



## The Right to Counsel

There is no established right to counsel for noncitizens in removal proceedings, even though 86 percent of likely voters in the United States support the government providing an attorney for immigrants who cannot afford one.<sup>1</sup> Immigration proceedings have been described as death penalty cases adjudicated in traffic court settings.<sup>2</sup> And indeed, the vast majority of people facing deportation go through the immigration courts without an attorney, despite the legal and procedural complexity of these cases and the high stakes involved.<sup>3</sup> For detained adults generally—isolated in remote jails far from community and legal support—approximately 70 percent go unrepresented during their removal proceedings.<sup>4</sup> Even particularly vulnerable populations, including children, asylum seekers, and people who speak little to no English, are not guaranteed legal representation.

No person should be required to navigate incredibly complex, hyper-technical immigration laws—described by one federal court as “second [in their complexity] only to the Internal Revenue Code”<sup>5</sup>—without legal representation. Our immigration system operates as a conveyor belt of mass deportations, rather than a system that upholds justice and due process.<sup>6</sup> The Trump administration’s relentless attacks on due process and on immigrants writ large have further undermined any semblance of justice in our immigration system, making it even more urgent to provide counsel for all indigent immigrants in removal proceedings.

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<sup>1</sup> Ingrid Eagly and Steven Shafer, “Access to Counsel in Immigration Court,” *American Immigration Council*, Sept. 28, 2016; <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>; Kate M. Manuel, “Aliens’ Right to Counsel in Removal Proceedings: In Brief,” Congressional Research Service, March 17, 2016, <https://fas.org/sgp/crs/homesec/R43613.pdf>.

<sup>2</sup> Sarah Stillman, “When Deportation is a Death Sentence,” *The New Yorker*, January 8, 2018, <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence>.

<sup>3</sup> For example, for the last decade, for those who are detained, around 70%-80% are unrepresented. “State and County Details on Deportation Proceedings in Immigration Court,” TRAC Immigration, <https://trac.syr.edu/phptools/immigration/nta/>.

<sup>4</sup> Kica Matos and Helen Gym, “One Big Thing Cities Can Do on Immigration,” *Bloomberg CityLab*, October 26, 2020, <https://www.bloomberg.com/news/articles/2020-10-26/one-big-thing-cities-can-do-to-protect-immigrants>; see also TRAC data, <https://trac.syr.edu/phptools/immigration/nta/> (for the last decade, for those who are detained, around 70%-80% are unrepresented).

<sup>5</sup> *Hernan Patricio Castro O’Ryan v. U.S. Department of Immigration and Naturalization*, 847 F.2d 1307, (9th Cir. 1987), <https://law.resource.org/pub/us/case/reporter/F2/847/847.F2d.1307.86-7502.html>.

<sup>6</sup> The few courts to consider the question have strongly suggested that due process at least sometimes requires counsel in removal proceedings. See, e.g., *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6th Cir. 1975) (“Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government’s expense. Otherwise, ‘fundamental fairness’ would be violated”). However, the federal courts have read the immigration statute’s jurisdictional provisions to require *unrepresented* individuals to raise and preserve their claims for counsel on an individualized basis, while also declining to resolve counsel claims when presented individually. These rulings have impeded efforts to obtain systemic remedies through the courts. See *JEFM v. Lynch*, 837 F.3d 1026 (9th Cir. 2016) (holding 8 U.S.C. 1252(b)(9) foreclosed class action arguing children are entitled to appointed counsel); *ASAP v. Barr*, 409 F. Supp. 3d 221 (S.D.N.Y. 2019) (same, for claim that unrepresented children and families ordered removed in absentia could not be removed without procedures permitting them to file a motion to reopen). Cf. *CJLG v. Sessions*, 923 F.3d 622 (9th Cir. 2019) (en banc) (declining to resolve child’s claim for counsel, and instead deciding on other grounds); see also *id.* at 629 (Paez, J., concurring) (opining that the due process clause requires appointed counsel for children in removal proceedings).

Legal counsel dramatically improves an individual's chances of successfully exercising the rights and options provided in the immigration laws. Data indicates that only 5 percent of those who obtained relief from deportation between 2007 and 2012 managed to do so without formal representation, even with various initiatives to provide legal advice short of full-scope representation.<sup>7</sup> Representation also improves efficiency in the courtroom; noncitizens, with the help of counsel, are more likely to understand the process, comply with court appearances, and file necessary documents in a timely manner, thereby enabling their cases to move more quickly. Without representation, noncitizens are often unable even to file in immigration court the papers that are necessary to seek asylum or other forms of available relief.<sup>8</sup> In short, there can be no substitute for meaningful representation.

Some government-funded programs provide counsel to limited populations. The National Qualified Representative Program (NQRP) provides appointed legal counsel to detained immigrants who are found incompetent to represent themselves because of a serious mental disorder.<sup>9</sup> This program, which was created in response to litigation by the ACLU and partners, operates in only a handful of states.<sup>10</sup> The Office of Refugee Resettlement (ORR) also operates counsel programs throughout the country that provide legal representation to children who were or are detained in ORR custody.<sup>11</sup>

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<sup>7</sup> Karen Berberich, Annie Chen, Corey Lazar, and Emily Tucker, "The Case for Universal Representation," Vera Institute of Justice, December 2018, <https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1>.

<sup>8</sup> "With the Immigration Court's Rocket Docket Many Unrepresented Families Quickly Ordered Deported," TRAC Immigration, October 18, 2016, <https://trac.syr.edu/immigration/reports/441/>.

<sup>9</sup> Gregory Pleasants, "National Qualified Representative Program," Vera Institute of Justice, 2020, <https://www.vera.org/projects/national-qualified-representative-program/learn-more>. (Noting that "the NQRP is the first program in the United States to provide appointed legal representation at the federal government's expense to a specific vulnerable population facing deportation" and that it is operated by the Vera Institute of Justice, which serves as a government contractor to set up program services and provide training, support, and analysis).

<sup>10</sup> See *Franco-Gonzalez v. Holder*, [CITE] <https://www.aclu.org/legal-document/franco-gonzalez-v-holder-order?redirect=immigrants-rights/franco-gonzales-v-holder-order> (class action lawsuit that secured protections for detained immigrants with mental and developmental disabilities); see also Esha Bhandari, "Historic Decision Recognizing Right to Counsel for Group of Immigration Detainees," ACLU, April 24, 2013, <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/historic-decision-recognizing-right-counsel>. Note that the government is required to appoint counsel only after an individual is found not competent to represent themselves.

<sup>11</sup> In August 2017, the Trump administration ended the justice AmeriCorps (jAC) Legal Services for Unaccompanied Children Program. The program, which began in January 2015, used the AmeriCorps service model to provide legal services by attorneys and paralegals for children under the age of 16 who were released from federal custody. The Vera Institute of Justice evaluated the program for the Department of Justice, which administered the program with the Corporation for National and Community Service (which operates AmeriCorps). The evaluation found the program increased efficiency and appearance rates in immigration court. See "Summary of the justice AmeriCorps Legal Services for Unaccompanied Children Program," American Bar Association Commission on Immigration, 2018, [https://www.americanbar.org/groups/public\\_interest/immigration/resources/justice-ameri-corps-legal-services-for-unaccompanied-children-pro/](https://www.americanbar.org/groups/public_interest/immigration/resources/justice-ameri-corps-legal-services-for-unaccompanied-children-pro/) and Laura Simich, "Evaluation of justice AmeriCorps Legal Services for Unaccompanied Children Program," Vera Institute of Justice, 2020, <https://www.vera.org/projects/evaluation-of-justice-ameri-corps-legal-services-for-unaccompanied-children-program/overview>.

Finally, states<sup>12</sup> and localities<sup>13</sup> are increasingly pursuing programs and legislation to fund appointed counsel.<sup>14</sup> These patchwork programs, while meaningful for those who are served, do not provide the comprehensive solution due process requires.<sup>15</sup>

### **Meaningful Access to Counsel Outside the Courtroom**

There are also contexts outside of court where the assistance of counsel is necessary to uphold civil liberties, but the government affirmatively impedes access to counsel.<sup>16</sup> Fair treatment requires that individuals have the right to consult and be accompanied by an attorney during any questioning by the government and at any critical stage of proceedings that could result in their exclusion or deportation.

But this basic principle is frequently violated. Immigration and Customs Enforcement (ICE) officers, for example, often do not allow attorneys (or consular officers) to be present during questioning at ICE field offices. In these settings, clients and attorneys are often unable to even call one another. ICE officers have also falsely told attorneys that their clients are not entitled to representation. ICE imposes these restrictions during custodial interviews, as well as questioning related to orders of supervision, stays of removal, and deferred action requests.

Similarly, Customs and Border Protection (CBP) officers question individuals without attorneys during secondary and deferred inspection proceedings even when those individuals have requested that counsel be present. CBP also imposes substantial penalties upon applicants for admission without any opportunity for a hearing. And such issues are not limited to ICE and CBP. At the Department of State, for example, consular offices have the discretion to ban attorneys from interviews and examinations of visa applicants.

### **Recommendations to the President**

The administration must recognize that basic concepts of fairness—as well as the government’s interest in the speedy and efficient operation of the immigration adjudication system—require the government to provide appointed counsel to individuals in proceedings who cannot afford legal representation. The president’s annual budget request to Congress must reflect a commitment to achieving the goals below.

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<sup>12</sup> Jennifer Stave, Peter Markowitz, Karen Berberich, Tammy Cho, Danny Dubbaneh, Laura Simich, Nina Siulc, and Noelle Smart, “Evaluation of the New York Immigrant Family Unity Project,” Vera Institute of Justice, November 2017, [https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy\\_downloads/new-york-immigrant-family-unity-project-evaluation.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-immigrant-family-unity-project-evaluation/legacy_downloads/new-york-immigrant-family-unity-project-evaluation.pdf).

<sup>13</sup> “SAFE Network Expands to 18 Communities Fighting for Legal Representation for Immigrants Facing Deportation,” Press release, Vera Institute of Justice, July 16, 2019, <https://www.vera.org/newsroom/safe-network-expands-to-18-communities-fighting-for-legal-representation-for-immigrants-facing-deportation>.

<sup>14</sup> See generally Emily Tucker et al., “Building the Movement,” Vera Institute for Justice, May 2020, <https://www.vera.org/advancing-universal-representation-toolkit/building-the-movement>.

<sup>15</sup> Mazin Sidahmed, “It’s Like an Automatic Deportation if You Don’t Have a Lawyer,” *The New York Times*, Aug. 13, 2019, <https://www.nytimes.com/2019/08/13/opinion/facing-the-injustice-of-immigration-court.html?fbclid=IwAR2aPD1eOjfvex5QoeSGmi641Yz0jDHPHYnd8gPpawrE42xRAeVduDN894>.

<sup>16</sup> See e.g., “Behind Closed Doors: An Overview of DHS Restrictions on Access to Counsel,” American Immigration Council, American Immigration Lawyers Association, and the Center for Immigrants’ Rights at Pennsylvania State University’s Dickinson School of Law, May 2012, <https://www.americanimmigrationcouncil.org/research/behind-closed-doors-overview-dhs-restrictions-access-counsel>.

### *First 100 Days*

1. Appoint counsel for vulnerable populations. Until the federal government provides counsel to every indigent individual facing removal:
  - The Executive Office for Immigration Review (EOIR) should issue a memorandum to all immigration judges recognizing their authority to appoint counsel for vulnerable populations and others who, in the judge's discretion, the judge believes to be vulnerable individuals. Vulnerable populations should include, at minimum, detained individuals, children ages 21 and younger, individuals with mental disabilities (not limited to those who are detained and found to have serious mental disorders), asylum seekers, and others with particular vulnerabilities, whether or not they are detained.
  - EOIR should issue policy guidance advising immigration judges to institute safeguards, including termination, administrative closure, or suspension of removal proceedings in such cases where a vulnerable individual is not represented by legal counsel.
2. Clarify the definition of "unaccompanied" for purposes of appointing counsel for children. DOJ, ORR, and the Department of Homeland Security (DHS) should issue binding memoranda clarifying that 1) an "unaccompanied child" for purposes of 6 U.S.C. 279 includes any child who is encountered outside the company of their parents, including at the time of their apprehension, the time they appear in removal proceedings, or at any other point; 2) as soon as possible after designation as "unaccompanied," all such children must be appointed counsel in their removal proceedings; and 3) for the purposes of counsel appointment, the designation as "unaccompanied" should follow the child through the entirety of the child's removal proceedings, including Board of Immigration Appeals (BIA) review.
3. Forbear from proceeding with removal charges against any individual described above without counsel: Where the government is unable to provide counsel for any individual described above, it should forbear from pursuing removal proceedings until such time as it can provide counsel.

### *Beyond the First 100 Days*

1. The attorney general should issue a directive on counsel that does the following:
  - Affirms it is the federal government's responsibility to guarantee and provide legal counsel to every noncitizen facing deportation who cannot afford counsel and instructs immigration judges not to move forward with removal proceedings for any unrepresented respondent.<sup>17</sup> Judges should consider a range of procedural safeguards in order to ensure that individuals are not required to proceed without counsel, including administratively closing the case, terminating proceedings, and granting continuances.

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<sup>17</sup> This proposal would not effectively halt all deportation cases involving unrepresented people. For cases in which the administration believes deportation is a priority, it must simply appoint counsel before proceeding with the case. That approach would give the government greater control over its docketing priorities while simultaneously ensuring that the cases that do proceed go forward with greater fairness and efficiency.

- Creates a program—such as a national public defender system or expansion of an existing program—to provide appointed counsel for all indigent persons in immigration proceedings.
2. ICE should provide affirmative guidance regarding individuals without counsel. ICE should issue a directive to trial attorneys affirming that the government will not proceed with removal cases in which an indigent individual is unrepresented, consistent with the attorney general’s directive. This includes not requiring pro se individuals to plead to the allegations in the Notice to Appear.
  3. ICE should allow for reopening of removal proceedings for individuals who were not represented by counsel and ordered removed *in absentia*. The ICE Office of the Principal Legal Advisor should issue guidance stating that the office would support a motion to reopen for any individual ordered removed *in absentia* and not represented by counsel at the time the removal order was entered.
  4. DHS and the Department of State should provide a presumptive right of access to counsel. The federal government should guarantee the right of a noncitizen to have an attorney present contemporaneously to make legal arguments when there is a distinct and identifiable legal interest to protect, including petitioners or applicants seeking a benefit or avoiding imposition of penalties under immigration law. DHS and the Department of State should provide a presumptive right of access to counsel and provide training and written guidance for every officer and contractor regarding the treatment of attorneys and emphasize an atmosphere of mutual respect between government officials and attorneys. This includes the following:
    - CBP providing written guidance to agents to allow for the presence of counsel in person or, if necessary, by electronic means during secondary and deferred inspection proceedings, and to provide noncitizens the opportunity to consult with counsel before being subjected to an immigration penalty under the Consequence Delivery System, lateral repatriation, expedited removal, or other fast-track removal procedures, including voluntary departure.
    - ICE providing written guidance to officers to permit counsel to be present during any ICE custodial questioning, including but not limited to post-arrest interrogation and interviews at ICE field offices.
    - The Department of State providing written guidance that requires consular officers to recognize the right to counsel and standing of individual and organizational petitioners and applicants for immigrant and nonimmigrant visas.