

*The below paper is part of a collection of papers that have been prepared as part of a process, organized jointly by the Center for Migration Studies of New York (CMS) and the Zolberg Institute on Migration and Mobility at the New School, to identify ways to strengthen the US immigration and refugee protection systems through administrative action. Additional papers in this collection can be read on the Zolberg Institute's website.*

## **Strengthening the U.S. Immigration System through Legal Orientation, Screening and Representation: Recommendations for a New Administration**

Donald Kerwin

August 2020

### **Executive Summary**

This paper highlights the importance of legal orientation, screening, and representation to the U.S. immigration system. It proposes that a new administration facilitate legal representation in order to establish a fairer and more efficient removal adjudication system and to place more immigrants on a path to permanent residence and citizenship. As is well-documented, legal assistance can:

- Improve the ability of immigrants to identify and articulate their claims in removal proceedings and produce better-informed case outcomes.
- Increase the efficiency and contribute to the integrity of the removal adjudication system.
- Lead to better-prepared applications for immigration benefits, and thus a more just and efficient legal immigration system.
- Place more non-citizens on a path to permanent residence and naturalization by identifying their potential eligibility for immigration benefits or relief, and, in some cases, their existing U.S. citizenship.

Legal representation and expertise can also contribute to resolving some of the substantial problems that afflict the U.S. immigration system, such as lengthy court and asylum backlogs. In addition, it can identify and help to correct legal and factual errors by immigration adjudicators, and abuses by enforcement officers and private contractors.

The paper's first section describes federal legal orientation and assistance programs for non-citizens in removal proceedings. The second section discusses the need for large-scale legal screening and representation of U.S. undocumented residents, Deferred Action for Childhood Arrivals (DACA) recipients, and Temporary Protected Status (TPS) beneficiaries. Its third section examines the proliferation of universal representation programs—supported by states, localities and private funders—for non-citizens in removal proceedings before an immigration

judge, and in summary removal processes administered by the US Department of Homeland Security (DHS). The paper concludes with a series of administrative measures that a new administration could take in its first year to strengthen and expand legal representation. It also outlines longer-term policy recommendations that would require legislation.

## **Legal Orientation and Representation**

Several trends in U.S. immigration law and policy, accelerated by the Trump administration, underscore the need to invest in legal representation as an indispensable tool in promoting due process. These trends include:

- The immense growth in the size and sophistication of the U.S. immigration enforcement system (Meissner et al. 2013).
- The U.S. immigration system’s location in a homeland security agency.
- The expansion of summary, non-court removals (ACLU 2014).
- The diminished independence of immigration courts and judges (ABA 2010 and 2019).
- The Trump administration’s attempts to dismantle the U.S. asylum system (Aleinikoff 2019).
- The immense, privatized U.S. detention system, which continues to hold tens of thousands of immigrants during the pandemic.
- The constriction of relief from removal on equitable grounds (Kerwin 2018a).
- The steady drumbeat of attacks by the Trump administration on humanitarian and protection programs.
- The failure of the political branches of government over the last 25 years to establish a legalization program.

By statute, persons in removal proceedings enjoy a right to counsel, but “at no expense to the Government.”<sup>1</sup> A 1995 opinion by the Immigration and Naturalization Service (INS) General Counsel interpreted this provision to preclude a right to representation at government expense, but not to prohibit federal expenditures to “facilitate” representation.<sup>2</sup> A 2010 legal opinion from the Principal Deputy General Counsel of the Department of Homeland Security (DHS) found “no general statutory prohibition” on the use of discretionary funding to fund legal representation in removal proceedings, so long as Congress authorized it for this purpose.<sup>3</sup> Federal courts, Congress and past administrations have recognized that, in certain cases, as with mentally incompetent persons, due process requires legal counsel in removal proceedings, including government-funded counsel.<sup>4</sup>

---

<sup>1</sup> Immigration and Nationality Act (INA) §292.

<sup>2</sup> Memorandum from David Martin, Gen. Counsel, Immigration and Naturalization Service, to T. Alexander Aleinikoff, Exec. Assoc. Comm. Programs, Immigration and Naturalization Service (Dec. 21, 1995).

<sup>3</sup> Letter from David A. Martin, Principal Deputy Gen. Counsel, Office of the Gen. Counsel, U.S. Dep’t. of Homeland Sec., to Thomas J. Perrelli, Assoc. Att’y Gen., U.S. Dep’t. of Justice (Dec. 10, 2010)

<sup>4</sup> Similarly unaccompanied child migrants cannot effectively represent themselves in removal proceedings, but federal courts have not recognized a constitutional right to appointed counsel for children.

Legal representation has proven to be particularly important in the removal adjudication system, given the high stakes, the complexity of the law, the adversarial nature of the proceedings and the disparity in case outcomes between represented and *pro se* immigrants. A study of more than 1.2 million formal removal cases,<sup>5</sup> decided on the merits between 2007 and 2012, found that only 37 percent of immigrants overall and 14 percent of those in detention secured legal counsel, and that 98 percent of those without counsel were ordered deported (Eagly and Shafer 2015, 16, 32).<sup>6</sup> Detainees with legal representation were “ten-and-a-half times more likely to succeed, released respondents were five-and-a-half times more likely to succeed, and never detained respondents were three-and-a-half times more likely to succeed” than unrepresented detainees (ibid., 49).<sup>7</sup>

A seminal study of immigration judge decisions from January 1, 2000 to August 31, 2004 similarly found the grant rate in asylum cases with legal representation to be nearly three times higher than for those without legal counsel, and concluded that legal representation was “the single most important factor” in determining asylum case outcomes (Ramji-Nogales, Schoenholtz, and Schrag 2007, 340)<sup>8</sup>. Several other studies have reached similar conclusions (Kuck 2004; Kerwin 2005; Katzmann 2008; Markowitz et al. 2011).

Many studies have concluded that legal representation can also lead to better prepared cases, fewer delays, less extraneous testimony, greater focus on legally relevant issues, better-informed decisions, higher court appearance rates, fewer *in absentia* removal orders, less time in detention, and reduced costs (Ramji-Nogales, Schoenholtz, and Schrag 2007, 384; ABA 2010, 5-3; ABA 2019, 5-4; AIC 2018). Moreover, immigration judges and others “agree that the presence of counsel helps courts adjudicate cases more fairly, efficiently, and quickly” (ABA 2019, 5-4). Legal representation can also operate as check on legal errors by immigration adjudicators and abuses by immigration enforcement officers.

### *Existing Federal Programs*

Since 2000, EOIR’s Office of Legal Access Programs (OLAP) has administered several legal orientation, facilitation, and representation programs. Its three legal orientation programs have continued during the pandemic, albeit by using the telephone and video calling apps and services.<sup>9</sup> The pandemic has magnified the importance of these programs, given the increased fear, isolation and confusion it has engendered among persons in removal proceedings.

As of March 2020, EOIR’s signature initiative, the Legal Orientation Program, operated in 45 detention centers in 12 states. This program offers:

- Group orientation sessions on removal proceedings and relief from removal.
- Intensive individual orientation that focuses on the questions of self-selected participants.

---

<sup>5</sup> INA § 240.

<sup>6</sup> Counsel also increases release on bond and court appearance rates (Eagly and Shafer 2015, 71-75).

<sup>7</sup> The study defined a successful case outcome as one in which relief was granted or the case terminated.

<sup>8</sup> By extension, lack of legal representation can lead to low asylum approval rates for impoverished groups fleeing refugee-producing conditions. Low approval rates can, in turn, generate unwarranted suspicion regarding the claims of nationals from these countries.

<sup>9</sup> Immigration and Customs Enforcement (ICE) has announced that government-sponsored legal orientation can continue in detention centers, but presenters must undergo the same screening as detention staff and no more than four presenters are allowed in a detention facility at a time (ICE 2020).

- Self-help workshops for those who want to depart voluntarily, pursue relief from removal, or request release on bond.
- Referral of select participants to pro bono legal assistance, as necessary and available (EOIR 2020a).<sup>10</sup>

Detainees who are subject to (non-court) summary removal processes—i.e., the overwhelming majority of persons facing removal (ACLU 2014)—can also attend group orientation sessions.<sup>11</sup> In addition, a modest partnership between Immigration and Customs Enforcement (ICE) and EOIR—the Legal Orientation Program for Expedited Removal—offers orientation in expedited removal cases at two facilities.<sup>12</sup> And, the House Committee on Appropriations recently directed EOIR to expand the LOP to “at least one” Customs and Border Protection “processing facility”, with a particular focus on extending the program to “family units.”<sup>13</sup>

Since 2010, the Legal Orientation Program for Custodians of Unaccompanied Children (LOPC) has provided information to adult caregivers of unaccompanied children on court processes, scheduling issues, the consequences of failure to appear for removal hearings, relief from removal, and their responsibility to protect those in their custody.<sup>14</sup> EOIR also funds LOPC National Call Centers in New York City and Los Angeles to assist custodians in scheduling services and to extend the program’s coverage to custodians located far from its in-person services.

The Immigration Court Helpdesk (ICH) operates in five courts, with plans to expand to 13. This program provides information on legal remedies and resources to non-detained persons in removal proceedings.<sup>15</sup> It offers an important service, but does not provide coverage as comprehensive as the legal orientation program for detainees.

The National Qualified Representation Program (NQRP) provides legal counsel in removal proceedings for mentally incompetent persons who are referred by an immigration judge or the BIA.

The Recognition and Accreditation program oversees the process to “recognize” non-profit and federally tax-exempt organizations and to “accredit” their qualified non-attorney staff to

<sup>10</sup> The base budget for LOP and related programs is \$18 million.

<sup>11</sup> In summary removal processes, DHS enforcement officials act as police, prosecutors, and judges (Benson 2017; USCCB/MRS and CMS 2015; ACLU 2014). Of these processes, only stipulated removal requires even cursory immigration judge oversight (sign-off). These procedures make it more difficult to access legal representation.

<sup>12</sup> Non-citizens should be screened to ensure that they fit the criteria for these summary processes, as opposed to placement in removal proceedings before an IJ. Among these processes, administrative removal applies to non-LPR aggravated felons; reinstatement to those who return to the United States without authorization following a removal order; and expedited removal to persons who illegally entered and cannot produce proper documents.

<sup>13</sup> H.R. Rep No. 116-XXX, at 63 (2020).

[https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/July%209th%20report%20for%20circulation\\_0.pdf](https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/July%209th%20report%20for%20circulation_0.pdf)

<sup>14</sup> The Legal Orientation Program for Custodians of Unaccompanied Minors arose in response to the mandate set forth in Section 235 (c) (4) of the Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat. 5044 (Dec. 23, 2008), to “address the custodian’s responsibility to attempt to ensure the child’s appearance at all immigration proceedings and to protect the child from mistreatment, exploitation, and trafficking.” Its statutory basis gives the program a level of security that the LOP does not possess.

<sup>15</sup> In March 2020, EOIR informed its Immigration Court Helpdesk (ICH) providers that it plans to staff the program with federal employees, and no longer with non-profit, community-based contractors. This decision will likely result in less information and fewer services at each of the ICH sites, given the anticipated restrictions placed on non-attorney federal employees.

represent immigrants before U.S. Citizenship and Immigration Services (USCIS) (partial accreditation), and the immigration courts and BIA (full accreditation).<sup>16</sup>

Several studies over many years have documented and affirmed the benefits of these federal programs. An evaluation of a three-site “rights presentation” pilot project, which paved the way for the Legal Orientation Program found that rights/orientation sessions, led to:

- The provision of “consistent and standard legal information” to detainees.
- An increase in cases completed at master calendar (scheduling) hearings.
- No increase in case processing times.
- Increased representation rates.
- Reduced “anxiety” among detainees (Hinken 2000).

A 2008 evaluation of the Legal Orientation Program concluded that it:

- Created efficiencies: Immigration court processing times for detained program participants were an average of 13 days shorter than for detained non-participants;
- Ensured appearances: The court appearance rate of released program participants exceeded that of comparable groups, and unrepresented participants received seven percent fewer *in absentia* removal orders; and
- Prepared detainees: According to immigration judges, participants were more likely to identify relief for which they were potentially eligible, and less likely to pursue relief for which they did not qualify. The case outcomes of detained, *unrepresented* program participants who received intensive program services approximated those of persons with legal representation (Siulc et al. 2008, iv-v, 47-68).

The study also reported that detention facility staff believed that the program led to a reduction in behavioral problems by detainees (*ibid.*).

Building on these earlier reports, a 2012 “cost saving analysis” found that the Legal Orientation Program reduced the length of participants’ immigration court proceedings, and that participants “spent an average of six fewer days in ICE detention” than those in comparison groups (EOIR 2012).

Under the Trump administration, EOIR contractors from Booz Allen Hamilton produced analyses of the Legal Orientation Program that were starkly at odds with previous findings. Phase I of an “LOP Cohort Analysis,” covering FY 2013 to FY 2017, concluded, *inter alia*, that, compared to non-participants facing removal, LOP participants, (1) had longer detention stays; (2) were less likely to secure legal counsel; (3) achieved case outcomes that did not “vary greatly”; (4) had longer proceedings; and (5) had more hearings (EOIR 2018a). An addendum to this analysis found that program participants had longer stays in detention, resulting in higher detention costs (2019a). Phase II of this analysis found that LOP participants had “marginally

---

<sup>16</sup> Although not discussed in this paper, the recognition and accreditation program has generated crucial legal capacity for low-income immigrant communities, who would otherwise turn to unauthorized “notaries” for assistance. Over the last quarter century, the program has grown from roughly 300 recognized agencies and slightly more than 300 accredited representatives, to more than 900 recognized agencies located in every state in the United States and in Washington, DC, and nearly 2,000 accredited representatives (EOIR 2020c). The program has also witnessed a sharp rise in accredited representatives able to represent immigrants before USCIS and in immigration court.

longer hearings” and those who filed at least one application had “slightly longer” merits hearings (EOIR 2019b).

However, the Booz Allen studies are of questionable value as they do not seem to compare LOP program participants with non-participants who possess shared characteristics that would allow for meaningful analysis. Put differently, the analyses do not compare cohorts.

By contrast, a study covering the same period by the Vera Institute for Justice, EOIR’s Legal Orientation Program contractor, found that:

- A higher rate of LOP cases (than comparable non-LOP cases) were completed.
- LOP cases were completed in fewer average days.
- LOP cases were “more likely” to be completed at master calendar hearings.
- LOP cases were “more likely to complete on any given day in court than non-LOP cases.”<sup>17</sup>

The Vera Institute distinguished its analysis by emphasizing that it compared Legal Orientation Program cases with non-LOP cases in formal removal proceedings and with “similar characteristics,” such as “only adult cases, cases that started and ended on detained dockets, cases with no relief applications.”<sup>18</sup> In addition, it observed that the high volume of pending cases initiated from FY 2013 through FY 2017 made it difficult “to track an entire cohort of cases from their onset through to completion,” making “accurate comparative” analysis difficult.<sup>19</sup> As a result, Vera also developed a predictive analysis model for pending cases.

#### *The Trump Administration’s Response to Federal Legal Orientation and Assistance Programs*

The Executive Office for Immigration Review also reorganized via an interim rule, which went into effect on August 26, 2019.<sup>20</sup> Among other changes, the rule eliminated Office of Legal Access Programs in name, albeit not its “current” functions, and moved it from the Office of the EOIR Director, to EOIR’s Office of Policy, which was established in 2017.

According to the interim rule, the Office of Policy’s remit is to “issue operational instructions and policy, administratively coordinate with other agencies, and provide for training to promote quality and consistency in adjudications.”<sup>21</sup> The rationale for locating OLAP in the Office of Policy is to “ensure sufficient resources” for its programs, “more appropriately align those programs with their policymaking character,” “help coordinate OLAP’s work over adjudicatory components,” and provide for “better coordination of OLAP’s functions within the broader scope of EOIR’s adjudicatory operations.”<sup>22</sup> It describes this move as “consistent with OLAP’s role in effectuating EOIR’s Nationwide Policy regarding procedural protections for detained aliens who

---

<sup>17</sup> Memorandum from Nina Siulc, Vera Institute for Justice, to Steven Lang, EOIR, “Update on Performance Indicators: LOP Case Time Analysis” (April 1, 2018).

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Executive Office for Immigration Review, Organization of the Executive Office for Immigration Review, 84 Fed. Reg. 44537 (Aug. 26, 2019). <https://www.federalregister.gov/documents/2019/08/26/2019-18196/organization-of-the-executive-office-for-immigration-review>.

<sup>21</sup> Id.

<sup>22</sup> Id.

may be deemed incompetent.”<sup>23</sup> The interim rule also baldly asserts that “there is no organizational justification for OLAP to remain in the Office of the Director.”<sup>24</sup>

These rationales lack merit. The Office of Legal Access Programs is a programmatic and operational entity that facilitate the work of the immigration court system and educates those that come before it. It lacks a “policymaking character.” Moreover, it is doubtful that the new Office of Policy would be better positioned than the Office of the EOIR Director to provide OLAP with “sufficient resources,” or that this would be one of its goals. OLAP’s former position within the Office of the Director signaled the importance of its programs to the mission of EOIR and to all of its “adjudicatory operations.” By contrast, the Office of Policy lacks a clearly articulated mission, purpose, or set of responsibilities, and seems mostly to serve as a vehicle for the direct oversight of EOIR by the White House, outside the normal agency channels. OLAP would be better situated as a distinct EOIR component or, in the alternative, located within the Office of the Director.

In early April 2010, the US Department of Justice (DOJ) announced that it would suspend the Legal Orientation Program in order to examine its cost-effectiveness and efficiency (Sacchetti 2018). However, the administration quickly backtracked on this decision due to congressional and public backlash (Breisblatt 2018). The program subsequently received an additional appropriation of \$10 million under the “Emergency Supplemental Appropriations for Humanitarian Assistance and Security at the Southern Border Act, 2019.”<sup>25</sup>

The Trump administration has tried to reduce the involvement of legal counsel and non-profit legal providers in other Office of Legal Access Programs initiatives, such as the Immigration Court Helpdesk (for non-detainees in removal proceedings) and the BIA Pro Bono project. For the BIA Pro Bono project’s first 18 years, non-governmental screeners reviewed full non-anonymized case files and posted anonymized case summaries –accessed by pro bono counsel – for possible representation. Potential pro bono counsel gained access to a case file only after the respondent consented to representation and the attorney entered an appearance in the case. Since the project’s inception in 2001, close to 1,200 persons have received representation under the project, which received positive evaluations in 2004 and 2014 (EOIR 2016b).

In October 2019, however, the administration took the position that the BIA Pro Bono Project’s screening process violated the prohibition against the disclosure to third parties of information “contained in or pertaining to any asylum application” or “records pertaining to” credible fear or reasonable fear determinations.<sup>26</sup> It also maintained that Privacy Act protections related to “personally identifiable information” continued to apply to lawful permanent residents seeking cancellation of removal.<sup>27</sup> The administration also stopped allowing screeners to review case transcripts and stopped providing a short extension of the brief filing deadline to allow time for the project attorney to match the case with pro bono representation. As a result, the project is now limited to screening by federal (OLAP) attorneys, *before* a transcript of hearings or the

---

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Pub. L. No. 116-26, 133 Stat. 1018 (2019). <https://www.congress.gov/116/plaws/publ26/PLAW-116publ26.pdf>.

<sup>26</sup> 8 CFR 1208.6,

<sup>27</sup> The president actually *restricted* Privacy Act protection to U.S. citizens and lawful permanent residents in a 2017 Executive Order. Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768,” 82 Fed. Reg. 8799 (January 25, 2017). <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>

immigration judge decision is available. As a result of these new procedures, there has been an approximately 85% reduction in cases matched through the project

Several OLAP programs involving representation of unaccompanied children have been terminated, including:

- The Baltimore Representation Initiative for Unaccompanied Children, a pilot program that provided representation to released unaccompanied migrant children under age 16;
- The Remote Access Initiative, a pilot program that provided representation to released unaccompanied migrant children located far from immigration courts; and
- The Justice AmeriCorps program, which provided grants to organizations to represent unaccompanied children under age 16.

By statute, the Secretary of Health and Human Services (HHS) “shall ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act” that unaccompanied children from non-contiguous countries “who are or have been” in federal custody “have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.”<sup>28</sup> As part of this broad mandate, the HHS Secretary “shall make every effort to utilize the services of pro bono counsel.”<sup>29</sup> In fact, it is not clear that HHS has sought counsel for unaccompanied minors to “the greatest extent practicable.” In addition, the lack of a “categorical” due process or statutory right to government-funded counsel for children in removal proceedings has been a barrier to establishing and preserving federally-funded legal programs for this population.<sup>30</sup>

The National Qualified Representation Program, which provides counsel for detainees who are not competent to represent themselves, arose from *Franco-Gonzalez v. Holder*, a class action lawsuit on behalf of unrepresented detainees in Arizona, California, and Washington with “mental disorders.”<sup>31</sup> The court entered a permanent injunction, ordering the government to provide “qualified representative[s]” to unrepresented detainees (within the Ninth Circuit) who are not competent to represent themselves in removal proceedings due to “a serious mental disorder or defect.”<sup>32</sup> It found legal representation to be a “reasonable accommodation” under Section 504 of the Rehabilitation Act of 1973.<sup>33</sup>

The NQR program has been criticized for disparities in coverage between *Franco-Gonzalez* class members and others eligible for the program, for deficiencies in identifying potentially eligible persons, and for its eligibility period for funded representation; i.e., until the case is completed or 90 days after release from detention, whichever comes first (ABA 2019, 5-11-12). However, the program represents an important building block in securing government-funded counsel for vulnerable persons when due process demands it.

---

<sup>28</sup> 8 USC 1232(c) (5).

<sup>29</sup> Id.

<sup>30</sup> *C.J.L.G. v. Sessions*, 880 F. 3d 1122 (9th Cir. 2019).

<sup>31</sup> *Franco-Gonzalez v. Holder*, Case No. CV-10-02211 DMG (DTBx) (C.D. Cal. Apr. 23, 2013), available at <https://casetext.com/case/franco-gonzalez-v-holder>; *Franco-Gonzalez v. Holder*, Case No. CV-10-02211 DMG (DTBx) (C.D. Cal. Oct. 29, 2014), available at <https://casetext.com/case/franco-gonzalez-v-holder-1>.

<sup>32</sup> Id.

<sup>33</sup> 29 U.S.C. § 794.

## Recommendations

An incoming administration should:

- Withdraw the interim federal rule that reorganizes EOIR and that places Office of Legal Access Programs under the EOIR Office of Legal Policy.
- Issue a proposed rule to make OLAP a distinct component of EOIR or, in the alternative, to relocate it within the Office of the EOIR Director.
- Expand Legal Orientation Program services to all U.S. detention centers and to all non-detained populations in removal proceedings.
- Offer the LOP to asylum-seekers who are subject to expedited removal and to non-citizens subject to reinstatement of removal prior to their “credible” and “reasonable” fear interviews (respectively) (ABA 2010, 5-13; ABA 2019, 5-21)).<sup>34</sup>
- Pilot the LOP at CBP processing facilities.
- Expand the National Qualified Representation Program to every immigration court in the country and to additional categories of cases in which due process requires legal representation.
- Fully restore the BIA Pro Bono Project’s pre-October 2019 procedures, and resolve any privacy concerns related to screening of anonymized case files on appeal under this project.
- Ensure that HHS fully complies with its statutory mandate to seek counsel for unaccompanied minors “to the greatest extent practicable.”

### **Screening of the undocumented and DACA and TPS recipients to determine eligibility for legal status**

Several studies suggest that a significant percentage of undocumented persons are potentially eligible for immigration benefits but have failed to pursue them. Legal screening can place undocumented or temporary residents on a path to permanent residency by identifying immigration benefits to which immigrants may be entitled. It would also reduce the U.S. undocumented population.

A 2014 survey of 67 immigrant-serving organizations from 24 states found that 14.3 percent of Deferred Action for Childhood Arrivals (DACA) applicants were potentially eligible for a non-DACA immigration benefit or relief (Wong et al. 2014). A subsequent study of 4,070 undocumented immigrants in 12 states determined that 18.5 percent potentially qualified for an immigration benefit, including two dozen likely U.S. citizens (Atkinson and Wong 2018).

Immigrant service agencies in a 2016 national study on implementation of the DACA program estimated, with one exception, that 20 to 25 percent of the DACA beneficiaries they screened were eligible for a non-DACA immigration benefit or relief (Kerwin et al. 2017, 9).

---

<sup>34</sup> Legal orientation sessions with non-citizens subject to non-court, summary removal processes should provide sufficient information to allow participants to determine if they have been properly placed in these processes.

These studies note that placing more non-citizens without status or with temporary status on a path to permanent residence would constitute a de facto legalization program, which charitable legal service programs and community-based organizations (CBOs) could pursue while advocating for broader immigration reform. The DACA study, for example, concluded: “Rigorous screening, coupled with representation of those found to be potentially eligible for immigration status, should be seen as a legalization program in its own right, which will offer a modicum of protection from removal and benefit any future legalization program” (ibid., 37). It would also achieve a bi-partisan objective; i.e., to reduce the U.S. undocumented population.

However, the Trump administration has sought to restrict legal immigration through a variety of administrative tools that would deny permanent residence and naturalization to large numbers of immigrants (Kerwin and Warren 2019). Moreover, dedicated funding for large-scale legal screening has not materialized and, as a result, overtaxed non-profit legal networks and their community-based partner organizations have not pursued such an initiative.

A large-scale legal screening program of undocumented immigrants, and TPS and DACA recipients could benefit from the lessons of DACA, particularly the need for a “whole of community” response to a program of this magnitude (Kerwin et al. 2017, 18-19). Such a response would need to draw from public and private institutions that can offer funding, public education, community outreach, advocacy, training, screening, and English-as-a-Second language instruction. In the legal community alone, it would require the commitment of non-profit legal service providers, the immigration bar, legal trade associations, large law firms, retired lawyers, bar associations, law school clinics, government lawyers, corporate counsel and others.

### Recommendation

An incoming administration should convene a summit—with participation by DHS and DOJ, states, localities, private funders, legal service networks, bar associations, immigration coalitions, CBOs, academia, and research institutions—with the goal of developing an action plan to promote, and secure funding for a national initiative that provides legal screening of undocumented persons and DACA and TPS recipients.<sup>35</sup> This plan should also include representation for those deemed eligible for an immigration benefit or relief. The new administration should appoint an inter-governmental (DOJ and DHS) working group responsible for drafting and implementing the action plan on a short timeline.

### **Expansion of Universal Representation Programs sponsored by states, local governments and private funders**

The federal government supports legal orientation services, but except in very limited cases does not fund direct representation. In a promising development, the last eight years have seen the proliferation of “universal representation” programs, funded by municipalities, counties, states, and private funders. These programs seek to represent all or a substantial number of persons in

---

<sup>35</sup> Absent such a plan, DACA and TPS recipients who may be eligible for an immigration benefit will be placed in removal proceeding, adding to the immense immigration court backlog.

removal proceedings in particular geographic areas,<sup>36</sup> as early in the legal process as possible and “regardless of the apparent merits” of a case or the perceived likelihood of its success. The overarching goal of this model is not to identify “meritorious” cases for representation, but to enhance “the quality of justice in immigration courts and the integrity of the removal system as a whole” and to “formalize, judicialize, and demand integrity from the adjudication system” (Nash 2018, 504, 511).

This model, piloted in New York City in 2013, has since expanded in New York State and has been adopted in 15 cities and counties in nine states. The New York model safeguards rights, serves as an important check on executive power, and builds public trust in the legitimacy of the court system (ibid., 521-522). Universal representation models also seek to preserve families, and to protect and maintain the integrity of communities, particularly communities that view all of their residents—regardless of status—as members.

### Recommendation

An incoming administration should convene a summit—with participation by DHS and DOJ, states, localities, private funders, legal service networks, bar associations, immigration coalitions, CBOs, academia, and research institutions—with the goal of developing an action plan to promote, expand, and attract funding for universal representation programs. It should also appoint an inter-governmental (DOJ and DHS) working group responsible for drafting and implementing the action plan in a short time-frame.

## **Responding to Backlogs**

Case backlogs constitute a primary obstacle to a viable immigration system and a barrier to effective legal representation. This section will limit its discussion to two major immigration backlogs, the backlogs for removal proceedings and for affirmative asylum cases (not in removal proceedings).

The USCIS asylum corps adjudicates affirmative asylum applications and makes “credible fear” determinations (for asylum-seekers subject to expedited removal) and “reasonable fear” determinations (for those subject to reinstatement of removal who are seeking withholding of removal). The affirmative asylum backlog had reached nearly 340,000 cases by late 2019, up from 40,000 in 2014 (Frazee 2019). The Trump administration has used the high affirmative asylum backlog to justify capping refugee admissions at historically low levels, notwithstanding the fact that the U.S. has repeatedly been able to accommodate the high demand on its asylum system *and* to maintain a robust resettlement program (Martin 2019).

Immigration court backlogs have more than tripled over the last decade, to 1.2 million by April 2020 (TRAC 2020). This figure does not include 360,000 administratively closed cases that could be re-calendared and returned to an active court docket based on Attorney General Sessions’ decision that immigration judges and the BIA lack the authority to close cases, except in very narrow circumstances.<sup>37</sup> The immigration court backlog preceded the Trump

---

<sup>36</sup> Notwithstanding the “universal” description, some funders restrict representation based on limited resources or preferences for some cases in removal proceedings over others. Some models represent only or mostly detainees. Others restrict representation to residency in the particular municipality or country, or exclude persons with criminal convictions.

<sup>37</sup> *Matter of Castro Tum*, 27 I & N Dec. 271 (A.G. 2018).

administration, but has grown significantly over the last three years. The former chair of the BIA argues that this seemingly intractable problem “has largely been caused by political interference and ever-changing priorities during the past three administrations” (Schmidt 2019). He particularly criticizes “aimless docket reshuffling [that] involves priority cases moving to the front of the docket, and relegating other cases, some many years old, to the end” (ibid.).

Legal representation contributes to the efficiency of removal proceedings, an important consideration in light of the case backlog (ABA 2019, 5-4). Moreover, the legal community is uniquely qualified to contribute ideas for reducing backlogs, given its expertise in removal proceedings and in the asylum process. Reducing court backlogs will require, for example, referring fewer people to the removal adjudication system through the principled exercise of prosecutorial discretion, permitting the USCIS to approve asylum claims for those facing expedited removal (ABA 2010, 1-61), and removing cases from the court backlog by administratively closing or terminating them.

### Recommendation

An incoming administration should establish a public-private advisory group with participation from DOJ and DHS, states, localities, the philanthropic community, legal service providers, and CBOs, and task this group with developing proposals and producing a report on how to reduce immigration court and affirmative asylum backlogs to manageable levels.

## **Conclusion**

This paper outlines a series of measures that a new administration could take in its first year to expand legal representation in the U.S. removal adjudication process and legal immigration system. In particular, it proposes that a new administration:

- Withdraw the interim federal rule that reorganizes the Executive Office for Immigration Review and that places the Office of Legal Access Programs under the EOIR Office of Policy.
- Make the Office of Legal Access Programs a distinct component of EOIR or, in the alternative, relocate it within the Office of the EOIR Director.
- Extend the Legal Orientation Program to all U.S. detention centers and to all non-detained populations in removal proceedings.
- Offer legal orientation to asylum-seekers subject to expedited removal and to non-citizens subject to reinstatement of removal prior to their “credible” and “reasonable” fear interviews (respectively) (ABA 2010, 5-13; ABA 2019, 5-21)).
- Pilot the Legal Orientation Program at CBP processing facilities.
- Expand the National Qualified Representation Program to every immigration court and to additional categories of cases in which immigration judges or the Board of Immigration Appeals (BIA) determine that due process requires it.
- Fully restore the BIA Pro Bono Project’s pre-October 2019 procedures, and resolve any privacy concerns related to the screening of case files on appeal to the BIA under this project.

- Ensure that HHS fully complies with its statutory mandate to seek counsel for unaccompanied minors “to the greatest extent practicable.”
- Convene public-private summits devoted to developing action plans to promote, expand and attract funding commitments for: (1) a national legal screening and representation program for undocumented residents, and DACA and TPS recipients; and (2) the expansion of universal representation programs for persons in removal proceedings.
- Establish a public-private advisory group with high-level participation by DOJ and DHS, states, localities, the philanthropic community, legal service providers, academia, research institutions, and community-based organizations. Task this group with developing proposals to reduce immigration court and affirmative asylum backlogs to manageable levels.

Legal orientation, screening and representation can contribute to immigration and removal adjudication systems that achieve their programmatic goals, operate more fairly and efficiently, and treat all those who come before it with respect. Yet legal representation is not a panacea. An incoming administration will also need to address broader systemic problems in the U.S. immigration system. Many of the necessary reforms with a nexus to legal representation will require legislation. Among these longer-term reforms, a new administration and Congress should work together to:

- Significantly increase funding to the immigration court system, including to the Office of Legal Access Programs,<sup>38</sup> in order to promote due process, reduce case backlogs and meet its steady-state workload.
- Create and adequately fund an independent Article 1 immigration court system to promote the integrity, independence, professionalism, and prestige of this system (ABA 2010, 6-26 – 6-36).
- Create a middle option – such as a fine or provisional legal status -- between the current binary options for those in removal proceedings of removal/voluntary departure *or* relief/permanent status– and allow removal proceedings to be resolved via “plea bargaining” (Kerwin 2018b, 559).
- Broaden discretionary relief from removal on equitable grounds, particularly for those who have not broken the law knowingly or intentionally.
- Eliminate Trump era barriers to permanent residence and naturalization (Kerwin and Warren 2019).
- Reverse the administrative barriers to access to asylum, established by the Trump administration (Aleinikoff 2019).

---

<sup>38</sup> The Office of Legal Access Programs needs funding to backfill attorney departures, including for oversight of the National Qualified Representation Program, and to adjudicate recognition and accreditation applications, which are backlogged at this writing by roughly five months.

## References

- Aleinikoff, T. Alexander. November 13, 2019. "[Trump's War on Asylum](#)." *Mobilities*, Public Seminar.
- American Bar Association, Commission on Immigration. 2010. "Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases." Washington, DC: ABA.
- American Bar Association, Commission on Immigration. 2019. "[2019 Update Report: Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases: Volume 2 Update Report](#)." Washington, DC: ABA.
- American Civil Liberties Union. 2014. *American Exile: Rapid Deportations That Bypass the Courtroom*. New York, NY: ACLU Foundation.
- American Immigration Council. September 6, 2018. "[Fact Sheet: Legal Orientation Program Overview](#)."
- Atkinson, Jeanne, and Tom K. Wong. 2018. "[The Case for a National Legalization Program without Legislation or Executive Action: Results from Screening for Legal Immigration Options](#)." *Journal on Migration and Human Security* 6(2): 161-66.
- Benson, Lenni. 2017. "[Immigration Adjudication: The Missing 'Rule of Law'](#)." *Journal on Migration and Human Security* 5(2): 331-55.
- Breisblatt, Joshua. 2018. "[Justice Department Will Not Halt Legal Orientation Program for Detained Immigrants, Reversing Course for Now](#)." *Immigration Impact*, Apr. 25.
- Eagly, Ingrid V., and Steven Shafer. 2015. "[A National Study of Access to Counsel in Immigration Court](#)." *University of Pennsylvania Law Review* 164(1): 1-91.
- EOIR (U.S. Department of Justice, Executive Office for Immigration Review). 2020a. "[Legal Orientation Program](#)." Falls Church, VA: EOIR.
- \_\_\_\_\_. 2020b. "[Recognition & Accreditation \(R&A\) Program](#)." Falls Church, VA: EOIR.
- \_\_\_\_\_. 2020c. "[Recognized Organizations and Accredited Representatives Roster by State and City Report Last Updated on: 02/24/20](#)." Falls Church, VA: EOIR.
- \_\_\_\_\_. 2019.a "[Addendum to LOP Cohort Analysis, Phase 1: Detention Length with DHS Data](#)."
- \_\_\_\_\_. 2019b. "[LOP Cohort Analysis: Phase II](#)," Jan. 29.
- \_\_\_\_\_. 2018a. "[LOP Cohort Analysis](#)." Sept. 5.
- \_\_\_\_\_. 2016a (revised). "[Fact Sheet: EOIR's Office of Legal Access Programs](#)." Falls Church, VA: EOIR.
- \_\_\_\_\_. 2016b (updated). "[BIA Pro Bono Project](#)." Falls, Church, VA: EOIR.

\_\_\_\_\_. 2012 (updated April 4, 2012). “[Cost Savings Analysis – The EOIR Legal Orientation Program](#).” Falls Church, VA: EOIR.

Frazeo, Gretchen. 2019. “[U.S. claims reducing asylum numbers will help with the backlog. Will it?](#)” *PBS News Hour*, Oct. 2.

Hinken, Anna. 2000. “Evaluation of the Rights Presentation.” Falls Church, VA: EOIR.

ICE (U.S. Immigration and Customs Enforcement). 2020. “[ICE Guidance on COVID-19](#).” Washington, DC: ICE. (last visited June 2, 2020).

Katzmann, Robert A. 2008. “The Legal Profession and the Unmet Needs of the Immigrant Poor.” *Georgetown Journal of Legal Ethics* 21: 3-29.

Kerwin, Donald. 2018a. “[From IIRIRA to Trump: Connecting the Dots to the Current U.S. Immigration Policy Crisis](#).” *Journal on Migration and Human Security* 6(3): 192-204.

\_\_\_\_\_. 2018b. “[Moving Beyond Comprehensive Immigration Reform](#).” *Journal on Migration and Human Security* 5(3): 541-76.

\_\_\_\_\_. 2005. “[Revisiting the Need for Appointed Counsel](#).” *MPI Insight*. Washington, DC: Migration Policy Institute.

Kerwin, Donald, Roberto Suro, Tess Thorman, and Daniela Alulema. 2017. “[The DACA Era and the Continuous Legalization Work of the U.S Immigrant-Serving Community](#).” New York: Center for Migration Studies.

Kerwin, Donald, and Robert Warren. 2019. “[Putting Americans First: A Statistical Case for Encouraging, Rather Than Impeding and Devaluing U.S. Citizenship](#).” *Journal on Migration and Human Security* 7(4): 108-122.

Kuck, Charles H. 2004. “[Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices](#)” Washington, DC: U.S. Commission on International Religious Freedom.

Martin, Susan. 2019. “[FY 2019 Ceiling on U.S. Refugee Resettlement: Bad Policy, Faulty Logic](#).” New York, NY: Center for Migration Studies.

Markowitz, Peter L., Jojo Annobil, Stacy Caplow, Peter v. Cobb, Nancy Morawetz, Oren Root, Claudia Slovinsky, Zhifen Cheng, and Lindsay C. Nash. 2011. “[Assessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings](#).” *Cardozo Law Review* 33(2); 357-416 (2011).

Meissner, Doris, Donald Kerwin, Muzaffar Chishti, and Claire Bergeron. 2013. “[Immigration Enforcement in the United States: the Rise of a Formidable Machinery](#).” Washington, DC: Migration Policy Institute.

Nash, Lindsay. 2018. “[Universal Representation](#).” *Fordham Law Review* 87(2): 503-529.

Ramji-Nogales, Jaya, Andrew Schoenholtz, Philip Schrag. 2007. “[Refugee Roulette: Disparities in Asylum Adjudication](#).” *Stanford Law Review* 60: 295-412.

- Sacchetti, Maria. 2018. "[Justice Dept. to halt legal-advice program for immigrants in detention.](#)" *Washington Post*, April 10.
- Schmidt, Paul W. 2019. "[An Overview and Critique of U.S. Immigration and Asylum Policies in the Trump Era.](#)" *Journal on Migration and Human Security* 7(3): 92-102.
- Siulc, Nina, Zhifen Cheng, Arnold Son, and Olga Byrne. 2008. "[Legal Orientation Program, Evaluation and Performance and Outcome: Measurement Report, Phase II.](#)" New York, NY: Vera Institute for Justice.
- TRAC (Transaction Records Access Clearinghouse). 2020. "[Backlog of Pending Cases in Immigration Courts as of March 2020.](#)" Syracuse, NY: TRAC Immigration. (last visited July 15, 2020).
- USCCB-MRS and CMS (U.S. Conference of Catholic Bishops, Migration and Refugee Services, and Center for Migration Studies of New York). 2015. "[Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System.](#)" *Journal on Migration and Human Security* 3(2): 159-204.
- Wong, Tom K., Donald Kerwin, Jeanne M. Atkinson, and Mary Meg McCarthy. 2014. "[Paths to Lawful Immigration Status: Results and Implications from the PERSON Survey.](#)" *Journal on Migration and Human Security* 2(4): 287-304).