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ARBITRARY ARBITERS: EVALUATING THE RIGHT TO BE INFORMED OF ELIGIBILITY FOR DISCRETIONARY RELIEF IN REMOVAL PROCEEDINGS

Michael Jordan*

The touchstone of due process is protection of the individual against arbitrary action of government.¹

INTRODUCTION

In 2007, Emilio Estrada, a lawful permanent resident, “pleaded guilty to possession of a firearm by an unlawful user of a controlled substance.”² He was subsequently placed in removal proceedings and deported.³ While it was possible that Mr. Estrada had an avenue of relief from deportation under section 212(h) of the Immigration and Nationality Act,⁴ he was never informed of this possibility—either by the immigration judge (IJ) or his attorneys⁵—despite the fact that the IJ is obligated under federal regulations to “inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter,”⁶ including “[r]elief from removal.”⁷

In a subsequent appeal, Mr. Estrada argued that the failure of his attorneys to inform him of his possible relief under section 212(h) violated his Fifth Amendment due-process rights.⁸ To succeed, Mr. Estrada had to show that his deportation proceeding was “fundamentally unfair,” or, in other words, he had to “show both a due process violation emanating from defects in the underlying deportation proceeding and resulting prejudice.”⁹ Further, to find a due-process violation, Mr. Estrada would

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¹ *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)).

² *United States v. Estrada*, 876 F.3d 885, 886 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2623 (2018).

³ *Id.*

⁴ 8 U.S.C. § 1182(h) (2012).

⁵ *Estrada*, 876 F.3d at 886.

⁶ 8 C.F.R. § 1240.11(a)(2) (2013).

⁷ *See id.* § 1240.8(d) (emphasis omitted).

⁸ *Estrada*, 876 F.3d at 886.

⁹ *Id.* at 887 (citation omitted).

first have to “establish that [he] has been deprived of a life, liberty, or property interest sufficient to trigger the protection of the Due Process Clause in the first place.”¹⁰ However, in finding no due-process violation, the Sixth Circuit in *United States v. Estrada* reaffirmed that “an alien has no constitutional right to be informed of eligibility for, or to be considered for, discretionary relief,” and claimed to join “the majority of our sister circuits,” citing decisions from the Third, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits.¹¹

Circuit courts are indeed split over the issue. Collapsing the circuit decisions above as the “majority” addressing the issue is, however, misleading.¹² Only three of the circuits—the Fifth, Seventh, and Tenth—in the cases relied upon above actually addressed the narrower issue of whether there exists a constitutional due-process obligation to *inform* a person in removal proceedings of *possible* eligibility of relief.¹³ The Fourth, Eighth, and Eleventh Circuits instead focused solely on the question of whether respondents were *entitled* to discretionary relief when respondents in removal proceedings allegedly met eligibility requirements.¹⁴ The Third Circuit explicitly avoided deciding the issue.¹⁵ On the other hand, the Second and Ninth Circuits,

¹⁰ *Id.* (alteration in original) (quoting *Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000)).

¹¹ *Id.* at 888 (citations omitted).

¹² *Id.*

¹³ See *United States v. Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006) (“[A] majority of circuits have rejected the proposition that there is a constitutional right *to be informed of eligibility for*—or to be considered for—discretionary relief. . . . We now join the majority of circuits.” (emphasis added)); *United States v. Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (“We agree with the majority of other circuits which have addressed the issue and concluded that there is no constitutional right *to be informed of* the existence of discretionary relief for which a potential deportee might be eligible.” (emphasis added)); *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002) (“Because eligibility for § 212(c) relief is not a liberty or property interest warranting due process protection, we hold that the Immigration Judge’s error in *failing to explain* Lopez-Ortiz’s eligibility does not rise to the level of fundamental unfairness. . . . Lopez-Ortiz’s removal hearing did not violate his right to due process” (emphasis added)).

¹⁴ See *Smith v. Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002) (“Smith had no protected liberty or property interest in discretionary 212(c) relief, a circumstance fatal to his due process claim.”); *Oguejiofor v. Attorney Gen. of the U.S.*, 277 F.3d 1305, 1309 (11th Cir. 2002) (“[A]n alien has no constitutionally-protected right to discretionary relief or to be eligible for discretionary relief. Therefore, Petitioner can assert no due process challenge to the BIA’s conclusion that Petitioner was ineligible for discretionary relief. . . .”); *Escudero-Corona v. Bd. of Immigration Appeals*, 244 F.3d 608, 615 (8th Cir. 2001) (“[E]ligibility for suspension is not a right protected by the Constitution. Suspension of deportation is rather an act of grace that rests in the unfettered discretion of the Attorney General.’ We find this reasoning to be persuasive and conclude there has been no due process . . . violation.” (citation omitted)).

¹⁵ See *Bonhometre v. Gonzalez*, 414 F.3d 442, 444 n.1 (3d Cir. 2005) (“[W]e make no judgment as to whether or not the failure of an Immigration Judge or the Board of Immigration Appeals to advise an alien of the multitude of forms of relief that may be available to him . . . is a denial of his Fifth Amendment procedural due process rights.”).

which decide the majority of immigration cases,¹⁶ have held that there is such a right.¹⁷ In June of 2018, the Supreme Court denied a petition for writ of certiorari to resolve the issue.¹⁸ The Supreme Court's recent denial of a petition for certiorari in the *Estrada* case and the ongoing circuit split effectively mean that persons in removal proceedings in different states will continue to arbitrarily receive different procedural treatment for similar issues.

This Note argues that an individual in removal proceedings does have a constitutional due process right to be informed of possible discretionary relief and that not doing so subverts notions of fairness, especially given that the respondent relies upon the IJ to play a significant administrative role in developing the record in the case.¹⁹ Indeed, if the immigration court fails to inform respondents with apparent eligibility for relief²⁰ and they fail to assert such a claim, they will likely be foreclosed from doing so on appeal due to exhaustion requirements,²¹ thereby hindering any subsequent efforts to rectify the error. Removal proceedings already lack many of the hallmarks of procedural due process, such as the right to a court-appointed attorney for an indigent respondent.²² Without assistance of a court-appointed attorney, or the IJ charged with informing him under the regulation, the notion of adequate due process for a respondent in removal proceedings is little more than fiction. And where the immigration judge may eschew their regulatory duty to inform a respondent in removal proceedings of apparent eligibility for relief without consequence, the experiences of similarly situated respondents will be arbitrary.

¹⁶ See Petition for Writ of Certiorari at 2, *Estrada v. United States*, 138 S. Ct. 2623 (2018) (No. 17-1233) (“[T]he Second and Ninth Circuits . . . decide the vast majority of immigration appeals . . .”).

¹⁷ See *United States v. Lopez-Velasquez*, 629 F.3d 894, 896–97 (9th Cir. 2010) (“We have repeatedly held that an IJ’s failure to . . . advise an alien [of his or her ‘apparent eligibility’ for relief] violates due process.”); *United States v. Copeland*, 376 F.3d 61, 72 (2d Cir. 2004) (“The issue . . . is not whether Section 212(c) relief is constitutionally mandated, but whether a denial of an established right to be informed of the possibility of such relief can, if prejudicial, be a fundamental procedural error. We believe that it can.”).

¹⁸ *Estrada*, 138 S. Ct. 2623.

¹⁹ See, e.g., 8 U.S.C. § 1229a(b)(1) (2012) (“The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence.”); *Copeland*, 376 F.3d at 71 (“Given that IJs have a duty to develop the administrative record, and that many aliens are uncounseled, our removal system relies on IJs to explain the law accurately to *pro se* aliens. Otherwise, such aliens would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal.”).

²⁰ See 8 C.F.R. § 1240.11(a)(2) (2013).

²¹ See 8 U.S.C. § 1252(d) (2012) (“A court may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right . . .”).

²² *Id.* § 1362 (“In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”).

Like the Second Circuit, I argue that the majority of circuits that have weighed in on this issue of procedural due process have improperly analyzed the liberty or property interest at stake. For instance, the key in the Sixth Circuit's determination that the disclosure of such information was not mandatory was the fact that the "suspension of deportation is discretionary[] [and] does not create a protectable liberty or property interest."²³ However, as the Second Circuit noted, there is a distinction between a right to the suspension of removal proceedings and a right to be informed of the possibility of seeking discretionary suspension of deportation proceedings.²⁴ Here, I argue that current immigration regulations create a cognizable property or liberty interest in the act of being informed of eligibility for seeking discretionary relief itself, regardless of the ultimate discretionary decision.²⁵ Simply put, while there may not be a right to the discretionary relief sought, there does exist a right to be informed of the possibility.

In supporting this position, I draw on: (1) case law regarding "property" and "liberty" interests for the purposes of procedural due process;²⁶ (2) commentary undermining the notion that removal proceedings are "purely" civil and, hence, entitled to fewer procedural due process protections;²⁷ and (3) policy considerations that emphasize the uniqueness of immigration proceedings and the heightened importance of finding a constitutionally protected liberty interest given that discretionary relief might be an alien's only defense, deportation has serious consequences,²⁸ aliens in removal proceedings are often unrepresented by counsel,²⁹ and immigration judges have unique responsibilities to establish the record during removal proceedings.³⁰

In Part I, I analyze the history of due process protections in the immigration context and the state of such protections today.³¹ Part II dives deeper into the circuit split on the issue of the right to be informed of possible discretionary relief in

²³ *United States v. Estrada*, 876 F.3d 885, 888 (6th Cir. 2017) (quoting *Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000)), *cert. denied*, 138 S. Ct. 2623 (2018).

²⁴ *Copeland*, 376 F.3d at 72 ("Critical to our reasoning . . . is the distinction between a right to seek relief and the right to that relief itself The decisions holding that a failure to inform an alien about Section 212(c) relief cannot be a fundamental error collapse this distinction and incorrectly assume that, because the grant of Section 212(c) relief is itself discretionary, the denial of a Section 212(c) hearing cannot be a fundamental procedural error.").

²⁵ *See* 8 C.F.R. § 1240.11(a)(2) (creating the unambiguous expectation that the IJ will "inform the alien of his or her apparent eligibility" for relief).

²⁶ *See infra* Section II.A.

²⁷ *See infra* Section II.B.

²⁸ *See infra* notes 189–93 and accompanying text.

²⁹ *See* Ingrid Eagly & Steven Shafer, Special Report, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL 2 (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court> [<https://perma.cc/9P7P-8SFB>] ("Nationally, only 37 percent of all immigrants secured legal representation in their removal cases. . . . Only 14 percent of detained immigrants acquired legal counsel").

³⁰ *See supra* note 19 and accompanying text.

³¹ *See infra* Part I.

removal proceedings and presents: (A) themes in the majority opinions; (B) themes in the minority opinions; and (C) reasons supporting the latter.³² Part III elaborates on additional reasons enumerated above that support the minority position in these cases.³³ Finally, Part IV briefly offers recommendations to better safeguard constitutional procedural due process protections in the immigration context in light of the issue to be informed of possible discretionary relief.³⁴

I. HISTORICAL UNDERPINNINGS OF DUE PROCESS IN THE IMMIGRATION CONTEXT

A. *Brief History of Due Process in the Immigration Context*³⁵

Due process protections have long been construed narrowly in the immigration context in the United States due in large measure to the great deference that courts have afforded the legislative branch in developing policies regarding who is a desirable immigrant and the executive branch in using its discretion to weed out those who are not.³⁶ The roots of such deference and discretion stem from the notion of *jus soli*, or “right of the soil,” from medieval England granting “the right to remain within the territory of a sovereign—or the right not to be deported.”³⁷ It was in contradistinction to this right to remain in a given territory—a fundamental concept of our modern conception of citizenship—that American colonies first drew lines “between insiders, or ‘subjects,’ and outsiders, or ‘aliens.’”³⁸ Indeed, at this time, colonial governments

³² See *infra* Part II.

³³ See *infra* Part III.

³⁴ See *infra* Part IV.

³⁵ See generally BILL ONG HING, *DEFINING AMERICA: THROUGH IMMIGRATION POLICY* (2004) (exploring how policymakers and groups try to define American identity through immigration policy at key moments throughout U.S. history); DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007) (charting the development of deportation policy in the United States, beginning in the colonies); DEIRDRE M. MOLONEY, *NATIONAL INSECURITIES: IMMIGRANTS AND U.S. DEPORTATION POLICY SINCE 1882* (2012) (exploring the development of U.S. immigration policies through the lenses of race, ethnicity, gender, and class throughout U.S. history); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996) (discussing undesirable categories of “strangers” through U.S. history and the lack of constitutional protections extended to these groups); LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995) (analyzing legal debates surrounding Chinese immigration in the late nineteenth century and the efforts of Chinese immigrants to contest policies related to the same); DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* (2002) (providing detailed timeline of key immigration legislation and demonstrates how distinct political coalitions formed to advance certain types of policies throughout U.S. history); DANIEL WILSHER, *IMMIGRATION DETENTION: LAW, HISTORY, POLITICS* (2012) (discussing the legal development of current immigration policies in the U.S. and the U.K. through a historical lens).

³⁶ See *infra* notes 38–78 and accompanying text.

³⁷ KANSTROOM, *supra* note 35, at 23.

³⁸ *Id.*

used such distinctions to expel outsiders with undesirable ideologies and religions,³⁹ the poor,⁴⁰ and convicts.⁴¹

However, the weight given to the early colonial governments to determine who was a desirable immigrant was squarely confronted with emerging philosophies that celebrated the equality of man, including, in this case, foreigners.⁴² As the eighteenth century progressed, new ideas about the natural rights of man and social contract theory began to counteract strict, medieval notions of “subjectship” that made such exclusionary policies more contested.⁴³ Natural rights theory supported “the development of liberal principles of economics and constitutionalism [that] marched together to enhance the status of aliens[,] . . . increasing recognition of [their] equality to act on the market [and] stripping away old restrictions based upon privileges and status.”⁴⁴ Consider the familiar language of the Declaration of Independence: “We hold these truths to be self-evident, *that all men are created equal*, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”⁴⁵ Indeed, one of the grievances listed to King George III in

³⁹ There was especially a worry among the colonies about the arrival of the newcomers “whose moral or social characteristics would introduce in America the decadence and corruption of Europe.” *Id.* at 30 (quoting MARILYN C. BASLER, “ASYLUM FOR MANKIND”: AMERICA 1607–1800, at 150 (1998)). Kanstroom highlights a number of such policies:

In 1643, a Virginia law ordered Catholic priests to be deported within five days of their arrival. By 1717, Pennsylvania’s council, concerned about the entry of “great numbers of Foreigners from Germany, strangers to our Language and Constitutions,” ordered shipmasters to provide lists of incoming passengers and required all immigrants to take loyalty oaths upon arrival. A Connecticut exclusion and deportation law in 1743, aimed at Moravian immigrants, was entitled “Act providing Relief against the evil and dangerous Designs of Foreigners and Suspected Persons.”

Id. at 30 (citations omitted).

⁴⁰ Colonial removal policies targeting poor newcomers drew upon

English practices, going back to the sixteenth century, that permitted local officials to remove beggars “to the next constable, and so from constable to constable, til they be brought to the place where they were born or most conversant for the space of three years, there to be nourished of alms.”

Id. at 33–34 (quoting JANE PERRY CLARK, DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE 33 (1931)). For instance, in New England, colonies developed a “warning-out” system—akin to our modern deportation system—that scrutinized whether “transients” without settlements merited remaining in a locality, wherein the process was “discretionary” and the consequences meant forced removal. *Id.* at 35–37.

⁴¹ In the 1700s, colonial thinkers were increasingly concerned over the large number of convicts sent from Great Britain to the colonies under the indentured servitude program, and the early congress called upon the states “to pass proper laws for preventing the transportation of convicted malefactors from foreign countries.” *Id.* at 42.

⁴² WILSHER, *supra* note 35, at ix.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

the Declaration complained that his immigration policies toward the colonies were too restrictive.⁴⁶ As Judith Shklar noted, “[N]atural[-]rights theory makes it very difficult to find good reasons for excluding anyone from full political membership in a modern republic.”⁴⁷

Understanding this fundamental tension between discretion rooted in policies deciding which immigrants are desirable and natural rights notions that all persons are equal helps inform the way in which due process protections—enshrined in the Fifth Amendment to the Constitution⁴⁸—have been interpreted narrowly in the immigration context from the earliest years of our republic until today. Such tension was on full display with the passage of some of the first major pieces of federal legislation targeting immigrants—the Alien and Sedition Acts of 1798.⁴⁹ Amidst growing concern of possible war with France, the United States Congress passed this series of legislation to target “dangerous” pro-French immigrants.⁵⁰ The pertinent provision of the Acts, granting discretion to the Executive regarding removal reads, “[I]t shall be lawful for the President of the United States at any time during the continuance of this act, to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States . . . to depart out of the territory”⁵¹ However, James Madison—one of the critics of the measure—expressed alarm at the due process implications of the law, writing:

The ground of suspicion is to be judged of, not by any judicial authority, but by the executive magistrate alone. No oath or affirmation is required. . . . [The President] may order the suspected alien to depart . . . without the opportunity of avoiding the sentence by finding pledges for his future good conduct, . . . the benefit of the writ of habeas corpus may be suspended⁵²

Madison further countered any argument that such measures were purely civil, public safety measures, noting that:

⁴⁶ KANSTROOM, *supra* note 35, at 30.

⁴⁷ *Id.* at 24 (quoting JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 37 (1991)).

⁴⁸ U.S. CONST. amend. V.

⁴⁹ Sedition Act, ch. 74, 1 Stat. 596 (1798); Act of July 6, 1798, ch. 66, 1 Stat. 577 (1798); Act of June 25, 1798, ch. 58, 1 Stat. 570 (1798); Naturalization Act, ch. 54, 1 Stat. 566 (1798).

⁵⁰ *Alien and Sedition Acts*, BRITANNICA CONCISE ENCYCLOPEDIA (2017), https://search.credoreference.com/content/entry/ebconcise/alien_and_sedition_acts/0 [https://perma.cc/KQ9Z-PU4H] (last visited Feb. 24, 2020).

⁵¹ Act of June 25, 1798, ch. 58, 1 Stat. 570, 570–71 (1798).

⁵² *Madison’s Report on the Virginia Resolutions*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (Washington, Jonathan Elliot ed., 2d ed. 1836) [hereinafter *Madison’s Report*].

[I]t can never be admitted that the removal of aliens, authorized by the act, is to be considered, not as punishment for an offence, but as a measure of precaution and prevention. If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security, and personal liberty, than he can elsewhere hope for; and where he may have nearly completed his probationary title to citizenship . . . if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.⁵³

In this way, the earliest moments of United States legislative history revealed congressional interests in extending vast powers of discretion to the executive branch to determine which types of immigrants should be permitted to remain in the country based on public safety concerns, as well as natural rights concerns regarding fundamental due process protections for the persons facing the brunt of that discretion.

The first instances where the Supreme Court grappled with procedural due process protections for immigrants came in the late nineteenth century when the federal government began to consolidate its authority over immigration in order to control the entry of Chinese into the country.⁵⁴ Here, the Court drew lines between immigrants seeking admission to the United States and those fighting deportation proceedings.⁵⁵ For those seeking entry, the Supreme Court in *The Chinese Exclusion Case* extended no meaningful review of a denial of entry, upholding the exclusion of a Chinese person with proper admission documents based on deference to the legislative and executive

⁵³ *Id.*

⁵⁴ See KANSTROOM, *supra* note 35, at 92.

⁵⁵ See *infra* notes 58–75 and accompanying text; see also Walter S. Gindin, (*Potentially*) *Resolving the Ever-Present Debate over Whether Noncitizens in Removal Proceedings Have a Due-Process Right to Effective Assistance of Counsel*, 96 IOWA L. REV. 669, 678 (2011) (discussing the history of due process in the immigration context as it pertains to access to counsel). Also note that prior to 1996, exclusion proceedings were used to determine a noncitizen's eligibility for admission to the United States, while deportation proceedings were used to try to remove a noncitizen who had previously been admitted to the United States from the country. *Vartelas v. Holder*, 566 U.S. 257, 261 (2012) (“Exclusion hearings were held for certain aliens seeking entry to the United States, and deportation hearings were held for certain aliens who had already entered this country.”). After 1996, these types of proceedings were consolidated into one, known as the removal proceeding, but the grounds invoked for the proceedings—inadmissibility grounds related to exclusion and deportability grounds related to expulsion—remain distinct. See *id.* at 262–63.

branches.⁵⁶ The Court observed that such authority was inherent in the sovereignty of the government, writing, “The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination . . . [is] necessarily conclusive upon all its departments and officers,” including such determinations regarding “the presence of foreigners of a different race in this country [which] is conclusive upon the judiciary.”⁵⁷ Indeed, building off of the discretion observed in early United States history with the Alien and Sedition Acts toward aliens, scholars have noted that this case pronounced what would come to be known as the plenary power⁵⁸ doctrine, wherein “the federal government enjoys plenary authority to dictate the terms and conditions for noncitizens seeking entry into the United States.”⁵⁹

The Supreme Court extended recognition of such plenary power to its decisions regarding which noncitizens to expel from the country in *Fong Yue Ting v. United States*.⁶⁰ There, similar to *The Chinese Exclusion Case*, the Court observed that “[t]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government,” and the Court noted that “[t]he power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers.”⁶¹ One of the underpinnings of the Court’s rationale was the notion that such a proceeding is purely civil in nature. Indeed, the Court wrote, “The [removal] proceeding before a United States judge . . . is in no proper sense a trial and sentence for a crime or offense,” and that “[t]he order of deportation is not a punishment for crime,” but instead “[i]t is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend.”⁶² Because the proceeding was not criminal, the Court observed that the noncitizen in removal proceedings “has not . . . been deprived of life, liberty or property, without due process of law.”⁶³ Despite the assertion here of no due process violation, the Court more generally in *Fong Yue Ting* did hint at exceptions that would allow for judicial interference, including when “authorized by treaty or by statute, or [as] required by the paramount law of the Constitution.”⁶⁴

⁵⁶ 130 U.S. 581, 606–11 (1889).

⁵⁷ *Id.* at 606.

⁵⁸ Black’s Law Dictionary defines “plenary power” as “[p]ower that is broadly construed; esp., a court’s power to dispose of any matter properly before it.” *Plenary Power*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁵⁹ Gindin, *supra* note 55, at 677; see also David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 (2015).

⁶⁰ 149 U.S. 698 (1893).

⁶¹ *Id.* at 713–14.

⁶² *Id.* at 730.

⁶³ *Id.*

⁶⁴ *Id.* at 713.

The Court more fully addressed these constitutional concerns regarding the removal of a noncitizen resident of the United States in *The Japanese Immigrant Case*.⁶⁵ There, the Court began by reaffirming the plenary power of the Government “to exclude or expel aliens” and reiterating that “the order of an executive officer, invested with the power to determine finally the facts upon which an alien’s right to enter this country, or remain in it, . . . was ‘due process of law.’”⁶⁶ But, contrary to *Fong Yue Ting*, the Court here noted that such executive orders may not “disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of the adoption of the Constitution.”⁶⁷ The Court elaborated on the types of protections that should be extended to noncitizens in removal proceedings, including a hearing, writing, “One of these [fundamental due process] principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends.”⁶⁸ The Court also noted that such due process principles include a right from arbitrary proceedings and a right for the noncitizen to articulate reasons in defense of deportation.⁶⁹ It wrote:

[I]t is not competent for . . . any executive officer . . . arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population . . . to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.⁷⁰

Therefore, the substantive due process interest identified by the Court encompassed a noncitizen’s right to be free from arbitrary detention, while the procedural due process protections must have included at a minimum a hearing, freedom from arbitrary proceedings, and a right to be heard.⁷¹ Similar to Madison’s earlier observations regarding the heavy consequences of possible expulsion from the country,⁷² the Court seemed to give considerable weight to private considerations in extending due process protections to noncitizens, despite its re-invocation of the broad authority of Congress to determine the grounds for such expulsion.⁷³

From the mid-twentieth century to the present, the Supreme Court has continued to afford disparate constitutional treatment to noncitizens seeking entry or admission to the United States and those who have already been admitted. For the former, due

⁶⁵ 189 U.S. 86 (1903).

⁶⁶ *Id.* at 100 (quoting *Fong Yue Ting*, 149 U.S. at 713).

⁶⁷ *Id.*

⁶⁸ *Id.* at 100–01.

⁶⁹ *Id.* at 101.

⁷⁰ *Id.*

⁷¹ *Id.* at 100–02.

⁷² See Madison’s *Report*, *supra* note 52, at 555.

⁷³ *The Japanese Immigrant Case*, 189 U.S. at 100–01.

process protections have been construed especially narrowly. For instance, in *United States ex rel. Knauff v. Shaughnessy*, the Court curtailed any possible substantive due process of a “right” to enter the United States for a wife seeking to be reunited with her U.S. citizen husband, holding that “an alien who seeks admission to this country may not do so under any claim of right,” and finding instead that such “[a]dmission of aliens . . . is a privilege granted by the sovereign United States Government.”⁷⁴ Therefore procedurally, the Court held, “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”⁷⁵ Therefore, constitutional protections do not serve noncitizens seeking entry.

However, the Supreme Court has continued to hold that constitutional protections attach once a noncitizen has been admitted to the United States, and can even follow a lawful permanent resident abroad. For instance, in *Kwong Hai Chew v. Colding*, the Court held that a lawful permanent resident seaman who left the United States to work aboard a U.S. merchant vessel was entitled to Fifth Amendment due process protections upon his return, and that his detention “without notice of the charges against him and without opportunity to be heard in opposition to them” was insufficient procedurally.⁷⁶ However, the Court has indicated that a prolonged absence from the United States may cause a lawful permanent resident to lose such constitutional protections,⁷⁷ and Congress has adopted similar legislation providing that a lawful permanent resident’s status can be abandoned or relinquished following a trip abroad for several grounds, including an absence of longer than 180 days.⁷⁸ Despite these exceptions, however, it is clear from the Supreme Court jurisprudence discussed above that noncitizens already admitted to the United States are generally entitled to the due process protections of the Fifth Amendment.⁷⁹

By way of summary, early debates regarding immigration policies and Supreme Court jurisprudence might be characterized as having a core tension between affording the political branches of government wide discretion to enact and execute immigration policies for its interests in sovereignty and national security, while recognizing that constitutional protections extend to certain classes of noncitizen residents, especially given their established ties to the United States and weighty interests in avoiding the grave consequences of expulsion.

⁷⁴ 338 U.S. 537, 542 (1950).

⁷⁵ *Id.* at 544.

⁷⁶ 344 U.S. 590, 602–03 (1953); *see also* *Landon v. Plasencia*, 459 U.S. 21, 21–22 (1982) (holding that a lawful permanent resident who left the United States for a brief trip of a few days was still entitled to the protections of the Due Process Clause).

⁷⁷ *See Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206, 273–74 (1953) (holding that a lawful permanent resident who left the United States for nineteen months without previously obtaining authorization for reentry was not entitled due process protections upon his attempt to reenter the country and was instead treated as an alien seeking admission), *superseded by statute*, 8 U.S.C. § 1101(a)(13) (2012).

⁷⁸ 8 U.S.C. § 1101(a)(13).

⁷⁹ *See supra* note 78 and accompanying text.

B. Current Due Process Protections in Civil Proceedings

The Fifth Amendment of the Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”⁸⁰ The Supreme Court has interpreted this clause, and its similar appearance in the Fourteenth Amendment,⁸¹ as applied to the states as containing both procedural and substantive due process components.⁸² Substantive due process refers to the essence of what is being deprived—the life, liberty, and property of the individual.⁸³ Here, the Court has construed property as applying to “interests that a person has already acquired in specific benefits” ranging from real property to statutory and administrative benefits, or benefits that a person “[has] a legitimate claim of entitlement to,” rather than an “abstract need or desire for it” nor “a unilateral expectation of it.”⁸⁴ For instance, in *Goldberg v. Kelly*, the Court held that “welfare recipients . . . had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them.”⁸⁵

Liberty interests, on the other hand, have been defined by reference to two criteria.⁸⁶ First, “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”⁸⁷ Second, “substantive-due-process cases [require] a ‘careful description’ of the asserted fundamental liberty interest,” that refers to “[o]ur Nation’s history, legal traditions, and practices . . . [as] crucial ‘guideposts for responsible decisionmaking’ . . . that direct and restrain our exposition of the Due Process Clause.”⁸⁸ Examples of liberty interests include “freedoms protected by the Bill of Rights . . . the rights to marry . . . to have children . . . to direct the education and upbringing of one’s children . . . to marital privacy . . . to use contraception . . . to bodily integrity . . . and to abortion.”⁸⁹

Procedural due process refers instead to the administrative safeguards that the state must afford individuals prior to depriving them of their substantive due process right described above.⁹⁰ The lines between these two categories of due process rights—substantive and procedural—are strict. The Supreme Court has held that “[t]he

⁸⁰ U.S. CONST. amend. V.

⁸¹ *Id.* amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

⁸² *See, e.g.,* Michael H. v. Gerald D., 491 U.S. 110, 119–24 (1989).

⁸³ *See, e.g.,* *Deshaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 194–96 (1989).

⁸⁴ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576–77 (1972).

⁸⁵ *Id.* at 577 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

⁸⁶ *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

⁸⁷ *Id.* (internal citations omitted).

⁸⁸ *Id.* at 721 (internal citations omitted).

⁸⁹ *Id.* at 719–20 (internal citations omitted).

⁹⁰ *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

categories of substance and procedure are distinct. . . . ‘Property’ cannot be defined by the procedures provided for its deprivation any more than can life or liberty.”⁹¹

In the civil context, the Supreme Court has held that a state actor must take into account both public and private interests, as well as the risk of “erroneous deprivation” of one’s liberty or property interest, in order to determine whether a given procedural protection is needed.⁹² This balancing test was announced in *Mathews v. Eldridge*, where the Court observed that:

[T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁹³

For instance, there the Court held that “an evidentiary hearing is not required prior to the termination of disability benefits” through its determination that the current procedures—including medical reports weighing in on the need of the disability benefits—were adequate to avoid erroneous results, that the private interest was lessened because the benefit was based not solely on financial need, and that the financial burdens to the state in providing evidentiary hearings on the issue would outweigh such need.⁹⁴

A determination of what procedures are needed prior to depriving individuals of their life, liberty, or property then mirrors the tension that courts faced early on in the immigration context when reconciling the government’s interest in public safety and deciding which immigrants are desirable, with a noncitizen’s private interest in remaining in his home in the country.

C. Current Due Process Protections Afforded Noncitizens in Removal Proceedings

As noted previously in *The Japanese Immigrant Case*, the due process protections of the Fifth Amendment have been extended to immigrants in removal proceedings,⁹⁵ a general proposition that has consistently been reaffirmed by the courts.⁹⁶

⁹¹ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

⁹² *Mathews*, 424 U.S. at 334–35.

⁹³ *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1976)).

⁹⁴ *Id.* at 332–49.

⁹⁵ 189 U.S. 86, 100–02 (1903).

⁹⁶ *See, e.g., Ma v. Ashcroft*, 257 F.3d 1095, 1109 (9th Cir. 2001) (“[O]ur case law makes clear that, as a general matter, aliens who have entered the United States, legally or illegally, are entitled to the protections of the *Fifth Amendment*.” (emphasis added)).

While “the Supreme Court has not identified all of the procedural safeguards that must be afforded to aliens in removal proceedings,” there are a number of key due process protections that have been identified, including “that aliens ‘be provided (1) notice of the charges against [them], (2) a hearing before an executive or administrative tribunal, and (3) a fair opportunity to be heard.’”⁹⁷ In addition, while noncitizens in removal proceedings are not afforded *court-appointed* counsel,⁹⁸ a number of circuit courts, as well as the Board of Immigration Appeals, have upheld the right to effective counsel in removal proceedings.⁹⁹

II. ISSUES WITH THE “MAJORITY’S” CIRCUIT DECISIONS

In finding no right to be informed of possible discretionary relief for persons in removal proceedings, the majority of circuits that have analyzed the issue have relied on three key themes concerning: (1) the discretionary nature of the property or liberty issue at stake; (2) the civil nature of removal proceedings; and (3) the narrow notions of “fairness” for respondents in removal proceedings. Here, I address each in turn.

*A. The Majority of Circuits Collapse the Distinction Between the Right to Discretionary Relief and the Right to Be Informed of the Possibility of Discretionary Relief*¹⁰⁰

The majority of circuits collapse the distinction between the right to discretionary relief and the right to be informed of the possibility of discretionary relief,¹⁰¹ which is apparent in the manner in which they analyze the property or liberty issue at stake.¹⁰² For instance, the relief sought in *Estrada* rested on INA section 212(h), which “provide[d] that ‘[t]he Attorney General may, in his discretion, waive’ inadmissibility for certain aliens with criminal convictions if he is satisfied that denying the alien’s

⁹⁷ Darlene C. Goring, *A False Sense of Security: Due Process Failures in Removal Proceedings*, 56 S. TEX. L. REV. 91, 95–96 (2014) (alteration in original).

⁹⁸ 8 U.S.C. § 1362 (2012).

⁹⁹ *Matter of Lozada*, 19 I. & N. Dec. 637, 638 (B.I.A. 1988) (finding that a right to effective assistance of counsel exists where the proceeding was “so fundamentally unfair that the alien was prevented from reasonably presenting his case”); Jean Pierre Espinoza, *Ineffective Assistance of Counsel in Removal Proceedings Matter of Compean and the Fundamental Fairness Doctrine*, 22 FLA. J. INT’L L. 65, 66 (2010) (“The Immigration and Nationality Act of 1952 (INA) set forth that aliens have the right to counsel but not at the expense of the government. Although, in theory, courts have recognized that government-funded counsel might be required, courts have uniformly refused to appoint government-funded counsel even in cases where the immigrant is indigent. Despite this controversy, eight of eleven federal circuits have sustained the constitutional right for effective assistance of counsel.”).

¹⁰⁰ *See United States v. Copeland*, 376 F.3d 61, 72 (2d Cir. 2004).

¹⁰¹ *See id.*

¹⁰² *See infra* note 104 and accompanying text.

admission would result in extreme hardship to the alien’s spouse, child, or parent who is a U.S. citizen or lawful resident”¹⁰³ The court continued, “The statute’s plain language is clear: relief under § 212(h) is discretionary. And when ‘suspension of deportation is discretionary, it does not create a protectable liberty or property interest.’”¹⁰⁴

Similarly, the Seventh Circuit observed, “[A] majority of circuits have rejected the proposition that there is a constitutional right to be informed of eligibility for—or to be considered for—discretionary relief,”¹⁰⁵ and “that ‘it would be hard to show that the loss of a chance at wholly discretionary relief from removal is the kind of deprivation of liberty or property that the due process clause is designed to protect.’”¹⁰⁶ The Fifth Circuit also concluded that an “Immigration Judge’s error in failing to explain . . . eligibility [for relief under INA section 212(c)] does not rise to the level of fundamental unfairness”¹⁰⁷ because “[a]s a piece of legislative grace, [section 212(c)] conveyed no rights, it conferred no status, and its denial does not implicate the Due Process clause.”¹⁰⁸ In short, a procedural due process violation would only arise where the ultimate benefit sought—in their view, the discretionary relief itself—constituted an entitlement rather than a discretionary act.

The minority of circuits did not dispute that the relief itself could not be construed as a property interest because of its discretionary nature, but distinguished the relief itself from the separate duty to inform respondents of the possibility of seeking relief given their apparent eligibility.¹⁰⁹ Indeed, while the Sixth, Seventh, and Fifth Circuits above focused solely on the statutory text of the forms of relief,¹¹⁰ the Ninth

¹⁰³ *United States v. Estrada*, 876 F.3d 885, 888 (6th Cir. 2017) (alteration in original) (citing 8 U.S.C. § 9982 (h)(1)(B) (2012), *cert. denied*, 138 S. Ct. 2623 (2018)).

¹⁰⁴ *Id.* (citing *Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000)).

¹⁰⁵ *United States v. Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006).

¹⁰⁶ *Id.* (quoting *United States v. Roque-Espinoza*, 338 F.3d 724, 729–30 (7th Cir. 2003)).

¹⁰⁷ *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002).

¹⁰⁸ *Id.* (quoting *Alfarache v. Cravener*, 203 F.3d 381, 383 (5th Cir. 2000)).

¹⁰⁹ *See United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004) (“To be sure, relief under Section 212(c) is not constitutionally mandated and is discretionary. It does not follow, however, that where an alien is erroneously denied information regarding the right to seek such relief, and the erroneous denial of that information results in a deportation that likely would have been avoided if the alien was properly informed, such error is not fundamentally unfair”); *see also United States v. Lopez-Velasquez*, 629 F.3d 894, 896–97 (9th Cir. 2010) (focusing not on the ultimate discretionary relief itself to resolve the question of the due process violation, but rather on “the extent of an IJ’s duty to inform aliens of their eligibility for relief from removal”).

¹¹⁰ *See United States v. Estrada*, 876 F.3d 885, 888 (6th Cir. 2017) (“[R]elief under [INA] § 212(h) is discretionary.”), *cert. denied*, 138 S. Ct. 2623 (2018); *Lopez-Ortiz*, 313 F.3d at 231 (“§ 212(c) relief ‘was couched in conditional and permissive terms. As a piece of legislative grace, it conveyed no rights, it conferred no status’, and its denial does not implicate the Due Process clause.” (quoting *Alfarache v. Cravener*, 203 F.3d 381, 383 (5th Cir. 2000))); *Santiago-Ochoa*, 447 F.3d at 1019–20 (“[Santiago-Ochoa] contends that his right to due process was violated because he was not informed of his eligibility for discretionary forms

and Second Circuits also took note of other pertinent regulations, which indicated in unambiguous terms that the IJ possessed a duty to inform.¹¹¹ Namely, 8 C.F.R. section 1240.11(a)(2) provides that “[t]he immigration judge *shall* inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and *shall* afford the alien an opportunity to make application during the hearing”¹¹² The repetition of the term “shall” reiterates the mandatory nature of the duty to inform and indeed serves to create an expectation that such a duty would be observed.¹¹³ While not noted by the minority circuits, this requirement also appears plainly in the Department of Justice’s *Immigration Court Practice Manual*, which states “[i]f the Immigration Judge decides to proceed with pleadings, he or she advises the respondent of any relief for which the respondent appears to be eligible.”¹¹⁴ For the minority circuits then, the question of whether the respondent had a due process right to be informed was an inquiry and regulatory obligation distinct from the later analysis of whether the respondent would ultimately obtain the relief.

Consistent with the minority’s approach, the right to be informed of the possibility of seeking discretionary relief could be construed as a substantive “property” interest in light of due process jurisprudence. In *Board of Regents of State Colleges v. Roth*, the Supreme Court defined “property” with respect to its specific relationship to rules or statutes, noting that “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it. . . . defined by existing rules or understandings that stem from an independent source [from the Constitution]”¹¹⁵ As noted above, agency regulations¹¹⁶ and the *Immigration Court Practice Manual*¹¹⁷ each create a clear “expectation” for respondents that the IJ will inform them of their apparent eligibility for relief under their duties as an immigration judge. While the Supreme

of relief such as cancellation of removal and adjustment of status [H]owever, a majority of circuits have rejected the proposition that there is a constitutional right to be informed of eligibility for—or to be considered for—discretionary relief.”)

¹¹¹ See *Lopez-Velasquez*, 629 F.3d at 896–97 (“Immigration regulations require an IJ to inform an alien of ‘apparent eligibility’ for relief. . . . We have repeatedly held that an IJ’s failure to so advise an alien violates due process”). While relief under section 212(c) and the corresponding regulation regarding the IJ’s duty to inform respondent of his eligibility for the relief has been repealed, they mirror the same type of analysis as in the Ninth Circuit above. See *Copeland*, 376 F.3d at 72 (“[U]nder applicable regulations, an IJ must both inform an eligible alien of his or her right to a Section 212(c) hearing and thereafter hold such a hearing, if requested” (internal citation omitted)).

¹¹² 8 C.F.R. § 1240.11(a)(2) (2013) (emphasis added).

¹¹³ See *id.*

¹¹⁴ DEP’T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 69 (2019) [hereinafter IMMIGRATION MANUAL].

¹¹⁵ 408 U.S. 564, 577 (1972).

¹¹⁶ 8 C.F.R. § 1240.11(a)(2).

¹¹⁷ IMMIGRATION MANUAL, *supra* note 114, at 69.

Court has noted that “[p]roperty’ cannot be defined by the procedures provided for its deprivation,”¹¹⁸ the interest here in being informed of possible relief from removal is not merely a procedural protection for the ultimate discretionary relief. Instead, it is part of a larger, substantive interest that the respondent—especially when not represented by counsel¹¹⁹—has in having the IJ perform his or her duty to faithfully evaluate both the grounds for removal of the respondent and any possible avenues of relief.

While not raised by the minority circuit courts, the failure of an IJ to inform a respondent in removal proceedings of his or her apparent eligibility for relief also implicates a procedural due process failure of the “right to be heard” for safeguarding the more basic liberty interest in the right to be free from arbitrary bodily detention and removal from the country.¹²⁰ As noted earlier, basic due process protections for removal proceedings include “notice,” “a hearing,” and “a fair opportunity to be heard.”¹²¹ The failure of the IJ to inform respondents of their apparent eligibility of relief will likely foreclose the possibility of a respondent raising the same colorable claim for relief on appeal, as respondents are required to exhaust their remedies before lower courts.¹²² Without a court-appointed attorney, and with an IJ who fails to inform him or her of their apparent eligibility for relief, a respondent would be hard-pressed to navigate complex immigration regulations¹²³ to identify and assert the claim for relief on their own. In this way, a respondent’s “right to be heard” as a procedural protection for the ultimate disposition of their liberty interest in remaining in the United States is severely undercut if the respondent is not entitled to information regarding colorable claims of relief from removal from either an attorney or the immigration judge.

¹¹⁸ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

¹¹⁹ *See* 8 U.S.C. § 1362 (2012).

¹²⁰ *See infra* notes 121–23 and accompanying text.

¹²¹ *Goring*, *supra* note 97, at 96 (quoting *United States v. Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002)).

¹²² *See* 8 U.S.C. § 1252(d) (2012) (“A court may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right . . .”).

¹²³ *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 *DUKE L.J.* 1635, 1637–38 (2010) (“Immigration law presents special complexities. The sheer size and chaotic layout of the principal statute and related sources of law bewilder specialists and nonspecialists alike. The labyrinth known as the Immigration and Nationality Act governs the admission of noncitizens to the United States, their expulsion from the United States, and a host of miscellaneous decisions. Its five hundred pages conspire with more than one thousand pages of administrative regulations issued by a variety of federal departments, as well as precedent decisions of administrative tribunals, executive officers, and courts, to create a byzantine network of substantive and procedural rules of law. The organization of the statute further confounds nonspecialists because qualifications to many of its most important provisions appear in distant and unexpected places. Moreover, even when the law is otherwise clear, rules that require judges to apply broadly worded statutory or regulatory language to individualized facts are exceptionally common, rendering outcomes highly indeterminate.” (footnotes omitted)).

Some courts have expressed skepticism over whether procedural due process protections can be extended to an entitlement that is procedural in nature itself.¹²⁴ For instance, in *Shango v. Jurich*, a prisoner alleged that a prison violated his procedural due process rights by failing to follow the Illinois Department of Corrections's rules guiding such a decision.¹²⁵ However, while acknowledging that "prison regulations may give rise to . . . [a liberty] interest," the Seventh Circuit found that his claim failed, because "prison officials are accorded discretion under state law to transfer a prisoner for whatever reason or for no reason at all," and "the procedural protections of the due process clause cannot attach, quite simply, because there is no substantive liberty interest at stake. The existence of such discretion 'preclude[s] the implication of a liberty interest deserving of due process protection.'"¹²⁶ In short, the court noted that "it cannot be the right to demand needless formality."¹²⁷ With respect to the right to be informed of relief in removal proceedings, the majority of circuits relied on a similar logic in constantly reiterating the discretionary nature of the relief sought.¹²⁸

The Seventh Circuit's discussion of a discretionary procedure in *Shango*, however, stands in stark contrast to the duty incumbent upon the IJ in removal proceedings.¹²⁹ Specifically, the Department of Corrections regulation in *Shango* "d[id] not limit the decision to transfer [a prisoner] to any particular reason," and it was the absence of such a limitation that allowed the court to find no liberty interest at stake.¹³⁰ In essence, the prisoner in that scenario would not have been guaranteed any predictable outcome. With respect to an IJ's duty to inform a respondent of their apparent eligibility for relief, however, the regulation does oblige a specific outcome—namely, the judge "shall inform" the respondent of their apparent eligibility for relief.¹³¹ This result is predictable and expected in a way that the regulation governing prisoner transfers in *Shango* was not.¹³² Rather than a "needless formality," the duty to inform provides the substantive benefit of helpful and pertinent information to a possible defense for a respondent facing the possibility of removal from his home.¹³³ The majority circuits analyzing this issue failed to recognize the

¹²⁴ See, e.g., *Shango v. Jurich*, 681 F.2d 1091, 1101–02 (7th Cir. 1982).

¹²⁵ *Id.* at 1094–96.

¹²⁶ *Id.* at 1099–100 (alteration in original) (footnote omitted) (quoting *Anthony v. Wilkinson*, 637 F.2d 1130, 1141 (7th Cir. 1980)).

¹²⁷ *Id.* at 1101.

¹²⁸ See, e.g., *United States v. Santiago-Ochoa*, 447 F.3d 1015, 1019–20 (7th Cir. 2006) ("[Santiago-Ochoa] contends that his right to due process was violated because he was not informed of his eligibility for discretionary forms of relief such as cancellation of removal and adjustment of status. . . . [H]owever, a majority of circuits have rejected the proposition that there is a constitutional right to be informed of eligibility for—or to be considered for—discretionary relief.").

¹²⁹ See *infra* notes 130–33 and accompanying text.

¹³⁰ *Shango*, 681 F.2d at 1100–03.

¹³¹ 8 C.F.R. § 1240.11(a)(2) (2013).

¹³² Compare *id.*, with *Shango*, 681 F.2d at 1100–03.

¹³³ Compare 8 C.F.R. § 1240.11(a)(2), with *Shango*, 681 F.2d at 1100–01.

mandatory nature placed upon the IJ in this scenario and how such a limitation gives rise to a liberty interest that merits procedural due process protections.

B. It Is a Fiction that Immigration Proceedings Are Purely Civil Proceedings, and Even So, Mathews V. Eldridge Balancing Would Merit Greater Procedural Protections for Respondents

As another prong of support, the decisions in the majority camp emphasize the limited nature of procedural due process protections in the immigration context because of the civil nature of immigration proceedings. For instance, the Fifth Circuit notes, “Removal hearings are civil proceedings, not criminal; therefore, procedural protections accorded an alien in a removal proceeding are less stringent than those available to a criminal defendant.”¹³⁴ Similarly, the Tenth Circuit observed, “Deportation proceedings are, of course, civil proceedings, not criminal ones, ‘and various constitutional protections associated with criminal proceedings therefore are not required.’”¹³⁵

Such assertions do have support dating back to nineteenth century Supreme Court jurisprudence,¹³⁶ but scholars and recent court decisions have challenged the persuasiveness of such dusty case law.¹³⁷ Such criticism has been echoed by the Supreme Court as recently as 2010 in *Padilla v. Kentucky*, where the Court observed that, while “deportation . . . is not . . . a criminal sanction. . . . [it] is nevertheless intimately related to the criminal process.”¹³⁸ The similarities of removal proceedings

¹³⁴ *United States v. Lopez-Ortiz*, 313 F.3d 225, 230 (5th Cir. 2002).

¹³⁵ *United States v. Aguirre-Tello*, 353 F.3d 1199, 1204 (10th Cir. 2004) (quoting *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990)).

¹³⁶ *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“[A removal] proceeding before a United States judge . . . is in no proper sense a trial and sentence for a crime or offence.”).

¹³⁷ Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. REV. 289, 295 (2008) (“The unsettling imbalance between the grave liberty interests at stake in removal proceedings and the relative dearth of procedural protections attaching thereto has sparked pointed criticism of the civil label. This criticism began from the moment the civil label was first invoked. Justice Brewer, writing in dissent in *Fong Yue Ting*, urged: ‘But it needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.’ Over the years, Justice Brewer’s words have been echoed many times by other judges, all of whom either found themselves in the minority of their court or, notwithstanding their own analysis, felt bound by the principle of *stare decisis*.” (quoting *Fong Yue Ting*, 149 U.S. at 740 (Brewer, J., dissenting)); *see also* Angela M. Banks, *Deporting Families: Legal Matter or Political Question*, 27 GA. ST. U. L. REV. 489, 490–91 (2011) (describing the stakes of one noncitizen in removal proceedings, including descriptions of the length of time he had spent in the country, his extensive work and family ties, and the hardships his close family with medical conditions would suffer should he face deportation).

¹³⁸ 559 U.S. 356, 365 (2010) (citations omitted).

to criminal proceedings can be found echoed in the minority court positions regarding the right to be informed of apparent eligibility for relief as well.¹³⁹

Even if removal proceedings can be described as civil, they should merit more stringent procedural due process protections under *Mathews v. Eldridge*.¹⁴⁰ Under the balancing test established by *Mathews*, the Supreme Court noted that “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”¹⁴¹ Three interests should be weighed in considering the protections needed—namely (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 probative value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved in the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”¹⁴²

Applying the analysis laid out to the question of whether the IJ’s duty to inform the respondent of apparent eligibility for relief, leads to the conclusion that performing such function should be required. Here, the private interest is great, as a respondent in removal proceedings potentially faces banishment from the country, their home, their family, their friends, and their work.¹⁴³ The government interest is also great, because it is charged with safeguarding the country from immigrants that pose risks to the community, while also keeping administrative and financial burdens at a minimum. However, the decisive factor here is the risk of erroneous deprivation of the respondent’s interest without the procedure requested.

In removal proceedings, respondents are faced with the daunting task of facing complicated immigration regulations on their own without the right to court-appointed counsel,¹⁴⁴ and they will be severely hindered in presenting a defense without being informed of their eligibility for possible forms of discretionary relief. Such a procedure would not impose too great a burden on the government, because the IJ already performs a role in developing the administrative record¹⁴⁵ and will have the pertinent information readily available. Further, such procedure is unlikely to lead to frivolous claims because the judge can perform a gatekeeping function through observance of the “apparent eligibility” requirement¹⁴⁶ by only informing those respondents who

¹³⁹ *United States v. Copeland*, 376 F.3d 61, 72–73 (2d Cir. 2004) (“Deportation usually has very serious consequences . . . [D]eportation is a drastic measure and at times the equivalent of banishment or exile” (quoting *Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (alteration in original))).

¹⁴⁰ 424 U.S. 319 (1976).

¹⁴¹ *Id.* at 334 (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

¹⁴² *Id.* at 335.

¹⁴³ *Madison’s Report*, *supra* note 52, at 555.

¹⁴⁴ See 8 U.S.C. § 1362 (2012).

¹⁴⁵ *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004) (“IJs have a duty to develop the administrative record, and . . . our removal system relies on IJs to explain the law accurately to *pro se* aliens.”).

¹⁴⁶ 8 C.F.R. § 1240.11(a)(2) (2013).

clearly meet the eligibility requirements for a given form of discretionary relief. Other scholars have reached similar conclusions in reviewing other procedures in removal proceedings.¹⁴⁷

C. The “Majority” Construe Notions of “Fairness” for Respondents in Removal Proceedings Unduly Narrowly

Finally, the majority of circuits construe notions of “fairness” for respondents in removal proceedings narrowly that favor the prosecution. For instance, the Eighth Circuit observes that in removal proceedings, “The Due Process Clause requires only that an alien receive notice and a fair hearing where the INS must prove by clear, unequivocal, and convincing evidence that the alien is subject to deportation.”¹⁴⁸ However, this notion of fairness precludes assurances of predictability during proceedings for respondents, as well as hinders the government’s ability to effectively use its limited resources to prioritize the removal of aliens.

For the majority of circuits to reach a finding that there is no constitutionally protected interest to be informed of the possibility of discretionary relief, they must also find that the Executive Office for Immigration Review does not need to follow its own regulations,¹⁴⁹ resulting in unpredictability for respondents. Indeed, under the majority’s rationale, the IJ can choose not to comply with his or her regulatory obligation to inform a respondent of their apparent eligibility for relief or not¹⁵⁰ without ramifications, because the judiciary will not enforce a failure to observe such a procedure.¹⁵¹

Following government regulations in some instances and not others without consequences is the epitome of arbitrariness—an infirmity that the Supreme Court has long recognized¹⁵² and that the Supreme Court has taken seriously in the context of removal proceedings. Indeed, recently in *Sessions v. Dimaya*, the Supreme Court found

¹⁴⁷ Ramanujan Nadadur, Note, *Beyond Crimmigration and the Civil-Criminal Dichotomy—Applying Mathews v. Eldridge in the Immigration Context*, 16 YALE HUM. RTS. & DEV. L.J. 141, 147 (2013) (applying *Mathews v. Eldridge* balancing to three groups of noncitizens and finding that certain vulnerable groups of noncitizens merit additional procedural safeguards); Bradley J. Wyatt, Note, *Even Aliens are Entitled to Due Process: Extending Mathews v. Eldridge Balancing to Board of Immigration Appeals Procedural Reforms*, 12 WM. & MARY BILL RTS. J. 605, 635 (2004) (applying *Mathews v. Eldridge* balancing and finding that “[c]onstitutional due process minimums should extend to procedures before the BIA”); see also Gindin, *supra* note 55, at 669.

¹⁴⁸ *Escudero-Corona v. INS*, 244 F.3d 608, 614 (8th Cir. 2001) (alteration in original) (quoting *Afolagan v. INS*, 219 F.3d 784, 789 (8th Cir. 2000)).

¹⁴⁹ See 8 C.F.R. § 1240.11(a)(2).

¹⁵⁰ See *id.*

¹⁵¹ See, e.g., *United States v. Estrada*, 876 F.3d 885, 888 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2623 (2018).

¹⁵² *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)) (“The touchstone of due process is protection of the individual against arbitrary action of government.”).

that a vague criminal statute incorporated into the INA as a possible ground for deportability was unconstitutionally vague in part because it “invited arbitrary enforcement.”¹⁵³ While this holding hinged upon the vagueness of a statute that served as the ground for possible deportation rather than the mandatory procedures related to discretionary relief, the reasoning of the Court emphasized the fear of judges applying the statutes inconsistently without proper notice to respondents.¹⁵⁴ There, the Court enumerated a litany of issues related to the application of the vague statute in question among circuit courts, writing, “Does car burglary qualify as a violent felony under section 16(b)? Some courts say yes, another says no. What of statutory rape? Once again, the Circuits part ways. How about evading arrest? The decisions point in different directions. Residential trespass? The same is true.”¹⁵⁵ In short, the statute “‘produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates.’”¹⁵⁶

Again, while *Dimaya* was concerned with a vague statute related to deportability grounds themselves, the issues raised regarding arbitrariness and proper notice in removal proceedings should similarly give cause for concern where an agency follows its own regulations inconsistently to the detriment of a respondent who, in the words of Justice Kagan, faces “deportation[, which] is ‘a particularly severe penalty,’ [and] which may be of greater concern to a convicted alien than ‘any potential jail sentence.’”¹⁵⁷ Indeed, failure to hold immigration judges accountable for their duties under the regulation will lead to variable results for similarly situated respondents, as some may be notified of their apparent eligibility for discretionary relief, while others may not.¹⁵⁸

This variability in outcomes is also likely to hinder the government’s ability to effectively prioritize which respondents in removal proceedings might be deserving of a waiver. In INA section 212(h), Congress seemingly provided for the possibility of a waiver of deportation to mitigate the harshness of INA deportability grounds through consideration of a number of factors, including how long ago a respondent’s crime had occurred and evidence of rehabilitation, as well as evidence of extreme hardship to U.S. citizen or lawful permanent resident spouses, parents, or children.¹⁵⁹ While the same statute emphasizes that the waiver is in the Attorney General’s discretion,¹⁶⁰ the Executive Office for Immigration Review also seemingly incorporated provisions in its regulations to mitigate the harshness of possible deportation grounds

¹⁵³ 138 S. Ct. 1204, 1223 (2018).

¹⁵⁴ *Id.* at 1210–23.

¹⁵⁵ *Id.* at 1222 (footnotes omitted).

¹⁵⁶ *Id.* at 1223 (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015)).

¹⁵⁷ *Id.* at 1213 (quoting *Jae Lee v. United States*, 137 S. Ct. 1958, 1968 (2017)).

¹⁵⁸ *See* 8 C.F.R. § 1240.11(a)(2) (2013).

¹⁵⁹ *See* 8 U.S.C. § 1182(h)(1)(A)–(B) (2012).

¹⁶⁰ *Id.* § 1182(h) (“The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams of marijuana if . . . [the following criteria are met].”).

by providing mandatory procedural protections for respondents that stated “[t]he immigration judge *shall* inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter [including a waiver of a ground of inadmissibility] and *shall* afford the alien an opportunity to make application during the hearing”¹⁶¹

Should the IJ fail intermittently and arbitrarily to perform his or her duty to inform and provide a venue for a hearing on possible discretionary relief, the results are also likely to be intermittent and arbitrary. Two identical respondents, each charged with the same ground of deportability, and each with the same equities rendering them eligible for a waiver, might only be made aware of their eligibility for relief and afforded an opportunity to present their cases for relief if they are lucky enough to be placed in a removal proceedings in the court of an immigration judge who follows the regulations.

Imagine a scenario where an indigent, lawful permanent resident is placed in removal proceedings for a ground of inadmissibility triggered twenty years prior to obtaining his lawful permanent residence, since which time he has been a model resident of his community, and supports his U.S. citizen wife and three U.S. citizen children through his employment. If he is placed in removal proceedings, unable to afford legal counsel, and tries to prepare himself for the proceeding by reading the Executive Office for Immigration Review’s regulations regarding a removal proceeding, could he not rely upon the IJ to inform him of his apparent eligibility for relief? If the answer is no or sometimes, then does the Executive Office for Immigration Review have to follow any of its regulations?

III. OTHER SUPPORT FOR THE MINORITY’S APPROACHES TO FINDING A CONSTITUTIONAL RIGHT TO BE INFORMED OF APPARENT ELIGIBILITY FOR DISCRETIONARY RELIEF

A. Jurisprudence Covering Discretion in the Prison Context Supports a Finding of a Right to Be Informed of Apparent Eligibility for Discretionary Relief

Legal treatment of regulations regarding the use of discretion in the prison context also lends support to finding a constitutionally protected due process right to be informed of eligibility for discretionary relief in removal proceedings.¹⁶² Informative parallels can be drawn in the context of parole and prison transfer.

With respect to parole for instance, the Supreme Court in *Board of Pardons v. Allen* observed the possibility of the creation of a liberty interest related to a prisoner’s possibility of obtaining parole.¹⁶³ There the Court observed that the statute’s “use[] [of the] mandatory language (‘shall’) . . . ‘creat[ed] a presumption that parole release will be granted’ when the designated findings are made,” despite the fact that the parole

¹⁶¹ 8 C.F.R. § 1240.11(a)(2) (emphasis added).

¹⁶² See *infra* notes 164–83 and accompanying text.

¹⁶³ 482 U.S. 369, 373–78 (1987), *superseded by statute*, MONT. CODE ANN. § 46-23-201 (2015).

board had the authority to use its discretion to determine when a given prisoner “believes that the prisoner is able and willing to fulfill the obligations of a law-abiding citizen.”¹⁶⁴ Similarly, while INA section 212(h) grants the Attorney General the ultimate discretionary authority to grant or deny waivers,¹⁶⁵ the Executive Office of Immigration Review’s use of the mandatory language “shall” in 8 C.F.R. section 1240.11(a)(2)¹⁶⁶ creates a presumption that respondents will be informed of their apparent eligibility for relief and given an opportunity for a hearing on the same by the immigration judge,¹⁶⁷ notwithstanding the ultimate discretion of the Attorney General to grant or deny the waiver.

In the context of transfer of prison inmates, the determination of whether a constitutional due process protection might arise depends on whether the government official’s discretion is limited by the state’s rules.¹⁶⁸ In *Olim v. Wakinekona*, the Supreme Court found that there was no protected liberty interest created by Hawaii’s prison regulations governing the transfer of prison inmates because “officials may transfer a prisoner ‘for whatever reason or for no reason at all’” and as such, “there is no . . . interest for process to protect.”¹⁶⁹ In removal proceedings, while the Attorney General may use his discretion in choosing to award the ultimate discretionary relief based on grounds enumerated by Congress,¹⁷⁰ the immigration judge is not given such discretion in his duty to inform the respondent of his apparent eligibility for discretionary relief.¹⁷¹ Instead, the IJ must, upon review of the pertinent facts in the record, inform the respondent of his eligibility for discretionary relief based in an enumerated regulatory list of possible grounds for waivers.¹⁷² Importantly, the regulation does not give the IJ the discretion to forego such a requirement for any reason.¹⁷³

It is important to note that the Supreme Court has expressed caution in relying too heavily on mandatory language in the due process context. For instance, in *Sandin v. Conner*, the Court noted “two undesirable effects” of finding due process property interests rooted in the mandatory language of prison regulations: (1) that “it creates disincentives for States to codify prison management procedures in the interest of uniform treatment”; and (2) that it “le[ads] to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with

¹⁶⁴ *Id.* at 376–78 (citations omitted).

¹⁶⁵ 8 U.S.C. § 1182(h).

¹⁶⁶ 8 C.F.R. § 1240.11(a)(2) (“The immigration judge *shall* inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter [including a waiver of a ground of inadmissibility] and *shall* afford the alien an opportunity to make application during the hearing . . .” (emphasis added)).

¹⁶⁷ *Cf. Allen*, 482 U.S. at 373–78.

¹⁶⁸ *See, e.g., Olim v. Wakinekona* 461 U.S. 238, 250 (1983).

¹⁶⁹ *Id.* (quoting *Meachum v. Fano*, 427 U.S. 215, 228 (1976)).

¹⁷⁰ *See* 8 U.S.C. § 1182(h)(2).

¹⁷¹ *See* 8 C.F.R. § 1240.11(a)(2).

¹⁷² *See id.*; *see also* 8 U.S.C. § 1182(h).

¹⁷³ *See* 8 C.F.R. § 1240.11(a)(2).

little offsetting benefit to anyone.”¹⁷⁴ In the context of removal proceedings, such concerns are muted. For the former, uniform treatment of respondents would best be served by having immigration judges consistently carry out their regulatory duty to inform respondents of their apparent eligibility of discretionary relief, rather than informing some and not others arbitrarily. For the latter, following the regulatory duty consistently will more effectively help immigration judges to serve a gate-keeping function to determine upon their initial review of the record a respondent’s “apparent” eligibility for relief, thereby weeding out possible frivolous claims that might otherwise waste limited judicial resources.

In addition, *Sandin* still allowed for the possibility of a prison regulation that gives rise to a due process protection,¹⁷⁵ but insisted that “a deprivation [of such interest must be] sufficiently ‘atypical and significant’ to warrant procedural due process protections.”¹⁷⁶ The Court did not elaborate greatly on the meaning of the phrase “atypical and significant,” but indicated that “segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest,” because such a procedure “does not present a dramatic departure from the basic conditions of [the prisoner’s] indeterminate sentence.”¹⁷⁷

The failure of an immigration judge to inform a respondent of apparent eligibility of relief from removal will undoubtedly be both significant and atypical. It is significant because a failure to present an application for relief will foreclose the possibility of preventing the serious consequence of deportation.¹⁷⁸ It is atypical because such a failure handicaps a respondent’s ability to make the best argument for their case to remain in the United States¹⁷⁹ in a manner that constitutes “a dramatic departure from the basic conditions”¹⁸⁰ outlined in the final stage of a removal proceeding where the Immigration Court entertains applications for relief.¹⁸¹

In this way, jurisprudence from the prison context supports a finding that the pertinent immigration regulations have placed substantive limits on the role of the immigration judge in administering the removal proceeding in a way that created a due process protection for respondents.¹⁸² While the courts have exercised some caution in relying

¹⁷⁴ 515 U.S. 472, 482 (1995).

¹⁷⁵ *See id.* at 483–84 (“[W]e recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. . . . But these interests will be generally limited to freedom from restraint which . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”).

¹⁷⁶ Donna H. Lee, *The Law of Typicality: Examining the Procedural Due Process Implications of Sandin v. Conner*, 72 FORDHAM L. REV. 785, 788 (2004).

¹⁷⁷ *Sandin*, 515 U.S. at 484–86.

¹⁷⁸ *See* 8 U.S.C. § 1252(d) (2012) (“A court may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right . . .”).

¹⁷⁹ *See id.*

¹⁸⁰ *Sandin*, 515 U.S. at 485.

¹⁸¹ Christen Chapman, *Relief From Deportation: An Unnecessary Battle*, 44 LOY. L.A. L. REV. 1529, 1570–73 (2011) (describing the relief stage of the removal proceeding).

¹⁸² *See supra* notes 169–73 and accompanying text.

too heavily on the mandatory language itself, the nature of the interest being deprived here—i.e., critical information pertinent to allowing a respondent to avoid possible deportation—is sufficiently atypical and significant to allay such concerns.¹⁸³

B. Public Policy Supports a Finding of a Right to Be Informed of Apparent Eligibility for Discretionary Relief

The vast majority of immigrants detained in removal proceedings are unrepresented.¹⁸⁴ Indeed, “Only 37 percent of all immigrants have an attorney to represent them in immigration court,” and as many as “[e]ighty-six percent of immigrants who’ve been detained will appear without a lawyer.”¹⁸⁵ By not enforcing the IJ’s regulatory obligation to inform a pro se respondent of possible eligibility for relief,¹⁸⁶ courts hinder the ability of respondents to effectively present reasons for why they should remain in the country pursuant to statutory guidelines regarding relief from removal.¹⁸⁷ As such, this handicap is likely to lead to an increase in incidences of removals—even of those who may have sympathetic grounds for relief, such as ties to U.S. families¹⁸⁸—and exacerbate the observed negative impacts of deportation proceedings more generally on U.S. families.

The negative effects of deportation on U.S. families and communities is well-documented.¹⁸⁹ In a recent interview with families that had one family member deported, the Kaiser Family Foundation observed extensive psychological, financial, and medical hardships.¹⁹⁰ These included financial hardships that caused food insecurity and worries about covering necessary expenses like rent, “Disruption to Children’s Routines and Relationships,” “Extreme Stress, Anxiety, and Depression,” “Abrupt Declines in School Performance,” “Fear of Accessing Public Programs,” “Gaps in Support and Resources” for families, and “Fear and Uncertainty for the Future.”¹⁹¹ A recent review of scholarship on the subject confirmed similar findings regarding families, noting that “[f]amily members left behind suffer multiple psychological

¹⁸³ See *supra* notes 175–77 and accompanying text.

¹⁸⁴ See *infra* note 185 and accompanying text.

¹⁸⁵ Fatma Marouf, *What Makes Immigration Court Different from Typical Judicial Proceedings?*, PAC. STANDARD (June 25, 2018), <https://psmag.com/social-justice/how-does-immigration-court-work> [<https://perma.cc/H33H-B67Q>].

¹⁸⁶ 8 C.F.R. § 1240.11 (a)(2) (2013).

¹⁸⁷ See generally 8 U.S.C. § 1182 (2012) (discussing the various avenues that a respondent may have for relief in removal proceedings).

¹⁸⁸ See, e.g., *id.* § 1182(h)(1)(B).

¹⁸⁹ See, e.g., Kalina M. Brabeck et al., *The Psychological Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496 (2014).

¹⁹⁰ Samantha Artiga & Barbara Lyons, *Family Consequences of Detention/Deportation: Effects on Finances, Health, and Well-Being*, KAISER FAMILY FOUNDATION (Sept. 18, 2018), <https://www.kff.org/report-section/family-consequences-of-detention-deportation-effects-on-finances-health-and-well-being-issue-brief/> [<https://perma.cc/AWR8-254L>].

¹⁹¹ *Id.*

consequences,” which included “economic hardship, housing instability, and food insecurity,” new roles for remaining caregivers and children, poor school performance, as well as “emotional and behavioral challenges, such as eating and sleeping changes, anxiety, sadness, anger, and withdrawal.”¹⁹² The psychological damage to children can last for their lifetime.¹⁹³

The consequences of deportation for communities are also grave. Specifically, “immigration raids and deportations” often leave “community members . . . more fearful and mistrustful of public institutions, less likely to participate in churches, schools, health clinics, cultural activities, and social services, and more reluctant to report crime to the police.”¹⁹⁴

Recognizing that a respondent in removal proceedings has a constitutional due process right to be informed of possible discretionary relief from removal is not a cure-all for the woes of deportation enumerated above; it would, however, help ensure that respondents who appear to be eligible for a waiver of deportation on grounds identified by Congress—including those whose removal might cause “extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter, of such alien,”¹⁹⁵ are properly informed of such a possibility and afforded a hearing to present their case for the same.

IV. RECOMMENDATION

To ensure that similarly situated respondents in removal proceedings receive consistent treatment from immigration judges moving forward, the Supreme Court should take up a case that resolves the current circuit split and recognize that there exists a constitutional due process protection to be informed of the possibility of eligibility for discretionary relief. Such a measure is necessary to safeguard against arbitrariness in the judicial administration of removal proceedings.

¹⁹² *Statement on the Effects of Deportation and Forced Separation on Immigrants, Their Families, and Communities*, 62 AM. J. COMMUNITY PSYCHOL. 3, 4 (2018), <https://doi.org/10.1002/ajcp.12256> [<https://perma.cc/E56N-DAA2>] [hereinafter *Statement on the Effects of Deportation*].

¹⁹³ Fernando Stein, *AAP Statement on Protecting Immigrant Children*, AM. ACAD. PEDIATRICS (Jan. 25, 2017), <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAPStatementonProtectingImmigrantChildren.aspx> [<https://perma.cc/MX2C-H29T>] (“When children are scared, it can impact their health and development. Indeed, fear and stress, particularly prolonged exposure to serious stress—known as toxic stress—can harm the developing brain and negatively impact short- and long-term health.”); see also Johayra Bouza et al., *The Science Is Clear: Separating Families Has Long-Term Damaging Psychological and Health Consequences for Children, Families, and Communities*, SOC’Y RES.CHILD DEV. (June 20, 2018), http://www.srcd.org/sites/default/files/documents/the_science_is_clear.pdf [<https://perma.cc/6T9U-U2CM>] (discussing the harmful impacts of the separation of family members in the enforcement of immigration policies).

¹⁹⁴ *Statement on the Effects of Deportation*, *supra* note 192, at 4.

¹⁹⁵ 8 U.S.C. § 1182(h)(1)(B) (2012).

Notably, immigration judges are entrusted with a role in immigration proceedings to not act solely as common-law arbiters between two civil parties. Indeed, Christen Chapman has argued that we should treat immigration judges in the relief stage of a proceeding in a fashion similar to the “non-adversarial,” civil law inquisitorial judges.¹⁹⁶ However, I would posit that immigration judges already occupy this quasi-inquisitorial, administrative role by nature of the regulations requiring that they develop the administrative record¹⁹⁷ and advise respondents of their apparent eligibility for relief from removal proceedings.¹⁹⁸ By creating an expectation through its regulations that the IJ will play this administrative function,¹⁹⁹ the Executive Office of Immigration Review has already signaled to unrepresented respondents that it will inform them of apparent eligibility for a waiver, thereby helping those who might merit an opportunity to remain in the United States on grounds deemed pertinent by Congress to make their case before the Attorney General.

Such regulations, however, need the support of a judiciary to ensure that they are not enforced arbitrarily, or not at all. By extending constitutional due process protections to the right to be informed of discretionary relief found in Executive Office of Immigration Review regulations, courts moving forward are positioned to protect such a vulnerable population from arbitrary enforcement of procedures designed to provide substantive, informative benefits to respondents in removal proceedings regarding their possibilities of remaining in the United States.

CONCLUSION

The Sixth Circuit in *Estrada* erred in finding no constitutional due process protection for the right to be informed of eligibility for discretionary relief by improperly analyzing the nature of the property or liberty issue at stake, raising an increasingly questionable observation that removal proceedings are purely “civil” in nature, and construing notions of “fairness” for respondents in removal proceedings in a way that is, above all, arbitrary. The Supreme Court’s recent decision to deny certiorari in the case means that for the foreseeable future, similarly situated respondents in removal proceedings in different circuits will have immigration judges held

¹⁹⁶ Chapman, *supra* note 181, at 1529–30 (“This Article argues that immigration courts should shift to a nonadversarial model at the relief stage of removal hearings. In a nonadversarial relief stage, the ICE attorney would withdraw and the immigration judge would adopt an inquisitorial role. Such a shift would provide noncitizens with an opportunity to present their applications for relief under procedures that comport with the Due Process Clause, accommodate the government’s immigration enforcement goals, and impose insubstantial administrative costs on the immigration court system.”).

¹⁹⁷ *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004) (“IJs have a duty to develop the administrative record, and . . . our removal system relies on IJs to explain the law accurately to *pro se* aliens.”).

¹⁹⁸ 8 C.F.R. § 1240.11 (2013).

¹⁹⁹ *Id.*

to different standards with possibly different implications for their ability to present applications for waivers based on their *prima facie* eligibility.

Deportation presents grave consequences—removal from family, home, work, and communities. By the same token, the government has a weighty interest in ensuring the safety of communities and national security in carrying out its policies regarding deportation. Both of these interests though, are best served through recognition that noncitizens in removal proceedings have a constitutionally protected right to be informed of possible eligibility of relief from deportation, as such a right helps ensure that those individuals Congress recognized might merit a waiver receive the necessary information and opportunity to make their case. Such a finding is supported both by due process jurisprudence in the context of removal proceedings and other discretionary contexts like prison parole and transfer, as well as public policy. Indeed, such a finding would be consistent with “[t]he touchstone of due process”—namely, “protecti[ng] the individual against arbitrary action of government.”²⁰⁰

²⁰⁰ *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)).