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Improving Immigration Adjudications Through Competent Counsel

ANDREW I. SCHOENHOLTZ* & HAMUTAL BERNSTEIN**

The immigration adjudication system in the United States is in serious need of reform. While much attention has focused on one of the principal adjudicators, the Immigration Judges, recent research conducted by Philip Schrag, Jaya Ramji-Nogales, and Andrew Schoenholtz has shown that policymakers and adjudicators should be examining all levels of decision making. This includes not only decisions at the Immigration Court level but also at the Asylum Office, the Board of Immigration Appeals and the Circuit Courts. In *Refugee Roulette: Disparities in Asylum Adjudication*,¹ the authors found a troubling degree of inconsistency at all levels that track individual merits decisions.

Where biographical data on individual judges at the Immigration Court level were available, the authors were able to learn about factors that make a difference in just how favorable decisions are to asylum seekers. What types of non-merit factors matter in terms of outcomes? Judges granted favorable decisions at higher rates to those asylum seekers who were accompanied by other family members. Judges' previous work experience mattered. Those who had worked in academia, in private practice, or with advocacy organizations granted asylum at higher rates than those who worked in government or the military. The longer judges had served as lawyers for the Immigration and Naturalization Service or the Department of Homeland Security, the lower their grant rate. Perhaps most interestingly, gender mattered. Female judges granted asylum at higher rates than male judges.

But the single most important non-merit factor that mattered was representation. Asylum seekers represented by counsel were three times more likely to succeed in their claim than pro se applicants. This supports previous research conducted by academics, government researchers, and non-governmental analysts.² Moreover, this result does not even take into account the competency of the representation.

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1. Jaya Ramji-Nogales, Andrew Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

2. See *infra* text accompanying notes 12 and 13.

Unlike in the criminal justice system, the United States government does not provide public defenders for indigent clients placed in immigration removal proceedings. Non-citizens are entitled to counsel only at their own expense or on a pro bono basis. This is a serious problem not only for the plight of individuals, but for the system as a whole. Many times individuals slated for removal hearings have difficulty procuring representation because they do not know how to go about finding counsel, do not have the resources to pay a private-sector lawyer, and/or are detained and thus even more limited in their information about and access to counsel.³ Of the 323,845 immigration matters before Immigration Courts in 2006, only 113,140 respondents—or 35 percent—were represented.⁴

Experts have believed for years that these cases pose major obstacles to the smooth and efficient operation of the immigration court system. The Justice Department's Immigration Judges are strained to capacity with huge case loads. Dealing with unrepresented cases may increase the length of time needed to resolve a case. The judges tend to grant unrepresented applicants additional time to find counsel, and such continuances delay the entire system. In pro se cases, Immigration Judges must also spend considerable time explaining procedures to the applicant and sorting through incomplete briefs and evidence. There is also some indication that lack of representation leads to higher rates of respondents not showing up at their hearings.⁵ The "in absentia" problem is serious and growing. In FY 2006, the overall failure to appear rate was 39 percent (109,713 decisions out of a total 280,494 Immigration Judge decisions and administrative closures). This represents a significant increase from the five-year low absence rate of 22 percent in FY 2003.⁶

Unrepresented cases are equally disadvantaged at the Justice Department's Board of Immigration Appeals ("BIA") and United States Circuit Court of Appeals levels. The briefs are generally not well-researched, do not provide sound arguments, and do not give a linear presentation of the facts and evidence of the case. Judges thus must use valuable time and resources figuring out the facts and the law of the case. In FY 2006, about one-third of cases at the BIA were unrepresented (10,465 out of a total of 36,350 Immigration Judge appeal decisions). The representation rate was the same in the four previous years as

3. See Andrew I. Schoenholtz and Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 746 n.53 (2002), (citing Felinda Mottino, *Moving Forward: The Role of Legal Counsel in Immigration Court*, at 24, 35 (July 2000) (unpublished manuscript, on file with the Vera Institute of Justice)).

4. U.S. Department of Justice, Executive Office for Immigration Review, FY 2006 Statistical Year Book G1 (Feb. 2006).

5. See Schoenholtz & Jacobs, *supra* note 3, at 746 n.53 (citing Felinda Mottino, *Moving Forward: The Role of Legal Counsel in Immigration Court*, at 13-14 (July 2000) (unpublished manuscript, on file with the Vera Institute of Justice)); Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT (Migration Policy Institute, Washington, DC), Apr. 2005 at 5-7.

6. U.S. Department of Justice, Executive Office for Immigration Review, FY 2005 Statistical Year Book H2 (Feb. 2005).

well.⁷

What would the immigration review system be like if competent counsel represented respondents from the moment they were placed in removal proceedings? That is the major question that a new pilot project will test over the next two years. Under the leadership of two ABA entities, the Standing Committee on Federal Judicial Improvements, chaired by the Honorable M. Margaret McKeown of the Ninth Circuit Court of Appeals, and the Commission on Immigration, chaired by Mark D. Agrast, the ABA is launching an innovative pilot project called the Immigration Justice Project of San Diego. The project will provide pro bono counsel in immigration matters before the Immigration Court in San Diego, and will be studied to assess the effects of representation on the immigration system. Other ABA entity partners are the Section of Litigation, Standing Committee on Pro Bono and Public Service, and the Judicial Division. The project is a cooperative effort with the key players at all levels of the system—the administrative and federal court entities, the Department of Justice, the American Immigration Lawyers Association, and multiple bar associations. An independent Advisory Board will help administer the project. Through an Enterprise Fund grant, the ABA is funding the two-year program, which aims at improving the efficiency, fairness and effectiveness of the immigration court system, which is currently facing a massive increase of cases and appeals. In the last five years, the number of Immigration Court cases has surged, with a concomitant explosion of appeals to the BIA and Circuit Court levels.⁸ Immigration Courts have seen a rise in the number of receipts from 290,400 in 2002 to 348,216 in 2006.⁹ Appeals to circuit courts have increased from 4,407

7. U.S. Department of Justice, Executive Office for Immigration Review, FY 2005 Statistical Year Book W1 (Feb. 2005). The BIA has its own pro bono program for administrative appeals, but as the Executive Office for Immigration Review explains, the number of cases represented through this program is limited:

“In January of 2001, the Pro Bono Program, in conjunction with the BIA Clerk’s Office, implemented the Board of Immigration Appeals (BIA) Pro Bono Project (the “Project”) to increase pro bono representation for individuals detained by the U.S. Immigration and Customs Enforcement (ICE) with immigration cases under appeal. The Project was developed between EOIR and several non-governmental organizations, including the Catholic Legal Immigration Network, Inc., the Capital Area Immigrants’ Rights Coalition, the National Immigration Project of the National Lawyers Guild, and the American Immigration Law Foundation. Since its start, the Project has succeeded in securing pro bono counsel for close to 400 detainees around the country—individuals who would not have otherwise been represented by counsel.”

U.S. Department of Justice, Executive Office for Immigration Review, EOIR Legal Orientation and Pro Bono Program, BIA Pro Bono Project, <http://www.usdoj.gov/eoir/probono/MajorInitiatives.htm#BIAProBono> (last visited Nov. 30, 2007).

8. See John R. B. Palmer, Stephen W. Yale-Loehr and Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 56 n.248 (2005); Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 9-10 (2006).

9. U.S. Dep’t of Justice, Executive Office for Immigration Review, FY 2006 Statistical Year Book B2 (Feb. 2006).

petitions from October 1999 to March 2002, compared to 47,329 petitions from April 2002 to September 2006.¹⁰ These immigration appeals constitute 40 percent of all the appeals in the Second and Ninth Circuits, creating a serious drain on an overburdened court system.¹¹

Evidence shows that unrepresented cases are less likely to be successful. Asylum applications in particular have been researched in some detail in this regard. Research has shown that asylum seekers who are represented are considerably more likely than unrepresented seekers to succeed in obtaining relief.¹² A study by the United States Commission on International Religious Freedom showed that in expedited removal cases, unrepresented asylum seekers succeeded in only two percent of cases, while represented asylum seekers obtained relief twenty-five percent of the time.¹³ Of asylum cases, only one in three applicants are represented at the affirmative application stage before the Department of Homeland Security's Asylum Office, although about two out of three asylum seekers are represented at the Immigration Court merits hearing. These rates vary considerably across national-origin groups and locations within the United States.¹⁴ What we do not know is how many more respondents would have applied for asylum or other forms of relief if given representation at an early stage. We also do not know how many of those who filed asylum applications might have sought other avenues of relief or accepted voluntary departure had they been cautioned about weaknesses in their asylum claims. Those scenarios are what the ABA Immigration Justice Project will, in part, investigate.

The problem is not only *lack* of representation but also poor *quality* of representation. Low-quality representation is too often the case at the Immigration Court level. 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

10. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 2006, at 115 tbl.B-3 (2006), available at <http://www.uscourts.gov/judbus2006/appendices/b3.pdf>.

11. Alexander III, *supra* note 8, at 2 (citing ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 2005, at 114 tbl.B-3 (2005)), available at <http://www.uscourts.gov/judbus2005/contents.html> (last visited Nov. 30, 2007); see also Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1.

12. On the importance of representation in winning asylum: see Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT (Migration Policy Institute, Washington, DC), Apr. 2005 at 5-6; Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 239, 232-280 (2005); Schoenholtz and Jacobs, *supra* note 3, at 739-40.

13. See Kuck, *supra* note 12, at 239. This study found representation made asylum-seekers 12.5 more likely to be successful, while the *Refugee Roulette* analysis, *supra* note 1, at 340, found a three-fold impact. The difference in the importance of representation may be due to the smaller subset of asylum seekers studied by Kuck. The USCIRF data only included cases of expedited removal, where applicants are subject to mandatory detention during their credible fear interviews and are often detained throughout their Immigration Court proceedings.

14. See Schoenholtz and Jacobs, *supra* note 3, at 742.

individuals, or (4) may even be fraudulent.

The crucial role of competent representation is one of the motivating factors behind the ABA Immigration Justice Project, which seeks not only to provide representation but also to train and prepare counsel in order to provide competent services. The Project will help us understand not only the degree to which competent counsel make a difference in obtaining relief but also the extent to which such representation eliminates non-meritorious claims at an early stage and affects the efficiency of adjudicative proceedings. One hypothesis to be tested, for example, is that higher-quality representation will lead to better decision making by the Immigration Judge, and thus fewer appeals to the BIA. This hypothesis will be tested as well at the BIA level in terms of appeals to the Circuit Court of Appeals.

To test the true impact of representation on the immigration adjudication system, the ABA Immigration Justice Project ideally will intervene as early as possible in the process, following an initial master calendar hearing. In this way, the Project will be able to screen potential clients to see if they are eligible for relief and representation and to ensure that they will be able to respond appropriately to the immigration charges asserted against them at their next 'reset' master calendar hearing. Although some applicants will not have relief, representation early on in the process may result in more individuals with meritorious cases seeking relief. We suspect that many eligible applicants do not appear for their hearings or do not file the appropriate documents because they are not aware of how the legal procedure works and do not understand the substantive law. Having competent pro bono counsel will steer applicants onto the correct legal path early on, bringing relief-appropriate cases through the adjudicatory system in an efficient manner while encouraging those for whom substantive relief is not available to opt for voluntary departure and or otherwise exit the system early on. Additionally, the Project may also help ease the burden on the immigration system by deterring applications for relief from those without meritorious claims.

The ABA Immigration Justice Project is the first program that seeks to provide representation throughout the entire system, from Immigration Court to the BIA to the federal courts. A team of social scientists and lawyers at Georgetown University's Institute for the Study of International Migration is currently designing a study to assess the ABA Immigration Justice Project. The outcomes examined will extend throughout the entire court system.

In particular, key research questions include:

- Has the Project been able to recruit sufficient numbers of competent pro bono representatives? If not, what were the barriers?
- Has the Project improved the level and quality of representation at the Immigration Court, BIA, and Circuit Court levels?
- Is decision making facilitated by pro bono representation? For example, has

the Project allowed adjudicators to focus more effectively and efficiently on substantive issues?

- What effects did the Project have on in absentia rates, relief application rates, ineffective assistance of counsel incidents, etc.?
- What are the effects of representation on the administration of justice? Has the overall effectiveness of the system been improved?
- Are there other sources of inefficiency that should be considered in the attempt to improve the immigration adjudication system? Is quality of representation indeed a key component?
- What are the costs and unanticipated negative consequences of the Project?

Based on the evaluation of the ABA Immigration Justice Project, the study team hopes to formulate policy recommendations. For example, would the immigration review system benefit as a whole from mandated representation? Short of mandated representation, what are the best ways to expand pro bono services in immigration adjudications?

The ABA Immigration Justice Project, then, will hopefully provide us the information that policy makers need to know about the role of representation in the immigration adjudication system. They already recognize that representation matters in terms of outcomes for non-citizens. If they are going to fund representation even for a subset of non-citizens in removal proceedings, such as children, Congress also wants to understand whether representation will make the immigration review system more efficient and effective. Increased efficiency and effectiveness was the test that Senator Moynihan proposed legislatively almost a decade ago and has now come to fruition in the ABA Immigration Justice Project. In two years, we hope to have some very important answers. It is even more critical today that we learn from the Project, given the current state of affairs in immigration adjudications at all levels of the system.