

SPECIAL REPORT

## Lack of representation in removal proceedings: How today's legal infrastructure fails immigrants

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**Abstract** Legal representation makes a significant difference to the outcome of removal proceedings. Yet high percentages of both detained and non-detained immigrants do not have access to such representation. Some state and local governments have undertaken to increase access to *pro bono* legal representation for immigrants in these proceedings.

**Keywords:** *immigration, legal representation, removal proceedings*

As a young immigration attorney, one problem I see with today's legal infrastructure is the lack of access to legal representation for immigrants in removal proceedings. While noncitizens have the right to retain counsel at their own expense, if they cannot afford to hire an attorney, they must secure *pro bono* representation or proceed *pro se*. (8 U.S.C. § 1362) Immigration proceedings are civil; thus, there is no Sixth Amendment right to appointed counsel in immigration court. On average, approximately thirty-four percent of non-detained immigrants are unrepresented in removal proceedings. (Eagly & Shafer, 2015, p. 34) The percentage of detained immigrants without legal representation is even more staggering: eighty-six percent appear *pro se*. (Eagly & Shafer, 2015, pp. 32, 34) Immigration law is notoriously complicated. Unsurprisingly, *pro se* detainees achieve substantially worse outcomes in their removal proceedings at every stage than those who are represented.

Detainees with attorneys are ten-and-a-half times more likely to obtain immigration relief or have their removal proceedings terminated than unrepresented detainees. (Eagly & Shafer, 2015, p. 9) They also have a substantially better chance of bonding out of immigration detention. However, detained immigrants face unique challenges in securing representation. As a practical matter, detained immigrants are unable to work, and so are less likely to come up with the money to hire an attorney. Detained immigrants also have a harder time obtaining *pro bono* representation for a variety of reasons. For one thing, cases on the detained docket move much more quickly than non-detained cases, meaning there is less time to collect documents and testimony relevant to an application for relief. Detainees also face geographical limitations in retaining counsel, as they are often held in remote detention facilities, far from social service providers and attorneys.

Nonprofit organizations that provide free or low-cost immigration legal services often concentrate their resources on non-detained cases. From what I can tell, this is partially due to the unique challenges of representing detained immigrants (i.e., the fast pace of the detained docket, communication challenges, etc.). It may also be because nonprofits have typically had an easier time raising funding for legal representation of immigrants without criminal histories. I should note that not all immigrants who are detained have a criminal record. Although some immigrants are detained because of a criminal conviction or charge, others end up in immigration detention even though they have no criminal history. These individuals may be brought to the attention of immigration officials during an immigration

raid or even a routine traffic stop. Another reality is that the resources of nonprofits that provide free or low-cost immigration legal services are far outstripped by the demand for services.

There is at least one promising avenue on the horizon. Recently, New York State recognized the difficulty many immigrants face in obtaining legal representation for their removal proceedings and launched the Liberty Defense Project, the nation's first public-private immigrant legal defense initiative. The Liberty Defense Project aims to increase access to *pro bono* immigration legal services and alleviate the strain on nonprofits in the state of New York. It is designed to bring this about through a variety of initiatives. For example, it will address the geographical disparity of legal services outside of New York City by funding the placement of attorneys and law students in areas with high immigrant populations and limited access to legal resources. New York's Liberty Defense Project was launched in 2017. Several cities and states are in the process of designing and implementing their own programs to increase access to *pro bono* legal representation for immigrants in removal proceedings.

## References

8 U.S.C. § 1362

Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. Rev. I, 34 (2015).