

# A Federal Defender Service for Immigrants: Why We Need a Universal, Zealous, and Person-Centered Model

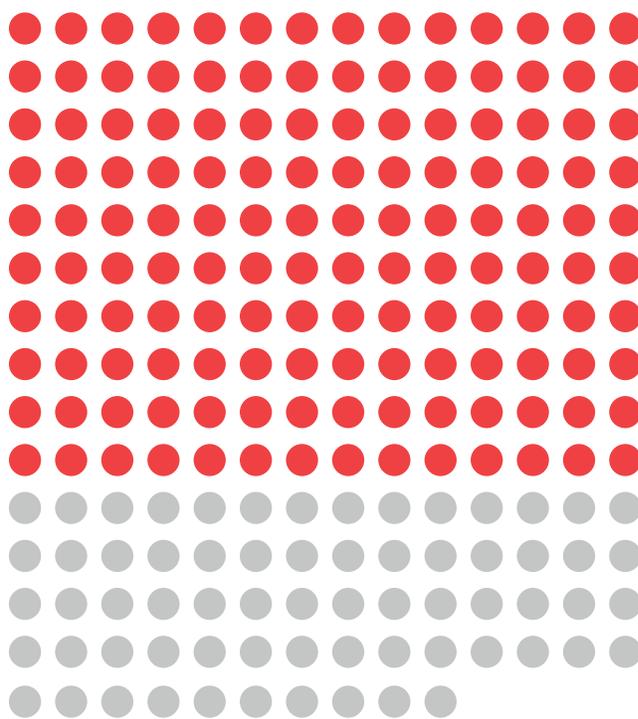
February 2021  
Policy Brief

We need a federally funded universal legal defense service for immigrants—one that is deliberately modeled on the criminal federal defender system, which, while not perfect, is generally regarded as more successfully realizing the values of high-quality, appropriately funded representation than its state counterparts.<sup>1</sup> This service should provide universal, zealous, and person-centered legal defense to all immigrants in any immigration proceedings. The Vera Institute of Justice (Vera) makes this recommendation based on years of experience building and managing national immigrant legal defense programs.

A federal defender service built on these core values is effective and achievable, and it would help ensure that the lives, liberty, and community health of immigrants are given full and equal protection under the law, regardless of status.<sup>2</sup>

**There is an urgent need for a federal defender service for immigrants because most immigrants are unrepresented, and the stakes in immigration proceedings are so high.** Deportation can result in physical exile from home, separation from family, loss of income, and even forcible return to conditions of persecution, violence, torture, or death in a person's country of origin. But immigrants are not entitled to publicly funded counsel in these proceedings. Currently, there are 1.25 million pending cases in the immigration court system, and people in more than 500,000 of those lack legal representation.<sup>3</sup> The lack of representation is particularly staggering for people subjected to immigration detention, where over the past five years, 70 percent have had no counsel.<sup>4</sup> The stakes in immigration proceedings are extraordinary: the U.S. Supreme Court has described them as no less than “both property and life, or of all that makes life worth living.”<sup>5</sup>

Out of the 195,625 people whose immigration court cases completed in Fiscal Year 2019, **77 percent did not have legal representation.\***



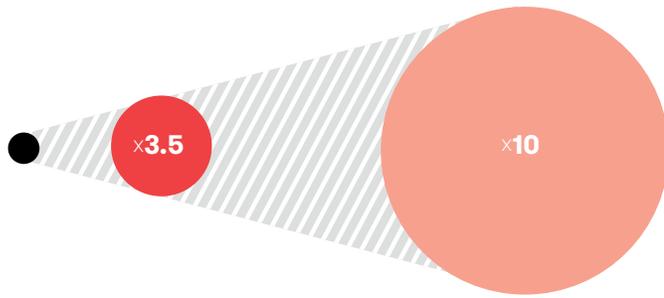
\* See Transactional Records Access Clearinghouse (TRAC), “State and County Details on Deportation Proceedings in Immigration Court by Hearing Location and Attendance, Representation, Nationality, Custody, Month and Year of NTA, Outcome, and Current Status,” database, accessed January 29, 2021, <https://trac.syr.edu/phptools/immigration/nta/>. This information is refreshed monthly and may change as new data is added.

## For more information

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For more information about Vera, visit [www.vera.org](http://www.vera.org). For more information about this policy brief, contact Shaina Aber, deputy director, Center on Immigration and Justice, at [saber@vera.org](mailto:saber@vera.org).

## Immigrants with attorneys are 3.5 times more likely to be granted bond—enabling release from immigrant detention



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We know that legal representation makes a significant difference. Studies show that immigrants with attorneys are 3.5 times more likely to be granted bond—enabling release from immigrant detention—and up to 10 times more likely to establish their right to remain in the United States than those without representation.<sup>6</sup>

**A federal defender system for immigrants must be built on the core values of universality, zealously, and person-centeredness.** These core values advance race equity, are community-driven, and have been tested by Vera's years of experience creating and running national immigrant defense programs. The blueprint for a system grounded in the values of universality, zealously, and person-centeredness already exists. Over the last decade, federal, state, and local government partners have worked with Vera, an extensive network of legal defense providers, and other advocates and impacted people to create, test, and refine national immigrant legal defense programs that are grounded in these key principles.<sup>7</sup>

- 1 Universal.** Representation is provided to all immigrants at every stage in any immigration proceeding (including summary proceedings and related collateral or appellate stages) in which immigration status or loss of liberty and life is at stake, regardless of any other factor. This value rejects false notions of deservedness and prejudgment of an immigrant's case and honors the community demand that no immigrant face detention or deportation alone.

- 2 Zealous.** Every immigrant has representation that aggressively holds the government to its burden in every instance and presents the fullest defense ethically possible in every immigrant's case. Counsel are on equal footing with immigration judges and prosecutors (including having funds for defense experts, multidisciplinary teams, and continuous professional development), have limited caseloads, and exercise independence from any judicial or political interference. Every immigrant has meaningful recourse when representation is less than zealous.<sup>8</sup>
- 3 Person-centered.** Every immigrant has representation that meets clients where they are without judgment and with empathy and listening; is rooted in principles of race and identity equity and accountability; provides holistic legal defense that addresses a client's multidimensional needs as the client defines them; and is team-based, with lawyers, social workers, case managers, community navigators, organizers, and others working in concert to develop and present a full defense. This value rejects the notion of legal representation as blind to the client as a whole person and ensures that the people most impacted have the most say.

These principles also answer the shortcomings of both the 1963 U.S. Supreme Court case *Gideon v. Wainwright* and the immigration legal defense field.<sup>9</sup>

- > *Gideon*—while requiring representation for all people accused in criminal cases who cannot afford it—has failed to fulfill its promise because it did not mandate the structural conditions necessary for effective defense, including sufficient resources, a limit on caseloads, and meaningful recourse when legal defense is ineffective.<sup>10</sup>
- > The immigration defense field has fared little better. It faces many structural barriers to justice even apart from the absence of a right to counsel, including biased and unaccountable judges, prolonged detention without bond, and even summary deportation without any hearing.<sup>11</sup>

The current limitations of *Gideon* and the immigrant defense field have disproportionately harmed Black and brown people, as well as other immigrants who face systemic prejudice, including people with mental health conditions and those with criminal convictions.<sup>12</sup> It is imperative that a new federal defender system for immigrants not repeat these failures.

**A federal defender service for immigrants is a necessary step to address the system's racist history and its current harms.** Although the immigration system has historically welcomed some immigrants, it is rooted in xenophobia and white supremacy. The immigration system, consistent with our nation's deeply troubled history of racism, has been used to exclude immigrants of color—from the Chinese Exclusion Act in the 19<sup>th</sup> century to the more recent combined use of criminal and immigration law to detain and deport Mexican, Central American, Caribbean, African, and other criminalized migrants of color. Over the past four years, the Trump administration further weaponized and strengthened the existing inequities in immigration law and policy to explicitly promote and strengthen racism, xenophobia, and white supremacy. Unjust policies such as the Muslim ban, the Migrant Protection Protocols, and family separations have inflicted severe and ongoing harm on immigrants and our shared communities.

**A federal defender service ensures legal representation for immigrants, providing them an opportunity to be heard in an otherwise inequitable system.** The immigration system is difficult to navigate—described by scholars and courts as second only to the federal tax code in complexity—subject to political interference, and unaccountable to the people whose fates it decides. The tens of thousands of immigrants who face this system without legal representation each year, including long-term permanent residents, asylum seekers, and parents of U.S.-citizen children, are forced to represent themselves against trained U.S. Immigration and Customs Enforcement (ICE) prosecutors and immigration judges applying an increasingly hostile set of immigration laws. The Trump administration has made this system even more punitive and difficult by placing biased personnel in

key government posts and issuing anti-immigrant executive actions. A federal defender service ensures that immigrants in proceedings have a fundamentally fair opportunity to be heard in a system with these baked-in inequities.

**A federal defender service for immigrants will help address the systemic and compounded racism of the criminalization-to-deportation pipeline.**<sup>13</sup> Ensuring representation for immigrants in deportation proceedings is a necessary step toward mitigating the harmful, discriminatory effects of even incidental contact with the criminal legal system. Black immigrants and other overpoliced immigrants of color are at higher risk of deportation as a result of any law enforcement contact, even if they are never charged with or convicted of a crime.<sup>14</sup> Ensuring that immigrants have representation reduces the harmful effects of the linked and racially biased criminal legal and deportation systems by promoting fair outcomes.

**A federal defender service for immigrants is a safeguard that is proven, effective, achievable, and has public support.** Publicly funded legal representation for immigrants is buttressed by a growing movement seeking to ensure that no immigrant is deported simply because they lack the economic resources to pay for a quality legal defense. It also has widespread support. Two in three people in the United States—67 percent—support government-funded representation for immigrants facing deportation, including 67 percent of likely voters, 80 percent of Democrats, a majority of Republicans, and 66 percent of people who do not identify with either party.<sup>15</sup>

The Biden administration has the opportunity to draw from time-tested models, data, and knowledge to build a system that provides universal, zealous, person-centered, and cost-effective defense to all immigrants.

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## Endnotes

1. David E. Patton, "The Structure of Federal Public Defense: A Call for Independence," *Cornell Law Review* 102, no. 2 (2017), 335-411 (noting that "while never on equal footing with better resourced federal prosecutors, federal indigent defense under the [Criminal Justice Act] has fared far better than its counterparts in most state systems"), <https://perma.cc/9H24-4RNQ>. Also see Richard A. Posner and Albert H. Yoon, "What Judges Think of the Quality of Legal Representation," *Stanford Law Review* 63, no. 2 (2011), 317-349 (in a survey of judges, finding that federal judges ranked federal public defenders the highest quality, followed closely by prosecutors, with state judges giving their highest ranking to retained counsel instead of state public defenders), <https://perma.cc/9R42-J22V>.
2. This memorandum establishes the context of, core values underlying, and guiding models for a federal defender service for immigrants. A forthcoming memorandum will outline the practical and technical steps to create this service.
3. TRAC, "Immigration Court Backlog Tool," database, accessed December 20, 2020, [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/).
4. The representation rate in immigration court fluctuates slightly over time. In the past five years—from October 2015 through September 2020—just more than 70 percent of all people in detention had never been represented (221,820 of 311,854 cases), with the exact percentage varying slightly from year to year. See Transactional

Records Access Clearinghouse (TRAC), “State and County Details on Deportation Proceedings in Immigration Court by Hearing Location and Attendance, Representation, Nationality, Custody, Month and Year of NTA, Outcome, and Current Status,” database, accessed January 29, 2021, <https://trac.syr.edu/phptools/immigration/nta/>. This information is refreshed monthly and may change as new data is added.

5. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).
6. Vera Institute of Justice, *Rising to the Moment: Advancing the National Movement for Universal Representation* (New York: Vera Institute of Justice, 2020), 4, <https://perma.cc/9ZQ2-WM7Q>. Also see Emily Ryo, “Detained: A Study of Immigration Bond Hearings,” *Law & Society Review* 50, no. 1 (2016), 117-153; and Ingrid V. Eagly and Steven Shafer, “A National Study of Access to Counsel in Immigration Court,” *University of Pennsylvania Law Review* 164, no. 1 (2015), 1-91, 49, <https://perma.cc/EE3B-JR7W>.
7. Such programs include the National Qualified Representative Program, which provides defense counsel to people who are in immigration detention, unrepresented, and with serious mental health conditions, <https://perma.cc/9KYE-B99P>; and the Unaccompanied Children Program, which provides defense counsel to minors who are in immigration detention and unrepresented, <https://perma.cc/JXZ8-K3K6>.
8. This value rejects the persistent notion that the best representation is reserved for those who are whiter, wealthier, more educated, and more able to appeal to the prejudices of the system. In the same way, this value also rejects the pernicious notion that immigrants with criminal convictions, poor immigrants, Black immigrants, and immigrants with severe mental health conditions or trauma, whose cases require creative and complex legal work, should “just take a deport.”
9. *Gideon v. Wainwright* was the unanimous 1963 landmark U.S. Supreme Court ruling establishing that the Sixth Amendment’s right to counsel obligations extended through the 14<sup>th</sup> Amendment to states and that, as such, court-appointed counsel for indigent criminal defendants in state court was “fundamental and essential to a fair trial.”
10. Erwin Chemerinsky, “Lessons from *Gideon*,” *Yale Law Journal* 122, no. 8 (2013), 2106-2720, <https://perma.cc/KTV2-6274>. The result is a patchwork state public defender system that is systematically underfunded and, in too many instances, harms clients and communities and has been subverted to the purposes of mass incarceration. See American Bar Association, Standing Committee on Legal Aid and Indigent Defendants *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* (Chicago: American Bar Association, 2004), <https://perma.cc/U9LL-5ZDA>; National Right to Counsel Committee, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel* (Washington, DC: The Constitution Project, 2009), <https://perma.cc/8T6K-YMDX>; and U.S. Department of Justice, “Attorney General Eric Holder Speaks at the Justice Department’s 50<sup>th</sup> Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright*,” press release (Washington, DC: U.S. Department of Justice, March 15, 2013) (noting that “America’s indigent defense systems exist in a state of crisis”), <https://perma.cc/5J9Q-DW8S>.
11. American Immigration Counsel, *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice* (Washington, DC: American Immigration Council, 2013), <https://perma.cc/S28Y-78HJ>. But the culture of the immigrant defense field has itself been a barrier to justice as well, sometimes prioritizing certain immigrants for legal defense based on pernicious and biased good/bad immigrant narratives, prejudiced notions of deservedness, or dubious pre-judgment of the strengths of a legal case. See Elizabeth Keyes, “Zealous Advocacy: Pushing Against the Borders in Immigration Litigation,” *Seton Hall Law Review* 45, no. 2 (2015), 475-543, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2499206](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2499206).
12. See for example Charles H. Ogletree, Jr., “An Essay on the New Public Defender for the 21<sup>st</sup> Century,” *Law and Contemporary Problems* 58, no. 1 (1995), 81-93 (noting that structural deficiencies of public defense systems, if left unaddressed, “create further disparities in treatment of persons of difference races”), <https://perma.cc/HH87-398N>; Molly J. Walker Wilson, “Defense Attorney Bias and the Rush to the Plea,” *Kansas Law Review* 65, no. 2 (2016), 271-325, <https://perma.cc/8Q8D-2394>; and Juliana Morgan-Trostle, Kexin Zheng, and Carl Lipscombe, *The State of Black Immigrants* (New York: NYU Law Immigrant Rights Clinic and Black Alliance for Justice Immigration, 2020), <https://perma.cc/4R72-MBY5>.
13. Jeremy Raff, “The ‘Double Punishment’ for Black Undocumented Immigrants,” *The Atlantic*, December 30, 2017, <https://perma.cc/LFT3-SNJU>.
14. *Ibid.*; and Morgan-Trostle, Zheng, and Lipscombe, *The State of Black Immigrants*, 2020.
15. Lucila Figueroa and Nina Siulc, “It’s Time to Provide Government-Funded Lawyers to All Immigrants Facing Deportation,” Vera Institute of Justice, January 14, 2021, <https://perma.cc/7MC2-P7D2>.