

TESTIMONY IN SUPPORT OF SENATE BILL 317
Right to Counsel in Immigration Proceedings
January 27, 2021

Chair Smith, Vice Chair Waldstreicher, and members of the Judicial Proceedings Committee,

I write to you to express my unequivocal support of SB 317, which ensures that all Maryland residents facing deportation have legal representation. I express my support as both a long-time Maryland resident (District 13) and, as a recently retired Immigration Judge who served for over 20 years.

All people in the United States are guaranteed by our Constitution the right to due process of law regardless of whether they are citizens or noncitizens. The process that is due to noncitizens who find themselves before an Immigration Court is set forth in the federal immigration statute. However, unlike laws that provide for the appointment of legal counsel for criminal defendants, the immigration statute does not provide for appointed counsel for those in immigration court proceedings. While immigration proceedings are correctly characterized as being civil in nature, the consequences for those in such proceedings can be just as serious as the consequences for a criminal defendant: potential separation from family and community – in the case of a noncitizen, perhaps for life.

Yet noncitizens without legal representation find themselves in this position every day. No person should be denied access to justice simply because they are poor. The only way to ensure that noncitizens are afforded due process in immigration proceedings is to provide them with competent legal representation. Without representation, there is simply no other way a noncitizen can effectively navigate an extremely complicated legal specialty that has been described by one federal court as being a “labyrinth” which is “second only to the Internal Revenue Code in complexity.”¹ Notably, one United States Supreme Court Justice has commented on the complexity and “intricacies” of immigration law noting that even some lawyers have difficulty navigating the system because as he observed, “. . . nothing is ever simple with immigration law....”²

Impediments to due process begin even before first court appearances for those without legal counsel. It is important to note that all applications made to the Court, including applications for asylum, must be filled out in English. In addition, all foreign documents filed in support of those applications must be translated into English and must be accompanied by a specifically worded certification of translation. Applications that are not completed in English and documents that have not been translated and appropriately certified are not considered by the Court and are likely rejected as deficient filings before they are even presented to a judge. There is no requirement

¹ *Castro-O’Ryan v. INS*, 847 F.2d 1307 (9th Cir. 1987).

² *Padilla v. Kentucky*, 559 U.S. 356 (2010)

that the government provide assistance to people who do not speak, read, or write English. Consequently, unrepresented noncitizens who are not fluent in English may not be able to access the assistance they need to pursue applications for relief. This is particularly the case when these individuals are detained.

Immigration Judges have a duty to inform noncitizens who appear without an attorney of “apparent eligibility” for relief, including the opportunity to apply for asylum if they express a fear of returning to their country.³ Some Judges may seek input from the attorney for the Department of Homeland Security; the person who is fighting to remove the immigrant from this country, in order to identify any eligibility for relief from removal or to otherwise identify potential eligibility for legal immigration status. The government attorney’s role and mandate are completely inconsistent with that task. Despite a judge’s best efforts, without legal counsel, it is simply not possible to ensure that the immigrant has had all of the relevant facts about his or her case presented and that all legal defenses to removal have been explored, explained, and understood. Judges can advise but they cannot advocate.

I know from my experience that it is simply not possible that people appearing before judges without counsel have the same chance of relief as those appearing with counsel. National studies have borne this out; people with representation are 10.5 times more likely to be successful in their immigration court cases than unrepresented people⁴. I also know that my courtroom ran more efficiently when all parties were represented; applications and other documents were properly filed; relevant facts and arguments were presented by both parties; requests to delay hearings decreased. I can state unequivocally that the presence of competent counsel representing *both* parties yielded better decisions and more efficient and just outcomes.

To ensure due process, all immigrants should have access to counsel, including those who have a history with the criminal justice system. Facts bear out the increasing criminalization of immigration over the years and the increased popularity of scapegoating, disparaging and demonizing immigrant populations. This trend, combined with the sad fact that people of color have been historically over-policed and prosecuted in this country means that Black and brown noncitizens find themselves disproportionately subjected to immigration proceedings for even minor criminal offenses. This painful legacy of injustices, including racial profiling, has led to the unfair and uneven enforcement of our nation’s immigration laws. As a result, for many of these people, the prospect of deportation from the United States is a real possibility because the criminal justice system has acted, for years, as a direct funnel to the immigration system.⁵

It must be emphasized that not everyone who is placed in immigration court proceedings is eligible for relief from deportation such that concerns over providing criminal immigration violators with representation should not influence the decision to ensure due process of law by providing legal counsel for *all* noncitizens in immigration court proceedings. Denying the benefit of legal counsel to those without criminal histories to ensure that those with criminal histories do not benefit is as unfair as it is misguided. Misguided because concerns over providing improper favor to those

³ 8 C.F.R. § 1240.11(a)(2); 124011(c)

⁴ Berberich et al., “Advancing Universal Representation: A Toolkit,” The Vera Institute of Justice, December 2018, available at:

<https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1>

⁵ Tanvi Misra, *The Rise of ‘Crimmigration’: Law Professor César García Hernández Talks About How America Built a Legal System that Targets Immigrants For Profit – and How to Take it Down*, BLOOMBERG CITYLAB, (Sep. 16, 2016, 2:01 PM), <https://www.bloomberg.com/news/articles/2016-09-16/c-sar-garc-a-hern-ndez-on-the-rise-of-crimmigration>.

with criminal histories are mitigated by strict federal immigration laws which in most cases preclude relief for most felons and sometimes bar relief even for sympathetic applicants with minor criminal histories. Immigration Judges are in the best position to determine who is eligible and worthy of relief and can make the best and fairest decisions in a hearing where the level playing field guaranteed by the Constitution exists.

Why provide legal counsel even to those for whom there is no relief from deportation? In my experience, the presence of legal counsel in such cases has served to prevent delayed resolution of cases. This is because people who hear from their own, trusted advocate that there is no application that they can make and no avenue for them to remain in the United States are far more likely to understand and to accept this reality quickly and are therefore prepared to accept an order of removal and to waive their right to appeal.

We all benefit from a just system that preserves faith in our legal institutions. Ensuring due process for all is the right thing to do. The time to do it is now.