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INTRODUCTION

Persons inside the United States who are placed in removal proceedings (formerly known as deportation proceedings) potentially face both the threat of prolonged custody as well as forcible expulsion from the country, which often results in permanent separation from family and home. The Immigration and Nationality Act (INA), which governs these proceedings, has a statute providing for the "Right to Counsel." However, the statute makes clear that persons are only entitled to legal representation when they are fortuitous enough to retain counsel at "no expense to the government."[1] Given this law, only those who can afford to retain a private attorney, or have the good fortune to obtain pro bono counsel, receive legal representation. The rest are forced to forge through the complex immigration system without an attorney. Consequently, the majority of persons charged as deportable (who are referred to as "respondents" in removal proceedings) are obligated to stand alone in immigration court. Even though the majority of respondents are unrepresented, removal proceedings are extremely adversarial: in each case, the respondent must face off against a U.S. trial attorney, who is advocating that the immigration judge order his or her removal from the United States.[2]

Federal courts have repeatedly acknowledged the complexity of removal proceedings and the plight of individuals who are forced to defend themselves without legal representation.[3] It is, by no means, an easy feat to successfully maneuver this morass even with experienced legal representation. Despite the enormous interests that are at stake in removal proceedings, and notwithstanding the indisputable adversarial nature of

these complex proceedings, where the respondents are opposed by experienced U.S. trial attorneys trained on the intricacies of immigration law, the respondents are not entitled to assigned counsel.

While the INA does not provide for appointed counsel at government expense, established case law from the Supreme Court—providing a constitutional basis for asserting the right to appointed counsel in other fields—lays out a roadmap for advocates to follow in challenges to removal proceedings. Up until the present date, case law has been relatively scarce with regard to the specific challenges of seeking assigned counsel in the context of immigration proceedings. What little case law there is at least acknowledges the opportunity to seek appointed counsel on a case-by-case basis. This must serve as a starting point. The current system, especially with regard to those who are detained during removal proceedings, is simply inadequate as it fails to provide the respondents with a fundamentally fair hearing.

I. THE IMMEDIATE AND LONG-TERM EFFECTS OF REMOVAL PROCEEDINGS

Loss of liberty through immigration custody must be a primary factor in any analysis regarding the right to appointed counsel in removal proceedings. Most respondents are detained during the removal proceedings.[4] Some detained respondents are eligible to request a bond hearing before the immigration judge to determine if they can either obtain an initial bond or have their bond reduced so as to avoid incarceration during this lengthy process.[5] Again, at each bond hearing, the detained respondents must face off against a U.S. trial attorney who is opposing their request. For some respondents, a successful bond hearing will allow them to avoid literally years of detention during protracted removal proceedings.[6]

However, there is much more at risk than this immediate loss of liberty. The Supreme Court has long recognized the broad range of fundamental liberty interests at stake in deportation proceedings. In discussing the

government's efforts to denaturalize individuals and subject them to deportation, Justice Brandeis famously opined ninety years ago that such an action "may result also in loss of both property and life; or of all that makes life worth living."[7] Those who are ordered deported will be banished from this country and, as a result, will lose their homes, property, employment, and often any possibility of continuing with their livelihood. [8]

In addition, many persons will be permanently separated from family, loved ones, and friends. Respondents include persons who have lawfully resided in this country for decades, including those married to U.S. citizens and those who have U.S. citizen children. The overwhelming majority of persons ordered removed will never qualify to be readmitted. Thus, unless their family members are able to leave their own jobs, education, and other family members in order relocate with them to the foreign country, they face permanent separation from their loved ones.

Other respondents have just arrived to the United States after fleeing their countries of origin to escape various forms of persecution and now face the risk of being forcibly returned to the very governments that previously ordered their imprisonment and often torture. In light of these recurrent factors, the Supreme Court has long recognized that deportation results in a severe penalty that affects core rights:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.[9]

II. VAST NUMBERS OF PRO SE RESPONDENTS

In light of the liberties at stake and the complexity of the immigration system, it is striking that most respondents must appear pro se as they are unable to retain a private attorney. The percentages of respondents who are

forced through the process without legal representation vary slightly throughout the country, but the numbers processed by the Seattle and Tacoma immigration courts make clear that the majority of respondents are obliged to defend themselves in immigration proceedings. For the last calendar year reported (2008), 10,211 cases were completed in Seattle and Tacoma; and, of those, almost 70 percent (7,220 individuals) were forced to appear unrepresented in removal proceedings.[10]

Closer examination reveals the extent to which detention limits an individual's opportunity to obtain legal representation. The majority of respondents in removal proceedings, more than 65 percent, were detained. Of those who were detained, more than 90 percent were unrepresented. On the other hand, those who were not placed in custody during their proceedings were able to obtain legal representation in almost 68 percent of the cases.[11]

III. CASE LAW ESTABLISHING THE RIGHT TO COUNSEL: FROM CRIMINAL TO CIVIL

Over the last forty-five years, developments in case law have created a now familiar legal framework for determining whether an indigent person in custody or facing deprivation of liberty is entitled to assigned counsel. The landmark case, *Gideon v. Wainwright*,[12] clearly established the general right to assigned counsel for all indigent persons in criminal proceedings facing deprivation of physical liberty. Soon thereafter, in a case examining whether a juvenile in delinquency proceedings was entitled to counsel, the U.S. Supreme Court held that the right to court appointed counsel may extend beyond criminal proceedings.[13] That case, *In Re Gault*, established a per se rule that juveniles in delinquency proceedings who were at risk of confinement were entitled to court-appointed counsel under the due process clause, even though they were not in criminal proceedings and, thus, did not enjoy the same Sixth Amendment protections relied on by the Court in *Gideon*.

However, fifteen years later, the Supreme Court took a dramatically different approach in *Lassiter v. Department of Social Services of Durham County*, a decision addressing whether an indigent parent facing termination of her parental rights was entitled to a court-appointed attorney.[14] Instead of determining whether all similarly situated individuals were categorically entitled to assigned counsel under a per se rule, the Court announced a case-by-case approach, applying the three-pronged balancing test of *Mathews v. Eldridge* (balancing the private interests at stake, the government's interests, and the risk of error in the absence of assigned counsel).[15] In announcing this case-by-case approach, as opposed to a per se rule, the Court held that there is a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[16]

Following *Lassiter,* courts have generally determined that the cases before them required the case-by-case approach. Thus, courts have applied the balancing test of *Mathews v. Eldridge* in deciding whether to appoint counsel to indigent persons in civil proceedings, rather than recognizing a per se rule that would categorically provide appointed counsel. Nonetheless, *Lassiter'*s reiteration that a presumption to appointed counsel exists in situations where persons are faced with deprivation of physical liberty reinforces forceful arguments in support of a per se rule for most persons in removal proceedings. The arguments are strengthened when focusing on detained respondents and other subgroups, such as unaccompanied children and mentally incompetent respondents, who clearly demonstrate an inability to represent themselves in an adversarial judicial system. Regardless of which approach is found applicable for persons in removal proceedings, it is readily apparent that there are compelling arguments for providing appointed counsel to indigent respondents.

IV. THE NATURE AND CONSEQUENCES OF REMOVAL PROCEEDINGS REQUIRE APPOINTED COUNSEL

As previously noted, the majority of persons placed in removal proceedings are deprived of their liberty. The detained respondents are generally held at county jails contracted by the Department of Homeland Security ("DHS"), or they are placed in one of nearly a dozen monolithic immigration prisons spread across the country, operated by private companies who contracted with DHS.[17] As of May 3, 2010, there were 256 jails, correctional facilities, and detention centers authorized to detain persons charged as removable.[18]

The length of custody varies considerably. In defending the practice of mandatory detention, the government has previously asserted that the average length of custody for persons in removal proceedings was forty-seven days, with a thirty day median.[19] Even accepting these numbers as the most probable infringement on a person's liberty, the potential of being locked up for a month or a month and a half (even if an individual were to ultimately prevail in the removal proceedings) creates sufficient deprivation of liberty to warrant the need for appointed counsel. There is simply not any comparable legal framework in the United States where an individual is faced with such deprivation of physical liberty—not to mention the other fundamental liberties hanging in the balance—without the right to appointed counsel.

Moreover, the numbers cited by the government in *Demore v. Kim*, 538 U.S. 510, 529 (2003), provide a skewed picture. As previously noted, the majority of persons in removal proceedings do not contest the charges against them, but rather (especially for those in detention) seek to be removed as quickly as possible. Those who do contest the removal charges, or seek an application for relief, are subjected to prolonged procedures. These respondents face prolonged detention that can stretch out over a period of years. In recognition of the wide scale nature of prolonged detention in removal proceedings, the Ninth Circuit recently certified a

circuit-wide class. *See* Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010); Casas-Castrillon v. Dept. of Homeland Sec., 535 F.3d 942, 946 (9th Cir. 2008) ("As Casas' case ably demonstrates, aliens challenging an order of removal may languish in the system for years."). Even individuals who prevailed in their removal proceedings have faced years of incarceration. See e.g., Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006).

V. THE FAILURE OF THE INA AND PREVAILING CASE LAW TO PROVIDE THE RIGHT TO COUNSEL

In any other context, the enormous liberty interests at stake, the adversarial framework of the immigration court system, the complexity of the law, and the extreme imbalance of power would almost certainly lead to case law providing for the right to assigned counsel. Yet, in removal proceedings, there have been no such developments.

One of the principal reasons, if not the primary factor, for this failure, is the statutory "Right to Counsel" enacted by Congress in the INA. The INA includes a statutory right labeled "Right to Counsel,"[20] which, despite its title, has actually undermined any development to recognize that indigent respondents in removal proceedings should be entitled to assigned counsel. The law states:

> 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.

With those six words, "at no expense to the Government," the statute has managed to thwart most efforts by advocates to develop case law providing for the right to assigned counsel before they even begin. Instead, case law examining the right to counsel in removal proceedings has focused on whether the respondents have been advised of their right to pursue legal

representation at their own expense, whether the immigration judge has provided them with sufficient time to look for their own counsel, and whether they received ineffective assistance of counsel.[21]

Despite the provision expressly denying the right to counsel at government expense under the INA, there remains a notable absence of case law exploring the right to assigned counsel based on the Constitution. The right to assigned counsel in other criminal and civil proceedings was almost uniformly the result of constitutional challenges, not the result of Congress's largesse. Indeed, it would be remarkable if Congress were to affirmatively act to create the right to assigned counsel for indigent persons in removal proceedings where case law had not already clarified that counsel is required in order to safeguard constitutional rights.

In one of the very few federal court cases challenging the lack of assigned counsel, the Sixth Circuit Court of Appeals acknowledged that "[w]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, 'fundamental fairness' would be violated."[22] Interestingly, in the underlying proceeding, the immigration judge had first rejected the respondent's request for assigned counsel, relying on the statutory provision's qualification, "at no expense to the Government." Thus, the immigration judge ruled that the INA "prevented appointment of counsel at Government expense."[23]

The respondent accordingly argued before the Sixth Circuit that the "Right to Counsel" provision violated his constitutional right to due process under the law. The court held that, "[t]he test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide fundamental fairness, the touchstone of due process.'"[24] In a footnote, the court recognized that case law from the Supreme Court demonstrated that fundamental fairness could require appointed counsel.[25] Nonetheless, the court found that his case did not deprive him of due process since he had

legal counsel on appeal before the Board of Immigration Appeals, and his lack of representation before the immigration judge did not undermine his ability, with his current attorney, to present the purely legal question his case presented on appeal.

The few other courts that have addressed right to counsel challenges in related contexts have also recognized that fundamental fairness may require the appointment of counsel. In *United States v. Campos-Asencio*, the Fifth Circuit Court of Appeals ruled that, while there is no statutory right to assigned counsel, an individual may successfully argue that deprivation of assigned counsel in deportation proceedings violated his right to due process under the law: "[A]n alien has a right to counsel if the absence of counsel would violate due process under the [F]ifth [A]mendment."[26] In that case, the appellant had been charged with criminal re-entry after having been previously deported under Section 276 of the INA.[27] Mr. Campos asserted that the deprivation of counsel in his prior deportation proceeding violated his Fifth Amendment right to due process under the law. The court remanded the case to the district court to determine if the deprivation of counsel resulted in a due process violation.[28]

It cannot be overemphasized that while the statutory right to counsel fails to provide counsel at government expense, the federal courts have recognized that the Constitution provides an independent basis for determining whether an individual is entitled to assigned counsel. From *Gideon*, *In re Gault*, and *Lassiter*, the Supreme Court has focused on the constitutional underpinnings for the right to assigned counsel. The INA's statutory provision does not preclude the government from assigning counsel to indigent persons. Rather, it simply informs the individuals that they do not have a statutory right under the INA to counsel at government expense. This does not prohibit the Department of Justice or its delegate, the Executive Office for Immigration Review ("EOIR"), in its efforts to ensure fundamental fairness in removal proceedings, from affirmatively bestowing a safeguard that is not required by the statute. More importantly,

the statute does nothing to undermine constitutional claims for assigned counsel.[29]

VI. LEGAL ORIENTATION PROGRAMS ARE INADEQUATE REPLACEMENTS

While neither Congress nor the Department of Justice has taken steps to provide assigned counsel to indigent respondents in removal proceedings, the EOIR has followed the lead of non-profit agencies to provide legal orientation programs to respondents detained at the largest immigration detention centers. After viewing the results of pilot projects, Congress appropriated $1 million in fiscal year 2002 to develop and implement the Legal Orientation Program ("LOP") for detained respondents.[30]

Initially, the LOP was focused on six detention centers, including the detention center in Washington State. By the fiscal year 2008, appropriations had increased to $3.7 million, allowing the expansion of the LOP to the twelve principle detention centers, and subsequently included the LOP for detained juveniles in other facilities.[31] The LOP has expanded significantly from its inception, but the program is still limited to working only with detained immigrants. Moreover, even with regard to detained immigrants, in light of the rapid expansion of the detained percentage of persons in removal proceedings, the LOP is not able to provide resources for all detained immigrants.[32]

But an even greater impediment is that the LOP is strictly limited to group and individual orientation sessions. Indeed, in administering the LOP, the EOIR apparently views the "Right to Counsel" provision under the INA as precluding any legal representation, including any legal advice and any legal practice or preparation of forms, even on a limited pro se basis.[33] Thus, the LOP does not provide any resources for direct representation, no matter how limited in scope: "Program providers are not permitted to use LOP funds to engage in legal representation."[34] Consequently, the numbers

of represented respondents remains abysmal, with less than 10 percent of detained respondents able to obtain legal representation.[35]

While the LOP provides substantive assistance that is useful for assisting unrepresented individuals with initially identifying potential forms of relief, it can in no way compensate for the lack of legal representation. As previously noted, removal proceedings are complex and adversarial, in each case the unrepresented individual is pitted against a U.S. trial attorney trained in immigration law. The imbalance of power is further exacerbated by the fact that the respondents generally do not speak English and often have limited education. In addition, without legal representation, most respondents do not have access to obtain the necessary supporting documents to appropriately present their cases.

No matter how limited in scope, the LOP provides valuable assistance to many unrepresented detained respondents. Nonetheless, it can in no way be credited as providing a viable alternative to legal representation. Even if all detained respondents in removal proceedings were guaranteed participation in legal orientation sessions, the overwhelming majority would still be denied fundamentally fair hearings. Even those respondents who understand the substance of the basic charges against them or those who are advised that they may qualify for an application for relief, are left with little or no understanding of the intricacies of the substantive provisions of the law. Nor can they generally learn the particulars of the legal process, which are required to successfully contest charges and present applications for relief. To the extent that the LOP is viewed as a remedy for ensuring fundamentally fair hearings to respondents, its implementation is counterproductive.[36] Due process requires that persons receive direct legal representation in their removal proceedings.

CONCLUSION

For the present, the vast majority of indigent respondents in removal proceedings are compelled to appear without legal representation. Contrary

to its title, the "Right to Counsel" provision in Section 292 of the INA (8 U.S.C. § 1362) has actually undermined the right to counsel in removal proceedings by expressly stating that there is no statutory right to assigned counsel. However, given the enormous interests that are at stake in removal proceedings and the sharp imbalance of powers created by the indisputably complex and adversarial nature of the proceedings, constitutional case law provides a framework to assert the right to assigned counsel. As noted, two circuits have already recognized that in some cases, the "absence of counsel would violate due process under the [F]ifth [A]mendment."[37] The framework currently in place, especially governing those placed in detention during removal proceedings, provides ample opportunities for advocates to demonstrate cases where the absence of assigned counsel has indeed violated due process.

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[1] 8 U.S.C. § 1362 (1996). *See also* 8 U.S.C. § 1229a(b)(4)(A) (2006).

[2] 8 C.F.R. § 1240.2 (2008).

[3] *See e.g.*, Escobar-Grijalva v. INS, 206 F.3d 1331, 1334 (9th Cir. 2000) ("Deprivation of the statutory right to counsel deprives an alien asylum-seeker of the one hope she has to thread a labyrinth almost as impenetrable as the Internal Revenue Code."); Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity . . . . A lawyer is often the only person who could thread the labyrinth."); Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate."); Leslie v. Att'y Gen., 611 F.3d 171, 181 (3d Cir. 2010) ("Many courts have recognized that 'our immigration statutory framework is notoriously complex.' *[e].g., N-A-M v. Holder,* 587 F.3d 1052, 1058 (10th Cir. 2009)*; see also INS v. Nat'l Ctr. for Immigrants' Rights, Inc.,* 502 U.S. 183, 195 (1991) (referencing our 'complex regime of immigration law'). The complexity of removal proceedings renders the alien's right to counsel particularly vital to his ability to 'reasonably present[ ] his case.'")); Del Rey Tortilleria, Inc. v. N.L.R.B., 976 F.2d 1115, 1122 (7th Cir. 1992) ("[T]he federal immigration laws are exceedingly complex . . . . It is hard to believe that Congress wished to place upon an NLRB compliance officer . . . the responsibility of determining the alien status of an undocumented worker.") (quoting Local 512 Warehouse and Office Workers' Union v. N.L.R.B., 795 F.2d 705, 721 (9th Cir. 1986)).

[4] *See e.g.,* United States Department of Justice, Executive Office for Immigration Review, Office of Planning, Analysis, and Technology. OPAT#09-57. For the 2008 Calendar Year, in Washington State 10,211 cases were processed by the Immigration Courts in Seattle and Tacoma. In 6,896 of those cases, over 67.5 percent, of the respondents were locked up in DHS custody. This does not even include 975 detained individuals, another 9.5 percent, who were released at different points during the course of removal proceedings.

[5] 8 U.S.C. § 1226(a) (1996).

[6] Contested immigration proceedings (as opposed to immigration proceedings where individuals do not contest their removal and accept either a removal order or a voluntary departure) are generally protracted affairs that last a minimum of months, if not years. This is further exacerbated if there are administrative and judicial appeals. Consequently, detention is likewise drawn out over a period of years for many individuals in contested proceedings. *See e.g.,* Casas-Castrillon v. Dept. of Homeland Security, 535 F.3d 942, 946 (9th Cir. 2008) ("As Casas' case ably demonstrates, aliens challenging an order of removal may languish in the system for years.").

[7] Ng Fung Ho v. White, 259 U.S. 276, 284 (1921); *see also* Al-Karagholi v. INS, 409 U.S. 1086, 1087 (1972) (Douglas, J., dissenting) (citing same language in context of immigrant student facing deportation).

[8] Federal courts have recognized an expanded concept of the "in custody" requirement under 28 U.S.C. § 2241 for persons filing a habeas challenge where they are subject to a removal order. *See* Rosales v. ICE, 426 F.3d 733, 734–36 (5th Cir. 2005) (on remand from the Supreme Court, the Fifth Circuit joined the Second, Sixth, Ninth and Tenth Circuits in holding that a person subject to a final order of removal is in custody for habeas purposes, even if not physically detained).

[9] *Bridges v. Wixon,* 326 U.S. 135, 154 (1945); *see also* Padilla v. Kentucky*,* 130 S.Ct. 1473, 1481 (2010) ("We have long recognized that deportation is a particularly severe 'penalty'") (quoting Fong Yue Ting v. United States*,* 149 U.S. 698, 740 (1893));

[10] *See* United States Department of Justice, Executive Office of Immigration Review, Office of Planning, Analysis and Technology. OPAT#09–57 [hereinafter DOJ EOIR OPAT].

[11] *Id*.

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

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

[14] Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18 (1981)

[15] *Id.* at 27 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[16] *Id.* at 26–27.

[17] *See* U.S. Immigration and Customs Enforcement, *Authorized Immigration Detention Facility List*, May 3, 2010.

[18] *Id.*

[19] Demore v. Kim, 538 U.S. 510, 529 (2003).

[20] 8 U.S.C. § 1362 (INA § 292) (1996); *see also* 8 U.S.C. § 1229a(b)(4)(A) (2006).

[21] *See e.g.*, *Leslie*, *supra* note 3 (failure to inform of right to seek assistance from free legal services violated right to counsel); Ram v. Mukasey, 529 F.3d 1238 (9th Cir. 2008) (immigration judge violated due process rights of petitioner by failing to inquire whether

petitioner wished to have opportunity to look for counsel); Rafiyev v. Mukasey, 536 F.3d 853 (8th Cir. 2008) (no due process right to ineffective assistance of counsel but remanding for a determination of whether there was an administrative right); Jezierski v. Mukasey, 543 F.3d 886 (7th Cir. 2008) (no statutory or constitutional right to reopen proceedings based on ineffective assistance of counsel); Fadiga v. Att'y Gen., 488 F.3d 142 (3d Cir. 2007) (ineffective assistance of counsel violates due process rights to fair hearing); Gjeci v. Gonzales, 451 F.3d 416 (7th Cir. 2006) (denied fair hearing by immigration judge's refusal to grant continuance in order for petitioner to obtain new counsel); Biwot v. Gonzales, 403 F.3d 1094, 1098–101 (9th Cir. 2005) (denial of right to counsel where detained respondent given only five working days to find counsel); Lin v. Ashcroft, 377 F.3d 1014 (9th Cir. 2004) (due process rights violated by ineffective assistance of counsel); Montilla v. INS, 926 F.2d 162 (2d Cir. 1991) (no meaningful waiver of right to counsel where petitioner provided incorrect information); Rios-Berrios v. INS, 776 F.2d 859 (9th Cir. 1985) (denied right to counsel by immigration judge's failure to inquire whether petitioner desired to proceed pro se).

[22] Aguilera-Enriquez v. INS, 516 F.2d 565, 568 n.3 (6th Cir. 1975) (citing Murgia-Melendez v. INS, 407 F.2d 207 (9th Cir. 1969).

[23] *Id.* at 568.

[24] *Id.* (citing Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).

[25] *Id.* at 568 n.3.

[26] United States v. Campos-Asencio, 822 F.2d 506, 509 (5th Cir. 1987).

[27] *Id.* at 507.

[28] *Id.* at 510. *See also* Cobourne v. INS, 779 F.2d 1564, 1566 (11th Cir. 1986) (holding that presence of counsel would not have affected the outcome); United States v. Torres-Sanchez, 68 F.3d 227, 230–31 (8th Cir. 1995) ("[I]n some circumstances, depriving an alien of the right to counsel may rise to due process violation).

[29] It is also worth noting that the INA's "Right to Counsel" provision was enacted before the emergence of Supreme Court case law establishing the bedrock constitutional principles which provided for the right to assigned counsel in either criminal or civil proceedings.

[30] Vera Institute of Justice, *Legal Orientation Program Evaluation and Performance and Outcome Measurement Report, Phase II*, at 8 (2008), http://www.vera.org/download?file=1778/LOP%2Bevalution_updated%2B5-20-08.pdf.

[31] *Id.* at 9–10.

[32] *Id.* at 27–28: "However, as the expansion of detention has outpaced the expansion of funding for the Legal Orientation Program, the numbers of people receiving services represents a shrinking percentage of the overall detained immigration court population each year." Numbers provided from 2006 showed that even at the locations with LOP programs more than half the detained respondents placed in removal proceedings did not receive any orientation prior to their first hearing. *Id.* at 34.

[33] *See* Executive Office for Immigration Review, BIA April 14, 2009, Legal Orientation Program Protocols—Orientation vs. Representation. Stephen Lang.

[34] *Id.* at 19.

[35] DOJ EOIR OPAT 09-57, *supra* note 10.

[36] In passing a resolution supporting a due process right to counsel for all persons in removal proceedings, the ABA acknowledged the value of expanding LOPs to include nondetained respondents in removal proceedings, as well as all detained respondents. But more importantly, the ABA also recognized that LOPs were insufficient to guarantee a fundamentally fair hearing for the respondents. *See* American Bar Association. *Right to Counsel Resolution. Adopted by the House of Delegates* (Feb. 13, 2006), www.abanet.org/poladv/priorities/immigration/107a_righttocounsel.doc.
[37] *Campos-Ascencio, supra* note 25, at 509.