

# Aliens' Right to Counsel in Removal Proceedings: In Brief

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## Summary

The scope of aliens' right to counsel in removal proceedings is a topic of recurring congressional and public interest. This topic is complicated, in part, because the term *right to counsel* can refer to either (1) the right to counsel of one's own choice at one's own expense, or (2) the right of indigent persons to counsel at the government's expense. A right to counsel can also arise from multiple sources, including the Fifth and Sixth Amendments to the U.S. Constitution, the Immigration and Nationality Act (INA), other federal statutes, and federal regulations. Further, in some cases, courts have declined to recognize a "categorical" right to counsel, applicable to all aliens in removal proceedings, but have found that individual aliens could potentially have a right to counsel on a case-by-case basis because of their specific circumstances.

**Right to Counsel at the Alien's Expense.** The Fifth Amendment to the U.S. Constitution has generally been construed to mean that aliens have a right to counsel at their own expense in formal removal proceedings. The Fifth Amendment guarantees that "[n]o person ... shall be deprived of life, liberty, or property" without due process of law. Aliens—including those who have entered or remained in the United States in violation of federal immigration law—have been found to be encompassed by the Fifth Amendment's usage of "person," and removal can be seen as implicating an alien's interest in liberty. Thus, courts have historically viewed access to counsel at one's own expense as required to ensure "fundamental fairness" in formal removal proceedings. While then-Attorney General Mukasey's 2009 decision in *Matter of Compean* expressed doubt about the Fifth Amendment basis for aliens' right to counsel at their own expense, this decision was subsequently vacated by Attorney General Holder.

Various federal statutes and regulations also provide aliens with a right to counsel at their own expense. Some of these provisions refer to such counsel as a "privilege." However, they have generally been construed as conferring a legally enforceable right.

**Right to Counsel at the Government's Expense.** Aliens, as a group, generally do not have a right to counsel at the government's expense in administrative removal proceedings under either the Sixth Amendment or the INA. The Sixth Amendment's "right to ... have the Assistance of Counsel" at government expense, in the case of indigent persons, applies to criminal proceedings. Removal proceedings, in contrast, are civil in nature (although aliens subject to judicial orders of removal may have a Sixth Amendment right to counsel in the criminal proceedings that result in such orders). Similarly, the INA and its implementing regulations do not purport to provide a right to appointed counsel for any aliens except those removed by the Alien Terrorist Removal Court, which has not been used to date.

Individual aliens could, however, potentially be found to have a right to counsel at the government's expense on other grounds, depending upon the facts and circumstances of the case. At least four federal courts of appeals have opined that the Fifth Amendment's guarantee of due process could require the appointment of counsel on a case-by-case basis for individual aliens who are incapable of representing themselves due to "age, ignorance, or mental capacity," although it does not appear that any alien has actually been provided with appointed counsel, to date, on this basis. In addition, Section 504 of the Rehabilitation Act has been construed to require the appointment of "qualified representatives" for aliens who are "mentally incompetent" to represent themselves in removal proceedings. These representatives may be *pro bono*, or appointed at government expense, and they can include licensed attorneys as well as persons who are not attorneys.

## **Contents**

Right to Counsel at the Alien's Expense.....	2
Fifth Amendment.....	2
INA and Other Provisions of Immigration Law .....	3
Right to Counsel at the Government's Expense .....	6
Sixth Amendment .....	6
INA and Other Provisions of Immigration Law .....	7
Fifth Amendment.....	8
Rehabilitation Act.....	9

## **Contacts**

Author Contact Information.....	11
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The scope of aliens' right to counsel in removal proceedings (i.e., proceedings to remove them from the United States) is a topic of recurring congressional and public interest. This topic is complicated, in part, because the term *right to counsel* can refer to either (1) the right to counsel of one's own choice at one's own expense, or (2) the right of indigent persons to counsel at the government's expense. A right to counsel can also arise from multiple sources, including the Fifth and Sixth Amendments to the U.S. Constitution, the Immigration and Nationality Act (INA), other federal statutes, and federal regulations. Further, in some cases, courts have declined to recognize a "categorical" right to counsel, applicable to all aliens in removal proceedings, but have found that individual aliens could potentially have a right to counsel on a case-by-case basis because of their specific circumstances. In addition, federal, state, and local governments may provide counsel to aliens in circumstances where they have not been seen as having a legal right to counsel.<sup>1</sup>

As used here, the term *removal proceeding* refers to formal proceedings before an immigration judge under Section 240 of the INA.<sup>2</sup> There are other types of proceedings that can result in an alien being removed from the United States—most notably, expedited removal under Section 235 of the INA.<sup>3</sup> However, insofar as these other types of proceedings involve aliens who have few, if any, ties to the United States, the aliens subject to them could be seen to lack constitutional or statutory rights to counsel,<sup>4</sup> and thus this report does not address these other forms of removal proceedings.

This report provides an overview of the various legal authorities governing aliens' right to counsel—as that term is broadly understood—in removal proceedings. It does not address aliens' right to counsel in criminal proceedings, the outcomes of which could potentially affect their ability to remain in the United States under immigration law.<sup>5</sup> The report also does not address effective assistance of counsel.<sup>6</sup>

<sup>1</sup> See, e.g., Kirk Semple, *Youths Facing Deportation To Be Given Legal Counsel*, N.Y. TIMES, June 6, 2014, available at [http://www.nytimes.com/2014/06/07/us/us-to-provide-lawyers-for-children-facing-deportation.html?\\_r=0](http://www.nytimes.com/2014/06/07/us/us-to-provide-lawyers-for-children-facing-deportation.html?_r=0) (reporting that the federal government will award \$2 million in grants to enroll "about 100 lawyers and paralegals" to represent children in "immigration proceedings"); David Iaconangelo, *NYC Unveils Pilot Program To Give Legal Defense to Detained Immigrants Facing Deportation*, LATIN TIMES, Nov. 7, 2013, available at <http://www.latintimes.com/nyc-unveils-pilot-program-give-legal-defense-detained-immigrants-facing-deportation-132676> (reporting that the New York City Council appropriated \$500,000 for a pilot project to provide *pro bono* counsel to indigent aliens).

<sup>2</sup> See 8 U.S.C. § 1229a.

<sup>3</sup> See generally 8 U.S.C. § 1225.

<sup>4</sup> See, e.g., *United States v. Barajas-Alvarado*, 655 F.3 1077, 1088 (9<sup>th</sup> Cir. 2011) ("Barajas-Alvarado's claim that he was denied his right to counsel, is meritless on its face. Barajas-Alvarado himself identifies no legal basis for his claim that non-admitted aliens who have not entered the United States have a right to representation ... The cases cited by Barajas-Alvarado involve aliens in the more formal removal proceedings, where the regulations provide a right of counsel, as compared to expedited removal proceedings, where they do not. ... Because non-admitted aliens are entitled only to whatever process Congress provides, ... Barajas-Alvarado's lack of representation in the removal proceeding did not constitute a procedural error at all, let alone a due process violation.").

<sup>5</sup> See, e.g., INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (aliens who are convicted of two or more "crimes involving moral turpitude", not arising from a single scheme of criminal conduct, at any time after admission are deportable); INA § 240A(a), 8 U.S.C. § 1229b(a) (cancellation of removal may not be granted to otherwise eligible lawful permanent resident (LPR) aliens who have been convicted of "aggravated felonies").

<sup>6</sup> See generally CRS Report R41190, *Ineffective Assistance of Counsel: Deportation Consequences of Guilty Pleas*, by Larry M. Eig; Thomas K. Ragland, *The Right to Effective Assistance of Counsel in Immigration Proceedings*, Am. Bar Assoc., available at [http://apps.americanbar.org/litigation/committees/immigration/articles/0609\\_ragland.html](http://apps.americanbar.org/litigation/committees/immigration/articles/0609_ragland.html) (last accessed: June 13, 2014).

## Right to Counsel at the Alien's Expense

Aliens have generally been seen as having both constitutional and statutory rights to counsel at their own expense in formal removal proceedings. The constitutional right is grounded in the Fifth Amendment's guarantee of due process, while the statutory right arises from the INA and related provisions of immigration law. The regulations implementing these statutory provisions further establish these and other rights pertaining to counsel in removal proceedings.

### Fifth Amendment

The Fifth Amendment guarantees that “[n]o person ... shall be deprived of life, liberty, or property” without due process of law.<sup>7</sup> Aliens—including those who have entered or remained in the United States in violation of federal immigration law—have been found to be encompassed by the Fifth Amendment's usage of “person,”<sup>8</sup> and removal can be seen as implicating an alien's interest in liberty.<sup>9</sup> Thus, courts have historically viewed access to counsel at one's own expense as required to ensure “fundamental fairness” in formal removal proceedings.<sup>10</sup> For example, in *Leslie v. Attorney General*, the U.S. Court of Appeals for the Third Circuit (Third Circuit) noted that “although the Fifth Amendment does not mandate government-appointed counsel for aliens at removal proceedings, it indisputably affords an alien the right to counsel of his or her own choice at his or her own expense.”<sup>11</sup> Similarly, in *United States v. Charleswell*, the Third Circuit described aliens' right to counsel at their own expense in formal removal proceedings as “so fundamental to the proceeding's fairness” that a denial of this right could “rise to the level of fundamental unfairness.”<sup>12</sup> Aliens' Fifth Amendment right to counsel at their own expense has also been seen as underlying the INA's provisions granting aliens a right to counsel at their own

<sup>7</sup> U.S. Const., amend. V.

<sup>8</sup> *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”); *Landon v. Plasencia*, 459 U.S. 21 (1982) (recognizing certain aliens' right to due process in exclusion proceedings, a predecessor of contemporary removal proceedings that applied to aliens seeking to enter the United States); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (recognizing aliens' right to due process in deportation proceedings, another predecessor of removal proceedings that applied to aliens within the United States, regardless of whether they were lawfully present); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (aliens who have “become subject in all respects to [the] jurisdiction [of the United States], and a part of its population,” are entitled to due process in removal proceedings, even if they are “alleged to be illegally here”). In 1996, Congress created a new unified proceeding known as *removal*, combining exclusion and deportation proceedings into one.

<sup>9</sup> See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (“[Because removal] visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom[,] ... meticulous care must be exercised lest the procedure by which [an alien] is deprived of that liberty not meet the essential standards of fairness.”) In certain cases, removal proceedings also implicate a liberty interest in being free from detention because the INA requires that aliens be held pending the issuance of a final order of removal, or pending the execution of such a removal order. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Ly v. Hansen*, 351 F.3d 263, 269 (6<sup>th</sup> Cir. 2002).

<sup>10</sup> See, e.g., *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9<sup>th</sup> Cir. 2005) (“The right to counsel in immigration proceedings is rooted in the Due Process Clause.”); *Dakane v. U.S. Attorney General*, 399 F.3d 1269, 1273 (11<sup>th</sup> Cir. 2005) (“It is well established in this Circuit that an alien in civil deportation proceedings ... has the constitutional right under the Fifth Amendment Due Process Clause ... to a fundamentally fair hearing.”); *Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005) (“The Fifth Amendment entitles aliens to due process of law in deportation proceedings.”); *Rosales v. Bureau of Immigration & Customs Enforcement*, 426 F.3d 733, 736 (5<sup>th</sup> Cir. 2005) (“[D]ue process requires that deportation hearings be fundamentally fair”); *Brown v. Ashcroft*, 360 F.3d 346, 350 (2d Cir. 2004) (“The right ... under the Fifth Amendment to due process of law in deportation proceedings is well established.”).

<sup>11</sup> 611 F.3d 171, 181 (3d Cir. 2010).

<sup>12</sup> 456 F.3d 347, 360 (3d Cir. 2006).

expense,<sup>13</sup> discussed below, although courts have generally treated actions that deprive aliens of counsel at their own expenses as violating the statute, not the Constitution.<sup>14</sup>

Then-Attorney General Mukasey departed from this general view in his 2009 decision in *Matter of Compean*, finding that aliens have no Fifth Amendment right to counsel at their own expense in removal proceedings.<sup>15</sup> This finding formed, in part, the basis for his articulation of a new standard for assessing claims of ineffective assistance of counsel in removal proceedings,<sup>16</sup> since aliens cannot be said to have a constitutional right to effective assistance of counsel in removal proceedings if they lack any constitutional right to counsel in these proceedings.<sup>17</sup> However, this decision was vacated later in 2009 by Attorney General Holder.<sup>18</sup> Holder's decision in *Matter of Compean* is primarily concerned with the standards for assessing claims of ineffective assistance of counsel in removal proceedings,<sup>19</sup> but the *vacatur* apparently encompasses Mukasey's findings about aliens' Fifth Amendment right to counsel at their own expense.

## INA and Other Provisions of Immigration Law

Various provisions of the INA and other immigration-related statutes, as well as their implementing regulations, provide aliens with a right to counsel at their own expense in removal proceedings. Section 292 of the INA generally governs aliens' right to counsel, and provides that,

In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel ... as he shall choose.<sup>20</sup>

However, other provisions of the INA or related statutes address the rights of particular categories of aliens (e.g., children),<sup>21</sup> or aliens' rights in particular types of removal proceedings (e.g.,

<sup>13</sup> See, e.g., *Leslie*, 611 F.3d 171, 180-181 (“[Aliens’] statutory and regulatory right to counsel is also derivative of the due process right to a fundamentally fair hearing.”); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1302 (7<sup>th</sup> Cir. 1975) (characterizing the INA’s provisions regarding the right to counsel as “an integral part of the procedural due process to which the alien is entitled”).

<sup>14</sup> See “Right to Counsel at the Alien’s Expense: INA and Other Provisions of Immigration Law.”

<sup>15</sup> 24 I. & N. Dec. 710, 726 (A.G. 2009) (“The fact that aliens in removal proceedings have a statutory privilege to retain counsel of their choosing at no expense to the Government ... does not change the constitutional analysis, because a statutory privilege is not the same as a right to assistance of counsel, including Government-appointed counsel, under the Constitution.”). Decisions by the Board of Immigration Appeals (BIA)—the highest administrative tribunal for interpreting and applying immigration law—may be certified to the Attorney General for his review, resulting in decisions such as that in *Matter of Compean*. See generally 8 C.F.R. §1003.1(h)(1)(i)-(iii).

<sup>16</sup> 24 I. & N. Dec. at 732-739.

<sup>17</sup> *Id.* at 729 (“[T]here is no valid basis for finding a constitutional right to counsel in removal proceedings, and thus no valid basis for recognizing a constitutional right to effective assistance of privately retained lawyers in such proceedings.”).

<sup>18</sup> 25 I. & N. Dec. 1 (A.G. 2009).

<sup>19</sup> *Id.* at 2 (directing the Executive Office for Immigration Review (EOIR) to initiate rulemaking procedures “as soon as practicable” to determine the appropriate standard for assessing claims of ineffective assistance of counsel in removal proceedings).

<sup>20</sup> See 8 U.S.C. §1362.

<sup>21</sup> See, e.g., 8 U.S.C. §1232(c)(5) (“The Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of the [INA] ..., that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not nationals or habitual residents (continued...)”).

expedited removal under Section 238 of the INA).<sup>22</sup> These statutory provisions also afford aliens certain other rights as to counsel in removal proceedings. Specifically, they (1) impose restrictions upon when hearings in removal proceedings may be held, so as to permit aliens the opportunity to obtain counsel;<sup>23</sup> (2) require that aliens against whom removal proceedings have been initiated be furnished with lists of persons available for *pro bono* representation;<sup>24</sup> and (3) establish additional protections for classes of aliens who are seen as particularly “vulnerable” (e.g., unaccompanied minors, “mentally incompetent” individuals).<sup>25</sup> Many of these statutory provisions describe aliens’ retention of counsel at their own expense as a “privilege.”<sup>26</sup> However, the implementing regulations are drafted so as to suggest that there is a legal right to counsel at the alien’s expense,<sup>27</sup> and numerous courts have construed the INA as establishing a statutory right to counsel at the alien’s expense.<sup>28</sup>

(...continued)

of countries contiguous with the United States, have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.”); INA §240(b)(3), 8 U.S.C. §1229a(b)(3) (“If it is impracticable by reason of an alien’s mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.”). Among other things, the safeguards for “mentally incompetent” aliens (1) call for service of the Notice to Appear (NTA) initiating removal proceedings upon near relatives, guardians, or friends of the alien, 8 C.F.R. §103.8(c)(2); 8 C.F.R. §236.2(a); (2) permit attorneys, legal representatives and guardians, and family and friends of the alien to appear on the alien’s behalf in removal proceedings, 8 C.F.R. §1240.4; and (3) bar immigration judges from accepting admissions of removability from unrepresented respondents who are “incompetent” absent certain assistance from third parties, 8 C.F.R. §1240.10(c).

<sup>22</sup> See, e.g., INA §208(d)(4), 8 U.S.C. §1158(d)(4) (requiring that applicants for asylum be advised of the “privilege” of being represented by counsel and given a list of persons who can provide *pro bono* representation); INA §238(b)(4)(B), 8 U.S.C. §1228(b)(4)(B) (providing that aliens convicted of aggravated felonies who are subject to expedited removal under Section 238 of the INA shall “have the privilege of being represented (at no expense to the government) by such counsel ... as the alien shall choose.”). Expedited removal under Section 238 is distinct from expedited removal under Section 235. See *supra* note 4 and accompanying text.

<sup>23</sup> See, e.g., INA §239(b)(1), 8 U.S.C. §1229(b)(1).

<sup>24</sup> See, e.g., INA §239(b)(2), 8 U.S.C. §1229(b)(2) (general requirement); 8 C.F.R. §238.1(b)(2)(iv) (requirement as to aliens convicted of aggravated felonies who are facing “expedited removal” under Section 238 of the INA).

<sup>25</sup> See, e.g., 6 U.S.C. §279(b)(1)(A) (requiring the Office of Refugee Resettlement (ORR) at the Department of Health and Human Services to develop a plan to “ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on November 25, 2002”). Despite the reference to the “appointment” of counsel, this provision has not been construed to require that unaccompanied alien children (UAC) receive counsel at the government’s expense because such representation is to be “consistent with the law regarding appointment of counsel that is in effect on November 25, 2002,” and the INA at that time generally provided only for aliens’ right to counsel at their own expense. ORR sought to meet this mandate by contracting with the Vera Institute of Justice in 2005 to develop and test ways to provide legal representation to UAC. See Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 5 HARV. J. LEG. 332, 340 (2013). The Institute, in turn, oversees programs at 17 nonprofit agencies that provide legal assistance to UAC throughout the country. *Id.* Among other things, these agencies make presentations about legal rights at local detention facilities before UAC’s first court appearance, conduct individual screenings to identify UAC’s legal needs and furnish information, and provide *pro bono* assistance and referrals. *Id.* For more on the protections for “mentally incompetent” individuals, see *supra* note 21.

<sup>26</sup> See, e.g., INA §208(d)(4), 8 U.S.C. §1158(d)(4); INA §292, 8 U.S.C. §1362. But see *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9<sup>th</sup> Cir. 1982) (noting that the captions of some provisions refer to a “Right to Counsel”).

<sup>27</sup> See, e.g., 8 C.F.R. §292.5(b) (“Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative.”); 8 C.F.R. §1240.10(a)(1) (“In a removal proceeding, the immigration judge shall ... [a]dvice the respondent of his or her right to representation at no expense to the government, by counsel of his or her choice.”).

<sup>28</sup> See *supra* note 11; *Castro-O’Ryan*, 847 F.2d at 1312 (noting that the caption of Section 292 of the INA, as well as its legislative history, “confirms that Congress wanted to confer a right”).

These and other courts have generally viewed aliens' statutory right to counsel at their own expense as satisfied if the immigration judge inquires whether the alien wishes counsel, gives any alien wishing counsel a reasonable period of time in which to obtain it, and determines that any waivers of this right are knowing and voluntary.<sup>29</sup> On the other hand, violations of aliens' right to counsel at their own expense have been found in specific circumstances where (1) the alien was not advised of his/her due process rights, including the right to counsel, in a language s/he could understand;<sup>30</sup> (2) the alien was transferred to a remote facility without notice to his/her attorney;<sup>31</sup> (3) the government exercised "unexplained" haste in beginning removal proceedings;<sup>32</sup> (4) the alien was prevented from consulting with counsel prior to signing a voluntary departure form;<sup>33</sup> (5) the alien was denied access to basic written legal materials;<sup>34</sup> and (6) the alien was denied a change of venue to allow the retention of counsel.<sup>35</sup> Courts in some jurisdictions have, however, found that violations of aliens' statutory right to counsel at their own expense are not, in themselves, grounds for reopening removal proceedings or otherwise permitting the alien to re-litigate his/her removability or eligibility for relief from removal.<sup>36</sup> Instead, courts in these jurisdictions have generally required that aliens show that any violation of their statutory rights was "prejudicial" in that the outcome of the proceeding could have been different absent the violation.<sup>37</sup> For example, in *United States v. Reyes-Bonilla*, the U.S. Court of Appeals for the Ninth Circuit found that an alien was not entitled to have his conviction for violating 8 U.S.C. §1326 (being a deported alien found in the United States without permission) overturned due to a violation of his statutory rights because he could not show the requisite prejudice resulting from such violation.<sup>38</sup> In so finding, the Ninth Circuit noted that the immigration judge had failed to provide Reyes-Bonilla the requisite notice of his rights—including his right to counsel at his own expense—in a language he could understand during his removal proceedings. However, it did not view this error as having affected the outcome of the proceeding because Reyes-Bonilla's ability to obtain relief from removal was "severely limited," regardless of whether he had counsel, due to his "prior convictions for aggravated felonies."<sup>39</sup>

<sup>29</sup> See, e.g., *United States v. Ramos*, 623 F.3d 672, 682 (9<sup>th</sup> Cir. 2010); *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9<sup>th</sup> Cir. 2004).

<sup>30</sup> See, e.g., *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1046 (9<sup>th</sup> Cir. 2012); *Ramos*, 623 F.3d at 683.

<sup>31</sup> See, e.g., *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 565 (9<sup>th</sup> Cir. 1990); *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9<sup>th</sup> Cir. 1985). *But see* *Committee of Central American Refugees v. INS*, 682 F. Supp. 1055, 1065 (N.D. Cal. 1988) (transfer to a remote location does not, per se, violate due process absent an existing attorney-client relationship).

<sup>32</sup> See *Rios-Berrios*, 776 F.2d at 863.

<sup>33</sup> See *Orantes-Hernandez*, 919 F.2d at 565.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See generally Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 133 n.133 (2008) (discussing variations in courts' approaches on this issue).

<sup>37</sup> See, e.g., *Cruz Rendon v. Holder*, 603 F.3d 1104, 1109 (9<sup>th</sup> Cir. 2010) ("The alien also must show prejudice, 'which means that the outcome of the proceeding may have been affected by the alleged violation.'"); *Lapaix v. U.S. Att'y Gen.*, 605 F.3d 1138, 1143 (11<sup>th</sup> Cir. 2012) ("To establish a due process violation, the petitioner must show that she was deprived of liberty without due process of law and that the purported errors caused her substantial prejudice. ... To show substantial prejudice, an alien must demonstrate that, in the absence of the alleged violations, the outcome of the proceeding would have been different."); *Alzainati v. Holder*, 568 F.3d 844, 851 (10<sup>th</sup> Cir. 2009) ("To prevail on a due process claim, an alien must establish not only error, but prejudice."); *Lopez v. Heinauer*, 332 F.3d 507, 512 (8<sup>th</sup> Cir. 2003) ("To demonstrate a violation of due process, an alien must demonstrate both a fundamental procedural error and that the error resulted in prejudice.").

<sup>38</sup> See generally 671 F.3d 1036 (9<sup>th</sup> Cir. 2012).

<sup>39</sup> *Id.* at 1049. In so finding, the Ninth Circuit expressly declined to adopt the view that any error is, per se, prejudicial, (continued...)

## Right to Counsel at the Government's Expense

Aliens, as a category, have generally not been seen as having either constitutional or statutory rights to counsel at the government's expense in administrative removal proceedings. The Sixth Amendment right to appointed counsel for indigent persons applies only in criminal proceedings, not in civil proceedings such as removal. The INA and its implementing regulations also do not purport to provide a right to counsel at the government's expense for any aliens except those subject to removal proceedings before the Alien Terrorist Removal Court, which has not been used to date. Nonetheless, individual aliens could potentially be found to have a right to counsel at the government's expense based on the Fifth Amendment's guarantee of due process or Section 504 of the Rehabilitation Act, depending upon the facts and circumstances of the case.

### Sixth Amendment

Courts have repeatedly declined to find that indigent aliens have a Sixth Amendment right to counsel at the government's expense in removal proceedings.<sup>40</sup> Those who would afford such a right to aliens often emphasize the serious consequences that being removed from the United States can have for aliens.<sup>41</sup> They sometimes also note that immigration law has become increasingly intertwined with criminal law (a phenomenon sometimes referred to as "crimmigration").<sup>42</sup> However, such arguments have consistently proved unavailing because the Sixth Amendment explicitly refers to "the Assistance of Counsel" in "criminal proceedings,"<sup>44</sup> and removal proceedings are civil in nature.<sup>45</sup> Thus, courts have deemed it appropriate that aliens subject to removal receive a different degree of protections than criminal defendants because removal proceedings are civil, not criminal.<sup>46</sup>

(...continued)

instead requiring a showing of actual prejudice to the alien's case. *Id.* at 1047-1048.

<sup>40</sup> See, e.g., *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10<sup>th</sup> Cir. 2003); *Ramos*, 623 F.3d at 682; *Romero v. U.S. INS*, 399 F.3d 109, 112 (2d Cir. 2005); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8<sup>th</sup> Cir. 2004); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5<sup>th</sup> Cir. 2001); *Hernandez v. Reno*, 238 F.3d 50, 55 (1<sup>st</sup> Cir. 2001); *Stroe v. INS*, 256 F.3d 498, 500-501 (7<sup>th</sup> Cir. 2001); *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 131 (3d Cir. 2001); *Mejia-Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11<sup>th</sup> Cir. 1999); *Mustata v. U.S. Dep't of Justice [DOJ]*, 179 F.3d 1017, 1022 n.6 (6<sup>th</sup> Cir. 1999); *Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4<sup>th</sup> Cir. 1995); *Mantell v. U.S. DOJ*, 798 F.2d 124, 127 (5<sup>th</sup> Cir. 1986).

<sup>41</sup> See, e.g., *Bridges*, 326 U.S. at 154 ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted."). In addition, some aliens may be subject to detention during removal proceedings or pending their removal. See INA §§235-236, 8 U.S.C. §§1225-1226.

<sup>42</sup> See Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and the Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

<sup>43</sup> See, e.g., Mark T. Fennell, *Preserving Process in the Wake of Policy: The Need for Appointed Counsel in Immigration Removal Proceedings*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 261 (2009); Nimrod Pitsker, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CAL. L. REV. 169 (2007).

<sup>44</sup> U.S. Const., amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

<sup>45</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry."); *Abel v. United States*, 362 U.S. 217, 237 (1960) (noting the different procedural protections associated with criminal proceedings and removal proceedings).

<sup>46</sup> *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013) ("A noncitizen in removal proceedings is not at all similarly situated to a defendant in a federal criminal prosecution."); *Lopez-Mendoza*, 468 U.S. at 1039 ("[A] deportation hearing (continued...)")

Aliens are, however, entitled to counsel at the government's expense in criminal proceedings to the same extent as citizens.<sup>47</sup> This can include any criminal proceedings that may also result in a judicial order of removal, although such orders are rarely sought.<sup>48</sup>

## INA and Other Provisions of Immigration Law

The INA also generally does not purport to afford aliens a right to counsel at the government's expense in removal proceedings. Alone among the provisions of the INA, 8 U.S.C. Section 1534 states that "[a]ny alien financially unable to obtain counsel shall be entitled to have counsel assigned to represent" him or her.<sup>49</sup> However, this provision applies only to aliens removed by the Alien Terrorist Removal Court, a forum which has not been used to date.<sup>50</sup> All the other provisions of the INA and their implementing regulations specify that aliens' right to counsel shall be "at no expense to the government."<sup>51</sup>

In fact, some have suggested that the INA's provisions regarding counsel "at no expense to the government" bar the government from providing or otherwise paying for aliens' counsel in removal proceedings.<sup>52</sup> Those making this argument seemingly construe the language about aliens' "privilege" to have counsel at their own expense to mean that the government may not pay for counsel for them. However, an argument could be made that these provisions only restrict aliens' ability to claim an entitlement to counsel at the government's expense, and do not preclude the government from paying for aliens' counsel pursuant to other provisions of law or at its discretion.<sup>53</sup> Indeed, as previously noted, the federal government—as well as certain local

(...continued)

is intended to provide a streamlined determination of eligibility to remain in this country, nothing more.”).

<sup>47</sup> See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 388 (2010) (Scalia, J., dissenting on other grounds) (noting that Sixth Amendment protections apply to “the accused,” a term which has been construed to include aliens).

<sup>48</sup> Thomas Alexander Aleinikoff, David A. Martin, Hiroshi Motomura, & Maryellen Fullerton, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1210 (7<sup>th</sup> ed. 2012) (noting that judicial orders of removal are “rarely used today”). For a court to order removal as part of a criminal proceeding, the U.S. Attorney must seek a removal order with the concurrence of federal immigration authorities, and the court must agree to hear the removal case. See INA §238(c), 8 U.S.C. §1228(c).

<sup>49</sup> INA §504(c)(1), 8 U.S.C. §1534(c)(1).

<sup>50</sup> See, e.g., Andrew Becker, *Terrorist Court Unused 16 Years after Creation*, Apr. 12, 2012, *available at* <http://californiawatch.org/dailyreport/terrorist-court-unused-16-years-after-creation-14746>.

<sup>51</sup> See, e.g., INA §235(b)(1)(B)(iv), 8 U.S.C. §1225(b)(1)(B)(iv); INA §238(b)(4)(B), 8 U.S.C. §1228(b)(4)(B); INA §240(b)(4)(A), 8 U.S.C. §1229a(b)(4)(A); INA §292, 8 U.S.C. §1362.

<sup>52</sup> See, e.g., *Escobar Ruiz v. INS*, 787 F.2d 1294 (9<sup>th</sup> Cir. 1986) (holding that Section 292 of the INA does not bar the payment of attorney fees, pursuant to the Equal Access to Justice Act (EAJA), to prevailing plaintiffs); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6<sup>th</sup> Cir. 1975) (noting that the immigration judge in this case had found that Section 292 of the INA barred the provision of appointed counsel for the plaintiff); *Funding of a Pilot Project for the Representation of Aliens in Immigration Proceedings*, memorandum from David A. Martin, General Counsel, INS, to T. Alexander Aleinikoff, Executive Associate Commissioner, INS, Dec. 21, 1995 (reading 5 U.S.C. §3106, which generally bars agencies from “employ[ing] an attorney or counsel for the conduct of litigation in which the United States ... is a party,” in conjunction with INA §292, to bar the appointment of counsel for aliens in removal proceedings) (copy on file with the author).

<sup>53</sup> See *Views Concerning Whether It Is Legally Permissible to Use Discretionary Funding for Representation of Aliens in Immigration Proceedings*, memorandum from David A. Martin, Principal Deputy General Counsel, Department of Homeland Security, to Thomas J. Perrelli, Associate Attorney General, Department of Justice, Dec. 10, 2010 (copy on file with the author).

governments—have recently adopted programs to provide counsel for at least certain aliens in removal proceedings.<sup>54</sup>

## Fifth Amendment

In contrast, at least four federal courts of appeals<sup>55</sup> have opined that the Fifth Amendment's guarantee of due process could potentially require the appointment of counsel for individual aliens who are incapable of representing themselves due to "age, ignorance, or mental capacity."<sup>56</sup> The earliest and most cited example of this appears to be the U.S. Court of Appeals for the Sixth Circuit's 1975 decision in *Aguilera-Enriquez v. Immigration and Naturalization Service*.<sup>57</sup> There, the court rejected the argument that Section 292 of the INA—which provides for aliens to be represented by counsel in removal proceedings at their own expense—unconstitutionally deprived aliens of their right to counsel. In so doing, the court indicated that it viewed the Due Process Clause of the Fifth Amendment to require the appointment of counsel "[w]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge."<sup>58</sup> However, it viewed the entitlement to appointed counsel as being determined on a case-by-case basis, and, in this case, it concluded that there was "no defense for which a lawyer would have helped."<sup>59</sup>

There are certain contexts wherein courts have recognized a Fifth Amendment right to appointed counsel for all persons subject to particular types of proceedings, regardless of their individual circumstances.<sup>60</sup> However, courts have, to date, declined to take this approach to aliens—or even particular subcategories of aliens—facing removal proceedings.<sup>61</sup> A federal district court in

<sup>54</sup> See *supra* note 1 and accompanying text.

<sup>55</sup> See *Aguilera-Enriquez*, 516 F.2d at 569 n.3; *Michelson v. INS*, 897 F.2d 465, 468 (10<sup>th</sup> Cir. 1990); *Ruiz v. INS*, 787 F.2d 1294, 1297 n.3 (9<sup>th</sup> Cir. 1996), *withdrawn on other grounds*, 838 F.2d 1020 (9<sup>th</sup> Cir. 1998) (en banc); *Barthold v. INS*, 517 F.2d 689, 690-91 (5<sup>th</sup> Cir. 1975).

<sup>56</sup> Cf. *Wade v. Mayo*, 334 U.S. 672, 683-684 (1948) ("There are some individuals who, by reason of age, ignorance, or mental capacity, are incapable of representing themselves in a prosecution of a relatively simple nature. ... Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law.").

<sup>57</sup> 516 F.2d 565 (6<sup>th</sup> Cir. 1975).

<sup>58</sup> *Id.* at 568 n.3.

<sup>59</sup> *Id.*

<sup>60</sup> Compare *Vitek v. Jones*, 445 U.S. 480 (1980) (plurality of the Court finding that due process required the appointment of counsel for an indigent prisoner facing commitment to a mental institution); *In re Gault*, 387 U.S. 1, 41 (1966) (children in delinquency proceedings have a categorical right to appointed counsel under the Due Process Clause); *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005) (categorical right to appointed counsel for children in proceedings to terminate parental rights pursuant to the Due Process Clause of the Georgia constitution, which tracks the language of the U.S. Constitution); and *In re T.T.*, 599 N.Y.S.2d 892, 894 (App. Div. 1993) (same right under the U.S. Constitution) with *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26 (1981) (establishing a presumption that "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty"). See also *Parham v. J.R.*, 442 U.S. 584, 627-28 (1979) (Brennan, J., dissenting) ("[C]hildhood is a particularly vulnerable time of life.").

<sup>61</sup> *Chlomos v. INS*, 516 F.2d 310, 314 (3d Cir. 1975) (considering whether the alien was actually prejudiced by the alleged errors in his removal proceedings); *Burquez v. INS*, 513 F.2d 751, 755 (10<sup>th</sup> Cir. 1975) (same); *Henriques v. INS*, 465 F.2d 119, 120 n.3 (2d Cir. 1972) ("[W]e can agree with, and follow, the majority in *Argersinger* and *Gideon*, each involving the sixth amendment and criminal cases, without reaching a blanket rule that the fifth amendment requires, as a matter of due process, counsel for indigent aliens in deportation cases, regardless of their nature."), *Tupacypunqui-Marin v. INS*, 447 F.2d 603, 606 (7<sup>th</sup> Cir. 1971) (considering whether the alien was actually prejudiced by the alleged violations of Due Process in his removal proceedings).

Washington, for example, expressly rejected the argument that unaccompanied alien children (UAC), as a class, have a due process right to appointed counsel in its 2002 decision *Gonzalez Machado v. Ashcroft*.<sup>62</sup> In so doing, the court indicated that the “[c]ase law does not demonstrate ... that the right to counsel is on an inevitable path of outward expansion,”<sup>63</sup> a factor which the court viewed as significant since the plaintiff would have to show that the precedents finding that aliens have no right to counsel at the government’s expense in removal proceedings have been “eroded” by subsequent decisions or “become anachronistic” in order to prevail in the face of the government’s motion to dismiss the complaint.<sup>64</sup>

Indeed, to date, there does not appear to be any published decision in which a court has found that the Due Process Clause requires the appointment of counsel for an individual alien.<sup>65</sup>

## Rehabilitation Act

Section 504 of the Rehabilitation Act has also been construed to require the appointment of “qualified representatives”—a term which includes (but is not limited to) legal counsel—for aliens who are “mentally incompetent” to represent themselves in removal proceedings.<sup>66</sup> Section 504 states, in relevant part, that no “qualified individual with a disability” may “be excluded from participation in, be denied the benefits of, or be subjected to discrimination ... under any program or activity conducted by any Executive agency,”<sup>67</sup> and has been construed to mean that agencies cannot deny qualified individuals with disabilities any “reasonable accommodation” that they might need in order to enjoy meaningful access to the benefits of public services.<sup>68</sup> As used here,

<sup>62</sup> Order Granting Motion to Dismiss, No. CS-01-0066-FVS (E.D. Wa. June 18, 2002) (copy on file with the author).

<sup>63</sup> *Id.* at 17. See also *Perez-Funez v. District Director*, 619 F. Supp. 656 (C.D. Cal. 1985) (finding that the government’s practices in obtaining voluntary departure agreements from UAC violated due process, but also noting that the “case law clearly forecloses ... a finding” that UAC have a right to appointed counsel).

<sup>64</sup> Order Granting Motion to Dismiss, *supra* note 62, at 13. Similarly, in his 2009 decision in *Matter of Compean*, then-Attorney General Mukasey distinguished the potential loss of physical liberty associated with removal proceedings from that in other proceedings wherein courts have found a categorical right to appointed counsel under the Due Process Clause on the grounds that the loss of physical liberty is incidental to removal proceedings, rather than the outcome of such proceedings. 24 I. & N. Dec. at 718 n.3 (“Although an alien may be detained during the course of removal proceedings, he does not ‘lose his physical liberty’ based on the outcome of the proceeding.”). In so stating, Attorney General Mukasey was apparently influenced by the “presumption”, established by the Supreme Court in *Lassiter*, that “an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” See 452 U.S. at 27. While Mukasey’s decision here has been vacated, it was arguably vacated on other grounds, and it is unclear that a court would necessarily adopt different reasoning as to the distinction between removal proceedings and other proceedings wherein persons have been found to have a Fifth Amendment right to appointed counsel.

<sup>65</sup> See IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY, *supra* note 48, at 1155 (“Research reveals no published decision applying the test set forth in *Aguilera-Enriquez* to require government-paid counsel in a deportation or removal proceeding, though many cases reiterate the fundamental fairness standard.”).

<sup>66</sup> See *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010). Initially, the court expressly declined to address the merits of the plaintiffs’ claim that due process also requires the appointment of counsel for them. *Id.* at 1059. However, dicta in a subsequent decision suggest that the court may have viewed the plaintiffs as having a “constitutional right to representation” at the government’s expense. See *Franco-Gonzalez v. Holder*, 828 F. Supp. 2d 1133, 1145 (C.D. Cal. 2011).

<sup>67</sup> 29 U.S.C. §794(a).

<sup>68</sup> 28 C.F.R. §35.130(b)(7); *Alexander v. Choate*, 469 U.S. 287, 300-301 n.21 (1985); *Mark H. v. Hamamoto*, 620 F.3d 1090, 1098 (9<sup>th</sup> Cir. 2010).

*disability* includes “a physical or mental impairment that substantially limits one or more major life activities of such individual.”<sup>69</sup>

In the litigation that gave rise to this finding, *Franco-Gonzales v. Holder*, the government apparently did not contest that the plaintiffs—who included aliens found incompetent to stand trial for criminal offenses—had established a *prima facie* case under Section 504.<sup>70</sup> Instead, the plaintiffs and the government disagreed over whether current statutory and regulatory protections, discussed above, suffice to protect the rights of “mentally incompetent” aliens in removal proceedings<sup>71</sup> and, if not, what would constitute a reasonable accommodation.<sup>72</sup> The court agreed with the plaintiffs that the existing statutory and regulatory protections are inadequate, in part, because “near relatives” or “friends” acting as the alien’s “representatives” cannot be compelled to appear in removal proceedings and are often unable to adequately represent the alien’s interests.<sup>73</sup> The court also agreed with the plaintiffs that the appointment of “qualified representatives,” either *pro bono* or at the government’s expense, for the entirety of the immigration proceedings constituted a reasonable accommodation.<sup>74</sup> In so finding, the court expressly rejected the government’s argument that Section 504 is “only intended to level the playing field and not to provide advantages to the disabled” on the grounds that an accommodation which provides a preference can constitute a “reasonable accommodation” for purposes of the Rehabilitation Act.<sup>75</sup>

In a 2010 decision, the *Franco-Gonzales* court adopted the plaintiffs’ proposed definition of a *qualified representative* as a person (1) obligated to provide zealous representation; (2) subject to sanction by the immigration courts for ineffective assistance; (3) free of any conflicts of interest; (4) having adequate knowledge and information to provide representation at least as competent as that provided by an alien detained pending removal proceedings with ample time, motivation, and access to legal material; and (5) obligated to maintain the confidentiality of information.<sup>76</sup> However, it did not directly address whether qualified representatives must be attorneys. A subsequent decision, issued in 2011, clarified that qualified representatives can include not only licensed attorneys but also law students or graduates who are directly supervised by retained attorneys and “accredited representatives.”<sup>77</sup> *Accredited representatives* are persons employed by certain non-profit religious, charitable, social service, or similar organizations who have been accredited by the Board of Immigration Appeals (BIA) and are effectively registered to practice before the immigration judges and the BIA.<sup>78</sup>

<sup>69</sup> 42 U.S.C. §12102(1).

<sup>70</sup> See 767 F. Supp. 2d at 1052.

<sup>71</sup> *Id.* at 1052-1053. The defendants conceded that the protections required under existing law had not been provided here. *Id.* 1053.

<sup>72</sup> *Id.* at 1053-1056.

<sup>73</sup> *Id.* at 1054.

<sup>74</sup> *Id.* at 1058. The court expressly rejected the plaintiffs suggestion that counsel be appointed pursuant to the Criminal Justice Act, 18 U.S.C. §2006A(a)(1)(D) and (I), on the grounds this provision contemplates the appointment of criminal defense attorneys, and expertise in criminal law is not necessarily relevant to removal proceedings. *Id.* at 1058 n.20.

<sup>75</sup> 767 F. Supp. 2d at 1056.

<sup>76</sup> *Id.* at 1058.

<sup>77</sup> *Franco-Gonzalez*, 828 F. Supp. 2d at 1147.

<sup>78</sup> 8 C.F.R. §1292.1(a)(4).

In 2013, as a result of the *Franco-Gonzales* litigation, the Departments of Justice and Homeland Security adopted a “nationwide policy” regarding unrepresented immigration detainees with “serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings.” Among other things, this policy calls for procedures that would make qualified representatives available to such individuals.<sup>79</sup>

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<sup>79</sup> Dep’t of Justice, Press Release, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions, Apr. 22, 2013, available at <http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html>. The announcement of this policy coincided with the court’s issuance of an order permanently enjoining the government to provide qualified representatives, “whether *pro bono* or at Defendants’ expense,” for the plaintiffs. See *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), Partial Judgment and Permanent Injunction, at ¶¶ 2 and 6 (D.C. Cal., Apr. 23, 2013) (copy on file with the author). For purposes of this order, representation must be provided for appeals and custody hearings. *Id.* at ¶ 6.