Immigration Briefings

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NO DEPORTATION WITHOUT REPRESENTATION: THE RIGHT TO APPOINTED COUNSEL IN THE

IMMIGRATION CONTEXT*

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Rabinovitz [FNa1]

This *Briefing* is a summary of a symposium on the right to counsel in immigration proceedings held on April 22, 2004 in New York City. The symposium was given in memory of the late Arthur Helton. The program was organized by the Immigration and Nationality Committee of the Association of the Bar of the City of New York (ABCNY), and was sponsored by the Immigration Committee, Human Rights First (formerly the Lawyers Committee on Human Rights) and the American Civil Liberties Union (ACLU). The speakers were:

- Eleanor Acer, Director of Human Rights First, Asylum Program (moderator)
- Chris Nugent, Senior Counsel with the Community Services Team of the international law firm of Holland and Knight in Washington D.C.

- Immigration Judge William Van Wyke
- Lory Rosenberg, Director of the Defending Immigrants Partnership at the National Legal Aid and Defender Association
- Judy Rabinovitz, Senior Staff Counsel with the ACLU Immigrants Rights Project

THE SYMPOSIUM

Claudia Slovinsky, Chair of the Immigration and Nationality Committee of ABCNY, opened the proceedings.
Claudia Slovinsky **:** This symposium is presented in honor of the late Arthur Helton, a colleague and friend perhaps most well known as an advocate for refugees and asylum seekers. But he also more broadly cared passionately for the rights of all immigrants and particularly the right to effective legal representation in immigration proceedings.

Tonight's program is a beginning. With it, we hope to launch a campaign in Arthur's honor to establish the right to counsel for those facing deportation and, increasingly, detention as part of the deportation process. Why this campaign? To those of us who have defended immigrants for a long time, the last few years have represented a new harsh era in the treatment of immigrants by our government. We've seen the prolonged detention of asylum seekers, the legal changes brought by the Illegal Immigrant Responsibility and Immigration Reform Act (IIRIRA) [FN1] and the Antiterrorism and Effective Death

Penalty Act of 1996 (AEDPA), [FN2] which resulted in mandatory detention and deportation of longtime legal permanent residents for criminal convictions without any possibility of relief. We've seen the detention and deportation of juveniles, and the prolonged and needless detention of immigrants from selected countries after September 11, 2001.

The drawing of an arbitrary line between a criminal proceeding and a civil one has resulted in the deprivation of physical liberty and the dire consequence of loss of one's home and often family without any of the safeguards that we associate with due process of law. One of these safeguards is the right to legal counsel, to navigate what nearly everyone agrees is an extremely complex and confusing body of law. Some might find it ironic that we are holding this symposium tonight, in the few days between the Supreme Court arguments in the *Padilla* [FN3] and *Hamdi* [FN4] cases next week, cases in which the government makes a stunning assertion that the Executive Branch has the power to deprive those locked up of all access to the justice system. We are aware that what we are doing here tonight must look like tilting at windmills. But we proceed, consciously recognizing that pressing for the protections that a democratic system of justice should provide to all human beings is not an easy thing. And this campaign is certain to be a long-range project. We are also pragmatic, so tonight we will look at all approaches to the problem. A stunning *Gideon* [FN5]-like victory would be fabulous, but in the meantime, starting tonight, we will look to possible legislation, litigation and a creation of other models for the delivery of legal services to immigrants. We hope that you will join us in this campaign.

Eleanor Acer **:** I want to begin by thanking Claudia, the Association of the Bar of the City of New York and its Immigration and Nationality Committee for organizing this symposium. I am very privileged to be here tonight on a panel filled with such learned colleagues and experts. I am particularly privileged to be part of a panel that was planned as a tribute to the work of Arthur Helton. Arthur inspired and served as a mentor for many attorneys, across the country, across the city, and here at the Association. In fact, the very first time I met Arthur was at the steps of the Association. I remember it so clearly because I had admired his work for so long and was looking forward to actually meeting him in person. We are very honored tonight to have Arthur's wife Jackie here with us.

Arthur directed the Refugee Project at Lawyers Committee for Human Rights (now Human Rights First) from 1982 to 1994. He led our organization's efforts to help asylum seekers find legal counsel. Through the *pro bono* program that he oversaw, thousands of lawyers were, and are today, recruited to represent individual asylum seekers in their proceedings before Immigration Courts and the asylum offices. Arthur truly understood the critical need for representation in asylum and immigration proceedings. He began working for the Lawyers' Committee in 1982, in the midst of a prior Haitian refugee crisis. In June of 1982, a federal judge ruled in the case called *Louis v. Nelson* [FN6] that the U.S. government's decision to detain Haitian asylum seekers was improper. In response, a number of organizations, including the American Bar Association, the American Immigration Lawyer's Association and many local bar associations, including

the City Bar I am sure, quickly devised a plan to train and recruit the Haitians, if and when they were released from detention. Arthur persuaded Michael Posner, the Executive Director of the Lawyers' Committee, to actually testify in front of the judge and explain how this comprehensive plan had been drafted and prepared in order to find lawyers across the country for all 2,000 Haitians. The judge released the Haitians and a massive *pro bono* effort was launched. Arthur crisscrossed the country working with many organizations, conducting trainings in city after city, in Boston, in Chicago, Detroit, Los Angeles, Louisville, Miami, Newark, New Orleans, New York, Palm Beach, San Antonio, and San Francisco. Over 1,200 lawyers attended these sessions. By 1984, that project had already provided free legal assistance to 1,850 Haitian asylum seekers. In an article he wrote in 1984, Arthur said that volunteer lawyers had spent the equivalent of well over ten lawyer years in providing rigorous and zealous representation. He described the project as one of the most ambitious *pro bono* enterprises ever attempted by the legal community in the United States.

Arthur also developed the *pro bono* program that is my privilege to now oversee. In his time at the Lawyers' Committee, he recruited hundreds and hundreds of lawyers to represent individual asylum seekers in their proceedings and over the years, hundreds and thousands of refugees were given the chance to start a new life here in this country. Arthur truly understood the importance of *pro bono* representation. He gave so much to refugees and to migrants, both at the Lawyers' Committee and through his subsequent work with the Open Society Institute and with the Council on Foreign Relations. With his death last August, in the bombing of the United Nations compound in Baghdad, many of us lost a mentor, a colleague, a friend and a true inspiration. But Arthur's work still lives on, every time that a *pro bono* project that he inspired recruits a *pro bono* lawyer, when that lawyer in turn wins asylum for his client and then persuades his or her colleague to take on another *pro bono* case.

Legal representation was something that Arthur cared about greatly. His friend Andrew Shoenhoeltz did a comprehensive analysis about a year or so ago of representation in asylum cases. [FN7] The study, conducted by the Georgetown University Institute for the Study of International Migration, analyzed government statistics which revealed that asylum seekers are up to six times more likely to be granted asylum when they are represented. The Georgetown analysis also showed that more than one out of three asylum seekers in Immigration Court lacked legal representation; for detained asylum seekers-- no surprise--the situation is even worse. More than twice as many detained asylum seekers lack representation when compared to non-detained asylum seekers in Immigration Court proceedings. For those who cannot afford to pay for counsel, the availability of free legal assistance is limited. The need for representation far exceeds the limited resources of non-profit organizations, and the U.S. government, as the panelists will discuss in detail, does not provide funding for legal representation of immigrants, including asylum seekers. The need for representation in asylum cases, as in many other types of immigration cases, is critical. We see this every day in the *pro bono* program that we work on. For an asylum seeker, it can mean the difference between life and death. Under the Refugee Convention, [FN8] the U.S. government is obligated not to return a refugee to a place where they might face persecution. How can the United States honor

this obligation if it fails to provide asylum seekers with legal representation in their cases? Without that kind of representation, there could be no doubt that in fact refugees are being returned by the United States to countries where they will face persecution.

What can be done about this? We are very lucky tonight to have such a learned collection of experts to help us sort through these issues, analyze them, come up with some potential solutions and spend time talking about the many challenges that would be faced in trying to pursue those solutions. I asked one of my colleagues to check and see whether any representatives of our Department of Homeland Security are present tonight. Many government officials are in fact supportive of the need for representation, recognizing how critically important it is, and how it can improve the administration of justice. With that, I will turn over the panel to Chris Nugent.

Chris Nugent **:** Thank you. It is a privilege to be here, especially as an opportunity to honor Arthur Helton. I worked with Arthur at the American Bar Association's Immigration Commission. Arthur was a tireless and tenacious advocate who inspired incredible work at the American Bar Association (ABA). He worked with that organization to design the ABA Detention Standards Implementation Initiative, which coordinates law firms and bar associations around the country to visit detention centers and report on each facility's compliance with the detention standards that the ABA negotiated with the Department of Justice in 2000. [FN9] Today, more than 60 law firms and bar associations have participated in these delegations and the continued positive change that Arthur's work is yielding in this arena of immigration detention is a real testament to his vision and creativity.

I worked on the issue of the right to representation in a variety of capacities with various constituencies while at the Florence Immigrant and Refugee Rights Project in rural Arizona, [FN10] at the American Bar Association, and at the law firm of Holland and Knight, where I serve as *pro bono* counsel to the Women's Commission for Refugee Women and Children on the Unaccompanied Alien Child Protection Act, [FN11] which is pending for a vote in the Senate Judiciary Committee and deals with the right to counsel *vis-a-vis* children. My experience has been more in the program and policy arena than in litigation, although I was the consultant on the *Machado* [FN12] case in Spokane, Washington two years ago, which was a class action filed by the Southern Poverty Law Center, the Northwest Immigrant Rights Project, and Columbia Legal Services, to establish the right to counsel for unaccompanied children in detention.

There is both a compelling need for legal representation for immigrants in removal proceedings and an incredible difference that representation can make for this constituency. The irony is that even with government-appointed counsel, miscarriages of justice and problems could still arise, because, for a variety of reasons, the immigration system is not designed properly. The immigration laws tend to be arcane and can be rather unjust. They are highly complex, for practitioners as well as Immigration Judges and DHS, and require extreme confidence to understand and implement. There is also a general lack of oversight, transparency or accountability in the system, unlike any other court system that we have. For this reason, we must consider the issue of representation

in conjunction with other reform efforts that are needed for the immigration system in total.

We have significant challenges in terms of securing the right to representation, both in the political process and through litigation. In lobbying Congress, we face a major obstacle in the form of Immigration and Nationality Act Section 292, [FN13] which prohibits representation of aliens at any expense to the government. In regard to Constitutional litigation, we are limited by the Supreme Court's decision in *Mathews v. Eldridge*, [FN14] which requires a balancing of the interests of the individual versus those of the state to determine due process rights. We also face a complex due process problem in terms of the differing levels of protection for arriving aliens detained at ports of entry--who are subject to the legal fiction that they are not considered to have entered the United States--versus those who have actually entered the United States. The Southern Poverty Law Center (SPLC) attempted to challenge this duality in *Gonzalez Machado*, [FN15] which involved a foreign national who had "jumped the fence" to enter the United States, arguing that due process protections attached to this person because he had entered the United States and was not on the threshold of entry.

In the political arena, in terms of lobbying Congress, there is a persistent assumption that aliens do not need representation because these cases involve administrative law and are civil in nature. In addition, many believe that foreign nationals should not enjoy guaranteed representation because they are not U.S. citizens and should not have the same or more rights as U.S. citizens in civil legal matters. Many members of Congress believe that the tangible benefits of representation would accrue only to aliens and their attorneys. Preventing efficiency and justice is not considered to be enough of an incentive for the government to fund full representation in removal proceedings. It is very hard to break down the barriers around the question of guaranteed representation for aliens when such representation is perceived as something that would benefit lawyers. We must also bear in mind that, on average in Congress, it takes at least four years for any bill to become law. Many of the immigration bills that we work on are great stand-alone bills that garner some interest, but they do not attract many co-sponsors. Additionally, because immigration has become so politicized, these bills are rarely voted upon in the Judiciary Committee.

Given these barriers, we must consider smaller steps that can be taken towards ensuring the right to representation. We must also consider how to refine our messages. I want to briefly discuss several models and precedents, and lessons learned from them in making a material impact for aliens in detention. One is the Legal Orientation Program of the Executive Office for Immigration Review (EOIR). This program funds non-profit organizations to provide legal orientation services for detained aliens at six sites around the country, with future expansion to more sites. Currently, $1 million is appropriated to the program, and we are hopeful that figure will be increased.

The EOIR program came about through the Florence Project's work with Lutheran Immigration and Refugee Services and the U.S. Conference of Catholic Bishops. The Florence Project worked conscientiously to develop a systematic model of legal services,

under which they could provide some legal assistance through "know your rights" presentations to all detainees in a facility and then, in a triage model, determine which cases they could staff in-house and which could be referred for *pro bono* representation. The project was created in 1991, when an Immigration Judge, Judge John J. McCarrick, appalled by the lack of representation in the rural detention centers, called upon the Arizona State Bar to create this initiative. The project had a representation focus from the beginning.

Since the inception of the Florence Project, several positive developments have occurred. In 1996, the U.S. Commission for Immigration Reform recognized the crisis in terms of legal representation for aliens and cited the Florence Project's model as an effective system for legal services delivery to this population. In 1998, a pilot program within EOIR provides grants to the Florence Project, ABA's ProBar and the Catholic Legal Immigration Network to develop best practices for these legal representation programs. In 2000, the ABA detention standards codified access to "know your rights" presentations. In 2002, the $1 million appropriation was made, and has continued.

How were these results achieved? The EOIR project was not designed to be a remedy to counter injustice; unfortunately, that argument doesn't necessarily resonate with policy makers when it comes to immigrants. Instead, the project was conceptualized to correct inefficiencies, to save the system time and resources by having better prepared respondents before the Immigration Judge as well as channeling resources more effectively and strategically for *pro bono* representation. This was known as the justice and efficiency model. At the appropriation stage, a new name--the "legal orientation program"--was developed for the project. This legal orientation program was written into law and the appropriation continued. The Immigration Service and the Immigration Court have been very pleased with these programs, because *pro se* respondents are better prepared and more foreign nationals have *pro bono* representation. These programs have brought much needed funding to the field. Since September 11, 2001, and even before that date, money for legal services is very difficult to obtain; now, for non-profit organizations, there is a new albeit modest funding stream that permits them to use their own resources for direct representation.

However, because this is a triage model, some weaknesses remain. We've seen from experience that INA Section 292, [FN16] which covers both preparation and representation of immigrants at no government expense, still rears its ugly head. In practical terms, this means that an organization can use the funding to hold a workshop to teach aliens how to complete their asylum applications, but cannot take the pen and write the application for the detainee, because federal money cannot be used for individualized assessment of a foreign national under this program. Section 292 can have draconian implications in terms of securing federal funding for legal assistance for detainees. The issue of government control arises as well. Some agencies, such as Human Rights First, will not accept government money, on the principle that it can undermine independent zealous advocacy. On the other hand, the Florence Project and other programs that accept government funds face possible conflicts. In order to maintain good relations with the

Department of Homeland Security and the Immigration Court, they are sometimes forced to refer problematic cases to *pro bono* counsel.

Another weakness in this model is that there is no requirement that services for detainees come from grassroots, community-based programs. Programs offering alternatives to detention are one example of the problem. These programs began as small pilot projects that offered supervised release of individual detainees. Successful pilots were carried out by the Vera Institute of Justice's Appearance Assistance Program in New York and Lutheran Immigration and Refugee Service's work with Chinese asylum seekers in Ullin, Illinois. Based on the success of these programs, Congress appropriated $8 million per year to alternatives to detention; that figure is expected to rise to $13 million next year. The government loves Alternatives to Detention, considering the program as a cost-effective means to release those who will appear at hearings while continuing to detain others. The problem with alternatives to detention is that the Department of Homeland Security has used private or not-for-profit contractors who adopt an enforcement approach rather than using community-based organizations based on the Vera Institute of Justice model. Hopefully, there will be some clarifying language in subsequent appropriations bills specifying that alternatives must be community-based programs.

There has been success in promoting the right of representation for unaccompanied alien children. The Unaccompanied Alien Child Protection Act, [FN17] introduced by Senators Feinstein and Brownback, has garnered many co-sponsors and has the potential to emerge from the Judiciary Committee. The bill would benefit the 5,000 unaccompanied alien children detained at over 30 facilities nationwide who are now without the right to counsel. The bill was a result of a compromise with Republicans. They agreed to *pro bono* representation for these children, and to provide funding for the non-profits to coordinate *pro bono* representation. But they are not willing to confer a right to counsel to these children because they believe that this right could easily be extended to other aliens such as asylum seekers, the mentally disabled and the incompetent. Therefore, they were willing to strike this compromise that would provide *pro bono* representation, but no paid counsel. That compromise is reflected in the latest amended version of the bill.

Interestingly, the Homeland Security Act, which transferred care, custody and placement of unaccompanied children to the Department of Health and Human Services, also imposed obligations on the Office of Refugee Resettlement (ORR), which is responsible for compiling a list of *pro bono* attorneys and finding guardians for these children. ORR is looking into undertaking pilot projects for *pro bono* representation and guardians which would provide modest funding for their coordination and implementation. We should also look to other noteworthy models, such as the Violence Against Women Act and trafficking legislation, [FN18] which provide federal funding streams for legal services for victims of trafficking and victims of domestic violence seeking green cards. This was achieved, with very sympathetic constituencies and in the context of immigration benefits rather than quasi-judicial removal proceedings. In addition, these programs are not administered by DHS; rather, they are administered by the Department of Health and Human Services and the Department of Justice.

Finally, in terms of litigation, the *Gonzalez Machado* [FN19] case did result in the judge ordering representation for the child for the purposes of release from detention, but the class action failed in terms of finding a due process right to counsel for the child in the removal proceedings. But litigation remains an avenue on this issue considering that Congress is very divorced from litigation, as we saw in the case of special immigrant juvenile status, and no member of Congress is going to cite the *Gonzalez Machado* [FN20] case as an indication that there can be no right to counsel for unaccompanied alien children. Succeeding through litigation helps create the movement and climate for change. We also need more advocates on this issue on a national basis. Most immigration organizations have one or two advocates and each is stretched thin. Our media messages need to be reframed as well. We pay too much attention to ourselves as the "white knights"--*pro bono* attorneys who save the detainee and win asylum for them. We need to communicate the message that these foreign nationals are among the fortunate few who get representation and that many other individuals with equally compelling cases in the detention centers may be lost in the system. In dealing with the media, it is very important to communicate the context, showing where your client stands in terms of the representation he is receiving in contrast to the entire constituency.

Immigration Judge William Van Wyke **:** It is an honor for me to be here as well. I first met Arthur when I went to him for help. We were all lawyers talking about how to help others and, like many of these lawyers who started working on refugee issues with Central Americans, Haitians, and others in the 80s, I was a newcomer. In the mid-80s, I had a case where I decided I was really going to pursue it. It had to do with the right of a kid in El Salvador not to serve in the military that he thought was committing human rights abuses. I called up Arthur and I got to know him for the first time and he decided Lawyers Committee would write a brief. Then that case turned into *M.A. v. INS*, [FN21] which was a short-term success when a three-judge panel said, "Yes, things are bad in El Salvador and somebody ought to have a right not to serve in a military that is doing this sort of thing." Then there was a petition for review and he wrote a brief for that as well. We lost on that and the score was six to five. Bruce Hake was the editor of Interpreter Releases at the time and he called me up one day and said, "I did some research and the six judges who decided against M.A. in that six to five decision were all Republican appointees and the five judges who all decided in his favor were all Democrat appointees." That has always stuck with me as a sign of how important it is that we have judges who are open-minded. At any rate, it is an honor for me to be able to honor Arthur by paying back a little bit of what he has taught me as a lawyer. I know he has been a lawyers' lawyer to so many people. We would go to him for advice and especially those of us who were newcomers back then.

Though I am a judge now and I have been for about nine years, I am first required to tell you that I only speak for myself. I am not here to speak for other Immigration Judges, and there are some here. I am not here to speak for the Justice Department or the EOIR. I am not here to speak for Immigration. I get to speak for William Van Wyke today and I am all right with that.

I want to say a little bit about the other side of Section 292. People in immigration proceedings have the right to be represented not at any expense to the government. The idea of the right to counsel is still something of a hook. I went to Westlaw in preparation for this and put in "right to counsel" in the immigration section of cases and I came up with over 1,200 cases. This is something that is talked about a lot and many federal courts assume there is a right to counsel even though it's not at the government's expense. The right to counsel is not a Sixth Amendment right, as in criminal cases, but is often viewed as a Fifth Amendment right. It is one of the guarantees of due process. So, if we are going to have a system that sets up due process, a right to counsel is a right that people can have. If something stands in the way as an obstacle to that right, we might be able to remove it. The only thing is that you may have to pay for your lawyer or have a lawyer work *pro bono*. But I think that we should not neglect that this is an important hook that is already there--a success if you will--even though Section 292 also causes all the problems that it does.

From the standpoint of somebody who is supposed to hear cases, I'd like to speak a little bit about what specific functions we might have in mind when we talk about the right to counsel or when we talk about counsel. Because if we want to have appointed counsel, we have to think: what does counsel do? I want to give you some idea mainly from my experience in York where I was an Immigration Judge for six years and everybody was detained. What happens when people do not have lawyers? Here's an example so you can see why it might matter to have a lawyer. We start out with people who have no idea of what is going on. This is one of the reasons why under the regulations lawyers have to tell people about their rights. People come in and say, "If I pay the fine, can I get out?" and they are referring to a bond. There are a lot of myths about what immigration law is about and what the whole process is about. So judges have to spend a lot of time explaining to people, "Now what you hear on the street is not true," or "Yes, this part is true," and so on. So one of the things that lawyers clearly do--one of the things that Chris was saying about the Florence Project and its successors--is to let people know here is what is going on, this is what is happening to you, you have some rights, although there are not many. Then they start checking them out, filtering cases and sending some cases on to lawyers if it appears that there is a chance for them.

One of the things the Florence Project successfully did was to help determine in which cases people had some sort of remedy or relief and in which cases they didn't. In the best of all worlds for immigrants that wouldn't have to be done--you'd let everybody stay. But given that people are going to have to be deported if they do not have relief and given that they are going to be detained while they are deported, for a lot of people the first concern is to ask, "How long do I have to be here in jail? When can I go home?" --meaning, to their country. The quicker you can do that, the better it is. In the study that EOIR did of the Florence Project, the clinic, and pro-bar, they spoke about how much of a service this was--how this was efficient in terms of helping both the court and the INS with respect to detention--not to mention the humanity of telling people who have to go home that they at least don't have to wait a long time in order to do so. When I was in York, at the beginning that was not done, and later a program started that modeled itself on the Florence Project, and that began to be done. What happened is that people who

were clear about their rights were put onto a separate docket and decided to go home, usually to Mexico. This related a lot to immigrant workers.

Another thing that lawyers do besides giving people the lay of the land is handholding. No, it is more than that, it is helping people through the process of determining if they have relief. Here I am thinking more of political asylum, and I am thinking as much of my experience as an immigration lawyer for about a dozen years before I became a judge. You have had these experiences as well. People come to your office, and if they come from a repressive country, political repression often produces psychological repression. You say to people: "What happened?" "No, nothing." "Is everything O.K.?" "Yeah, everything is O.K." Sometimes it may take hours to get a story out of somebody. Those same people are going to say the same thing to an Immigration Judge that they say to you at the first appointment: "No, nothing is going on." One of the functions that a lawyer does--that I don't see an Immigration Judge being able to do because we are in an authority position and we are in a mentality of wanting to go on to the next case--we can't delve as you can, as lawyers can. That is a really important function. Every time you think of asylum seekers being deported without having a lawyer represent them, it may well be because somebody who hurts really bad is just not going to spill it out on the first go. It will take time. I was aware of some situations where a person comes from a place where something is going on that will justify an asylum claim, but they are saying, "No, I don't have anything," and we just don't know.

Another function that lawyers carry out is to determine whether somebody is deportable in the first place. Here also, often the person's own situation is such that they are not deportable (if they are derivative citizen) and this is very hard for a judge to go into in detail about. Sometimes it depends on whether the person lives with both parents, or whether the parents were separated or who was the primary caretaker, whether they were really married or whether they were married by common law marriage or by non-common law marriage. There are lots of derivative citizenship cases in York. These come up especially with people who were convicted of an aggravated felony and have no other form of relief, except if it turns out that they are citizens and are not subject to deportation in the first place.

In 212(c) cases, I like to think of attorney help like this: we have the title "attorney and counselor." An attorney is an advocate who speaks to others for somebody, but a counselor is one who speaks with his or her own client. In 212(c) cases or other kinds of cancellation, you often have situations where a lawyer can guide a person to literally make changes in his or her life that the person would not make without the threat of deportation. I have had that in my experience as a lawyer and I know I have seen it as a judge. People went to jail a few times--maybe for a drug crime, maybe they were addicts, maybe it was an alcohol problem--and never had the big wake-up call until all of a sudden they realized that they could be sent away from home and family forever and never come back. Suddenly they say, "I've got to change." They might not recognize that on their own, but with the help of a lawyer they can see that they have to. I have seen cases where a father and son had not spoken to each for years and the son realizes he's got to have his father testify for him. So the whole process of what you do in court may be

therapeutic in a sense and is something that cannot be done successfully unless there is a lawyer. If there is no lawyer, both marshalling the resources and predicting possible outcomes for a person in that situation are often not possible.

Another thing happens, especially in detention, that may seem minor, but if you don't have a lawyer it is major. There are so many little things that happen in detention. Often they are things such as, "I have been here for three weeks, but I have not been able to make any phone calls because my address book is over in property." I would see that all the time and nobody else seemed to have the interest to make something happen. Even those with an interest in moving people out to have more beds available for the next batch were not taking the responsibility for making that sort of thing happen. In cases where there were lawyers I would not even have to say anything. But in cases where there were no lawyers, I would look at the trial attorney for the government: "What can you do?" "Well, he should talk with a deportation officer." "How does he do that?" "Make a written request for this." But he doesn't write English--and so there are all kinds of problems. Why that doesn't work smoothly, instead of with all of these ripples, I don't quite understand, but that is a big problem.

Here is another thing that lawyers do. Who is going to write up the asylum application if they are not represented? Maybe they get somebody else from the same country. But you have to be careful about that because if you are suffering persecution in a country you may be talking with the persecutor's friends as you seek help from a compatriot to fill out your political asylum application. Some people may be willing to take such risks, but many people are not. There was a time when we simply had the court interpreter fill out applications for people. Then it was discovered that was not correct because EOIR should not be paying for it--INS should--and so we had disputes about that. So nobody was doing it. I would go on the record and waste time on the record, filling out an asylum application, asking the questions at a semi-merits hearing: "What is your name?" "What is your address" "When did you get married?" I would fill it all out and then say, "Now we are going to continue the hearing and both sides have a copy and next time we will do another hearing." Do this all on the record and I may still get a motion to recuse--and did--because I am supposedly taking somebody's side by simply filling out an application that the person has a right to make but that nobody else will help with.

One of the other things that lawyers do--that we notice when they are not there--is pretty obvious: legal research. Especially when dealing with detained people, we were working under AEDPA, IIRIRA and new laws, and there were lot of statutory construction issues--what is the person's right? If somebody had a lawyer, that often made all the difference in the world.

Last, but not least, is having a lawyer actually sit next to the person in court and speak for the person. I have mentioned all these other things first because you usually think of this last one as the most important, but I don't think it is necessarily the most important. I want you to have your mind open about other things that lawyers can do in cases, short of being the person who submits the G-28, a representation form to the court.

There are a couple of distinctions I want to make that might help us think about having lawyers in cases. What do we mean by cases? Every case before the Immigration Court? Every removal proceeding? Only removal proceedings? What about NSEERS [FN22] interviews, and so on?

A couple of other distinctions--we have all made these already--but just to be specific about them. I think we should pay attention to the difference between people who are detained--people who are in prison and deprived of their liberty--and people who are not, because when people are deprived of their liberty everything matters more. The risks are higher and if there is a decision against the person they are much more likely to actually be deported, and soon. When a person is detained it is much harder to do absolutely everything without a lawyer than in cases where people are not detained. That is not to minimize the need for lawyers in cases where they are not detained, but to recognize there are different needs.

Another distinction is that between competent people and incompetents. Incompetents include children and mentally incompetent people. I had a man once who appeared to have an asylum claim but he could not say anything about it because he was on all these antipsychotic drugs. What did we do? He didn't have a lawyer and we couldn't get a lawyer for him. So, there are really compelling cases.

Lory Rosenberg **:** So what did you do for him?
Judge Van Wyke **:** In that case, I terminated the proceedings because sometimes you just try to make things happen so the justice-related issues can be addressed by others with more power.

The other distinction I think we ought to make is between kicking people out who have been here for a long time, and letting new people in. This is an artificial exaggeration but there is a difference between someone who has lived here twenty years and has children and a wife and now because of a criminal conviction is facing removal --and only because of the criminal conviction, 100 percent because of it, which raises certain *ex-post facto* questions as well-- and somebody who is knocking on the door to come in because of what may happen to them in another country. I am not saying one is not more important or less important but I think it should help our analysis of the situation to realize that not all immigration cases are the same. For example there are many cases of people who are doing work, agricultural or other work, who once they are caught, their main goal is to get out of jail, get home to their country and be productive (or come back as quickly as possible).

The last thing I want to say has to do with this taking away of discretion of Immigration Courts and jurisdiction of circuit courts. This is the context in which we swim. There is a lawyer when there is a forum. When there is no forum for the lawyer to speak in, what can a lawyer do? And one of the things that has been happening over and over and over, is there is no forum for really important things that need to be done. If a person has an aggravated felony now and has been here forever, we may say they have all these equities so it is really important that that person have a lawyer. But they come before an

Immigration Judge and there is nothing an Immigration Judge can do because there is no discretion, there is nothing to be done. Advocating for the right to counsel or the right to appointed counsel must have as a really important element to it having counsel there to *do* something. And there have to be *rights* to advocate for. What we have seen is a tremendous diminution of rights of people in immigration cases, especially long-term residents, and especially since '96. What we are hearing in the Supreme Court now is, are there just some places where rights don't exist? Some people don't have any place to go when they have their rights wronged. Jurisdiction and the power to deal with this situation is an important element to think about when you think about the right to counsel to do something in that forum.

Eleanor Acer **:** Thank you Judge. Our next speaker is Lory Rosenberg.
Lory Rosenberg **:** Thank you. I am very pleased to be here with an impressive group of fellow panelists and also to be here at the Bar Association. I do also have a short Arthur story to relate to you. I actually met Arthur for the first time after Mike Posner successfully persuaded Judge Spellman to allow the Haitian cases to be handled by appointed counsel. I was then practicing law in Boston and that was one of the places he came to with that program. That was when I first met him and that was quite some time ago. But more recently, I didn't see that much of Arthur because partly, from 1995 to 2002, I sat on the Board of Immigration Appeals and I never really ran into Arthur, except for one time shortly after 1996 when the law had changed. There had been two horrific changes in the law that drastically restricted the ability of noncitizens to stay in the United States and drastically increased all the deportation related enforcement rules and procedures that could be called upon to remove people from the United States if they had been in violation of the law. One day I went to a conference--I can't remember now which conference it was--I was feeling rather depressed about the fact that here I was, hoping to do some good on the Board of Immigration Appeals--as Judge Van Wyke just indicated, the law had virtually stripped away most of the discretion the judges could exercise--and I ran into Arthur. We were talking and I said, "I don't know if I'm going to be able to stick it out there," and he had an immediate answer for me. It was somewhat prescient, I suppose, because here I am off the Board of Immigration Appeals talking about the right to counsel, but he said, "Why don't you set up a *pro bono* program and provide counsel for people because there's a real need for those in detention to be represented?" So I think it's somewhat ironic that here I am, actually trying to make some of that suggestion a reality with the rest of you.

I don't have to give a caveat before I speak and it's one of the first times that I don't have to do that, since I'm no longer on the Board or in any way connected with the Department of Justice. What I'm going to talk about though has something to do with my experiences and observations on the Board of Immigration Appeals. I'm going to go back over some of the things that Judge Van Wyke talked about, from a slightly different perspective. Maybe I'm going to be a bit too basic for most of you but I'm going to do that anyway because I really like to put things in a framework. The framework that I see for this issue, which is whether we can win the right to appointed counsel for noncitizens in removal proceedings, really hinges on the notion of fundamental fairness, which is the touchstone of due process. Those of you who are students of this area of law know that because

immigration and removal proceedings are considered to be civil proceedings, there is no Sixth Amendment right to be represented by counsel that kicks in. One concession that was made early on is that immigration proceedings do trigger the protections of the Fifth Amendment. That's where you have to begin following the continuum of the due process provision of the Fifth Amendment that means you have to have a fair hearing. Sometimes in order to have a fair hearing you can only accomplish that if there's representation by counsel.

Judge Van Wyke is correct, and I want to underscore what he said, that at least in removal proceedings there is a right to counsel, a recognized right to counsel. Most of the courts that speak about it will emphasize that. In fact, one way to look at this is that there is a right to counsel in removal proceedings, however the way the case law has interpreted that right is to extend it, or realize it, in only those cases which on a case-by-case examination warrant it. The courts never seem to find that counsel was warranted. Often times, the reason that they find that counsel wasn't necessary was because there wasn't sufficient prejudice shown by the absence of counsel. So it's an after the fact rationalization: yes, there is a right, but only if on a case-by-case basis it is necessary to preserve the fairness of the proceeding. Looking at things backwards, counsel might not have changed the outcome, so therefore the courts will conclude there was no violation of the right to counsel because no prejudice has been shown.

We're sitting in the jurisdiction where the Second Circuit feels differently about it. The Second Circuit has said, although it somewhat modified the strongest statements it has said on this, that there is a right to counsel that is enforceable without a showing of prejudice. [FN23] So this may be a very appropriate place for us to begin this campaign because we can take a look back at those cases and at how the Second Circuit discussed this right to counsel in relationship to a Fifth Amendment rather than a Sixth Amendment protection. So if you look at the right as a fixed right, but one where there is no obligation to provide appointed counsel, that doesn't mean that's the end of the story. There are still several things that kick in, and from a litigation or advocacy-oriented perspective, there are several things that I want to take a little time to discuss that are important to look to in representing cases, in any lobbying, advocacy, or policy discussions taking place, and in any writing that people do.

First, in the broad scheme of things, immigration law has been repeatedly described as one of the most complex areas of statutory law. Virtually nobody can understand it. If any of you here are just beginning to do immigration law, or if you remember when you began, you recall how nothing made sense, and finally a year or two later things suddenly began to fall into place. But the respondents who appear in Immigration Court and who are arrested and detained and who then, if their case is not granted, have to appeal to the Board of Immigration Appeals, don't have that two-year period, or the college background that we had to study all those specific rules, regulations, procedures, and interpretations later made by the court. They are at a significant disadvantage.

What are some of the ways that Judge Van Wyke went over? What could an attorney do who is schooled in immigration law? When we're talking about attorneys, we're talking

about effective attorneys, who are on top of the cutting edge laws and practices in this area. For one thing, in the proceeding in front of the Immigration Judge, there is going to be a government attorney there. If you were an occasional observer going into court, you would notice immediately that the government is represented by somebody who has a law degree, and the respondent, who is in a proceeding that is supposed to be one with two parties, is not represented by counsel, unless they can afford their own counsel. That's really problematic because an attorney can do all the things that Judge Van Wyke talked about. Even backing up further, an attorney can clearly explain what the system is about, what kinds of challenges can be made to the charges, what kinds of relief are available, how that should be presented in terms of testimony, and how to present that testimony in front of the judge. There are a lot of impediments that Judge Van Wyke talked about and I fully agree with him and actually remember some of those cases from when I was sitting at the Board. The fact that an individual one of those cases was resolved does not mean that we are not still facing incredible problems in terms of asylum seekers who are possibly illiterate or literate in their own language but not in English. You have to fill out the asylum application in English. You can be a Nobel laureate poet in another language in your country, but if you can't fill out that application in English, the judge won't accept it, unless possibly Judge Van Wyke might accept it, or might have accepted it in his younger days.

Judge Van Wyke **:** We accepted a Polish case once, written in Polish.
Lory Rosenberg **:** That's an outstanding problem that still exists. The same is true with what Chris was talking about when you have minor respondents in these cases. There is a lot of need for assistance by somebody who is schooled in the legal issues and also who is familiar with the way courts handle these cases and, preferably with the way Immigration Judges handle these cases. What I say seconds what Judge Van Wyke is saying in terms of what a difference a competent, effective attorney can make in providing representation.

One of the issues that comes up, as I said before, is this is a civil arena that we're playing in. This is not a Sixth Amendment criminal case. Yet there are two things that we can explore further in this area. Number one is, when the case law came down holding that counsel was to be appointed under the Sixth Amendment in *Gideon v. Wainwright*, [FN24] that all hinged on the Sixth Amendment right to counsel: you should not be deprived of your liberty without the opportunity to present your case in the best way represented by counsel. I think we're looking in the last 30 to 40 years at a very different playing field for immigrants in Immigration Court. First of all, we have mandatory detention. There was no mandatory detention in civil immigration cases until at least a little more than a decade ago. Now there are questions about how closely detention and deprivation of liberty in the immigration context might be tied to the deprivation of liberty through imprisonment that is found in the Sixth Amendment's protections. Now we have people who remain in indefinite detention who haven't even been convicted of a crime. They have fewer protections than those who go to trial under the Sixth Amendment and who have the benefit of counsel. Now we have people serving out terms in immigration imprisonment which are often longer than the terms served by criminal defendants. That raises the question of whether it is time to reanalyze the nature of

removal hearings. An aspect of that, besides the fact of increased detention, is that there are so many criminal offenses that more or less automatically trigger immigration penalties in terms of removal. If you take the fact that after the 1996 Act, the penalties or sanctions for immigration violations increased, and the opportunity for judges to provide relief decreased, in many cases certain convictions in court where there is a right to counsel, automatically trigger removal with no hope of any alternate disposition other than a cause-and-effect relationship. The criminal charges are lodged, the criminal trial is conducted, and the person is deported. In some cases, the person is deported even without a hearing under the immigration statute. The whole complexion of the nature of the deportation and removal proceedings has altered dramatically in the last several years, and that's worth a look.

However, it may not be necessary to look that far, because after *Gideon v. Wainwright* [FN25] was decided in the 60's, there were cases in which quasi-criminal or certain civil proceedings were found to warrant the appointment of counsel, such as the juvenile case *In re Gault*. [FN26] The way the court decided to grant assigned counsel in that case and in a few others, was by looking at: What was the nature of the proceedings? What was at stake? Was something very serious at stake? What was the degree of deprivation of liberty? What was the nature of the proceedings and the ability of the person in the proceedings to handle the proceedings without representation? All of those factors appear and are the ones that we have articulated in the immigration removal hearing environment. In a criminal context, what you look at to determine when there's a right to counsel is whether it is a "critical stage" of the proceeding. In the immigration context, we could arguably push for an interpretation of due process protection under the Fifth Amendment that looks at a similar scale to determine whether this is this an area of the proceeding at which counsel should be provided.

I want to turn quickly in the time I have remaining to BIA practices. When you get to BIA practices, it is, one: a critical stage of the process and, two: very complex appellate rules and regulations. There is a laundry list of requirements that have to be satisfied, starting from filing a timely appeal and continuing through how the Notice of Appeal is prepared, what information is included on it, when that information is enough, or not enough, to allow the Board of Immigration Appeals to consider the case. On top of those regulations, in the last couple of years has been added a streamlining process, which sets out a standard that allows the Board to choose not to reason through the appeal itself, but to rely on the judge's reasoning, as long as it finds the appeal not to raise a novel issue and as long as it feels the judge was correct. Now, in order to defeat or overcome a standard that would limit review at the administrative appellate level, it's virtually impossible for somebody who is unrepresented to fill out on the Notice of Appeal for immigration purposes the necessary factors that are going to survive summary dismissal and then survive streamlining or summary affirmance.

As I close, I want to suggest advocacy in areas that I think we should not give up on, that do exist in the statute and in the regulations, and that will underscore the need for counsel for everyone, not just those who can afford it. Because there's a fixed right to counsel, the courts look at it as the exception and not the rule to not have counsel. Counsel has to be

waived. So one question is, was there an effective waiver of counsel in this case? Another question is, was there actually reason to grant a continuance? When I was at the Board, I saw a number of cases in which judges who might have been very frustrated, and maybe were entitled to their frustration, would say to somebody, "I gave you a continuance last time, and you told me you'd come with your lawyer this time." But this time the respondent is in front of the judge saying, "My lawyer's office says he's on his way." Instead of saying, "Fine, we'll wait, you clearly want to be represented," the judge, who is under tremendous pressure from higher officials in the Department of Justice, says, "That's it, I told you, we're going to go forward." I read numbers of transcripts where that happened. In a case where that happened recently in the Ninth Circuit, *Tawadrus v. Ashcroft* [FN27]--this was a rather egregious example--the individual was represented before the Immigration Judge and during the course of the hearing, the attorney asked the judge if he could withdraw, or perhaps the judge asked the attorney if he wished to withdraw. The attorney did withdraw, and then the respondent in the case, being very concerned about this said, "But I want to go forward and put on my case." The judge got angry and said, "Fine, we'll adjourn this for two hours. Come back this afternoon." He forced this person to present his asylum case without counsel when he clearly had not waived counsel and when certainly it would be appropriate to grant a continuance. Those are bases for appeal, and if you are the attorney who comes in after that's happened, those are places you can hit very hard on the Fifth Amendment due process protection being violated.

The other thing that I think is important to look at is the issue of prejudice. I said here in the Second Circuit that there was not necessarily a prejudice requirement because the right to counsel is viewed as such a fundamental aspect of fairness and a fair proceeding. But there are a lot of bases on which you could find prejudice that might render being forced to go forward without counsel a problem that interferes with the due process rights in the proceeding. Nancy Morawetz, a professor at NYU who is here tonight, mentioned to me earlier that a lot of the courts are throwing out appeals based on the fact that the issues haven't been exhausted. They won't hear the issues because they haven't been raised and argued below. When I was at the Board, I probably invoked what some might call "guerilla tactics" to deal with some of these problems. I remember writing several dissenting opinions where I raised the arguments that the respondent should have raised, and counsel should have raised if there had been an attorney there. Even when it was part of the case that my colleagues had an opportunity to consider in the appeal, the higher courts rejected it and said that wasn't exhaustion. Exhaustion means the respondent him or herself has to raise those points. So I leave you with a combination of consideration of the problems that are generated by not having counsel, and perhaps some of the ways that we can keep this issue in the foreground, and at least try to do our best for those who are unrepresented when we can challenge the way their existing right to counsel has not been observed properly.

Eleanor Acer **:** Thank you, Lory. Our final speaker is panelist Judy Rabinovitz.
Judy Rabinovitz **:** Thanks, Eleanor. One of the fortunate things about going last is that you get to hear what everyone else has said and start responding and asking questions. One of the unfortunate things is that everything you were planning on saying has already

been said. So, I'm going to try to use the brief time that I have to followup on some of the points raised by the other panelists.

Actually I do think that one of the interesting and important things that can come out of tonight's event is if we use it as an opportunity to begin talking about these issues among ourselves. Because, as everyone has said, this is just the beginning of a campaign. We are obviously all aware, as Claudia said in her introduction, that we are not in a period of expanding rights, yet this is an important issue for us to be taking on. We realize that it's an uphill battle but it's important to be doing it.

Let me start by again thanking the Bar Association for organizing this event, because I think we are often so much on the defensive these days, in terms of responding to one emergency after the next, that to be able to think affirmatively about what we want is a very positive thing in itself. For myself, I know that having to prepare for this panel meant that I actually had to focus on an issue that has been on my "to do" list for ages, but which, in light of more pressing and immediate demands, I never seem to get around to doing. For all of us to have to carve out time to begin thinking about this issue is really important.

I feel especially privileged to be here in terms of this being in honor of Arthur, because he was somebody who played a special role in terms of my history as a lawyer. I started working with him when I was still in law school. The summer after my first year of law school I worked with him, and Claudia, on trying to put together a class action lawsuit to challenge the denial of work authorization to Central American asylum applicants. Little did I know that this would be the first lawsuit I would work on when I later joined the ACLU. [FN28] Nor that I would spend the next eight years working on it--along with Arthur!

Turning back to the subject of this panel, I agree with pretty much everything that the prior panelists have said. To be a little bit contentious, however, just to get discussion going, one difference might be the question of litigation strategy, which is where my expertise lies. Although I've also been involved in advocacy work, during the last eight years my work has focused largely on federal court litigation. So when Chris suggested that, with respect to litigation, "let a hundred or a thousand flowers bloom," and that from the vantage point of Washington it is not going to matter if you get some bad decisions, I cringe a little bit. He may be right. And I'm definitely not suggesting that people should hold off on bringing lawsuits, particularly in individual cases where you have an obligation to a client. I do think, however, that when you're bringing a systemic challenge, this is something we want to strategize about. My sense, in reviewing how a right to appointed counsel was developed in *Gideon*, [FN29] and then again in *Gault*, [FN30] is that this is a long process. It's not going to happen overnight. We are going to have to start to lay the groundwork, and lay the groundwork in a lot of different ways.

Some of those things we have already begun doing today, namely identifying and refining our arguments about why counsel *is* important. Counsel can be important because, for example, it affects the outcome of a proceeding. More people will win if

they get counsel. Counsel might also be important because it provides some credibility to the system, by making the process more transparent and thus insuring that people have some idea what's going on in their cases. Counsel may also make a difference--I think you suggested this, Chris--in terms of efficiency. Or, as Judge Van Wyke suggested, in terms of making the courtroom proceedings move more smoothly, as demonstrated by the experience of the Florence Project. So we need to identify with even more precision the reasons why we think counsel is important, and then also begin to build an empirical record that supports these arguments.

For example, I think we can already point to statistics which show that if you have counsel you are more likely to win relief in removal proceedings. But we're going to need to do better than that. We're going to need to go a step further and show *why* this is the case. Can we do some controlled studies? Is it that a higher percentage of people with counsel win their removal proceedings because they are the ones most likely to have strong cases? And that the people who have no cases don't bother with counsel and don't bother to fight and just take removal orders? We're going to have to look at that. We're also going to have to look at to what extent there are certain groups of people who are most vulnerable--like juveniles, mentally incompetent individuals or detainees. Lory was also talking about looking at what portions of the removal proceeding are most critical in terms of having counsel. Is the most critical part of the proceeding framing an appeal to the BIA? Is it a bond hearing? We need to look at different aspects and then try to collect statistics that would show the effect of having counsel, while controlling for whether the individuals involved had meritorious claims or didn't have any claims, and also for whether counsel was incompetent. Because, as we all know, there are a lot of incompetent counsel out there.

So, one very concrete thing that the Bar Association itself might be able to undertake here in New York would be a study of the immigration court. Obviously, we'd need the help of statisticians and others who know how to formulate these kinds of studies. The goal would be to identify what effect the presence of counsel actually has on the workings of the immigration court and on the outcome of proceedings. For example, does it make proceedings shorter? A number of immigration judges, in addition to Judge Van Wyke, have talked about how having counsel would make their proceedings not only more efficient, but would also allow them to feel more confident that they reached a fair result. I assume that one of the things we care about is fair results.

Following up on Lory's remarks about the right to counsel in other contexts, we also need to look closely at the Supreme Court's right-to-counsel decisions in order to frame our arguments most persuasively. For example, in *Gault* [FN31] the Supreme Court found a right to appointed counsel in juvenile delinquency proceedings. However, the Court did not find such a right in probation and parole revocation proceedings. Obviously, we want to look at those decisions and see what factors the Court found important, which it dismissed, and what kind of evidence the plaintiffs had compiled and put before the Court. Then, we need to think about how we can frame our challenges in similar terms and how we can begin to collect the kinds of evidence that the Court found most convincing.

At the same time, people should be challenging the lack of counsel in their individual cases. In particular, as Lory mentioned, people should remember that there is a statutory right to counsel (albeit, "at no expense to the government") and that interference with this right can also amount to a denial of due process. The recent case that Lory mentioned--the Ninth Circuit's decision in *Tawadrus* [FN32]--is just one example. There are other cases where people have raised similar statutory and due process challenges based on their having been transferred away from counsel, or having being denied a continuance to obtain counsel, or otherwise having failed to make a knowing and voluntary waiver of their statutory right to counsel. In the Second Circuit case that was earlier referred to, *Montilla*, [FN33] the government failed to comply with its regulations implementing the statutory right to counsel and this alone was a basis for reversing the deportation order. So there are definitely ways to use the statutory right to counsel and we should be trying to use it as much as possible.

In addition, quite apart from our long term goal of establishing a right to appointed counsel for all immigrants in removal proceedings, we should be relying on the Fifth Amendment right to a fundamentally fair hearing as a basis for arguing for appointed counsel in individual cases. I teach as an adjunct at NYU Law School and one case I always assign to my students, is *Aguilera Enriquez.* [FN34] This is a Sixth Circuit case from the '70s, which went further than any other decision I have seen because it used the fundamental fairness language that Lory was talking about. The Court recognized that there was no Sixth Amendment right to counsel in deportation proceedings, but nonetheless it found that, if in a given case the lack of counsel would render a hearing fundamentally unfair, then due process would require appointment of counsel.

Unfortunately, in that case and in others, courts have applied a prejudice test as a way of avoiding the conclusion that due process required a remand and appointment of counsel. Essentially, the courts look back and determine that, because in their view counsel wouldn't have made a difference in the outcome of the proceeding, due process does not require a remand. In reaching this conclusion, the courts look at a number of factors, among these whether the individual would have been eligible for any relief from removal, or whether, in the court's view, a removal order was inevitable. In addition, to the extent that the individual had the assistance of counsel for their BIA or federal court appeal, the court may reason that any prejudice that might have been caused by the initial deprivation of counsel has since been corrected.

Obviously, the problem with this kind of backward-looking approach is that it doesn't acknowledge other ways that counsel may have been able to frame the case in its initial stages, including the development of a fuller record for appeal. In addition, even where litigation may be successful in obtaining results in a particular case, the possibility of using these cases as a vehicle for establishing a due process right to appointed counsel is inherently limited. That's because those cases that make it to court will now have the benefit of our representation. Thus, the very legal issue we want to establish may well be rendered moot by our representation.

On the other hand, bringing class action litigation presents its own obstacles. For one, it means going up against the jurisdictional hurdles that the 1996 Act erected. [FN35] Also, class actions have the potential for creating bad law, which will affect a lot of people. Thus, we want to be careful that we really are setting a foundation.

Another context that we should be looking at in terms of litigation to establish a due process right to appointed counsel is criminal re-entry. This is a huge issue--people who have been deported, if they come back into the country, they can be, and are being, criminally prosecuted for re-entering illegally after deportation. Fortunately, because this is a criminal prosecution, this is one of the few places where the individuals involved do have a right to appointed counsel--in this case, federal defenders. In addition, because they are being charged with a criminal offense, and one essential element of that offense is the existence of a prior deportation order, the Supreme Court has held that a valid defense to such a charge is that the prior deportation order was fundamentally unfair. Thus, these prosecutions have become a forum for litigating the fundamental fairness of prior removal proceedings, and might well provide a venue for trying to raise the issue of a lack of counsel and its effect on the fundamental fairness of a removal order. Again, the exhaustion issue that Lory raised will likely come up here as well, because criminal defendants need to show that they took advantage of their opportunity for judicial review of the prior removal order. However, there was actually a recent Ninth Circuit decision where, because the Immigration Judge hadn't informed the person of his right to appeal, the Court held that the prior removal order was fundamentally unfair even though the individual had not exhausted judicial review. [FN36] We could try to use similar reasoning to get around the exhaustion argument where an unrepresented respondent failed to seek judicial review of a removal order.

One final point I'd like to raise before concluding and turning this over for further discussion, is the contours of the existing statutory right to counsel in removal proceedings, and in particular, the government's position that language in the statute, INA Section 292, constitutes a prohibition on any government funding for appointed counsel in removal proceedings. I don't think that this is an accurate reading of the statute. The statute says that individuals in removal proceedings have the privilege of being represented by counsel "at no expense to the government." To me, that means they do not have a right to appointed counsel, but it doesn't mean that the government is *prohibited* from assigning counsel in a particular case where due process requires it. I think that we should keep this in mind in terms of legislative and advocacy approaches, especially where there seems to be some receptivity on the part of the government and policymakers to trying to increase *pro bono* representation. Why not advocate for a policy and a mechanism where the immigration court could appoint counsel in those cases where it determined that otherwise the proceeding would be fundamentally unfair?

For example, William--I don't know if you would be disbarred by the Immigration Court--but if you were to say, "I'm appointing counsel on this case," what would happen? Would the Immigration Court say you *can't* do this because it's prohibited by the statute? Or could you say that you have an obligation to make sure this is a fair proceeding and appoint counsel? Or perhaps, more realistically, suppose a person were to ask for

appointed counsel and you were to say that you believe it is warranted but that you are without authority to do so?

What I'm suggesting--and essentially I'm just thinking out loud now--is that we should not assume that the government is correct in its construction of the statute and we should not give up on looking for ways to persuade the government to change its interpretation and to recognize that it does not bar government appointed counsel in circumstances where a fair hearing would otherwise be impossible. The advantage of such an approach--although I acknowledge that it's likely more of a fantasy--is that it could be done without any new legislation, under existing statutory authority. I don't think there is anything that would preclude the Department from saying, "we have revisited the statute and we now believe that we can use government funds to appoint counsel in appropriate cases." Of course, the problem is persuading them that it's in their interest to do that.

Lory Rosenberg **:** They have been actually opposing it in connection with CJA [FN37] appointments in indefinite detention cases. So the federal defenders, particularly in Seattle, where Jay Stansell is working, have been going in and asking to be appointed in District Court cases of indefinite detention.

Judy Rabinovitz **:** Just to clarify, I don't believe the government has been objecting to the federal defenders' representing indefinite immigration detainees in federal court habeas actions. But you're right, they have used their interpretation of the statute to oppose these same federal defenders representing these detainees before the immigration court. This problem arose in the context of regulations that the government promulgated which purport to authorize indefinite detention of detainees whom DHS has determined to be specially dangerous. [FN38] The regulations provide for a hearing before an Immigration Judge where a detainee can challenge the specially dangerous designation. And so Jay [Stansell], and the people from the Seattle Federal Defenders Office, went in before the Immigration Judge to do that and that's where the trial attorney was taking the position, "You can't come in here because the statute prohibits counsel at the expense of the government," which just seems ridiculous, since they had already been appointed by the Federal court and they were not representing the detainees in removal proceedings, but solely to challenge their indefinite detention.

RESPONSE TO AUDIENCE QUESTIONS [FN39]

Ineffective Assistance of Counsel

Lory Rosenberg **:** In its last decision on this subject, *Matter of Assaad*, [FN40] which was a BIA decision from 2003, they basically acknowledge that they could remedy ineffective assistance of counsel complaints by granting motions to reopen, but they did not. If you go back and look at that decision, you'll see that they scrupulously did not ever once mention that there was a Fifth Amendment or Due Process right to counsel. In fact, they said, "We used to think, when we first wrote *Matter of Lozada*, [FN41] that this all emanated or stemmed from the Due Process Clause. However, it's sufficient for us here to talk only in terms of there being a statutory right to counsel, and that right to counsel

means that if you're going to have a right to counsel, it's implicit that it's effective counsel." The problem with all of that is that you're only entitled to effective counsel if you can pay for counsel in the first place. So they're basically saying they will respect somebody undertaking to represent you having to be effective and competent, but the fact that you can stand there alone is not going to be a concern. I just think that, particularly because they backpedaled on the due process question in that case and also because I happen to have been privy to some discussions on the subject before I left, there is a strong view that a couple of Supreme Court decisions that are discussed in Lauri Filppu's concurring opinion in that case really suggests that the Supreme Court has already spoken on the fact that there is no right to complain about ineffective counsel unless you actually start with a right to counsel, appointed counsel. So, I would say that it's really faltering on the edge of almost being a situation where the Board would be ready to overrule *Matter of Lozada* [FN42] to the extent of saying that there is no remedy for ineffective assistance of counsel. I think that's actually contrary to where a lot of the Circuit Courts are, though, so it wouldn't be that easy for the Board to backtrack. But I think it's also going to be a hard way to approach it.

The Use of Statistics to Support an Argument for a Right to Counsel

Chris Nugent **:** My experience has been that you need rigorous and credible documentation. I think that if the Open Society Institute or another foundation were to give a grant to do this type of rigorous research, it would be very helpful as a seminal study. Such a study could perhaps be accomplished too through a federal appropriation.

Eleanor Acer **:** The statistics issue, I think, is an important one too. The papers that were passed out here had some of the statistics on them and I know that Andy Shoenholtz at Georgetown got them by doing a FOIA. So these are actually statistics that generally they do have, but I don't think that they're publicly released. You won't find them on the EOIR or DHS website, I don't think, and so even using and circulating more prominently the statistics that do exist and making sure to FOIA additional statistics is, I think, a very helpful exercise.

Independent Immigration Court

Chris Nugent **:** The other reality I want to throw out there and have Lory comment on is the whole movement that's starting to germinate on creating an independent Immigration Court as an Article I court and trying to increase the stature and autonomy of the court to be a court. That's where counsel would really be vital. In Washington, very few policy-makers knows what the Executive Office for Immigration Review in fact is or does and where it can be found in the federal budget.

Lory Rosenberg **:** There are a couple of different things going on. There's the association of judges that has long been championing and calling for an independent Immigration Court and I don't know if Judge Van Wyke prefers to speak about this, but they have had a lobbyist and they have been advocating for that. At the same time, some of the national groups based in D.C. are just completing working with people in Congress on what's

called the Civil Liberties Restoration Act, [FN43] which is going to be introduced very shortly, and one of its components is going to call for an independent Immigration Court or independent EOIR. I think that's a really important idea, I'm completely in support of it, but I think that it would be a mistake to expect very much of that because if it happens the way it's being proposed it's really just going to take the entire bureaucratic formulation out of the DOJ and put it into its own agency with the same personnel and I'm just not optimistic about how quickly a lot of change would come about. However, if it did have its own budget and it did have its own ability to make certain rules, this might be one area where there could be some movement.

I'm not exactly sure that the documentation of information is going to be all that helpful. Remember a long time ago when Judge Robie was among us, he wanted AILA to agree to participate in a *pro bono* program that would appoint people to represent detainees. This was when they first began holding hearings in the courts, years ago, and the whole idea was that it would look good statistically, so that they could say, "We have 90% of the people represented." Well, that doesn't tell you anything about the quality of representation, that doesn't tell you anything about how many people were represented on the same day, it just doesn't tell you a lot of the information that would really make a difference in terms of what we're talking about when we're talking about counsel. And it also means, in terms of whether people succeed when they have counsel as opposed to when they don't have counsel, it requires a certain amount of a judgment call about what succeeding means and what arguments could have been made. I just think that's a tough area. Do we have a best practices rule about what counsel should be doing? Is EOIR going to agree with us on what that might be? For example, every dissent that I wrote represented everything I thought the judge had done wrong or that the majority was misreading in terms of the law, and yet a majority of the people at EOIR, if you want to call it recording their vote, voted against me. That meant, for example, if I said they shouldn't say that driving under the influence is a crime of violence, I was alone; everybody else thought it wasn't worthwhile to make that argument. So if they asked, "Is it beneficial to have counsel in this case?" they would have said, "No," because they wouldn't think it was an argument. So I'm just saying this not to be discouraging about looking for ways to find numbers and prove that this is so important, but we have to do it in a way that recognizes how skewed--if they're doing the counting--it's going to be.

Judge Van Wyke **:** If I could just say a word about the Article I court, there is a National Association of Immigration Judges (NAIJ), it's actually a union, and we have not taken a formal position in favor of an Article I court as such, but we have taken a formal position among our membership in favor of greater independence. And that could be something like a government agency, like EPA, that is not under one or other department heads, or it could be an Article I court. After September 11, it's not been viewed as any sort of realistic goal for us to be working on and we put our last lobbying efforts into staying out of DHS and, with the help of many others were successful in that. But I don't think it's totally irrelevant, because when you look at the larger picture, even if it's some of the same people who would be running such an agency or such a court in the end. I think there'd be a different sense of mission, because what would impel us to advocate for or

set up an independent court is exactly that independence, and independence from whom? I mean, we're really talking about independence from immigration prosecutors.

Eleanor Acer **:** The Attorney General.
Judge Van Wyke **:** The Attorney General in this particular case, now that immigration is in DHS, so we're talking about being more judge-like, being more court-like, and I think that's a worthy goal to keep in everybody's mind, especially when we want to advocate for representation for people. Again, there has to be representation not for the sake of representation but for the sake of guaranteeing rights. It's all part of a package--having a more independent court, having representation by attorneys, having enforceable rights. Although it's perhaps not a realistic goal right now, as an aspiration, there's a lot to be said for it. And I think you'll find a majority of Immigration Judges, and certainly most who are members of the NAIJ or the NAIJ as a whole, taking a stand for greater independence.

Comparison with the Criminal Context

Judge Van Wyke **:** We've raised the analogy of the right to counsel in criminal cases and I think the analogy kind of works and kind of doesn't work. One of the ways it doesn't work is that in a criminal case, one of the values in society is to make the prosecutor prove his or her case. The defendant can remain silent and the government has to be proactive. In immigration, although the burden of proof is on the government to show deportability, it's usually met by just showing that the person is not a citizen. The main issue in most cases relates to the application for relief from removability, like a waiver, cancellation, asylum, etc., and in each of those cases the burden is on the person making the application. He or she can't remain silent, but must be proactive. Lawyers have a different role in such a case than when defending a criminal defendant who makes the government prove its case. So, if we think of the idea of universal appointment of counsel, I think we have to be cognizant of some of the differences in immigration cases where usually the important part is somebody's asking for something rather than just defending against a government action.

Judy Rabinovitz **:** I thought that this was changing now on some level-- that, to the extent that Congress has limited the availability of discretionary relief from removal, the focus of removal proceedings is much more on whether an individual is actually removable in the first instance, which is the government's burden to prove. So the elimination of discretionary relief cuts both ways. In some ways, for individuals who are clearly deportable, the lack of relief obviously makes it harder to show that counsel would have made a difference in the outcome of these proceedings. But at the same time, it also means that it has become all the more important for counsel to come up with other ways to help the client; namely, to force the government to prove its case; to actually prove that the person is a noncitizen, and to prove that a conviction falls into one of the categories that renders a person removable. The issue is no longer simply one of discretionary relief, but whether the individual is in fact removable. For example, an individual may come in to immigration court and say, "I concede that I committed this crime." But that doesn't resolve the issue of removability. The individual may have committed this crime, but is it

a crime of violence? That issue is going up to the Supreme Court now, and yet people without counsel wouldn't have known that this was an issue they should challenge. [FN44] And so lawyers are in many ways even more important.

Lory Rosenberg **:** Well, there are a couple comments that I'd add, which are: number one, it is phenomenal to see the transcripts of proceedings. Now, I know, part of the reason that Judge Van Wyke may not have seized upon this is I'm sure he doesn't conduct his court this way, but I've read numerous transcripts where the colloquy between the judge and the respondent would go as follows. First of all, you would never know that there was a government attorney in the room. I mean literally, if they stated their name for the record, they would not appear after that in the transcript, so the colloquy would go: "Now, were you convicted of burglary under California Code 459, or theft under blah blah blah" and rattle off several numbers, and the guy would say, "Yes." You tell me how this unrepresented person from (pick whatever country you want) happens to be familiar with the penal code section from the State of California. Obviously, he was just saying that he was convicted, but he really just conceded the charges. It does happen with lawyers, but it should never happen with a lawyer present. That's exactly what Judy is talking about.

The other thing that I think is critical now is that we have so many protection cases, such as protection of withholding of deportation and protection of Convention Against Torture, nonrefoulement, that turn to certain degrees on the nature of the underlying offense that may have made that person ineligible for asylum. So it becomes really important that there be counsel in those cases. Even though you're still in the position of asking for something, the relief is mandatory if it's proven. I am not totally persuaded that I would want to say this is so much like a criminal proceeding. Actually, there is a movement for civil *Gideon* [FN45] that's occurring and may be that's something that we can hook up with. The problem is that, in so many ways, even though it's a civil proceeding, it's so much more like a criminal proceeding and so I don't know. I don't personally know the answer to that, though I do agree with Judge Van Wyke that we should be looking at the way to properly visualize and approach this issue and not just say it totally corresponds to a criminal proceeding.

Chris Nugent **:** I think politically it cuts both ways. You know, language is everything in Washington and a lot of policy-makers already analogize immigrants to be *per se* criminals or people in deportation proceedings to be *per se* criminals. I think there would be a lot of policy-makers who would be willing to make a concession: "Immigration proceedings can be criminalized, deportation can be construed as punishment and the right to counsel will be provided as a consequence." How such a Faustian *quid pro quo* would impact the viability of advocacy for The DREAM Act [FN46] or any kind of positive immigration reform program would remain to be seen. However, in all probability, the stigma of relegating immigrants to be criminal could jeopardize advocacy for immigration benefits and positive immigration reforms.

Judy Rabinovitz: It just paves the way for more local police enforcement.
Chris Nugent **:** I think the *quid pro quo* would be right to counsel.

Eleanor Acer **:** Well, I think we'll wind down now. We've had an excellent discussion with learned panelists and we've given the Committee and the Association quite a lot of ideas to be thinking through and some really excellent suggestions. The Association clearly has a lot of work before it, but I have no doubt that since they will be inspired by the example of Arthur Helton, who was tenacious and tireless, I have no doubt that you will certainly ultimately succeed on this project. Best of luck and we all look forward to working together with you.

[FN1]. Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

[FN2]. Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 214, 1996).

[FN3]. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

[FN4]. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

[FN5]. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963).

[FN6]. *Louis v. Nelson*, 544 F.Supp. 973 (D. Fla. 1982); Louis v. Nelson, 544 F.Supp. 1004 (D. Fla. 1982).

[FN7]. A. Schoenholtz and J. Jacobs, The State of Asylum Representation: Ideas for Change, 16 Geo. Imm. L.J. 739 (Fall 2002).

[FN8]. Convention relating to the Status of Refugees, adopted on July 28, 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

[FN9]. See Department of Homeland Security, Detention Operations Manual, http://www.ice.gov/graphics/dro/opsmanual/index.htm.

[FN10]. The Florence Immigrant Rights and Refugee Project is a nonprofit legal service organization that provides free legal services to men, women and children detained by Immigration and Customs Enforcement (ICE) in remote detention facilities in Florence and Eloy, Arizona. See http://www.firrp.org/.

[FN11]. Unaccompanied Alien Child Protection Act of 2001, S. 1129, H.R. 3361.

[FN12]. *Gonzalez Machado v. Ashcroft*, No. CS-02-0066-FVS (E.D. Washington, June 18, 2002).

[FN13]. 8 U.S.C. § 1362.

[FN14]. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[FN15]. *Gonzalez Machado v. Ashcroft*, No. CS-02-0066-FVS (E.D. Washington, June

18, 2002).

[FN16]. "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, authorized to practice in such proceedings, as he shall choose." Section 292 of the Immigration and Nationality Act ("INA"), 8 U.S.C. Section 1362.

[FN17]. Unaccompanied Alien Child Protection Act of 2001, S. 1129, H.R. 3361.

[FN18]. Violence Against Women Act of 1994 ("VAWA"), P.L. No. 103-322, 108 Stat. 1796 (1994); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 .

[FN19]. *Gonzalez Machado v. Ashcroft*, No. CS-02-0066-FVS (E.D. Washington, June 18, 2002).

[FN20]. *Gonzalez Machado v. Ashcroft*, No. CS-02-0066-FVS (E.D. Washington, June 18, 2002).

[FN21]. *M.A. v. INS*, 899 F.2d 304 (4th Cir. 1990) (en banc).

[FN22]. "National Security Entry Exit Registration System," also referred to as "Special Registration." This program, implemented on September 11, 2002, required nonimmigrants from certain designated countries to appear at local INS offices for registration. In addition, those individuals were required to register upon entry and exit from the United States. The "call-in" registration program was cancelled in December 2003. More information on NSEERS is available at http://www.ice.gov/graphics/specialregistration/index.htm.

[FN23]. *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991).

[FN24]. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[FN25]. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[FN26]. *In re Gault*, 387 U.S. 1 (1967).

[FN27]. *Tawadrus v. Ashcroft*, 364 F.3d 1099 (9th Cir. 2004).

[FN28]. *Najera-Borja v. McElroy*, 1995 WL 151775 (E.D.N.Y., March 29, 1995) (No. 89 CV 2320).

[FN29]. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[FN30]. *In Re Gault*, 387 U.S. 1 (1967).

[FN31]. *In Re Gault*, 387 U.S. 1 (1967).

[FN32]. *Tawadrus v. Ashcroft*, 364 F.3d 1099 (9th Cir. 2004).

[FN33]. *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991).

[FN34]. *US v. Aguilera-Enriquez*, 516 F.2d 565 (6th Cir. 1975).

[FN35]. See, e.g., INA Section 242(b)(9).

[FN36]. See *US v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2005).

[FN37]. Criminal Justice Act of 1964, 18 U.S.C. § 3006a.

[FN38]. These regulations, 8 C.F.R. Sections 241.14(f) et seq., were subsequently struck down by the Ninth Circuit as ultra vires, in *Tuan Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004).

[FN39]. Audience questions were not recorded. Therefore, this section includes headings reflecting the general nature of the questions and the panelists' responses.

[FN40]. *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003).

[FN41]. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

[FN42]. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

[FN43]. S. 2528, 108th Cong. (introduced June 16, 2004); H.R. 4591 108th Cong. (introduced June 16, 2004).

[FN44]. *Leocal v. Ashcroft*, No. 03-583 (U.S. Nov. 09, 2004)(holding that DUI offenses which do not have a *mens rea* component or require only a showing of negligence are not crimes of violence).

[FN45]. *Gideon v. Wainwright*, 372 US 335 (1963).

[FN46]. Development, Relief, and Education for Alien Minors Act of 2003, S. 1545, 107th Congress (introduced July 31, 2003).

[FNa1].
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Judge Van Wyke has been an Immigration Judge since 1995, both in the detained context and the non-detained context, and has worked in York, Pennsylvania, Philadelphia, and New York. Judge Van Wyke formerly worked for the Salvadorian Human Rights Commission both in Washington and El Salvador on human rights cases in the early 80s and early 90s.

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