

S U M M A R Y

Most of the immigrants in the United States who face removal, the process more commonly known as deportation, lack legal representation. Although criminal defendants and people in many civil proceedings enjoy a right to appointed counsel, immigrants in removal proceedings do not. By statute, they can be represented by counsel, but “at no expense to the Government.” Courts have recognized, in theory, that due process protections could require government-funded counsel in particular removal cases, but in practice they have uniformly refused to appoint counsel. Charitable and pro bono legal projects cannot afford to serve all indigent immigrants, and few immigrants can adequately represent themselves. Detainees face particular hurdles in attempting to secure counsel and represent themselves. In these proceedings, unrepresented immigrants generally fare far more poorly than do those with counsel.

Legal representation benefits immigrants, but it also serves the government’s interest by promoting better-prepared cases, more efficient proceedings, shorter detention periods, and correct legal decisions. The factors that support appointed counsel in criminal cases and certain civil cases—the adversarial nature of the proceedings, the complexity of the law, and the severe consequences of an adverse decision—also obtain in removal proceedings. Recent changes in immigration law, the increased treatment of immigration violations as crimes, and the trend towards government-funded counsel in analogous federal and state civil cases also argue for an appointed counsel system. This Insight highlights three models that the government could adopt or expand to increase legal representation: (1) a public defender-like system; (2) a pro bono representation model; and (3) a “legal orientation” program for detainees. It sets forth five ways that legal representation could be increased without significant federal funding, including changes in federal law and greater state and private support.

Revisiting the Need for Appointed Counsel

By Donald Kerwin

The US legal system recognizes the value of counsel in complex proceedings, particularly those with weighty consequences. As a result, the government often provides legal counsel to indigent persons, either as a matter of constitutional right or by statute. Removal (deportation) proceedings seem an appropriate area for government-appointed lawyers. Immigration law and procedures are so complex that very few immigrants can adequately represent themselves. By any measure, banishment from the country constitutes a severe sanction. Yet most immigrants face removal proceedings without counsel, and unrepresented immigrants fare far more poorly than do those with counsel. By federal statute, persons in removal proceedings have “the privilege of being represented,” but “at no expense to the Government.”¹ This paper analyzes the “no expense” restriction. It concludes that an appointed counsel system would serve the interests of the government and of non-citizens facing removal. It outlines options that the government, private funders, and non-governmental organizations might pursue to increase legal representation in these proceedings.

Immigration Law and Policy

When the US Department of Homeland Security (DHS) decides that a non-citizen should be removed (deported) for an immigration violation, it issues a “Notice to Appear” (NTA) which sets forth the legal grounds for removal.² The NTA transfers jurisdiction of the case from DHS to the Executive Office for Immigration Review (EOIR), the Department of Justice (DOJ) entity that oversees the Immigration Courts. The NTA also serves to initiate removal proceedings. Responsibility for detention and (ultimately) removal rests with DHS. Non-citizens in removal proceedings can concede to

1 Immigration and Nationality Act (INA) § 292.

2 In cases initiated since April 1, 1997, “removal” proceedings have replaced “deportation” (for persons in the country) and “exclusion” proceedings (for those seeking admission).

removal (or to depart voluntarily), or they can seek to avoid removal by contesting the grounds of removal, asserting a claim for “relief” or both.

Recent changes in immigration law have increased the need for competent counsel. The consequences for immigration violations can include automatic removal, mandatory detention, and even criminal prosecution. Legal standards have become far more complex. New rules governing administrative appeals and federal court review make it more difficult and in many cases impossible to appeal adverse decisions by Immigration Judges. Finally, the post-September 11 use of the removal process as a proxy for terrorism-related prosecutions has further blurred the distinction between violations of immigration and criminal law.

The 1996 Immigration Act

In the last two decades, culminating with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“the 1996 Immigration Act”),³ the grounds for removal have expanded and relief from removal has been significantly restricted, particularly in cases involving criminal convictions. “Aggravated felons”—an expansive category unique to immigration law—cannot contest removal notwithstanding their US family ties, the time elapsed since their convictions, or the severity of their crimes. Criminal defense attorneys frequently advise their clients to accept plea agreements unaware of the immigration repercussions. In other cases, judges accept waivers of counsel and plea agreements from immigrants who cannot read the relevant form or understand English.⁴ These immigrants can find themselves in removal proceedings (without counsel) because they lacked representation in their criminal cases.

Removal proceedings, although characterized as “civil,”⁵ bear striking similarities to criminal trials. Pro se (unrepresented) litigants must identify, corroborate, and argue complex claims, often in their second language, before a presiding judge. They must attempt to master a complex area of the law. They must develop and argue factually and legally complex claims for relief. They must contest the government’s charge, introduce evidence, and put on witnesses. They must compete against opposing government counsel, knowing that their failure will result in banishment and, in some cases, persecution. Language and interpreter problems and the increased use of videoconferencing to conduct hearings further complicate representation. Competent representation is essential to securing the procedural protections available in removal proceedings. As the adage goes, the person who represents himself has a fool for a client. However, without some system of appointed counsel, this folly cannot be avoided.

The crucial role of legal counsel in immigration cases has been highlighted by a recent Supreme Court decision. In the case, a lawful permanent resident had been removed as an “aggravated felon” for committing a “crime of violence,” drunk driving.⁶ In a unanimous decision, the Court held that a conviction under the Florida drunk driving statute did not constitute a “crime of violence” or (thus) an “aggravated felony” under immigration law.⁷ This issue would never have been articulated, much less pursued, without legal representation. The man received counsel as part of a unique pro bono project that represents immigrants with cases on appeal before the Board of Immigration Appeals (BIA), the immigration appeals court.⁸

The forms of relief available to persons in removal proceedings include, among others,

3 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3 610), Pub. L. No. 104-208, 110 Stat. 3009 (hereinafter “the 1996 Immigration Act”).

4 American Bar Association, Standing Committee on Legal Aid and Indigent Defendants, “Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice” (Dec. 2004) at 25 [hereinafter “Gideon’s Broken Promise.”]

5 *INS v. Lopez-Mendoza*, 468 US 1032, 1038, 104 S.Ct. 3479, 3483, 4 L.Ed.2d 668 (1984).

6 INA §237(a)(2)(A)(iii). “Aggravated felons” cannot receive relief from removal based on their equitable ties to the United States. INA §240A(a)(3). They also face mandatory detention. INA §236(c)(1).

7 *Leocal v. Ashcroft*, 543 US ___, 125 S.Ct. 377, ___, L.Ed.2d, ___ (2004).

8 A three-year “impact assessment” concluded that this project: (1) increased the level and quality of the pro bono representation; (2) led to approval rates three to four times higher than those for unrepresented immigrants; and (3) facilitated the adjudicatory process by reducing the time it took government attorneys to understand the issues on appeal. Board of Immigration Appeals, “The BIA Pro Bono Project is Successful” (Oct. 2004).

political asylum based on “a well-founded fear of persecution” on a statutory ground, non-return based on the likelihood of torture, adjustment to permanent resident status based on a close family relationship to a US citizen or lawful permanent resident, and “cancellation of removal” based on strong equities and long tenure in the country. Persons who are eligible for these forms of relief (and others) have an immense interest in remaining in the United States. As Justice Brandeis put it more than 80 years ago, removal can result “in loss of both property and life; or of all that makes life worth living.”⁹

The loss of liberty has been a decisive factor in the appointment of counsel in various types of civil cases. This has been the case where civil proceedings can lead to confinement and in civil cases in which detainees are parties. Detention now constitutes the norm for broad categories of immigrants in removal proceedings and for those ordered removed.

The 1996 Act greatly expanded the categories of non-citizens subject to mandatory detention. Since its passage, the number of immigration detainees per night has nearly tripled to 21,133.¹⁰ DHS keeps the majority in state and local “contract” jails. It houses the rest in its own Service Processing Centers, in for-profit prisons, and in Bureau of Prison (BOP) facilities. Various factors—remote facilities, detainee transfers,¹¹ short visiting hours, restrictive telephone policies, and a shortage of pro bono legal programs—make it impossible for many indigent

detainees to secure representation,¹² and lead many to abandon their claims altogether.¹³

Post-September 11 Developments

The September 11 terrorist attacks altered the way in which the United States uses its immigration laws and procedures, increasing the need for an appointed counsel system. In the wake of the attacks, the government moved to expand its detention authority. By regulation, it can now detain certain non-citizens for up to 48 hours without a charge or, in “emergency or other extraordinary circumstances,” for a longer “reasonable” period.¹⁴ If DHS has set a bond of at least \$10,000 or has denied bond altogether, it can also hold in abeyance (pending an appeal) a subsequent decision by an Immigration Judge to release a detainee.¹⁵

After September 11, the government initiated a broad investigation that led to the arrest and detention of 762 persons, most of them Middle Easterners and South Asians. According to an April 2003 report by DOJ’s Office of Inspector General, prison officials in two facilities severely mistreated “high interest” detainees, who typically had no connection to terrorism.¹⁶ The detainees endured mental and physical abuse, confinement to their cells, and severe restrictions on access to counsel and visitors.¹⁷ Rather than initiating criminal prosecutions, the government held most detainees on immigration violations. DOJ officials have said that they opted against criminal prosecution to avoid revealing their investigative methods and sources

9 *Ng Fung Ho v. White*, 259 US 276, 284, 42 S. Ct. 492, 495, 66 L.Ed. 938, 943 (1921).

10 US Department of Homeland Security, Office of Immigration Statistics, “2003 Yearbook of Immigration Statistics” (Sept. 2004) at 148.

11 US Department of Homeland Security, Immigration and Customs Enforcement, “Report to Congress: Detained Asylum Seekers Fiscal Year 2002” (In FY 2002, 34 percent of detained “affirmative” asylum-seekers, 23 percent of detained “credible fear” asylum-seekers, and 36 percent of detained “defensive” asylum-seekers were transferred between facilities.)

12 In FY 2002, 36 percent of asylum-seekers in Immigration Court were detained in more than one facility. US Immigration and Customs Enforcement, “Detained Asylum Seekers Fiscal Year 2002,” Report to Congress, Required by Section 903 of the Haitian Refugee Immigration Fairness Act (Pub. L. 105-277) (2004).

13 United States Commission on International Religious Freedom, “Report on Asylum Seekers in Expedited Removal, Volume II: Expert Reports” (Feb. 2005) at 197-198, 412-413 (The report reviews the cases of 39 detained asylum-seekers who forfeited their claims, and concludes that “withdrawal rates are significantly higher for detained aliens.”) [hereinafter “Report on Asylum Seekers in Expedited Removal.”]; Catholic Legal Immigration Network, Inc., “The Needless Detention of Immigrants in the United States: Why Are We Locking Up Asylum-Seekers, Children, Stateless Person, Long-Term Permanent Resident, and Petty Offenders?” (Aug. 2000) at 6 [hereinafter “The Needless Detention of Immigrants in the United States.”]

14 66 Fed. Reg. 48334 (Sept. 20, 2001).

15 8 CFR § 1003.19(i)(2).

16 US Department of Justice, Office of the Inspector General, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks” (Apr. 2003) [hereinafter “OIG Report on September 11 Detainees”] at 16, 41-42.

17 *Id.* at 112.

and due to the comparative ease of removal.¹⁸ These officials prefer the term “preventive prosecution” to “preventive detention” to describe their strategy, but the “prosecutions” overwhelmingly took the form of civil removal proceedings.¹⁹ Although DOJ explicitly used removal proceedings as a proxy for terrorism prosecutions, the detainees—typically in closed proceedings—had no right to appointed counsel.

These cases have erased the traditional line between civil immigration procedures and criminal prosecutions. They also reflect a broader trend to “criminalize” immigration violations. Over the last decade, immigration violations previously treated as civil matters have been made crimes and the rate of prosecutions and the sentences for immigration-related crimes have dramatically increased.²⁰

Administrative Appeals and Federal Review

Recent changes in the administrative appeals process and federal judicial review have made it extremely difficult for represented litigants, much less for pro se ones, to appeal adverse decisions by Immigration Judges.²¹ Under the circumstances, the need for counsel in removal proceedings has become even greater.

In August 2002, DOJ issued a regulation intended to limit the authority of the BIA, to reduce

adjudication delays and to eliminate a backlog of nearly 60,000 cases.²² The BIA can now make de novo factual determinations only if an Immigration Judge has made a “clearly erroneous” finding.²³ The rule allows panel review of appeals only in limited circumstances.²⁴ Pro se appellants will find it difficult to craft appeals to avoid summary denials. Not surprisingly, the new procedures have led to high numbers of denied appeals and affirmances without an opinion.²⁵ Since they have been in place, roughly one-third of BIA decisions have been affirmed without opinion.²⁶ Likewise, appeals by asylum seekers in the expedited removal process have been sustained at far lower rates, falling from a rate of 23 percent in 2001 to only three percent from 2002 to 2004.²⁷

The procedures have also led to increased appeals from the BIA to federal courts of appeal. Rates of appeal have risen from five to 25 percent, with the number of petitions rising from roughly 125 a month (under the old procedures) to between 1,000 and 1,200 a month (under the new).²⁸ Between fiscal year (FY) 2001 and 2004, immigration appeals to federal appeals courts rose 515 percent.²⁹ The number of immigration appeals increased in the Second Circuit (from 170 to 2,632 per year) and in the Ninth Circuit (from 954 to 5,368).³⁰ As a result, DOJ has been forced to divert immigration cases to other divisions

18 Presentation by Stuart Levey, Associate Deputy Attorney General, Catholic Legal Immigration Network, Inc. and Migration and Refugee Services, Conference on Government Policies, Practices and National Security Since September 11, 2001 (Oct. 21, 2002).

19 Presentation by Viet Dinh, former Associate Deputy Attorney General, Migration Policy Institute, Georgetown University Law Center; Catholic Legal Immigration Network, Inc., Annual Immigration Policy Conference (May 18, 2004).

20 Catholic Legal Immigration Network, Inc., “Chaos on the US-Mexico Border: A Report on Migrant Crossing Deaths, Immigrant Families and Subsistence-Level Laborers” (Nov. 2001) at 46-49.

21 US Department of Justice, Executive Office for Immigration Review, “FY 2003 Statistical Year Book,” at W1 (Apr. 2004) [hereinafter “FY 2003 Statistical Yearbook”].

22 67 Fed. Reg. 54878 (Aug. 26, 2002) (codified at 8 CFR Part 3).

23 8 CFR §1003.1(d)(3)(i).

24 Panel review occurs only if necessary: (1) to settle inconsistent immigration judge rulings; (2) to establish precedent; (3) to review a decision not in conformity with the law or precedent; (4) to resolve cases or controversies of “major national import”; (5) to review a “clearly erroneous” factual decision by an Immigration Judge; and (6) otherwise to reverse an Immigration Judge or other administrative decision. 8 CFR §1003.1(e)(6).

25 Dorsey & Whitney, LLP, “Board of Immigration Appeals: Procedural Reforms to Improve Case Management,” Study for the American Bar Association Commission on Immigration Policy, Practice and Pro Bono (Oct. 2003) at 39-40.

26 US Department of Justice, Executive Office for Immigration Review, “Fact Sheet: BIA Streamlining” (Sept. 15, 2004).

27 “Report on Asylum Seekers in Expedited Removal” at 413-414.

28 *Id.*

29 “BIA Appeals Remain High in 2nd and 9th Circuits,” *The Third Branch, Newsletter of the Federal Courts*, Vol. 37, No. 2 (Feb. 2005) available at <http://www.uscourts.gov>.

30 *Id.*

(besides its Office of Immigration Litigation) and to US attorneys' offices.³¹ In effect, the new procedures have moved the backlog in immigration cases from the BIA to federal appeals courts, a far less efficient or appropriate forum for them.

Federal courts likewise offer scant recourse for unrepresented immigrants. The 1996 Immigration Act sought to eliminate federal judicial review of removal orders based on criminal behavior,³² as well as review of discretionary denials of relief.³³ In addition, federal courts cannot review claims that have not been raised and considered in the appropriate administrative fora.³⁴ Pro se claimants are more likely to fail to exhaust their administrative remedies, barring federal review of their claims.³⁵

The Impact of Counsel

EOIR statistics reveal that most persons in removal proceedings appear pro se, and that the lack of counsel has a pronounced, negative impact on case outcomes.³⁶ The statistics underscore the fact that many persons who cannot afford counsel, particularly detainees, cannot secure the rights and relief available to them under US and international law.³⁷ Lack of counsel also subverts the government's

interest in the most informed decisions being made under its laws.

EOIR Statistics

In 2003, US immigration courts completed 250,763 cases.³⁸ Non-citizens enjoyed legal representation in 120,033 (48 percent) of these cases and filed applications for relief in 89,360 (36 percent).³⁹ Conversely, 52 percent of those facing removal—130,730 persons—lacked counsel. These figures approximate the norm in recent years. In fact, a slightly higher percentage of non-citizens enjoyed representation in 2003 than in any of the prior four years.⁴⁰ In 2003, 28 percent of the appeals to the BIA (12,946 in total) were made without legal representation.⁴¹

The unrepresented include non-citizens with the resources to afford counsel and others with no legal recourse.⁴² More troubling, they also include indigent immigrants, many in detention, with viable claims to remain in the United States based on their fear of persecution, likelihood of torture, long-term lawful permanent residency, and family ties. Increased representation would lead to more bona fide applications for relief and better-prepared applications, outcomes that would serve

31 D. Eggen, "Immigration Backlog Forces Justice to Shift Staffing: Hundreds of Lawyers Being Reassigned to Deal With More Than 4,000 Appeals in New York City," *Washington Post* (Dec. 14, 2004); M. Coyle, "BIA 'Overwhelmed': A Swamped DOJ Farms Out Immigration Cases," *National Law Journal* (Feb. 28, 2005).

32 INA § 242(a)(2)(C).

33 INA § 242(a)(2)(B).

34 INA § 242(d)(1).

35 See *Theodoropoulos v. INS*, 358 F.3d 162, 168 (2d. Cir. 2004) (federal court lacks subject matter jurisdiction to entertain claim due to failure of pro se petitioner to exhaust before the BIA).

36 Separate databases maintained by various branches of DHS track information on non-citizens deemed to have a "credible fear" of persecution after arriving at a US port-of-entry; on affirmative political asylum seekers (those who apply before being placed in removal proceedings), and on DHS detainees.

37 Under the 1967 United Nations' Protocol relating to the Status of Refugees (which adopted Articles 2 to 34 of 1951 United Nations' Convention relating to the Status of Refugee), the United States cannot return a person to a country where his or her life or freedom would be threatened on account of race, religion, nationality, membership in a social group or political opinion. Under the United Nations' Convention Against Torture and Other Crimes, Inhumane or Degrading Treatment or Punishment, the United States cannot return a person to a state where there are "substantial grounds" for believing that he or she would be tortured.

38 "FY 2003 Statistical Yearbook" at B2 and B5. Completed proceedings include decisions to order removal, to grant relief, or to terminate proceedings, as well as other dispositions like administrative closures.

39 *Id.* at G-1 and N-1.

40 *Id.* at G-1.

41 *Id.*

42 Of the 197,920 Immigration Judge decisions (excluding administrative case closures), 155,149 or 78.4 percent resulted in orders of removal (defined to include voluntary departure), 31,243 or 15.8 percent resulted in grants of relief, 9,975 or five percent were terminated, and less than one percent fell into an "other" category. *Id.* at D1, D2.

the government's interest in the best decisions being made under its laws.⁴³ EOIR provided the Catholic Legal Immigration Network, Inc. (CLINIC) with FY 2003 statistics that break down approval rates by type of relief requested for those represented and unrepresented and for detainees and non-detainees.⁴⁴ Represented, non-detained immigrants secured relief in 34 percent of their cases, in contrast to 23 percent of unrepresented, non-detained cases. Represented detainees received relief in 24 percent of their cases, compared to 15 percent for unrepresented detainees.

Disparities in outcomes grow more pronounced in political asylum cases, which often involve life-or-death decisions. Thirty-nine (39) percent of non-detained, represented asylum seekers received political asylum, in contrast to 14 percent of non-detained, unrepresented asylum seekers. Eighteen (18) percent of represented, detained asylum seekers were granted asylum, compared to three percent of detained asylum seekers who did not have counsel.⁴⁵ These disparities have remained over many years.⁴⁶

Detention Cases

The voluminous literature on the DHS detention system reveals recurrent, severe and system-wide problems.⁴⁷ Credible reports have detailed the hardships suffered by post-September 11 detainees,⁴⁸ political asylum seekers,⁴⁹ women in detention,⁵⁰ children,⁵¹ long-term lawful permanent residents,⁵² and detainees in local jails,⁵³ for-profit facilities,⁵⁴ and particular detention centers.⁵⁵ The US Commission on International Religious Freedom has concluded that DHS detention facilities “are structured and operated much like standardized correctional facilities” and that “in some instances, actual criminal justice institutions—in this case, county jails—are operated as dual use facilities that simultaneously house asylum seekers and criminal offenders, side-by-side.”⁵⁶ Not surprisingly, detainees withdraw their asylum claims, after being found to have a “credible fear” of persecution, at rates more than two times higher than non-detained asylum seekers.⁵⁷

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- 43 In recent years, the role of counsel has been severely circumscribed and even eliminated in many categories of immigration cases. “Aggravated felons” who are not lawful permanent residents, for example, can be administratively deported without access to counsel. INA §238(b). Persons who attempt to enter the United States at an inspection point with improper or no documents are subject to expedited return unless they request asylum or express a fear of persecution; attorneys are wholly absent from the inspection process. INA § 235(b)(1)(A). Recently, DHS announced plans to expand expedited removal to persons caught by Border Patrol agents between ports-of-entry. The expedited removal process “has had the effect of significantly restricting an alien’s right to counsel.” “Report on Asylum Seekers in Expedited Removal” at 238. In other cases, counsel can do little to help. With narrow exceptions, for example, aliens cannot seek asylum after a year in the country. INA § 208(a)(2)(B).
- 44 D. Kerwin, “Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded,” *Immigration Briefings*, No. 04-06 (June 2004) at 11-12 [hereinafter “Charitable Legal Programs for Immigrants”].
- 45 Asylum approval rates also vary by immigration court, with 15 percent of Atlanta cases granted asylum compared to 53 percent of New York cases. “FY 2003 Statistical Yearbook” at K4. Despite an overall asylum approval rate of 23.3 percent for immigration judges from FY 1989 to 2000, certain judges granted asylum in less than one percent of their asylum cases. C. Einolf, *The Mercy Factory: Refugees and the American Asylum System*, Ivan R. Dee, Publisher (2001) at 219-226, 246-247. These variances suggest the potential inequities of a system in which Immigration Judges would have the discretion to appoint counsel.
- 46 A. Schoenholtz and J. Jacobs, “The State of Asylum Representation: Ideas for Change,” 16 *Gtown Immig. L.J.* 739, 740 (Summer 2002) (An analysis of Immigration Judge decisions in 1999 found that asylum-seekers with counsel were four to six times more likely to prevail in their cases than those without counsel); “Report on Asylum Seekers in Expedited Removal” at 239 (Of persons determined to have a “credible fear” in the expedited removal process, 25 percent of those with counsel received asylum from 2000 to 2004, compared to two percent of those without counsel).
- 47 Detainees constitute 34 percent of those in immigration court proceedings. “FY 2003 Statistical Yearbook” at O1.
- 48 “OIG Report on September 11 Detainees.”
- 49 Human Rights First, “In Liberty’s Shadow: US Detention of Asylum Seekers in the Era of Homeland Security” (2004); Physicians for Human Rights and The Bellevue/NYU Program for Survivors of Torture” (June 2003); Amnesty International, “Lost in the Labyrinth: Detention of Asylum Seekers” (July 1999).
- 50 Women’s Commission for Refugee Women and Children, “Liberty Denied: Women Seeking Asylum Imprisoned in the United States” (Apr. 1997).
- 51 Amnesty International, “Why Am I Here?: Children in Detention” (June 2003); Florida Immigrant Advocacy Center; “Profiles of Children in INS Detention in Florida” (Oct. 2002); Human Rights Watch, “Slipping Through the Cracks: Unaccompanied Children Detained by the US Immigration and Naturalization Service” (Apr. 1997).
- 52 “The Needless Detention of Immigrants in the United States.”
- 53 Human Rights Watch, “Locked Away: Immigration Detainees in Jails in the United States” (Sept. 1998); Florida Immigrant Advocacy Center, Inc., “Florida’s County Jails: INS’s Secret Detention World” (Nov. 1997).
- 54 US Department of Justice, “The Elizabeth, New Jersey Contract Detention Facility Operated by ESMOR, Inc.” (July 19, 1995).
- 55 Florida Immigrant Advocacy Center, Inc., “Krome’s Invisible Prisoners: Cycles of Abuse and Neglect” (1996); American Civil Liberties Union, “Justice Detained: Conditions at the Varick Street Immigration Detention Center” (1993).
- 56 “Report on Asylum Seekers in Expedited Removal” at 189.
- 57 *Id.* at 412-413 (Between 2000 and 2004, 13 percent of detained asylum-seekers in expedited removal withdrew their claims, compared to five percent of non-detained asylum-seekers.)

Indigent detainees in removal proceedings need government-funded counsel perhaps more than any other group. Detention makes it difficult (and costly) for attorneys to offer representation, for detainees to secure legal counsel, for attorneys (who represent detainees) to provide effective representation, and for detainees to prepare their own cases. Non-profit and pro bono projects for detained (and non-detained) aliens have been established in strategic locations nationwide. However, they cannot serve every poor person in removal proceedings. This goes to the extraordinary amount of time required to prepare even a single case, as well as to the volume and location of detention facilities.⁵⁸ It also reflects the immense need of low-income immigrants for low-cost legal services in other immigration and civil cases.⁵⁹

In addition, progressive foundations—a major source of funding for non-profit immigrant service agencies—often disfavor direct service projects in the belief that they represent a financial “black hole” and do not further social change.⁶⁰ The “shrinking pool of available funding” for these services does not bode well for sustained, much less expanded, legal capacity.⁶¹ Without appointed counsel, large numbers of detainees will remain unrepresented.

The Right to Counsel in Removal Proceedings

The Immigration and Nationality Act of 1952 set forth the procedural protections for removal proceedings, prominent among them the right to counsel.⁶² The House Judiciary Committee report stipulated that “hearings must provide for adequate notice to the alien of the nature of the charges against him and the time and place of hearing; that the alien shall have the right of being represented

(at no expense to the Government) by counsel; that the alien shall be permitted to examine evidence against him and to present evidence on his own behalf and shall have the right of cross-examination of witnesses; and that no decision... shall be valid unless based on reasonable, substantial, and probative evidence.”⁶³ The “no expense” restriction has survived immense changes in US immigration law and policy in the past 52 years, including major legislation in 1965, 1980, 1986, 1990 and 1996, as well as the measures adopted in the post-September 11 era. At the very least, the restriction should be revisited in light of these changes.

The Scope of the “No Expense” Restriction

A blanket right to appointed counsel for indigent non-citizens in removal proceedings would require legislation. However, the current statute offers some leeway to expand representation. Its language does not preclude appointed counsel or prevent the government from establishing programs to increase legal representation. Nor could it, since courts have recognized, in theory, a constitutional right to counsel. Instead, the statute merely affirms that counsel need not be provided. In addition, if appointed counsel saved “the government” money by increasing the efficiency of the removal process and by reducing detention time (and costs), the prohibition would not apply. Finally, the statute refers only to the provision of “counsel,” not to activities that support legal representation.

A 1995 opinion from the Office of General Counsel of the Immigration and Naturalization Service (INS) recognized the latter distinction. It analyzed the restriction in response to a request for DOJ funding to represent detained aliens.⁶⁴ The Office concluded

58 *Id.* at 241 (“Many of the 185 detention facilities are located in rural areas without access to counsel of any kind, let alone attorneys trained in and experienced with asylum cases, and most detention facilities do not provide ready access to communication with outside counsel.” (citations omitted)).

59 See Institute for Research on Multiculturalism and International Labor, “Becoming American, Seeking Justice: The Immigrants’ Legal Needs Study” (Apr. 1996).

60 “Charitable Legal Programs for Immigrants” at 4.

61 “Report on Asylum Seekers in Expedited Removal” at 250.

62 Immigration and Nationality Act of 1952 (INA), Pub. L. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§ 1101 *et seq.*).

63 H.R. Rep. No. 1365, 82d Cong., 2d Sess. 57 (1952), *reprinted in* 1952 US Code Cong. & Ad. News 1653, 1712.

64 INS Office of General Counsel, “Funding of a Pilot Project for the Representation of Aliens in Immigration Proceedings” (Dec. 21, 1995).

that the “no expense” language did not bar the government from voluntarily funding activities that “facilitate” legal representation. The opinion, however, interpreted this language in combination with a statute that concentrates within DOJ the authority to litigate cases “in which the United States, an agency, or employee thereof is a party, or is interested.”⁶⁵ This statute does not appear to apply to the provision of counsel in administrative proceedings, although it could arguably be interpreted to require DOJ approval for an appointed counsel regime. The INS opinion nonetheless concluded that, in tandem, the statutes prohibited “using appropriated funds to pay the salaries of persons representing aliens.”

Due Process Right to Appointed Counsel in Removal Proceedings

Courts have uniformly rejected a Sixth Amendment right to counsel in civil removal proceedings.⁶⁶ However, for more than 100 years, they have found that due process protections apply to the removal process.⁶⁷ In theory, courts have recognized that government-funded counsel might be required, but they have uniformly refused to appoint counsel in particular cases.⁶⁸

In *Aguilera-Enriquez v. INS*, a federal appeals court considered a constitutional challenge to the “no expense” statute. The court did not find a

right to appointed counsel in all deportation cases, but adopted a case-by-case approach to the issue. Citing *Gagnon*, it held that the “test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness—the touchstone of due process.’”⁶⁹ The court denied appointed counsel on the facts of the case, reasoning that “no different administrative result” could have been obtained.⁷⁰ Other appeals courts have also adopted a “no prejudice” rule.⁷¹

Statutory Right to Counsel in Removal Proceedings

It is an anomaly that interference with the ability of non-citizens to obtain an attorney has been held to violate the right to counsel, but that the inability to afford counsel does not offend this right. Violations of the (statutory) right to counsel have been found in cases in which a non-citizen has been granted an inadequate continuance;⁷² has been transferred away from counsel;⁷³ has been denied a motion to change venue in order to obtain counsel;⁷⁴ has not been asked if he wanted counsel;⁷⁵ has waived the right to counsel without being informed by an Immigration Judge of the complexity of the case;⁷⁶ had counsel who was not informed of the hearing;⁷⁷ and had counsel who

65 5 USCA § 3106.

66 *Michelson v. INS*, 897 F.2d 465, 467-68 (10th Cir. 1990); *United States v. Campos-Ascencio*, 822 F.2d 506, 509 (5th Cir. 1987); *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985).

67 *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 US 86, 23 S.Ct. 611, 47 L.Ed.2d 721 (1903).

68 B. Werlin, “Renewing the Call: Immigrants’ Right to Appointed Counsel In Deportation Proceedings,” 20 *B.C. Third World L.J.* 393, 404 (“In practice, the case-by-case approach has essentially resulted in across-the-board denials of appointed counsel.”) In a recent case, a three-member panel of the BIA remanded a case to Immigration Court to determine the respondent’s mental competency and to appoint a guardian or representative, if necessary.

69 516 F.2d 565, 568 (5th Cir. 1975), cert. denied 423 US 1050, 96 S. Ct. 776, 46 L.Ed.2d 638 (1976).

70 *Id.* at 569.

71 *Michelson*, 897 F.2d at 468. *But cf. Castaneda-Delgado v. INS*, 525 F.2d 1295, 1300 (7th Cir. 1975) (“In our view the right to be represented by counsel of their choice granted to aliens in deportation proceedings by statute and regulations is too important and fundamental a right to be circumscribed by a harmless error rule.”)

72 *Rios-Berrios*, 776 F.2d at 862-863; *Castaneda*, 525 F.2d at 1300. *But see Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 376-377 (3rd Cir. 2003) (failure to grant continuance despite counsel’s failure to attend asylum hearing does not violate right to counsel).

73 *Louis v. Meissner*, 530 F. Supp. 924, 926 (S.D. Fla. 1981); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1509 (C.D. Cal. 1988), *aff’d* 919 F.2d 549, 564-67 (9th Cir. 1990) (finding a violation of the right to counsel on statutory and constitutional grounds).

74 *Gastro-O’Ryan v. US Department of Immigration*, 847 F.2d 1307, 1313 (9th Cir. 1988); *Campos v. Nail*, 43 F.3d 1285, 1289 (9th Cir. 1994).

75 *Reyes-Palacios v. INS*, 836 F.2d 1154, 1155-56 (9th Cir. 1988).

76 *Partible v. INS*, 600 F.2d 1094, 1096 (5th Cir. 1979).

77 *Chlomos v. INS*, 516 F.2d 310, 313-314 (3rd Cir. 1975).

an Immigration Judge banned from the case.⁷⁸ In far more cases, however, indigent non-citizens cannot secure counsel at all.

The Right to Counsel in Other Civil Proceedings

More than 40 years ago, the Supreme Court held that indigent criminal defendants enjoyed a Sixth Amendment right to appointed counsel, finding it an “obvious truth” that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁷⁹ The same rationale supports government-funded counsel in removal proceedings, which include many of the features that make appointed counsel “fundamental and essential” to a fair criminal trial.⁸⁰

The well-established right to government-funded counsel in other civil proceedings also argues against the “no expense” restriction. A blanket, due process right to appointed counsel has been found in (civil) delinquency and commitment proceedings. This right has been recognized on a case-by-case basis in probation revocation and parental termination cases. By statute, states also provide counsel in a range of civil cases. Legal counsel has consistently been deemed fundamental to the fairness of these proceedings.

Due Process Right to Appointed Counsel in Analogous Cases

The Supreme Court has found a blanket, due process right to counsel in juvenile delinquency and civil commitment proceedings. In *In re Gault*,⁸¹

the court held that minors in proceedings in which their freedom might be “curtailed” enjoyed a right to appointed counsel. The court rejected the government’s claim that a judge or probation officer could adequately represent the minor’s interests.⁸² It reasoned that “(t)he juvenile needs the assistance of counsel to cope with problems of the law, to make skilled inquiry into the fact, to insist upon the regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”⁸³ The same rationale supports appointed counsel in removal proceedings.

Similarly, in *Vitek v. Jones*,⁸⁴ the court considered a Nebraska statute that provided for the commitment to a mental hospital of certain prisoners. It held that the “stigmatizing consequences” of commitment, combined with a mandatory behavior modification treatment, represented a deprivation of liberty beyond criminal incarceration,⁸⁵ and that an indigent prisoner suffering from mental disease needed counsel “to understand or exercise his rights.”⁸⁶

By contrast, the court has adopted a “case-by-case” approach to appointed counsel in probation revocation and parental termination cases. In *Gagnon v. Scarpelli*,⁸⁷ it held that counsel could be appointed in probation revocation proceedings, reasoning:

Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.⁸⁸

78 *Baltazar-Alcazar v. INS*, No. 02-73363 (9th Cir. Oct. 21, 2004).

79 *Gideon v. Wainwright*, 372 US 335, 344, 83 S. Ct. 792, 796, 9 L.Ed.2d 799, 805 (1963).

80 *Gideon*, 372 US at 344.

81 387 US 1, 41, 87 S.Ct. 1428, 1451 18 L.Ed.2d 527 (1967).

82 *Id.* at 35-36.

83 *Id.* at 36.

84 445 US 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980).

85 *Id.* at 494.

86 *Id.* at 497.

87 411 US 778, 93 S.Ct. 1756, 36 L. Ed. 2d. 656 (1973)

88 *Id.* at 786-787.

The court, however, concluded that in some cases counsel would not be needed and would alter the “rehabilitative” nature of the proceeding, making it more adversarial and costly for the government.⁸⁹ By the *Gagnon* rationale, indigent litigants in non-“rehabilitative” and adversarial proceedings—like removal—particularly need counsel.

In *Lassiter v. Department of Social Services of Durham County, North Carolina*,⁹⁰ the court considered this issue in parental termination proceedings. Its review of precedent led it to the “presumption” that a right to appointed counsel obtains only when an indigent litigant faces a potential loss of physical liberty.⁹¹ The court adopted the due process analysis set forth in *Matthews v. Eldridge* which balances: (1) the private interest at stake; (2) the risk of an erroneous deprivation of that interest given the procedures used and the probable value of other procedures; and (3) the government’s interest in the current, rather than alternative, procedures.⁹² It recognized the parent’s “commanding” interest in the parent-child relationship,⁹³ and reasoned that the State’s interest in the child’s safety might be furthered by appointed counsel:

If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State’s interest in the child’s welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal.⁹⁴

It found that the State’s legitimate interest in avoiding the expense of appointed counsel and

possible lengthened proceedings was “hardly significant enough to overcome” the private interests at stake, and that the complexity of the proceedings could “overwhelm an uncounseled parent.”⁹⁵ Nonetheless, it held that an analysis of the *Matthews* factors would not invariably “overcome the presumption against the right to appointed counsel.”⁹⁶

The court acknowledged that “informed opinion” had “clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings,” as reflected in model rules, bar association guidelines, federal agency guide books, and the laws of (then) 33 states and the District of Columbia. It concluded that a “wise public policy... may require that higher standards be adopted than those minimally tolerable under the Constitution.”⁹⁷

Federal Statutory Right to Appointed Counsel in Civil Cases

Federal law also recognizes a right to counsel in child abuse and neglect cases. Under the Child Abuse Prevention and Treatment Act (CAPTA), federal funding can be used by states to provide appointed counsel for children in abuse and neglect cases.⁹⁸ In addition, states must appoint a guardian ad litem to represent children in these cases, as a condition of receiving federal child protective service grants.⁹⁹ US Department of Health and Human Services guidelines for legislation on adoption and foster care recommend that states provide counsel to parents and to children in protection

89 *Id.* at 788-790.

90 452 US 18, 101 S. Ct. 2153, 68 L. Ed.2d 640 (1981).

91 *Id.* at 27.

92 424 US 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18.

93 *Lassiter*, 452 US at 27.

94 *Id.* at 28.

95 *Id.* at 30.

96 *Id.* at 31.

97 *Id.* at 33.

98 42 USC § 5106a(2)(B) (2003).

99 42 USC § 5106a(b)(2)(A)(xiii) (2003).

proceedings.¹⁰⁰ The federal “in forma pauperis” statute allows a court to appoint counsel to represent an indigent person in virtually any civil case.¹⁰¹

State Statutory Right to Counsel in Analogous Civil Proceedings

Apart from a federal right to counsel, states provide counsel to indigent persons in broad categories of civil cases. These cases can be seen as analogous to removal proceedings and represent a consensus in support of appointed counsel in many civil cases.

Virtually every state, for example, now requires appointed counsel in abuse and neglect cases (where parents may lose the custody of their children), in termination of parental rights proceedings (which permanently sever the parent-child relationship), and in involuntary commitment proceedings. States allow for the discretionary appointment of counsel in myriad cases. While the inequities and inefficiencies of pro se representation argue for appointed counsel, the severe consequences of an adverse decision seem to be the determining factor in many cases. Courts also tend to appoint counsel based on the severity of the sanction, particularly if (as in removal proceedings) the “civil punishment” can exceed a criminal sanction.¹⁰² Incarceration also mitigates in favor of appointed counsel in

civil cases, including in civil rights actions brought by prisoners.¹⁰³

A survey of the laws of four states highlights the extent of appointed counsel systems. In California, courts must appoint counsel for indigent children and for parents in termination of parental right¹⁰⁴ and involuntary commitment proceedings.¹⁰⁵

A representative (guardian ad litem) may be appointed in probate cases,¹⁰⁶ custody cases (to represent the minor)¹⁰⁷ and for prisoners sued in civil cases.

In Illinois, representatives must be appointed in adoption cases (a guardian ad litem for a minor or a disabled defendant, and counsel for an allegedly “unfit” parent),¹⁰⁸ involuntary commitment cases,¹⁰⁹ and probate cases where a disabled person requests or takes a position adverse to a guardian ad litem.¹¹⁰ Counsel may be appointed for the child in proceedings to determine paternity, custody, visitation, and support, as well as to any defendant to establish a parent-child relationship or an order of support.¹¹¹ Courts may also appoint counsel in probate cases (for disabled persons),¹¹² civil rights cases,¹¹³ and in law suits involving indigent prisoners.

In New York, counsel must be appointed to minors in family court proceedings.¹¹⁴ It must also be provided to respondents in child protection cases, to persons with legal custody in child custody and

100 US Department of Health and Human Services, Administration for Children and Families, “Adoption 2002: The President’s Initiative on Adoption and Foster Care, Guidelines for Public Policy and State Legislation Governing Permanence for Children,” available at <http://www.acf.hhs.gov/programs/cb/publications/adopt02/> (last visited Aug. 30, 2004).

101 28 USC § 1915 (2004).

102 Annot., 80 ALR3d 1145 (1977) (“Generally speaking the trend appears to be for courts, when confronted with the deprivation of parental rights, to hold that a constitutional right of appointed counsel for the indigent parent exists in the absence of any statute providing such a right. Courts appear to be recognizing the fundamental nature of a parent’s right to custody of his child and the loss of custody as a punishment more severe than many criminal sanctions as factors requiring appointment of counsel...”)

103 *Tedder v. Fairman*, 441 N.E.2d 311, 315 (Ill.1982) (appointment of public defender to represent inmates in civil rights action not an abuse of discretion).

104 CAL. FAM. CODE §§ 7861, 7862 (Deering 2004).

105 CAL. WELF. & INST. CODE §§ 5111, 5302, 6500 (Deering 2003).

106 CAL. PROB. CODE § 1003 (Deering 2003).

107 CAL. CIV. CODE § 4606 (Deering 2004).

108 ILL. ANN. STAT. ch. 750, § 50/13B (Smith-Hurd 2004).

109 ILL. ANN. STAT. ch. 405, § 5/3-805 (Smith-Hurd 2004).

110 ILL. ANN. STAT. ch. 755, § 5/11a-10(b) (Smith-Hurd 2004).

111 ILL. ANN. STAT. ch. 750, § 45/18 (Smith-Hurd 2004).

112 ILL. ANN. STAT. ch. 755, § 5/11a-10(b) (Smith-Hurd 2004).

113 ILL. ANN. STAT. ch. 775, § 5/10-102 (Smith-Hurd 2004).

114 N.Y. FCA LAW § 241 (McKinney/Consol. 2004).

guardianship cases, to non-custodial parents and grandparents who seek visitation, to petitioners and respondents in domestic violence cases, to parents seeking or opposing child custody, and to persons against whom an order of contempt is sought in family court.¹¹⁵ Counsel must also be appointed in appeals in these cases.¹¹⁶ Courts may assign counsel in proceedings to commit mentally ill persons and drug addicts,¹¹⁷ to commit a child to a state agency due to parental mental illness or retardation,¹¹⁸ in habeas cases,¹¹⁹ and in civil actions in general.¹²⁰

In Texas, counsel must be provided in proceedings for parental termination (for the minor and for parents who oppose termination),¹²¹ for delinquency,¹²² for commitment of mentally ill¹²³ and chemically dependent persons,¹²⁴ and for contempt due to non-payment of child support if incarceration might result.¹²⁵

The State Counsel for Offenders in Texas also represents indigent prisoners in a range of criminal and civil cases, including removal proceedings. State-funded attorneys inform prisoners of their rights in Immigration Court and extend representation when relief from removal might be available.¹²⁶ In 1995, DOJ and the Texas Department of Criminal Justice entered an agreement to expedite the deportation of immigrants in prison.¹²⁷ As a result, the state began to transfer incarcerated immigrants to the Goree Unit in Huntsville. The State Counsel for Offenders screens all immigration cases in this facility and assumes representation in

select cases. In 2003, State Counsel attorneys conducted 651 interviews and provided representation in 232 removal hearings.¹²⁸ In 20 of these cases, immigrants received relief from removal, and 12 cases were on appeal at year-end. This program allows the parole board (for criminals) to consider the disposition of the removal case in making release decisions, potentially leading to earlier release dates and financial savings for the state.

Options for Reform

This Insight does not propose any single system for government-funded counsel. Rather, it offers three possible models, each of which contains the following core elements: (1) legal screening of all unrepresented immigrants in removal proceedings by a qualified and impartial attorney or a BIA-accredited representative;¹²⁹ (2) a system of referral for representation of income-eligible non-citizens with potential claims of relief (as determined in the screening); (3) a system to train and screen the attorneys and BIA-accredited representatives handling these cases. The three options, which could be combined, build on existing models that leverage charitable and pro bono resources. They would vary in cost and scope. All non-citizens in removal proceedings deserve legal representation. While this Insight would not restrict appointed counsel to any particular group, it recognizes the unique needs of immigrant detainees.¹³⁰

115 N.Y. FCA LAW § 262(a) (McKinney/Consol. 2004).

116 N.Y. FCA LAW § 1120(a) (McKinney/Consol. 2004).

117 N.Y. JUD. LAW § 35(1)(a) (McKinney/Consol. 2004).

118 *Id.*

119 *Id.*

120 N.Y. CIV. PRAC. LAW § 1102 (McKinney/Consol. 2004).

121 TEX. FAM. CODE ANN. §§ 107.012, 107.013(a) (Vernon 2004).

122 TEX. FAM. CODE ANN. § 51.10(f) (Vernon 2004).

123 TEX. HEALTH & SAFETY CODE ANN. §§ 571.017(a), 571.018(a)-(c) (Vernon 2004).

124 TEX. HEALTH & SAFETY CODE ANN. §§ 462.063©-(d) (Vernon 2004).

125 TEX. FAM. CODE ANN. § 157.163(e) (Vernon 2004).

126 Texas Department of Criminal Justice, available at <http://www.tdcj.state.tx.us/stcounsel/stcnsloff-immvcs.htm> (last visited July 26, 2004).

127 Telephone Interview with Kim Vernon, Director, Texas State Counsel for Offenders (Nov. 22, 2004).

128 Texas Department of Criminal Justice, "Annual Review 2003," available at http://www.tdcj.state.tx.us/publications/annual_report/annualreview2003/oversight/scfo.html (last visited Dec. 7, 2004).

129 Federal law allows qualified non-attorneys (BIA-accredited representatives) who work for "recognized" charitable agencies to represent immigrants before the DHS and in Immigration Court.

130 Other particularly needy groups include unaccompanied minors, torture survivors, asylum-seekers, and persons with mental incapacity.

Public Defender-Like System

The first model, a public defender-like system, would provide the most exhaustive coverage. Under it, core attorneys would screen all removal cases before a particular Immigration Court,¹³¹ accept representation in particular cases, and refer other cases to appointed or contract attorneys, or to pro bono projects.¹³² This system would require adequate funding and oversight. Chronic underfunding of indigent legal defense has resulted in a criminal justice system that denies “meaningful legal representation” to thousands of indigent persons each year and “constantly risks” convicting the innocent.¹³³

Federal public defenders already represent detained immigrants in habeas proceedings. In the federal defender system, each US district court must develop a plan for providing legal representation and related services for financially eligible persons charged with felonies or Class A misdemeanors, as well as those in delinquency, parole revocation, commitment, and other hearings.¹³⁴ In addition, whenever “the interests of justice” require it, counsel “may be provided” for financially eligible persons in habeas proceedings and for those charged with Class B or C misdemeanors or other infractions.¹³⁵ The court plan must include the appointment of private attorneys, and attorneys from: (1) a bar association or legal aid agency; and/or (2) a defender organization.¹³⁶ In districts, parts of districts, or adjacent districts in which at least 200 persons require appointed counsel each year, defender organizations can be established.¹³⁷

The court of appeals for the circuit appoints a federal public defender who oversees the work of salaried attorneys.¹³⁸ Appointed counsel are selected from a panel approved by the court, or from a bar association, legal aid agency, or defender organization.¹³⁹ In larger districts, court clerks review pro se habeas petitions to determine if the “interests of justice” require representation. In Seattle, Washington, for example, the federal public defender has led the litigation of indefinite detention cases, but has recommended creating a group of expert lawyers to assume representation in complicated political asylum and torture cases.

Immigration Representation Project Model

The Immigration Representation Project (IRP)—which serves detained and non-detained immigrants in New York City—offers an excellent, lower-cost alternative to a defender system. The IRP provides individual attorney review of all cases and direct representation in cases in which a viable claim exists. Immigration Judges and service organizations refer non-detained unrepresented immigrants to one of four project screening sessions per month at the federal building in New York City. The four participating non-profit agencies provide attorneys on a rotating basis who interview all referred clients.¹⁴⁰ Income-eligible clients with potential claims are referred to one of the participating agencies for representation or to pro bono attorneys, most of them from the Association of the Bar of the City of New York.¹⁴¹ Each year, the core agencies offer a

131 Immigration Judges could also screen and refer cases. However, given the great disparity in approval rates and attitudes toward immigrants by individual judges, it would be preferable if government-funded counsel performed this role.

132 States and counties typically provide legal counsel to indigent criminal defendants through public defender programs, court assignments to private attorney, contracts with private attorneys, or some combination of these methods. “Gideon’s Broken Promise” at 2.

133 “Gideon’s Broken Promise” at 7 and 16. Likewise, the absence of government funding for representation of indigent immigrants invariably leads to the removal of persons who are qualified to remain under US law.

134 18 USC § 3006A(a)(1).

135 18 USC § 3006A(a)(2)(A).

136 18 USC § 3006A(a)(3).

137 18 USC § 3006A(g)(1).

138 18 USC § 3006A(g)(2)(A).

139 18 USC § 3006A(b).

140 The participating agencies are the Legal Aid Society of New York, Catholic Charities of the Archdiocese of New York, Human Rights First, and Hebrew Immigrant Aid Society.

141 The IRP hopes to begin to refer more cases to other non-profit agencies, which would benefit the project and reduce the pre-representation costs of other agencies.

training for private attorneys. In return, each attorney agrees to provide pro bono representation in at least one IRP case.

The IRP also serves detainees in the Jamaica detention facility (formerly Wackenhut) in Queens, in the Elizabeth (New Jersey) detention facility, and in county jails in New Jersey. The Jamaica and Elizabeth facilities have traditionally housed asylum seekers referred from John F. Kennedy airport. In the past, DHS had provided project attorneys with manifests containing basic information on all arriving detainees. As with non-detained cases, the core agencies screen every detainee each week on a rotating basis. Recently, DHS has stopped providing this information in favor of an (often) incomplete detainee sign-up sheet. This has required project attorneys to attend “master calendar” hearings and Immigration Judges to assign the cases of detainees who do not appear on the sign-up sheet.

The IRP model depends heavily on the contributed services of the participating non-profit agencies and pro bono attorneys. In recent years, the four core agencies have shared \$250,000 in annual grant funding. However, they contribute far more than this amount to the project in their own resources.¹⁴² In 2003, the project provided consultations in 1,155 cases, assumed representation in 220 new cases, and completed proceedings in 226 cases. Relief from removal was granted in 93 percent of these cases, highlighting the crucial role counsel plays in these proceedings. Government funding to support the IRP infrastructure—or even making the IRP model mandatory at the nation’s 52 Immigration Courts—would greatly expand legal representation in worthy cases.¹⁴³

The IRP model enjoys broad support from Immigration Judges. Judge Steven Abrams at the Jamaica facility argues that the IRP furthers efficiency and due process, which he sees as

complementary goals. “Efficiency is not just about completion of cases in an expeditious way,” he says, “it’s about due process too. If an individual is going to have a full hearing, every issue needs to be raised.”¹⁴⁴ According to Judge Abrams, the IRP leads to fewer continuances, fewer delays (since attorneys have knowledge and resources that pro se litigants must try to develop) and potentially fewer government appeals (since IRP cases tend to be well-documented and to include all the appropriate legal claims). The type of case seen by Judge Abrams—detainees “coming straight from wherever conflict is taking place”—heightens the need for counsel. In short, the project furthers the government’s interest in making the best, most informed decisions.

Legal Orientation/Rights Presentations

The federal government could also fund legal orientation presentations at all large US detention facilities. Under the “Florence” rights model, an attorney or paralegal meets with all incoming non-citizens in a detention facility to educate them on the law and the removal process. Based on a group orientation, detainees decide whether they should pursue relief from removal. Persons with no hope of remaining in the United States typically agree to removal. The non-profit agencies who conduct the presentations attempt to match those with potential relief to legal counsel, either from their own agencies or from pro bono programs. In either case, the EOIR does not fund legal representation.¹⁴⁵

In 1999, the EOIR funded a three-site pilot project to test the Florence model. In its project analysis, EOIR concluded that the presentations decreased the government’s overall costs by expediting case completions and convincing detainees with no possibility of relief not to oppose removal.¹⁴⁶ The evaluation determined that

142 Telephone interview with Janet Sabel, Legal Aid Society of New York (Dec. 3, 2004).

143 As discussed below, increased private support for these models would also greatly expand legal representation to detained immigrants.

144 Telephone interview with Judge Steven R. Abrams, Immigration Judge at Jamaica detention facility in New York City (Aug. 27, 2004).

145 This model could be adapted to serve non-detained aliens.

146 US Department of Justice, Executive Office for Immigration Review, “Evaluation of the Rights Presentation” (Jan. 2000) at I, 6-8.

a \$1.3 million program expansion would lead to \$8 million in cost savings.¹⁴⁷ The project also benefited detainees by providing them with legal information and greater access to counsel. Like the IRP, legal orientation programs enjoy broad support from Immigration Judges.

The EOIR now funds legal orientation sessions in seven detention facilities.¹⁴⁸ It would also be difficult and costly to provide “rights presentations” at the hundreds of state and local facilities used by DHS to detain immigrants. Nonetheless, expanding the model to DHS “Service Processing Centers,” other federal prisons, for-profit prisons, and local jails with large immigrant populations would significantly increase legal representation.¹⁴⁹

In 2002, a modest commitment of roughly \$1 million allowed EOIR grantees (in six sites at the time) to provide legal orientation sessions to 17,041 detainees, roughly 20 percent of detainees whose proceedings were completed that year (and 8.4 percent of all non-citizens detained.) Extending this program to detainees in other large facilities would be similarly cost-effective. According to EOIR, the project also reduces the processing time for detained cases by one-and-one-half to three days.¹⁵⁰

Another study has found similar benefits from legal representation in non-detained cases. From 1997 to 2000, the INS funded a “supervised release” pilot project run by the Vera Institute of Justice. The project required participants to check in regularly during the removal process in order to discourage their flight. The project evaluation identified legal representation as among the “most consistent” factors in assuring appearance in removal proceedings.¹⁵¹ Court appearance rates,

in turn, speak to the integrity and efficiency of the immigration system.

Other Ways to Expand Legal Representation

Short of direct government funding, several steps could be taken that would significantly increase representation in removal proceedings. First, legislation could be passed to remove the fee restriction on non-profit organizations whose non-attorney, BIA-accredited representatives can legally represent immigrants. As it stands, BIA-recognized agencies can charge no more than “nominal” fees.¹⁵² This restriction artificially limits an important source of revenue for charitable programs. In a recent survey, these programs reported running a median, annual deficit in excess of \$60,000.¹⁵³ Relief from the “nominal fee” restriction would allow them to charge higher fees in simple applications for immigration benefits, as a way to subsidize time-consuming and costly removal cases.

Second, agencies funded by the federal Legal Services Corporation (LSC) could be required to provide representation in removal proceedings. It makes sense to try to increase removal representation by building on a national infrastructure with established expertise in poverty law and a commitment to low-income persons. However, an expanded mandate for LSC-grantees would require a significant increase in funding.¹⁵⁴ It would also require legislation since, at present, LSC grantees cannot represent the undocumented, even with non-LSC funding.¹⁵⁵

147 *Id.* at 3-6, 8-9, 11-12.

148 Legal presentations also deter frivolous claims and protect non-citizens from predatory and often unauthorized legal practitioners.

149 “FY 2003 Statistical Yearbook” at O2 (Immigration Courts in Texas, California and Arizona accounted for 59 percent of completed removal proceedings for detainees in 2003).

150 “Report on Asylum Seekers in Expedited Removal” at 243.

151 Vera Institute of Justice, “Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program: Volume I” (Jun. 7, 2000) at 7; see also F. Mottino, Vera Institute of Justice, “Moving Forward: The Role of Legal Counsel in Immigration Court” (July 2000) (unpublished) at 11-12, 40-41.

152 8 CFR § 292.2(a)(1).

153 Catholic Legal Immigration Network, Inc. “Assessment of CLINIC Affiliate Member Agencies” (April 2003).

154 LSC funding declined precipitously from 1995 (\$400 million) to 1996 (\$278 million). Since then, it has been steadily rising, reaching \$336.6 million in 2002.

155 45 CFR §§ 1626.3, 1626.4(a). A narrow exception exists for undocumented victims of domestic violence.

Third, the Equal Access to Justice Act (EAJA) could be amended to apply to removal cases.¹⁵⁶ Under the EAJA, the “prevailing party” in an adversarial administrative proceeding can obtain attorney’s fees and costs in the absence of a “substantially justified” government position or other “special circumstances.”¹⁵⁷ The Supreme Court has held that removal proceedings do not constitute an “adversary adjudication” under the Administrative Procedures Act, as required by the EAJA.¹⁵⁸ In dicta, however, the court stated:

We have no doubt that the broad purposes of the EAJA would be served by making the statute applicable to deportation proceedings. We are mindful that the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation especially important.¹⁵⁹

As the dissent in this case pointed out: “[D]eportation proceedings exemplify the kind of adjudications for which Congress authorized fee awards: The alien’s stake in the proceeding is enormous (sometimes life or death in the asylum context); the legal rules surrounding deportation and asylum proceedings are very complex; [and] specialized counsel are necessary but in short supply...”¹⁶⁰ To award attorney’s fees in removal proceedings would significantly increase representation in worthy cases.

Fourth, although immigration is a creature of federal law, states could opt to provide representation to persons in removal proceedings, as the Texas State Counsel for Offenders does for incarcerated immigrants. State and federal public defenders could also extend representation of non-citizens in criminal cases to their removal proceedings. This system would build on existing

attorney-client relationships and would recognize the increasing connection between criminal and immigration proceedings.

Fifth, US foundations and bar associations could increase their support for immigration legal services. In 2001, the top 50 US foundations that fund immigrant/refugee causes made grants totaling nearly \$95 million.¹⁶¹ In 2002, State Interest on Lawyers Trust Account (IOLTA) funds provided more than \$124 million to civil legal service projects for the poor.¹⁶² In both cases, only a small (and untracked) percentage of these grants supported immigration legal services.¹⁶³ Nor have legal programs for immigrants received significant corporate or individual support.

Conclusion

This Insight provides a series of options that would expand legal representation to indigent immigrants in removal proceedings, particularly to detainees. For non-citizens facing removal and their families, the stakes could not be higher. Removal results in separation from family, means of support, and community. For some, it can lead to persecution. Without legal counsel, indigent immigrants have a significantly lower chance of securing relief from removal based on these compelling factors.¹⁶⁴

The government also has strong, multiple interests in creating an appointed counsel system. A growing body of evidence suggests that legal representation in removal proceedings financially benefits the government by leading to improved appearance rates in courts, fewer

156 The Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 (codified at 28 USC § 2412(d) and 5 USC § 504 et. seq.).

157 28 USC § 2412.

158 *Ardestani v. INS*, 502 US 129, 133-134, 112 S.Ct. 515, 116 L.Ed.2d 496 (1991).

159 *Id.* at 138.

160 *Id.* at 140 (Blackmun, J., dissenting).

161 Foundation Center Statistical Services, “Top 50 US Foundations Awarding Grants for Immigrants and Refugees, circa 2001” (2003).

162 “Charitable Legal Programs for Immigrants” at 4.

163 *Id.*

164 See generally *Lassiter*, 452 US at 51 (Blackmun, J., dissenting); *Aguilera*, 516 F.2d at 573 (DeMascio, District Judge, dissenting).

requests for continuances and shorter periods in detention.¹⁶⁵ It also deters frivolous claims.¹⁶⁶

An adversarial process, like removal proceedings, requires that both sides have counsel. A recent report of the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants harshly criticized the US criminal justice system for spending roughly twice as much on prosecution as on indigent defense.¹⁶⁷ The report called for “equivalent funding and other resources” for these essential and interdependent elements of a fair system. In contrast, the government devotes no resources to the representation of immigrants in removal proceedings which, in many ways, mirror criminal trials. This undermines the legitimacy of the removal process.

It also undermines the government’s interest in the best, most informed decisions being made under its laws.¹⁶⁸ As demonstrated in multiple reports over many years, legal representation (or its absence) too often determines who can remain in the United States. US legal standards, not income, should constitute the decisive factor in so crucial a determination.

¹⁶⁵ Additional studies—perhaps that analyze the impact of representation in a particular court—would provide a clearer sense of the benefits and financial implications of an appointed counsel system.

¹⁶⁶ This proposal does not attempt to set forth the manifest benefits of legal representation in every type of case. Legal representation, for example, has been identified as the only public service that reduces domestic abuse in the long-term. *United Press International*, “Access to legal aid lowers domestic abuse” (Jan. 8, 2003).

¹⁶⁷ “Gideon’s Broken Promise” at 13-14.

¹⁶⁸ “Report on Asylum Seekers in Expedited Removal” at 251 (“[B]ona fide asylum seekers who navigate the adversarial Expedited Removal process unassisted by legal counsel seem particularly vulnerable to being incorrectly removed.”)

Project Advisors

Eleanor Acer, *Human Rights First*

T. Alex Aleinikoff, *Georgetown University Law School*

Jeanne Butterfield, *American Immigration Lawyers Association*

Muzaffar Chishti, *Migration Policy Institute*

Marty Guggenheim, *New York University School of Law*

Lucas Guttentag, *ACLU Immigrant Rights Project*

David Martin, *University of Virginia Law School*

Doris Meissner, *Migration Policy Institute*

Demetrios G. Papademetriou, *Migration Policy Institute*

Judy Rabinovitz, *ACLU Immigrant Rights Project*

Janet Sabel, *Legal Aid Society of New York, Immigration Law Unit*

Andy Schoenholtz, *Georgetown University, Institute for the Study of International Migration*

Manny Vargas, *New York State Defenders Association, Immigrant Defense Project*

Nadine Wettstein, *American Immigration Law Foundation*

Michael Wishnie, *New York University School of Law*

Carol Wolchok, *formerly with the American Bar Association*

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About the Author



Donald Kerwin

Donald Kerwin is the Executive Director of the Catholic Legal Immigration Network, Inc. (CLINIC). CLINIC, a subsidiary of the United States Conference of Catholic Bishops (USCCB), is a public interest legal corporation that represents low-income immigrants out of 12 sites and that supports a network of 155 charitable legal immigration programs. Mr. Kerwin oversees CLINIC's extensive legal support and direct service programs for low-income immigrants. He serves as a consultant to the USCCB's Committee on Migration, a member of the American Bar Association's (ABA's) Committee on Immigration, and co-chair of the Immigration and Nationality Committee of the ABA's International Law Section.

The Migration Policy Institute (MPI) is an independent, non-partisan, non-profit think tank dedicated to the study of the movement of people worldwide. The institute provides analysis, development, and evaluation of migration and refugee policies at the local, national, and international levels. It aims to meet the rising demand for pragmatic responses to the challenges and opportunities that migration presents in an ever more intergrated world. MPI produces the Migration Information Source website, at www.migrationinformation.org.

In March 2005, the Migration Information Source, MPI's award-winning online resource, released a Special Issue on Migration and Human Rights. The issue includes articles by noted scholars examining some of the intersections between migration and human rights, including: biometric identifiers at borders; protection of migrant workers' rights; trafficking and smuggling; the vision, language, and framework of human rights; and the friction between seeking asylum and US detention policy.

The Special Issue is available online at:
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www.migrationinformation.org

202 266 1940
 202 266 1900 (fax)

1400 16th Street NW
 Suite 300
 Washington, DC 20036