

## II. Ensuring Access to Counsel

### Recommendations

- Government-funded counsel should be provided to all indigent individuals in removal proceedings before the immigration courts and before the Board of Immigration Appeals, no later than at the first Master Calendar hearing.
- Legal representation, including appointed counsel, should be provided to unaccompanied children and to mentally ill and disabled persons in *all* immigration processes and proceedings.
- The government should rescind policies and executive actions that impede meaningful access to counsel for noncitizens in removal proceedings.
- Congress should repeal the “at no expense to the government” restriction in 8 U.S.C. § 1362 (INA § 292).
- The Legal Orientation Program should be expanded to cover all detained individuals facing removal from the United States.
- Congress should repeal restrictions prohibiting civil legal service providers funded by the Legal Services Corporation from serving undocumented immigrants.

A universal right to counsel and broad access to legal information should be essential components of the U.S. immigration system. Government authorities should prioritize legislative and administrative actions to advance these goals. Counsel is particularly important for vulnerable populations who are not competent to represent themselves in immigration proceedings, such as children and the mentally ill or disabled. Recommendations for legal representation for unaccompanied children are discussed in greater detail in Section V.

## A. Government-Funded Counsel for Indigent Immigrants in Removal Proceedings Is Essential to Due Process

The ABA is strongly committed to ensuring fair treatment and full due process rights for immigrants and asylum seekers under the nation's immigration laws and in accordance with the Constitution. ABA policy has consistently recognized the importance of access to counsel in removal proceedings where a lawyer's assistance is essential for a noncitizen to fully understand and effectively navigate the complexities of the U.S. immigration system. Government-appointed counsel for indigent persons who cannot afford a lawyer is a necessary step to achieving a more just, fair, and efficient immigration system.

The courts have long recognized that people placed in removal proceedings under section 240 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1229a, are entitled to due process protections.<sup>17</sup> One of the most important elements of due process is the right to be represented by counsel, particularly in complex proceedings that have severe consequences. Nearly a century ago, Justice Brandeis stated that removal can result “in loss of both property and life, or of all that makes life worth living.”<sup>18</sup> Removal proceedings present exceedingly high stakes: the potential loss of homes and livelihoods, permanent separation from U.S. citizen and lawful permanent resident (LPR) family members, banishment of a family's sole breadwinner, or even persecution, torture, or death.

The need for counsel cannot be overstated. Immigration law is often compared to the tax code in its degree of complexity, and it is often lawyers alone who are qualified to decipher the code and case precedents.<sup>19</sup> For those without counsel, it is exceptionally difficult to determine eligibility for waivers or defenses to removal, to comprehend complex statutes, and to navigate evolving case law. That difficulty is compounded for those with limited or no English proficiency. Unrepresented individuals in removal proceedings are inherently disadvantaged in an adversarial system in which the government is always represented by an experienced attorney.

Representation in removal proceedings is, arguably, at least as critical as it is in the criminal context,<sup>20</sup> yet to date minimal public funding is dedicated to representation of indigent immigrants. The momentum for public funding is growing, however, due to

increased immigration enforcement and a growing public awareness of the drastic impact of deportation on U.S. families and communities. In fact, recent polling found that an overwhelming majority of people in the United States (87%) support government-funded attorneys for people in immigration court.<sup>21</sup>

Individuals detained throughout the pendency of their removal proceedings face even more severe barriers to fairness and due process. Applications for relief from removal often require in-depth legal analysis, documentary evidence, sworn declarations and research on country conditions. Precisely prepared applications must be served on multiple parties and adhere to strict deadlines. These challenges are often insurmountable for detained immigrants without the resources to hire private counsel. Moreover, securing *pro bono* or lower-cost representation is more difficult for those in detention. Representation of detained individuals requires additional time and resources. Detained representation requires travel time to detention facilities, often located in remote areas hours away from major cities. Confidential communication with detained clients usually requires in-person visits, so even asking a simple question or obtaining a signature requires more time than for clients who are not detained. Representation of detained clients often also involves more complex issues, especially for those with criminal histories. It is thus no surprise that the rates of representation for detained individuals is significantly lower than for those not detained during their removal proceedings. In 2017, for example, only 30 percent of detained individuals were represented by counsel in removal proceedings, compared to 65 percent of non-detained individuals.<sup>22</sup>

Studies and individual examples consistently demonstrate the impact of representation on noncitizens' ability to exercise their legal rights under our immigration laws. For example, the ABA ProBAR project recently found *pro bono* counsel for an individual in Texas who was believed to be an LPR with a non-violent criminal history and had been detained for six months. Upon reviewing his case, the *pro bono* attorney realized that according to the Child Citizenship Act, her client actually qualified as a U.S. citizen. After providing the relevant documentation to Immigration and Customs Enforcement (ICE), this individual was quickly released from detention and his removal proceedings were terminated. Without counsel, this individual would likely have been unlawfully deported *even though he was a U.S. citizen*. A comprehensive national study in 2015 revealed that those who were represented in removal proceedings were between three-and-a-half and ten-and-a-half times more likely to succeed than those without counsel. The disparities in success rates were due to custody status, with representation having the most significant impact for those who were detained. *Those detained throughout their removal proceedings were more than 1,000 percent more likely to succeed with counsel than without.*<sup>23</sup> This study also demonstrated that detained individuals were much more likely to be released from detention once represented by counsel than unrepresented individuals.<sup>24</sup>

Universal representation of indigent immigrants in removal proceedings also maintains the integrity of the immigration system. Proceedings are more likely to comport with due process and basic notions of fairness and are often more efficient. Immigration judges prefer adjudicating cases of represented individuals.<sup>25</sup> Represented individuals with no defenses to removal are likely to accept removal orders more quickly than those who may

spend months trying unsuccessfully to find counsel and applying for waivers or defenses to removal for which they are ineligible. Moreover, those with attorneys are more likely to appear in immigration court throughout their proceedings. A recent study found that 85 percent of *in absentia* orders of removal, issued when individuals fail to appear in immigration court, were for unrepresented individuals. The same study found that only four percent of final *in absentia* removal orders, not including those that are rescinded, are for individuals represented by counsel.<sup>26</sup>

Universal representation also addresses racial inequities inherent in the U.S. immigration system. Decades of over-policing of communities of color, coupled with overly harsh immigration laws and increased enforcement efforts against those with criminal histories, have caused significantly disproportionate impacts on immigrants of color. Criminal convictions often result in mandatory detention of those in immigration proceedings, resulting in disproportionate numbers of people of color in detention with restricted access to counsel. Universal representation negates some of these racial inequities by providing counsel to all indigent individuals, regardless of the complexity of their cases or prior contacts with the criminal justice system.

Government-funded representation also produces economic benefits that should not be overlooked. For example, New York's publicly funded legal representation program resulted in an estimated \$2.7 million annual tax revenue increase, due to the increased number of immigrants who won their immigration cases and were granted or maintained work authorization as a result. These immigrants were then able to work, pay taxes and contribute to their communities' economies.<sup>27</sup>

Critics of universal representation for indigent immigrants in removal proceedings have pointed to 8 U.S.C. § 1362 (INA § 292) as prohibiting government funding for representation.<sup>28</sup> The ABA has long called for, and continues to call for, the repeal of the "at no expense to the government" restriction in Section 292. It is widely held that Section 292 does not prohibit government-funded counsel, it merely relates to an individual's ability to claim an entitlement or right to appointed counsel.<sup>29</sup> A contrary interpretation would be inconsistent with the Executive Office for Immigration Review's (EOIR) National Qualified Representative Program (NQRP), which, as a result of the *Franco-Gonzalez v. Holder*<sup>30</sup> litigation, pays for legal representation. Through the program, noncitizens with serious mental incapacities are appointed counsel in their immigration cases so that they may "meaningfully participate" in their removal proceedings. The ABA's Immigration Justice Project in California is a NQRP provider. Although *Franco* class membership is particular to individuals deemed to have a serious mental disorder, the language of the holding notes that Section 292 does not prohibit outright the provision of counsel at government expense. Even without the repeal of the relevant language in Section 292, government funding of counsel for indigent individuals in immigration proceedings is not only permissible, but essential to an immigration adjudication system that comports with this nation's values of fairness and due process.

## B. The Right to Counsel Requires Meaningful Access to Counsel

As discussed above, those seeking asylum and other immigration protection in the U.S. have a right to be represented by a lawyer at their own expense or through *pro bono* assistance. But repeated executive branch actions in the past few years have rendered that right meaningless for too many. For example, the practice of “metering,” which restricts entry at border ports of entry, and the “Migrant Protection Protocols” (MPP) that force individuals to wait in Mexico for their U.S. removal hearings, both subject asylum seekers to conditions and locations which make it very difficult, if not impossible, for them to secure and consult with counsel. Virtual hearings for those subject to MPP are often held in “tent courts” in remote border areas. Limited attorney-client meeting areas in the tent courts and restrictive rules on pre-and post-hearing attorney-client meetings serve to prevent lawyers from consulting with their clients and to further impede meaningful exercise of the statutory right to counsel. Likewise, the effect of “expulsion” policies (immediately rejecting migrants—including, during the pandemic, unaccompanied children—at the border, with very limited or no screening or adjudication) has similar consequences. There are other problems that arise from such policies, discussed elsewhere in this paper, but given the difference legal representation can make in the outcome of any immigration case, the chilling effect on the right to assistance of counsel is among the most serious and disturbing consequences of these policies.

## C. The Legal Orientation Program Is a Critical Safeguard and Should Be Expanded

Until universal representation is achieved, one important safeguard to advance justice, fairness and efficiency in the immigration system is the Legal Orientation Program (LOP), funded by EOIR and administered by the Vera Institute of Justice (Vera).

In 1998, EOIR initiated a “Legal Rights Presentation” pilot project in three locations. The ABA’s South Texas Pro Bono Asylum Representation Project (ProBAR) was one of the legal service programs selected to implement this 90-day pilot at the Port Isabel Service Processing Center in Los Fresnos, Texas. The positive findings from that pilot program resulted in today’s federally funded Legal Orientation Program. Today, LOP operates in 43 immigration detention facilities through a network of 18 legal service providers, and includes a national LOP telephonic Information Line.<sup>31</sup> The LOP program assists detained immigrants by providing them with information on their legal rights and responsibilities, the immigration court process, and options for release from detention. The four major elements of the LOP program are group legal rights presentations, individ-

ual orientations, self-help workshops, and referrals to *pro bono* attorneys where available. Today, the program reaches approximately 55,000 detained individuals annually<sup>32</sup> by providing them with critical, multilingual information. While LOP is not a substitute for legal representation, it is an effective way to provide legal information to unrepresented detained individuals, thereby improving fairness and making proceedings more efficient. Unfortunately, a series of actions in recent years threatens to drastically undermine the scope and efficacy of the LOP program.<sup>33</sup> It is critically important that EOIR ensure continued access to the full scope of existing services. EOIR also should expand LOP to reach all detained individuals facing removal from the United States.

Studies demonstrate that the LOP program facilitates faster case processing and saves taxpayer dollars. In a 2012 report to the U.S. Senate Appropriations Committee, EOIR analyzed data on detention costs and duration of detention for individuals who had received LOP services compared with those who had not. EOIR concluded that detained LOP participants completed their immigration court proceedings an average of 12 days faster than those who did not participate in the LOP.<sup>34</sup> EOIR reported that ICE data showed these same LOP participants spent an average of six fewer days in ICE detention than those who did not participate.<sup>35</sup> Furthermore, in a 2018 updated analysis of the LOP program, Vera found again that LOP is associated with faster case completions and more case closures at the initial master calendar hearing than comparable non-LOP cases.<sup>36</sup>

## D. Civil Legal Services Providers Should Be Allowed to Provide Legal Representation to all Persons Who Otherwise Qualify for Their Services, Regardless of Immigration Status

Civil legal services programs funded by the Legal Services Corporation (LSC) are the primary source of legal assistance for indigent and low-income persons across the nation. In the absence of universal representation for those in the immigration system, immigrants might seek lawyers at LSC programs, but this critical resource is not available to many who seek immigration relief, including asylum seekers and unaccompanied children. With few exceptions, LSC funds may only be used to represent U.S. citizens, lawful permanent residents, and refugees.<sup>37</sup> In 1996, Congress extended the “alien restrictions” to all funds received by an LSC grantee, including those from nongovernmental sources.<sup>38</sup> Prior to that change, many legal services programs used foundation grants and other non-LSC funds to represent clients in need without regard to their citizenship or immigration status. This option is no longer available under current law.<sup>39</sup> Nonetheless, even with current restrictions, LSC-funded civil legal services programs can still represent lawful permanent residents, H2A agricultural workers, H2B forestry workers, and victims of battering, extreme cruelty, sexual assault or trafficking.<sup>40</sup> LSC-funded programs—as well as non-LSC-funded programs—should consider representing undocumented immigrants, where

resources permit and consistent with relevant legal restrictions, to expand representation critical to obtaining specialized forms of immigration relief available to such persons, such as VAWA, U and T visas for victims of domestic violence, trafficking and other criminal activity.

Pro bono lawyers, along with religious-based and other nonprofit organizations, have worked hard to fill the void but simply do not have sufficient resources to meet the needs generated by the current expansive enforcement regime. Congress should repeal the restrictions on LSC-funded grantees so that, at a minimum, legal services organizations are not restricted from using nongovernment funds when they have the time and resources available to represent immigrants regardless of their status.