REPORT ON THE RIGHT TO COUNSEL FOR DETAINED INDIVIDUALS IN REMOVAL PROCEEDINGS

Committee on Immigration & Nationality Law

AUGUST 2009

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
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THE NEW YORK CITY BAR ASSOCIATION
IMMIGRATION AND NATIONALITY LAW COMMITTEE

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"In our legal system, driven by complex rules and procedures, a lack of access to competent legal services damages fundamental concepts of fairness and equality before the law." - Hon. Robert A. Katzmann, United States Circuit Judge, U.S. Court of Appeals for the Second Circuit, at the Orison S. Marden Lecture, February 28, 2007 at the New York City Bar Association.

The New York City Bar Association (the "City Bar") and the Immigration and Nationality Law Committee (the "Committee") of the City Bar have long been interested in the right to counsel [in] immigration proceedings.[1] The Committee particularly has taken an active interest in due process issues in the Immigration Courts. Immigration and Customs Enforcement's ("ICE") increased use of detention as an enforcement policy has resulted in greater numbers of detained respondents.[2] This has led to more unrepresented, detained respondents appearing before the Immigration Court, which, in turn, has created serious due process concerns. This glaring injustice can be remedied by recognizing the right to appointed counsel for indigent detained respondents.

The United States legal system has recognized the right to assigned counsel for indigent defendants in criminal proceedings and certain complex proceedings that have significant consequences, such as the loss of liberty. Immigration law is extremely complex and is constantly changing. Removal (deportation) proceedings are adversarial, and can have very severe consequences. Deportation can separate immigrants from their families, impoverish them, and/or send them to their countries in which they have no functional ties and may be persecuted. As Justice Brandeis wrote more than 80 years ago, removal can result "in loss of both property and life; or of all that makes life worth living."[3] In recent years, while the grounds for removal have expanded, the available relief from removal has been restricted, and the use of detention (which impedes the ability of respondents to obtain counsel) has skyrocketed.[4]

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[1] The City Bar hosted an event called *No Deportation without Representation: the right to appointed counsel in the immigration context* on April 22, 2004. More recently, the Committee submitted a letter to Attorney General Holder regarding the *Compean* decision, presented a panel discussion on the Executive Office for Immigration Review ("EOIR") Practice Manual, and submitted comments on the EOIR Proposed Code of Conduct for Immigration Judges to EOIR.

[2] Respondents, i.e., persons in removal proceedings, range from undocumented individuals, to lawful permanent residents, and even to United States citizens, in some situations.

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

[4] American Bar Association Commission on Immigration, *Report to the House of Delegates on The Right to Counsel*, February 13, 2006, p. 3. The ABA House of Delegates adopted seven policy resolutions

By statute, respondents have the "privilege of being represented" but "at no expense to the Government."[5] As a result, most respondents must negotiate this process without counsel. In the last four years, fewer than half of the respondents whose proceedings were completed had representation, with that percentage ranging between 35 and 45%. In 2008, that number was 40%, meaning that 60% of respondents lacked counsel in Immigration Courts.[6] The unrepresented number includes respondents with the resources to afford counsel; however, this number also includes indigent respondents, many in detention, with viable claims to remain in the United States, based on their fear of persecution, likelihood of being tortured, long-term permanent residency, and/or family ties.[7]

Not surprisingly, *pro se* respondents fare far more poorly in these proceedings than do those with legal representation.[8] In Fiscal Year 2003, represented non-detained respondents secured relief in 34% of cases, while only 23% of unrepresented non-detained respondents were able to do so. Represented detained respondents received relief in 24% of cases, compared to 15% for unrepresented detained respondents.[9] The disparities in outcomes grow more pronounced for respondents who apply for political asylum before the Immigration Court. Non-detained represented asylum seekers received asylum 39% of the time, in contrast to only 14% of non-detained unrepresented asylum seekers. Represented detained asylum seekers were granted asylum 18% of the time, compared to 3% of detained asylum seekers who did not have counsel.

Representation rates at the Board of Immigration Appeals ("BIA") level are significantly higher, but in many cases the damage already occurred at the Immigration Court level and cannot be "repaired" on appeal. Respondents who cannot pay for an attorney may also be forgoing valid appeals.

Knowing that they need help navigating this complicated and foreign system, many unrepresented respondents turn to unauthorized and often predatory non-attorneys for legal advice and representation.[10] These so-called "*notarios*" or "visa-consultants" often collect high fees for services they do not provide and fraudulently guarantee that legal benefits will be obtained.

The stakes are too high and the system too complicated for respondents to be unrepresented in removal proceedings before the Immigration Court. A right to appointed counsel is necessary so that the outcome of removal cases does not turn on a respondent's ability to afford counsel, but rather on the merits of his or her claim.

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sponsored by the Commission on Immigration, including the cited resolution about the right to counsel, which supports the due process right to counsel for all persons in removal proceedings, and the availability of legal representation to all non-citizens in immigration-related matters.

[5] Immigration and Nationality Act (INA) § 292.

[6] "FY 2008 Statistical Yearbook" at G1.

[7] Donald Kerwin, *Revisiting the Need for Appointed Counsel,* Migration Policy Institute (April 2005) p. 5.

[8] Kerwin, supra, at 1.

[9] Kerwin, supra at 6.

[10] See generally A. Moore, *Fraud, The Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants*, 19 Geo. Immigr. L.J. 1 (Fall 2004).

THE ISSUES

Serious Constitutional Concerns

Denying detained respondents counsel in immigration proceedings raises serious constitutional issues. Despite the fact that immigration matters routinely involve issues of life and liberty, the administrative system of justice that exists for immigration matters lacks some of the most basic due process protections and check and balances that we take for granted in the American justice system. Because of the significant personal interests at stake and the complexity of the law, access to assigned counsel is critical to ensure that individuals in removal proceedings are able to exercise their due process rights and seek relief for which they may be eligible.

More than 40 years ago, the Supreme Court held that indigent criminal defendants enjoyed a Sixth Amendment right to appointed counsel, finding it an "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[11] The same rationale supports government funded counsel in removal proceedings, which include many of the features that make appointed counsel "fundamental and essential" to a fair criminal trial.[12]

Removal Proceedings - Criminal Trials in All But Name

While viewed as "civil" or "administrative" in nature, removal proceedings largely mirror criminal trials and thus viewing them as civil cases is a legal fiction that has endured for too long.[13] Although "administrative," they strongly resemble the formal adversarial nature of a criminal trial - the proceedings are recorded, witnesses testify under oath, there is an opportunity for cross-examination, and evidence is entered into the record. The respondent, the respondent's attorney, if represented, the attorney for the Department of Homeland Security ("DHS"), and the Immigration Judge ("IJ") all participate actively in creating the record. The DHS counsel is present to defend the government's case, as well as to "attack" the respondent's case, by cross-examining the respondent and challenging the evidence presented by the respondent.[14] The IJ also plays an active role in the hearings and, according to the Immigration and Nationality Act ("INA"), shall "interrogate, examine, and cross-examine the alien and any witnesses."[15] Without counsel, a respondent may be unable to "conserve the advantages of formality" at the same time he is being subjected to interrogation by the IJ and DHS counsel. This calls into question the fairness of a removal hearing when the respondent is not represented.

In many cases before the Immigration Court, the respondent must meet a heavy burden, in order to obtain relief from removal. The respondent appearing *pro se* must understand immigration

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[11] *Gideon v. Wainwright*, 372 US 335, 344, 83, S. Ct. 792, 796, 9 L.Ed.2d 799, 805 (1963).
[12] Kerwin, supra, at 9.
[13] *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 3483, 4 L.Ed.2d 668 (1984).
[14] Beth Werlin, Note, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. Third World L.J. 393 (Spring 2000).
[15] INA § 240(b)(1)

law, a particularly complex area of jurisprudence.[16] He or she must marshal the evidence, and argue complex claims before the IJ. He or she must identify and develop factually and legally complex claims for relief, and must contest the government's charges, introduce evidence, and put on witnesses. The unrepresented respondent must do all this all while knowing that an adverse decision will result in his or her deportation and, in some cases, significant peril once deportation occurs. An adverse decision can result in the respondent's permanent banishment from the United States, permanent separation from his family and, in some cases, the possibility of grave physical harm or even death.[17] A respondent appearing *pro se* in such a proceeding faces significant barriers, compounded by the language, cultural, and social barriers many respondents experience.

Representation is critical in a hearing with the formalities and adversarial nature of a criminal trial. Trained counsel can prepare and guide a respondent through this confusing process where even a small admission can alter the course of a case, and a life. As Justice Sutherland said in *Powell v. Alabama*, "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law. . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."[18]

A Right to Counsel When Loss of Liberty is at Stake

The consequences of an immigration proceeding, whether called "deportation" or "removal," can involve a more dangerous and lasting penalty than in criminal proceedings, where a right to counsel has long been guaranteed, premised on the potential severity of the punishment and the loss of liberty.

In *Powell*, the Supreme Court reversed the conviction of seven black youths charged with the capital offense of rape. In its decision, the Court premised the guarantee of appointed counsel on two factors: the severity of the threatened deprivation and the imbalance of the parties.[19] Noting repeatedly that the petitioners were in peril for their lives, Justice Sutherland, writing for the Court, emphasized their relative powerlessness, and suggested that any criminal defendant requires the assistance of counsel to safeguard his rights.

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[16] Courts and judges have compared immigration law and the Internal Revenue Code, finding that immigration law is "second only to the Internal Revenue Code in complexity." *Chan v. Reno*, 1997 U.S. Dist. 3016,*5 (S.D.N.Y. 1997); *see also* "Enforcing Immigration Law: Issues of Complexity," Congressional Research Service Memorandum, July 28, 2005.

[17] Federal courts have recognized in the nature of the language that they employ, that the characterization of deportation statutes as "civil" or "administrative" (as opposed to penal) is purely formal and is not in accord with the realities of what actually transpires. See *Bridges v. Wixon*, 326 U.S. 135, 164 (1945); *Fong Haw Ton v. Phelan*, 333 U.S. 6 (1948).

[18] *Powell v. Alabama*, 287 U.S. 45, 68, 69 (1932).

[19] Robert Catz and Nancy Lee Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard,* 19 Harv. C.R.-C.L.L. Rev. 397, 402 (1984).

Thirty years later, in *Gideon v. Wainwright*, the Supreme Court expanded this right and emphasized the vulnerability of any defendant against the resources of the state. The Court asserted the "obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[20]

In *Patterson v. Warden*, the Supreme Court extended the *Gideon* requirement of appointed counsel to defendants accused of misdemeanors punishable by a felony-length sentence.[21] In *Argersinger v. Hamlin*, the Supreme Court clarified that the right to counsel in a criminal case depends not upon the character of the charge, but upon the character of the possible punishment: loss of liberty.[22] The Supreme Court stated that, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."

The Supreme Court has long protected the indigent defendant confronted with the threat of incarceration. It is the deprivation of physical liberty and not the characterization of the alleged offense as felony or misdemeanor that entitles a defendant to appointed counsel. Respondents in removal proceedings face the same threat of loss or liberty based on an unfavorable outcome in their hearings, one that is often more severe and permanent than the punishments received by indigent individuals in criminal court, who are guaranteed a right to counsel.

The Line Between Civil Immigration Proceedings and Criminal Prosecutions Has Become More Blurred

The traditional line between civil immigration procedures and criminal prosecutions has been further blurred since September 11, 2001. In the wake of the terrorist attacks, the immigration removal process has been used as a proxy for terrorism prosecutions. According to the Migration Policy Institute's Donald Kerwin, after September 11 the Government rounded up over 700 persons as part of a broad terrorism investigation. However, rather than initiating criminal prosecutions, the government held most detainees on immigration violations. Department of Justice ("DOJ") officials said they opted against criminal prosecution to avoid revealing their investigative methods and sources, and due to the comparative ease of removal. The DOJ used the term "preventive prosecution" instead of "preventive detention" to describe their strategy, but the "prosecutions" overwhelmingly took the form of civil removal proceedings. Although DOJ explicitly used removal proceedings as a proxy for terrorism prosecutions, the detainees - typically in closed proceedings - had no right to appointed counsel.[23]

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[20] Catz, supra, at 404.
[21] *Patterson v. Warden,* 372 U.S. 776, 83 S.Ct. 1103, 10 L.Ed.2d 137
[22] *Argersinger v. Hamlin*, 407 U.S. 25 (1972).
[23] Kerwin, supra at 3.

Representation is Essential in this Complex System

Immigration laws are extremely complex, disjointed and often counterintuitive, particularly for people who often are just becoming familiar with our language, culture and legal system. When laws and procedures are complex, there is a greater need for counsel to ensure that a just outcome is reached.

A look at the various grounds for removal in the INA reveals the complex nature of immigration law. The INA breaks the grounds for removal into sixteen different categories. Within these categories there are parts, subparts, exceptions, and waivers, and almost all of these various provisions encompass several elements.[24]

The statutory language of the INA is also very confusing, and must be interpreted against a collection of constantly shifting statutory definitions, regulations, and BIA and federal court precedential decisions. Case law often varies from federal circuit to federal circuit. The criminal grounds for removal provide an example of the difficult task facing an immigrant trying to understand the INA. For example, the INA uses the word "convicted" to describe the criminal grounds for deportation. Although typically associated with a guilty finding, for deportation purposes, convictions encompass dispositions other than "guilty."[25] The definition section of the INA must be consulted to determine whether a criminal disposition rendered an immigrant "convicted." Respondents placed in removal proceedings now must take careful notice of the aggravated felony provisions in the INA[26] since Congress has broadened the definition of aggravated felony and applied it retroactively. Whether or not a given criminal offense falls under the definition of an aggravated felony can make the difference between eligibility and lack of eligibility for relief from removal.

Recent Changes in the System Make the Need for Counsel Particularly Dire for Detained Respondents

Recent changes in the law increase the need for legal representation in removal proceedings.[27] These include expanded grounds for removal, diminished relief from removal, severe limitations on administrative and judicial review, the increased use of detention, and video conference hearings. Fewer respondents now have viable claims for relief, and respondents who can legally contest removal typically have extremely strong humanitarian or equitable claims to remain.

Major newspapers across the U.S., including the *New York Times*, report regularly on the poor and often dangerous conditions detainees face.[28] The Obama administration recently indicated that it would not make regulatory rules on detention of non-citizens.[29]

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[24] Werlin, supra at 414-415.

[25] *See* INA § 101(b)(48), 8 USC § 1101(B)(48) - definition of "conviction."

[26] *See* INA § 101(a)(43), 8 USC § 1101(a)(43).

[27] American Bar Association's Commission on Immigration, *American Justice Through Immigrants' Eyes* (2004) at 68.

[28] *The New York Times*, Nina Bernstein, *Homeland Security is Ordered to Respond to Petition on Immigration Jails*, July 27, 2009, available at http://www.nytimes.com/2009/06/27/nyregion/27immig.html

Detention practices, in particular, make it exceedingly difficult for detained respondents to secure and communicate with counsel and pursue relief. Immigration authorities frequently transfer detainees to distant locations, often without notifying their lawyers and without regard for their need to prepare for a hearing or to be close to their families and support systems. Many of the more than 900 facilities used for immigration detention are in rural locations, far from private and *pro bono* lawyers and non-profit legal programs, making access to lawyers, families, and legal materials even more difficult. Without representation, detained respondents often cannot access the extensive documentation and other information necessary to meet their burden of proof and apply for most forms of relief, including asylum.[30]

Changes in the administrative appeals process and federal judicial review have made it extremely difficult for represented litigants, much less for *pro se* ones, to appeal adverse decisions by an Immigration Judge. In August 2002, the DOJ issued a regulation intended to limit the authority of the BIA, to reduce adjudication delays and to eliminate a backlog of nearly 60,000 cases. The BIA now can only make *de novo* factual determinations if an IJ made a "clearly erroneous" finding. The rule also allows panel review of appeals only in limited circumstances. *Pro se* appellants will find it difficult to craft appeals to avoid summary denials. The new procedures have led to high numbers of denied appeals and affirmances without an opinion. At one point, the rate of BIA affirmances without an opinion was as high as approximately 33%. Likewise, appeals by asylum seekers in the expedited removal process have been sustained at far lower rates, falling from a rate of 23% in 2001 to only 3% from 2002 to 2004.[31] Thus, counsel is critical to get a fair hearing at the BIA, and absolutely essential in order to create an accurate record in the first hearing.

The changes have also led to increased appeals from the BIA to federal courts of appeal. Rates of appeal have risen from 5% to 25%, with the number of petitions rising from roughly 125 per month to between 1,000 and 1,200 per month. Between FY 2001 and 2004, immigration appeals to federal courts rose 515%. The number of immigration appeals increased in the Second Circuit (from 170 to 2,632 per year) and in the Ninth Circuit (from 954 to 5,368). As a result, the DOJ has been forced to divert immigration cases to other divisions and to US Attorneys' Offices.[32]

Representation Benefits Efficiency

Beyond implicating basic fairness issues rooted in the constitutional rights of the individual, creating a right to appointed counsel in the immigration system actually benefits the government and expedites the administration of justice. Expenditures to increase representation rates for

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[29] *See* Letter from the U.S. Department of Homeland Security, Re: "Petition for Rulemaking to Promulgate Regulations Governing Detention Standards for Immigration Detainees," July 24, 2009, available at http://www.nationalimmigrationproject.org/DHS%20denial%20-%207-09.pdf ; *The New York Times*, Nina Bernstein, *U.S. Rejects Call for Immigration Detention Rules*, July 29, 2009, available at http://www.nytimes.com/2009/07/29/nyregion/29detain.html); Detention Watch Network Report on Detention Conditions available at www.detentionwatchnetwork.org/aboutdetention

[30] *Id.*

[31] Kerwin, *supra* at 4.

[32] Kerwin *supra* at 5.

indigent respondents in removal cases would serve the purposes of the agencies' general appropriations by leading to more efficient immigration court proceedings, reduced detention costs, and better-informed decision making by the IJ and BIA.[33]

Representation leads to improved appearance rates in court, fewer requests for continuances and shorter periods in detention at significant financial savings.[34] It also deters frivolous claims. Above all, increased representation serves the government's interest in seeing that its decisions in these consequential cases turn on U.S. legal standards and merit, and not on a litigant's income.

The Vera Institute has found, through conducting the Legal Orientation Program ("LOP"), that participants move through the court system faster. The program seeks to educate detained respondents in removal proceedings, by providing them with basic information on forms of relief from removal, how to accelerate repatriation through the removal process, how to proceed *pro se*, and how to obtain legal representation. Processing times for detained LOP participants with Immigration Court cases are an average of thirteen days shorter than cases for detained persons who did not participate in the program. This suggests that providing modest amounts of legal guidance will have important resource-saving benefits for the immigration courts and immigration detention system. The more quickly detained cases are completed, the sooner detained persons are eligible to be released from custody or removed from the U.S. This can free available bed space at detention facilities and substantially reduce costs for the federal government. Participants who were released from detention prior to the completion of their Immigration Court cases appeared for court hearings at greater rates than comparison groups.

Likewise, there are costs to the states and localities when a breadwinning parent is locked in a detention facility, without access to counsel. Some detained respondents are eligible for bond to return to their jobs and the community during the pendency of their case. Without access to assigned counsel, it is unlikely that they will have the wherewithal to seek and prevail at a bond redetermination hearing, to lower a high bond so they can go back to work. Covering the costs of the other parent and children, who can be U.S. citizens, when a breadwinner is incarcerated, can fall on the public benefits system and these costs should be part of the equation.

Moreover, the Immigration Judges at sites with these programs have stated that the LOP increases immigration court efficiency. Judges at LOP sites report that respondents who have attended the LOP appear in Immigration Court better prepared and are more likely to be able to identify the relief for which they are statutorily eligible, to not pursue relief for which they are ineligible, and to have a better understanding of the Immigration Court process, thus helping to improve court efficiencies.[35] Universal representation would bring even greater and fairer results.

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[33] Oren Root, Vera Institute of Justice pg. 1

[34] See U.S. Commission on International Religious Freedom, "Report on Asylum Seekers in Expedited Removal," Vol. II (Feb. 2005) at 243; U.S. Department of the Justice, Executive Office for Immigration Review.

[35] Vera Institute of Justice "Improving Efficiency and Promoting Justice in the Immigration System."

Human Rights Norms and Practices Guarantee a Right to Due Process

International law, like the U.S. Constitution, guarantees a right to due process of law.[36] Denial of the right to counsel, even where such denial is circumstantial rather than deliberate, is a denial to due process of law. International law supports the claim that respondents in detention have a right to access counsel.[37] The International Covenant on Civil and Political Rights ("ICCPR") states that due process requires that criminal defendants receive adequate time and facilities to prepare a defense and to communicate with counsel.[38] International law should extend that basic protection to immigration detainees in U.S. facilities who face deportation, a very serious consequence. At present, detainees in U.S. facilities do not have consistent access to free legal counsel to communicate with about their cases. The LOP is a start, but is only available during the initial screening of a case and not during the entire pendency of removal proceedings.

Detention of individuals in removal proceedings implicates international treaty obligations and other human rights norms and practices. International covenants and norms that provide protection to detained individuals include the ICCPR, the United Nations Declaration on Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.[39] The U.S. has adopted or ratified each of these treaties, with certain reservations. The protections for immigrants who are detained include the right to be informed of the charges against him, to have a court review such charges without delay, and to be treated humanely and without discrimination based upon race, national origin, religion, or other factors. Moreover, the ICCPR protects all persons against arbitrary arrest and detention.[40]

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[36] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Article 26 ("ICCPR"), available at http://www.ohchr.org/english/law/ccpr.htm

[37] National Immigrant Justice Center, Briefing Paper: "Access to Counsel and Due Process for Detained Immigrants," April 2007.

[38] ICCPR Art. 14(3)(b).

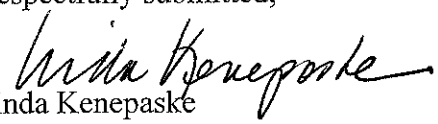
[39] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), available at http://www.un.org/Overview/rights.html ; International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195, available at http://www.unhchr.ch/html/menu3/b/d_icerd.htm

[40] ICCPR, Art 9(1); National Immigrant Justice Center, *supra*.

CONCLUSION

For the reasons discussed above, the Immigration and Nationality Law Committee of the New York City Bar Association supports the position that basic due process requires assignment of counsel at government expense to all detained indigent respondents facing removal from the United States.

Respectfully submitted,



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***The Committee gratefully acknowledges the assistance of Kathryn Pawlik, an attorney awaiting admission to the Bar, in the research and preparation of the report.**