Access to Counsel in Removal Proceedings: A Case Study for Exploring the Legal and Societal Imperative to Expand the Civil Right to Counsel

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Recommended Citation
Carla L. Reyes, Access to Counsel in Removal Proceedings: A Case Study for Exploring the Legal and Societal Imperative to Expand the Civil Right to Counsel, 17 UDC/DCSL L. REV. 131 (2014)

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ACCESS TO COUNSEL IN REMOVAL PROCEEDINGS: A CASE STUDY FOR EXPLORING THE LEGAL AND SOCIETAL IMPERATIVE TO EXPAND THE CIVIL RIGHT TO COUNSEL

Carla L. Reyes

INTRODUCTION

Of the approximately 400,000 immigration cases pending before federal immigration courts across the country, approximately fifty percent involve pro se respondents. Although empirical evidence shows that a foreign national’s chances of receiving a favorable ruling doubles when an attorney represents him or her in removal proceedings, a unique confluence of history, legal tradition and policy climate have restricted immigrants’ access to counsel to a ten-day window in which the immigrant may seek representation of his or her own choosing at no expense to the government. Although removal proceedings are, by definition, civil proceedings, they nevertheless involve physical detention and the possibility of permanent removal from the United States. These circumstances make the immigration

* Adjunct Faculty, Northwest University; Associate, Perkins Coie LLP; J.D., LL.M, Duke University School of Law (2009), MPP, Duke Terry Sanford School of Public Policy (2009). I would like to thank my husband, Mario C. Reyes, for his unwavering support. I would also like to thank the editors of the University of the District of Columbia Law Review for hosting and organizing a symposium on this very important topic.

1 Executive Office of Immigration Review ("EOIR"), Office of Planning Analysis and Technology, FY 2012 Statistical Year Book, at B2 (Feb. 2013), available at http://www.justice.gov/EOIR/statspub/fy12syb.pdf. Note that the number of immigration cases received by EOIR in FY 2012 was 410,753, and the number of cases has hovered around the 400,000 mark since 2009. Id.

2 Id. at G1. During FY 2012 a record low of 44% of respondents proceeded on a pro se basis, however, the number of pro se respondents has ranged between 55% and 44% between 2008 and 2012, for an average of 49.8% for that time period. Id.
This article argues that, in light of the high stakes involved and the large obstacles to effective pro se participation, there exists a legal and social imperative to expand access to counsel in removal proceedings. This article further evaluates alternative frameworks for effectuating that right to counsel in light of specific public policy criteria and recommends the creation of a Court Appointed Special Advocate-type program implemented through regulatory change.

This article proceeds in four parts. Part I explores the historical and policy considerations behind the current statutory mandate that immigrants in removal proceedings are entitled only to a ten day period to find representation at no expense to the government. Part II argues that compelling reasons exist for expanding access to counsel in removal proceedings. Part III evaluates three alternatives for expanding access to counsel in removal proceedings and four possible implementation methods. Using a public policy analysis methodology, Part III ultimately recommends a Court Appointed Special Advocate-type program implemented through regulatory change as the framework and implementation method that best serves immigrants in removal proceedings under present circumstances. The article concludes by briefly exploring the jurisprudential and policy lessons from the case study of removal proceedings and applying them to the discussion of a right to counsel in civil proceedings more generally.

I. HISTORICAL AND POLITICAL UNDERPINNINGS OF THE CURRENT REPRESENTATION RULE IN REMOVAL PROCEEDINGS

A. Immigration Law and Policy in the United States: A Cycle of Openness and Restriction

From the founding of the United States to the present, roughly 100 million persons have immigrated, nearly 75,500,000 of whom have done so legally. From the very beginning, immigration law and policy in the United States has experienced a cycle of relative openness followed by restriction and resistance. Initially, for example, policy makers sought to encourage immigration to the United States through the first naturalization law of Congress, the Naturalization Act of 1790.

The Act required only that the immigrant (1) be a free white person, (2) demonstrate two-year residency in the United States and (3) good character and allegiance to the United States and its Constitution. These very liberal naturalization requirements were quickly tightened in 1795 and again in 1798 in response to both the large influx of immigrants resulting from the “Open Door Policy” and the beginning of hostilities with France. As these tensions decreased, immigration law and policy was again relaxed. The mid-1800s were governed by naturalization and immigration laws (the first immigration law was passed in 1819) that focused on a five-year residency requirement, allegiance to the United States and good moral character — requirements that remain important hallmarks of immigration law to this day.

A second cycle of restriction began in the 1880s when, reacting to the changing composition of immigrants to the United States, “[a] plethora of nativist groups emerged after 1880 to use violence and to politically agitate to restrict immigration.” With growing concerns over the composition of the workforce, reliance on immigrant contract labor and public health, the period between 1880 and 1920 saw the enactment of increasingly restrictive federal laws, executive orders and judicial mandates regulating both newly-arriving immigrants and the immigrants already within United States territory. World War II interrupted the immigration policy debate, and the next period of regulation did not begin until 1945.

The progression of the modern era of immigration law has similarly followed a cycle of openness and restriction. The period 1945 to 1986 was characterized first by immigrants arriving under the quota system, and then under the preference system. Policy discussions

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5 LeMay, *supra* note 3, at 1.


7 *Id.* at 152, 162.


9 *Id.* at 19 (LeMay refers to this period, from 1880-1920, as the “Door Ajar Era”).

were marked by a concern for displaced persons and refugees after World War II, and for refugees suffering after a variety of armed conflicts, including those in Cuba, Vietnam, and others. The concern about how to care for such displaced persons quickly transformed into a concern for how to stem the mass flow of asylees. This reactive nature of immigration policy led to the passage of the Refugee Act of 1980 which attempted to curb the flow to only those who met the United Nations definition of refugee and asylee. Further, growing concern with the problems posed by undocumented immigration led to enactment of the Immigration Reform and Control Act of 1986. From that time through the present, events such as those that occurred on September 11, 2001, and trends such as the rising gang problem in Latin America and armed conflict in the Middle East have led to an increasingly restrictive and divisive tone for immigration policy and have stalled efforts at reform in Congress.

Ultimately, the history of naturalization and immigration law and policy from the founding of the United States to the present has informed the judicial process affecting immigrants in removal proceedings. The trends followed by lawmakers regarding admissions and other requirements mirror developments on the enforcement side, causing changes in enforcement priorities, changes in jurisprudential

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11 Id. at 4-7.
12 Id. at 8.
13 Id.
14 Id.
15 Id. at 9-13; see also Laura C. Thaut & Carla L. Reyes, Immigration and the U.S. Liberal Welfare State: Why Mainstream Theories Fail to Explain Patterns on Immigration and Access to Political Mobilization, in 3 TRANSFORMING AMERICA: PERSPECTIVES ON U.S. IMMIGRATION, 109, 115 (Michael C. LeMay, ed. 2013) ("The current immigration policy debate remains heated to such an extent that no consensus can be sufficiently built to pass comprehensive immigration reform.").
16 Elizabeth Shaffer-Wishner, Post-9/11 Immigration Policy, National Security and Human Rights Implications for Muslim Americans, in 3 TRANSFORMING AMERICA: PERSPECTIVES ON U.S. IMMIGRATION, 81, 83 (Michael C. LeMay, ed. 2013) (noting “hardened U.S. borders, and hardened attitudes toward foreigners” that resulted in enforcement priorities for “priority absconders” – “those who had been ordered to leave the country following visa expiration or other immigration legislation, but did not”); see also Daniel Kanstroom, ‘Passed Beyond Our Aid’: U.S. Deportation, Integrity and the Rule of Law, 35 FLETCHER FORUM WORLD AFF. 95, 95-96 (2011) (noting a new “strong ‘national security’ and ‘crime control’ orientation” in immigration enforcement priorities after legal changes in the 1990s).
emphasis on identity documentation and credibility determinations, and generally limiting immigrant access to social and legal assistance through the imposition of funding restrictions. These dueling policy and jurisprudential concerns must be considered when evaluating whether to appoint legal counsel to immigrants in removal proceedings, what form of counsel is appropriate, and how to implement any such policy. If these concerns are ignored, any such attempt will either fail or result in unforeseen consequences that may or may not benefit the very immigrants the policy is intended to serve.


The long and cyclical history of immigration law and policy in the United States has inevitably bled into the jurisprudence governing removal proceedings. Historians such as Lucy E. Slayer and William C. Van Vleck have documented decades of criticism aimed at United States immigration admission, adjudication and deportation proceedings because “[t]he safeguards of a judicial trial are conspicuously lacking.” Removal proceedings have always provided foreign nationals relatively greater protection than admission proceedings; however, Van Vleck notes that even the procedures for removal have “appeared to be devised ‘with a maximum of powers in the administrative officers, a minimum of checks and safeguards against error and prejudice, and with certainty, care and due deliberation sacrificed to the desire for speed.’”

Most observers blame the lack of judicial safeguards on the classification of removal proceedings as “civil” proceedings. As a general matter, “the law sharply demarcates between the many rights

18 Thaut & Reyes, supra note 15, at 115-17.
20 Id. (quoting VAN VLECK, supra note 19, at 224).
available to criminal defendants and the significantly more limited bundle of protections for civil litigants." The Supreme Court addressed the civil nature of removal proceedings as early as 1893, commenting that such proceedings are "in no proper sense a trial and sentence for a crime or offense." Notably, this determination coincided with the "Door Ajar Era" of restrictive United States immigration policy. Courts have continued to use the civil-criminal divide through the modern era as the basis for determining that certain substantive and procedural safeguards do not apply in removal proceedings, including the Sixth Amendment right to the assistance of counsel. Notably, such decisions were all initially taken during the "Door Ajar Era," and then judicially confirmed after a restrictive policy stance was reinstated by the Immigration Reform and Control Act. Nevertheless, the civil nature of removal proceedings does not change the fact that the proceedings must comport with due process requirements. As a result, to the extent that courts have considered

21 Kevin R. Johnson, Gideon v. Wainwright and the Right to Counsel in Immigration Removal Cases: An Immigration Gideon?, 122 YALE L.J. 2394, 2396 (2013); see also Robert Pauw, A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply, 52 ADMIN L. REV. 305, 309 (2000) ("[C]ourts have generally adopted an ‘all or nothing’ approach: either immigration proceedings are criminal, in which case the proceedings are weighted down with the ‘cumbersome baggage of criminal procedure;’ or else immigration proceedings are civil, in which case the proceedings travel lightly and efficiently.") (quoting Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 HASTINGS L.J. 1325, 1330 (1991)).

22 Fong Yue Ting. v. United States, 149 U.S. 698, 730 (1893).

23 See supra note 9 and accompanying text.

24 Fong Yue Ting, 149 U.S. at 730 (no right to trial by jury); Mantell v. United States, 798 F.2d 124, 127 (5th Cir. 1986) (no right to assistance of counsel under sixth amendment); INS v. Lopez-Mendoza, 468 U.S. 1032, 1033 (1984) (the Fourth Amendment exclusionary rule does not apply); United States v. Yacoubian, 24 F.3d 1, 10 (9th Cir. 1994) (denying ex post facto challenge to deportation because it "only applies to criminal laws"); Urbina-Mauricio v. INS, 989 F.2d 1085, 1089 n.7 (9th Cir. 1993) (indicating that double jeopardy does not limit removal proceedings because they are civil proceedings); Linnas v. INS, 790 F.2d 1024, 1029-30 (2d Cir. 1986) (Bill of Attainder Clause does not apply).

25 See, e.g., Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903) (arbitrary deportation without right to be heard would violate due process).
providing procedural safeguards in removal proceedings through jurisprudence, they have done so under the guise of due process.\textsuperscript{26}

To date, however, no Court has gone so far as to say that due process requires that immigrants in removal proceedings be uniformly appointed counsel. Although many opine that the recent \textit{Padilla v. Kentucky}\textsuperscript{27} decision represents a step towards judicially-created appointed counsel in removal proceedings and an erosion of this this long history of jurisprudence,\textsuperscript{28} the current state of affairs remains far afield of a regime of appointed counsel.

\section*{C. The Current Privilege of Representation: \textit{Ten Days to Find and Pay for Counsel}}

The current laws governing immigration proceedings can be found in the Immigration and Nationality Act §§ 239-245.\textsuperscript{29} An Immigration judge presides over removal proceedings, and has the power to “administer oaths, receive evidence, and interrogate, examine, and cross examine the alien and any witnesses.”\textsuperscript{30} Generally speaking, detained foreign nationals facing removal proceedings have “the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing...the privilege of] a reasonable opportunity to examine the evidence...to present evidence...and to cross-examine witnesses..., and [the safeguard that] a complete record

\begin{footnotesize}
\begin{enumerate}
\revnumber{26} Lopez-Mendoza, 468 U.S. at 1051-52 & n.5 (Exclusionary Rule applies as a matter of due process when the fourth-amendment violation would otherwise violate notions of fundamental fairness); Henriques v. INS, 465 F.2d 119, 121 (2d Cir. 1972) (suggesting without holding a due process right to appointed counsel in deportation proceedings).
\revnumber{29} Immigration and Nationality Act, 8 U.S.C.A. §§ 1226-1254a (2009).
\revnumber{30} \textit{Id.} § 240(b)(1).
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\end{footnotesize}
shall be kept of all testimony and evidence produced at the proceeding." The government, however, only provides ten days within which the foreign national facing removal proceedings may obtain counsel. At the end of ten days, the proceeding will begin, whether or not the foreign national has successfully obtained counsel.

Admittedly, immigrant advocates have also used a moderately successful impact litigation strategy to obtain certain due process rights for legally admitted foreign nationals facing removal proceedings. These include the right to be heard, the right to have the immigration judge fully develop the record when the immigrant is not represented by counsel, and the right to receive competent translation. Advocates have also advanced the rights of detained unaccompanied minors, and most recently, furthered protection of immigrants facing criminal proceedings.

However, impact litigation cannot take the place of improved legislation and can often have unintended consequences. In the case of removal proceedings, successful impact litigation offers some sense that immigrants are pushing the system towards whatever measure of process in removal proceedings is due. Many observers, however, question whether immigration proceedings are generally still weighted in favor of the government, with foreign nationals facing significant

31 Id. § 240(b)(4). One commentator asserts that INA § 240(b) codifies the essential elements of a fair hearing granted to immigrants. Note, The Due Process Implications of Estoppel Claims in Deportation Proceedings, 60 TEX. L. REV. 61 (1981-82).
33 Id. § 239(b)(3).
34 Yamataya, 189 U.S. 86; Kwong Hai Chew v. Colding, 344 U.S. 590, 598 (1953) (holding that once an alien has been admitted to lawful residence, "not even Congress may expel him without allowing him a fair opportunity to be heard").
35 Jacinto v. INS, 208 F.3d 725 (9th Cir. 2000).
36 Amadou v. INS, 226 F.3d 724, 726-28 (6th Cir. 2000).
38 See generally, Padilla, 559 U.S. 356.
obstacles to achieving favorable rulings without representation.\textsuperscript{40} Further, the empirical evidence shows that immigration proceedings are so complicated\textsuperscript{41} that a foreign national’s chance of receiving a favorable ruling doubles when an attorney represents him or her in the proceedings.\textsuperscript{42} In addition, certain populations of immigrants in removal proceedings face even greater procedural due process obstacles by virtue of additional circumstances leading to greater vulnerability.\textsuperscript{43} Armed with an understanding of the unique historical, legal and policy factors that combined to offer immigrants in removal proceedings only the privilege of obtaining counsel at their own expense during a ten-day window before proceedings begin, this article next evaluates whether the uniquely high stakes and significant obstacles facing immigrants in removal proceedings compel a different rule.

\textsuperscript{40} \textsc{Stephen H. Legomsky, Immigration and Refugee Law and Policy 653} (4th ed. 2005).

\textsuperscript{41} Kara Hartzler, Florence Immigrant and Refugee Rights Project, testimony before the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Committee on the Judiciary House of Representatives (Feb. 13, 2008) ("Immigration law is often compared in its complexity to the tax code, and there are many issues on which case law does not yet exist.").

\textsuperscript{42} \textit{Id.} at 654. See also, \textsc{Donald Kerwin, Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They can be Expanded, Immigr. Briefings (June 2004); Andrew I. Schoenholtz \\& Jonathan Jacobs, The State of Asylum Representation: Ideas for Change, 16 Geo. Imm. L.J. 739 (2002); United States General Accounting Office, Asylum Approval Rates for Selected Applicants (1987).}

\textsuperscript{43} Two populations come to mind in particular: mentally ill immigrants in removal proceedings, and minors (whether unaccompanied or accompanied by a family member). Although an extensive discussion of the additional and specialized due process challenges facing these two populations is beyond the scope of this article, each group deserves additional and specific attention by legislators (and not just advocates pursuing impact litigation). For further discussion regarding the challenges facing the mentally ill in removal proceedings, see Sarah Gillman, \textsc{Immigration Laws are Cruel to the Mentally Ill, Immigr. Matters} (Apr. 18, 2008); Cheryl Little, Executive Director, Florida Immigrant Advocacy Center, testimony before the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Committee on the Judiciary House of Representatives, at 89 (Oct. 4, 2007); and Hartzler, \textit{supra} note 40, at 18. For further discussion of the challenges facing minors see generally, e.g., Reyes, \textit{supra} note 39.
II. HIGH STAKES AND SIGNIFICANT OBSTACLES COMPEL EXPANDED ACCESS TO COUNSEL

Immigrants in removal proceedings face high stakes and significant obstacles to navigating the procedural issues, language barriers and complicated questions of law involved in the pursuit of those high stakes. These high stakes and significant obstacles are present in all removal proceedings – whether the immigrant is detained during the proceedings or not. These issues have been documented at length by others. However, it is necessary to touch on these circumstances briefly here in order to illuminate the current, real and present need for a solution to the lack of a right to appointed counsel in removal proceedings.

A. Life and Liberty: Removal Proceedings Involve the Highest Stakes

For many immigrants, removal to their country of origin could result in continued abuse, death, separation from family, inability

44 For this reason, this article does not limit its examination of policy alternatives for providing expanded access to counsel solely to detained immigrants in removal proceedings. Rather, immigrants in removal proceedings generally, detained or not, face similar obstacles to fair process and are in need of expanded access to counsel. This approach admittedly affects the analysis, and therefore should be stated here as a core policy assumption that informs the methodology employed below.


46 Kanstroom, supra, note 43, at 15-16 (discussing the abuse suffered by many deportees in their countries of origin and concluding that “[i]n many countries, the treatment of deportees has been a serious human rights concern.”).

47 Id. at 17 (describing the plight of youth deported to El Salvador who “are regarded as pariahs, hunted by vigilante squads, and some have been shot down within days of stepping off the planes from the United States.”) (citing Randall Richard, AP Investigation: 500,000 Criminal Deportees from America Wreak Havoc in Many Nations, Oct. 26, 2003, available at http://www.threestrikes.org/ap_12.html; Margaret Swedish, Gang Violence Spreads through Central America, Central America/Mexico Report, Nov.-Dec. 2003).

48 Jacqueline Hagan, Brianna Castro & Nestor Rodriguez, The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives, 88 N.C. L. Rev. 1799, 1818-22 (2010) (documenting the experience of families separated by deportation, and noting “[i]f deportees have a spouse or child in the United States, then they could find themselves in a situation in which they are
to economically support themselves and their family, and other similarly high-stake outcomes. Further, many immigrants face prolonged detention while awaiting the resolution of their removal proceedings. With the backlog in the immigration court docket, the result is that immigrants pursuing relief in immigration court might spend many months in an immigration detention center awaiting adjudication of their claims for relief.

In concrete terms, each year, the United States Bureau of Immigration and Customs Enforcement ("ICE") detains over 311,000 foreign nationals. As part of this enforcement effort, ICE oversees 330 adult, nineteen juvenile, and three family detention facilities nationwide, each of which have an average daily population of over

separated indefinitely from loved ones who may have depended on the deported family member's earnings."); see also Patrick Manning, As Washington Debates Immigration, Families Deal with Life After Deportation, FOX NEWS LATINO, Feb. 1, 2013, available at http://latino.foxnews.com/latino/news/2013/02/01/as-washington-debates-immigration-families-deal-with-life-after-deportation/ ("According to Immigration and Customs Enforcement, more than 200,000 undocumented immigrants deported between 2010 and early fall 2012 claim to have children who are U.S. Citizens.").

Hagan, Castro & Rodriguez, supra note 48, at 1814-18 (documenting "the devastating economic, social, and psychological effects of expanded interior enforcement on immigrant families and the communities where they live.").

Am. Civil Liberties Union Foundation Immigrants' Rights Project, Issue Brief: Prolonged Immigration Detention of Individuals Who are Challenging Removal, at 2 (July 2009) ("Finally lengthy delays in immigration courts, the Board of Immigration Appeals (BIA), and the federal courts, and the complex nature of immigration cases also cause many immigrants to languish in detention for months or even years while they wait for their cases to be decided.") (citing Brad Heath, Immigration courts face huge backlog, USA TODAY, Mar. 29, 2009).


30,000 detained foreign nationals.\(^{54}\) In 2012, ICE deported 409,849 immigrants and returned them to their countries of origin.\(^{55}\) Further, 11,000 immigrants were awarded asylum during their removal proceedings in 2011.\(^{56}\) It is unclear whether these numbers reflect the many children pursuing asylum under Unaccompanied Alien Child procedures,\(^{57}\) or those seeking Special Immigrant Juvenile Status before the United States Citizenship and Immigration Service.\(^{58}\) Whether adult or child, whether fleeing persecution and abuse (asylum, refugee, and SIJ seekers), seeking employment, attempting to maintain their family as an integrated unit, or simply trying to implement a choice to live in the United States for whatever reason, each of the immigrants represented by these statistics has core issues of life and liberty at stake - physical detention, the possibility of continued physical abuse and death, and the possibility of relief from those same possibilities. As one writer noted, "[t]he gravity of the liberty interest at stake for these respondents cannot be overstated and has been characterized by the Supreme Court as 'banishment' and the 'loss of all that makes life worth living.'"\(^{59}\) Removal proceedings are different from most other civil proceedings.\(^{60}\)

\(^{54}\) Id. at 2.


\(^{60}\) Markowitz, 2011, supra note 28, at 1329 (stating "‘deportation is different’...because of its gravity and its close relation to the criminal conviction");
B. Culture, Language and Education:
Obstacles to Fair Process in Removal Proceedings

Respondents in removal proceedings also face linguistic, cultural, educational and ethnic barriers to fair process in removal proceedings. Roughly seventy-eight percent (78%) of immigrants in removal proceedings require interpretation services.\textsuperscript{61} In addition, cultural difference may give those in removal proceedings preconceived notions about the immigration process, including “misinformation about U.S. laws and court procedures.”\textsuperscript{62} Further, cultural differences may substantively impact the immigrant’s pursuit of relief from removal in immigration court.\textsuperscript{63} A low level of education and lack of familiarity with the legal system may also make it more difficult for immigrants to proceed pro se or to seek counsel.\textsuperscript{64}

\textsuperscript{62} American Bar Association, \textit{Adult Legal Orientation Program (LOP)}, http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/south_texas_pro_bono_asylum_representation_project_probar/adult_legal_orientationprogramlop.html; see also \textit{Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings}, 33 CARDOZO L. REV. 357, 359-60 (2011) (“Compounding the lack of legal entitlement to appointed counsel are the distinctive characteristics of the population facing removal: a relative lack of familiarity with the legal system; lack of financial resources; language barriers; and general susceptibility to unscrupulous lawyers.”).
\textsuperscript{63} Scott Rempell, \textit{Gauging Credibility In Immigration Proceedings: Immaterial Inconsistencies, Demeanor and the Rule of Reason}, 25 GEO. IMMIGR. L.J. 377, 403 (2011) (“Needless to say, participants in immigration proceedings have distinctive cultural, ethnic, and linguistic backgrounds that may make generalizations about the significance of demeanor attributes from an American vantage point much harder to extend to those coming from other countries. An immigration judge might consider an applicant’s failure to maintain eye contact a sign of deception even though the applicant may simply be adhering to a cultural background that views direct eye contact as abrasive or disrespectful in certain instances.”); see also Cianciarulo, \textit{supra} note 17, at 131 (“Cultural differences may also have a strong impact on an adjudicator’s perception of an applicant’s credibility.”).
\textsuperscript{64} Matt Adams, \textit{Advancing the 'Right' to Counsel in Removal Proceedings}, 9 SEATTLE J. SOC. JUST. 169, 179 (2010).
These obstacles pose significant barriers to fair process for all immigrants in removal proceedings, whether represented by counsel or not. Nevertheless, even to the extent that competent counsel might assist immigrants in removal proceedings in overcoming these cultural, educational, ethnic and linguistic hurdles, immigrants in the current system face a variety of additional difficulties. First, as discussed above, by regulation, immigrants in removal proceedings have ten days from the filing of the Notice to Appear to obtain counsel at their own expense. Notably, "several factors make obtaining quality deportation defense representation impracticable for many. As a group, respondents tend to come from working class communities and have limited financial resources." Even where immigrants in removal proceedings can afford to privately retain counsel, "the best available evidence points to a serious and growing problem regarding the availability of legal representation, as well as the quality of such representations in removal proceedings."

C. These Circumstances Compel Expanded Access to Counsel in Removal Proceedings

The serious nature of the life and liberty interests at stake in removal proceedings, especially when combined with the additional obstacles to fair process involved, compel some form of expanded access to counsel to all immigrants in removal proceedings, whether detained pending resolution of their case, or not. When evaluating possible solutions to this situation, which some have called "[t]he representation crisis," the difficulties posed by linguistic, cultural, educational and ethnic barriers cannot be overlooked, and policymakers, academics and judicial officers must remember what practitioners know all too well - the mere appearance of an attorney on the respondent's behalf will not alleviate these obstacles automatically, especially if the quality of the representation is lacking. Removal proceedings are indeed "different" than other civil proceedings, and those differences not only cry out for expanded access to counsel, but

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65 See supra notes 29-33, and accompanying text.
66 Markowitz, 2009, supra note 59, at 548.
67 Id. at 542-543 (citing a variety of studies revealing the abuses of "notarios" and members of the immigration bar).
68 Id. at 544.
69 Markowitz, 2011, supra note 28, at 28.
for expanded access to *competent* counsel who can assist the immigrant in navigating both the complex law that will determine key issues of life and liberty and the complex cultural, educational and linguistic issues that pervade each immigration courtroom.

III. A PROPOSED FRAMEWORK FOR EXPANDED ACCESS TO COUNSEL IN REMOVAL PROCEEDINGS

Any discussion of the policy alternatives for expanding access to counsel to all immigrants in removal proceedings must address both the possible content of the system and the form in which the system will be implemented. In order to balance the historical and political considerations underpinning the current requirement that immigrants obtain and pay for their own counsel with the high stakes and significant obstacles facing immigrants in removal proceedings, this article recommends a framework that pursues expanded access to counsel, rather than assuming that appointed counsel will best address the policy problem. In particular, this article argues that, at present, the best alternative for providing expanded access to counsel and fair process in removal proceedings is to implement a Court Appointed Special Advocate (CASA)-type program. Further, after exploring four options for implementing such a framework, this article recommends that the program be developed through regulatory change. In recommending the proposed framework and implementation method, this article weighs whether the proposals will meet certain standards to a high degree, a methodology taken from the field of public policy.70

A. Standards for Designing Proposed Framework and for Weighing Implementation Alternatives

The analysis that follows presents several alternatives for a framework expanding access to counsel in removal proceedings. Each of these alternatives have been suggested, considered, or otherwise discussed in the literature regarding a right to counsel in removal

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70 Corresponding to the written analysis that follows, alternatives were assigned values of 0, 1, 2, or 3 based on how effectively the alternative met each criterion. The values were then totaled to determine an overall score for each alternative. For a full scoring breakdown, see Appendices A and B. In the policy analysis literature, this analytical tool is commonly used and is referred to as an outcomes matrix. EUGENE BARDACH, A PRACTICAL GUIDE FOR POLICY ANALYSIS: THE EIGHTFOLD PATH TO MORE EFFECTIVE PROBLEM SOLVING xvi (2d ed. 2005).
proceedings. Importantly, the literature surrounding these alternatives tends to focus on the jurisprudential basis for each position and whether it fulfills constitutional norms, rather than on the policy implications of the proposal. Without making a judgment as to the efficacy of such an approach, this article pursues a different methodology namely, asking which proposed solution and which method for implementing that solution best addresses the myriad aspects of the complicated “representation crisis” and problems impeding fair process for immigrants in removal proceedings discussed above when weighed against specific criteria.  

As part of this methodology, the alternatives for expanding access to counsel in removal proceedings and the possible implementation methods are weighed in light of the following standards: (1) maximize political feasibility; (2) respect due process; (3) enhance transparency; (4) maximize likelihood of success; (5) enhance judicial economy; and (6) provide accountability. “Political feasibility” refers to the variety and number of actors that will support the policy. For the purposes of this exercise, “due process” refers to the extent to which the framework for expanding access to counsel respects the immigrants’ interest in receiving fundamentally fair treatment in proceedings which determine significant questions related to their liberty interests.

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71 BARDACH, supra note 70, at 45-47 (summarizing the methodology as follows: “In a coherent narrative style [the policy analyst] will describe some problem that needs to be mitigated or solved. [The policy analyst] will lay out a few alternative courses of action that might be taken. To each course of action [the policy analyst] will attach a set of projected outcomes that [the policy analyst] think[s his or her] client or audience would care about, suggesting the evidentiary grounds for [the policy analyst’s] projections. If no alternative dominates all other alternatives with respect to all the evaluative criteria of interest, [the policy analyst] will indicate the nature and magnitude of the trade-offs implicit in different policy choices. Depending on the client’s expectations, [the policy analyst] may state [his or her] own recommendation as to which alternative should be chosen.”).

72 Id. at 32 (referring to this criterion as “political acceptability” and defining it as “a combination of two things: too much opposition (which may be wide or intense or both) and/or too little support (which may be insufficiently broad or insufficiently intense or both).”).

73 Defining “due process” as advancing fair treatment in removal proceedings is consistent with the focus of the United States Supreme Court when inquiring into the due process rights of immigrants. See, e.g., Low Wah Suey v. Backus, 225 U.S. 460 (1912) (holding that a successful attack on immigration hearings must demonstrate that they were manifestly unfair); Landon v. Plasencia, 459 U.S. 21 (1982) (limiting the judicial inquiry to whether deportation procedures meet the essential standard of fairness under the due process clause). Immigrants do not enjoy
“Transparency” refers to the degree to which the special procedure can be made well known and well understood. 74 “Likelihood of success” refers to whether the alternative will actually achieve the desired level of fair process for immigrants in removal proceedings. 75 “Judicial economy” refers to the efficiency of the immigration courts, especially with regard to unnecessary effort, expenses or use of resources. 76 The final criterion, “accountability,” is used only to weigh the appropriate method of implementing the framework for counsel in removal proceedings, rather than in designing the framework itself. “Accountability” refers to the ability to enforce the “right” to counsel provided to immigrants in removal proceedings through the proposed framework. 77 The method for implementing the proposed framework that provides accountability will grant immigrants in removal proceedings a remedy for deprivation of their “right” to counsel.

the full panoply of due process rights that United States citizens do. Mathews v. Diaz, 426 U.S. 67 (1883). For example, although detained immigrants are entitled to an opportunity to be heard, that opportunity is “not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress.” Yamataya, 189 U.S. 86, 101; see also Kwong Hai Chew, 344 U.S. at 598. Detained immigrants are also entitled to the development of a full record by the Immigration Judge, Jacinto, 208 F.3d 725, and to competent translation. Amadou, 226 F.3d at 726-28. Each of these rights advance the definition of “due process” above as fair treatment in proceedings affecting a significant liberty interest.


75 BARDACH, supra note 70, at 33 (labeling this criterion “robustness and improvability,” Bardach explains: “Policies that emerge in practice can diverge, even substantially, from policies as designed and adopted. A policy alternative therefore should be robust enough so that even if the implementation process does not go very smoothly, the policy outcomes will still prove to be satisfactory.”).


77 Transparency and Accountability Initiative, Definitions, http://www.transparency-initiative.org/about/definitions (“Accountability means ensuring that officials in public, private and voluntary sector organisations are answerable for their actions and that there is redress when duties and commitments are not met.”).

This section presents three alternatives for addressing the "representation crisis" facing immigrants in removal proceedings. After evaluating each of the alternatives in light of the criteria set forth above in Part III A, this article encourages advocates to seek expanded access to counsel for immigrants in removal proceedings through a CASA-type program. As will be shown by the analysis set forth below, the CASA-type program is the alternative that best meets the criteria. It is important to note the impact of the criterion of political feasibility, and to understand that the effect of this criterion on the analysis varies with the changing political landscape. Consequently, the analysis below should be updated in light of current conditions before advocates pursue any strategy for expanding access to counsel in removal proceedings. Furthermore, the strategy recommended here is not recommended as the ideal or final solution for expanding access to counsel in removal proceedings. Rather, it is offered as the policy choice that is most likely to achieve a real impact for immigrants in removal proceedings in the near future, and should be viewed as an interim solution recommended on the basis of the current political, jurisprudential and cultural climate.

1. Mandatory Participation in an Expanded Legal Orientation Program

This alternative would expand the current Legal Orientation Program ("LOP") provided by the Executive Office of Immigration Review ("EOIR") to certain detention centers throughout the country. After EOIR initiated several pilot LOP projects on its own, in 2002 Congress appropriated one million dollars to fully develop the program. Despite several expansions of the program, EOIR is still only able to provide LOP to a portion of detained immigrants. This

78 In both the analysis of the proposed framework and the implementation method, the difference between the prevailing alternative and the secondary alternative is political feasibility.
80 Id. (citing Vera Institute of Justice at 27-28).
alternative would expand funding for the program such that LOP could be provided to all immigrants in removal proceedings.81

This alternative is moderately politically feasible. The prior expansions of the program and of funding for the program indicate significant political support for LOP. However, in light of the present budget crisis, increased funding for any program is unlikely.82 If, however, funding is the issue that would make this alternative more or less politically feasible, the degree of feasibility will vary with the changing politics of the time and the ability to create additional funding sources. For example, at the time of this writing Congress is considering a proposal for comprehensive immigration reform which seeks to create a statutory right for all detained immigrants to participate in LOP within five days of detention.83 The bill's sponsors expect the funding for even this moderate increase in the reach of the LOP program to come from a new fund created by the reform legislation itself, not from any existing source of funding.84 As a result, advocates pursuing an advocacy strategy should evaluate the effect of this criterion anew before pursuing any strategy involving an expanded LOP.

This alternative only minimally satisfies due process and, for substantially the same reasons, also has a low likelihood of actually providing sufficient fair process to immigrants in removal proceedings such that the difficulties discussed in Part I above are alleviated.85 As one writer explained, after participating in LOP, “[e]ven those respondents who understand the substance of the basic charges against them or those who are advised that they may qualify for an application

81 This alternative is suggested, albeit ultimately rejected, by Matt Adams’ work. Id. at 179 (“Even if all detained respondents in removal proceedings were guaranteed participation in legal orientation sessions ...”).
84 Id.
85 This is Adams’ main objection to using LOP as a solution to the representation crisis. “[LOP] 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.” Adams, supra note 64, at 179.
for relief, are left with little or no understanding of the intricacies of the substantive provisions of the law."\(^8\)

This alternative only minimally advances transparency. The aim of LOP is to make removal proceedings more widely known and better understood. However, given the variance in the linguistic, cultural and educational backgrounds of the immigrants participating in LOP, it is unlikely that removal proceedings will be well known and well understood by many of the participating immigrants.\(^8\)

This alternative moderately increases judicial economy. To the extent that LOP enables immigrants in removal proceedings to better understand the availability of relief from removal in their particular case,\(^8\) it may also enable the immigration court to forego delays in the proceedings. Such delays otherwise stem from the immigration judge using precious court time to act as both "impartial adjudicator and counselor to the respondent,"\(^8\) or from the preparation (and subsequent rejection) of improper applications for relief, or from other continuance requests.\(^8\) However, because LOP prohibits "any legal representation, including any legal advice and any legal practice or preparation of forms, even on a limited pro se basis,"\(^8\) it does not alleviate the additional time immigration judges must spend "researching issues without the benefit of counseled briefing."\(^8\)

\(^8\) Id.

\(^8\) Markowitz, 2009, supra note 59, at 551 ("Fifty-two percent of the foreign-born population are limited English proficient. As discussed earlier, they are disproportionately poor and they are significantly more likely to be lacking in basic education.")(citing Press Release, U.S. Census Bureau, Census Bureau Data show Characteristics of the U.S. Foreign-Born Population (Feb. 19, 2009), available at http://www.census.gov/newsroom/releases/archives/american_community_survey_a cs/cb09-cn01.html).

\(^8\) Adams, supra note 64, at 179 (noting that "LOP provides substantive assistance that is useful for assisting unrepresented individuals with initially identifying potential forms of relief ....").

\(^8\) Markowitz, 2009, supra note 59, at 544-45 (explaining the difficulties surrounding the fact that "[i]n pro se cases, immigration judges are obligated to investigate and advise respondents on the availability of potential defenses to removal.") (citing 8 C.F.R § 1240.11(a)(2) (2009) ("The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter ....").)

\(^8\) Id. at 545 ("Pro se cases require more adjournments ....").

\(^8\) Adams, supra note 64, at 178 (citing Stephen Lang, Executive Office for Immigration Review, Legal Orientation Program Protocols Orientation vs. Representation, Apr. 14, 2009).

\(^8\) Markowitz, 2009, supra note 59, at 545.
Because expanding LOP to provide mandatory participation for all immigrants in removal proceedings, is only moderately politically feasible, does not respect due process, has little likelihood of success, and only marginally advances both transparency and judicial economy, this alternative is unlikely the best avenue for pursuing increased access to counsel for immigrants in removal proceedings. This alternative received a total score of 4.93

2. Court Appointed Special Advocate-Type Program

This alternative proposes creating a Court Appointed Special Advocate (CASA)-type advocacy program, in which volunteers, whether attorneys or not, are assigned to assist the respondent navigate the non-legal aspects of removal proceedings. This alternative helps alleviate the burden suffered by immigrants in removal proceedings due to the immigration bar’s strong disincentives to practice immigration defense. By creating a volunteer program that is open to both lawyers and non-lawyers, this alternative enlarges the possibility that any immigrant in removal proceedings would receive some form

93 See Appendix A: Outcomes Matrix.

94 This alternative is modeled after an initiative begun by Maria Woltjen of the University of Chicago Law School. In Prof. Woltjen’s initiative, volunteers are assigned to act in a CASA type role on behalf of unaccompanied alien children. See Jennifer Carnig, Woltjen Brings Immigrant Children’s Advocacy Project to Law School’s Mandel Legal Aid Clinic, UNIV. CHIC. CHRON., Sept. 21, 2006, available at http://chronicle.uchicago.edu/060921/woltjen.shtml. Note also that others have suggested a guardian ad litem program for mentally ill respondents in removal proceedings. Amelia Wilson & Natalie H. Prokop, Applying Method to the Madness: The Right to Court Appointed Guardians Ad Litem and Counsel for the Mentally Ill in Immigration Proceedings, 16 U. PA. J. L. & SOC. CHANGE 1 (2013). The alternative proposed here differs from the guardian ad litem proposal as it does not limit the population of respondents to the mentally ill, and does not propose that the CASA-type volunteers act as formal advocates before the court (whether for the respondent’s stated interest or the respondent’s best interest).

95 Accessing Justice, supra note 62 (“According to the providers surveyed, detained cases are least served by existing removal-defense providers.”); Markowitz, 2009, supra note 59, at 549-50 (discussing financial disincentives for the private immigration bar to focus its practice on removal defense and the problem of under-funding for pro bono service providers); Geoffrey Heeren, Illegal Aid: Legal Assistance to Immigrants in the United States, 33 CARDOZO L. REV. 619, 621 (noting that “there are too few lawyers for poor immigrants in the United States”).”) (citing Jennifer L. Colyer et al., The Representational and Counseling Needs of the Immigrant Poor, 78 FORDHAM L. REV. 461, 462 (2009); Kerwin, supra note 42, at 1).
of assistance. The CASA-type volunteers would be charged with: ensuring immigrants in removal proceedings understand the basic procedural disposition of their case,\(^{96}\) alerting the immigrants to possible avenues for obtaining counsel,\(^{97}\) assisting the immigrant in overcoming language barriers (either by finding an appropriate translator or speaking in the immigrant's native language),\(^{98}\) and if the immigrant decides to proceed \textit{pro se}, assisting the immigrant in obtaining the necessary supporting paperwork for his or her applications (e.g. coordinating with family members of the immigrant to obtain identity documents or providing basic research assistance on country conditions and other similar corroborative evidence).\(^{99}\) As an outside observer focused on the best interest of the immigrant, the CASA-type advocate might even serve as a check on poor quality representation.\(^{100}\)

This alternative is quite politically feasible. As a volunteer program, this alternative would pose no additional cost to the government. In fact, by alleviating some of the non-legal obstacles immigrants face in removal proceedings, this alternative advances judicial economy and might stretch expenditures in the immigration court system by saving time otherwise devoted to continuances, prolonged hearings and additional research time an immigration judge

\(^{96}\) Adams, \textit{supra} note 64, at 179 (noting the difficulty that immigrants will have in learning the procedures of the immigration court on their own).

\(^{97}\) Andrew I. Schoenholtz & Hamutal Bernstein, \textit{Improving Immigration Adjudications through Competent Counsel}, 21 GEO. J. LEGAL ETHICS 55, 56 (2008) ("Many times individuals slated for removal hearings have difficulty procuring representation because they do not know how to go about finding counsel...and/or are detained and thus even more limited in their information about and access to counsel.") (citing Andrew I. Schoenholtz & Jonathan Jacobs, \textit{The State of Asylum Representation: Ideas for Change}, 16 GEO. IMMIGR. L.J. 739, 746 n.53 (2002)).

\(^{98}\) Markowitz, 2009, \textit{supra} note 59, at 551 ("Fifty-two percent of the foreign-born population are limited English proficient.").

\(^{99}\) Adams, \textit{supra} note 64, at 179 ("In addition, without legal representation, most respondents do not have access to obtain the necessary supporting documents to appropriately present their cases.").

\(^{100}\) Schoenholtz & Bernstein, \textit{supra} note 97, at 58 ("The problem is not only lack of representation but also poor quality of representation....Some applicants manage to secure representation, but their representative (1) may not have the appropriate legal expertise, (2) may be overloaded with too many cases, (3) may not give due attention and care to individuals, or (4) may even be fraudulent.").
might otherwise need to invest.\textsuperscript{101} Taken together, these factors make this alternative strong in terms of the efficiencies it offers.

This alternative moderately advances due process and, similarly, has a moderate likelihood of success. By focusing on the non-substantive legal barriers to fair process in removal proceedings, this alternative advances the immigrant’s ability to navigate the proceedings to a strong degree. Nevertheless, given the uniquely complicated nature of immigration law, many opine that “due process requires that persons receive direct legal representation in their removal proceedings.”\textsuperscript{102} For such advocates, anything short of direct legal representation cannot fulfill the promise of due process in removal proceedings. This alternative also has a strong likelihood of success in certain situations. Namely, if an immigrant can afford private counsel, this alternative makes it more likely that the immigrant can locate quality representation and effectively communicate with counsel. To the extent a respondent must proceed \textit{pro se}, this alternative gives the immigrant non-legal support that he or she would not otherwise have. This alternative received a value of 10.\textsuperscript{103}

3. Federally Funded Right to Appointed Counsel

This alternative would recognize a right to appointed counsel in removal proceedings. Most of the literature surrounding this alternative focuses on the jurisprudential basis for a constitutional right to appointed counsel.\textsuperscript{104} However, such an approach presumes the method of implementing the policy solution and is not the methodological approach taken here. Rather, here, this alternative is evaluated on the basis of its content, standing alone. On that basis it is

\textsuperscript{101} See discussion of these drains on the immigration court system \textit{supra} notes 88-92 and accompanying text.
\textsuperscript{102} Adams, \textit{supra} note 64, at 179.
\textsuperscript{103} See Appendix A: Outcomes Matrix.
clear that, at least at the present time, this alternative is so lacking in political feasibility as to render it a less desirable alternative than the CASA-type program.

First, this approach is not politically feasible. This approach would require either that Congress pass immigration-related legislation, or that the judiciary wade into this politically volatile and jurisprudentially complicated morass of legal issues. Under either of these avenues, this alternative would require significant funding. Such funding is a political nonstarter.105 This is true even when, at the time of this writing, a significant immigration reform bill is seriously being considered in Congress.

Notably, that bill offers the several provisions on appointed counsel none of which involve a federally funded right to appointed counsel. The legislation contemplates a right to appointed counsel for unaccompanied alien children, for an immigrant in removal proceedings who is "incompetent to represent himself or herself due to a serious mental disability that would be included in section 3(2) of the Americans with Disabilities Act of 1990," and for an immigrant who "is considered particularly vulnerable when compared to other aliens in removal proceedings, such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings."106 The proposed legislation also authorizes the Attorney General, in his "sole and unreviewable discretion" to "appoint or provide counsel to aliens in immigration proceedings."107 This last provision can be read as the best evidence of the current low level of political feasibility of providing a statutory right to federally funded appointed counsel in removal proceedings. The current proposal, the one that negotiations landed upon as the most feasible, offers far less than a right to appointed counsel for all immigrants in removal proceedings.

This alternative would otherwise meet the other criteria to a moderate degree. In principle, appointed counsel would respect due process, enhance transparency, advance judicial economy and have a

105 Heeren, supra note 95, at 620-654 (detailing the long history and current state of restrictions on allowing federal funding to be used for direct representation of non-citizens); see also Markowitz, 2009, supra note 59, at 550 ("Congress has made clear its disinclination to fund deportation defense work on a broad scale.").
107 Id.
strong likelihood of successfully providing immigrants their best chance at fair process in removal proceedings. Nevertheless, the ability of counsel to deliver on the promises of this ideal in reality depends on the quality of representation. For the reasons discussed at length above, there is as much a crisis of quality in representation for immigrants in removal proceedings as the crisis presented by the absence of representation. Ineffective assistance of appointed counsel will advance none of these goals, and instead would victimize the very persons this alternative seeks to serve. As a result of the high level of political infeasibility and the practical obstacles to achieving the ideal levels of the other criteria, this alternative received a value of 8.

C. Access to Counsel: A Proposed Politically Feasible Method for Enacting the Framework

Although advocates and academics tend to focus on statutory reform and impact litigation as the two vehicles for expanding access to counsel in removal proceedings, the immigration system actually presents at least four methods for implementing the above proposed framework: (1) memoranda or guidelines issued by the Secretary of

108 Mills, Echemendia & Yale-Loehr, supra note 104, at 362 (arguing that “[i]n the current system, many petitioners who are eligible for asylum – and therefore might face persecution or death after deportation – are being denied relief erroneously because they lack counsel.”).

109 See generally Kaufman, supra note 104, at 149, (“recognition of a right to counsel would also create a number of practical problems. Finding qualified lawyers and administrating an appointed counsel system would be an enormous undertaking ...”).

110 See supra notes 66, 67, and accompanying text.

111 See Appendix A: Outcomes Matrix.

Homeland Security ("DHS") and/or the Chief Immigration Judge; (2) impact litigation; (3) regulatory change through DHS' rule making authority; and (4) statutory change. By evaluating each of the four options against the policy standards discussed above in Part III-A, it is clear that the best method for providing a new framework for expanded access to counsel in removal proceedings is lobbying for DHS to effectuate regulatory change.

1. Memoranda or Guidelines

This alternative calls for the content of the special procedures to be in the form of memoranda and guidelines to be issued by the Secretary of Homeland Security, the Director of the U.S. Immigration and Customs Enforcement, and/or the Chief Immigration Judge. The memoranda and guidelines would thus be applicable to government immigration enforcement officers, detention facility staff, government attorneys appearing in immigration courts, and immigration judges. Such memoranda and guidelines are not binding law upon these various actors, but are regularly used as methods of creating and

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113 As explained in a recent memorandum from Secretary of the Department of Homeland Security Janet Napolitano, memorandums can confer no substantive rights because "[O]nly the Congress, acting through its legislative authority, can confer these rights." Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot., et al., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, at 3 (Jun. 15, 2012), available at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. Nevertheless, "[I]t remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law." Id. It is in the capacity of setting policy within the framework of the existing law that the Secretary of Homeland Security and/or the Chief Immigration Judge, under the auspices of the Executive Office for Immigration Review, have the authority to issue such memoranda.


115 See, e.g., Id. at 6 ("[T]his memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and
enforcing new procedures to address issues for groups of detainees with special needs and situations, such as children and refugees. 116

This alternative is highly politically feasible. Memos and guidelines are created directly by the Secretary of Homeland Security or the Chief Immigration Judge and are circulated as operating procedures internal to the agency. 117 As a result, the number and variety of actors that are necessary to support the alternative are reduced to a minimum and advocates would only need to center their lobbying efforts on several key players within DHS in order to implement special procedures in the form of a memo or guideline.

This alternative only marginally enhances transparency. The use of internal memoranda or guidelines to promulgate procedures for allowing immigrants in removal proceedings greater access to counsel will not enhance transparency to a high degree because it does not lend itself to being well known and well understood. Unlike case law, regulations or statutes, internal immigration memos are not collected and systematically presented in reporters of any kind. 118 The problem posed by this failure to collect and present important policy memoranda and guidance is clear in the context of immigrants in removal proceedings: how are immigrants to access justice in removal proceedings if the rules applicable to them are based on internal, unpublished memoranda?

This alternative provides no accountability. Any procedures contained in a memorandum are unenforceable procedures 119 in the sense that failure to abide by a memorandum does not provide immigrants a remedial right. In light of its status as unenforceable agency guidance, the memorandum, at best, might be used as

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116 See, e.g., Memo from Janet Napolitano, supra note 113.
117 See, e.g., Memo from John Morton, supra note 114, at 1.
119 See Memorandum from John Morton, supra note 114, at 6.
persuasive authority on appeal as a tool for advocating that the judgment of the lower court was incorrect.

Because this form of special procedures only marginally advances the goals of due process, transparency, and provides no accountability, it is unlikely to provide the desired level of access to counsel for immigrants in removal proceedings. This alternative receives a total score of 6.\textsuperscript{120}

2. Impact Litigation

This alternative envisions attorneys obtaining greater access to counsel for immigrants in removal proceedings by carving out fundamental rights through impact litigation. Such litigation could draw from case law on the right to counsel in other civil contexts and on the recent Supreme Court decision in \textit{Padilla v. Kentucky}.\textsuperscript{121} Such strategies are well documented,\textsuperscript{122} and tend to coincide with substantive proposals for a federally funded right to counsel.

This alternative is only marginally politically feasible. Although this alternative limits the number and variety of actors necessary to achieve expanded access to counsel for immigrants in removal proceedings, it introduces new legal difficulties in interpreting due process provisions as they relate to foreign nationals.\textsuperscript{123} What makes this strategy for implementation problematic is that “the law is well settled in this area and the judiciary has given no indication in recent years that it is inclined to revisit the issue.”\textsuperscript{124} Although some have argued that the \textit{Padilla} Court took the first step toward shaking up this well-settled jurisprudential principle,\textsuperscript{125} the Court’s pronouncements to that effect only carry the weight of dicta.\textsuperscript{126} The Court’s failure to directly issue any holdings on the issue indicates, at minimum, a continuing reluctance to revisit the civil-criminal divide and the

\begin{footnotesize}
\begin{enumerate}
\item See Appendix B: Outcomes Matrix.
\item See generally KANSTROOM, supra note 45 (investigating the limits of the law applicable to foreign nationals, including time and territory).
\item Markowitz, 2009, supra note 59, at 547.
\item Kanstroom, \textit{The Right to Deportation Counsel}, supra note 28; Markowitz, 2011, supra note 28, at 1301.
\item Markowitz, 2011, supra note 28, at 1331.
\end{enumerate}
\end{footnotesize}
resulting effect on an immigrant’s right to counsel in removal proceedings. This reluctance is similarly reflected by the Court's recent decisions on appointed counsel in civil proceedings generally.\textsuperscript{127}

Using impact litigation as the form for expanding access to counsel in removal proceedings will significantly respect due process because a federal court would determine the balance between the national interest in safeguarding the immigration system and the immigrant’s personal interest in receiving fundamentally fair treatment in proceedings involving his or her liberty. However, judicially created law is always subject to judicially created revisions and the level of expanded access to counsel achieved via impact litigation is thus vulnerable to volatility.

Impact litigation will also significantly enhance transparency, as case law is regularly published and systematically made available. However, judicially created law is not always the most clear or best crafted form of law\textsuperscript{128} and a pronouncement about the boundaries of an immigrant’s right to counsel in removal proceedings given in this fashion may suffer from significant ambiguity. The potential for such ambiguity and the possibility that judicially created procedures will later be judicially overturned indicate that this alternative only marginally provides accountability and has low likelihood of success. This alternative receives a total score of 7.\textsuperscript{129}

\textsuperscript{127} See, e.g., Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (the 14th Amendment’s "Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)"). Notably, a district court recently granted a permanent injunction recognizing that detained immigrants with mental disabilities facing deportation and who are unable to adequately represent themselves in immigration proceedings are entitled to a qualified representative in their removal proceedings. Franco-Gonzalez v. Holder, CV-10-2211-DMG (C.D. Cal., Apr. 23, 2013), available at http://www.aclu-sc.org/franco-injunction/. Although an important milestone as the first decision to recognize a right to appointed counsel for any class of immigrants in removal proceedings, the limited scope of its application belies the point argued above namely, that the judiciary is unlikely to wade into the abyss of recognizing appointed counsel for all immigrants in removal proceedings in the near future.

\textsuperscript{128} Jerome A. Barron, \textit{The Ambiguity of Judicial Review: A Response to Professor Bickel}, 1970 DUKE L.J. 591 (1970) ("There is an abundance of alternative doctrine in American case law which makes generalized prediction hazardous.").

\textsuperscript{129} See Appendix B: Outcomes Matrix.
3. Regulatory Change

Under this alternative, DHS would implement regulations that reflect the proposed framework discussed above. DHS is competent to promulgate such implementing guidelines under its authority as the regulatory agency in charge of administration and enforcement of immigration law. 130 This alternative is moderately politically feasible because the promulgation of regulations is an agency decision, rather than a decision that must withstand the political process. However, the rule-making process requires a period of notice and comment, and it is possible that opposition to the new regulations could arise during that time. 131

This alternative both respects due process and enhances transparency to a high degree. Immigration regulations are promulgated at 8 C.F.R. et seq., and are presented there systematically. All parties to immigration proceedings are aware of the regulations: the DHS attorneys, the immigration judge, and the immigrant (whether via counsel, LOP or instruction from the immigration judge). To the extent that the promulgated regulations are ambiguous, the agency may issue further guidance. 132

Furthermore, this alternative meets the criterion of providing accountability to a high degree. Addressing the “representation crisis” through regulations creates a norm of enforceability, whereby the parties to an immigration proceeding will expect to be held accountable if the respondent is denied the access to counsel prescribed. Lastly, this alternative has a high likelihood of success. A regulation will likely provide the intended level of access to counsel for immigrants in removal proceedings because it will provide a clear, accessible, and understandable procedure for accessing counsel when

130 U.S. Dep't of Homeland Sec., DHS Rulemaking, http://www.dhs.gov/dhs-rulemaking (“In many cases, DHS carries out its mission through the promulgation of regulatory actions.”).

131 5 U.S.C. § 553(b)-(c).

132 Bryan C. Clark & Amanda C. Leiter, Regulatory Hide and Seek: What Agencies Can (and Can’t) Do to Limit Judicial Review, 52 B.C. L. Rev. 1687, 1692 (2011) (“Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations.”) (quoting Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000)).
faced with proceedings in immigration court. This alternative receives a total score of 14.133

4. Statutory Change

This alternative would require statutory change implementing expanded access to counsel in removal proceedings as proposed above as a matter of federal law. The level of political feasibility will be tied to the scope of the proposed statutory expansion of access to counsel. For example, a general right to appointed counsel for all immigrants in removal proceedings is likely a political nonstarter.134 A more limited proposal focusing, for example, on special and/or politically sympathetic subsets of immigrants in removal proceedings, may gain more traction.135

Despite this significant difficulty with expanding access to counsel through federal statutory change, this alternative otherwise meets the remaining criteria to a high degree. A statute might best offer respect for the due process concerns of immigrants in removal proceedings because it can be carefully crafted and considered. Furthermore, this alternative enhances transparency because a federal statute would make the access to counsel a major and accepted part of immigration law that will both be well known and well understood.

In addition, this alternative has a strong likelihood of successfully achieving the desired level of fair process for immigrants in removal proceedings because attorneys and judges would be forced to respect and enforce the new law. Finally, a statute will provide immigrants opportunity to seek redress if access to counsel is denied, making this alternative one that also advances accountability to a high degree. This alternative receives a total score of 12.136

133 See Appendix B: Outcomes Matrix.
134 Markowitz, 2011, supra note 28, at 1357 (noting that criminal aliens are a group that “garners almost unrivaled political disfavor”); Noferi, supra note 112, at 74 (suggesting that unless the immigrants at issue in the legislation are asylum seekers, mentally disabled or juveniles, the legislation is not politically viable).
135 The possibility that a more limited provision will gain more traction is being tested at the time of this writing by provisions in a comprehensive immigration reform proposal currently being considered by congress. See A Bill to Provide for Comprehensive Immigration Reform and for Other Purposes, S. 13500, 113th Cong., § 3502 at 567-68 (2013), available at http://www.schumer.senate.gov/forms/immigration.pdf.
136 See Appendix B: Outcomes Matrix.
CONCLUSION

The long, cyclical history of naturalization and immigration policy and the jurisprudence that mirrors it stands as a significant, but not insurmountable, barrier to implementing a policy that provides immigrants in removal proceedings expanded access to counsel. The largest hurdle to clear is devising a politically feasible system and implementing it through effective, yet fairly uncontroversial, means. As a result, a federally funded immigrant public defense bar is likely not a mandate that will be issued by either legislators or the judiciary any time soon. This article instead suggests that advocates consider a CASA-type program, implemented through regulatory change, not as the perfect, or even best, method to providing immigrants access to counsel in removal proceedings, but as a starting point for exploring creative policy solutions to a real and present need. In other words, the deeper value of the proposal presented here is its ability to engender discussion and critical thinking around creative solutions to assist detained immigrants facing high stakes and significant obstacles to proceeding pro se.

Furthermore, in light of what this exercise has revealed about providing meaningful access to counsel in removal proceedings, it is also clear that advocates and academics should consider creative solutions to providing the broader class of indigent persons access to counsel in civil proceedings. The government cannot fund everything, and the five decades since Gideon v. Wainwright137 have demonstrated a lack of political will to advance indigent access to counsel in civil proceedings. Perhaps then, in the interest of serving those in need of assistance, it is time that we put on our policy hats and explore creative solutions rather than stand firmly but statically upon claims of constitutional rights and an unattainable ideal standard.

APPENDIX A: OUTCOMES MATRIX - FRAMEWORK FOR EXPANDING ACCESS TO COUNSEL

| Alternatives for Expanded Access to Counsel in Removal Proceedings | Outcomes Matrix: Proposed Framework<sup>1</sup> |
|---|---|---|
| Criteria | Mandatory LOP | CASA-Type Program | Right to Appointed Counsel |
| Political Feasibility | 2 | 3 | 0 |
| Due Process | 0 | 2 | 2 |
| Transparency | 2 | 1 | 2 |
| Likelihood of Success | 0 | 2 | 2 |
| Judicial Economy | 1 | 2 | 2 |
| Total | 5 | 10 | 8 |

<sup>1</sup>I assign point values of 0 (low), 1, 2, or 3 (high) based on how effectively the alternative meets each criterion.
## Appendix B: Outcomes Matrix – Implementation Method

### Alternatives for Expanded Access to Counsel in Removal Proceedings

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Memo or Guidelines</th>
<th>Impact Litigation</th>
<th>Regulatory Change</th>
<th>Statutory Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political Feasibility</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Due Process</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Transparency</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Likelihood of Success</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Accountability</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>6</strong></td>
<td><strong>7</strong></td>
<td><strong>14</strong></td>
<td><strong>12</strong></td>
</tr>
</tbody>
</table>

1 Assign point values of 0 (low), 1, 2, or 3 (high based on how effectively the alternative meets each criterion.