10-17-2008

"Death is Different" and a Refugee's Right to Counsel

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Date of draft: October 17, 2008

"Death is Different" and a Refugee's Right to Counsel

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Abstract: This article asserts that there is a due process right to appointed counsel at government expense for non-citizens who file cases where persecution and death of the petitioner may result after removal – namely claims for asylum, relief under the Convention Against Torture, and restriction on removal. Due process protects all persons' interests in life, liberty and property, regardless of their legal status within the country. Where death may result from an erroneous denial of relief, a non-citizen's interest in life and liberty is directly implicated.

As has been aptly stated in the criminal context, "death is different." Where death is on the table, there is a heightened need for reliability and accuracy. The article analogizes from death penalty cases to argue that due process requires a right to appointed counsel in cases concerning indigent non-citizens applying for asylum, relief under the Convention Against Torture, or restriction on removal. The failure of 8 U.S.C. section 1362 to provide such a right makes it unconstitutional.

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Mr. S was only eighteen years old when he arrived poor and alone in the United States. The brutal rape and beatings that he endured at the hands of the government and the guerillas in Guatemala caused him to suffer a depression so severe that at times he could barely care for himself. Nevertheless, after arriving in the United States, unfamiliar with the culture and language, he attempted to apply for asylum to avoid the persecution or death he would likely face in Guatemala.

Mr. S. never received the asylum he applied for. This denial was not because he was not eligible and not because he would not face further persecution or even death if returned to Guatemala. Instead, the denial occurred because he did not know that he had to appear for a hearing and did not have the legal know-how to properly prepare his application. Indeed, it is likely that Mr. S would never have faced removal back to Guatemala if the government had provided Mr. S with an attorney.

The Supreme Court has never addressed the constitutionality of 8 U.S.C. § 1362.[1] This statute permits representation in immigration proceedings only when the representation is "at no expense to the government." Although immigration judges must inform petitioners of their right to an attorney and provide a list of pro bono legal services, immigration judges sometimes fail to inform petitioners of their rights and, more frequently, the lists of pro bono services are outdated or incorrect. Moreover, even if a refugee can locate an attorney, often they cannot afford one. The result to indigent petitioners is that they must navigate "the morass of immigration law"[2]

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[1] The closest the Court has come to addressing the constitutionality of § 1362 was in Landon v. Plascencia, 459 U.S. 21 (1982) (holding resident non-citizens entitled to due process upon their return to the United States). *See* discussion *infra* Part II.

[2] Al Khouri v. Ashcroft, 362 F.3d 461, 464 (8th Cir. 2004); *see also* Kwon v. I.N.S., 646 F.2d 909, 919 (5th Cir. 1981) ("Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that they yield up meaning only grudgingly and that morsels of comprehension must be pried from mollusks of jargon."); Lok v. I.N.S., 548 F.2d 37, 38 (2d Cir. 1977) ("Congress . . . has enacted a baffling skein of provisions for the I.N.S. and the courts to disentangle."); Yeun San Low v. Attorney General, 470 F.2d 820, 821 (9th Cir. 1973) ("[W]e are in the never-never land of the Immigration and

without the assistance of an attorney. The effect is that many claims for refugee status – either through applications for asylum, relief under the Convention Against Torture (CAT), or restriction on removal – are incorrectly decided. A recent study published in the Stanford Law Review found that "[r]epresented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel."[3] A recent Government Accountability Office report similarly found that asylum seekers were three times as likely to obtain asylum if they had legal representation.[4] It therefore stands to reason that some petitioners who were eligible for asylum, and therefore may have faced persecution or death after deportation, were erroneously denied relief because they lacked counsel.

This article asserts that section 1362 is unconstitutional, and that there is a due process right to counsel for non-citizens who file cases where persecution and death of the petitioner may result after removal – namely claims for asylum, relief under the Convention Against Torture, and restriction on removal.[5] Due process protects all persons' interests in life, liberty and property, regardless of their legal status within the country.[6] Where death may result from an erroneous denial of relief, a non-citizen's interest in life and liberty is directly implicated.

Nationality Act where plain words do not always mean what they say."); E. Hull, WITHOUT JUSTICE FOR ALL 107 (1985) ("A lawyer is often the only person who could thread the labyrinth [of immigration law].").

[3] Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007); *see also* GOVERNMENT ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 30 (2008), *available at* http://www.legistorm.com/ls_score/gao/pdf/2008/9/ful38994.pdf. [hereinafter GAO ASYLUM REPORT].

[4] GAO ASYLUM REPORT, *supra* note 3, at 30.

[5] Restriction on removal is the formal term for the relief commonly referred to as "withholding." Withholding of removal as described in this article differs from withholding of removal under the Convention Against Torture. *See generally* CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE §§ 34.03, 33.10 (rev. ed. 2008). For purposes of this article we call all non-citizens who are applying for asylum, relief under the Convention Against Torture, or restriction on removal "refugees."

[6] Landon v. Plascencia, 459 U.S. 21 (1982) (holding resident non-citizens entitled to due process upon their return to the United States).

As has been aptly stated in the criminal context, "death is different."[7] Where death is on the table, there is a heightened need for reliability and accuracy. We argue that due process demands more in these cases; it demands free legal counsel for indigent non-citizens applying for asylum, relief under the Convention Against Torture, or restriction on removal.

Part II of this article discusses the history of section 1362, explains past jurisprudence on the right to counsel in immigration cases, and illustrates that section 1362 is inconsistent with Supreme Court jurisprudence on the right to counsel. Part III analyzes the right to counsel under the *Matthews v. Eldridge* balancing test, explains the impact of "death is different" jurisprudence on the balancing test, and concludes that due process requires the government to provide counsel in certain immigration proceedings. Part IV briefly explains other scholars' determinations that counsel must be provided in certain immigration proceedings and summarizes our recommendations. Part V summarizes our analysis and conclusions.

II. 8 U.S.C. § 1362

The United States is a party to the 1967 United Nations Protocol relating to the Status of Refugees,[8] which incorporates articles two through thirty-four of the 1951 United Nations Convention relating to the Status of Refugees.[9] The United State is also a party to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or

[7] Gardner v. Florida, 430 U.S. 349, 357-58 (1977) ("[D]eath is different . . . in both its severity and its finality.").
[8] Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967).
[9] United Nations Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150.

Punishment.[10] These documents form the international foundation for U.S. laws relating to asylum,[11] relief under the Convention against Torture,[12] and restriction on removal.[13]

Non-citizens may apply for asylum affirmatively or defensively. After a non-citizen petitions for affirmative relief, an asylum officer conducts an initial interview to determine whether he or she is eligible.[14] The officer may "grant, deny, or refer" a claim.[15] If the officer refers an asylum claim, meaning that the applicant "appears to be neither deportable nor inadmissible," the applicant will be issued a Notice to Appear for removal proceedings and will enter defensive proceedings.[16]

Defensive asylum proceedings are available to applicants who were referred by an asylum officer or who have otherwise entered removal proceedings. During these proceedings, an attorney from the Department of Homeland Security (DHS) always represents the government.[17] Non-citizens can apply for relief under the Convention Against Torture[18] or restriction on removal[19] only defensively, before an immigration judge.

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[10] Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, adopted Dec. 10, 1984, *opened for signature* Feb. 4, 1985, G.A. Res. A/Res/39/46 (1984), *reprinted at* S. Treaty Doc. 100-2 (1990).
[11] Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006), provides that any individual who demonstrates that he or she is a refugee is eligible for asylum. A refugee is any individual "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.*
[12] An individual cannot be refouled to his or her country of origin if it is more likely than not that the individual will be tortured. Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, 112 Stat. 2681, Div. G (Oct. 21, 1998) (FARRA). *See generally* GORDON ET AL., *supra* note 5, at § 33.10.
[13] An individual may not be refouled to his or her country of origin if that individual demonstrates that "it is more likely than not that he or she will be persecuted if removed." I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987). *See generally* Gordon et al., *supra* note 5, at § 34.03; REGINA GERMAIN, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 22-42 (4th ed. 2005), for an in-depth discussion of these grounds for relief.
[14] See GERMAIN, *supra* note 13, at 393-95 for a helpful chart comparing affirmative and defensive procedures.
[15] *Id.*; 8 C.F.R. §§ 1208.1(b), 1208.9, 1208.14(b)-(c) (2008).
[16] GERMAIN, *supra* note 13, at 393-95; 8 C.F.R. §§ 1003.18(b), 1208.2(c)(3)(ii) (2008).
[17] Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 Geo. Immigr. L.J. 739, 741 (2002).
[18] 8 C.F.R. §§ 1208.16-.18 (2008).
[19] 8 U.S.C. § 1231(b)(3) (2000).

Courts consider removal proceedings civil in nature.[20] Therefore, the right to counsel in immigration proceedings derives from the Fifth Amendment guarantee of due process. Due process requires fundamental fairness in trials. Part of fundamental fairness in immigration proceedings includes the right to counsel of the petitioner's choosing.[21] Congress intended to implement this right in 8 U.S.C. § 1362:

> In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose.[22]

Several additional provisions enforce this right. For example, both the government and the immigration judge must notify the applicant of the right to counsel and provide a list of pro bono representatives.[23] In addition, if an applicant is unrepresented, immigration judges have a duty to fully develop the record.[24] To fully develop the record, a judge must "scrupulously and conscientiously prove into, inquire of, and explore for all relevant facts."[25] However, this duty seriously undermines the judge's role as a neutral arbitrator and does nothing to remedy the

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[20] The Supreme Court held in Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 491 (1999), that removal is not punishment. This is despite the fact that severe penalties, including the loss of life, liberty, and property, may result from the proceedings. For a more in-depth discussion of the costs of errors in immigration proceedings, see *infra* part IV.

[21] Iavorski v. I.N.S., 232 F.3d 124, 128-29 (2d Cir. 2000) (indicating that petitioners have a right to hire counsel of their choosing).

[22] INA § 204(b)(4)(A), 8 U.S.C. § 1362 (2006) (emphasis added).

[23] INA § 208(d)(4), 8 U.S.C. § 1158(d)(4) (2006); 8 C.F.R. § 1240.10(a) (2008).

[24] INA § 240, 8 U.S.C. § 1229a(b)(1) (2006) ("The immigration judge shall . . . interrogate, examine, and cross-examine the alien and any witnesses."); *see* Matter of S-M-J-, 21 I. & N. Dec. 722, 727 (1997) (explaining 8 U.S.C. § 1229a(b)(1) requires the immigration judge to develop the record.

[25] Al Khouri v. Ashcroft, 362 F.3d 461, 464-65 (8th Cir. 2004).

individual's understanding of the proceedings – and consequently his or her ability to gather probative evidence.

Nevertheless, several courts have upheld the constitutionality of § 1362. In 1975, in *Aguilera-Enriquez v. Immigration and Naturalization Service*,[26] the Sixth Circuit held that noncitizens did not have an unqualified right to free legal counsel in deportation proceedings. Due process may, however, require the government to provide an attorney to indigent non-citizens where "an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge."[27] This case-by-case approach has amounted to no right at all, as no court has ever found that due process required free counsel in any specific case.[28]

Indeed, some courts have even gone so far as to directly state that "there is no right to appointed counsel" in these proceedings.[29] Other courts, however, have at least acknowledged the important need for attorneys, even if they were unable to provide as much because of current immigration precedent. For example, the court in *Portillo Baires v. I.N.S.* stressed the "critical role of counsel in deportation proceedings" and noted that in some areas of the country, it is difficult, expensive, and at times impossible to obtain paid counsel.[30] This view recognizes the gross injustice of preventing appointed counsel in immigration proceedings. It alludes to the inevitable conclusion that appointed counsel is not only demanded by sound policy, but is consistent with case law regarding the right to counsel in other contexts.

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[26] 516 F.2d 565 (6th Cir. 1975).
[27] *Id.* at 568 n.3.
[28] *See, e.g.*, Vides-Vides v. I.N.S., 783 F.2d 1463, 1468 (9th Cir. 1986) (indicating that the petitioner was "unable to secure counsel at his own expense," but holding that this was not a denial of due process).
[29] United States v. Lara-Unzueta, 287 F. Supp. 2d 888, 892 (N.D. Ill. 2003) (stating that "there is no right to appointed counsel.").
[30] Portillo Baires v. I.N.S., 856 F.2d 89, nn.3, 6 (9th Cir. 1988).

In In re *Gault* the Supreme Court established that due process requires appointed counsel for juveniles in delinquency proceedings.[31] The Court noted in particular that because a juvenile's interest in preventing his or her loss of liberty was so great, the juvenile's interests could not be adequately protected by probation officers, whose role it was to file complaints against the juvenile.[32] The Court also flatly rejected that the presiding judge could advocate for the juvenile.[33] In the immigration context, however, despite a petitioner's similar interest in avoiding a loss of life or liberty, and similar conflicts of interest between government attorneys, immigration judges, and petitioners, the statute continues to deny indigent petitioners appointed counsel.

Nevertheless, instead of adopting the approach taken by *Gault*, courts have drawn from settings involving far less important personal interests. In *Gagnon v. Scarpelli*, the Court adopted a case-by-case approach for appointed counsel in probation hearings.[34] The Court acknowledged that in some circumstances "the effectiveness of rights guaranteed . . . depend on the use of skills which the probationer or parolee is unlikely to possess."[35] Countervailing concerns, however, such as the desire to maintain an informal forum and retain a rehabilitative atmosphere, counseled in favor of a more flexible approach.[36]

Similarly, in *Lassiter v. Durham County*, the Court adopted a case-by-case approach in adjudications of parental rights.[37] There, the Court determined that due process mandates appointed counsel for indigents where there is a risk of loss of the petitioner's personal physical

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[31] *In re* Gault, 387 U.S. 1, 35 (1967).
[32] *Id.*
[33] *Id.*
[34] Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).
[35] *Id.* at 786.
[36] *Id.*
[37] Lassiter v. Durham County, 452 U.S. 18, 33 (1981).

liberty, not more generalized rights like those of a parent.[38] Under this interpretation an indigent immigration petitioner must be appointed counsel were there is a risk of detention or death – risks that exist in nearly every claim involving asylum, restriction on removal, and relief under the Convention Against Torture. Therefore, it stands to reason that the time has come to reevaluate the need for appointed counsel in these contexts.

III. Death (After Deportation) is Different and *Matthews v. Eldridge*

Due process applies to refugees in immigration proceedings.[39] An analysis of the factors enumerated in *Matthews v. Eldridge*[40] suggests that refugees must receive greater due process safeguards than they currently do.

In *Eldridge*, the Court explained that it would weigh the private party's interest and the risk associated with a wrongful determination against the government's interests.[41] More precisely, it held that its prior decisions indicated that identification of the specific dictates of due process generally requires consideration of three distinct factors:

> First, the private interest that will be affected by the official action; second, 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 finally, the Government's interest, including the function involved and the

[38] *Id.* at 26-27.
[39] *See supra* text accompanying notes 21-25.
[40] 424 U.S. 319 (1976).
[41] *Id.* at 335-36.

> fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[42]

The remainder of this section outlines: (1) the government's interest in maintaining the current procedures attendant to refugee status determination; (2) a refugee's interest in having an accurate determination, using "death is different" as the paradigm for examining the interest; (3) the risk of an erroneous determination of that interest; and, (4) a weighing of the government's interest, including costs of implementation, against the refugee's interest to determine whether adding procedural safeguards to refugee status determination proceedings is warranted and required by the Constitution.

A. The Government's Interest

There may be no federal power the judiciary more venerates more highly than the federal government's plenary power to regulate immigration.[43] The Supreme Court has held that immigration is the ultimate in Congressional authority: "Over no conceivable subject is the legislative power more complete."[44]

The Court has deferred to the federal government on matters of immigration as it would never consider doing in many other areas of law. As one commentator has noted, "In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored

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[42] *Id.*
[43] *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977) (explaining "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens" (quotations omitted)).
[44] *See* Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

bases as race, gender, and legitimacy."[45] The government's power also reaches what courts would normally consider violations of the First Amendment.[46] Thus, the government's plenary power over immigration suggests a high interest in maintaining whatever procedures the federal government has deemed appropriate.[47]

The doctrine, however, contains serious flaws. Plenary power is inconsistent with the Tenth Amendment and the constitutional democracy of the United States.[48] The Tenth Amendment reserves powers not enumerated to the states and to the people.[49] Moreover, early Supreme Court decisions suggested an enumerative-only view of the federal power. For example, in *McCullough v. Maryland*,[50] Chief Justice Marshall explained that the federal government cannot act unless the Constitution gives it authority to do so or the action is reasonably implied from an enumerated power.[51] He specifically contrasted reasonably implied

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[45] Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984) (citing Fiallo v. Bell, 430 U.S. 787 (1977) (gender and legitimacy); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (race); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (race)).

[46] Kleindienst v. Mandel, 408 U.S. 753, 756, 769-70 (1972) (rejecting respondents' claim that the government's refusal to admit a socialist scholar to the United States violated their First Amendment rights); Galvan v. Press, 347 U.S. 522, 529 (1954) (rejecting alien's argument that the Internal Security Act of 1950, 64 Stat. 987, which authorized deportation of any alien who has been a member of the Communist Party, violated Due Process Clause); Harisiades v. Shaughnessy, 342 U.S. 580, 588, 596 (1952) (finding that the Alien Registration Act of 1940, § 23, 8 U.S.C. § 137 (repealed June 27, 1952), which authorized deportation of any legal resident alien because of membership in the Communist Party, did not violate Due Process Clause).

[47] While the power of a given branch of government is not related to its interests on a one to one basis, the two are certainly related. It seems likely that the Supreme Court would hold that the federal government's plenary power to regulate immigration would weigh heavily in its favor under an *Eldridge* balancing test. *But see* David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 848 (1998) (describing the question of whether the Supreme Court will find the plenary power of the federal government to weigh heavily on the government's side under *Eldridge* as "difficult.").

[48] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved . . . to the people."); *see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs,* 81 TEX. L. REV. 1 (2002) (arguing that the inherent powers doctrine is inconsistent with the enumerated powers principles upon which the United States was founded, and is based on nationalist and racist views of federal power dating to the mid-nineteenth century).

[49] U.S. CONST. amend. X.

[50] 17 U.S. 316 (1819).

[51] *Id.* at 411.

powers with "great substantive and independent power[s]" such as the power of making war, levying taxes, or regulating commerce.[52]

This limited view of the federal government's power stands in stark contrast to the inherent authority doctrine the Supreme Court announced in *United States v. Curtiss-Wright Export Co* in 1936.[53] In *Curtiss-Wright*, the Court explained that the enumerated powers doctrine "is categorically true only in respect of our internal affairs."[54] Numerous commentators have attacked *Curtiss-Wright* as inconsistent with the Constitution and the principles upon which it is based.[55] Scholars have suggested that *Curtiss-Wright* is an anomaly worthy of repudiating in favor of a more mainstream constitutional understanding.[56]

Moreover, *Curtiss-Wright* stands in contrast to the more limiting approach taken by the Court itself fifty years earlier in 1886.[57] In 1886 the Court decided *Yick Wo v. Hopkins*, holding that a person's equal protection and due process rights do not depend on alienage.[58] The Court specifically repudiated the plenary powers doctrine as a source for government authority to discriminate against non-citizens: "Sovereignty itself is, of course, not subject to law; but in our system, while sovereign powers are delegated to the agencies of the government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."[59]

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[52] *Id.*
[53] 299 U.S. 304 (1936).
[54] *Id.* at 315-16 (emphasis added).
[55] *See. e.g.*, HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 94 (1990) (criticizing *Curtiss-Wright* as "a dramatically different vision of the National Security Constitution from that which [had] prevailed since the founding of the Republic."); CHARLES A. LOFGREN, *The Foreign Relations Power:* United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, *in* GOVERNMENT FROM REFLECTION AND CHOICE 167, 205 (1986).
[56] *See* Cleveland, *supra* note 48, at 6 (collecting sources); Curtis Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1104-07 (1999) (predicting an end to foreign affairs exceptionalism); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1659-60 (1997) (rejecting *Curtiss-Wright* as authority for a federal common law of foreign relations).
[57] Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[58] *Id.* at 368-69.
[59] *Id.* at 374. *See also* Cleveland, *supra* note 48, at 121 (discussing *Yick Wo* as a repudiation of the inherent powers doctrine).

Yick Wo accords with the view announced by Chief Justice Marshall in *McCullough* and stands in stark contrast to the wide latitude courts currently give the federal government on immigration issues. As one commentator has observed, "[T]he power over exclusion and deportation is far from normalized . . . courts frequently agree that federal immigration law should be subject to little or no judicial review, based on the immigration power's roots in 'national sovereignty, foreign relations, and the fundamentally political character of nationality decisions.'"[60]

Besides applying the plenary power doctrine to immigration law, the Supreme Court has explicitly characterized the interest in "efficient administration of the immigration laws" as "weighty."[61] The Court continued, "[I]t must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature."[62] The courts have good reasons, based on both plenary power and precedent, to view the government's interest in maintaining the current procedures used in refugee status determinations as strong.

Both the plenary power doctrine and the government's interest in promoting compliance with treaty obligations apply to the determination of refugee status. The plenary power applies to all immigration procedures, including determination of refugee status.[63]

The interest in treaty compliance applies most directly to determinations of eligibility for relief under the CAT[64] and restriction on removal.[65] Each are rooted in international treaties

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[60] Cleveland, *supra* note 48, at 163 (quoting Brief for the United States at 8, 12-14, 22 in Miller v. Albright, 523 U.S. 420 (1998).
[61] Landon v. Plasencia, 459 U.S. 21, 34 (1982) (applying *Mathews v. Eldridge* balancing test in holding that due process requires notice of a deportation hearing).
[62] *Id.*
[63] *See supra* text accompanying notes 44-49.
[64] *See supra* text accompanying note 10.
[65] INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2006).

adopted and implemented by the United States.[66] Thus, an inaccurate determination of eligibility for either may damage relations with foreign governments, for two reasons.[67]

First, the failure to comply with a treaty itself would damage the ability of the federal government to enter into treaties. The government's failure to abide by the treaty would undermine its reliability as a treaty partner.

Second, a commitment to accurate determinations of eligibility for CAT and restriction on removal demonstrates our commitment to international law, because both are rooted in international law.[68]

Persons seeking asylum present a slightly different case. Although the United States is a signatory to the United Nations Protocol relating to the Status of Refugees, grants of asylum are not mandatory.[69] Therefore, any link to treaties and international relations is somewhat more attenuated for asylum seekers. U.S. asylum law, however, is based on directly on the Convention and the Protocol and relies strongly on guidelines adopted by the United Nations High Commissioner for Refugees.[70]

Therefore, the government's interest in maintaining the current level of procedural protections for refugees is not as high as it is for other non-citizens because the plenary power doctrine is mitigated by the government's countervailing interest in complying with its treaty obligations. As Justice Kennedy aptly stated in *Roper v. Simmons*, "[t]he opinion of the world

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[66] See *supra* Part II (indicating that U.S. refugee law is derived from the U.N. refugee convention, protocol, and CAT).
[67] *See* Medellin v. Texas, __ U.S. __, 128 S. Ct. 1346, 2008 U.S. LEXIS 2912, 76 U.S.L.W. 4143, 2008 WL 762533, at *26 (2008) (listing "relations with foreign governments" as a "plainly compelling interest" of the federal government).
[68] *See supra* Part II.
[69] *Id.*
[70] *See, e.g.*, United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1992), *available at* http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf. *See, e.g.*, Cardoza-Fonseca v. I.N.S., 480 U.S. 421, 439 n.22 (1987) ("the Handbook provides significant guidance in construing the Protocol. . . . It has been widely considered useful in giving content to the obligations that the Protocol establishes.") (citations omitted).

community, while not controlling our outcome, does provide respected and significant confirmation of our conclusions."[71] The United States enters treaties because it believes in the rights and privileges the treaties protect. The United States cares about its image abroad, believes in a more just society and strives for a more decent legal system. This is why the Supreme Court has looked to international law and the examples set by other nations when holding that it is unconstitutional to impose the death penalty on juveniles[72] and to restrict the rights of homosexuals through discriminatory anti-sodomy laws.[73] Similarly here, the government must look to and abide by the country's international obligations to maintain appropriate and civilized procedures and laws.

B. The Interest of Refugees

Mathews v. Eldridge requires consideration of "the private interest that will be affected by the official action."[74] We specifically look at this interest through the viewpoint that "death is different."[75] In other words, avoiding death, torture, and serious bodily harm is the "private interest" that is affected "by the official action," i.e., removal from the United States. The death penalty principle that "death is different" suggests that the interest of refugees in the outcome of their cases could hardly be higher.

The Supreme Court has repeatedly recognized the need for reliability and accuracy of the outcome of death penalty determinations.[76] In *Gregg v. Georgia*[77] the Court explained, "[W]here

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[71] Roper v. Simmons, 543 U.S. 551, 578 (2005).
[72] *Id.*
[73] Lawrence v. Texas, 539 U.S. 558 (2003).
[74] Matthews v. Eldridge, 424 U.S. 319, 335-36 (1976).
[75] Gardner v. Florida, 430 U.S. 349, 357-58 (1977) ("[D]eath is different . . . in both its severity and its finality.").
[76] Zant v. Stephens, 462 U.S. 862, (1983) ("to avoid [arbitrary sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty."); Godfrey v. Georgia, 446 U.S. 420 (1980); Gardner v. Florida, 430 U.S. 349, * (1977) ("[It] is of vital importance . . . that any decision to impose the death

discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion *must be suitably directed* and limited *so as to minimize the risk of wholly arbitrary* and capricious action."[78] The Court's desire to prevent arbitrariness and improve reliability in the administration of the death penalty has led it to adopt a myriad of procedural protections for death eligible defendants.

Two major concerns motivate the Court to require greater reliability and accuracy: (1) the irreversibility of death and (2) the gravity of the punishment: "[D]eath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality."[79] The finality of death is important because it makes the courts' determination that death is appropriate irreversible.[80] Once executed, there is no possibility of correcting erroneous determinations of guilt or culpability.

In death penalty jurisprudence the gravity of the judgment also plays a prominent role. This role is, in part,[81] because of the dignity interest the death penalty implicates.[82] This dignitary interest is rooted in the inviolability of the human person.[83]

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sentence be, and appear to be, based on reason rather than caprice or emotion."); Gregg v. Georgia, 428 U.S. 153 (1976),

[77] 428 U.S. 153 (1976).

[78] *Id.* at 189 (emphasis added).

[79] Gardner v. Florida, 430 U.S. 349, 357 (1977).

[80] Ring v. Arizona, 536 U.S. 584, 616 (2002) (Breyer, J., concurring) (explaining that death's irreversibility is reason for jurors to have the final say in its application in a given case); Baldwin v. Alabama, 472 U.S. 372, 399 (1985) (Stevens, J., dissenting) (citing fact that "capital punishment is the most extreme and uniquely irreversible expression of societal condemnation" as a reason why Alabama's compulsory sentencing language was unconstitutional).

[81] Of course, the test for whether a given punishment violates the Eighth Amendment explicitly requires the justices to consider whether the punishment "comports with the basic concept of human dignity." Gregg v. Georgia, 428 U.S. 153, 182 (1976). Other punishments are considered under the same test, but the dignity implications of death weigh more heavily than other judgments, for the Court rarely strikes down any other legislatively prescribed punishment as violating the Eighth Amendment. *See, e.g.*, Ewing v. California, 538 U.S. 11, 26-28, 30-31 (2003) (holding that California's three strikes law was not grossly disproportionate, and therefore, did not violate the Eighth Amendment's ban on cruel and unusual punishment); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that death penalty for mentally retarded constituted cruel and unusual punishment).

[82] *See* Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring). There was no majority opinion in *Furman*, and Brennan's position that the death penalty was a per se violation of the Eighth Amendment was repudiated. *See* Gregg v. Georgia, 428 U.S. 153 (1976); *but see* Roper v. Simmons, 543 U.S. 551, 578 (2005) (citing

In the death penalty context, it is directly linked to the Eight Amendment's ban on cruel and unusual punishment. It is bottomed in barring a state from treating a person as less a human, even in death: "The basic concept underlying the (Clause) is nothing less than the dignity of man. While the State has the power to punish, the (Clause) stands to assure that this power be exercised within the limits of civilized standards."[84] The Eighth Amendment protects a prisoner's dignity. His dignity is protected from state-infliction of uncivilized treatment.

The same concerns – a heightened need for reliability in the outcome and a respect for human dignity – also apply to eligibility for refugee status for many of the same reasons they apply to the death penalty.

A wrong decision will likely irreparably harm the refugee. The source of and reason for the harm differs for refugees and death row inmates. A refugee is harmed as a result of her wrongful deportation to a country that violates human rights or acquiesces in violations of human rights. The harm is not U.S. government-inflicted punishment. By way of contrast, the concern underlying the "death is different" doctrine is that a death row inmate might be wrongfully put to death as punishment for a crime he either did not commit or did not deserve to die for committing.[85] Nevertheless, the harm in each case is irreparable. Just as there is no remedy for

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"human dignity" as a reason that sentencing persons who were juveniles at the time of the crime to death is unconstitutional). The imposition of death, especially by a regime that does so in a fashion sufficient to qualify an immigrant for asylum, restriction on removal, or CAT relief, surely also implicates a refugee's dignitary interests.

[83] R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 532-34 (2006) (listing freedom from bodily intrusion and privacy as two major values protected by human dignity).

[84] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[85] There have been over 100 DNA exonerations for death row inmates. Death Penalty Information Center, *Innocence and the Crisis in the American Death Penalty* (Sept. 2004), http://www.deathpenaltyinfo.org/article.php?scid=45&did=1150. Unfortunately, the prospect of wrongfully putting someone to death is neither remote nor far-fetched.

wrongful death, there is nothing that can undo the suffering of a refugee: persecution, serious bodily harm, or even death.[86]

Moreover, the gravity of the harm, as emphasized in death penalty jurisprudence, is relevant to refugees in two respects. First, where the refugee faces death, the gravity is the same. The person facing the death penalty and the person facing deportation are similarly situated insofar as they both face death.

Second, the refugee facing torture, serious bodily injury, or cruel, inhuman or degrading treatment faces a serious affront to her dignity.[87] Indeed, the *jus cogens* norm prohibiting torture and cruel, inhuman or degrading treatment is derived directly from the international respect for human dignity.[88]

Likewise, a refugee who faces persecution on account of a protected ground faces a serious affront to her dignity: she is persecuted for part of her life that she either cannot or should not be required to change.[89] Such a persecution is inherently personal and implicates a dignity interest.[90]

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[86] Psychologists have documented lasting psychological effects of torture and persecution, including post-traumatic stress disorder and severe depression, which can interfere with an individual's daily functioning for years after persecution has ended. J. David Kinzie & James M. Jaranson, *Refugee and Asylum Seekers*, *in* ELLEN T. GERRITY ET AL., THE MENTAL HEALTH CONSEQUENCES OF TORTURE 111-16 (1997); Carlos Madriaga, *Psychological Trauma, Post Traumatic Stress Disorder and Torture* (2002), www.redsalud-ddhh.org/pdf/monotraumapsicosocialingles.pdf.

[87] Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1726-27 (2005) (explaining the connection between the law's respect for human dignity and its prohibition of torture).

[88] *Id.*

[89] Matter of Acosta, 19 I. & N, Dec. 211, 233 (BIA 1985), *overruled on other grounds by* Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987). In *Matter of Acosta*, the Board of Immigration Appeals (BIA) specifically stated that membership in a particular social group is based on shared, immutable characteristics. *Id.* A characteristic is immutable if the characteristic is one that "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.* Similarly, the other bases for asylum – race, religion, nationality, and political opinion – form an integral part of the non-citizen's identity. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006). Even when those characteristics are imputed to the refugee, meaning that others believe that the refugee possesses certain characteristics that he or she does not, the realization of that imputation and persecution on that basis may inevitably define the refugee's sense of self.

[90] Waldron, *supra* note 87, at 1726-27.

The Supreme Court's treatment of a death penalty litigant's dignity interest is bottomed in the Eighth Amendment.[91] Immigration proceedings are governed by a different constitutional provision: the Due Process Clause of the Fifth Amendment.[92] The source of the bar, however, is irrelevant to the analogy; the motivating rationale remains the same.

Therefore, in the *Eldridge* analysis, the interest of the refugee parallels the interest of death penalty litigants.[93] Like a death penalty litigant, refugees face extremely high stakes: the loss of life or "all that makes life worth living."[94] The Supreme Court has recognized that the interest of a death penalty litigant is qualitatively different than other persons facing punishment. This recognition is embodied in the phrase "death is different." Similarly, refugees face risks qualitatively different than other immigrants. An erroneous deportation of a genuine refugee poses a serious risk of persecution.[95] A refugee must show that the persecution is on account of race, religion, nationality, membership in a particular social group, or political opinion.[96] A refugee will face severe consequences that strike at the very core of what it means to be a person. Thus, like the death penalty defendant, the refugee has a high dignity interest in the proper determination of her claim.

Separate from death penalty jurisprudence, the United States has already articulated its interest in barring the kinds of harm that refugees generally suffer. It has done so by generally attaching criminal penalties to[97] and otherwise prohibiting the kind of actions that would qualify a person as a refugee. These broad bars, like the notion that death is different, compel the finding

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[91] *See Trop*, 356 U.S. at 100.
[92] *See supra* text accompanying notes 20-24.
[93] *See* Matthews v. Eldridge, 424 U.S. 319, 335-36 (1976) (indicating that individual interests must be analyzed).
[94] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (discussing the possible effects of a deportation order).
[95] INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) (noting that even just a ten percent risk of persecution is sufficient to qualify a person for asylum).
[96] INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2006).
[97] *See* 18 U.S.C. § 2441(d)(1)(A) (2006) (proscribing torture).

that a refugee has a weighty interest in being free from the harms that would make her eligible for relief.

More than eighty years ago Justice Brandeis wrote that deportation can result "in loss of both property and life; or of all that makes life worth living."[98] The same is true today.

C. The Risk of Erroneous Deprivation

The risk of erroneous determination of refugee status has recently come under national scrutiny.[99] The scrutiny is largely the result of a study published in November of 2007.[100] The study demonstrated the importance of representation in immigration proceedings in front of an immigration judge:

> The results of the cross-tabulation analysis confirm earlier studies showing that whether an asylum seeker is represented in court is the single most important factor affecting the outcome of her case. Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel. The regression analysis confirmed that, with all other variables in the study held constant, represented asylum seekers were substantially more likely to win their case than those without representation.[101]

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[98] Ng Fung Ho v. White, 259 U.S. 276, 284 (1921).
[99] *See, e.g.*, Julia Preston, *Wide Disparities Found in Judging of Asylum Cases*, N.Y. TIMES, May 31, 2007, at A1, *available at* http://www.nytimes.com/2007/05/31/washington/31asylum.htm; Bill Frogameni, *For Asylum Seekers, A Fickle System*, THE CHRISTIAN SCIENCE MONITOR, July 3, 2007, at 3, *available at* http://www.csmonitor.com/2007/0703/p03s03-ussc.html?page=2.
[100] *See* Ramji-Nogales et al., *supra* note 3.
[101] *Id.* at 340.

The study also pointed to other wide disparities in asylum determinations by immigration courts. It found wide disparities both among courts and among judges at a single court.[102] For example, Colombian asylum seekers were found to be "232% more likely to win their claims in Orlando than they are in Atlanta."[103] In New York, one judge granted only 6% of asylum claims, while another three judges in the same office granted 80% or more of asylum claims.[104] A recent GAO report confirmed that there are significant variations in asylum outcomes based on seven factors wholly unrelated to the merits of the asylum seeker's claim: (1) whether the claim was filed affirmatively or defensively; (2) the applicant's nationality; (3) the time period in which the asylum decision was made; (4) whether counsel represented the asylum seeker; (5) whether the asylum seeker filed the application within one year of arriving in the United States; (6) whether the seeker claimed dependents on the application; and (7) whether the asylum seeker had ever been detained.[105] For example, if the asylum seeker was represented, she was more than three times as likely to be granted asylum.[106]

While it is impossible to know the percentage of wrongly decided asylum cases, based on the study it is clear that the merits of any given case are not the main, or even the substantial, factor in determining the outcome of the case. Factors like the particular immigration judge, whether the refugee was represented, and in which immigration court the claim was brought are each improper but highly relevant factors in predicting the outcome of asylum cases. The demonstrated impact of factors irrelevant to the merits of a claim for refugee status strongly

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[102] *Id.* 328-41.
[103] *Id.* at 330.
[104] *Id.* at 334.
[105] GAO ASYLUM REPORT, *supra* note 3, at 7.
[106] *Id.* at 30.

suggest a high risk of an erroneous deprivation of a refugee's life and liberty interests under current procedures.[107]

D. The Costs And Benefits of the Proposed Remedy: A Refugee's Right to Counsel

Besides recognizing that human dignity and the irreversibility of death as important, death penalty jurisprudence also recognizes that these values demand action. That is, there are increased procedural protections for people facing the death penalty, and those protections are grounded in the notion that death is different.

A broad range of safeguards is required in death penalty proceedings. These include: guided, individualized discretion for death eligibility determinations; being able to inquire as a potential juror's views on the death penalty; automatic review of death sentences; and a bifurcated trial.[108]

Legislative bodies have also provided protections unique to death penalty litigants: two defense attorneys are generally assigned to each death eligible case[109] and there is a statutory right to counsel that extends to federal habeas corpus proceedings,[110] a right not provided to litigants sentenced to lesser punishments. Each of these procedural protections is intended to improve the reliability in the determination of the proceedings.

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[107] *See*, *e.g.*, Baltazar-Alcazar v. I.N.S., 386 F.3d 940, 948 (9th Cir. 2004) (indicating that the requirements for relief are often "daunting enough for a seasoned immigration lawyer" and may indeed be impossible for petitioners with a limited knowledge of English to understand).

[108] *See* Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (individualized consideration); Witherspoon v. Illinois, 391 U.S. 510 (1968) (voir dire on death penalty views); Gregg v. Georgia, 428 U.S. 153 (1976) (upholding Georgia statute based on its bifurcated trial and automatic review of death sentences by the Georgia Supreme Court).

[109] AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES REVISED EDITION 28 (2003) (recommending the appointment of a minimum of two attorneys to work on each death penalty case), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf.

[110] 18 U.S.C. § 3599(a)(2) (2006).

We propose something much more modest: provide a right to counsel at government expense for refugees in deportation proceedings.

Lassiter created a presumption that there is a due process right to a government-funded attorney only where there is a liberty interest at stake.[111] As discussed *supra*, refugees face incredibly high stakes – including imprisonment and death – if they are deported to a country where they are persecuted. Moreover, the risk of erroneous deprivation of the refugee's rights is disturbingly high. Thus, wrongfully deporting a refugee clearly involves a liberty interest.

A right to counsel is indispensable to a fair hearing in asylum hearings.[112] First, it addresses the two major problems identified in a recent comprehensive empirical study of asylum hearings: the disparity of outcomes between represented and unrepresented asylum seekers and the wide variation from immigration judge to immigration to immigration judge in deciding asylum cases.[113]

Providing counsel to refugees would directly address the disparity between the represented and unrepresented. Currently forty-five percent of represented applicants have their claims granted.[114] Only sixteen percent of unrepresented applicants win the same relief.[115] Guaranteeing refugees counsel would directly address this disparity and result in more meritorious claims being heard.

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[111] *See* Lassiter v. Durham County, 452 U.S. 18, 26-27 (1981).
[112] *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. Pa. L. Rev. 1267 (1975) (arguing that procedural protections should be adapted to the context in question). Judge Friendly ranked "counsel" as seventh out of eleven priorities for providing a fair hearing. *Id.* at 1279–94. The other procedural protections Judge Friendly suggests are, by and large, in place. Despite these procedural protections, irregularities persist. *See supra* text accompanying notes 99-105. Moreover, an attorney represents the government, thereby causing the problems Friendly hoped to avoid without reaping any of the benefits for refugees. *See infra* text accompanying notes 117 -118.
[113] *See* Ramji-Nogales et al., *supra* note 3, at 329, 341 (outlining disparities in asylum grant rates between courts and for asylum seekers represented by counsel and those unrepresented).
[114] *Id.* at 341.
[115] *Id.*

Providing counsel would also address another major concern: disparities from one immigration judge to the next.[116] Government-funded counsel for refugees would act as an external check on the immigration judge's wide discretion and minimize the disparities in outcomes between judges. Counsel would act as a check in several ways: making ensuring the proper procedures are followed; presenting the facts of a refugee's case; and providing legal expertise in guiding the refugee through the proceeding. Immigration proceedings are complex, and refugee applicants are from countries with different legal systems. Facing complex adjudicative proceedings is intimidating for even the most initiated; it is all the more so for a person wholly unfamiliar with U.S. law.

Moreover, the nature of asylum claims lends themselves well to presentation by an attorney. The introduction of counsel into an administrative will likely cause the hearing to be more adversarial and less inquisitorial or investigatory.[117] The federal government has indicated its agreement as to the propriety of having an attorney represent its case in asylum hearings: in front of an immigration judge the Department of Homeland Security is uniformly represented by lawyers.

This one-sided representation already undermines the investigatory aspect of the immigration tribunal. This imbalance undermines the accuracy of the proceedings, and where the stakes are so high – in asylum, CAT, and withholding claims – providing an attorney for the asylum seeker is constitutionally required.[118]

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[116] *Id.* at 329.
[117] *See* Friendly, *supra* note 112, at 1267 (raising the specter of a "protracted controversy" if counsel is introduced to a given proceeding).
[118] *But see* Ardestani v. I.N.S., 502 U.S. 129 (1991) (holding that Equal Access to Justice Act fees not recoverable for deportation hearings because immigration proceedings are not adversarial).

Moreover, unlike other forms of "mass justice,"[119] the facts are often complex and difficult for a refugee to present. For example, a refugee may be inhibited about talking about the persecutory treatment she received at the hands of her home country's government. A refugee's culture, psychological impairment, or fear of her government's influence in the United States may make her inhibited in the immigration hearing. Counsel would act as a friendly face and ally who can "bring out facts ignored or unknown to the authorities."[120]

Other procedural protections – judicial review, the making of a record, the right to have a decision made based on the evidence presented, and so on – are already largely in place.[121] Despite their presence, gross disparities persist in asylum hearings. Providing government-funded counsel for refugees would mitigate these disparities.

The cost of such counsel to the government would be substantial, but not unreasonable in light of the interest at stake. In 2007 immigration judges made 42,653 merit decisions in asylum cases.[122] Currently, one-third of asylum applicants are unrepresented before an immigration judge.[123] Certainly fewer than two-thirds of the figure would hire their own counsel under the proposed scheme, but those who could afford to pay for counsel could be required to pay for the counsel they receive, similar to the public defender system. This requirement would partially offset the fiscal costs.

Furthermore, the *power* of the federal government should not be the lone factor in determining its *interests*.[124] There are countervailing interests – negative costs – to the federal

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[119] *See* Friendly, *supra* note 112, at 1279-95 (enumerating and ranking procedural protections that should be considered in administrative, or "mass justice," proceedings.
[120] *Id.* at 1287.
[121] *Id.* at 1279-95 (listing these procedural protections).
[122] Executive Office for Immigration Review, U.S. Dep't of Justice, Immigration Courts, FY 2007 Asylum Statistics (2008), *available at* http://www.usdoj.gov/eoir/efoia/FY07AsyStats.pdf.
[123] *See* Ramji-Nogales, *supra* note 3, at 325.
[124] *See* Grable, *supra* note 47, at 848 (arguing that the power to do something is a separate consideration from whether it is in the party possessing the power's interest to do it).

government. The federal government has an interest in meeting its treaty obligations. For example, the United States has "'plainly compelling' interests in 'ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law.'"[125]

Moreover, commentators have suggested that the federal government has an interest – another negative cost – in speaking with one voice in international relations.[126] Implicit in this argument is that the federal government has an interest in enforcing the agreements reached pursuant to those relationships. Treaties are the strongest example of such agreements. They have constitutional pedigree as the "supreme law of the land."[127] They also have the imprimatur of democratic approval via the advice and consent of the Senate.

The government's interest in complying with treaty obligations suggests that insofar as new or different procedural obligations would promote compliance with those obligations, such compliance would help offset any costs associated with such procedural obligations.

Besides government benefits, or negative costs, certain safeguards would further limit the administrative costs of such a system. Most jurisdictions bar attorneys in death penalty cases from filing frivolous claims.[128] A similar standard already applies to asylum claims. If a person knowingly files a frivolous application for asylum, the applicant is "permanently ineligible for

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[125] Medellin v. Texas, __ U.S. __, 128 S. Ct. 1346, 2008 U.S. LEXIS 2912, 76 U.S.L.W. 4143, at ***82 (2008) (Stevens, J., concurring).

[126] *See, e.g.*, Louis Henkin, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 139 (2d ed. 1996); Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?* 26 HASTINGS CONST. L.Q. 307, 349-50 (1999); John Norton Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 275-76 (1965). *Zchernig v. Miller,* 389 U.S. 429 (1968), is the leading case for the one voice theory of dormant foreign affairs power preemption. *See* Curtis Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59, 78 (2006) (explaining the importance of *Zschernig*).

[127] U.S. CONST. art. VI, cl. 2; *see also* Whitney v. Robertson, 124 U.S. 190, 194 (1887); Reid v. Covert, 354 U.S. 1, 17 (1957) (explaining the relationship of treaty obligations to other sources of federal law).

[128] A.B.A., MODEL RULES OF PROF'L CONDUCT R. 3.1 (1983), *available at* http://www.abanet.org/cpr/mrpc/rule_3_1.html.

any benefits."[129] The immigration courts could use the duty not to file frivolous claims as a mechanism for requiring lawyers to police their own cases.

The penalty, which the filing person would be made aware of by her lawyer, would act as an incentive not to file such claims. Indeed, one study indicated that knowledge of the penalties involved reduces the number of frivolous claims and thereby increases efficiency and reduces the costs associated with processing claims by potential refugees.[130]

These safeguards, in addition to reducing the cost to the government, would improve the correlation between the private interest and the procedure sought. The disincentive for filing frivolous claims increases the likelihood that the beneficiaries of the representation deserve relief as refugees. As more deserving refugees acquire relief, the U.S. government better complies with its treaty obligations and the "plainly compelling interest" it has in the improvement of asylum procedures.[131]

Moreover, requiring representation for refugees is narrowly tailored to the interest of the correct determination of refugee status. Representation – and the lack thereof – is the strongest predictor of outcomes in asylum cases before an immigration judge. Providing counsel would improve consistency in the asylum process and assure refugees that their most basic interest, "life, or all that makes it worth living,"[132] is protected.

Some commentators believe that despite the myriad of procedures that apply in death penalty cases, the quality of counsel is still the determinative factor in the outcome.[133] Where

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[129] INA § 208(d)(6), 8 U.S.C. § 1158(d)(6) (2006).
[130] *See* Schoenholtz & Jacobs, *supra* note 17, at 743; Christopher Nugent, *Strengthening Access to Justice: Prehearing Rights Presentations for Detained Respondents*, 76 INTERPRETER RELEASES 1077, 1078 (1999).
[131] Medellin v. Texas, __ U.S. __, 128 S. Ct. 1346, 2008 U.S. LEXIS 2912, 76 U.S.L.W. 4143, at ***82 (2008) (Stevens, J., concurring); *see also supra* text accompanying notes 125-27.
[132] Ng Fung Ho v. White, 259 U.S. 276, 284 (1921).
[133] Stephen Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994).

there are no similar procedural protections and no right to counsel, the presence or absence of counsel has been shown to make an enormous difference.[134]

"There can be no equal justice where the kind of trial a [person] gets depends on the amount of money [the person] has."[135] Unequal justice is exactly what is happening in asylum cases, the very ones that matter most to the litigants. Due process demands more.

IV. Alternative Arguments and Recommendations for Improving Access to Counsel

Arguing that due process demands greater protections in immigration proceedings is not novel. The need for greater protection, as demonstrated in the Stanford study discussed above,[136] is obvious. Numerous commentators have stated as much. Indeed, most representatives, DHS attorneys, Asylum Officers, and Immigration Judges agree that representations makes a difference for those seeking relief and that it improves the effectively and efficiency of the system.[137]

One common argument for increased procedural safeguards in immigration proceedings is that deportation is effectively a criminal punishment, not a civil fine.[138] For example, Robert

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[134] *See* Ramji-Nogales et al., *supra* note 3, at 341; *see also* Schoenholtz & Jacobs, *supra* note 17, at 743 (finding that "representation [or lack thereof] matters considerably" in the outcome of refugee proceedings).
[135] Griffin v. Illinois, 351 U.S. 12, 19 (1956).
[136] *See supra* text accompanying notes 99-105.
[137] *See* Schoenholtz & Jacobs, *supra* note 17, at 740.
[138] The Supreme Court has consistently held the opposite: "It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien . . . may remain within the country. The order of deportation is not a punishment for a crime." Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); *see also* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); United States *ex rel*. Bilokumsky v. Tod, 263 U.S. 149, 157 (1923); I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984). It is this conclusory ruling that fails to differentiate deportation from any other finding of a condition to exist (like the commission of a crime) that commentators correctly and commonly attack. *See, e.g.*, LeTourner v. I.N.S., 538 F.2d 1368, 1370 (9th Cir. 1976); Lisa Mendel, Note, *The Court's Failure to Recognize Deportation as Punishment: A Critical Analysis of Judicial Deference*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 205 (2000) (comparing deportation to other civil sanctions in which the Court has extended the Ex Post Facto Clause); Bill Ong Hing, *Providing a Second Chance*, 39 CONN. L. REV. 1893, 1902 (2007) (describing deportation as "double punishment" and "the final and most permanent punishment an individual can face"); Recent Development, *Deportation of an Alien for a Marijuana Conviction Can Constitute Cruel and Unusual Punishment:* Lieggi v. United States Immigration and Naturalization Service, 13 SAN DIEGO L. REV. 454, 456-58 (1976).

Pauw has argued that deportation, particularly where it is coupled with permanent banishment, is "an extremely cruel punishment."[139] Pauw highlights the absence of a statute of limitations to grounds of deportability, the circumscribed role of discretion after the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), and the plain inhumanity of deporting long-time residents based on long-forgotten crimes.[140]

After examining some of the significant hurdles to arguing that deportation is punishment,[141] Pauw concludes that it is, in some instances, punishment. First, for Pauw, instances in which there is no waiver to deportability, regardless of the facts of the underlying ground for deportability, is punishment.[142] He cites the aggravated felony, alien smuggling, and false claims of citizenship grounds of deportability as some of the best cases for finding deportation to be punishment.[143]

Having found deportation to, in at least some instances, to be punishment, Pauw recommends concomitant procedural safeguards.[144] He argues that at a minimum, the prohibition on cruel and unusual punishment and the Ex Post Facto Clause should limit the government's power in deportation hearings. He also argues that counsel should be guaranteed because "[i]t is not fundamentally fair to punish someone by permanently banishing him from his home unless he has the assistance of counsel in the proceedings."[145]

The American Bar Association (ABA) has called for the establishment of the right to government funded counsel for persons "with potential relief from removal" and to all "mentally

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[139] *See, e.g.*, 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, 306, 340 (2000).
[140] *Id.* at 333-36.
[141] *See supra* note 20.
[142] *See* Pauw, *supra* note 139, at 338.
[143] *Id.*
[144] *Id.* at 339.
[145] *Id.* at 340.

ill and disabled persons in all processes and procedures, whether or not potential relief may be available to them."[146] The ABA has specifically called for the legislative reversal of INA § 292, which provides for counsel in removal proceedings only "at no cost to the government."[147] The ABA emphasizes the complexity of immigration law, the language and cultural barrier facing immigrants, and the high stakes of immigration proceedings.[148]

Similar to the argument set forth above, some commentators have suggested that refugees facing deportation should have counsel because of the dangers they face.[149] They, however, do not draw on death penalty jurisprudence to make their argument.

As illustrated above, we believe that more process is due. Specifically, the interests of potential refugees in life and dignity demands access to free counsel and that therefore § 1362 is unconstitutional. This right to counsel should attach before the initiation of proceedings before an immigration judge regardless of whether the non-citizen applied for relief affirmatively or defensively. This is the most cost efficient way in which to optimize the benefits of legal counsel.[150]

Individuals who are granted asylum affirmatively by an immigration officer will never have the need for free legal counsel to adjudicate their claims. Furthermore, this prevents the need for creating a new position to screen colorable asylum claims from patently frivolous claims. Instead, most affirmative claims are likely to be at least colorable because of the risks

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[146] ABA Resolution 107(a) (Feb. 2006), *available at* http://www.abanet.org/adminlaw/midyear/2006/107a.pdf.
[147] INA § 292, 8 U.S.C. § 1362 (2006).
[148] ABA Resolution 107(a), *supra* note 146, at 2.
[149] *See, e.g.*, David Ngaruri Kenney & Philip G. Schrag, ASYLUM DENIED: A REFUGEE'S STRUGGLE FOR SAFETY IN AMERICA 314 (2008); Erin Craddock, Note, *Tortuous Consequences and the Case of Maher Arar: Can Canadian Solutions "Cure" the Due Process Deficiencies in U.S. Removal Proceedings?*, 93 Cornell L. Rev. 621, 645 (2008) ("[W]hen the alien faces removal to a country that engages in torture and, after removal, the alien is in fact tortured, the cost of error is very high.").
[150] *But see* Schoenholtz & Jacobs, *supra* note 17, at 745 (indicating that it may be more cost effective to provide counsel before the initiation of credible fear interviews because testimony during those interviews directly impacts the rest of the litigation).

associated with non-citizens making themselves known to authorities. The risk of deportation and permanent exclusion is a significant deterrent to prevent wholly frivolous claims.

Furthermore, for both affirmative and defensive proceedings, providing counsel to indigent petitioners will reduce the number of claims that lack merit and thereby increase the efficiency of the system. First, an attorney can indicate to a non-citizen whether the non-citizen has a valid claim for relief. Individuals who do not have a valid claim may submit themselves to voluntary departure, thereby eliminating the costs associated with prolonged detention during appeals processes.

Therefore, this not only improves the efficiency of the judicial arm of the immigration system, but also the detention system. Research from "know your rights" presentations studies indicates that individuals who are informed that they have no right to relief often opt for voluntary departure.[151] Having an attorney analyze individual claims will not only further improve efficiency in this manner, but will have an additional benefit. By individually analyzing claims, attorneys will ensure that potentially meritorious claims are effectively presented by gathering probative evidence and presenting it in an organized manner, thereby minimizing the need protracted appeals of erroneously decided meritorious claims.

Second, attorneys have an ethical duty not to file frivolous claims. ABA Model Rule of Professional Conduct 3.1 states that attorneys "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . . ."[152] An action is frivolous if a competent lawyer would believe that the claim is "so lacking in merit that there is no substantial possibility that the tribunal would accept it."[153]

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[151] *Id.*
[152] MODEL RULES OF PROF'L CONDUCT R. 3.1 (2002), *available at* http://www.abanet.org/cpr/mrpc/rule_3_1.html.
[153] Restatement of Ethics § 110, cmt. D (2000); GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 664 (4th ed. 2005).

Moreover, providing counsel will eliminate the need for Immigration Judges to grant repeated continuances while petitioners attempt to seek counsel. Most Immigration Judges will grant continuances because they prefer claims to be presented by counsel.[154] Therefore, not only will claims be presented more expeditiously, but they will also be presented with greater accuracy by improving ease of determining whether the petitioner qualifies for relief.

V. Conclusion

We believe that increased procedural safeguards, specifically the availability of free legal representation, is mandated by due process in immigration proceedings involving claims for asylum, restriction on removal, and relief under the Convention Against Torture. The stakes are high, and it is fundamentally unfair to ask an immigrant to navigate the complexity of the U.S. immigration system without the aid of counsel. Deportation, particularly when it is permanent, amounts to punishment. This article is neither meant to disparage those who have argued as much or suggest that the ABA is wrong to suggest that counsel is warranted in those proceedings, regardless of whether a court considers deportation punishment. Instead, we seek to set forth an additional reason why the Constitution requires Congress to provide additional due process protection – erroneous deportation may result in death.

Death penalty jurisprudence, particularly the notion that "death is different," provides a compelling, unexplored argument for increased procedural safeguards for refugees.[155] We believe that because of the stakes refugees face, they are among the best candidates for safeguards like guaranteed counsel. Moreover, death penalty jurisprudence already recognizes the need for increased protection when a litigant's life is on the line. Even though "death is

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[154] Schoenholtz & Jacobs, *supra* note 17, at 746.
[155] *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (explaining that "death is qualitatively different" than other forms of punishment).

different" is rooted in the Eighth Amendment's proscription of cruel and unusual punishment, the interest of the refugees and those facing the death penalty is often the same: life.

Moreover, courts have already held that numerous procedural protections are required based on this high stake. The courts, therefore, would not have to make an intellectual leap to find that the high stakes attendant to potential death warrant increased protection. The high stakes present in a refugee's hearing alone furnishes a sufficient reason for increased protection; courts need not find that deportation is punishment.[156] The inherent respect for human dignity upon which U.S. asylum and refugee law is based demands as much.

[156] *Cf.* LeTourner v. I.N.S., 538 F.2d 1368, 1370 (9th Cir. 1976); Mendel, *supra* note 138, at 216-23 (comparing deportation to other civil sanctions to which the court has extended the Ex Post Facto Clause); Hing, *supra* note 138, at 1902 (describing deportation as "double punishment" and "the final and most permanent punishment an individual can face"); Recent Development, *supra* note 138, at 456-58.