

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

JOHN S. KIERNAN
PRESIDENT
Phone: (212) 382-6700
Fax: (212) 768-8116
jkiernan@nycbar.org

June 1, 2017

Mayor Bill de Blasio
City Hall
New York, NY 10007

Re: Due Process, Universal Representation, and the New York Immigrant Family Unity Project

Dear Mayor de Blasio:

The New York City Bar Association (“City Bar”) urges you to preserve universal representation for all individuals detained and facing deportation in New York City through the New York Immigrant Family Unity Project (“NYIFUP”). We have long supported a right to counsel for all people in removal proceedings, and we have commended New York City’s groundbreaking efforts to increase access to counsel for immigrants. We urge New York City not to deny access to counsel to anyone based upon past convictions or criminal charges.

The City Bar’s over 24,000 members include attorneys in private practice, government service, non-profit practice, and academia. Our Immigration and Nationality Law Committee is comprised of immigration attorneys, current and former judges, immigration law scholars, and attorneys specializing in human and civil rights. Committee members represent clients in all aspects of the immigration system and have deep expertise in the fields of immigration law and immigrants’ rights.

Over the last four years, NYIFUP, as the nation’s first immigration public defender system, has set the national standard for how jurisdictions that value their immigrant communities can protect their fundamental rights. Through its universal representation model, NYIFUP provides a critically important guarantee to all New Yorkers: it ensures that no New York family will have a loved one held in detention and deported simply because they cannot afford an attorney. While New Yorkers do have a recognized federal constitutional right to appointed counsel in most criminal proceedings, the federal government generally does not recognize this right in immigration proceedings, even though the Supreme Court has recognized that “deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”¹ With a

¹ *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

new federal administration that has promised to increase enforcement and detention, it is more critical than ever that New York maintain and strengthen its system of universal representation.

In 2013 and 2014, the City Bar applauded the City Council for allocating funds to NYIFUP² and the Immigration and Nationality Law Committee testified in support of the funding.³ Appointing counsel to individuals facing deportation, especially those detained, is a crucial step to supporting justice and due process and ensuring that New York families are not torn apart. New York already requires appointment of counsel to parents and others at risk of losing custody of their children in Family Court,⁴ and to defendants in preliminary hearings in Criminal Court,⁵ and soon will, to tenants facing eviction in Housing Court.⁶ The right to appointed counsel in those courts is based on financial need, not on an evaluation of the individual's criminal record. A criminal record may, at times, be an appropriate consideration for a judge deciding the merits in any of these proceedings, but it is never an appropriate factor in deciding who deserves an attorney to ensure a fair process.

The same is true in immigration proceedings. As former City Bar President Carey Dunne stated, "it's hard to see why appointed counsel is still denied to non-citizen[s] [...] facing detention and deportation."⁷ Deportation involves extremely high stakes—"all that makes life worth living," as the Supreme Court has said.⁸ As a result of deportation, even a long-time U.S.-resident with a green card is banished from his or her home, friends, family (even U.S.-citizen family members), job, and property, and is sent to a country in which he or she may have no ties and may face persecution.⁹ For these reasons, the right to counsel in criminal cases already includes the right to immigration advice.¹⁰

Detained immigrants face unique hardships and obstacles to due process exacerbating the

² New York City Bar Association, City Bar Statement Praising New York City Council's Efforts to Fund Immigration Public Defender System, and Urging Nationwide Action (July 19, 2013), available at <http://bit.ly/2r1BIQG>.

³ New York City Bar Association, Testimony of Mark Noferi, New York City Council Committee on Immigration Hearing, Examining Models for Providing Legal Services for Immigrants in Deportation Proceedings (February 25, 2014), available at <http://bit.ly/2rUH6xV>.

⁴ N.Y. Family Court Act § 262(a) (McKinney 2011). See *id.* at § 261 (declaring constitutional right to counsel in certain family court proceedings for those facing infringements of fundamental interests, and noting that "[c]ounsel is often indispensable to a practical realization of due process of law and may be helpful to the court in making reasoned determinations.")

⁵ N.Y. Criminal Procedure Law § 170.10 (McKinney 2010); see Laura K. Abel and Max Rettig, State Statutes Providing for a Right to Counsel in Civil Cases, 40 Clearinghouse Review 245 (July-Aug. 2006), available at <http://bit.ly/2s0hmPT>.

⁶ Politico, De Blasio, Mark-Viverito announce right to counsel initiative (February 12, 2017), available at <http://politi.co/2kCVV3S>.

⁷ New York City Bar Association, President's Letter: The City Bar Takes on Immigration Reform (July 2013), at <http://bit.ly/2qgUJtK>.

⁸ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *Padilla*, 559 U.S. at 364 (2010).

⁹ *Supra* note 3 at 3.

¹⁰ *Padilla*, 559 U.S. at 364; see also New York City Bar, New York City Bar Association Applauds Court of Appeals' Ruling Regarding Due Process Rights of Immigrant Defendants in *People v. Peque* (Feb. 20, 2014) (supporting expanded criminal court advisals of immigration consequences), available at <http://bit.ly/2r1Dmwe>.

stakes and the need for counsel.¹¹ Non-citizens are often held for several weeks before seeing an immigration judge for the first time.¹² Detention interrupts engagement in all the “essentials of life”—family, housing, work, and education. As retired Immigration Judge Paul Grussendorf has explained, “It is un-American to detain someone, send them to a remote facility where they have no contact with family, place them in legal proceedings where they are often unable to comprehend, and not to provide counsel for them.”¹³

Counsel is particularly necessary to detainees because U.S. Immigration and Customs Enforcement (“ICE”) employs detention so widely in New York. From 2005 to 2010, ICE denied bail to nearly 80% of its New York City arrestees. As a result, ICE detained without bond the New York parents of over 10,000 U.S.-citizen children.¹⁴ ICE set bond for another 20%, with nearly 75% of bonds over \$5,000; and released fewer than 1% of detainees on recognizance. Fifty five percent of those receiving bond could not afford to pay.¹⁵ This starkly contrasts with New York criminal bail decisions, where criminal judges release 68% on recognizance; set bond for another 31%, with 80% of bonds under \$1,000; and deny bail to only 1%.¹⁶ Counsel is thus key to winning a bond hearing and securing release.

But detainees “face a Catch-22” -- they are highly unlikely to be released from detention without counsel’s assistance, but generally cannot find counsel until release from detention, given limited access to communication, financial constraints, and barriers to lawyers accessing detention facilities. Without counsel, detention hampers the ability to collect evidence and litigate a case on its merits.¹⁷ Thus, the “immigrant representation crisis” particularly affects detainees. Before NYIFUP, 60% of those in detained in proceedings lacked counsel, according to the New York Immigrant Representation Group’s 2011 study.¹⁸ A stunning 97% of those detained without counsel lost their cases. Meanwhile, 74% of those not detained and able to find representation won their deportation cases.¹⁹ Counsel levels the playing field for non-citizens asserting a right to stay in the U.S. against a trained ICE attorney in an adversarial system. Competent representation also results in some non-citizens who have no relief accepting a deportation order and leaving the United States more quickly.

During the past four years, NYIFUP has provided representation to over 2,000 indigent

¹¹ *Supra* note 3 at 3.

¹² American Immigration Council, *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice* (March 2013), available at <http://bit.ly/2qkP7ed>.

¹³ *Building an Immigration System Worthy of American Values*, Hearing Before the S. Comm. on the Judiciary, 113th Cong. 8 (2013) (Statement of Paul Grussendorf) (“Grussendorf”), available at <http://bit.ly/2r0Zdlu>.

¹⁴ NYU et. al., *Insecure Communities, Devastated Families: New Data on Immigrant Detention and Deportation Practices in New York City* (July 2012), available at <http://bit.ly/2qTUuUX>.

¹⁵ *Id.* at 11.

¹⁶ *Id.*

¹⁷ *Id.*; Noferi, *Cascading Constitutional Deprivation*, 18 Mich. J. Race & L. at 105-08 (articulating impact of detention on ability to litigate proceedings).

¹⁸ *New York Immigrant Representation Study, Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 Cardozo L. Rev. 357, 361 (2011), available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

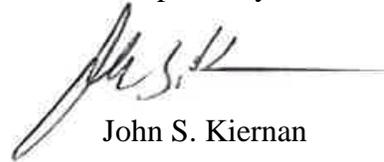
¹⁹ *Id.* at 363-64.

immigrants. Through August 2015, NYIFUP attorneys were successful in reuniting detained immigrants with family members in 52% of their cases and winning 71% of their trials – a 1,000% improvement over the success rate for detained unrepresented non-citizens facing removal.²⁰ Many of the individuals whose cases NYIFUP won would not have been eligible for representation through the program if the proposed exclusions based on certain convictions had been in place.

“Access to justice reflects our American values,”²¹ and the right to due process means that every individual should have a fair day in court. Denying counsel to some individuals based on their criminal record, or where they lived before being detained, will gut New York’s model universal representation system for immigrants. In this time of unprecedented hostility to immigrants from the federal government, New York should be expanding access to counsel, not contracting a successful and groundbreaking representation program.

The City Bar urges your office to continue to lead our nation in our fight for due process for all, and to provide appointed counsel to all detained indigent non-citizens in removal proceedings by providing full funding for NYIFUP.

Respectfully,



John S. Kiernan

Cc: Commissioner Nisha Agarwal, Mayor’s Office of Immigrant Affairs
Hon. Julissa Ferreras-Copeland
Hon. Rory Lancman
Hon. Melissa Mark-Viverito
Hon. Carlos Menchaca

²⁰ *Blazing a Trail, The Fight for Right to Counsel in Detention and Beyond*, National Immigration Law Center, (March 2016) p. 15 <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf>.

²¹ New York City Bar Association, “Bridging the Gap: Immigration Issues Are Civil Access-to-Justice Issues” (Sept. 24, 2013) (testimony to Chief Judge Lippman’s Task Force to Expand Access to Civil Legal Services in New York), available at <http://bit.ly/2s0ee6s>.