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Fee Retrenchment in Immigration Habeas

Seth Katsuya Endo
University of Florida Levin College of Law, endo@law.ufl.edu

ARTICLES

FEE RETRENCHMENT IN IMMIGRATION HABEAS

*Seth Katsuya Endo**

For noncitizens facing removal, habeas corpus provides one of very few avenues for Article III review. For decades, habeas proceedings have been interpreted as falling under the ambit of the Equal Access to Justice Act (EAJA), which provides for the award of attorneys' fees to prevailing parties in suits against the federal government. But this understanding is being challenged, threatening the judicial backstop to executive and legislative overreach in immigration. Reducing the ability of lawyers to recover their fees in these circumstances will reduce the number and quality of habeas challenges by individuals being detained while they await removal—a particularly salient worry given the aggressive enforcement and misconduct by U.S. Immigration and Customs Enforcement over the past few years.

This Article demonstrates that reading out habeas proceedings from the EAJA is best understood as an example of the federal courts' jurisprudential shift against the private enforcement of civil rights—that is, the rights retrenchment movement. This case study also shows how nonacquiescence permits agencies to selectively tee up issues for retrenchment and magnify the structural power differences between them and the individuals they face in litigation. This Article then applies a procedural justice lens to normatively assess whether the EAJA should cover immigration habeas. Using the Mathews v. Eldridge *framework for this inquiry, this Article identifies the strong private interests at stake, the value of the process, and the government's interest, mapping these factors to the accuracy, efficiency, and participation norms.*

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INTRODUCTION

Imagine moving to the United States with your family as an eleven-year-old child. Over the next eighteen years, your parents and sibling become citizens or lawful permanent residents. You are pursuing citizenship, too. But, at the end of 2016, you are taken into custody by U.S. Immigration and Customs Enforcement (ICE) for detention until you can be sent back to Colombia because of a conviction for possession of a small amount of marijuana that occurred almost a decade earlier. Before an immigration judge, you argue that the government failed to prove that your conviction was for a removable offense because the governing statute contains a personal-use exception for marijuana possession. After almost two years of detention, the Board of Immigration Appeals agrees with you, and the immigration judge's removal ruling is reversed. But the government still contests your release, raising several new arguments and engaging in a pattern of delay, omission, and misrepresentation. You file a petition for a writ of habeas corpus. After having spent 796 days in confinement, you get to present your arguments to a district court judge who finds that you are constitutionally entitled to a bond hearing. At the bond hearing, the immigration judge determines that you do not pose a danger to the community and sets your bond at $5000. The following day, you are

released. This is the specific story of Jose Andres Obando-Segura, but the general narrative is all too common; in 2019, ICE recorded 123,128 administrative arrests and removed 226,400 individuals after detaining them for months or years.[1]

While Mr. Obando-Segura was released from detention, the litigation was only a partial victory. Mr. Obando-Segura moved for attorneys' fees as a prevailing party under the Equal Access to Justice Act (EAJA).[2] But the district court determined that the immigration habeas proceeding was not a "civil action" within the meaning of the EAJA, and therefore, Mr. Obando-Segura's counsel was ineligible for court-awarded fees.[3] The Fourth Circuit then affirmed the district court's decision, creating a circuit split on this issue.[4]

Standard statutory interpretation tools do not support an argument that the EAJA's use of the term "civil action" excludes habeas proceedings.[5] But restricting noncitizen detainees' ability to meaningfully access justice is part of a very old pattern. For decades, the U.S. Congress limited Article III review of all sorts of immigration issues without encountering much resistance from the U.S. Supreme Court. For example, in 2020, the Court held that a statutory limit to habeas review for noncitizens detained for expedited removal did not violate either the Suspension Clause or the Due Process Clause.[6] Noncitizens' remedies and fee shifting as a tool to promote the private enforcement of civil rights have been met with similar antipathy.[7] Weaving these strands together, the Court held that immigration proceedings before administrative law judges are not covered by the EAJA.[8]

With this background, interpreting the EAJA to exclude immigration habeas is easily understood as an example of the federal courts' jurisprudential shift against the private enforcement of civil rights. Building on the foundational rights retrenchment scholarship, this Article contributes to the literature by concretely describing an important piece of the story: how

1. ICE, FISCAL YEAR 2019 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 8, 12, 18 (2019) [hereinafter 2019 ICE REPORT], https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf [https://perma.cc/R4QX-T28Q].

2. 28 U.S.C. § 2412.

3. Memorandum to Counsel, Obando-Segura v. Barr, No. GLR-17-319 (D. Md. Oct. 18, 2019).

4. Obando-Segura v. Garland, 999 F.3d 190, 191 (4th Cir. 2021) ("Because the Act does not provide a basis for Obando to recover attorney's fees, we affirm the district court's denial.").

5. *Compare id.*, *with* Kholyavskiy v. Schlecht, 479 F. Supp. 2d 897, 901 (E.D. Wis. 2007) (rejecting arguments that EAJA's use of "civil action" excludes habeas proceedings).

6. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1968–69 (2020).

7. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735, 749–50 (2020); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 609 (2001); *see also* Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 73, 106 (2015); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 241 (2003).

8. *See* Ardestani v. Immigr. & Naturalization Serv., 502 U.S. 129, 138 (1991).

agency nonacquiescence[9] allows the executive branch to selectively develop case law to present to appellate courts and magnifies its structural power advantage.[10] Here, the agency's nonacquiescence threatens the availability of attorneys' fees in immigration habeas, weakening the judicial backstop to executive and legislative overreach in immigration removal proceedings.[11]

Once viewed as an example of rights retrenchment, the question of whether a habeas proceeding is a "civil action" under the EAJA raises procedural justice concerns beyond the stand-alone statutory interpretation issues. Excluding habeas from the EAJA's ambit is inconsistent with a traditional weighing of the private interest at stake, the value of the process, and the government's interest. These three factors from *Mathews v. Eldridge*[12] provide a general framework for evaluating procedural issues—and this includes habeas as exemplified by its use in *Hamdi v. Rumsfeld*.[13]

Part I of this Article describes the important role of habeas corpus in securing judicial review of immigration decisions to remove noncitizens and links its importance to the availability of attorneys' fees under the EAJA. Part II presents a case study of ICE's attempts to establish that the EAJA's use of the term "civil action" excludes habeas proceedings. It first shows why standard statutory interpretation tools strongly resist this narrow reading. Next, it explains that the narrow reading is appropriately read as part of the federal courts' resistance to the private enforcement of civil rights. It then details the implications of the agency's use of nonacquiescence as a mechanism for retrenchment. Part III uses a procedural justice lens to further examine the issue, primarily applying the *Mathews* framework to normatively evaluate whether the EAJA *should* include immigration habeas. This analysis shows that treating habeas as a "civil action" better comports with notions of procedural justice because of the strong private interests in liberty and in remaining in the United States, the value of promoting legal counsel, and the government's interest in enforcing the law. This Article concludes with a discussion of the broader application of the *Mathews* analysis and identifies issues for additional investigation.

9. *See* Vertex Surgical, Inc. v. Paradigm Biodevices, Inc., 648 F. Supp. 2d 226, 238 n.14 (D. Mass. 2009) (noting that "federal agencies have developed nonacquiesence policies, whereby the agency instructs its employees to follow an agency position regarding governing law, rather than an adverse circuit court decision, while the agency relitigates the issue in other circuits in order to challenge circuit case law with which it disagrees.").

10. *See, e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION *passim* (2017); *see also* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185.

11. This is especially troubling given the aggressive enforcement and COVID-related issues over the past few years. *See, e.g.*, 2019 ICE REPORT, *supra* note 1; *see also* Valenzuela Arias v. Decker, No. 20–2802, 2020 WL 1847986, at *1 (S.D.N.Y. Apr. 10, 2020) (granting temporary restraining order requiring ICE to release two at-risk detainees and prohibiting their rearrest during the pendency of their immigration proceedings).

12. 424 U.S. 319 (1976).

13. 542 U.S. 507 (2004).

I. ANCHORING THE JUDICIAL BACKSTOP

Despite the potentially dire consequences, immigration proceedings to either deport or exclude noncitizens (collectively, "removal proceedings") are largely conducted without much, if any, oversight by Article III courts.[14] The conventional understanding of current immigration proceedings begins with the frontline enforcement of federal immigration statutes by the U.S. Department of Homeland Security's Customs and Border Protection (CBP) and ICE agents.[15] The CBP and ICE agents file a charging document with the immigration court, which is run by the Department of Justice's (DOJ) Executive Office for Immigration Review.[16] The immigration judge first determines whether the noncitizen is removable and then assesses whether the noncitizen is otherwise eligible for relief.[17] Appeals from the immigration courts initially stay within the administrative body, going to the DOJ's Board of Immigration Appeals (BIA).[18] Only after the BIA issues a final decision may a noncitizen appeal an immigration decision to the federal courts of appeal—and, even then, the Article III court's jurisdiction has been significantly curtailed by congressional statute.[19]

Habeas is one of the few procedural bulwarks that stands against the tide of aggressive executive and legislative action, allowing noncitizens to contest their detention before an independent Article III judge.[20] And the use of habeas has risen in tandem with increased immigration enforcement by the executive branch—from 2012 to 2017, the number of habeas petitions filed by noncitizens challenging their detention rose by 76 percent.[21] Habeas is an especially vital mechanism because, until recently, courts have consistently held that noncitizens who prevailed in their habeas petitions challenging their

14. Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1005–06 (2017); Faiza W. Sayed, Note, *Challenging Detention: Why Immigrant Detainees Receive Less Process than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1851–52 (2011). There are, of course, many other types of immigration proceedings that are beyond the scope of this Article. *See, e.g.*, Andrew Hammond, *The Immigration-Welfare Nexus in a New Era?*, 22 LEWIS & CLARK L. REV. 501 *passim* (2018).

15. *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 188 (2017).

16. *Id.*

17. *Id.* at 189. While beyond the scope of this Article, the recent history of immigration proceedings is a deeply problematic story of decreasing independence by the administrative law judges. *See* Mary Holper, *The Fourth Amendment Implications of "U.S. Imitation Judges,"* 104 MINN. L. REV. 1275, 1306 (2020); Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* 33 GEO. IMMIGR. L.J. 261, 270–76 (2019).

18. Koh, *supra* note 15, at 192 (citing 8 C.F.R. § 1003.1(b) (2016)).

19. *Id.* (citing 8 U.S.C. §§ 1252(a)(2)(B), (D)).

20. *See* David Cole, *No Clear Statement: An Argument for Preserving Judicial Review of Removal Decisions*, 12 GEO. IMMIGR. L.J. 427, 428 (1998).

21. *See* Anthony R. Enriquez, Note, *Structural Due Process in Immigration Detention*, 21 CUNY L. REV. 35, 53 n.109 (2017) (citing *Suits Challenging Confinement of Noncitizens Jump*, TRAC REPORTS (Feb. 21, 2017), https://trac.syr.edu/tracreports/civil/460/ [https://perma.cc/TWN4-QDXG]).

detention could take advantage of the EAJA's fee-shifting provisions, providing an economic incentive for lawyers to take these cases.[22]

A. Availability of Judicial Review

The writ of habeas corpus may be used to require a detainee to be before a court so the court can determine whether the detention is legal.[23] The writ originated in England, was then enfolded into the colonies' common-law tradition, and was implicitly carried into the U.S. Constitution through the Suspension Clause.[24] Then, more directly, as part of the Judiciary Act of 1789,[25] Congress provided for writs of habeas corpus to be issued by the federal courts.[26]

Historically, habeas corpus has been especially significant in the immigration context because it was the only judicial process available to noncitizens to contest removal orders before the mid-1950s.[27] The Immigration Act of 1917 and earlier immigration statutes called for treating the attorney general's decisions on immigration matters as "final."[28] In *Heikkila v. Barber*,[29] the Supreme Court interpreted this as "precluding judicial intervention in deportation cases except insofar as it was required by the Constitution."[30]

While *Heikkila* was pending, Congress passed the Immigration and Nationality Act,[31] which included similar language.[32] And, shortly after

22. *See, e.g.*, Vacchio v. Ashcroft, 404 F.3d 663, 665 (2d Cir. 2005); *infra* Parts II.B–C (discussing other cases holding the same).

23. *See* Boumediene v. Bush, 553 U.S. 723, 737 (2008) (defining habeas as "a writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal" (quoting *Habeas Corpus*, BLACK'S LAW DICTIONARY (8th ed. 2004))); *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 970–71 (1998).

24. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 438 (11th ed. 1791) (describing the Habeas Corpus Act of 1679 as the "bulwark of [the British] Constitution"); *Ex parte* Bollman and *ex parte* Swartwout, 8 U.S. (4 Cranch) 75, 93–94 (1807); U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). Numerous books and articles provide excellent descriptions of the writ's history. *See, e.g.*, ERIC M. FREEDMAN, MAKING HABEAS WORK: A LEGAL HISTORY (2018); Neuman, *supra* note 23, at 970–76; Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 60–63 (2012).

25. Ch. 20, 1 Stat. 73.

26. 28 U.S.C. § 2241.

27. *See* Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1967–69 (2000) (describing history and noting that "[f]rom 1882 until 1952, no express authorization for judicial control of administrative decisions existed in the immigration statutes").

28. Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874, 889–90 (repealed 1952).

29. 345 U.S. 229 (1953).

30. *Id.* at 234–35.

31. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

32. *Heikkila*, 345 U.S. at 232 n.4.

Heikkila was issued, the Court in *Shaughnessy v. Pedreiro*[33] was tasked with determining whether the 1952 Immigration and Nationality Act likewise precluded judicial review other than habeas.[34] The Supreme Court held that the Act's language should be freshly interpreted in light of the purpose and legislative history of the Administrative Procedure Act of 1946 (APA).[35] Given the APA's expansion of judicial review of administrative actions, the Court held that the 1952 Immigration and Nationality Act's use of the term "final" spoke to administrative finality and did not preclude judicial review of administrative actions in the immigration context.[36]

In response to the *Pedreiro* holding, Congress passed the Immigration and Nationality Act of 1961 (INA) and added section 106, which restricted review of deportation decisions to the courts of appeal.[37] Congress also amended the Act to provide for habeas review of exclusion orders.[38] Together, these developments provided for relatively comprehensive APA-based judicial review of removal orders.[39]

In the past twenty-five years, Congress has attempted to limit judicial review of immigration actions several times, sparking legions of legal challenges and scholarly discussion.[40] In 1996, as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress struck the INA's habeas provision and limited judicial review of deportation for noncitizens deportable on criminal grounds.[41] Later in that same year, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), jettisoning the INA's section 106 for a new section 242, which eliminated the differences in judicial review for deportation and exclusion orders, permitting both to be appealed to the courts of appeal.[42] The IIRIRA also included the AEDPA's jurisdiction-stripping

33. 349 U.S. 48 (1955).

34. *See generally id.*

35. 5 U.S.C. §§ 551–559, 701–706; *Pedreiro*, 349 U.S. at 50.

36. *Id.* at 50–52.

37. Immigration and Nationality Act of 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650, 651; *see also* Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 306 (2001) (describing history); Foti v. Immigr. & Naturalization Serv., 375 U.S. 217, 226 (1963) (holding that even discretionary denials were appealable to the court of appeals); Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 461–63 (2006) (summarizing legislative developments).

38. *See* Pub. L. No. 87-301, § 5, 75 Stat. 650, 651.

39. David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of Real ID (1996–2005)*, 51 N.Y.L. SCH. L. REV. 75, 81 (2007) ("The resulting review scheme, described below, afforded non-citizens judicial review more closely resembling APA review than the narrow habeas corpus review described in *Heikkila*.").

40. *See, e.g.*, Nancy Morawetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. THIRD WORLD L.J. 13, 15–16 (2005); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1411–12 (1997); McConnell, *supra* note 39, at 79–81.

41. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 401(e), 440(a), 110 Stat. 1214, 1268, 1276 (previously codified at 8 U.S.C. § 1105(a)).

42. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 306, 110 Stat. 3009-546, 3009-607 to 3009-12 (codified at 8 U.S.C. § 1252(a)(1)).

provision for noncitizens deportable on criminal grounds and added another jurisdictional bar for most discretionary decisions of the attorney general.[43] Finally, the IIRIRA stated that the new section 242 procedures were the exclusive means of challenging removal orders, explicitly excluding the general habeas jurisdiction under § 2241.[44] These provisions could be read to exclude noncitizens deportable on criminal grounds from seeking any judicial relief, but the Supreme Court instead held that habeas relief for constitutional claims and pure questions of law remained available.[45] In the REAL ID Act of 2005, Congress amended § 1252 again and directed all challenges to removal orders to the courts of appeal.[46]

While congressionally authorized judicial review is a relatively recent development, the use of habeas corpus in immigration cases dates from as early as the nineteenth century, and these early decisions articulated foundational principles that influenced the development of both immigration and habeas law.[47] A pair of cases from the late 1800s involved the use of habeas to challenge the Chinese Exclusion Act of 1882, which prohibited nearly all immigration from China and created several administrative requirements, such as obtaining a certificate, for those who were already settled in the United States.[48] The first case, *Chae Chan Ping v. United States*,[49] involved a Chinese individual who obtained the certificate and then temporarily returned to China during which time Congress changed the law to bar such individuals.[50] The Court determined that the statute barring the return of individuals with certificates was constitutional and that any relief lay only with the executive branch.[51] *Ping* marked a critical jurisprudential development in immigration law articulating the "plenary power" doctrine that limits Article III–enforced constitutional protections to this day.[52]

However, seven years later, in *Wong Wing v. United States*,[53] the Court found a provision of an immigration statute unconstitutional for the first time.[54] In *Wong Wing*, four noncitizens were adjudged guilty of violating

43. 8 U.S.C. § 1252(a)(2)(B)–(C).
44. *Id.* § 1252(g).
45. Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 300 (2001).
46. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a), 119 Stat. 302, 310 (codified as amended at 8 U.S.C. § 1252).
47. *See generally, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893); Ekiu v. United States, 142 U.S. 651 (1892); Chae Chan Ping v. United States, 130 U.S. 581 (1889); United States v. Jung Ah Lung, 124 U.S. 621 (1888).
48. Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (repealed 1943); *see also* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 856 n.12 (1987).
49. 130 U.S. 581 (1889).
50. *Id.* at 582.
51. *Id.* at 606.
52. *See* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1015–16 (2002); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1633–34 (1992).
53. 163 U.S. 228 (1896).
54. *Id.* at 238.

the Chinese Exclusion Act in a summary proceeding before a commissioner (i.e., an early type of administrative law judge).[55] These individuals filed habeas petitions challenging the statute's imposition of a punishment of imprisonment at hard labor.[56] The Court held that the noncitizens' imprisonment was sufficiently similar to a criminal punishment such that it warranted the protections of the Fifth and Sixth Amendments.[57]

Habeas continues to provide noncitizens with an avenue for judicial review of executive action.[58] For example, in *Zadvydas v. Davis*,[59] the Court held that noncitizens could not be detained indefinitely by ICE pending their deportations.[60] The Court also recognized that noncitizens may use habeas to challenge the constitutionality of the statute authorizing their detention without bail in *Demore v. Kim*.[61] And the Ninth Circuit and other lower courts have navigated this precedent to hold, for example, that a bond hearing is required once an appeal is pending with the circuit court notwithstanding the application of section 236(a).[62]

Further highlighting the ongoing weight of the writ, when the COVID-19 pandemic struck, a number of noncitizens filed successful habeas petitions to escape unsafe detention conditions.[63] In the Southern District of New York, while awaiting removal, four noncitizens were being detained by ICE in county jails where the COVID-19 virus had been detected.[64] Each of the petitioners had chronic medical conditions—such as asthma, diminished lung capacity, diabetes, and compromised immune systems—that put them at risk of injury or death if exposed to the virus.[65] The district court noted that habeas challenges to conditions posing medical threats to detainees were

55. *Id.* at 229.

56. *Id.* at 234–35.

57. *Id.* at 236–38; *see also* Cole, *supra* note 52, at 1016 (commenting on case); Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 825 (2013) (same).

58. *See* Nielsen v. Preap, 139 S. Ct. 954, 962 (2019) (reiterating the availability of habeas corpus despite attempts to strip courts of jurisdiction in 8 U.S.C. §§ 1226(e), 1252(b)(9)); Sayed, *supra* note 14, at 1851–52.

59. 533 U.S. 678 (2001).

60. *Id.* at 701.

61. 538 U.S. 510, 517 (2003) ("Section 1226(e) contains no explicit provision barring habeas review, and we think that its clear text does not bar respondent's constitutional challenge to the legislation authorizing his detention without bail."); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018).

62. *See* Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 949 (9th Cir. 2008).

63. *See, e.g.*, Valenzuela Arias v. Decker, No. 20–2802, 2020 WL 1847986, at *1 (S.D.N.Y. Apr. 10, 2020); Ferreyra v. Decker, 456 F. Supp. 3d 538, 542 (S.D.N.Y. 2020) (ordering release of at-risk detainees). *But see* Singh v. Hoover, No. 20-00627, 2020 WL 1904470, at *1 (M.D. Pa. Apr. 17, 2020) (denying motion for release). There are numerous other important examples of how noncitizens' use of habeas beyond the pure immigration context is also a driver of significant jurisprudence. In 2008, the Supreme Court decided *Boumediene v. Bush*, holding that the Suspension Clause applied to the noncitizen enemy combatants held at Guantanamo Bay and that these detainees had a constitutional right to challenge the factual basis for their detention. 553 U.S. 723, 733, 771 (2008); *see also* Moore, *supra* note 57, at 869–70 (discussing case).

64. *Ferreyra*, 456 F. Supp. 3d at 542.

65. *Id.*

properly brought under 28 U.S.C. § 2241.[66] And, in assessing the merits, the district court found that the petitioners had demonstrated a danger of irreparable harm, a likelihood of success on the merits, and a balance of equities that tipped in their favor.[67]

B. Availability of Attorneys' Fees

While judicial review through habeas corpus petitions is itself a vital protection for noncitizens facing removal, habeas is also intertwined with a second procedural safeguard: the availability of attorneys' fees under the EAJA. Section 292 of the INA permits noncitizens facing removal to be assisted by counsel but explicitly requires that the "privilege" of representation come at "no expense to the Government."[68] This statutory provision, though, does not categorically bar the payment of attorneys' fees under the EAJA.[69] But when a noncitizen challenges removal, attorneys' fees are not available until the noncitizen prevails in an Article III proceeding, not just an administrative hearing.[70] Thus, habeas is one of the main ways noncitizen plaintiffs and their lawyers are financially incentivized to challenge potential legislative or executive overreach.[71]

A "bedrock principle" when considering attorneys' fees is the "American Rule," which requires litigants to cover their own legal expenses, regardless of whether they win or lose.[72] The American Rule goes back more than two-hundred years,[73] and the tradition carries with it a strong presumption against deviation.[74] The Supreme Court has consistently recognized departures only when either a long-standing common-law exception or explicit statutory provision so provides. To illustrate the former, the American Rule does not prevent courts from awarding attorneys' fees as a sanction for "willful disobedience of a court order" or as a sanction "when

66. *Id.* at 549–50.

67. *Id.* at 545–50.

68. 8 U.S.C. § 1362; *see also* Shani M. King & Nicole Silvestri Hall, *Unaccompanied Minors, Statutory Interpretation, and Due Process*, 108 CALIF. L. REV. 1, 24–25 (2020) (discussing the limits of Section 292).

69. *See* Ardestani v. Immigr. & Naturalization Serv., 502 U.S. 129, 139 (1991) (noting that it did not reach the question as to whether section 292 of the INA bars the payment of attorneys' fees under the EAJA).

70. *Compare* Implementation of the Equal Access to Justice Act in Department of Justice Administrative Proceedings, 46 Fed. Reg. 48,921 (Oct. 5, 1981) (codified at 28 C.F.R. pt. 24) (excluding deportation and exclusion hearings from the coverage of EAJA), *and Ardestani*, 502 U.S. at 129 (confirming that deportation proceedings before the administrative bodies do not qualify as adversary adjudications under the EAJA), *with* Vacchio v. Ashcroft, 404 F.3d 663, 665 (2d Cir. 2005) (awarding fees in habeas immigration proceeding).

71. *See generally* Prerna Lal & Mindy Phillips, *Discover Our Model: The Critical Need for School-Based Immigration Legal Services*, 106 CALIF. L. REV. 577, 590–91 (2018) ("[P]aying for clients' immigration application fees also gives an incentive for people to come in for an initial consultation with an attorney and walk out with a comprehensive plan for their cases."); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 11 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 396–97, 441–42 (1982).

72. Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 252–53 (2010).

73. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

74. *See* Baker Botts v. ASARCO, 135 S. Ct. 2158, 2164 (2015).

the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"[75] To the latter, more than 150 federal statutes permit the award of attorneys' fees, most predicated on the party achieving some degree of success.[76]

Some of these issue-specific fee-shifting statutes may happen to apply in immigration proceedings. For example, in a political asylum case, the asylum seeker brought an action under the Freedom of Information Act[77] (FOIA) for documents relating to his immigration proceedings.[78] After prevailing, the asylum seeker was awarded attorneys' fees and costs for the FOIA litigation as a prevailing party.[79] But the EAJA is the fee-shifting statute that applies most broadly—albeit, with significant limitations—to proceedings in which the issue in dispute is substantively about immigration.[80]

The EAJA arose, in part, as a response to the American Rule and the need to promote private enforcement of civil rights.[81] It has long been recognized as an example of a statutory exception about which "there could be little dispute that [the] provision . . . trumps the American Rule."[82] The EAJA's waiver of sovereign immunity was part of a trend in which the federal government "gradually lowered the shield of sovereign immunity and made itself increasingly amenable to awards of attorney's fees to those who succeed in specific types of litigation against the government."[83] For example, as far back as 1948, Congress partially waived sovereign immunity by making the United States liable for fees and costs when expressly provided for by an act of Congress.[84] Congress reaffirmed this waiver in 1966 when it amended the predecessor statute to the EAJA.[85] And, after the Supreme Court rejected a judicial expansion of fee shifting in *Alyeska*

75. *See* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 557 (2014) (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258–59 (1975)).

76. *See* Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983).

77. 5 U.S.C. § 552.

78. Jarno v. Dep't of Homeland Sec., 365 F. Supp. 2d 733, 736 (E.D. Va. 2005).

79. *Id.* at 741.

80. Illustrating its importance, a number of high-profile immigration practice guides discuss the EAJA. *See, e.g.*, Off. of Staff Att'ys, *Ninth Circuit Immigration Outline*, U.S. CTS. FOR THE NINTH CIR., https://www.ca9.uscourts.gov/guides/immigration_outline.php [https://perma.cc/CPF7-48DR] (Feb. 2021); TRINA REALMUTO & STACY TOLCHIN, AM. IMMIGR. COUNCIL & NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD, REQUESTING ATTORNEYS' FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT (2014), https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2014_17Jun_eaja.pdf [https://perma.cc/KCE8-3NC4].

81. Hensley v. Eckerhart, 461 U.S. 424, 445–46 (1982) (Brennan, J., concurring in part and dissenting in part).

82. *See* Baker Botts v. ASARCO, 135 S. Ct. 2158, 2164 (2015) (quoting Comm'r v. Jean, 496 U.S. 154, 161 (1990)).

83. *See* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217, 221 (1994).

84. Act of June 25, 1948, Pub. L. No. 80-773, § 2412, 62 Stat. 869, 973.

85. 28 U.S.C. § 2412(a).

Pipeline Service Co. v. Wilderness Society,[86] Congress responded by passing statutes that permitted fee shifting in civil rights cases, including the Civil Rights Attorney's Fees Award Act of 1976.[87]

In 1980, Congress passed the EAJA as a rider to a bill providing assistance to small businesses.[88] The rider was added to respond to concerns that small businesses were being targeted by regulatory agencies because they lacked the funds to litigate the issues.[89] Thus, the EAJA provided for the award of attorneys' fees to prevailing parties in civil actions brought by or against the United States, a broad waiver of sovereign immunity and a statutory exception to the "American Rule" described above.[90]

Notwithstanding this particular focus, the EAJA's scope was not limited just to small businesses.[91] Instead, it imposed a few limits—such as a net worth cap—but reached most individual and corporate litigants who might contest unreasonable government action if not deterred by the financial costs.[92]

The EAJA's original passage contained a three-year sunset provision.[93] Shortly after the expiration of its trial period, Congress enacted a permanent version.[94] By extending the EAJA indefinitely, Congress tried to ensure that private individuals, corporations, and organizations would "not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved."[95] This objective was intertwined with the policy goal of deterring the unreasonable exercise of government authority.[96] While not explicitly stated in the legislative history, commentators have observed that compensating wronged parties is another goal of the EAJA.[97]

The EAJA seeks to effectuate these goals by providing for fee shifting in three distinct circumstances. One provision simply puts the United States on

86. 421 U.S. 240, 263 (1975).

87. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, §2, 90 Stat. 2641, 2641 (codified at 42 U.S.C. § 1988(b)); *see also* Sisk, *supra* note 83, at 221 (citing Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 ARIZ. ST. L.J. 733, 735–36 (1993)).

88. Sisk, *supra* note 83, at 222.

89. *Id.* (first citing H.R. REP. NO. 96-1418, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988; and then citing S. REP. NO. 96-253, at 7 (1979)).

90. *Id.* at 220; *see also* 28 U.S.C. § 2412(d)(1)(A).

91. Sisk, *supra* note 83, at 222 (citing 28 U.S.C. § 2412(d)(2)(B) (1988)) (defining the term "party" as used in the EAJA).

92. *Id.*; *see also* Sullivan v. Hudson, 490 U.S. 877, 883 (1989).

93. Sisk, *supra* note 83, at 222 (citing Act of Oct. 21, 1980, Pub. L. No. 96-481, tit. II, § 204(c), 94 Stat. 2325, 2329 (lapsed)).

94. *Id.*

95. H.R. REP. NO. 99-120, at 4 (1985).

96. Ardestani v. Immigr. & Naturalization Serv., 502 U.S. 129, 138 (1991).

97. *See* Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 YALE L. & POL'Y REV. 458, 478 (1993); Sisk, *supra* note 83, at 226; *see also* Berman v. Schweiker, 713 F.2d 1290, 1295 (7th Cir. 1983) ("[I]t has been suggested that the EAJA was intended to compensate parties for expenses incurred in defending against unreasonable government action—a purpose which arguably is distinct from mitigating the deterrent effect of litigating.").

equal footing with private litigants by making the federal government liable for attorneys' fees under the general, existing common-law and statutory exceptions to the American Rule.[98] Another provision, section 504(a), permits the award of attorneys' fees to prevailing parties in adversarial administrative adjudications.[99] The EAJA also created a new right to attorneys' fees, requiring fee shifting when an eligible party—whether plaintiff or defendant—prevails in a non-tort civil action brought in any court with jurisdiction against the federal government in which the government's position was not substantially justified.[100]

Section 504(a)(1) would, on its face, seem to apply to immigration proceedings. The DOJ regulations, however, exclude removal proceedings before the administrative bodies from the coverage of EAJA.[101] In *Ardestani v. INS*,[102] the Court took up the question of whether a noncitizen who prevailed in administrative deportation proceedings was entitled to attorneys' fees under section 504(a)(1).[103] The Court reasoned that the hearing was not an "adversary adjudication" because the EAJA defined the term, in relevant part, as "an adjudication under section 554," which only covers hearings governed by the APA.[104] The Court agreed that the purposes of the EAJA would be served by extending it to the removal proceedings but held that it "cannot extend the EAJA to administrative deportation proceedings when the plain language of the statute, coupled with the strict construction of waivers of sovereign immunity, constrain us to do otherwise."[105] With the *Ardestani* ruling, § 2412(d)(1)(A)—authorizing the award of attorneys' fees for prevailing parties' non-tort civil actions brought in any court with jurisdiction against the federal government and where the government's position was not substantially justified—takes on an even more important role in ensuring the availability of counsel and the protection of the rights of noncitizens facing removal.[106]

While there are many rationales for fee shifting,[107] the most directly applicable to the EAJA's fee-shifting provisions as seen in the immigration habeas context is the "private attorney general" theory, which rewards private litigants for bringing successful lawsuits that further the public

98. *See* Sisk, *supra* note 83, at 223 (discussing 28 U.S.C. § 2412(b)).

99. *See id.* at 224–25 (discussing 5 U.S.C. § 504(a)(1)).

100. *See id.* at 223–24 (discussing 28 U.S.C. § 2412(d)). For further details, in two articles published in the *Louisiana Law Review*, Sisk expertly covers each element of this fee-shifting provision. *See id. passim*; Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1 *passim* (1995).

101. 46 Fed. Reg. 48,921 (Oct. 5, 1981) (excluding deportation and exclusion hearings from the coverage of EAJA).

102. 502 U.S. 129, 131 (1991).

103. *Id.*

104. *Id.* at 132–33.

105. *Id.* at 138.

106. *See, e.g.*, Vacchio v. Ashcroft, 404 F.3d 663, 663 (2d Cir. 2005).

107. Thomas Rowe has identified six rationales for fee shifting. Thomas D. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 653–66.

interest.[108] At first glance, an individual's habeas petition challenging conditions of detention while awaiting removal might not obviously implicate the public interest warranting an award of attorneys' fees. But, under the EAJA, attorneys' fees are only available if the government's position lacked a "substantial justification," which suggests that either there was outlier misconduct or larger legal issues were at stake.[109] This rationale suggests, as a theoretical matter, that the availability of fees will encourage attorneys to push forward the public interests at stake with immigration habeas cases.

While the empirical literature on the EAJA and related statutes is sparse and does not lend itself to making bold causal claims at a granular level, on balance, the body of evidence suggests that the EAJA's fee-shifting provisions incentivize individual claims with limited monetary value.[110] The growth of private federal statutory enforcement legislation followed the expansion of fee-shifting provisions in "strikingly close association," which suggested "the efficacy of private enforcement regimes in mobilizing private litigants."[111] As Pamela S. Karlan succinctly summarized, "Attorney's fees are the fuel that drives the private attorney general engine."[112]

More generally, Congress has frequently used fee-shifting provisions to enforce federal laws promoting civil rights.[113] Fee shifting is a necessary

108. *See* John P. Stern, *Applying the Equal Access to Justice Act to Asylum Hearings*, 97 YALE L.J. 1459, 1462 n.26 (1988); *see also* Thomas W. Holm, *Aliens' Alienation from Justice: The Equal Access to Justice Act Should Apply to Deportation Proceedings*, 75 MINN. L. REV. 1185, 1215 (1991); John J. Sullivan, *The Equal Access to Justice Act in the Federal Courts*, 84 COLUM. L. REV. 1089, 1093 (1984).

109. *See generally* Krent, *supra* note 97, at 458 n.3 (discussing legislative history of EAJA, including how it was partially a response to a limitation on court-awarded fees in private attorneys general cases); *see also* H.R. REP. NO. 96-1418, at 9 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4987.

110. *See* Susan M. Olson, *How Much Access to Justice from State "Equal Access to Justice Acts"?*, 71 CHI.-KENT L. REV. 547, 549 (1995) ("The study finds that EAJAs have produced a rather modest degree of redistribution of resources from the government to private parties."); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 756–59 (1988) (finding no conclusive evidence of increased filing rates).

111. BURBANK & FARHANG, *supra* note 10, at 14–15.

112. Karlan, *supra* note 10, at 205; *see also* Comm'r, Immigr. & Naturalization Serv. v. Jean, 496 U.S. 154, 163 (1990) ("[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions."); Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy over Immigration*, 71 N.C. L. REV. 413, 486 (1993); Alix Langone, *This Nonprofit Just Got $20 Million to Help Immigrants Detained at the Border—But It's Still Not Enough*, MONEY (Jun. 26, 2018, 2:32 PM), https://money.com/texas-raices-fundraiser-money/ [https://perma.cc/J6YM-X9BV].

113. *See, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401–02 (1968) ("A Title II [of the Civil Rights Act of 1964] suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."); *see also* Jeffrey S. Brand, *The Second Front in the Right for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 302 (1990); David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 989 (2017) ("The

element of enforcing civil rights because the expense of litigation—in conjunction with the American Rule—may otherwise discourage attorneys from bringing meritorious cases where damages are low or nonmonetary relief is sought.[114] Congress has used it for 150 years, initially providing for fee shifting in voting rights cases as part of the Enforcement Act of 1870.[115] In fact, all major federal civil rights laws enacted since 1964 have included a fee-shifting provision.[116]

C. The Need for a Judicial Backstop in a Time of Aggressive Enforcement

Losing the judicial backstop to executive and legislative overreach would especially harm noncitizen detainees during a time when ICE has been aggressively pursuing removal.[117] While running for president, Donald J. Trump raised concerns about a lack of enforcement in immigration policies that he perceived as permitting "thousands of criminal aliens to freely roam our streets, walk around, do whatever they want to do, [commit] crime all over the place."[118] And, once ensconced in office, the Trump administration aggressively pursued policies to detain and remove noncitizens who had been charged with any criminal offense.[119] While the rates leveled off in 2019 because of a perceived need to divert resources toward border enforcement,[120] the number of administrative arrests rose by 44 percent from

starting point is to appreciate the extent of Congress's reliance on private civil litigation to implement federal law.").

114. BURBANK & FARHANG, *supra* note 10, at 8.

115. Enforcement Act of 1870, ch. 114, §§ 2–4, 16 Stat. 140, 141; Armand Derfner, *Background and Origin of the Civil Rights Attorney's Fee Awards Act of 1976*, 37 URB. LAW. 653, 654 (2005); William H. Fedullo, *Classless and Uncivil: The Three-Decade Legacy of Evans v. Jeff D.*, 21 U. PA. J. CONST. L. 1349, 1352 (2019).

116. Zarcone v. Perry, 438 F. Supp. 788, 793 (E.D.N.Y. 1977), *aff'd*, 581 F.2d 1039 (2d Cir. 1978) (first citing Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c); then citing Emergency School Aid Act of 1972, 20 U.S.C. § 1617; then citing Equal Employment Amendments of 1972, 42 U.S.C. § 2000e-16(b); and then citing Voting Rights Act Extension of 1975, 42 U.S.C. § 1973l(e)); *see also* Karlan, *supra* note 10, at 205.

117. *See, e.g.*, Michael K.T. Tan & Michael Kaufman, *Jailing the Immigrant Poor:* Hernandez v. Sessions, 21 CUNY L. REV. 69, 87 (2017).

118. *See, e.g.*, Kate Evans, *Immigration Detainers, Local Discretion, and State Law's Historical Constraints*, 84 BROOK. L. REV. 1085, 1085 n.2 (2019) (quoting *Transcript: Donald Trump's Full Immigration Speech, Annotated*, L.A. TIMES (Aug. 31, 2016, 9:35 PM), http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html [https://perma.cc/95FZ-59N9])).

119. Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. 433, 436 (2018) ("When the Trump Administration came to power early in 2017, it quickly made every potentially deportable noncitizen a removal priority.") (citing Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017))); *id.* at 436 n.8 ("It is the policy of the executive branch to . . . detain individuals apprehended on suspicion of violating Federal or State law . . . ." (quoting Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. at 8793–94)); *see also* Dean DeChiaro, *DHS Rolls Back Obama-Era Deportation Priorities, Will Target All Criminals*, CQ ROLL CALL, Feb. 21, 2017, 2017 WL 675880.

120. 2019 ICE REPORT, *supra* note 1, at 3. In this same vein, although deportation is the focus of most immigration policy debates, it is just a part of what ICE does. *See* Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1464 (2019).

2016 to 2018.[121] The arrest rates of noncitizens with pending criminal charges rose from 6267 to 32,977 over that same time—a 426 percent increase.[122] Similarly, the number of removals has rapidly grown. Between 2017 and 2019, the number of removals rose from 226,119 to 267,258.[123] And, here too, the highest rate of growth—44 percent—accompanied individuals who had pending criminal charges.[124] It is unclear that a change in the administration will either reduce the rate of new enforcement or address those already caught in the system.[125]

Moreover, even as the number of individuals detained and removed climbs, ICE has been beset by reports of misconduct, including the use of highly questionable tactics.[126] For example, ICE created a fake university as part of a sting operation.[127] And the COVID-19 pandemic highlighted the unsafe medical conditions endemic throughout detention facilities.[128]

In the face of ICE's aggression, counsel for detained noncitizens facing removal acts as a necessary counterbalance.[129] Without counsel, noncitizen detainees win their cases at a rate that is ten times less than that of their

121. U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 3 (2018), https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf [https://perma.cc/9V5G-AYWQ].

122. *Id.* at 3.

123. 2019 ICE REPORT, *supra* note 1, at 19.

124. *Id.*

125. The 2021 statistics have yet to be released, so it remains unclear how the Biden administration's approach might differ. The 2020 statistics do already show a significant drop in removals but that was related to the pandemic. *See* U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2020 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 18–19 (2020), https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf [https://perma.cc/TY3X-PQ42].

126. *See, e.g.*, Charles Lane, *ICE Failed to Hold Detention Center Contractors Accountable, Report Finds*, NPR (Feb. 1, 2019, 3:59 PM), https://www.npr.org/2019/02/01/690690056/ice-failed-to-hold-detention-center-contractors-accountable-report-finds [https://perma.cc/CJ6T-2TCA]; *see also* OFF. OF INSPECTOR GEN., DHS NEEDS TO IMPROVE ITS OVERSIGHT OF MISCONDUCT AND DISCIPLINE (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-48-Jun19.pdf [https://perma.cc/DRH5-JV2L]; Jennifer M. Chacón, *A Diversion of Attention?: Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1615–16 (2010).

127. Niraj Warikoo, *ICE and DOJ Defend Creating Fake University in Michigan, Some Question Tactics Used by Feds in Sting*, DETROIT FREE PRESS (Dec. 9, 2019, 6:00 AM), https://www.freep.com/story/news/local/michigan/2019/12/09/ice-defends-fake-university-metro-detroit-led-250-arrests/2625316001/ [https://perma.cc/G6P8-LV6H].

128. *See, e.g.*, *supra* note 63 (discussing *Valenzuela Arias* and other cases); *see also* Emily Ryo, *Introduction to the Special Issue on Immigration Detention*, 54 LAW & SOC'Y REV. 750, 751 (2020) ("As the COVID-19 pandemic engulfed the nation in the spring and summer of 2020, jails, prisons, and detention facilities became a tinderbox of infection.").

129. Kevin Gardner, *Prisoners in the Face of Gladiators: Providing a Sword and Shield to Aliens in Removal Proceedings Through Court-Appointed Counsel*, 52 AKRON L. REV. 1189, 1205 (2018) ("[C]ourt-appointed counsel would protect U.S. citizens from unlawful removal, thus providing a counterweight to aggressive enforcement of immigration laws."); David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1213 (2016) (explaining need for government-appointed counsel for immigrants in removal proceedings because immigration judges can—and do—influence whether detained immigrants can even find and retain counsel privately, which limits efficacy of appeals).

represented counterparts.[130] And, again, it is the availability of attorneys' fees under the EAJA that incentivizes lawyers to take these cases.[131]

II. CASE STUDY OF RETRENCHMENT

The attempts to establish that the EAJA's use of the term "civil action" does not include immigration habeas are best understood as an example of rights retrenchment. This part begins by summarizing the rights retrenchment movement and identifying how it has pushed back on both noncitizens' use of courts and the availability of fees to promote civil rights litigation. It then details how traditional statutory interpretation tools support the conclusion that the EAJA's use of the term "civil action" is meant to encompass habeas proceedings. One implication of this analysis is that something other than the formal legal reasoning must be driving the attack on the availability of fees—and that something is rights retrenchment. This part uses this example to draw further conclusions about rights retrenchment more generally, including how agency nonacquiescence can be used to push back against the enforcement of civil rights.

A. Rights Retrenchment Background

Professors Steven Burbank and Sean Farhang have detailed how the conservative legal movement responded to the civil rights legislation of the 1960s and 1970s by using the federal courts—and the Supreme Court, especially—to create new procedural barriers to the private enforcement mechanisms.[132] Their study of 369 cases between 1960 and 2014 show a substantial decline in plaintiffs' probability of success in cases involving procedures that either enhanced or hampered the incentives and access of private litigants to enforce civil rights.[133] By 2014, in cases involving a divided court, the private enforcement side lost about five times more than they won.[134] Burbank and Farhang further observed that ideological polarization over procedural rules was even greater than that over the underlying substantive rights.[135]

Among the various institutional actors—Congress, the courts, and the rules committee—who have been part of the rights retrenchment movement, the

130. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 50 (2015). While this study looks at the administrative proceedings, as discussed later, the same features are seen in habeas.

131. *See* Krent, *supra* note 97, at 495; Michael J. Mortimer & Robert W. Malmsheimer, *The Equal Access to Justice Act and US Forest Service Land Management: Incentives to Litigate?*, 109 J. FORESTRY 352, 357 (2011).

132. *See generally* BURBANK & FARHANG, *supra* note 10; *see also* Karlan, *supra* note 10, at 185 ("The other approach, which is more insidious, is for the court to leave the formal right in place, but to constrict the remedial machinery. At best, this will dilute the value of the right, since some violations will go unremedied.").

133. Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 FORDHAM L. REV. 37, 59 (2018).

134. *Id.*

135. *Id.* at 60.

Supreme Court has been the most effective.[136] Procedural issues are rarely of high salience for the general public and, therefore, go unnoticed.[137] Moreover, the federal bench is politically insulated from any public dissatisfaction that might arise.[138] Without any meaningful popular support or public oversight, the judiciary's creation of procedural barriers to the private enforcement of civil rights is a concerning exercise of counter-majoritarian power.[139]

Another reason that the Supreme Court has been so effective is that, in the federal system, trial and intermediate appellate courts tend to be its faithful agents. The lower courts are sensitive to the reputational and workload damage accompanying reversal.[140] Also, no matter what the reasoning, as a descriptive matter, lower courts exhibit a responsiveness to the perceived ideological trends and preferences of the Supreme Court.[141] And there is plenty for the lower courts to respond to when it comes to both fee shifting and the rights of noncitizens.

A particularly apt example of retrenchment in fee shifting is *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*.[142] There, the Supreme Court narrowly construed the term "prevailing party" to mean only those litigants who achieved a court-ordered change, even if the litigation prompted the requested change.[143] By limiting the award of fees to such circumstances, the Court created incentives for civil rights lawyers (to take one example) to choose lawsuits in which damages are available and, thus, are not as susceptible to strategic mooting.[144]

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136. *Id.* at 60–62.

137. BURBANK & FARHANG, *supra* note 10, at 201–04.

138. Burbank & Farhang, *supra* note 133, at 61.

139. *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system."). Even in the wake of mass protests of police brutality that sparked legislative action in Colorado, the Supreme Court declined to take up the issue of qualified immunity. *See* Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point amid Protests*, N.Y. TIMES (Oct. 18, 2021), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html [https://perma.cc/62VY-JAYQ].

140. *See* Kevin T. McGuire et al., *Measuring Policy Content on the U.S. Supreme Court*, 71 J. POL. 1305, 1307 (2009).

141. *See* David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 579 (2003) ("For the most part, lower court judges tend to follow specific higher court precedents, and their decisions generally track ideological trends in the higher court."); Brian J. Broughman & Deborah A. Widiss, *After the Override: An Empirical Analysis of Shadow Precedent*, 46 J. LEGAL STUD. 51, 53 (2017) (suggesting judges have a "preference for reducing the risk of reversal by deciding cases in line with the Supreme Court's presumed preferences").

142. 532 U.S. 598 (2001).

143. *Id.* at 609; *see also* Karlan, *supra* note 10, at 206 ("*Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources* marked yet a further retrenchment."); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2139 (2000).

144. Karlan, *supra* note 10, at 207–09.

As to noncitizens' rights, in *Hernandez v. Mesa*,[145] the Supreme Court questioned whether a *Bivens* action could be brought against a CBP officer who shot across the border and killed a Mexican teenager.[146] On remand, the Fifth Circuit responded to the Supreme Court's signaling, holding that the *Bivens* action could not be brought because of concerns about foreign relations with Mexico even though Mexico had filed a brief in support of the murdered teenager's family.[147]

Even more closely related to the attack on fees in immigration habeas, the Supreme Court's holding that the EAJA did not apply to deportation hearings before an administrative judge has been characterized by a leading immigration and federal courts scholar as part of the then Rehnquist Court's reform efforts to discourage civil rights litigation.[148] And, before joining the Supreme Court, Chief Justice Roberts proposed a bill to slash the availability of attorneys' fees for just these sorts of cases.[149] Even if the district and circuit court judges are not consciously molding their orders to conform to this signaling, the rights retrenchment movement is a part of the background context in which they are making their decisions.

B. ICE's Attack on Attorneys' Fees in Habeas Proceedings

In the context of immigration removal proceedings, the availability of attorneys' fees through the EAJA is a critical incentive to ensuring that all individuals, citizen and noncitizen alike, have their habeas rights respected.[150] Accordingly, whether intended or not, reading habeas proceedings out of the EAJA looks very much like another example of rights

145. 137 S. Ct. 2003 (2017).

146. *Id.* at 2008; *see also* James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 747 (2020) ("Confirming its distaste for legal remediation, the Court embraced a trend in the lower courts that views gratuitous payments to foreign nationals injured by government actions abroad as justifying the denial of any right to sue for damages."); James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 563 (2020) ("Reflected in the Court's 2017 decision in *Ziglar v. Abbasi*, and echoed more recently in *Hernandez v. Mesa*, such worries about official liability have fueled an expansion of immunity defenses, as well as a growing hostility to the recognition of any right to sue under the *Bivens* doctrine.").

147. Hernandez v. Mesa, 885 F.3d 811, 820 (5th Cir. 2018); *see also* Louise Weinberg, *Age of Unreason: Rationality and the Regulatory State*, 53 U. MICH. J.L. REFORM 1, 4–5 n.2 (2019) (identifying this case as failing in its formal logic).

148. *See* Johnson, *supra* note 112, at 480 n.329 ("*Ardestani* is indicative of the Rehnquist Court's hostility the toward awarding of attorneys' fees, a practice designed to encourage certain types of litigation.").

149. Burbank & Farhang, *supra* note 133, at 41 (noting that Roberts stated that "[t]his legislation will, of course, be opposed by the self-styled public interest bar, but the abuses that have arisen in the award of attorney's fees against the government clearly demand remedial action.").

150. *See* Vacchio v. Ashcroft, 404 F.3d 663, 671 (2d Cir. 2005) ("The rationale of encouraging challenges to improper government action as a means of formulating better public policy rather than vindicating individual rights is well addressed by applying EAJA to these particular habeas proceedings.").

retrenchment. This impression is heightened when the arguments for and against such an interpretation are marshalled against each other.

The standard court approach to statutory construction is to begin with the statutory text and, unless otherwise defined, ascertain the ordinary meaning of the term at issue.[151] Even in *Ardestani*, the Supreme Court only looked to the canon of construing waivers of sovereign immunity narrowly *after* addressing whether the statutory text was unambiguous.[152] The EAJA does not define the term "civil action" and so the question becomes whether habeas proceedings are ordinarily understood to be civil or criminal proceedings. There is little, if any, serious debate that habeas proceedings are civil actions. Functionally, the writ is sought by individuals against the government custodian and is not a government-initiated criminal action.[153] As the Supreme Court explained in *Riddle v. Dyche*,[154] the "writ of *habeas corpus* is not a proceeding in the original criminal prosecution but an independent civil suit."[155] And, thus, the reasons for the underlying detention cannot—and should not—change the nature of the writ.[156]

The Supreme Court has recognized that, even in colonial America, the writ of habeas corpus was available to individuals who were civilly detained.[157] This is a consistent aspect of the historical court practices in the United States. For example, in 1824, a father sought to free his minor son from the custody of the child's grandfather by petitioning for habeas relief.[158]

The Supreme Court's older precedent further supports the characterization of habeas proceedings as civil actions. For example, in 1883, the Court stated, "the judicial proceeding under [the habeas corpus statute] is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings."[159] In 1889, the Court described a habeas petition as "a civil remedy, given in a civil action; as much so as a writ of *habeas corpus*, which this court has held to be a civil, and not a criminal, proceeding, even when instituted to arrest a criminal prosecution."[160] By 1892, the Court's jurisprudence regarding the civil nature of habeas was sufficiently

151. *See* BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006); *see also* Blackman v. District of Columbia, 456 F.3d 167, 176 (D.C. Cir. 2006) (using the same approach in an EAJA case).

152. Ardestani v. Immigr. & Naturalization Serv., 502 U.S. 129, 138 (1991).

153. *See* FREEDMAN, *supra* note 24, at 7 (laying out this functional definition of habeas).

154. 262 U.S. 333 (1923).

155. *Id.* at 336.

156. *See* Farnsworth v. Montana, 129 U.S. 104, 113 (1889).

157. *See* Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 301–302 (2001); *see also* FREEDMAN, *supra* note 24, at 12–15, 21–22, 40–43 (describing cases from as early as 1714 in colonial America); Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2522–23 (1998).

158. United States v. Green, 26 F. Cas. 30, 31 (C.C.D.R.I. 1824) (No. 15,256).

159. *Ex parte* Tom Tong, 108 U.S. 556, 559 (1883).

160. *Farnsworth*, 129 U.S. at 113; *see also* Kurtz v. Moffitt, 115 U.S. 487, 494 (1885) ("A writ of *habeas corpus*, sued out by one arrested for crime, is a civil suit or proceeding, brought by him to assert the civil right of personal liberty, against those who are holding him in custody as a criminal.").

established that it was described as "well settled."[161] A year later, the Court reiterated this position in the immigration context.[162]

The historical understanding of habeas as a civil proceeding has persisted, even after the passage of the EAJA in 1980. For example, in *Hilton v. Braunskill*,[163] the Supreme Court noted that its "decisions have consistently recognized that habeas corpus proceedings are civil in nature."[164] And, in more recent vintage, the Supreme Court held that proceedings for noncriminal immigration detention are "civil, not criminal."[165] Federal circuit and district courts have acknowledged this trend, consistently holding that, at minimum, noncriminal petitions for writs of habeas corpus are civil actions.[166] And, in the specific context of the EAJA, several circuit and district courts have reached the same conclusion.[167]

On the other hand, when faced with habeas petitions challenging criminal confinement, the Fourth Circuit and Tenth Circuit followed the same analytic path to hold that the EAJA did not apply. The Fourth Circuit and Tenth Circuit both found that fee shifting is not necessary to incentivize challenges to detention.[168] However, the core argument more directly turns on how to define the use of "civil action" in the EAJA.[169] Tellingly, the first decision in each circuit—*Ewing v. Rodgers*[170] in the Tenth Circuit and *O'Brien v. Moore*[171] in the Fourth Circuit—involved habeas challenges to criminal detentions.[172] Accordingly, the courts unsurprisingly relied on a case from the Second Circuit, *Boudin v. Thomas*,[173] which likewise involved a habeas challenge to a criminal detention.[174] Within this context, the Fourth Circuit

161. Cross v. Burke, 146 U.S. 82, 88 (1892).

162. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime.").

163. 481 U.S. 770 (1987).

164. *Id.* at 776; *see also* Keeney v. Tamayo-Reyes, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting) ("The availability and scope of habeas corpus have changed over the writ's long history, but one thing has remained constant: Habeas corpus is . . . an original civil action.").

165. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

166. *See, e.g.*, Brown v. Vasquez, 952 F.2d 1164, 1169 (9th Cir. 1991).

167. *See, e.g.*, Kholyavskiy v. Schlecht, 479 F. Supp. 2d 897, 901 (E.D. Wis. 2007) (holding that the term "any civil action," as used in the EAJA, is unambiguous and includes noncriminal habeas petition); Toutounjian v. Immigr. & Naturalization Serv., 2 F. Supp. 2d 374, 376–77 (W.D.N.Y. 1998) (holding that fees are available in habeas corpus proceedings seeking review of an immigration decision, but ultimately denying the award on other grounds). *But see* Al-Shewailey v. Mukasey, No. CIV-07-1392, 2008 WL 542956, at *2 (W.D. Okla. Feb. 25, 2008).

168. *See* Ewing v. Rodgers, 826 F.2d 967, 971 n.5 (10th Cir. 1987); O'Brien v. Moore, 395 F.3d 499, 507 (4th Cir. 2005).

169. *See Ewing*, 826 F.2d at 969; *O'Brien*, 395 F.3d at 500–01.

170. 826 F.2d 967 (10th Cir. 1987).

171. 395 F.3d 499 (4th Cir. 2005).

172. *See Ewing*, 826 F.2d at 968; *O'Brien*, 395 F.3d at 500.

173. 732 F.2d 1107 (2d Cir. 1984).

174. *See Ewing*, 826 F.2d at 969; *O'Brien*, 395 F.3d at 507.

and the Tenth Circuit naturally found that habeas is not always considered solely "civil" but can also have criminal qualities.[175] The Fourth Circuit and the Tenth Circuit then highlighted how waivers of sovereign immunity are to be construed narrowly.[176] Putting these factors together, both circuits held that the EAJA's use of the term "civil action" did not unambiguously cover habeas because of its "hybrid" nature.[177] In *Obando-Segura v. Garland*,[178] the Fourth Circuit extended this holding in a case involving an immigration proceeding without offering much additional reasoning other than a seeming aversion to considering either the EAJA's legislative history or purpose.[179]

On the other hand, in *Vacchio v. Ashcroft*[180] and *In re Hill*,[181] the Second Circuit and the Ninth Circuit, respectively, held that habeas proceedings challenging immigration detention qualify as civil actions under the EAJA.[182] In doing so, both courts rejected arguments to extend the holding in *Boudin*, which had interpreted habeas proceedings challenging criminal detention as not falling within the scope of the EAJA.[183] The circuit courts determined that the immigration context was different because the noncitizens were ineligible for government-provided counsel and their legal claims often presented important policy challenges.[184] The Second Circuit further identified that the EAJA covered actions brought by the government and, thus, its purpose went beyond just encouraging litigation to reach compensating parties for government overreach.[185] It also distinguished habeas claims that had "roots" in criminal actions.[186]

The legislative history and drafting choices of the EAJA further indicate that its use of the term "civil action" was meant to encompass habeas proceedings. To the former, in a Senate hearing, the government's representative stated that the award of attorneys' fees would "affect all areas of Government business," specifically mentioning "prisoner petitions."[187] Additionally, other aspects of the U.S. Code reflect Congress's treatment of habeas as a civil proceeding.[188] To the latter, the use of the term "any" to

175. *See Ewing*, 826 F.2d at 969; *O'Brien*, 395 F.3d at 505.

176. *See Ewing*, 826 F.2d at 969; *O'Brien*, 395 F.3d at 503.

177. *See O'Brien*, 395 F.3d at 508; *Ewing*, 826 F.2d at 971; *see also* Sloan v. Pugh, 351 F.3d 1319, 1323 (10th Cir. 2003).

178. 999 F.3d 190 (4th Cir. 2021).

179. *Id.* at 195 ("*O'Brien* teaches us that habeas proceedings include a 'criminal aspect' and 'a civil aspect.' . . . And we, like *O'Brien*, decline to delve into the legislative-purpose morass.").

180. 404 F.3d 663 (2d Cir. 2005).

181. 775 F.2d 1037 (9th Cir. 1985).

182. *See* Nadarajah v. Holder, 569 F.3d 906, 909–10 (9th Cir. 2009); *Vacchio*, 404 F.3d at 672; *In re* Hill, 775 F.2d at 1040–41.

183. *Vacchio*, 404 F.3d at 672; *In re* Hill, 775 F.2d at 1040–41.

184. *Vacchio*, 404 F.3d at 669–71; *In re* Hill, 775 F.2d at 1040–41.

185. *Vacchio*, 404 F.3d at 670.

186. *Id.* at 672.

187. *Equal Access to Justice Act of 1979, S. 265: Hearings Before the Subcomm. on Improvements in Jud. Machinery of the S. Comm. on the Judiciary*, 96th Cong. 50, 51 (1979).

188. *See, e.g.*, 28 U.S.C. § 1914(a).

modify "civil action" suggests a broad construction.[189] The explicit exclusion of tort actions also suggests that Congress was specifically identifying those civil actions not covered by the EAJA.[190]

Additionally, the Federal Rules of Civil Procedure specifically enfold habeas proceedings.[191] In relevant part, Rule 81 of the Federal Rules of Civil Procedure states: "These rules apply to proceedings for habeas corpus . . . to the extent that the practice in those proceedings: (A) is not specified in a federal statute . . . and (B) has previously conformed to the practice in civil actions."[192] And, over the years, courts have found that the Federal Rules of Civil Procedure apply in certain cases, such as Rule 17(c)'s provision for the appointment of a guardian ad litem.[193] While courts have determined that not all of the Federal Rules of Civil Procedure apply to habeas proceedings, even those courts uniformly acknowledge its civil nature.[194] Moreover, the inclusion of habeas in the Federal Rules of Civil Procedure also points us to Rule 2, which clearly lays out that "[t]here is one form of action—the civil action."[195]

Prudential concerns counsel against reading "civil action" too narrowly because, by excluding habeas proceedings under the EAJA, the Fourth Circuit created a significant circuit split and added to litigants' uncertainty about a doctrinal question that deals with both immigration and attorneys' fees.[196]

The federal courts generally—and the Supreme Court, in particular—have long been overtaxed by the number of cases being brought.[197] Thus, circuit splits may not be timely resolved by the Supreme Court.[198] These splits lead to federal law being enforced differently based on accidents of geography.[199]

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189. *See* Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219 (2007).

190. *See* Kholyavskiy v. Schlecht, 479 F. Supp. 2d 897, 901 (E.D. Wis. 2007).

191. *See* Banister v. Davis, 140 S. Ct. 1698, 1705 (2020) ("The Federal Rules of Civil Procedure generally govern habeas proceedings.").

192. FED. R. CIV. P. 81(a)(4).

193. *See Civil Discovery in Habeas Corpus*, 67 COLUM. L. REV. 1296, 1299 nn.19–22 (1967) (collecting cases, including *Smith v. United States*, 174 F. Supp. 828 (S.D. Cal. 1959)).

194. *See, e.g.*, Browder v. Dir., Dep't of Corr. of Ill., 434 U.S. 257, 269 (1978); Schlanger v. Seamans, 401 U.S. 487, 490 n.4 (1971).

195. FED. R. CIV. P. 2.

196. *Compare* Obando-Segura v. Garland, 999 F.3d 190, 195 (4th Cir. 2021), *with* Vacchio v. Ashcroft, 404 F.3d 663, 668–69 (2d Cir. 2005), *and In re* Hill, 775 F.2d 1037, 1040–41 (9th Cir. 1985).

197. *See* Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 514–15 (2001) (describing the growing problem of unresolved circuit splits as the number of intermediate appellate decisions proliferates); *see also* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1726 (2008) (describing "an already overburdened federal judiciary").

198. *See* Johnson, *supra* note 7, at 73, 105 (explaining that the Supreme Court granted certiorari in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), to resolve a circuit split but also noting that, since deciding *Arizona v. United States*, 567 U.S. 387 (2012), the Court has opted not to review any more cases that raise the question of federal preemption of state and local immigration enforcement laws).

199. *See* Morrison, *supra* note 197, at 515 (citing THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 20 (1994) (quoting *Establishing*

Immigration is an area of law constitutionally entrusted to the federal government, which sets national policy.[200] Accordingly, courts have recognized that "it would be unsound for each of the several Courts of Appeals to elaborate a potentially nonuniform body of law" because uniformity is "especially desirable in [immigration] cases."[201] National policies in the immigration sphere ensure the equal treatment of individuals regardless of accidents of geography.[202] A lack of uniformity seems particularly unfair when detained noncitizens facing removal may be transferred across jurisdictions with different substantive laws on such important issues as what sorts of criminal convictions are grounds for mandatory deportation.[203] Additionally, a uniform policy should lead to greater efficiency across the administrative functions.[204]

The Supreme Court has addressed circuit splits over the doctrine governing attorneys' fees, noting the importance of preventing uncertainty that could lead to additional litigation.[205] The risks of strategic forum-shopping also arise when a federal statute's fee-shifting provisions are interpreted differently across the circuit courts.[206] In another context, when dealing with multidistrict litigation (also an issue of national scope), federal judges themselves have expressed a preference for certainty and guidance about how to handle attorneys' fees.[207]

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an Intercircuit Panel: Hearings on S. 704 Before the Subcomm. on Cts. of the S. Comm. on the Judiciary, 99th Cong. 147–48 (1985))).

200. *See* Graham v. Richardson, 403 U.S. 365, 378 (1971).

201. Jian Hui Shao v. Bd. of Immigr. Appeals, 465 F.3d 497, 502 (2d Cir. 2006); *see also* Shi Liang Lin v. U.S. Dep't of Justice, 494 F.3d 296, 316 (2d Cir. 2007) (Katzmann, J., concurring) ("Instead, the majority has gone out of its way to create a circuit split where none need exist, *see* Maj. Op. at 300 n. 4, thereby frustrating the BIA's uniform enforcement of a national immigration policy.").

202. *See* Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 B.U. L. REV. 1427, 1470 (2017) (noting that resolving a circuit split over the immigration consequences of a conviction would lead to noncitizens convicted under the same state statute being treated identically).

203. *See* Adrienne Pon, Note, *Identifying Limits to Immigration Detention Transfers and Venue*, 71 STAN. L. REV. 747, 762 (2019).

204. *See, e.g.*, Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76,927, 76,932 (proposed Dec. 18, 2008) (codified at 8 C.F.R. pt. 1240, 1241) (proposing a national rule because "[t]he divergent practice among the federal courts of appeals undermines the sound public policy reasons to 'promote a greater measure of uniformity and expedition in the administration of the immigration laws'").

205. *See, e.g.*, Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation."); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 609 (2001) (defining "prevailing party" as used in fee-shifting statute).

206. *See* Mark Tannahill, *Fee-Shifting Provisions and the Clean Air Act: Should Financially-Motivated Plaintiffs Be Barred from Recovering Fees?*, 49 SANTA CLARA L. REV. 863, 878–79 (2009) (describing the issue of nonuniform fee-shifting law driving litigants' choices of where to file Clean Air Act claims); *see also* Seth Katsuya Endo, *Should Evidence of Settlement Negotiations Affect Attorneys' Fees Awards?*, 69 N.Y.U. ANN. SURV. AM. L. 417, 418 (2013) (noting the strategic importance of attorneys' fees within litigation).

207. *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1706 (2017).

Disagreement among the intermediate appellate courts can lead to the regular, considered development of the law. Justice William J. Brennan once explained that the Supreme Court had an informal policy "of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question."[208] Such a policy permits questions to "percolate" and develop in an orderly, considered fashion.[209] It also may provide a record of the consequences of the different decisions.[210] Here, however, it seems unlikely that the EAJA's use of the term "civil action" as excluding habeas proceedings presents the sort of difficult, close question of law that is best served by a leisurely common-law development—and, of course, there is now a circuit split that brings the issue to the fore.[211]

C. Agency Nonacquiescence Magnifies Its Structural Power

This case study illuminates a feature of immigration litigation that lends itself to rights retrenchment: ICE's practice of nonacquiescence.[212] Nonacquiescence is when an agency decides to give a judicial order either limited or no effect beyond the particular case in which it was issued.[213]

In *United States v. Mendoza*,[214] the Supreme Court refused to extend the doctrine of nonmutual offensive collateral estoppel from *Parklane Hosiery Co. v. Shore*[215] to the United States, which gives constitutional cover to the practice.[216] Since then, agencies have taken advantage of this latitude in myriad ways. Some follow a circuit court's interpretation only within the circuit's territory.[217] Others apply a uniform, national policy at the agency level regardless of the governing circuit's interpretation.[218] Agencies may

208. E. GRESSMAN ET AL., SUPREME COURT PRACTICE 246 (9th ed. 2007) (quoting William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1983)).

209. *See* Michael C. Dorf, *The Supreme Court, 1997 Term Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 65 (1998); *see also* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984).

210. Dorf, *supra* note 209, at 65.

211. *See* Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 898 (1974) ("Many [circuit splits] can be endured and sometimes perhaps ought to be endured while judges and scholars observe the respective workings out in practice of the conflicting rules, particularly where the question of law is a close one, to which [a] confident answer will in any case be impossible.").

212. *See* Stuart Woolman, *Judicial Review Under Section 106 of the Immigration and Nationality Act: Only Rich Aliens Need Apply*, 22 COLUM. HUM. RTS. L. REV. 97, 131–34 (1990).

213. *See* Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1330–31 (D.C. Cir. 1989) (discussing both intracircuit and intercircuit nonacquiescence by Immigration and Naturalization Services (INS)), *cert. granted, judgment vacated*, 498 U.S. 1117 (1991).

214. 464 U.S. 154 (1984).

215. 439 U.S. 322 (1979).

216. 464 U.S. at 157–61.

217. *See* Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 223; Woolman, *supra* note 212, at 132. *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989).

218. *See* Woolman, *supra* note 212, at 131.

choose nonacquiescence as a general policy or just as applied to specific issues.[219] They may do so openly or secretly and consistently or on an ad hoc basis.[220] With these various permutations, agency nonacquiescence presents thorny theoretical issues involving agency capture, separation of powers, and federalism that are beyond the scope of this Article.[221] But the practical import in this instance is clear: when ICE refuses to acquiesce to the (currently) uniform circuit-level case law holding that the EAJA includes immigration habeas, the agency can push for incremental, accretive change that magnifies the structural power differences between it and noncitizen detainees.[222]

Prior to its recent victory in *Obando-Segura*, ICE primarily cited four cases—*Boudin*, *Ewing*, *Sloan v. Pugh*,[223] and *O'Brien*—to support its position that the EAJA does not reach immigration habeas, characterizing the set of cases as laying out a categorical rule that *all* habeas proceedings are, in effect, neither civil nor criminal but some elusive, *sui generis* other.[224] But, again, none of those cases involved a habeas challenge to immigration detention—instead, all four involved criminal detention.[225] In stark contrast, the applicability of the EAJA to immigration habeas was directly at issue in *In re Hill*, *Diaz-Magana*, and *Vacchio*, where the circuit courts uniformly rejected ICE's position.[226]

When looking at the overarching timeline of cases, one sees ICE continually—if at somewhat irregular intervals—pushing to expand the holdings in *Boudin*, *Ewing*, *Pugh*, and *O'Brien* while simultaneously challenging the breadth of the holdings in *In re Hill* and *Vacchio*. In 1983, the Seventh Circuit noted that ICE did not contest that the EAJA applied in a habeas proceeding in which the petitioners were challenging their detention

219. *See* Matthew Diller & Alexander A. Reinert, *The Second Circuit and Social Justice*, 85 FORDHAM L. REV. 73, 103–04 (2016) (describing Social Security Administration's policy of nonacquiescence in 1980s); Sisk, *supra* note 100, at 64 (same).

220. *See* Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 100–01 (2003).

221. *See, e.g.*, Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law*, 74 MO. L. REV. 949, 972 (2009); Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991 (1987).

222. *See* Vertex Surgical, Inc. v. Paradigm Biodevices, Inc., 648 F. Supp. 2d 226, 238 n.14 (D. Mass. 2009) ("The principal repeat players in the federal courts, federal government agencies, have more than adequate opportunities, without resort to questionable vacatur gambits, for multiple litigation of issues to advance particular views on statutory or constitutional interpretation."). *See generally* Steve Y. Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 YALE L. & POL'Y REV. 430 (1991) (describing the particular importance of INS nonacquiescence).

223. 351 F.3d 1319 (10th Cir. 2003).

224. *See, e.g.*, Respondent-Appellee Brief at 8, Diaz-Magana v. Rogers (9th Cir. 1995) (No. 95-55884), 1995 WL 17069698, at *8.

225. O'Brien v. Moore, 395 F.3d 499, 501 (4th Cir. 2005); *Sloan*, 351 F.3d at 1319; Ewing v. Rodgers, 826 F.2d 967, 971 (10th Cir. 1987).

226. Vacchio v. Ashcroft, 404 F.3d 663, 672 (2d Cir. 2005); *In re* Hill, 775 F.2d 1037, 1040–41 (9th Cir. 1985).

pending deportation.[227] After the *Boudin* decision was issued in 1984,[228] ICE tried to import it over to both the Ninth Circuit and the immigration context the following year. But, in *In re Hill*, the Ninth Circuit rejected ICE's reading.[229] ICE then tried to limit *In re Hill* to its particular facts—even within the Ninth Circuit—as seen in its challenge to EAJA fee shifting in another immigration habeas proceeding the following year in *Montero v. Ilchert*.[230] The Ninth Circuit, in dicta, again rejected ICE's position.[231] Despite its failure to expand *Boudin* to immigration in these two cases, the U.S. government prevailed in holding the line of *Boudin* (i.e., EAJA does not reach habeas arising out of criminal detention) in the Tenth Circuit's *Ewing* decision in 1987.[232]

Challenges to the EAJA's applicability to immigration habeas arose again in the mid-1990s. ICE unsuccessfully argued that *Boudin* foreclosed application of the EAJA to immigration habeas in *Chen v. INS*,[233] a case in the Southern District of New York in 1994.[234] Two years later, the Ninth Circuit emphatically rejected ICE's proposed narrow reading of *In re Hill* and expansive reading of *Boudin* in an immigration habeas case, *Diaz-Magana v. Rogers*.[235] Two years after that, a federal district court in the Western District of New York likewise rejected ICE's arguments that *Boudin* and *Ewing* precluded applying the EAJA to immigration habeas proceedings.[236]

All was quiet for another five years. Then, in the lower court proceedings in *Vacchio*, ICE again challenged the application of the EAJA to immigration habeas. This likely was part of the same campaign to limit the EAJA's reach as seen in the *Pugh* litigation that also was briefed in June. The District of Vermont adopted ICE's interpretation based on its reading of *Boudin*.[237] Two years later, in *O'Brien*, the Fourth Circuit relied on a broad reading of *Boudin* as having created a categorical carveout.[238] Based on this interpretation, the court agreed with ICE's interpretation that the EAJA does not reach habeas proceedings—at least, not habeas proceedings that arise out of criminal detention.[239] A few months later in April, the Second Circuit reversed the District of Vermont, holding that the EAJA applied to the

227. Ramos v. Haig, 716 F.2d 471, 472–73 (7th Cir. 1983) (affirming denial because government's position was substantially justified).

228. ICE lost on the point in the 1982 district court decision. *See* Boudin v. Thomas, 554 F. Supp. 703, 705 (S.D.N.Y. 1982), *aff'd in part*, 732 F.2d 1107, 1117 (2d Cir. 1984).

229. *In re* Hill, 775 F.2d at 1040–41.

230. 780 F.2d 763 (9th Cir. 1986).

231. *Id.* at 765.

232. Ewing v. Rodgers, 826 F.2d 967, 971 (10th Cir. 1987).

233. No. 93 Civ. 2108, 1994 WL 9759 (S.D.N.Y. Jan. 12, 1994).

234. *Id.* at *1.

235. 81 F.3d 167 (9th Cir. 1996).

236. Toutounjian v. Immigr. & Naturalization Serv., 2 F. Supp. 2d 374, 375–76 (W.D.N.Y. 1998).

237. Ruling on Petitioner's Request for Attorney's Fees and Costs, Vacchio v. Ashcroft, No. 02-cv-00293 (D. Vt. July 31, 2003), ECF No. 24.

238. O'Brien v. Moore, 395 F.3d 499, 501 (4th Cir. 2005).

239. *Id.*

immigration habeas proceeding and rejecting the broad reading of *Boudin* adopted by the Fourth Circuit and Tenth Circuit.[240] A few months after the Second Circuit's decision, ICE declined to raise the argument before the District of Connecticut,[241] which then noted the *Vacchio* decision in its final order.[242] In 2006, ICE tried to import an expansive reading of the *O'Brien* holding to the Eastern District of Wisconsin in an immigration habeas proceeding.[243] A federal district court in the Eastern District of Wisconsin rejected ICE's proposed readings of *O'Brien* and *Ewing*, relying on *Vacchio*, which described a habeas action challenging detention by ICE as "both a civil action in its own right . . . and ha[ving] its roots in a civil action."[244] But, in 2008, despite neither party briefing the issue, a federal district court in the Western District of Oklahoma cited *Pugh* for the proposition that the EAJA did not reach immigration habeas proceedings.[245]

The next indication that ICE had not finished its efforts to establish that the EAJA does not reach immigration habeas came in 2017. In an immigration habeas case, a federal district court in the District of Kansas noted in a footnote that it read *Pugh* as precluding the application of the EAJA to immigration habeas.[246] And, in 2019, we come back to the case with which this Article began: *Obando-Segura,* where a federal district court in the District of Maryland agreed with ICE's interpretation of *O'Brien* and held that fees under the EAJA were not available in immigration habeas.

When it comes to the question of whether the EAJA reaches immigration habeas, ICE is a classic repeat player, "which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests."[247] And, just as predicted by Professor Marc Galanter's theory, as a repeat player, ICE can strategically play for the rules of litigation itself—i.e., the judicial interpretation holding that the EAJA's use of the term "civil action" does not include immigration habeas proceedings—rather than just the outcome in a specific case—i.e., the payment of fees in a given case.[248]

The history of the case law shows that ICE can consider when and where to advance arguments as part of a long-term campaign. More tactically, ICE can selectively settle cases or accept a trial-level loss instead of appealing to

240. Vacchio v. Ashcroft, 404 F.3d 663, 672 (2d Cir. 2005).

241. Opposition to Petitioner's EAJA Petition, Gorsira v. Loy, No. 03CV01184 (D. Conn. Nov. 8, 2005), ECF No. 51.

242. Gorsira v. Chertoff, No. 03CV1184, 2006 WL 197343, at *1 (D. Conn. Jan. 25, 2006).

243. Government's Response to Petitioner's Request for Costs and Fees at 7–11, Kholyavskiy v. Schlecht, No. 05-cv-00671 (E.D. Wis. May 17, 2006), ECF No. 34.

244. Kholyavskiy v. Schlecht, 479 F. Supp. 2d 897, 901 (E.D. Wis. 2007) (quoting *Vacchio*, 404 F.3d at 672).

245. Al-Shewailey v. Mukasey, No. CIV-07-1392, 2008 WL 542956, at *2 (W.D. Okla. Feb. 25, 2008).

246. Abuya v. Sessions, No. 17-2293, at *1 n.1 (D. Kan. Aug. 17, 2017) (relying on *Sloan* in a footnote to deny attorneys' fees in an immigration habeas case). Unfortunately, as discussed below, the briefing was not available via PACER.

247. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98 (1974).

248. *See id.* at 100–01.

avoid creating negative precedent within circuits it perceives as hostile to its position. In some habeas proceedings, ICE stipulates to attorneys' fees under the EAJA as part of a settlement agreement.[249] ICE also affirmatively conceded the issue before a district court within the Second Circuit following *Vacchio*.[250] On some occasions, ICE is silent about the issue, and ICE wins or loses on other grounds.[251] When the issue is contested at the trial-court level, ICE can choose to appeal or defend a decision, as seen in *Vacchio* and *Obando-Segura*, or to take the loss, as in *Kholyavskiy v. Schlecht*[252] or *Ortega v. Hodgson*,[253] a 2012 case from the District of Massachusetts.[254]

ICE can also be strategic about how it tries to go about getting courts to adopt its interpretation of the law. Most directly, it can raise new or renewed arguments multiple times because the costs—both in terms of resources and precedential case law—are likely modest. Exemplifying the cost efficiencies, before the district court in *Obando-Segura*, ICE devoted only one double-spaced page to its argument that the EAJA did not reach habeas proceedings. In the trial-level proceedings in *O'Brien*, the government did not even advance that argument until after it lost on its other arguments against the award of fees. The appellate briefs in *Obando-Segura* and *O'Brien* engaged much more robustly with the issue. But even there, the government's costs are likely modest because agencies may rely on their institutional expertise—the DOJ even maintains "brief banks" on recurring issues.[255] The similarity of the arguments advanced in *Kholyavskiy*, *Vacchio*, and *Obando-Segura* certainly suggest that ICE is taking advantage of knowledge-sharing within the agency. As to the precedential impacts, no district court opinion has any formal precedential force beyond the particular

249. *See, e.g.*, Bourguignon v. MacDonald, No. 09-cv-30068 (D. Mass. Apr. 29, 2010) (stipulating to EAJA fee shifting in immigration habeas proceeding).

250. D'Alessandro v. Mukasey, No. 08-CV-914, 2010 WL 1404909, at *8 (W.D.N.Y. Mar. 31, 2010) ("Respondents conceded that the present action is a 'civil action.'"), *report and recommendation adopted*, No. 08-CV-914, 2010 WL 2710623 (W.D.N.Y. July 6, 2010).

251. *See, e.g.*, Dvorkin v. Gonzales, 173 F. App'x 420, 423–24 (6th Cir. 2006) (per curiam) (reversing the district court's award of attorney's fees because the government's position was substantially justified where ICE did not raise the issue as to whether the EAJA applies to an immigration habeas petition); Sotelo-Aquije v. Slattery, 62 F.3d 54, 58 (2d Cir. 1995) (reversing denial of EAJA fees based on "substantial justification" prong); Cheng v. McCredit, No. 94 C 7520, 1995 WL 430953, at *1 (N.D. Ill. July 11, 1995) (noting that the government raised only a substantial justification argument). Of course, even when ICE is silent, courts may note their position. *See, e.g.*, Al-Shewailey v. Mukasey, No. CIV-07-1392, 2008 WL 542956, at *2 (W.D. Okla. Feb. 25, 2008) (denying attorneys' fees to an immigration habeas petitioner under the EAJA because of *Pugh* even though the issue was not in the briefing); Yafaee v. Holder, No. 09 Civ. 7946, 2010 WL 451030, at *3 (S.D.N.Y. Jan. 29, 2010) (noting that the EAJA reaches immigration habeas but was unavailable in the instant case because ICE mooted the case and the petitioner was pro se).

252. 479 F. Supp. 2d 897 (E.D. Wis. 2007).

253. No. 11-10358-MBB, 2012 WL 1658931 (D. Mass. May 10, 2012).

254. *Id.* at *3 n.2 (noting that the EAJA applies to immigration habeas and awarding fees).

255. *See* Amparo v. Comm'r of Soc. Sec., No. 12-cv-6403, 2014 WL 4678033, at *4 (D.N.J. Sept. 18, 2014) (describing the savings to private practitioners, government lawyers, and courts that come from being able to reuse materials from similar cases); Shapiro v. U.S. Dep't of Just., 969 F. Supp. 2d 18, 24–25 (D.D.C. 2013) (describing DOJ's "brief bank" for use in repeated FOIA litigation).

case, so it is not high cost if ICE loses in a particular case.[256] And even circuit court opinions will usually only bind the agency in a specific geographic region.[257]

One caveat to this discussion of how ICE is well-situated to strategically create favorable case law is that agencies presumably want to avoid antagonizing courts and, thus, limit their nonacquiescence. And, in the context of the EAJA, agency nonacquiescence within a jurisdiction has "led invariably to a finding of no substantial justification," removing a potential fee defense.[258] While nonacquiescence is unlikely to result in a contempt finding,[259] the District of Columbia Circuit sanctioned the National Labor Relations Board (NLRB) for its policy of nonacquiescence where the NLRB did not actively seek Supreme Court review of the contested issue and lacked candor in its application.[260] But ICE might very well be attempting to create a circuit split with the Second Circuit and Ninth Circuit, hoping to put the issue before a potentially friendly Supreme Court. As noted above, before his elevation to the bench, Chief Justice Roberts had publicly written against this sort of fee shifting.[261] Justice Alito also recently signaled his approval of *O'Brien*.[262] Additionally, although it gives little airtime to *Vacchio* in its briefs,[263] ICE does not seem to be hiding its nonacquiescence. Instead, as is common with agency nonacquiescence, ICE is simply interpreting the case law aggressively in its favor.[264]

A second caveat to this discussion is that many of the briefs in the cases cited above are unavailable on PACER. Many of the cases took place before widespread electronic filing began in 2002.[265] Additionally, the cases after

256. Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011); BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 255 (2016).

257. *See* Estreicher & Revesz, *supra* note 217, at 679, 699–702; Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391, 402–03 (2000).

258. Sisk, *supra* note 100, at 64 (citing Love v. Heckler, 588 F. Supp. 1346, 1348 (M.D. Ala. 1984)).

259. *See* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 691 n.15 (2018) (distinguishing noncompliance and nonacquiescence).

260. Heartland Plymouth Ct. MI, LLC v. NLRB, 838 F.3d 16, 22 (D.C. Cir. 2016).

261. Burbank & Farhang, *supra* note 133, at 41.

262. Banister v. Davis, 140 S. Ct. 1698, 1715 (2020) (Alito, J., dissenting) (citing *O'Brien* with approval).

263. Respondent-Appellee's Brief, Obando-Segura v. Garland, 999 F.3d 190 (4th Cir. 2021) (No. 19-7736); Respondent's Opposition to Petitioner's Motion for Award of Attorney's Fees, Obando-Segura v. Barr, No. 17-3190 (D. Md. Oct. 18, 2019), 2019 WL 12336432.

264. *See* Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1760–61 (2012) (describing EPA's creative attempts at interpretation when faced with unwelcome judicial precedent); ROBERT J. HUME, HOW COURTS IMPACT FEDERAL ADMINISTRATIVE BEHAVIOR 77–78 (2009) (describing the same phenomena).

265. Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855, 862 (2008) (discussing the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified as amended in scattered sections of the U.S.C.)).

2009 are subject to Federal Rule of Civil Procedure 5.2, which limits electronic access to immigration dockets.[266] It also would not be surprising to learn that many more cases are effectively invisible because they do not have published orders.[267]

ICE's nonacquiescence also foists costs on noncitizen detainees and the courts themselves. To the former, the agency can make all noncitizen detainees bring their own challenges to ICE's interpretation of the EAJA, even though the circuit courts have spoken in a single voice.[268] To the latter, circuit courts appear to be sensitive to the number of appeals that stem from an agency's policy of nonacquiescence, responding with greater deference to the agency decisions.[269] This, however, is probably less of a concern given the number of noncitizen petitioners that proceed pro se and their low win rates.[270]

In addition to the costs that ICE's nonacquiescence might place on noncitizen detainees and courts, the lower-court precedent matters, too. As discussed above, the Supreme Court might not for a long time decide whether the EAJA covers immigration habeas. In the meantime, the lower courts will follow each other—particularly in the circuits without directly controlling precedent.[271] Illustrating how quickly and broadly this can happen, two earlier unreported district court decisions in *Obando-Segura* have already been cited by six other courts.[272] And, even if the Fourth Circuit reverses the

266. FED. R. CIV. P. 5.2; *see also* Nancy Morawetz, *A Better Balance for Federal Rules Governing Public Access to Appeal Records in Immigration Cases*, 69 HASTINGS L.J. 1271 *passim* (2018) (discussing history and issues).

267. Michael Kagan et al., *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 698–99 (2018) (showing that many unpublished merits decisions in immigration appeals are not available on Westlaw); *see also* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 548 (2020) (noting that some circuit courts have specific procedures for dealing with immigration appeals).

268. Woolman, *supra* note 212, at 133.

269. *See* Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1123–24 (2011) (describing increased deference by the Second Circuit and Ninth Circuit when faced with a surge of immigration appeals); Diller & Reinert, *supra* note 219, at 103–04 (describing the impacts of Social Security Administration's flooding the courts with appeals due to policy of nonacquiescence).

270. *See* Brief of Amicus Curiae Am. Immigr. Laws. Ass'n in Support of Appellant and Reversal, Maldonado-Velasquez v. Moniz, No. 17-1918 (1st Cir. Nov. 28, 2017) (stating that 76 percent of immigration habeas petitions filed in Massachusetts were pro se); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139, 1209 n.280 (stating that the United States "prevailed in over 91% of habeas corpus proceedings challenging exclusion orders and over 64% of appeals of deportation orders in 1990").

271. *See* Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1254 (2020) (describing how district courts treat each other's orders as persuasive informal authority in the discovery context); Elizabeth Y. McCuskey, Horizontal Procedure 29–38 (2017) (unpublished manuscript) (on file with author) (describing general phenomena). *See generally* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619 (2020); Brian Soucek & Remington B. Lamons, *Heightened Pleading Standards for Defendants: A Case Study of Court-Counting Precedent*, 70 ALA. L. REV. 875 (2019).

272. *See* Duncan v. Kavanagh, 439 F. Supp. 3d 576, 588 (D. Md. 2020); Abshir H.A. v. Barr, No. 19-cv-1033, 2019 WL 3719467, at *9 (D. Minn. June 28, 2019), *report and*

Obando-Segura decision in this particular instance, it provides ICE and other recalcitrant district courts with a blueprint that might lead to a split further down the line.[273]

Another concern with using agency nonacquiescence in this sort of retrenchment effort is that, if habeas proceedings involving a detained noncitizen facing removal for an underlying criminal conviction are not considered "civil actions" for the purposes of the EAJA, the interpretation likely will creep into other contexts.[274] In *Buckhannon*, the Supreme Court rejected the catalyst theory, holding that the term "prevailing party," as used in the Fair Housing Amendments Act of 1988[275] and the Americans with Disabilities Act of 1990,[276] only applied when a litigant achieved some court-ordered relief.[277] The lower courts quickly applied this same definition to a plethora of other federal fee-shifting statutes, including the Social Security Act,[278] Title VII of the Civil Rights Act of 1964,[279] and the EAJA.[280] Even more directly on point, the holding in *Ardestani* quickly migrated from just removal proceedings to other types of administrative

recommendation adopted, No. 19-1033, 2019 WL 3719414 (D. Minn. Aug. 7, 2019); Campbell v. Barr, 387 F. Supp. 3d 286, 296 (W.D.N.Y. 2019); Mohamed A. v. Neilsen, No. 19-cv-49, 2019 WL 2396761, at *4 (D. Minn. May 16, 2019), *report and recommendation rejected sub nom.* Mohamed A. v. McAleenan, No. 19-cv-0049, 2019 WL 2395408 (D. Minn. June 6, 2019); Omar M. v. Barr, No. 18-cv-2646, 2019 WL 3570790, at *5 (D. Minn. May 6, 2019), *report and recommendation adopted*, No. 18-cv-2646, 2019 WL 2755937 (D. Minn. July 2, 2019), *appeal dismissed sub nom*. Mohamed v. Barr, No. 19-2881, 2019 WL 8112881 (8th Cir. Oct. 17, 2019); Misquitta v. Warden Pine Prairie ICE Processing Ctr., 353 F. Supp. 3d 518, 525 (W.D. La. 2018).

273. While this concern might seem overblown, recall that the controlling argument in *District of Columbia v. Heller*, 554 U.S. 570 (2008), was first raised in a 1960s student note that began by citing a contest-winning essay published in a National Rifle Association periodical. *See* Stuart R. Hays, Note, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 381 (1960). And, given the appearance of agency nonacquiescence, it is hard to imagine that ICE is going to abandon this argument after finally achieving some traction with it.

274. *See generally* Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277, 1279–80 (2019) (describing how contract doctrines migrate from one context to another); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1697–98 (1999) (identifying "doctrinal creep" in trademark law).

275. Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended in scattered sections of 28 and 42 U.S.C.).

276. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.).

277. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 609 (2001).

278. Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

279. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scatter sections of 42 U.S.C.).

280. *See* Kyle A. Loring, Note, *The Catalyst Theory Meets the Supreme Court—Common Sense Takes a Vacation*, 43 B.C. L. REV. 973, 993 n.198 (2002) (collecting cases, including Smyth v. Rivero, 282 F.3d 268, 277 (4th Cir. 2002) (Social Security Act); J.C. v. Reg'l Sch. Dist. 10, 278 F.3d 119, 125 (2d Cir. 2002) (Individuals with Disabilities in Education Act); Johnson v. ITT Aerospace/Commc'ns Div. of ITT Indus., Inc., 272 F.3d 498, 500 (7th Cir. 2001) (all fee-shifting provisions, including Title VII of the Civil Rights Act of 1964)).

hearings.[281] Were ICE's interpretation of the EAJA's use of "civil action" to take root and spread, it would weaken the ability of private citizens to enforce their civil rights in a variety of contexts.

III. APPLYING A PROCEDURAL JUSTICE LENS

Once the reading out of habeas from the EAJA's use of the term "civil action" is understood as an example of rights retrenchment, procedure-focused frameworks naturally lend themselves and add to a richer understanding of the normative implications of the issue. Chief among these procedure-focused frameworks is the three-factor balancing framework from *Mathews v. Eldridge*.[282] As Justice David Souter explained, "[t]he *Mathews* analysis has thus been used as a general approach for determining the procedures required by due process whenever erroneous governmental action would infringe an individual's protected interest."[283]

The *Mathews* factors shed light on the normative question of whether immigration habeas proceedings *should* be covered by the term "civil action." The normative inquiry is especially important because the practical effects of fee shifting are difficult to empirically prove as one sees in the conflicting judicial positions about the benefits of the EAJA. Faced with this sort of uncertainty, any legal decision implicitly takes a stance on who will bear the burden of a possible mistake.[284] The *Mathews* factors demonstrate that the award of attorneys' fees in immigration removal proceedings is most consistent with a view of procedural justice that values accuracy, efficiency, and participation.[285]

281. *See* Dart v. United States, 961 F.2d 284, 285 (D.C. Cir. 1992) (applying the prohibition on attorneys' fees awards under the EAJA to the Export Administration Act); Johnson, *supra* note 112, at 480 n.329 (citing Friends of the Earth v. Reilly, 966 F.2d 690, 692 (D.C. Cir. 1992) (applying the prohibition on attorneys' fees awards under the EAJA to the Resource Conservation and Recovery Act)).

282. 424 U.S. 319 (1976).

283. Burns v. United States, 501 U.S. 129, 148 (1991) (Souter, J., dissenting); *see also* Garrett, *supra* note 24, at 75 (noting that the use of the *Mathews* framework for assessing procedural issues broadly is "not an outlier approach").

284. *See* Allison Orr Larsen, *Judging "Under Fire" and the Retreat to Facts*, 61 WM. & MARY L. REV. 1083, 1090 (2020) (discussing judges' use of facts to defend politically fraught decisions).

285. Many readers will recognize these factors as coming from Lawrence B. Solum's *Procedural Justice*, 78 S. CAL. L. REV. 181, 237, 244–60 (2004) (explaining the goal of incorporating the accuracy, balancing, and participation models of procedural justice "into a unified theory of procedural justice"). These factors and their link to the *Mathews* framework are explained further in the main text of this part.

A. The Mathews *Framework*

1. Understanding the Framework

It is a foundational command that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law."[286] These constitutional prohibitions act, primarily, as bulwarks against executive or judicial misconduct by ensuring that any deprivation is authorized by law.[287] The Due Process Clauses further constrain legislatures from authorizing executive or judicial deprivations that do not provide processes that are fair to the parties given the specific circumstances.[288] But neither the Fifth nor Fourteenth Amendments detail exactly what process is due.

In *Mathews*, the Supreme Court set forth a general framework for evaluating due process challenges to state procedures.[289] The approach requires courts to weigh (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[290]

The *Mathews* Court specifically addressed the constitutionality of administrative fact-finding procedures used in social security disability benefits determinations.[291] But the three-factor framework has been widely adopted by courts and applied to challenges to procedures for state determinations ranging from involuntarily committing a minor to retrieving an impounded automobile.[292] And commentators have observed that courts frequently use a similar weighing even with subconstitutional questions that have arisen in the contexts of pleading, notice, and discovery.[293] More

286. U.S. CONST. amend. V (applying to the federal government); U.S. CONST. amend. XIV, § 1 (applying to the states).

287. *See* Gary Lawson et al., *"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 7–8 (2005) (explaining how this check "befit[s] their origins in Article 39 of the Magna Carta").

288. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856); *see also* Lawson et al., *supra* note 287, at 7–15 (describing the history of procedural due process from the adoption of the Constitution through *Mathews*).

289. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (O'Connor, J., plurality opinion) (explaining that the *Mathews* framework is "[t]he ordinary mechanism that we use . . . for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law'"); Parham v. J.R., 442 U.S. 584, 599 (1979) ("[O]ur prior holdings have set out a general approach for testing challenged state procedures under a due process claim.").

290. Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

291. *Id.* at 339–40.

292. City of Los Angeles v. David, 538 U.S. 715, 717–19 (2003); *Parham*, 442 U.S. at 599–600.

293. *See, e.g.*, Andrew Blair-Stanek, Twombly *Is the Logical Extension of the* Mathews v. Eldridge *Test to Discovery*, 62 FLA. L. REV. 1, 4 (2010) (arguing that *Twombly* "is merely an extension of the familiar and often-used *Mathews v. Eldridge* three-factor balancing test applied to property and liberty deprivations imposed by discovery, which commences after an

directly, the *Mathews* framework has been used in both immigration cases[294] and right-to-counsel cases.[295] A plethora of scholars have used this framework in the immigration context, too.[296]

The ubiquity of the *Mathews* framework alone might not be sufficient to justify its use in evaluating whether the EAJA encompasses immigration habeas where the practical legal question is primarily one of statutory interpretation, not procedural due process.[297] But these divisions are permeable. In *Landon v. Plasencia*,[298] the Supreme Court reexamined its removal precedent and noted that, in an earlier immigration case, "[a]lthough the holding was one of regulatory interpretation, the rationale was one of constitutional law."[299]

Additionally, the *Mathews* framework also provides a structure for considering the normative question: which interpretation is more consistent with the notions of reasonableness and fairness that comprise a vision of procedural justice? Professor Lawrence Solum's article, *Procedural Justice*, recognizes participation, accuracy, and efficiency (described as "balancing")

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unsuccessful motion to dismiss"); Seth Katsuya Endo, *Technological Opacity & Procedural Injustice,* 59 B.C. L. REV. 821, 832 (2018) (identifying the implicit use of factors in discovery disputes); Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1127 (2019) ("Despite their differences, the Court has clarified that the *Mathews* and *Mullane* tests are to be applied in a similar fashion, with courts weighing the individual's interests against the interests of the government.").

294. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 34–35 (1982) (discussing the *Mathews* factors in a challenge to INS procedures); Cancino Castellar v. McAleenan, 388 F. Supp. 3d 1218, 1238–44 (S.D. Cal. 2019) (applying *Mathews* to assess whether procedural due process requires a prompt postarrest hearing before an immigration judge for noncitizens detained by ICE); Hernandez v. Lynch, No. EDCV 16-00620, 2016 WL 7116611, at *25 (C.D. Cal. Nov. 10, 2016), *aff'd sub nom.* Hernandez v. Sessions, 872 F.3d 976 (9th Cir. 2017) (evaluating whether immigration officials setting a bond amount under § 1226(a) must look to detainees' financial situation and alternatives to detention to satisfy the Due Process Clause).

295. *See, e.g.*, Turner v. Rogers, 564 U.S. 431, 444–45 (2011) (determining whether due process required counsel when an individual faces imprisonment for civil contempt); Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18, 27 (1981) (considering whether a failure to appoint counsel for indigent parents in proceeding for termination of parental status was constitutional).

296. *See, e.g.*, Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting* Franco-Gonzalez, 90 ST. JOHN'S L. REV. 915, 953–63 (2016) (applying the framework to the women and children detained as part of the 2014–2015 "border surge"); Kevin R. Johnson, *An Immigration* Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2404–14 (2013) (applying the framework to immigration proceedings for lawful permanent residents); Cindy S. Woods, *Barriers to Due Process for Indigent Asylum Seekers in Immigration Detention*, 45 MITCHELL HAMLINE L. REV. 319, 333 (2019) (applying the framework for asylum seekers); Ramanujan Nadadur, Note, *Beyond "Crimigration" and the Civil-Criminal Dichotomy—Applying* Mathews v. Eldridge *in the Immigration Context*, 16 YALE HUM. RTS. & DEV. L.J. 141, 161–67 (2013) (applying framework in "crimigration" context). Jennifer Lee Koh has explained that the "lion's share of reform proposals have focused on improving the law, policies, and resources associated with the immigration courts" because of the inadequate existing procedures. Koh, *supra* note 15, at 183.

297. *See supra* Part II.A.

298. 459 U.S. 21 (1982).

299. *Id.* at 33.

as the three norms that go into a robust notion of procedural justice.[300] Each of these three norms is accounted for in the *Mathews* framework.[301]

First, under Solum's definition, the participation norm encompasses the procedural advantages that do not go to either accuracy or cost, such as "the right to observe, to make arguments, to present evidence, and to be informed of the reasons for a decision."[302] The *Mathews* Court explicitly acknowledged that the right to be heard is a cornerstone of due process.[303] The Court also identified the various ways afforded recipients of disability benefits to make their case, such as the submission of medical information, access to the information relied upon by the state agency, a tentative assessment with the rationale and summary of evidence supporting the determination, and opportunities to add evidence or contest the agency's tentative conclusions.[304]

The accuracy norm seeks to ensure that legal decisions are substantively correct—that is, the true facts have been uncovered and adduced along with a proper application of the law.[305] Similarly, the second *Mathews* factor is the "fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards."[306] In examining this factor, the Court highlighted the "truth-finding" function of the processes.[307] In assessing this factor, the Court identified the various procedures that enabled a disability benefits recipient to submit information to the agency for its consideration and to identify any errors made by the agency.[308] The Court determined that the existing procedures survived the procedural due process challenge because the eligibility determinations generally turned on written submissions and records submitted by medical professionals—evidence that was viewed as highly reliable.[309]

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300. Solum, *supra* note 285, at 244–60.

301. *See* Seth Katsuya Endo, *Discovery Hydraulics*, 52 U.C. DAVIS L. REV. 1317, 1323–24 (2019) (identifying how the *Mathews* framework integrates these norms when the framework is used to resolve discovery disputes). Additionally, in that habeas proceedings are governed—at least, in part—by the Federal Rules of Civil Procedure, it would also be consistent to consider Rule 1, which commands courts to construe, administer, and employ the rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. *See generally Civil Discovery in Habeas Corpus*, 67 COLUM. L. REV. 1296, 1299 (1967) (describing when several Federal Rules of Civil Procedure apply to habeas).

302. Solum, *supra* note 285, at 280.

303. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard . . . .").

304. *Id.* at 345–46; *see also* Endo, *supra* note 293, at 833 (discussing the presence of the participation norm in *Mathews*); Solum, *supra* note 285, at 309–10 (explaining how *Mathews* is consistent with the participation principle).

305. Solum, *supra* note 285, at 211.

306. *Mathews*, 424 U.S. at 343; *see also* Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565, 582 (2013) (explaining that the *Mathews* approach "balances the costs of additional process against the gains in accuracy that the additional process is expected to generate").

307. *Mathews*, 424 U.S. at 344.

308. *See id.* at 343–47.

309. *See id.* at 343–44.

In a world of limited resources, the efficiency norm seeks to strike a balance between the costs of process and its benefits.[310] At its core, the *Mathews* approach engages in a similar exercise—weighing the accuracy and participation benefits against the cost.[311] To this, the *Mathews* decision explicitly noted the financial costs and administrative burdens of additional procedure as comprising parts of the government's interest.[312]

The power of the *Mathews* framework derives from its flexibility, which leaves much to its implementation in particular cases.[313] And courts have identified values like dignity as part of the private interest or government interest factors.[314] The Supreme Court has acknowledged that one of the "central concerns of procedural due process" is "the promotion of participation and dialogue by affected individuals in the decisionmaking process."[315] Even the *Mathews* Court cautioned that the financial costs were not a dispositive factor, which implicitly acknowledges that the balance to be undertaken is not just a sparse pecuniary accounting.[316] And so, the *Mathews* framework accommodates important values, even where the original opinion did not explicitly acknowledge them.[317]

The migration of *Mathews* has had positive effects, particularly in the immigration context. Classically, noncitizens did not have true due process rights in immigration proceedings—the plenary power doctrine tended to resolve most issues.[318] But just six years after *Mathews*, the Supreme Court applied its balancing framework in an immigration removal case, *Landon v. Plasencia*.[319] This new approach led to more flexible, individual examination of cases, which let courts address underlying constitutional

310. Solum, *supra* note 285, at 308.

311. *Mathews*, 424 U.S. at 334 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))).

312. *Id.* at 347 ("This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits.").

313. *See* Adam N. Steinman, *The End of an Era?: Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 53 (2016) (explaining that, following the 2015 amendments to the discovery rules, "the key battleground will be the federal courts themselves, as judges are called upon to interpret and apply the rules in particular cases").

314. *See, e.g.*, Conti v. Dyer, 593 F. Supp. 696, 703 (N.D. Cal. 1984) ("California, through its courts, has stated that its governmental interests include freeing the individual from 'arbitrary adjudicative procedures' and 'recognizing the dignity and worth of the individual by treating him as an equal, fully participating and responsible member of society.'").

315. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

316. *Mathews*, 424 U.S. at 348 ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision.").

317. *See* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1353 (2011) ("[I]n the context of deportation, maybe the problem is not the civil approach but rather that the courts have just done a bad job applying the *Mathews* test in deportation cases.").

318. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); *see also* Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 890–94 (2015) (describing the history of due process rights held by noncitizens).

319. 459 U.S. 21, 34 (1982); *see also* Motomura, *supra* note 52, at 1656.

values and prevent overreach by the political branches.[320] Courts now routinely treat the *Mathews* framework as the standard in immigration removal cases.[321]

2. Applying the Framework

The following analysis applies the *Mathews* framework to whether the term "civil action," as used in the EAJA, should include habeas immigration proceedings. This is a normative inquiry, not a proposed application for an outcome-determinative legal test.[322] Although the *Mathews* framework lends itself to straightforward constitutional argument in favor of the availability of attorneys' fees—or even counsel—in habeas proceedings challenging the conditions of detention or removal, there are several reasons why that is not the focus of this Article. First, as a practical matter, courts frequently employ the constitutional avoidance canon when addressing immigration statutes. So, as a practical matter, courts do not reach the constitutional issue presented in a case but *do* consider the constitutional implications when interpreting the presented statutory issue.[323] As Professor Alina Das has observed, in the immigration context, the canon of constitutional avoidance may even trump *Chevron* deference principles.[324] Second, these arguments have already been made in other removal-related or general civil *Gideon* articles.[325]

320. *See* Motomura, *supra* note 52, at 1656; Matthew J. Lindsay, *Disaggregating "Immigration Law*,*"* 68 FLA. L. REV. 179, 243 (2016); Landau, *supra* note 318, at 894 (noting that the expansion of the *Mathews* framework to immigration can help limit political branch overreach).

321. *See* Kevin R. Johnson, *Immigration "Disaggregation" and the Mainstreaming of Immigration Law*, 68 FLA. L. REV. F. 38, 43 (2016) ("Generally applicable procedural due process doctrine has become the accepted norm in immigration removal cases.").

322. Accordingly, the exact parameters of immigrant detainees' cognizable Due Process Clause rights fall outside of this Article's purview. With that said, the *Plasencia* decision noted that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." Landon v. Plasencia, 459 U.S. 21, 32 (1982). Other commentators have more fully addressed this issue, as well as the relationship between procedural due process and habeas. *See, e.g.*, Cole, *supra* note 52, at 1014–15; Anthony R. Enriquez, *Structural Due Process in Immigration Detention*, 21 CUNY L. REV. 35, 56 (2017); Garrett, *supra* note 24, at 97-100.

323. *See, e.g.*, King & Hall, *supra* note 68, at 21–22 (discussing the application of the constitutional avoidance doctrine in *Zadvydas* and *Jennings*). Additionally, even the immigration agencies make policy choices that are shaped by procedural due process norms. *See* Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 518 (2018) (providing examples of BIA policies, such as one that excludes unlawfully acquired evidence).

324. *See* Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 191–92 (2015).

325. *See, e.g.*, Chacón, *supra* note 126, at 1629–30; Genieva A. Hylton, *Justice for All: The Right to Counsel for Unaccompanied Alien Children*, 31 GEO. IMMIGR. L.J. 157, 169 (2016); King & Hall, *supra* note 68, at 62.

a. Private Interest of Detainees Pending Removal

The *Mathews* framework starts with "the private interest that will be affected by the official action."[326] A narrow construction of the private interest at stake with whether the EAJA includes immigration habeas might be understood as simply the availability of compensated counsel. And it is beyond peradventure that individuals whose rights are adjudicated through judicial processes must be given a chance to be heard.[327] The value of this right is further addressed below as part of the second *Mathews* factor. As to the first *Mathews* factor, as applied in these sorts of immigration removal cases, the availability of counsel is really meant to effectuate two underlying categories of private interests.[328] First, as illustrated by Mr. Obando-Segura's story in the introduction, individuals subject to removal are frequently detained pending their removal. Second, the removal itself presents a set of significant private interests.

Most directly, an individual's detention necessarily implicates the liberty interest. In other applications of the *Mathews* framework, the Supreme Court has identified being free from physical detention as the "most elemental of liberty interests."[329] The concern about freedom from confinement is echoed in numerous other cases.[330] Although the Supreme Court has not uniformly held that there is a right to legal assistance when an individual faces civil detention, the centrality of physical liberty has never been questioned.[331]

The private interest in liberty is particularly pressing in the immigration removal context because the duration can be long and uncertain.[332] About a decade ago, one researcher found that the average immigration case had been pending for about a year and a half.[333] Given ICE's increased enforcement, the court backlogs have likely grown.[334]

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326. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

327. *See* Boddie v. Connecticut, 401 U.S. 371, 377 (1971) ("[A]bsent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."); *see also* Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) (finding a right to counsel in criminal trials).

328. *See generally* Turner v. Rogers, 564 U.S. 431, 445 (2011).

329. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004).

330. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); Parham v. J.R., 442 U.S. 584, 600 (1979).

331. *See, e.g.*, *Turner*, 564 U.S. at 445.

332. *See* Jenna Neumann, Note, *Proposing a One-Year Time Bar for 8 U.S.C. § 1226(c)*, 115 MICH. L. REV. 707, 727 (2017); *see also* Zadvydas v. Davis, 533 U.S. 678, 691–92 (2001) (discussing the problem of indefinite detention).

333. *See* Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 80–81 (2012). To prevent any confusion, please note that this figure includes those who are facing removal but are not being physically detained for the full time.

334. *See id.*; *see also* Enriquez, *supra* note 322, at 53 (citing Brief of Amici Curiae Ams. for Immigrant Just., et al. in Support of Respondents at 31, Jennings v. Rodriguez (No. 15-1204) (9th Cir. Feb. 10, 2017), 2017 WL 564164) ("Depending on the circuit, review of an immigration detention habeas petition takes, on average, from five-and-a-half to nineteen months.").

In addition to the intrinsic loss of liberty, imprisoned noncitizens awaiting removal may encounter conditions that resemble penal confinement. As one former detainee explained, "[t]hey call immigration detention civil confinement, but prison is prison no matter what label you use, and prison breaks people's souls, hearts, and even minds."[335] In some facilities, detainees are confined to their unit for as much as twenty-three hours per day with limited visitation from friends and family.[336] Additionally, the facilities may not provide adequate health care or other services.[337] A recent report from the Office of the Inspector General detailed abuses that have occurred at detention facilities, including sexual assault and the use of tear gas.[338] And the COVID-19 pandemic brought light to the unsafe detention conditions endured by noncitizens awaiting removal.[339]

Another distinct aspect of immigration detention is that the removal proceedings may be held in any immigration court and detained noncitizens may be transferred to geographically isolated facilities.[340] Geography exacerbates the difficulties that detainees already face in finding counsel.[341] Detention centers often are not close to cities where immigration lawyers are typically found.[342] And, when detained in geographically isolated locations, detainees' important social bonds with family and friends are disrupted.[343] Detainees may also lose their employment,[344] and their families may suffer, too.[345] Facing these various pressures, some noncitizens simply give up their cases, regardless of the merits or the consequences.[346]

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335. *See* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1387 (2014).

336. *See id.* at 1384.

337. *See, e.g.*, OFF. OF THE INSPECTOR GEN., ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf [https://perma.cc/4Z4L-NN4Z].

338. *See* Lane, *supra* note 126; Maria Sacchetti, *DHS Inspector General Calls on ICE to Better Oversee Jails*, WASH. POST, Feb. 3, 2019, at A3.

339. *See, e.g.*, *supra* note 63 (discussing *Valenzuela Arias* and other cases); Ryo, *supra* note 128, at 751.

340. *See* Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541, 556–57 (2009).

341. *See id.* at 556–67.

342. *See* Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2150 (2017). The data makes clear how significant these factors, working in tandem, can be. The Eagly-Shafer study found that "almost 90% of nondetained immigrants in New York City secured counsel, compared to only .002% of detained respondents in Tucson, Arizona." Eagly & Shafer, *supra* note 130, at 8.

343. Jayashri Srikantiah, *Reconsidering Money Bail in Immigration Detention*, 52 U.C. DAVIS L. REV. 521, 538 (2018).

344. *See* Andrés Dae Keun Kwon, *Defending Criminal(ized) "Aliens" After* Padilla*: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034, 1039 (2016).

345. *See, e.g.*, Mirian G. Martinez-Aranda, *Collective Liminality: The Spillover Effects of Indeterminate Detention on Immigrant Families*, 54 LAW & SOC'Y REV. 755, 755 (2020) (describing the "shared condition of heightened threat and uncertainty experienced by immigrant detainees and their families" while one is detained while awaiting removal).

346. *See* Noferi, *supra* note 333, at 80; *see also* Srikantiah, *supra* note 343, at 538.

The Supreme Court has recognized that removal is itself a "weighty" private interest.[347] An immigrant facing removal may lose the right to stay, live, and work in the United States.[348] And removal might entail permanent separation from family members.[349] The Supreme Court further acknowledged that removal may "result also in loss of both property and life; or of all that makes life worth living."[350] In sum, given the importance of counsel and the significance of removal proceedings, the private interest at stake is extremely high.

b. Value of Process

The second *Mathews* factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[351] In the context of assessing the availability of attorneys' fees in immigration habeas, this factor requires an examination of the benefits of providing attorneys' fees to prevailing parties in immigration habeas proceedings in light of the understanding that fee shifting encourages greater representation, particularly for communities that lack financial resources.[352]

As a group, detained immigrants facing removal are in dire need of additional legal assistance. A 2015 study conducted by Professor Ingrid Eagly and Steven Shafer examined removal proceedings, which make up 97 percent of immigration court proceedings.[353] The Eagly-Shafer study found that only 37 percent of immigrants secured representation in 1.2 million deportation cases between 2007 and 2012.[354]

Conversely, "[i]t is axiomatic that the government is represented by counsel at all times in the removal hearings."[355] As of 2014, nearly one thousand attorneys within ICE represented the government in immigration proceedings—a sharp increase from the amount employed in 2004.[356]

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347. Landon v. Plasencia, 459 U.S. 21, 34 (1982).

348. *Id.* (citing Bridges v. Wixon, 326 U.S. 135, 154 (1945)); *see also* Aris v. Mukasey, 517 F.3d 595, 600 (2d Cir. 2008).

349. *Landon*, 459 U.S. at 34.

350. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

351. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

352. Many of the statistics described below address the administrative proceedings. These figures should still be reasonably probative because, as described in the *Padilla* litigation, plaintiffs in immigration habeas proceedings "are frequently pro se." *See* Padilla v. Immigr. & Customs Enf't, 953 F.3d 1134, 1146 (9th Cir. 2020). And recall that an amicus brief suggested that 76 percent of immigration habeas petitions filed in Massachusetts were pro se. Brief of Amicus Curiae, *supra* note 270. Moreover, the search issues that contribute to underrepresentation in the administrative proceedings presumably remain present at the habeas level.

353. Eagly & Shafer, *supra* note 130, at 12.

354. *Id.* at 7. Eagly and Shafer explain that this number is lower than the government estimates, which look at the proportion of court proceedings with representation, not the proportion of cases. *Id.*

355. Fatemi, *supra* note 296, at 932.

356. *Id.*

Several of the Supreme Court's decisions in right-to-counsel cases turned on whether finding a right would either solve or create asymmetries between the parties.[357] These cases indicate that the presence of counsel on only one side may distort the outcome of a proceeding.[358] While immigration judges may try to offset this dynamic by taking a more inquisitorial approach with unrepresented litigants, the DOJ's Executive Office for Immigration Review recently reminded judges that "[t]he immigration court process is adversarial."[359]

A national study observed that immigration judges have incentives that promote the completion of cases over providing due process, which raises the risk of error.[360] And judicial review of immigration decisions is limited.[361] Furthermore, immigration cases have more limited remote access to the dockets than other cases, which might add to the necessity of having a lawyer well versed in the area.[362]

An important factor affecting the right to the appointment of counsel is "whether the probationer appears to be capable of speaking effectively for himself."[363] The assistance of legal counsel is especially necessary when an area of law is highly technical and complex or where a party faces other barriers that prevent meaningful participation in the process.[364] Both of these conditions are often present in removal proceedings.

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357. *Compare* Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) ("The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel . . . ."), *with* Turner v. Rogers, 564 U.S. 431, 446–47 (2011) ("[S]ometimes, as here, the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un*represented by counsel. A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation . . . ."); *see also* Fatemi, *supra* note 296, at 932.

358. Corin James, *Fairness and Efficiency in Removal Proceedings: The Hidden Costs of Not Appointing Counsel to Noncitizens*, 71 ADMIN. L. REV. 391, 404–05 (2019).

359. Jain, *supra* note 17, at 317–18.

360. *See* Jacqueline Stevens et al., *The Case Against Absolute Judicial Immunity for Immigration Judges*, 37 LAW & INEQ. 309, 381–83 (2019) (describing the limits of data available on misconduct by immigration judges and how structural incentives promote case completion at the risk of procedural regularity); *see also* Caroline Holliday, *U.S. Citizens Detained and Deported?: A Test of the Great Writ's Reach in Protecting Due Process Rights in Removal Proceedings*, 60 B.C. L. REV. E-SUPPLEMENT II.-217, II.-218 (2019) (describing the mistaken removal of foreign-born American citizens).

361. *See* Padilla v. Kentucky, 559 U.S. 356, 360 (2010); *see also* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616 (2000) (describing jurisdiction-stripping by Congress and doctrinal limitations).

362. *See generally* Morawetz, *supra* note 266, at 1274 (noting that "Federal Rules promulgated in 2009 provide for these cases to operate with an unusual veil of secrecy prior to the publishing of court opinions"); *see also* Kagan et al., *supra* note 267.

363. Gagnon v. Scarpelli, 411 U.S. 778, 791 (1973).

364. *See* Ardestani v. Immigr. & Naturalization Serv., 502 U.S. 129, 138 (1991); *see also Scarpelli*, 411 U.S. at 788; Jain, *supra* note 17, at 317 ("Adversarial legalism's procedural intricacy and contest-oriented nature make it a poor fit for immigration adjudication, in which a noncitizen is likely to face a sharp power disparity due to harsh and confusing law, limited access to counsel, and potential language barriers."); James, *supra* note 358, at 401; Deborah

Given the labyrinthine nature of immigrations laws, legal counsel is especially important in removal proceedings.[365] The difficulty of the area may stem from highly technical, unique, and convoluted statutory provisions that interlock in hard-to-follow ways.[366] For example, with cancellation of removal, several key terms are defined elsewhere in the governing statute.[367] Additionally, in response to shifting political pressures, the legislative and executive branches frequently change the substance and application of immigration laws.[368] Even the judiciary's interpretation of statutes can be difficult for experts to predict.[369] And modern habeas practice is anything but simple.[370] Illustrating these dynamics, Professor Emily Ryo's 2018 study found that noncitizen detainees with counsel submitted documents and made affirmative arguments at significantly higher rates than their unrepresented counterparts in bond hearings.[371]

Noncitizens facing removal may also face communication barriers when navigating the legal system without representation.[372] The impossibility of having a fair hearing when an individual is not fluent in English is well established.[373] Additionally, if detainees fear persecution if they are deported, the fear itself can impede effective self-representation.[374]

Even more compellingly, several recent studies have established the effectiveness of counsel in removal proceedings. While determining a

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L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1238 (2014).

365. *See* Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008); Zhang v. United States, 506 F.3d 162, 169 (2d Cir. 2007) (describing immigration law as a "notoriously complex and constantly shifting area of law"); Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1637 (2009).

366. *See, e.g.*, Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 554 (2011) (describing marijuana possession statutes that apply to noncitizens).

367. *Id.* at 557.

368. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 27–28 (2017), https://www.gao.gov/assets/690/685022.pdf [https://perma.cc/R7XG-J7T6].

369. *See* Nancy Morawetz, *Predicting the Meaning of INA § 242(b)(9)*, 14 GEO. IMMIGR. L.J. 453, 453 (2000) (discussing how "*American-Arab Anti-Discrimination Committee* ("AADC") *v. Reno* serves as a recent reminder that talented lawyers and judges can fail to anticipate an argument about a statute that the Court will ultimately adopt").

370. *See generally* Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 489 (1990–91).

371. Emily Ryo, *Representing Immigrants: The Role of Lawyers in Immigration Bond Hearings*, 52 LAW & SOC'Y REV. 503, 519 (2018).

372. *See* Jane Kaplan, *Breaking Down the Barriers: Bringing Legal Technicians into Immigration Law*, 32 GEO. J. LEGAL ETHICS 703, 704 (2019); *see also* Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 296 (2012).

373. *See, e.g.*, Orozco-Rangel v. Immigr. & Naturalization Serv., 528 F.2d 224 (9th Cir. 1976) (per curiam) (noting the presence of an interpreter at a deportation hearing in holding that the petitioners were accorded due process).

374. *See* Woods, *supra* note 296, at 333.

baseline for the "right" outcome can be difficult, in an adversarial setting, a reasonable estimate is the outcome reached when both sides are represented by competent counsel.[375] The Eagly-Shafer study observed that detained immigrants with counsel received either a case termination or other relief in over 20 percent of removal cases, while their unrepresented counterparts only had a 2 percent success rate.[376] The Eagly-Shafer findings are consistent with a 2011 report initiated by Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit.[377] The report found success rates dropped from 18 percent to 3 percent in removal cases involving represented and unrepresented parties, respectively.[378] Other studies have likewise shown that represented parties are more successful at every stage of immigration proceedings than their unrepresented counterparts.[379] A study of asylum seekers from 2007 showed that "whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case."[380] And there is no reason to doubt that this holds true in other removal cases.

The existing financial incentives already make it difficult for noncitizens facing removal to find competent private attorneys. Removal cases are much more "labor intensive, unpredictable, and time-consuming" than handling transactional immigration matters like employment visas and naturalization applications.[381] Also, noncitizens facing removal tend to be less financially secure than other immigrants who need counsel,[382] which raises the risk that they will default on their financial obligations and reduces their attractiveness as a client base.[383]

In the face of the financial disincentives for private representation, noncitizens facing removal have few other options.[384] There is no

375. *See* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2207 (2012).

376. Eagly & Shafer, *supra* note 130, at 50.

377. *See* Peter L. Markowitz et al., *Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings*, 33 CARDOZO L. REV. 357 (2011).

378. *Id.* at 364.

379. *See, e.g.*, *Asylum Representation Rates Have Fallen amid Rising Denial Rates*, TRAC IMMIGRATION (Nov. 28, 2017), http://trac.syr.edu/immigration/reports/491 [https://perma.cc/J3NR-SQ3B] (finding that asylum seekers are five times more likely to gain asylum when represented); CHARLES H. KUCK, LEGAL ASSISTANCE FOR ASYLUM SEEKERS IN EXPEDITED REMOVAL: A SURVEY OF ALTERNATIVE PRACTICES 232, 239 (2004), https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/legalAssist.pdf [https://perma.cc/N73B-63S8]; DONALD KERWIN, MIGRATION POL'Y INST., REVISITING THE NEED FOR APPOINTED COUNSEL 5–6 (2005), https://www.migrationpolicy.org/sites/default/files/publications/Insight_Kerwin.pdf [https://perma.cc/TZW3-2ZBY]; *see also* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 62–64 (2010) (collecting studies).

380. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).

381. Markowitz, *supra* note 340, at 549.

382. *Id.* at 548.

383. *Id.* at 549.

384. *Id.* at 549–50.

categorical constitutional right to appointed counsel under the Sixth Amendment because, as the Supreme Court has held, "[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry."[385] Still, the Criminal Justice Act[386] (CJA) has been used to fund public defenders' work on immigration issues that arise in connection with a criminal case or that arise when detainees are held beyond a reasonable period, which has led to groundbreaking case law like *Zadvydas*.[387] But, despite its availability, court-appointed counsel does not appear to be solving the system-level issue of representation.[388] This leaves only already overburdened and underfunded *pro bono* counsel. Illustrating this predicament, the leading nonprofit provider in New York can only serve less than 10 percent of the at-need population.[389] And other nonprofits generally cannot step in, because any entity that receives funds from the Legal Services Corporation is prohibited from engaging in various sorts of immigration representation.[390]

Ensuring that prevailing parties in removal proceedings remain entitled to attorneys' fees under the EAJA is not a panacea. As described above, noncitizens facing removal already face a significant unmet need for representation despite the incentives for attorneys to take these cases.[391] Additionally, quite a few courts and researchers have questioned the overall quality of lawyers who handle these cases. For example, a set of scholars noted that "[l]ow-quality representation is too often the case at the Immigration Court level" because the lawyers may lack the necessary substantive expertise, have too many cases, simply not give sufficient attention and care to each matter, or not even be actual lawyers.[392] This sentiment is widely echoed by courts across the nation.[393] In an anonymous

385. Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); *see also* Padilla v. Kentucky, 559 U.S. 356, 366 (2015) (rejecting Kentucky's argument that deportation proceedings are *categorically* excluded from the Sixth Amendment right to counsel).

386. 18 U.S.C. § 3006A.

387. Ingrid v. Eagly, Gideon*'s Migration*, 122 YALE L.J. 2282, 2298 (2013) (discussing efforts under the CJA).

388. Rhode, *supra* note 364, at 1238 ("Although leading federal decisions authorize the appointment of counsel to prevent erroneous judgments, surveys cannot find a single immigration case in three decades where a noncitizen has been granted a lawyer.").

389. Markowitz, *supra* note 340, at 549.

390. *Id.* at 550.

391. *See* Mortimer & Malmsheimer, *supra* note 131, at 357; *see also* Krent, *supra* note 97, at 495.

392. Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 58–59 (2008).

393. *See, e.g.*, Aris v. Mukasey, 517 F.3d 595, 596 (2d Cir. 2008) ("With disturbing frequency, this Court encounters evidence of ineffective representation by attorneys retained by immigrants seeking legal status in this country."); Bouras v. Holder, 779 F.3d 665, 681 (7th Cir. 2015) ("There are some first-rate immigration lawyers, especially at law schools that have clinical programs in immigration law, but on the whole the bar that defends immigrants in deportation proceedings . . . is weak—inevitably, because most such immigrants are impecunious and there is no government funding for their lawyers."); Morales Apolinar v. Mukasey, 514 F.3d 893, 897 (9th Cir. 2008) ("All too often, vulnerable immigrants are preyed

study of New York immigration judges, 37 percent of counsel in cases involving criminal removal procedures were observed to be inadequate or grossly inadequate.[394] While by no means a given, in light of these findings, it is possible that the availability of attorneys' fees might most greatly incentivize the types of lawyers with the lowest rates of success (i.e., solo practitioners and lawyers practicing in small firms).[395] On the other hand, it might also ensure that nonprofits, which were one of the most successful types of counsel, can continue to provide their excellent services and, perhaps, even build capacity.[396]

c. The Government's Interest

The third and final factor in the *Mathews* framework is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[397]

In *Mathews*, the government's interest included the tailoring of procedures "to insure that [the individuals subject to the process] are given a meaningful opportunity to present their case."[398] Here, the assistance of counsel is a virtual necessity in the context of immigration habeas proceedings. The public's perception of the legal system as fair and legitimate follows this opportunity to be heard.[399]

Additionally, the government has an interest in justice, which requires procedures that ensure the reasonable accuracy of its judgments.[400] Without counsel, noncitizens facing removal are unlikely to effectively advance their factual and legal arguments, undercutting the reliability of the decision-making process.[401] And the twin goals of the EAJA itself are reducing the deterrent effect of seeking review of governmental action and testing governmental regulations to "insure[] the legitimacy and fairness of the law" by reducing the cost barrier and the potentially pernicious effects of wealth imbalances between the parties.[402] Financially incentivized counsel

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upon by unlicensed *notarios* and unscrupulous appearance attorneys who extract heavy fees in exchange for false promises and shoddy, ineffective representation.").

394. *See* Markowitz et al., *supra* note 377, at 25.

395. Eagly & Shafer, *supra* note 130, at 52.

396. *Id.* at 53.

397. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

398. *Id.* at 349.

399. *See* Noferi, *supra* note 333, at 119.

400. *See, e.g.*, Denko v. Immigr. & Naturalization Serv., 351 F.3d 717, 731 n.10 (6th Cir. 2003) ("The INS has a strong interest in its procedures for *accurate*, efficient, and economical adjudication of immigration matters." (emphasis added)).

401. *See* William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1873–74 (2002).

402. *See* Comm'r, Immigr. & Naturalization Serv. v. Jean, 496 U.S 154, 165 n.14 (1990); *see also* Sullivan v. Hudson, 490 U.S. 877, 890 (1980). *See generally* Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 719 (2010).

might help noncitizens identify and combat discriminatory applications of immigration laws.[403]

Furthermore, continuing to interpret noncriminal immigration habeas proceedings as eligible for attorneys' fees under the EAJA carries low financial and administrative burdens. The statutory prerequisites that attorneys' fees only be awarded to prevailing parties in cases in which the government's position was not substantially justified should prevent unprincipled lawyers from promoting meritless litigation.[404] And the hourly rate provided for by the EAJA is capped at a level that is frequently below market.[405] Although recent data is unavailable,[406] the Department of Homeland Security only spent $2.3 million on all EAJA payments in fiscal year 2010.[407] Moreover, a lack of financial resources should not be a barrier to the courts.[408]

Promoting noncitizens' access to counsel through the availability of attorneys' fees might actually save the federal government money.[409] If the availability of attorneys' fees acts as a deterrent to wrongful detention and helps courts more quickly determine the merits of cases, it would lead to a relatively large net financial savings. For example, in 2016, the federal government spent over $5 million per day to detain immigrants.[410] This figure does not include all of the secondary financial costs that accompany the disruption to detainees' communities.[411] Even when legal representation does not reduce the number of days a noncitizen is detained pending removal, it can lead to cost savings by reducing the number of suits filed and other streamlining of the process.[412] The availability of an award of attorneys' fees

403. *See generally* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); *see also* Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RSRV. L. REV. 993, 1017–18 (2016).

404. *See* JOANNA R. LAMPE, CONG. RSCH. SERV., IF11246, ATTORNEY'S FEES AND THE EQUAL ACCESS TO JUSTICE ACT: LEGAL FRAMEWORK 1–2 (2019), https://fas.org/sgp/crs/misc/IF11246.pdf [https://perma.cc/P8XK-4TYF].

405. *Id.* at 2.

406. The Federal Reports Elimination and Sunset Act of 1995 eliminated the reporting requirements for EAJA awards. *See* Paul F. Figley, *The Judgment Fund: America's Deepest Pocket & Its Susceptibility to Executive Branch Misuse*, 18 U. PA. J. CONST. L. 145, 178 (2015).

407. PAUL F. VERKUIL, REPORT OF THE CHAIRMAN ON AGENCY AND COURT AWARDS IN FY 2010 UNDER THE EQUAL ACCESS TO JUSTICE ACT 8 (2013), https://www.acus.gov/sites/default/files/documents/FY%202010%20EAJA%20Report.pdf [https://perma.cc/HNF3-RRKM].

408. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 380–81 (1971) (holding that due process of law prohibits a state from denying indigent individuals the ability to seek judicial dissolution of their marriages because of their inability to pay court fees and costs).

409. *See* Eagly & Shafer, *supra* note 130, at 59 (citing a NERA Economic Consulting report, which found that "providing appointed counsel for immigrants in removal cases could actually pay for itself").

410. *See* Marouf, *supra* note 342, at 2149; *see also* Srikantiah, *supra* note 343, at 523.

411. *See* Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 22 CAP. U. L. REV. 1, 27–28 (1993).

412. *See* Eagly & Shafer, *supra* note 130, at 65 n.210 (citing studies from other areas of law that show such improvements).

might act as a general bulwark against the mandatory appointment of counsel in all removal cases, which would come with a higher price tag.[413]

Removal also is unlikely to serve its stated policy goals of crime prevention and national security. Removal does not stop any anti-American, criminal activity; it merely moves the location.[414] Its anti-crime goal is likewise difficult to achieve given the lack of migrant criminality, the overbroad reach of the policies, and lack of evidence of deterrence.[415] The history of racial animus driving crime-related deportation also cautions against overly privileging these goals.[416]

The strongest government interest that favors the position that the EAJA should not be read to include immigration habeas is the concern that the immigration courts will be overwhelmed given their existing backlog of cases.[417] Even in 2011, the Third Circuit noted that that immigration judges struggle with "an exponential growth in their caseloads" and that they often are "overburdened and under-resourced."[418] In August 2019, one immigration judge noted that there is a "backlog of more than 900,000 immigration cases nationwide."[419] But these capacity issues are not likely turning on the availability of fees.[420]

In sum, the *Mathews* balance tips in favor making the award of attorneys' fees available under the EAJA. The private interests at stake could hardly be greater. Freedom from confinement "lies at the heart of the liberty that [the Due Process] Clause protects."[421] And, in describing removal, the Supreme

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413. *See* Nadadur, *supra* note 296, at 143 (noting that "providing counsel to indigent noncitizens could be as much as $110 million per year"). While this $110 million figure is quite high, notice it is still more than $50 million less than the cost of housing the detainees. And the American Bar Association has called for government-provided counsel in removal proceedings. *See* Ramji-Nogales et al., *supra* note 380, at 384.

414. Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1873–74 (2007).

415. *Id.* at 1879–85; *see also* Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 237–38 (2019).

416. *See* Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171 *passim* (2018).

417. *See* Sara DeStefano, Note, *Unshackling the Due Process Rights of Asylum-Seekers*, 105 VA. L. REV. 1667, 1707 (2019) ("Considering the immense backlogs in the immigration courts today, increasing the administrative burden on immigration judges is a cause for concern.").

418. Abulashvili v. U.S. Att'y Gen., 663 F.3d 197, 208 n.10 (3d Cir. 2011); *see also* Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 3 (2008) (noting that the Second Circuit's caseload had nearly doubled due to an "avalanche of immigration cases").

419. *Amid "Nightmarish" Case Backlog, Experts Call for Independent Immigration Courts*, AM. BAR ASS'N (Aug. 9, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/amid-_nightmarish-case-backlog--experts-call-for-independent-imm/ [https://perma.cc/W59L-KJ7B].

420. *See* Eagly & Shafer, *supra* note 130, at 53 (showing the number of successful cases by lawyer type); PAUL GRUSSENDOR, MY TRIALS: INSIDE AMERICA'S DEPORTATION FACTORIES 12 (2d ed. 2011) ("The number of judges and court staff would still have to be doubled to have any meaningful impact on the overall quality of justice that is meted-out in these deportation factories.").

421. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

Court explained, "A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death."[422] Additionally, the value of counsel in ensuring that the detained noncitizen's voice is heard has been amply described in a copious number of studies and follows from the complexity of the legal issues and the barriers to effective pro se efforts.[423] The government's interest in fair, accurate, and efficient proceedings further militate in favor of the existing, more expansive view.

B. Assessing Accuracy, Efficiency, and Participation

Just as the *Mathews* factors favor ensuring that attorneys' fees awards remain available in immigration habeas proceedings, so do the procedural due process norms of accuracy, efficiency, and participation.

First, the presence of legal counsel should add to the accuracy of the proceedings. They ensure that the judges hear expert arguments from both sides, which is particularly important in the immigration context, which presents complex and technical issues.[424] Lawyers should also be able to effectively marshal the necessary evidence, which might otherwise be difficult for individuals whose command of English is not a given.[425] In an adversarial system, these benefits increase the likelihood that the outcome of adjudicative proceedings will be substantively correct and that the law is being appropriately applied.[426]

Second, legal counsel can add to the smooth progression of immigration proceedings and, often, reduce the overall social costs.[427] Thus, even under a thin view of efficiency that only considers the financial costs, the availability of awards promotes this norm.[428] When accounting for the nonpecuniary social benefits, such as avoiding the disruption to blended-citizenship families, the efficiency balances tip even more in favor of the availability of awards.

Third, assistance of counsel is a virtual necessity if detained noncitizens facing removal are to have a meaningful voice in the process.[429] And this enhances the participation norm, adding to the legitimacy of the proceedings.[430]

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422. Bridges v. Wixon, 326 U.S. 135, 164 (1945) (Murphy, J., concurring).
423. *See* Noferi, *supra* note 333, at 72.
424. *See supra* Part III.A.2.a–c.
425. *See supra* Part III.A.2.a–c.
426. *See* Martin H. Redish, *Pleadings, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 852 (2012); *see also* Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1162 (2006).
427. *See supra* Part III.A.2.b–c.
428. *See* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1797–800 (2015) (discussing and criticizing this phenomenon); *see also* Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2073–74 (2002).
429. *See supra* Part III.A.2.a–b.
430. *See* Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 480–83 (2010) (discussing study results).

CONCLUSION

Given the traditional availability of habeas to civil detainees and the array of statutory construction canons supporting the longstanding, unchallenged understanding that the EAJA's ambit encompassed habeas as part of the term "civil action," ICE's attempts at jurisprudential change are best understood as an example of the federal courts' retrenchment movement that erects barriers to the private enforcement of civil rights. The case study demonstrates how nonacquiescence can be used by agencies to selectively tee up issues for retrenchment and magnify the structural power differences between it and noncitizen detainees. So understood, applying a procedural justice lens demonstrates that the narrow reading is inconsistent with the *Mathews* factors, which balance the detainees' strong private interests in liberty and remaining in the United States, the benefits of legal assistance, and the government's interest in enforcing the law. And, normatively, promoting the availability of counsel in immigration habeas through attorneys' fees awards serves all three of the norms that define procedural justice.

Looking ahead, new information might improve the assessment of the legal, policy, and normative implications of ensuring the availability of attorneys' fees in habeas proceedings under the EAJA. Congress has passed a bill that will bring back the EAJA reporting requirements and should provide more accurate, concrete data on the actual costs.[431] Additionally, Congress has charged the DOJ's Executive Office for Immigration Review to explore the costs and benefits of providing legal counsel in certain contexts, which might provide more broadly applicable lessons.[432] Further academic studies might demonstrate whether there is a causal relationship between the provision of counsel and outcomes by controlling various aspects of selection bias.[433]

Finally, the normative analysis supports the broader "Civil *Gideon*" movement for appointed counsel in all adversarial proceedings involving basic human needs and interests.[434] This has special force in the immigration habeas context—recognizing a right to counsel in these sorts of important civil cases is consistent with international norms and human rights

431. 28 U.S.C. § 2412(d)(5) now provides that the chairman of the Administrative Conference of the United States must submit to Congress and make publicly available online a report on the amount of fees and other expenses awarded during the preceding fiscal year.

432. *See* H.R. REP. NO. 113-171, at 38 (2013).

433. *See* Eagly & Shafer, *supra* note 130, at 48 ("In the future, a controlled study in which immigrants are randomly assigned to counsel or self-representation would allow researchers to address some of these issues of selection bias."). The policy effects of the institutional design choices of the immigration agencies also presents significant information gaps. *See* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 145 (2013).

434. Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 92–93 (2011) (describing "Civil *Gideon*" movement); *see also* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 978–80 (2012).

conventions.[435] This movement already is occurring at the state and local levels in the United States and beyond its borders—it is past time that federal policymakers consider it, too.[436]

435. *See* Zachary H. Zarnow, Note, *Obligation Ignored: Why International Law Requires the United States to Provide Adequate Civil Legal Aid, What the United States Is Doing Instead, and How Legal Empowerment Can Help*, 20 AM. U. J. GENDER SOC. POL'Y & L. 273, 277–78 (2011).

436. Ryo, *supra* note 371, at 505 (noting the United States "lags behind 49 other countries in recognizing a right to legal assistance in civil matters"); Rachel Baye, *Maryland Lawmakers Consider Guaranteeing Lawyers for Immigrants Facing Deportation*, WYPR (Jan. 26, 2021, 9:49 PM), https://www.wypr.org/post/maryland-lawmakers-consider-guaranteeing-lawyers-immigrants-facing-deportation [https://perma.cc/54U8-L9RN]; *see also* Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 877 (2009) (providing international examples in which a right to counsel in civil cases has been found).