

Right to Counsel in Removal Proceedings and Legal Models

I. Overview of Right to Counsel in Removal Proceedings

II. the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“the 1996 Immigration Act”) has increased the complexity of immigration cases.

i. the grounds for removal have expanded and relief from removal has been restricted.

ii. the use of detention has been greatly expanded.

iii. immigrants accept criminal plea agreements with no sense of the immigration consequences.

III. Removal proceedings, although characterized as “civil,” bear striking similarities to criminal trials.

i. difficulties faced by pro se litigants.

ii. the consequences of removal (particularly for those potentially eligible to stay) are extremely harsh.

IV. The September 11th terrorist attacks altered the way in which the U.S. uses its immigration laws and procedures.

i. greater use of detention.

ii. use of immigration process as proxy for criminal prosecutions.

iii. trend towards increased prosecution for immigration-related crimes.

V. Changes in administrative appeals process and federal judicial review

i. difficulty of challenging removal decisions increases need for legal representation.

VI. Legal counsel has pronounced impact in removal decisions

i. statistical analysis of approval rates.

ii. representation particularly crucial in detention cases.

VII. Right to Counsel

i. scope of statutory prohibition.

- ii. theoretical due process right to appointed counsel in removal proceedings.
- iii. statutory right to counsel in removal proceedings.
- iv. right to appointed counsel in analogous federal and state civil proceedings.

VIII. Options for Reform / Legal Service Models

- i. public defender-like system.
- ii. expanded legal orientation program.
- iii. expanded Immigration Representation Program.
- iv. BIA Pro Bono project.

IX. Ways to Increase Legal Representation in Removal Without Federal Funding.

- i. eliminate fee restrictions on charitable agencies.
- ii. expand mandate and funding for LSC-grantees.
- iii. apply EAJA to removal cases.
- iv. states could opt to fund representation in removal, as Texas has.
- v. increase private funding.