Circuit Court disagreed.<sup>207</sup> This court distinguished *St. Cyr* on a ground that the Supreme Court found for *St. Cyr* through an interpretation of the IIRIRA not INA § 212(c). The Court reasoned that relying specifically on INA § 212(c) is solely within the discretion of the Attorney General and can be denied as it is not protected by due process.<sup>208</sup> The court turned to the three factors found in *Kwong* to determine if Lopez-Ortiz was provided with sufficient protection.<sup>209</sup> The Fifth Circuit court reasoned that the immigrant judge's error did not rise to a level that would interfere with the three factors in *Kwong*.<sup>210</sup> Thus, the hearing was fundamentally fair and INA § 212(c) is not a liberty or property interest that warranted due process protection.

The Tenth Circuit went even further in disputing the right of immigrants to be informed of discretionary relief and defines its own extremely narrow standard of due process.<sup>211</sup> Defining due process for deportable immigrants as “an opportunity to be heard at a meaningful time and in a meaningful manner”<sup>212</sup> injects subjectivity into the foundational principles of procedural due process.

The minority of circuits include the Second and Ninth Circuits.<sup>213</sup> These circuit courts recognize that the right to be informed of the availability of discretionary relief is a due process right.<sup>214</sup> The right to be informed is supported by the reasoning that a failure to be informed violates their due process rights and produces prejudice, which in turn leads to the hearing itself becoming

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<sup>206</sup> *Id.* at 230.

<sup>207</sup> *Id.* at 231.

<sup>208</sup> *Id.* at 231.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *United States v. Aguirre-Tello*, 353 F.3d 1199 (10th Cir. 2004).

<sup>212</sup> *Id.*

<sup>213</sup> *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2003); *see also United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004).

<sup>214</sup> *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2003); *see also United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004).

fundamentally unfair<sup>215</sup> thus, violating the defendant's constitutional rights.<sup>216</sup> These Circuits highly contest the position advanced by the Fifth Circuit as they argue this is contrary to the very fabric of procedural due process.<sup>217</sup>

The Second and Ninth Circuits state that a "failure to advise a potential deportee of a right to seek Section 212(c) [discretionary] relief can, if prejudicial, be fundamentally unfair within the meaning of Section 1326(d)(3)."<sup>218</sup> In doing so, the Ninth Circuit has taken a fairly liberal stance on the interpretation of the Due Process Clause in the context of Section 1326(d) and the right to be informed of discretionary relief.<sup>219</sup> The Ninth Circuit stated, "we have repeatedly held that an I.J.'s [immigration judge] failure to so advise violates due process and can serve as the basis for a collateral attack to a deportation order."<sup>220</sup>

The most progressive approach to this issue of informing an immigrant of her eligibility for discretionary relief is discussed in the Ninth Circuit case of *United States v. Ubaldo-Figueroa*.<sup>221</sup> In *Ubaldo-Figueroa*, an immigrant was convicted by a federal immigration judge for illegal re-entry into Southern California, and he appealed.<sup>222</sup> The Ninth Circuit Court of Appeals held an immigrant could collaterally attack a removal order underlying illegal re-entry prosecution despite failure to exhaust his administrative remedies.<sup>223</sup> Explicitly, the immigration judge deprived the immigrant of his due process rights when the judge did not inform the immigrant of his opportunity for discretionary relief in the immigrant's underlying removal proceeding.<sup>224</sup>

The Ninth Circuit reasoned that due to the immigration judge's failure to inform the immigrant of his right to appeal, his deportation order deprived the immigrant of the opportunity for

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<sup>215</sup> *Ubaldo-Figueroa*, 364 F.3d at 1048.

<sup>216</sup> *Id.*

<sup>217</sup> *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047-1048 (9th Cir. 2003); *see also* *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004).

<sup>218</sup> *Id.*

<sup>219</sup> *United States v. Lopez-Velasquez*, 629 F.3d 894 (9th Cir. 2010).

<sup>220</sup> *Id.* at 897.

<sup>221</sup> 364 F.3d 1042 (9th Cir. 2003).

<sup>222</sup> *Id.* at 1047.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

meaningful judicial review in violation of his due process rights.<sup>225</sup> Therefore, immigrants could collaterally attack a removal order underlying illegal re-entry prosecution.<sup>226</sup> The Court of Appeals further stated that an immigrant does not need to prove that he was entitled to relief to establish prejudice.<sup>227</sup> Instead, an immigrant must show that he had a “plausible” ground for relief from deportation.<sup>228</sup> This court distinctly rejected the principle that discretionary relief is at the grace of the Attorney General.<sup>229</sup> This court explicitly stated that it rendered the hearing unfair if all remedies are not proffered at removal hearings.<sup>230</sup> Relying heavily on *Mendoza-Lopez*, it held that determinations in an administrative proceeding have substantial implications, such as criminal sanctions, and thus there must be some meaningful judicial review.<sup>231</sup> This court found that not being informed of discretionary review amounts to improper deprivation of opportunity for meaningful judicial review under 8 U.S.C. § 1326(d)(2).<sup>232</sup> Further, this court states only one plausible legal challenge to his removal order is enough to amount to prejudice because if he had known of the opportunity he could have pursued it.<sup>233</sup> Thus, a immigration judge’s failure to properly inform has prejudicial effects from pursuing his plausible claim.

The Ninth Circuit has established the plausibility standard when reviewing these discretionary decisions en banc.<sup>234</sup> When reviewing discretionary decisions, the immigrant must only show prejudice.<sup>235</sup> To establish prejudice, the immigrant does not have to show that he actually would have been granted relief.<sup>236</sup> Instead, he must only show that he had “plausible” ground for relief from

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<sup>225</sup> *Id.* at 1050.

<sup>226</sup> *Id.* at 1047.

<sup>227</sup> *Id.* at 1050.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* (“The requirement that the IJ inform an alien of his or her ability to apply for relief from removal is ‘mandatory,’ and ‘failure to so inform the alien [of his or her eligibility for relief from removal] is a denial of due process that invalidates the underlying deportation proceeding.’” (quoting *United States v. Muro-Inclan*, 249 F.3d 1180, 1183 (9th Cir. 2001)))

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 1048.

<sup>232</sup> *Id.* at 1050.

<sup>233</sup> *Id.*

<sup>234</sup> *United States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004).

<sup>235</sup> *Id.* at 1050.

<sup>236</sup> *Id.*

deportation.<sup>237</sup> The Ninth Circuit has adopted and relied on a plausibility standard, which has more recently been discussed as a reasonable possibility standard.<sup>238</sup> The Ninth Circuit's interchangeable use indicates that plausibility and reasonable possibility may be synonymous. Recent case law cites to a reasonable possibility standard and may even indicate less of a burden than the plausibility standard previously established by the Ninth Circuit.<sup>239</sup> In practice, the above theories operate effectively identically, and an immigration judge must inform an immigrant of the possibility of discretionary relief if there is only a "reasonable possibility that the petitioner may be eligible for relief."<sup>240</sup>

Comparably, the Second Circuit adopted the more judicially manageable standard of reasonable probability for receiving discretionary relief.<sup>241</sup> The primary case arising under the Second Circuit is *United States v. Copeland*.<sup>242</sup> In *Copeland*, a Jamaican citizen, had been adopted by his grandmother, a naturalized citizen of the United States, and came to the United States at age twelve.<sup>243</sup> He was convicted of crimes while living as a lawful permanent alien and was subsequently deported.<sup>244</sup> Upon re-entry, he was again arrested for illegal re-entry and now faced with a second deportation proceeding.<sup>245</sup> The lower court held that Copeland "really did not appreciate that he has a right to appeal" and dismissed the indictment.<sup>246</sup> The lower court held Copeland's deportation order was found to be fundamentally unfair because the immigration judge failed to advise of the existence of discretionary relief and this unfairness was deemed prejudicial to Copeland because there was a reasonable probability of receiving § 212(c) relief.<sup>247</sup> The government appealed the decision.

The Second Circuit held that, a defendant must show both procedural error and prejudice resulting from that error to show

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<sup>237</sup> *Id.*

<sup>238</sup> *United States v. Lopez-Velasquez*, 629 F.3d 894, 897 (9th Cir. 2010).

<sup>239</sup> *Id.*; see also *Moran-Enriquez v. INS*, 884 F.2d 420, 423 (9th Cir.1989).

<sup>240</sup> 629 F.3d. at 901.

<sup>241</sup> *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004).

<sup>242</sup> 376 F.3d 61 (2d Cir. 2004).

<sup>243</sup> *Id.* at 62.

<sup>244</sup> *Id.* at 62-63.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 67.



fundamental unfairness.<sup>248</sup> The Second Circuit partially stood with the Ninth Circuit in recognizing that a failure to advise a potential deportee of a right to seek §212(c) relief can, if prejudicial, be fundamentally unfair within the meaning of §1326(d)(3). The Second Circuit concluded that where an alien is erroneously denied information and the erroneous denial of that information results in deportation that likely would have been avoided if the immigrant was properly informed, such error is fundamentally unfair within the meaning of §1326(d)(3).<sup>249</sup>

In the view of the Second Circuit, the defendant must show that he likely would have been granted the relief sought if he had obtained a hearing.<sup>250</sup> Although there is no formal level of proof for determining the likelihood of success at the hearing, the Second Circuit analogizes the failure to inform with that of the standard for ineffective counsel claims.<sup>251</sup> The court stated that this analogy is close-fitting because it would likely result from the failure of an immigration judge to adequately provide the essential duties to a pro se immigrant plaintiff.<sup>252</sup> Thus, prejudice requires a showing that the unprofessional errors of the sitting judge are the but-for cause of the immigrant not being granted discretionary relief.<sup>253</sup>

The Second Circuit takes logical steps in formulating the desire to provide immigrants with the guaranteed protections one is entitled to under the due process clause.<sup>254</sup> This approach acknowledges the built-in disadvantages an immigrant has when facing deportation. The Second Circuits approach acknowledges the disparities in the adversarial system and attempts to remedy these discrepancies.<sup>255</sup> However, the Second Circuit does require a defendant to show a reasonable probability that the immigrant would have obtained relief had he or she been informed of and sought a § 212(c) hearing.<sup>256</sup> This standard requires more than a mere plausibility of obtaining relief which its fellow Ninth Circuit Court

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<sup>248</sup> *Id.* at 70.

<sup>249</sup> *Id.* at 71.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 73.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 71.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 74.

requires.<sup>257</sup> The Second Circuit's ruling allows the balance that Congress initially sought by enacting these immigration statutes and is a better compromise than the Ninth Circuit's approach.<sup>258</sup>

The amendments enacted by Congress in 1996 (AEDPA and IIRIRA) sought to reduce immigration litigation through the restructuring of administrative appeals and judicial procedures.<sup>259</sup> The Second Circuit engages in the necessary balancing test, which the Supreme Court commonly engages in with regards to many constitutional inquiries, by requiring a higher threshold of prejudice than the Ninth Circuit but also realizing the fiscal responsibility the court has in engaging only credible appeals.<sup>260</sup> In doing so, the Second Circuit uses its discretion in not overly stretching the provisions of the clause beyond its constitutional limit. The Second Circuit identifies the requirement of the immigrant to show that an immigration judge committed prejudice in the handling of the immigrant's case in order to be successful.<sup>261</sup> The Second Circuit analogizes §212(c) claims to that of ineffective counsel claims.<sup>262</sup> They state "prejudice is shown where there is a reasonable probability that, but for the immigration judges unprofessional errors, the alien would have been granted §212(c) relief."<sup>263</sup> The Second Circuit's approach further cements the idea of both procedural and substantive fairness that is embedded in our nation's Constitution.

## VI. ARGUMENT

In the Argument, Section A discusses the view that the failure to inform an immigrant of the availability of discretionary relief is not fundamentally unfair under 8 U.S.C. § 1326(d) and the majority of circuit courts' reasoning is grounded in a strict textualist approach to constitutional interpretation. Section B addresses the countervailing progressive view that the failure to inform the

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<sup>257</sup> *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047-48 (9th Cir. 2003); *See also United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004).

<sup>258</sup> MARGARET MIKYUNG LEE, CONG. RSCH. SERV., R43226, AN OVERVIEW OF JUDICIAL REVIEW OF IMMIGRATION MATTERS (2013), <https://fas.org/sgp/crs/homsec/R43226.pdf>.

<sup>259</sup> *Id.*

<sup>260</sup> *United States v. Copeland*, 376 F.3d 61, 74 (2d Cir. 2004).

<sup>261</sup> *Id.* at 73.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

immigrant of the opportunity to seek discretionary relief is fundamentally unfair. This Section introduces some tests that are currently at work in the varying Circuits and reasons why they employ them.

**A. Failure to consider an Immigrant for Discretionary Relief is Not Fundamentally Unfair**

Proponents for the majority indicate the need for a strict textualist interpretation of the statutes.<sup>264</sup> The proponents emphasize that the statute uses no “explicit mandatory language” to create a due process right in discretionary relief and states the statute offers a “‘mere hope’ . . . of relief.”<sup>265</sup> Advocates for the majority lean on the intent of Congress when it modified the Immigration and Nationality Act in 1996.<sup>266</sup> Relevant legislative history was nicely summed up by then President Bill Clinton, who stated the legislation strengthened “the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system — without punishing those living in the United States legally.”<sup>267</sup> In modifying existing law, Congress sought to improve border security, encourage legal entry, enhance punishment on fraud and smuggling, and strengthen enforcement on restrictions against employment of and benefits received by illegal aliens. Specifically, Congress desired expedited immigrant removal or deportation and achieved this by reducing the scope of judicial review.<sup>268</sup> In combination with the legislative intent and plain language of the statute, the majority view seeks to interpret §1326(d) narrowly.

The narrow interpretation of §1326(d) is unconstitutional. It unnecessarily deprives immigrants of the opportunity of meaningful judicial review. The mere fact of informing the immigrant of the opportunity for discretionary review does not entitle him to relief. This would not create undue burden on the immigration courts by causing backlogs with extended hearings. The Fifth Circuit’s narrow

<sup>264</sup> *Id.*; see also *United States v. Torres*, 383 F.3d 92 (3d Cir. 2004); *United States v. Estrada*, 876 F.3d 885, 888 (6th Cir. 2017); *United States v. Lopez-Ortiz*, 313 F.3d 225 (5th Cir. 2002).

<sup>265</sup> *United States v. Torres*, 383 F.3d 92 (3d Cir. 2004).

<sup>266</sup> MARGARET MIKYUNG LEE, *supra* note 228, at 1.

<sup>267</sup> Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6(3) J. ON MIGRATION & HUM. SEC., 192, 192 (2018).

<sup>268</sup> SEGREST, *supra* note 120.

interpretation of *St. Cyr* is incorrect. They have held “denial of [Section 212(c) relief] does not implicate the Due Process clause” and therefore eligibility for such relief is not a interest warranting due process protection.<sup>269</sup> While it grounded some of its findings in the IIRIRA, the Fifth Circuit generally misapplied *St. Cyr*. *St. Cyr* also addressed § 212(c) relief specifically by stating there is definitive difference between certain deportation and possible deportation. These differences indicate that if discretionary relief could have made a difference in the outcome to the immigrant it would render the hearing fundamentally unfair. This further suggests that those immigrants eligible for § 212(c) relief should at least be informed of the opportunity, but, whether the court chooses to grant the relief sought is a different inquiry entirely. The carve out created by the Fifth Circuit disregards individual rights and shows the prevailing injustice of encroaching criminal prosecution ideology without the supporting criminal due process rights. Their opinion circumvents the purpose of *St. Cyr* which was to provide meaningful and unbiased review of deportation orders.

**B. Failure to Consider an Immigrant for Discretionary Relief is Fundamentally Unfair**

The Ninth Circuit has been known to make bold assertions in the defense of civil liberties and expansive individual rights.<sup>270</sup> Though audacious, the adoption of the plausibility standard is judicially unmanageable. With respect to the goals of efficiency, balancing the paramount importance of properly informing an immigrant of due process rights, the Ninth Circuit tips the scales slightly too far from the center. The adoption of a plausibility standard will most definitely create an unmanageable case load for administrative officials. This could have more negative consequences than positive. It may hamper the ability of the executive branch to effectively expedite hearings and keep all people including the immigrant safe. The adoption of the plausibility standard will cause undue delay for those who have more than a

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<sup>269</sup> *Lopez-Ortiz*, 313 F.3d at 231.

<sup>270</sup> *See Al Otro Lado v. Wolf*, 952 F.3d 999 (9th Cir. 2020). (granting preliminary injunction preventing enforcement of a regulation on a provisionally certified class that required asylum seekers to apply for asylum in a third country that they passed through on their way to the southern border).

plausible chance of remaining in the country. Conversely, it will provide those who only have one infinitesimal claim, the ability to seek review to the detriment of those whose chances of remaining are much greater. This is a delicate balance and I do not intend to cast aside the hopes of those who only have a plausible claim. However, there are both monetary and humanitarian costs in adopting this broad sweeping standard.

Section 1326 (d) of the eighth volume of the United States Code requires the immigrant detainee to prove one of three elements to sustain a collateral attack in a criminal proceeding.<sup>271</sup> The majority of disputes that pertain to the failure to inform an immigrant of the opportunity for discretionary relief are raised under § 1326 (d) within the third prong in the context of fundamental unfairness. The statute's inherent vagueness lends itself to multiple interpretations, as we see in the analysis of the different circuit decisions.<sup>272</sup> Although legislative history and executive action, from President Clinton through President Trump, may support a strict interpretation;<sup>273</sup> it would be naïve and improper to think that this statute completely eliminates judge's discretion and case by case analysis. It would also be so naïve to assume that the statutory language will provide a clear and definitive direction in all cases.<sup>274</sup>

Fundamental fairness is at the heart of this debate and the narrow interpretation of 8 U.S.C. § 1326 (d) is unconstitutional. Given the lives of individuals that hang in the balance of one immigration judge's discretion, either legislative or judicial action is urgent from not only a legal perspective but—more importantly—a humanitarian one. The Supreme Court needs to adopt a national standard when interpreting fundamental fairness under 8 U.S.C. § 1326 (d)(3). A narrow interpretation of §1326 (d) is in contrast with principals of equity and human rights. Immigration should not be treated any differently than other areas of the law and is no place for a dearth of due process especially with the import and recent development of “crimigration.”<sup>275</sup> Expansive unenumerated rights have given residents of the nation the necessary protections from government overreach. Disclosure of discretionary relief is a

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<sup>271</sup> *Id.*

<sup>272</sup> *See supra* Part V.

<sup>273</sup> *See supra* notes 151-233 and accompanying text.

<sup>274</sup> Neuman, *supra* note 2, at 611.

<sup>275</sup> Nadadur, *supra* note 92, at 145.

consequential fact during a quasi-civil trial and is fundamental to ensure fair proceedings in immigration courts and equal application of the law in all venues. To vest the ultimate power of a person's fate in executive officials with broad discretion is unconstitutional based on the broad findings of unenumerated rights in the past. The Supreme Court has found due process to apply to many fundamental rights, and it should be found to apply to discretionary relief at an immigration hearing if the immigrant has a probable chance of success.

An individual deserves to know the possible remedies available amidst a hearing that could change the course of her life forever. The law as currently interpreted and applied is unconstitutional. The current process should be modified to afford all immigrants seeking entry into this accepting nation the same opportunity under the law. The modification should be procedurally minor but substantively life changing. If the detainee is eligible for discretionary relief, the immigration judge should be required, both statutorily and constitutionally, to read this opportunity aloud if the opportunity would have impacted the immigrant's fate. In cases where this may not be clear, it should be read by the presiding immigration judge to avoid the disparate impact the alternative could create. The opportunity to be aware of all forms of relief that one may be entitled to ensure that all hearings are conducted fairly and consistently. Anything short of that is unconstitutional.

This assertion and reality for so many are unfair as a matter not only of law but also of morality. The Second Circuit's approach to this issue is one that should be implemented in all 8 U.S.C. Section 1326(d) discretionary relief cases to ensure absolute fairness to all litigants. The Second Circuit's approach considers both sides of the argument and attempts to compromise using sound logic.<sup>276</sup> It considers the narrow majority view and acknowledges the need for structure as a matter of law and procedure.<sup>277</sup> This view reinforces the argument that an immigrant's removal proceeding will not be found unconstitutional unless there is a reasonable likelihood that the disclosure of the availability of discretionary relief would have impacted the outcome of the immigrant's fate. This step by the

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<sup>276</sup> *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004).

<sup>277</sup> *Id.*

Second Circuit makes a necessary compromise in this area of the law.<sup>278</sup>

In further review of advancing and developing the Second Circuit's position, the Court does not go so far as to overstretch the bounds of the statute beyond its legislative intent. It acknowledges a boundary as not to induce more litigation of violative due process allegations as does the plausible ground standard adopted in the progressive Ninth Circuit. Logically, if the disclosure of the information would have impacted the outcome of the hearing, it is not too far to state that this disclosure is fundamentally fair. The position of the Second Circuit allows for the nondisclosure of discretionary relief to establish fundamental unfairness. If this does not rise to the level of a constitutional violation, it still provides the immigrant before the tribunal a fair opportunity at remaining in the country. The Second Circuit ultimately states that if the immigrant is prejudiced by not being informed of § 212(c) relief, then it can be a fundamental procedural error that does not need to be constitutionally mandated.<sup>279</sup> Deportation proceedings should not be clouded by whether or not the immigrant should be informed by the immigration judge of the availability of discretionary relief. To leave this decision to the discretion of agents of the executive branch, who are often more concerned with procedural efficiency as opposed to procedural rights, is unjust. The challenge to a deportation order should not be determinative of whether or not one is told of a particular availability of relief. All of those who are before an immigration judge should be afforded the full extent of due process rights including all possibilities of available relief. The suggestion that an executive official knows better or has the right to deprive an opportunity at freedom is the antithesis of constitutional behavior when it comes to procedural due process fairness.

**C. Failure to Consider an Immigrant for Discretionary Relief is Violative of an Immigrants Liberty Interest**

The difficulty with assessing the constitutionality of not informing a immigrant the right to discretionary relief is that there is no clear rule to apply. *Mathews* set forth a general standard and

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<sup>278</sup> *Id.*.

<sup>279</sup> *Id.* at 71.

several factors to follow, but jurisprudence applying *Mathews* is incomplete and vague with respect to immigration controversies. Procedural due process is situational and largely fact specific and as stated by the Court is “flexible and calls for such procedural protection as the particular situation demands.”<sup>280</sup> This section seeks to examine the paramount liberty interest of the immigrant in preserving wealth, family ties, and a begging of life in the United States compared with the burden and cost on the government in advising discretionary relief. This will be difficult to quantify but a review is necessary.

Currently, our immigration courts face untenable backlogs of cases and efforts to alleviate those backlogs have been categorically unsuccessful.<sup>281</sup> The ABA has noted that primarily the policies forcing case quotes and limiting judges discretionary decision also raise major procedural due process concerns.<sup>282</sup> The ABA has also recommended significant increase in the creation of immigration judge positions to alleviate the backlog.<sup>283</sup> They have also recommended the complete elimination of the administrative agency and the integration into an Article 1 court in order to eliminate the backlog.<sup>284</sup> While these may be helpful and should be implemented, it is apparent that the backlog is not going away. Currently there are over one million cases pending in immigration courts compared to only 540,000 in 2017.<sup>285</sup> One possible solution offered by the ABA is to “better balance the goals of enforcement priorities while still encouraging the use of prosecutorial discretion.”<sup>286</sup> This highlights the importance of discretionary decisions in administrative proceedings and supports that discretionary relief should be made available to help eliminate the backlog of cases. Though there could be a burden on the government as an increase of applications would likely occur, it could have a reverse effect allowing more cases to be dismissed through the use of judge’s discretion.

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<sup>280</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

<sup>281</sup> ARNOLD & PORTER, AM. BAR. ASS’N COMM. ON IMMIGRATION, Vol.2 at UD i-5 (2019).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Immigrant Court Backlog Tool*, TRAC IMMIGR., <https://trac.syr.edu/immigration/reports/637/> (last visited Apr. 8, 2021).

<sup>286</sup> ARNOLD & PORTER, AM. BAR. ASS’N COMM. ON IMMIGRATION, Vol.2 at UD i-5 (2019).



The discussion of the government's burden is only one factor to consider. The more important and often overlooked factor is the immigrant's liberty interest to live and remain in the United States. Procedural due process in administrative immigration hearings can be compared to many other proceedings. Some say they should be compared to criminal proceedings, other liken them more to property, welfare, and employment hearings where less due process is afforded.<sup>287</sup> Regardless, the Supreme Court has held that when a litigant will lose his physical liberty, it is paramount and significant that procedural safeguards should be recognized.<sup>288</sup> Under the *Mathews* factors, an immigrant in a deportation hearing is losing his right to be free which is a significant liberty interest. Additionally, the risk of erroneous removal is high. Although the cost of the government may increase if additional procedural protections are offered, it is necessary to secure the private interest of the individual. The interest to live as a free individual in the United States is paramount. Thus, a slight increase in cost does not outweigh the risk of erroneous deprivation of individual freedom. Congressional reliance on discretionary decisions is unwise when such a meaningful liberty interest is at stake. Therefore, there should be significant procedural protections offered, inclusive of the right to seek discretionary relief.

## VII. CONCLUSION

Due to discretion in immigration law, an immigrant who has challenged the proceedings as procedurally or substantively unfair would have a different fate depending on where they are detained and tried. On one end, there is an extensive Congressional framework in the form of statutes and highly rule-governed procedures that leave immigration judges little ability from which to deviate.<sup>289</sup> On the other end, the immigration system cannot be wholly rule-driven.<sup>290</sup> These deviations and injections of discretion can have unintended

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<sup>287</sup> Nadadur, *supra* note 92. at 160.

<sup>288</sup> See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981) ("The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.").

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

constitutional consequences that could lead to inconsistencies in the application of Congressional law. These inconsistencies often depend on where the deportation proceeding is held. The vastly different approaches taken by the circuit courts require intervention by the legislature to more clearly express the will of Congress. If Congress is unwilling to create new laws to address the situation, intervention by the United States Supreme Court is crucial. The Supreme Court must establish a national rule of law to ensure fundamental fairness to all persons in deportation hearings regardless of where the hearing is held.

Although many other rights have been protected by the Fifth and Fourteenth Amendment, it is worth noting that discretionary relief should also be considered in this realm of Constitutionally protected rights for as without it, a deprivation of liberty and life would occur. The Supreme Court has often been the guardian of individual freedoms in our democracy and has stated “[a]s the Constitution endures, persons in every generation can invoke its principle in their own search for greater freedom.”<sup>291</sup> It is our generation’s role to further these fundamental freedoms by adopting a national standard set forth in *Copeland*. The Second Circuit standard for fundamental fairness seeks to reinforce the principles set forth in the Constitution that all persons born or naturalized in the United States shall not be abridged the privileges of life, liberty, and property without due process of law.<sup>292</sup>

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<sup>291</sup> *Lawrence v. Texas*, 539 U.S. 558, 559 (2003).

<sup>292</sup> U.S. CONST. amend. XIV § 1.