

Refugee Law & Migration Studies Brief

Volume 1 | Issue 3

Article 3

June 2024

Advancing the Due Process Right to Appointed Counsel In Immigration Removal Proceedings

Chloe Schalit

American University Washington College of Law, Cs3316a@american.edu

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/refugeemigrationstudiesbrief>



Part of the [Human Rights Law Commons](#), [Immigration Law Commons](#), [International Humanitarian Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Chloe Schalit, *Advancing the Due Process Right to Appointed Counsel In Immigration Removal Proceedings*, 1 Refugee L. & Migration Stud. Brief 22 (2024).

Available at: <https://digitalcommons.wcl.american.edu/refugeemigrationstudiesbrief/vol1/iss3/3>

This Student Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Refugee Law & Migration Studies Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

ADVANCING THE DUE PROCESS RIGHT TO APPOINTED COUNSEL IN IMMIGRATION REMOVAL PROCEEDINGS

By Chloe Schalit¹

ABSTRACT

Right now, noncitizens only have the right to an attorney if they can afford one. While courts have grappled with the inherent due process issue accompanying this standard, no court has held that noncitizens have the right to a government-appointed attorney. This paper promotes the provision of government-appointed attorneys to noncitizens in removal proceedings in immigration court under a due process lens. This paper will first briefly examine the difference between criminal and civil matters related to the Sixth Amendment right to an appointed attorney. Next, the paper will engage in a Fifth Amendment due process analysis, ultimately concluding that noncitizens' right to an appointed attorney during removal proceedings can qualify as a due process right under the Fifth Amendment. Finally, the paper will provide an overview of local programs that have been implemented to illustrate a blueprint for a national framework to expand noncitizens' right to representation.

INTRODUCTION

The inability of noncitizens in removal proceedings to access court-appointed attorneys violates the Due Process Clause of the Fifth Amendment. Nonetheless, the Immigration and Nationality Act ("INA") specifies that noncitizens in removal proceedings only have the right to an attorney "*at no expense to the government*."¹ In addition, with the exception of unaccompanied children in long-term Office of Refugee Resettlement detention centers, noncitizen children also do not have the right to a government-appointed attorney.² Therefore, attorney representation rates for noncitizens remain low.³ In 2016, sixty-five percent of noncitizens were represented by attorneys; in 2023, however, the representation rate dropped to thirty percent.⁴

Research shows that noncitizens who are represented by an attorney have better outcomes than those who proceed *pro se*, with represented noncitizens being more likely to obtain relief and avoid deportation.⁵

Deportation has continued to impact more noncitizens, particularly after the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") was passed, which broadened the scope of immigration enforcement by increasing the number of criminal offenses that could lead to removal proceedings.⁶ Between 1996 and 1997, the number of noncitizens removed nearly doubled from 69,680 individuals to 114,432 individuals, and has since continued to increase.⁷ Although the number of noncitizens removed has increased—likely due, in part, to the expansion of criminal deportability grounds—over ninety percent of noncitizens in immigration court are in removal proceedings due to immigration charges or entering without inspection, rather than criminal charges.⁸ Nonetheless, the number of noncitizens in removal proceedings—particularly for those whose options for relief are limited, based on aggravated felonies—has continued to grow; more particularly, for those without an attorney, many more noncitizens are now subject to deportation.

Advocates and attorneys, including the American Bar Association,⁹ endorse the expansion of the right to an appointed attorney for noncitizens in removal proceedings.¹⁰ However, under the Sixth Amendment, only defendants in criminal trials have the right to a government-appointed attorney; it does not apply to civil matters, like immigration.¹¹ Although a small group of individuals in civil proceedings have the right to court-appointed attorneys, this has not been broadened to the immigration context.¹² However, although courts have held that noncitizens' due process rights are violated when a noncitizen does not voluntarily and

¹ Chloe Schalit is a first-year J.D. student at American University Washington College of Law. She graduated from Georgetown University in 2020 with a major in International Politics and a minor in Justice and Peace Studies. She is a member of AU WCL's International Refugee Assistance Project student chapter, a Junior Staffer on the Journal of Gender, Social Policy and the Law, and will be an immigration intern with Ayuda this summer. Chloe is interested in pursuing a career in immigration law, particularly in advocating for individuals who may not otherwise have access to an attorney.

knowingly waive their right to counsel, courts have not yet broadly held that both noncitizen children and adults have the right to a government-appointed attorney.¹³ Nonetheless, the analysis below outlines the legal arguments that can support a Fifth Amendment due process right to an appointed attorney for noncitizens in removal proceedings.¹⁴

I. BACKGROUND: THE SIXTH AMENDMENT RIGHT TO COUNSEL FOR CRIMINAL DEFENDANTS

Although noncitizens currently do not have the right to a government-appointed attorney, it was not until 1963 that all criminal defendants had this right under the Sixth Amendment. Prior to 1963, courts interpreted the Sixth Amendment only to apply to federal criminal defendants; however, the Supreme Court has since expanded this right.¹⁵ In *Gideon v. Wainwright*, the Court held that the Sixth Amendment applied to federal and state *criminal* defendants.¹⁶ This set a new precedent based on the necessity of procedural and substantive safeguards for criminal defendants, and emphasized the importance of attorney representation in ensuring fair trials.¹⁷

However, based on precedent from the 1893 Supreme Court case *Fong Yue Ting v. United States*, the Court does not consider deportation a punishment, but instead a civil and administrative enforcement mechanism, thereby preventing noncitizens from asserting a right to counsel under the Sixth Amendment.¹⁸ Nevertheless, in 2010, the Supreme Court in *Padilla v. Kentucky* recognized the close relationship between criminal convictions and immigration proceedings, acknowledging that "criminal convictions and the penalty of deportation" have been enmeshed for nearly a century.¹⁹ While the Court reaffirmed that immigration proceedings are civil and not criminal, it highlighted the significant penalty that deportation imposed on noncitizens.²⁰ Consequently, advocates began pushing for a "Civil Gideon" to expand the right to appointed counsel to individuals in civil trials, including immigration.²¹ The following analysis uses the Due Process Clause of the Fifth Amendment to provide a framework for creating a "Civil Gideon" in the context of immigration removal proceedings.

II. ANALYSIS: THE FIFTH AMENDMENT DUE PROCESS CLAUSE

A. MATHEWS V. ELDRIDGE ANALYSIS

Given the high stakes of removal proceedings and the significant disparities in outcomes for represented and unrepresented noncitizens, it is paramount for noncitizens in removal proceedings to have the right to a government-appointed attorney under the Due Process Clause. Although no court has yet held that noncitizens have this right, courts have acknowledged that lacking attorney representation in civil proceedings such as immigration implicates a Fifth Amendment due process analysis.²²

Following the Court's decision in *Mathews v. Eldridge*, lower courts conducting a due process analysis engage in a case-by-case balancing test by balancing three factors: (1) the private interest that will be affected by the action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²³ These factors are applied below as they apply to immigration removal proceedings, establishing a feasible legal justification for holding that government-appointed attorney representation for noncitizens is a constitutional right under the Due Process Clause.

i. Private Interests

The private interests implicated in removal proceedings strongly favor the noncitizen. When analyzing the private interests factor, the *Eldridge* Court assessed the risk that the final decision or time period during an appeal without disability benefits could wrongfully deprive the applicant of his means to live.²⁴ However, here, although some individuals in removal proceedings may have access to financial support during an appeal or after a final deportation order, the economic and social costs of deportation not only harms noncitizens, but also their families and communities. These impacts were highlighted in

Landon v. Plasencia where the court emphasized the noncitizen's strong interests that are at stake, including losing the right to live and work in the United States, and being disconnected from her family.²⁵

Research further demonstrates the severe consequences of deportation on individual safety. A study from Human Rights Watch recently reported that at least 138 individuals deported between 2013 and 2019 from the United States to El Salvador were killed, most often by gangs and law enforcement.²⁶ The study further uncovered at least 70 instances of sexual violence, torture, or abductions, often times at the hands of gangs.²⁷ This illustrates that, particularly for noncitizens who have come to the United States based on danger they may face in their country of origin, the consequence of deportation is severe.

In addition to the danger that deportees may face, their families also face consequences.²⁸ Often times, parents who are deported have U.S. citizen children who suffer challenges—including economic difficulty due to losing a source of the family's income, and the traumatic psychological impacts of being separated from a parent.²⁹ Accordingly, the first *Eldridge* factor concerning the private interests at stake favors the noncitizen in terms of the potential dire individual, family, and community consequences of deportation.

ii. Risk of Erroneous Deprivation and Substitute Safeguards

Without an attorney, the risk of erroneous deprivation of rights is high, and the procedural safeguards in place currently are insufficient. Further, many noncitizens without an attorney may face deportation, which may not be the result if they are represented by an attorney. Although courts have held that a noncitizen may be erroneously deprived of their liberty interests if an immigration judge does not properly assess whether they need an interpreter, based on the potential for misinterpretation or an inaccurate factual finding,³⁰ courts have not yet found that lack of attorney representation erroneously deprives a noncitizen of their due process rights.³¹ However, the complexity of immigration law and evidence that noncitizens represented by attorneys receive better outcomes indicates that noncitizens in removal proceedings face a substantial risk of being

erroneously deprived of their rights when not represented by an attorney.

First, the risk of erroneous deprivations of rights is high for noncitizens without attorney representation. Noncitizens represented by an attorney experience better outcomes than those without representation. Detained noncitizens with an attorney are twice as likely as those not represented to be granted immigration relief.³² Noncitizens who are not detained and who have an attorney are almost five times as likely to be granted relief.³³ Overall, noncitizens represented by an attorney are also more likely to be released from detention, appear in court, win their removal cases, and request and receive relief from deportation.³⁴ Furthermore, the complexity of immigration law has been acknowledged in court cases and articles alike: "With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.' A lawyer is often the only person who could thread the labyrinth."³⁵ A noncitizen, particularly a child, may not know about all the potential forms of relief for which they are eligible, or understand how to emphasize important facts to prove their case without the guidance of an attorney.

Second, without attorney representation, the procedural safeguards currently in place are insufficient to protect noncitizens from erroneous deprivation of their rights. Immigration judges have a duty to facilitate the development of the record while remaining neutral arbiters, and DHS attorneys are supposed to seek justice rather than speedy removal.³⁶ However, removal proceedings often remain adversarial and *pro se* applicants face off against DHS attorneys with specific knowledge of immigration law and the resources of a federal agency.³⁷ Without an attorney, noncitizens in removal proceedings are deprived of justice and a fair proceeding, and are more likely to receive worse outcomes than if they had been represented, therefore strengthening the argument that the second *Eldridge* factor favors the noncitizen.

iii. The Government's Interest

The government has an interest in effective and efficient removal proceedings, which attorney representation supports. Thus, the third *Eldridge* factor likely favors noncitizens. However, courts

conducting an *Eldridge* due process analysis in immigration proceedings often find that the facts favor the government. Courts usually specify two primary government interests: (1) the government's interest in "efficient administration of the immigration laws,"³⁸ and (2) the financial burden that providing appointed counsel to noncitizens would impose on the government.³⁹

First, attorney representation for noncitizens in removal proceedings can align with the government interest of efficient and effective administration of immigration law. Attorney representation has been found to improve the "efficiency, accuracy, and consistency" of immigration court decisions because detained noncitizens represented by attorneys are more likely to provide documents, claim proper relief, and make stronger legal arguments for their cases.⁴⁰ Second, looking comprehensively at the impact that attorney representation has on efficiency (as noted above), expanding attorney representation could save the government money in the long run.

Moreover, noncitizens with attorneys "sought fewer unmeritorious claims, had a greater chance of being released from detention, and were more likely to appear at hearings following release," thus allowing for speedier proceedings.⁴¹ Attorney representation further reduces the number of days that detained noncitizens are in detention, because more noncitizens are likely to be released on bond, and noncitizens who are detained may be more likely to accept a deportation order if they hear from their attorney that they do not have a strong chance at relief.⁴² A study of the Legal Orientation Program ("LOP")—a program funded by the Executive Office for Immigration Review ("EOIR"), which provides legal workshops for detained noncitizens—found that the program saved approximately \$19.9 million a year due in immigrant detention costs, a number that would likely be higher with full attorney representation for individuals.⁴³ Therefore, appointing attorneys for noncitizens would promote government interests by improving the efficiency and effectiveness of immigration court proceedings.

B. THE ADDITIONAL PREJUDICE REQUIREMENT

Although some individual cases may yield the same result whether or not the noncitizen is represented by

an attorney, generally, many noncitizens are prejudiced by a lack of attorney representation because the outcome of their case may have changed if they had been represented by an attorney.⁴⁴ Even if all three *Eldridge* factors are construed in the noncitizen's favor, many courts require that a noncitizen claiming a due process violation also demonstrate that they have been prejudiced by the violation—in this case, not having an attorney.⁴⁵ Thus, noncitizens must prove that if they had been represented by an attorney, their case would not have resulted in deportation.⁴⁶ Both the Board of Immigration Appeals ("BIA") and U.S. courts often contend that the noncitizen would have been deported regardless, and therefore an attorney likely would not have changed the outcome of the case.⁴⁷ However, while this assertion may be true for some individuals, it is very unlikely to be the case for all noncitizens, particularly given the complexity of immigration law and the variety of potential outcomes possible.⁴⁸ Furthermore, there is value to attorney representation beyond the result of the case. As outlined above, attorney representation increases the efficiency of proceedings, thus improving the entire process. Accordingly, both the process and outcome of immigration proceedings are likely to be impacted by attorney representation for many noncitizens in removal proceedings.

C. SEPARATION OF POWERS RATIONALE

When declining to find that noncitizens' lack of government-appointed attorneys during removal proceedings is a due process violation, courts often use a separation of powers rationale and defer to Congress' wording in the INA; however, not having an attorney during a removal proceeding is a due process violation squarely under the jurisdiction of the courts.⁴⁹ The Supreme Court has continued to emphasize that the role of courts, particularly pertaining to immigration, "does not extend to imposing procedures that merely displace congressional choices of policy."⁵⁰ Courts claim that if they granted noncitizens a due process right to appointed counsel, the courts would be usurping Congress by going beyond its role to merely "say what the law is."⁵¹ However, because the lack of attorney representation for noncitizen appears to be a due process violation, it should be the courts' role to implement this constitutional requirement.

III. RECOMMENDATIONS: UNIVERSAL REPRESENTATION PROGRAMS

The intractability of this issue appears, in part, based on the assumption that providing government-appointed attorneys to noncitizens in removal proceedings is administratively impossible, with both legislative⁵² and judicial actions yet to take hold on the federal level. However, the next section demonstrates that successful programs already implemented provide a framework for an expanded system of attorney representation at the federal level.

A. LEGAL ORIENTATION PROGRAMS

As of 2018, LOPs are administered by the EOIR within the Department of Justice ("DOJ") were available in thirty-eight detention centers across twelve states.⁵³ LOPs provide group orientations to detained noncitizens with the following legal information: a general overview of immigration court processes, limited individual intakes allowing noncitizens to ask specific questions about their cases, self-help workshops allowing noncitizens to interact with other individuals seeking similar forms of relief, guidance on specific legal topics, and referrals to pro bono attorneys.⁵⁴ Studies have shown that LOPs increase the efficiency of immigration court proceedings, better prepare noncitizens for their hearings, and generally lead to more favorable outcomes.⁵⁵ LOPs balance limiting financial expenditures with supporting noncitizens, although they are not necessarily a substitute for an attorney who can provide specific and comprehensive legal advice for each individual client.⁵⁶

B. ACCREDITED REPRESENTATIVES

Organized by the EOIR, an accredited representative ("AR") is a non-attorney who works for a recognized non-profit and is considered qualified to represent noncitizens in immigration court.⁵⁷ ARs' role in immigration court proceedings closely mirrors that of an attorney. ARs can form a direct relationship with the client, speak on their behalf in immigration proceedings, and file documents with the court.⁵⁸ The AR program also allows individuals who may not be able to access law school become immigration advocates.⁵⁹ However, although ARs are experienced professionals in the immigration field, they still may lack the nuanced understanding of immigration law

that an experienced attorney would have. Nonetheless, ARs likely require fewer financial expenditures than universal attorney representation and may provide stronger support for noncitizens than LOPs because the representation is individualized and comprehensive.

C. AMERICORPS REPRESENTATION PROGRAM

The justice AmeriCorps (jAC) Legal Services for Unaccompanied Children Program ran from January 2015 until August 2017, and provided government funding to support staff to represent unaccompanied children in immigration court through an AmeriCorps program.⁶⁰ Although some participants felt challenged by the strict eligibility requirements for clients, and the relatively short one-year term of service, the program substantially increased attorney representation for unaccompanied children and improved outcomes for represented individuals, thus providing an example of a more short-term program that could bridge the gap between the present scheme and a constitutional right to attorney representation.⁶¹

D. UNIVERSAL REPRESENTATION

Universal representation programs have been implemented on a smaller scale and demonstrate the impact that a potential national program could have. The New York Immigrant Family Unity Project ("NYIFUP") provides representation for noncitizens who are detained and are facing deportation by directing government funding to established organizations so they can expand their support network.⁶² The American Friends Service Committee ("AFSC") Friends Representation Initiative of New Jersey ("FRINJ") is a similar program that provides representation twice a week to all detained individuals under a certain income threshold who appear before a specific immigration court.⁶³ The Midwest Immigrant Defenders Alliance ("MIDA") provides representation to individuals in immigration detention and in court proceedings at the Chicago Immigration Court.⁶⁴ This program was initiated in 2022 as an expansion of the universal representation model to additional states, demonstrating the strength and success of these local programs thus far.⁶⁵ These programs have successfully provided universal representation to noncitizens in removal proceedings within the

programs' area of work.⁶⁶

IV. CONCLUSION

Due process requires that noncitizens in removal proceedings be provided the right to a government-appointed attorney. The percentage of noncitizens without representation leaves noncitizens in a perpetual state of being denied fair and adequate hearings. Not only would expanding representation align with due process based on above analysis of the Eldridge factors, but it would also be administratively and financially efficient. Smaller scale programs outlined above demonstrate that it is possible to expand the reach of representation for noncitizens, and that the country could do so on a national scale. Although courts tend to defer to the executive and legislative powers on immigration matters, this should not stop courts from intervening when there are clear due process violations.

ENDNOTES

- ¹ Immigration and Nationality Act § 292, 8 U.S.C. § 1362 (2024) (emphasis added).
- ² Laura Barrera, *A Better Way: Uncoupling the Right to Counsel with the Threat of Deportation for Unaccompanied Children and Beyond*, 36 J. CIV. RTS. AND ECON. DEV. 267 (2022).
- ³ *Too Few Immigration Attorneys: Average Representation Rates Fall from 65% to 30%*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Jan. 24, 2024), <https://trac.syr.edu/reports/736>.
- ⁴ *Id.*; See also Alyssa Snider & Rebecca DiBennardo, *Representation Matters: No Child Should Appear in Immigration Proceedings Alone*, VERA INST. OF JUST. (Dec. 2021), <https://www.vera.org/downloads/publications/representation-matters.pdf> (finding that only sixty-four percent of unaccompanied children had attorney representation at some point during their proceedings).
- ⁵ Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL 1, 3 (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf; see also Snider & DiBennardo, *supra* note 4 (finding that unaccompanied children with legal representation at some point during their cases were seven times more likely to have an outcome that allowed them to remain in the United States).
- ⁶ See Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6(3) J. ON MIGRATION AND HUM. SEC. 192, 194 (2018) (showing that the IIRIRA expanded the definition of “aggravated felony,” a term that also includes misdemeanor offenses in the immigration law context, narrowed the immigration judge’s discretion for granting parole, and increasing the use of immigration detention).
- ⁷ Off. of Homeland Sec. Stats., *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2019*, DEP’T. HOMELAND SEC., <https://www.dhs.gov/ohss/topics/immigration/yearbook/2019/table39> (last visited Mar. 29, 2024).
- ⁸ *New Proceedings Filed in Immigration Court*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Feb. 2024), <https://trac.syr.edu/phptools/immigration/ntanew/>.
- ⁹ *Achieving America’s Immigration Promise: ABA Recommendations to Advance Justice, Fairness and Efficiency*, AM. BAR ASS’N 1, 9 (2021), https://www.americanbar.org/content/dam/aba/administrative/immigration/achieving_americas_immigration_promise.pdf.
- ¹⁰ *Advancing Universal Representation Initiative*, VERA INST. OF JUST., <https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative> (last visited Apr. 6, 2024).
- ¹¹ See *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (holding that criminal defendants have the right to a court-appointed attorney).
- ¹² See *In re. Gault*, 387 U.S. 1, 17 (1967) (holding that children in civil juvenile delinquency hearings, which are civil, that may result in commitment have a right to an appointed attorney).
- ¹³ See *Biwot v. Gonzales*, 403 F.3d 1094, 1100; *Arrey v. Barr*, 916 F.3d 1149, 1157 (both holding that to proceed without counsel, a noncitizen must knowingly and intelligently waive their right to counsel); See also *United States v. Silvestre-Gregorio*, 983 F.3d 848, 857 (6th Cir. 2020) (holding that noncitizen juveniles do not have a due process right to court-appointed counsel); *Matter of Santos*, 19 I. & N. Dec. 105 (1984) (holding that noncitizens do not have a due process right to court-appointed counsel). But see *C.J.L.G. v. Barr*, 923 F.3d 622, 639 (9th Cir. 2019) (Pacz, J., *Concurring*) (supporting a due process right to court-appointed attorney to indigent noncitizen children).
- ¹⁴ See *Briefing Paper: Access to Counsel and Due Process for Detained Immigrants*, NATIONAL IMMIGRANT JUST. CTR. 1, 2-3 (Apr. 2007), <https://immigrantjustice.org/sites/default/files/Briefing%20Right%20to%20Counsel.pdf>.
- ¹⁵ See *Gideon*, 372 U.S. at 339 (holding that both state and federal criminal defendants have a sixth amendment right to government-appointed counsel).
- ¹⁶ *Id.*
- ¹⁷ See *id.* at 344.
- ¹⁸ See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893); U.S. CONST. amend. VI.
- ¹⁹ *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).
- ²⁰ See *id.* at 365.
- ²¹ *Civil Right to Counsel*, AM. BAR ASS’N, https://www.americanbar.org/groups/legal_aid_indigent_defense/civil_right_to_counsel1/ (last visited Feb. 18, 2024).
- ²² Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J.C.R. & C.L. 113, 115 (2008); See also *United States v. Silvestre-Gregorio*, 983 F.3d 848, 852 (6th Cir. 2020).
- ²³ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
- ²⁴ See *id.* at 341 (holding against the applicant and finding that disability benefits were not necessarily based on financial need, and the applicant may have access to alternate sources of income).
- ²⁵ *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)) (internal citations omitted).
- ²⁶ *Deported to Danger: U.S. Deportation Policies Expose Salvadorans to Death and Abuse*, HUM. RTS. WATCH 1, 27 (Feb. 5, 2020), https://www.hrw.org/sites/default/files/report_pdf/elsalvador0220_web_0.pdf.
- ²⁷ *Id.* at 1.

²⁸ *Deportation of a Parent Can Have Significant and Long-Lasting Harmful Effects on Child Well-Being*, MIGRATION POL'Y INST. (Sept. 21, 2015),

<https://www.migrationpolicy.org/news/deportation-parent-can-have-significant-and-long-lasting-harmful-effects-child-well-being-pair>.

²⁹ *Id.*

³⁰ See *B.C. v. Att'y Gen.*, 12 F.4th 306, 315 (3d Cir. 2021) (finding that the second factor favors the noncitizen).

³¹ See *U.S. v. Silvestre-Gregorio*, 983 F.3d 848, 853 (6th Cir. 2020) (citing *Al-Saka v. Sessions*, 904 F.3d 427, 434 (6th Cir. 2018)).

³² See Eagly & Shafer, *supra* note 5 at 3 (finding that for detained noncitizens, forty-nine percent of those with representation obtained immigration relief when requested, relative to twenty-three percent when not represented by an attorney).

³³ See *id.* (finding that for non-detained noncitizens, sixty-three percent of those with representation obtained immigration relief when requested, relative to thirteen percent when not represented by an attorney).

³⁴ *Id.* at 16-22.

³⁵ See *Castro-O'Ryan v. U.S. Dep't of Immigr. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 107 (1985) (internal quotations and citations omitted)).

³⁶ See *In re. S---M---J*, 21 I. & N. Dec. 722, 727 (BIA 1997) (“the government wins when justice is done”); *Quintero v. Garland*, 998 F.3d 612, 639 (4th Cir. 2021) (finding that the judge failed to fully develop the record).

³⁷ See *Access to Counsel*, NAT'L IMMIGR. JUST. CTR., <https://immigrantjustice.org/issues/access-counsel> (last visited Feb. 23, 2024).

³⁸ *Plasencia*, 459 U.S. at 34.

³⁹ *Silvestre-Gregorio*, 983 F.3d at 855.

⁴⁰ Muzaffar Chishti et al., *At the Breaking Point: Rethinking the U.S. Immigration Court System*, MIGRATION POL'Y INST. 1, 29 (July 2023), https://www.migrationpolicy.org/sites/default/files/publications/mpi-courts-report-2023_final.pdf.

⁴¹ *Id.*

⁴² See *Blazing a Trail: The Fight for Right to Counsel in Detention and Beyond*, NAT'L IMMIGR. L. CTR. 1, 9-10 (Mar. 2016), <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf> (web edition).

⁴³ *Id.* at 10.

⁴⁴ *Id.*

⁴⁵ See *Matter of Santos*, 19 I. & N. Dec. 105, 107 (BIA 1984); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975) (“the test for whether due process requires the appointment of counsel for indigent [noncitizens] is whether, in a given case, the assistance of counsel would be necessary to provide ‘fundamental fairness’ -- the touchstone of due process.”) (internal citations omitted).

⁴⁶ See *Matter of Santos*, 19 I. & N. Dec. 105 at 112. (holding against the noncitizen because none of the alleged procedural defects affected the outcome of the case).

⁴⁷ See *id.*

⁴⁸ See Kaufman, *supra* note 22, at 147 (“It is not a stretch to say that counsel could have a significant impact on the case of virtually every detained [noncitizen]”).

⁴⁹ See *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (finding that decisions related to immigration “are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary”).

⁵⁰ *Plasencia*, 459 U.S. at 35.

⁵¹ *Id.*; See *Silvestre-Gregorio*, 983 F.3d at 856 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

⁵² *The Fairness to Freedom Act of 2023 Summary*, VERA INST. OF JUST. 1, 2, https://www.vera.org/downloads/UREP_Fairness-to-Freedom-Act_Summary_2023.pdf (last visited Feb. 23, 2024) (describing the Fairness to Freedom Act introduced by the House of Representatives and Senate in the Spring of 2023 that would establish a right to attorney representation at the government’s expense for noncitizens in immigration removal proceedings who cannot afford an attorney, which would bypass courts and create a right to appointed attorneys for noncitizens in removal hearings).

⁵³ *Legal Orientation Program Overview*, AM. IMMIGR. COUNCIL 1, 3 (Sept. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/legal_orientation_program_overview.pdf.

⁵⁴ *Id.* at 2.

⁵⁵ *Id.*

⁵⁶ See *id.* at 3.

⁵⁷ *Recognition and Accreditation (R&A) Program*, EXEC. OFF. FOR IMMIGR. REV. (Feb. 14, 2024), <https://www.justice.gov/eoir/recognition-and-accreditation-program>.

⁵⁸ Michele R. Pistone, *The Crisis of Unrepresented Immigrants*, 92 FORDHAM L. REV. 893, 912 (2023).

⁵⁹ *Why Representation Matters: Stories About the Impact of the Recognition and Accreditation Program*, CATH. LEGAL IMMIGR. NETWORK, <https://www.cliniclegal.org/sites/default/files/2019-11/2019-1107-recognition-accreditation-stories.pdf> (last visited Apr. 14, 2024) (describing the experience of an individual who did not have the means to go to law school, but who became an accredited representative who has helped thousands of noncitizens).

⁶⁰ *Summary of the justice AmeriCorps Legal Services for Unaccompanied Children Program*, AM. BAR ASS'N COMM'N ON IMMIGR., https://www.americanbar.org/content/dam/aba/administrative/immigration/memo_justice_ameriCorp.pdf (last visited Apr. 13, 2024) (finding that the jAC program initiated representation of over 3,119 children, and children represented by a jAC attorney were seventy-one percent more likely to have a successful outcome through administrative closure, termination, or relief).

⁶¹ See William Castillo Guardado et al. *Outcome Evaluation of the justice AmeriCorps Legal Services Program for Unaccompanied Children*, VERA INST. OF JUST. i, iii - v (Oct. 2016), https://www.americanbar.org/content/dam/aba/administrative/immigration/justice_ameriCorps_outcome_evaluation.pdf.

⁶² *The New York Immigrant Family Unity Project*, VERA INST. OF JUST., <https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/new-york-immigrant-family-unity-project> (last visited Apr. 13, 2024).

⁶³ *Blazing a Trail: The Fight for Right to Counsel in Detention and Beyond*, *supra* note 42, at 18.

⁶⁴ *Information on the Midwest Immigrant Defenders Alliance (MIDA)*, NAT'L IMMIGR. JUST. CTR. (May 2022), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2022-05/MIDA-Flier-for-Advocates-May_2022.pdf.

⁶⁵ Press Release, NAT'L IMMIGR. L. CTR., *New Legal Aid All. Aims to Build a Model for Universal Representation for Detained Immigrants Facing Deportation in the Chicago Immigr. Ct.* (May 6, 2022).

⁶⁶ *Blazing a Trail: The Fight for Right to Counsel in Detention and Beyond*, *supra* note 41, at 15, 19 ((finding that the NYIFUP represented 1,554 clients between 2013 and 2015, and NYIFUP attorneys won seventy percent of their cases, and the AFSC FRINJ program increased representation from thirty-five percent to ninety-five to one hundred percent of detained noncitizens in the Elizabeth Immigration Court on the days covered).