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IMMIGRATION PUBLIC DEFENDERS: A MODEL FOR GOING BEYOND ADEQUATE REPRESENTATION

Matthew Chang*

What does adequate legal representation for noncitizen criminal defendants look like? After the Supreme Court decided the landmark case of Padilla v. Kentucky, criminal defense attorneys became responsible for advising clients if and when there might be immigration consequences that accompany acceptance of a guilty plea deal, such as a potential risk of deportation. Currently, the criminal and immigration representation are completely divided.

This Comment argues that the Padilla mandate alone, while important, fails to adequately provide noncitizen criminal defendants their Fifth Amendment Due Process Right and Sixth Amendment Right to Counsel. Using the Supreme Court's legal analysis in Padilla and similar cases, I contend that the criminal and immigration divide is not so discrete. Inadequate representation in either criminal or immigration courts is considered a failure of the Fifth Amendment. Nevertheless, one way to rectify this constitutional shortcoming is to create and implement government-appointed counsel for all noncitizen criminal defendants facing criminal and removal proceedings. This Comment evaluates local, government-enacted immigration public defender programs that have experienced great success within California. Further, this Comment posits that to fully comply with the Fifth Amendment's requirement of adequate representation, Congress must follow suit and expand quality legal access across the nation for noncitizens facing deportation proceedings, modeled after successful immigrant defender programs in California.

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INTRODUCTION

What does it take to provide adequate legal counsel? Consider, if you were a criminal defense attorney, how you might handle representing a noncitizen criminal defendant who is facing severe charges and has been offered a plea deal by the prosecution. Your client is nervous and has informed you that he is seriously considering the plea deal.

To complicate matters, your client is unaware of the relevant immigration laws and believes that if he accepts a guilty plea he would only be sentenced for one year.¹ However, “it is quite apparent to you that if he pleads guilty back he goes [to his native country], where he might be killed and so might his family.”² What would you tell this client?

Many of us would imagine the defense attorney should at least advise the client that taking the plea deal carries serious immigration risks. But prior to the Supreme Court’s ruling in *Padilla v. Kentucky*, a criminal defense attorney had no formal or explicit obligation to provide accurate advice concerning the potential immigration consequences of a noncitizen defendant accepting a criminal guilty plea.³ Amazingly, prior to the *Padilla* decision, there were some criminal defense attorneys who could merely say: “[W]ell, immigration law is very complicated, and I’m not an expert on this and I’m not going to tell you . . . If you want to know about that . . . you’ve got to get an immigration lawyer.”⁴

In *Padilla*, the Court held that legal counsel must advise a client that a pending criminal charge may carry a risk of adverse immigration consequences.⁵ This sharpened expectations for criminal defense attorneys and further required them to evaluate factors such as whether their client is a noncitizen, potential bars to immigration benefits, potential deportability consequences of contemplated pleas, and whether a crime will automatically

¹ Transcript of Oral Argument at 37, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651).

² *Id.*

³ Andrés Dae Keun Kwon, Comment, *Defending Criminal(ized) “Aliens” After Padilla: Toward a More Holistic Public Immigration Defense In The Era of Crimmigration*, 63 UCLA L. REV. 1034, 1057 (2016).

⁴ Transcript of Oral Argument, *supra* note 1, at 29.

⁵ Kwon, *supra* note 3, at 1059.

be elevated to an aggravated felony under 8 U.S.C. § 1101(a)(43).⁶ Thus, a criminal defense attorney representing a noncitizen criminal defendant could only fulfill their obligation after considering the multiple factors that potentially impact immigration and advising their clients of the consequences.⁷

This Comment argues that the *Padilla* mandate alone, while important, fails to adequately provide noncitizen criminal defendants their Fifth Amendment due process right and their Sixth Amendment right to counsel. The *Padilla* mandate only requires criminal defense attorneys to advise clients if there might be immigration consequences, like a potential risk of deportation, to their plea deals. The mandate does not require defense attorneys to help clients navigate their material immigration questions; criminal and immigration representation is completely separated.

One way to rectify this is to create and to implement a government-appointed counsel for all noncitizen criminal defendants facing criminal and removal proceedings. Currently, some local governments have begun implementing immigration public defender programs, which have experienced success at the local level. Congress must also follow suit and expand quality legal access across the nation for noncitizens facing deportation proceedings in order to comply with the Fifth Amendment's grant of procedural due process. Eventually, this coverage should expand to all immigrants facing criminal and removal proceedings to fully comport with the Fifth Amendment's grant of procedural due process.

Part I of this Comment will present the relevant legal background and discuss how the Fifth and Sixth Amendments, existing statutes, and case law demonstrate that noncitizens are entitled to adequate legal counsel. This Part will focus, in particular, on *Padilla v. Kentucky* and the Court's decision on a specific group of noncitizens: noncitizen criminal defendants. While *Padilla* mandated that noncitizen criminal defendants must receive counsel about potential immigration consequences of a guilty plea, this Part further advances two points: first, a defender unit is necessary for noncitizens, and second, the Fifth Amendment's grant of due process applies not only to criminal court but also immigration court.

Part II will explain that, despite the background laid out above, noncitizens are repeatedly denied their procedural due process rights. This

⁶ See Kevin Ruser, *Padilla v. Kentucky: "Crimmigration" Law Goes Constitutional*, 13 NEB. LAW. 13, 15 (2010) (noting how 8 U.S.C. § 1101(a)(43) qualifies certain acts as an "aggravated felony" and may lead to deportation and disqualification from relief).

⁷ Kwon, *supra* note 3, at 1058–62 (including factors such as citizenship status, deportability and inadmissibility status, history of aggravated felonies if relevant, and controlled substance offenses).

starts with public defender's offices, which are often deeply understaffed and are expected to juggle high caseloads. Despite these structural challenges, some local public defender's offices have risen to the Supreme Court's calling via the *Padilla* mandate. Immigration public defense is a possible remedy for this problem. This Part will explore immigration public defense as a possible remedy for this problem. Further, Part II will compare the different immigration public defense models, further evaluate the existing immigration public defender units across the state of California and include interviews from: (1) the Santa Clara County Public Defender's Office, (2) the Alameda County Public Defender's Office, and (3) the Los Angeles County Public Defender's Office.

Part III elucidates the continued constitutional challenges with the application of the *Padilla* mandate and immigration removal proceedings in general. Simply said, representation for many noncitizen criminal defendants often falls short, especially in immigration court. Sometimes, immigration judges are to blame, considering they must juggle their own biases and removal quotas. Other times, noncitizen criminal defendants face challenges like language barriers. Regardless, this type of inadequate representation deprives noncitizen criminal defendants their constitutional right of due process.

Part IV advocates that Congress must implement immigration public defender units across the nation, modeled after those in California. However, representation must not stop there. Truly comprehensive and adequate representation would recognize that *Padilla* representation alone is not enough. Rather, adequate representation should also provide representation for noncitizen criminal defendants in their immigration proceedings as well, akin to the California Public Defender's Offices. Finally, this Part analyzes federal legislation introduced to address this issue.

I. BACKGROUND

Prior to 2010, criminal defense attorneys did not have an express constitutional obligation to counsel their clients who might face adverse immigration consequences, like deportation, as a result of their criminal charges. In *Padilla v. Kentucky*, the Supreme Court held that the absence of this counsel fails to comport to the obligations dictated by the Sixth Amendment and may be grounds for a claim of ineffective assistance of counsel.⁸ This section first provides an overview of the facts behind *Padilla*

⁸ IMMIGRANT DEF. PROJECT, DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY* 7, 9–10 (2010), <https://nysba.org/NYSB>

v. *Kentucky* before discussing the nuances of the legal questions left unanswered.

A. *PADILLA V. KENTUCKY*

Mr. José Padilla was born in Honduras and later became a lawful permanent resident of the United States for about forty years.⁹ While in America, Mr. Padilla pursued his version of the “American Dream” and served as a member of the U.S. Armed Forces during the Vietnam War.¹⁰ In 2001, Mr. Padilla was arrested when he transported a large amount of marijuana in his tractor-trailer.¹¹ During his criminal court proceedings, Mr. Padilla accepted a guilty plea on the advice of his legal counsel.¹² Specifically, his attorney told him “he did not have to worry about immigration status since he has been in the country for so long.”¹³

Unfortunately, the legal advice Mr. Padilla received from his criminal defense lawyer was erroneous. Under existing statutory frameworks, drug trafficking offenses are considered an aggravated felony.¹⁴ By accepting the guilty plea based on his legal counsel’s erroneous recommendation, Mr. Padilla became subject to mandatory deportation proceedings which barred him from any potential claims for relief from removal.¹⁵ When he was granted an audience before the United States Supreme Court, Mr. Padilla argued that had his lawyer not provided him with erroneous legal advice, he would not have accepted the guilty plea and would instead have insisted on going to trial.¹⁶

For the first time, the Supreme Court tackled the issue of whether Padilla’s counsel, and criminal defense lawyers across the nation, had an obligation to correctly advise their clients about the potential immigration consequences of accepting a guilty plea.¹⁷ In the majority opinion authored by Justice Stevens, the Court held that “constitutionally competent counsel

A/Coursebooks/Fall%202013%20CLE%20Coursebooks/Best%20Immigrant%20Outcomes/2.DutyofCriminalDefenseCounselRepresenting.pdf [https://perma.cc/P2M6-9G63].

⁹ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477 (2010).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 1478.

¹³ *Id.*

¹⁴ 8 U.S.C. § 1101(a)(43)(B) (defining “aggravated felony” to include “illicit trafficking in a controlled substance”).

¹⁵ *Padilla*, 130 S. Ct. at 1478.

¹⁶ *Id.*

¹⁷ *Id.*

would have advised [José Padilla] that his conviction for drug distribution made him subject to automatic deportation.”¹⁸ Effectively overnight, criminal defense attorneys across the nation had an express constitutional obligation to advise their noncitizen clients of potential immigration consequences that accompany a guilty plea.¹⁹

In arriving at this constitutional mandate, the Supreme Court evaluated the requirements of adequate legal counsel for noncitizens. Although “[i]mmigration law can be complex, and it is a legal specialty of its own,” the challenges of researching an unfamiliar area of law pale in comparison to the harsh consequences of deportation.²⁰ In emphasizing this point, the Supreme Court analogized the severity of deportation as “the equivalent of banishment or exile” and thus required legal counsel to fully inform their noncitizen clients of immigration consequences.²¹ Short of this, all noncitizen clients really have is “little more than a warm body with a law degree.”²²

B. IS IMMIGRATION REMOVAL PROCEEDINGS LAW CIVIL, CRIMINAL, OR BOTH?

One of the most challenging questions the *Padilla* Court tackled is whether immigration law, specifically removal, is considered a civil or criminal punishment. This distinction is crucial in determining the applicability and probative value for making decisions about what constitutes adequate representation pursuant to the Sixth Amendment’s protections. The relevant text of the Sixth Amendment states: “In all *criminal* prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.”²³ Courts and legal scholars have uniformly agreed the Sixth Amendment’s emphasis on criminal prosecutions generally means there is no right to effective counsel in civil proceedings.²⁴

When Mr. Padilla’s case was heard before the Kentucky Supreme Court, the Court found that deportation was a collateral consequence outside the scope of the Sixth Amendment right to counsel guarantee.²⁵ Under the Court’s logic, it naturally followed that “counsel’s failure to advise Appellee

¹⁸ *Id.*

¹⁹ *See Padilla*, 130 S. Ct. at 1478.

²⁰ *Id.* at 1483.

²¹ *Id.* at 1486 (citing *Delgado v. Carmichael*, 332 U.S. 388, 390–91 (1947)).

²² Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999).

²³ U.S. CONST. amend. VI (emphasis added).

²⁴ *E.g.*, *Watson v. Moss*, 619 F.2d 775, 776 (8th Cir. 1980).

²⁵ *Commonwealth v. Padilla*, 253 S.W.3d. 482, 485 (Ky. 2008).

of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief.”²⁶ In other words, the Kentucky Supreme Court believed immigration removal proceedings to be a civil matter, not covered by the Sixth Amendment. This means Mr. Padilla would not have a claim that he was entitled to adequate counsel under the Sixth Amendment.

Before the United States Supreme Court, Kentucky argued that the “right to ‘counsel for his defense’ contemplates a criminal prosecution, not a civil proceeding,” and that the “constitutional standard focuses on attorney competence in criminal cases, not civil or administrative cases.”²⁷ Conversely, Padilla argued that “one can no longer draw distinct lines between criminal and immigration consequences.”²⁸ Supporting briefs also argued that “[s]tatutory changes have broken down the walls between criminal and immigration proceedings” and “the line between penal and immigration consequences has been blurred.”²⁹ These arguments built on existing literature that argues deportation is not definitively a civil or criminal claim; sometimes, like in the present case, there is overlap.

When faced with this question, the United States Supreme Court acknowledged the confusion between whether immigration removal proceedings can be definitively classified with a civil or criminal label. The Court first admitted how “deportation is a particularly severe ‘penalty,’ but it is not, in a strict sense, a criminal sanction.”³⁰ The Court added that, “[a]lthough removal proceedings are civil in nature, deportation is . . . intimately related to the criminal process,” and thus it is challenging to “divorce the penalty from the conviction in the deportation context.”³¹

Although the Supreme Court did not definitively assert that removal proceedings are a criminal consequence, it did emphasize that “[t]he severity of deportation—the equivalent of banishment or exile—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.”³² Perhaps most importantly, the Court made clear that

²⁶ *Id.*

²⁷ Brief of Respondent at 9, 40, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651).

²⁸ Brief of Petitioner at 53, *Padilla v. Kentucky*, 130 S. Ct. 1473 (No. 08-651).

²⁹ Brief of *Amici Curiae* Crim. and Immigr. L. Professors, Cap. Area Immigrants’ Rts. Coal., Wash. Laws.’ Comm. for C.R. & Urb. Affs., & W. Ky. Refugee Mut. Assistance Soc’y, Inc. in Support of Pet’r at 18, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651); Brief of Const. Accountability Ctr. as *Amicus Curiae* Supporting Pet’r at 15, *Padilla v. Kentucky*, 130 S. Ct. 1473 (No. 08-651).

³⁰ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (citation omitted).

³¹ *Id.* (citation omitted).

³² *Id.* at 1486 (citation omitted).

“[i]t is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the ‘mercies of incompetent counsel.’”³³ Indeed, other commentators have noted that immigration law is a complex hybrid of both civil and criminal law.³⁴

Padilla clarified that the Sixth Amendment offers constitutional protections for criminal defendants—their legal counsel must provide adequate advice about potential immigration consequences. However, the Court did not address whether the constitutional requirement of providing adequate advice applies to noncitizens facing removal from the United States.

C. DO NONCITIZENS HAVE ALTERNATIVE CLAIMS FOR ADEQUATE COUNSEL VIA THE FIFTH AMENDMENT?

In *Padilla*, the Supreme Court left unanswered whether constitutional protections, apart from those of the Sixth Amendment, could be afforded to other noncitizens facing removal proceedings. This has prompted public confusion and spread misinformation about legal remedies afforded to noncitizens. For instance, in June 2018, then-President Trump tweeted: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”³⁵

Contrary to President Trump’s policy suggestion, the Fifth Amendment and contemporary interpretations of the Due Process Clause specifically carve out protections for noncitizens. The Due Process Clause of the Fifth Amendment in relevant part states: “No *person* shall . . . be deprived of life, liberty, or property, without due process of law.”³⁶ In 1993, the Supreme Court provided a contemporary clarification of the Due Process Clause, specifically noting that the Fifth Amendment also applies to noncitizens.

In *Reno v. Flores*, the Supreme Court heard an appeal raised by Jenny Flores and other noncitizen juveniles arrested by Immigration and Naturalization Services (INS) and placed into deportation proceedings. The

³³ *Padilla*, 130 S. Ct. at 1486 (citation omitted).

³⁴ Peter L. Markowitz, *Deportation is Different*, 13 J. CONST. L. 1299, 1350 (2011) (noting how the Supreme Court in *Padilla* recognized that “deportation is neither purely civil nor is it purely criminal,” opening a potential path for advocacy under existing constitutional protections traditionally reserved for criminal defendants).

³⁵ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 11:02 AM), <https://www.thetrumparchive.com/?dates=%5B%222018-06-23%22%2C%222018-06-25%22%5D&results=1> [<https://perma.cc/3GQQ-A9TV?type=image>].

³⁶ U.S. CONST. amend. V (emphasis added).

Court held that “[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”³⁷ Thus, Ms. Flores and the others were entitled to a hearing before an immigration judge.

Additionally, in 2001, the Supreme Court decided *Zadvydas v. Davis*. There, the plaintiffs were ordered to be removed but remained in government custody after the maximum initial ninety-day removal period.³⁸ The Court noted: “[O]nce an alien enters the country, the legal circumstances change, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”³⁹ In effect, even noncitizens fall within the umbrella of protections afforded by the Fifth Amendment’s grant of Due Process and cannot be removed without “a fair hearing, notice of the charges, an opportunity to defend, to examine and cross-examine witnesses and to be represented by counsel, and the decision must be by an unbiased tribunal on the basis of substantial evidence on the record.”⁴⁰ Given the Court’s mandate, it’s important to consider how criminal defense lawyers have responded to their *Padilla* call to duty.

II. PADILLA & IMMIGRATION REPRESENTATION IN ACTION

A. THE NIGHTMARE FOR PUBLIC DEFENDERS

Although the *Padilla* ruling was considered a major constitutional victory for noncitizen criminal defendants, not everyone celebrated this decision. The same holding immediately added even more strain to public defense attorneys. For context, the “United States accounts for less than 5 percent of the world’s population but almost 25 percent of the global prison population.”⁴¹ Further overburdening the criminal justice system is the fact that many of the people that fall within that group are indigent and have no other recourse for legal representation but that which is provided by public

³⁷ *Reno v. Flores*, 507 U.S. 292, 306 (1993) (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100–01 (1903)).

³⁸ *Zadvydas v. Davis*, 533 U.S. 678, 684–85 (2001).

³⁹ *Id.* at 693.

⁴⁰ Charles Gordon, *Due Process of Law in Immigration Proceedings*, 50 A.B.A. J. 34, 34 (1964) (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100 (1903)).

⁴¹ Tina Peng, Opinion, *I’m a Public Defender. It’s Impossible For Me To Do a Good Job Representing My Clients.*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken--its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html [https://perma.cc/78EQ-RJ38].

defenders.⁴² In 2007, public defender's offices across the nation received more than 5.5 million cases.⁴³ In America, eighty-one public defender's offices and 3,700 lawyers, investigators, paralegals, and support staff struggle to provide their clients with adequate representation.⁴⁴

Public defense attorneys recognize the existing mandate of the Sixth Amendment, but further understand they may fall short of their duty. One public defender has admitted:

An unconstitutionally high caseload means that I often see my new clients only once in those two months. It means that I miss filing important motions, that I am unable to properly prepare for every trial, that I have serious conversations about plea bargains with my clients in open court because I did not spend enough time conducting confidential visits with them in jail. I plead some of my clients to felony convictions on the day I meet them. If I don't follow up to make sure clients are released when they should be, they can sit in jail for unnecessary weeks and months.⁴⁵

This is not a novel experience for public defenders. Studies found in some states, "the typical public defender had two to three times the workload they should in order to provide an adequate defense."⁴⁶ Notably, one defender estimated he would need "almost 10,000 hours or five work-years, to handle the 194 active felony cases he had as of that April day, not to mention the dozens more he would be assigned that year."⁴⁷

Suddenly, in addition to the insurmountable workload many defenders already assumed, they now had a constitutional requirement to understand and advise their client on immigration law. In *Padilla's* concurrence, Justice Alito penned his concerns for criminal defense attorneys, noting that "[b]ecause many criminal defense attorneys have little understanding of immigration law, it should follow that a criminal defense attorney who

⁴² U.S. DEP'T OF JUST., CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 3 (2000), <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf> [<https://perma.cc/6PNB-YLM7>] (estimating that between sixty to ninety percent of all criminal cases involve indigent defendants).

⁴³ U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS: SELECTED FINDINGS, CENSUS OF PUBLIC DEFENDER OFFICERS 1 (2010), <https://www.bjs.gov/content/pub/pdf/pdo07st.pdf> [<https://perma.cc/6KQA-BXLF>] (noting how over a decade ago, public defender offices were already inundated with representation responsibilities since 15,000 public defenders were responsible for litigating 5.5 million cases).

⁴⁴ *Defender Services*, U.S. CTS., <https://www.uscourts.gov/services-forms/defender-services> [<https://perma.cc/N5SX-DM4F>] (last visited Oct. 10, 2020).

⁴⁵ Peng, *supra* note 41.

⁴⁶ Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [<https://perma.cc/V69B-XMNX>].

⁴⁷ *Id.*

refrains from providing immigration advice does not violate prevailing professional norms.”⁴⁸ There simply are not enough lawyers in the country who are knowledgeable about the immigration consequences of crimes to provide the necessary advice required, even if public defenders had access to such financial resources.⁴⁹

Despite the existing financial shortcomings at their offices, public defenders needed to ascertain potential immigration consequences for noncitizens. This includes knowing whether a defendant’s crime amounts to grounds for deportability or inadmissibility and ineligibility for citizenship, among other considerations.⁵⁰

Despite the concerns echoed by public defenders across the nation, there are some offices that have developed guidelines for public defense officers to properly comply with the *Padilla* mandate.⁵¹ Some of these offices include the Santa Clara County Public Defender’s Office, the Los Angeles County Public Defender’s Office, and the Alameda County Public Defender’s Office. I conducted interviews with public defenders at three offices, Santa Clara, Los Angeles, and Alameda County, which all serve significant noncitizen populations across California.⁵² These offices have adopted different but equally effective approaches to meet the challenges behind the unfunded *Padilla* mandate.

B. SU YON YI: SANTA CLARA COUNTY PUBLIC DEFENDER IMMIGRATION UNIT

In 2014, the Santa Clara County Public Defender’s Office created an immigration attorney position at the office and hired Elizabeth Chance. For

⁴⁸ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1488 (Alito, J., concurring) (citation omitted) (noting that “it would not always be easy to tell whether a particular [immigration] statutory provision is ‘succinct, clear, and explicit,’” thus “many defendants are likely to be misled”).

⁴⁹ Maureen A. Sweeney, *Where Do We Go from Padilla v. Kentucky? Thoughts on Implementation and Future Directions*, 45 *NEW ENG. L. REV.* 353, 362 (2011).

⁵⁰ IMMIGRANT DEF. PROJECT, *supra* note 8, at 13; *see also* IMMIGRANT DEF. PROJECT & N.Y.U. SCH. OF L. IMMIGRANT RTS. CLINIC, *JUDICIAL OBLIGATIONS AFTER PADILLA V. KENTUCKY: THE ROLE OF JUDGES IN UPHOLDING DEFENDANTS’ RIGHTS TO ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS* 30–31 (2011), <https://immigrantdefenseproject.org/wp-content/uploads/2011/11/postpadillaFINALNov2011.pdf> [<https://perma.cc/TDG4-BWZN>].

⁵¹ *See, e.g.*, IMMIGRANT DEF. PROJECT, *supra* note 8, at 8–10.

⁵² *See* Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/#:~:text=Where%20do%20most%20U.S.%20immigrants,than%204%20million%20immigrants%20each> [<https://perma.cc/8F6D-AZXG>] (explaining that nearly half, about forty-five percent, of the nation’s immigrants live in California, Texas, and Florida).

a period of time, Ms. Chance was the sole person responsible for the entire county's *Padilla* advisals⁵³. However, community activists realized that one person alone could not adequately address the needs of all clients considering that nearly sixty percent of all families in Santa Clara County are composed of either immigrants or U.S.-born children of immigrants.⁵⁴

In response, the Santa Clara Board of Supervisors created a second immigration attorney position. After the creation of the second position, Su Yon Yi was hired in December 2019 to serve as the Deputy Public Defender. I interviewed Ms. Yi to learn about the operations of the position and how the Santa Clara Public Defender's Office not only addresses the *Padilla* mandate but also provides limited immigrant removal defense and post-conviction representation. Ms. Yi's main responsibilities today include *Padilla* advisals, post-conviction representation, and noncitizen immigration court representation.

1. *Padilla* Advisals

Before Ms. Chance was hired to work at the Santa Clara County Public Defender's Office, the office's criminal defense attorneys were individually responsible for ascertaining whether criminal pleas included immigration consequences, which proved to be challenging.⁵⁵ However, once the Immigration Attorney position was created, it devoted much attention to *Padilla* advisals for other public defenders.⁵⁶ Currently, they complete roughly 140 advisals per month.⁵⁷

When public defenders receive a case involving a noncitizen, they refer the case to the Immigration Unit.⁵⁸ A paralegal from the office completes an intake form.⁵⁹ They conduct an in-depth evaluation of the client's criminal record and immigration background before considering potential

⁵³ A thorough "Padilla-Advisal" requires a defense attorney to inquire about the client's relevant history and factors that could implicate deportation and explain the potential immigration consequences to a guilty plea.

⁵⁴ SANTA CLARA CNTY. OFF. OF IMMIGRANT RELS., OFFICE OF IMMIGRANT RELATIONS ANNUAL REPORT: DIVISION OF EQUITY AND SOCIAL JUSTICE FY 2020 7 (2020), <https://www.sccgov.org/sites/oir/Documents/OIR%20FY%202020%20Report.pdf> [<https://perma.cc/Y2RP-EDP9>].

⁵⁵ Telephone Interview with Su Yon Yi, Immigr. Pub. Def., Santa Clara Cnty. Pub. Def. Off. (Feb. 22, 2021).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

immigration consequences.⁶⁰ The timing for *Padilla* advisals varied—it can range from five minutes for an “easy case” (where the client is charged with a DUI and has no prior record) to a few hours (for a new criminal offense where the research has not been completed).⁶¹

2. *Post-Conviction Relief*

Another aspect of the Immigration Unit’s attention and work is devoted to post-conviction relief.⁶² When a client has a conviction, it triggers deportation proceedings and affects whether a client is inadmissible or deportable.⁶³ Clients might call the office to ascertain if they qualify for public defense services, and the only criteria for representation is income and whether their conviction occurred in Santa Clara County.⁶⁴ When working on a post-conviction case, the Immigration Unit evaluates the prior attorney’s file and determines whether there are safer immigration alternatives to the conviction they received.⁶⁵ This type of comprehensive review is aimed at providing clients with a full picture of their options.⁶⁶

The unit also works with clients to collect letters of support from family, or other relevant evidence demonstrating that the client has ties to the United States.⁶⁷ The Immigration Unit then presents this to the District Attorney, who has discretion to consent to a motion to vacate, which would result in a shorter brief and ease the public defender’s caseload.⁶⁸ However, if the District Attorney contests the presented case, then the Immigration Unit must produce an exponentially longer and more complicated brief and prepare for trial.⁶⁹

⁶⁰ *Id.*

⁶¹ Telephone Interview with Su Yon Yi, Immigr. Pub. Def., Santa Clara Cnty. Pub. Def. Off. (Feb. 22, 2021).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Telephone Interview with Su Yon Yi, Immigr. Pub. Def., Santa Clara Cnty. Pub. Def. Off. (Feb. 22, 2021).

⁶⁸ *Id.*

⁶⁹ *Id.*

3. *Noncitizen Immigration Court Representation*

Ms. Yi shared that since there are only two attorneys in the immigration unit, taking on a removal case becomes very challenging.⁷⁰ However, the office does take on select immigration deportation proceedings.⁷¹ Although they are only able to take on limited cases due to budget constraints, the office aims to provide thorough and comprehensive representation for the few clients they do take on.⁷² In the past year, Ms. Yi represented two clients who were detained post-conviction.⁷³

4. *Other Work*

Apart from helping people with criminal convictions and immigration issues, the Immigration Unit also considers itself as a gap -filler.⁷⁴ They aim to take on cases that nobody else can.⁷⁵ Sometimes, this takes the form of helping clients with immigration matters, such as completing work permit forms.⁷⁶ Although this is not criminal in nature, many immigrants do not have anywhere else to turn for such legal services.⁷⁷

One of the most significant challenges the Immigration Unit faces is that there is not enough expertise to provide both criminal and immigration legal services.⁷⁸ Oftentimes, immigration attorneys might not understand the difference between expungement and motions to vacate, whereas criminal attorneys might be unaware of adverse immigration consequences to certain guilty pleas.⁷⁹ In some of those instances, Santa Clara County funds nonprofits that are tasked with removal defense instead of housing a designated deportation defense attorney.⁸⁰ When the Immigration Unit encounters a case where a client requires deportation defense, the unit refers the case to outside groups.⁸¹

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Telephone Interview with Su Yon Yi, Immigr. Pub. Def., Santa Clara Cnty. Pub. Def. Off. (Feb. 22, 2021).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Telephone Interview with Su Yon Yi, Immigr. Pub. Def., Santa Clara Cnty. Pub. Def. Off. (Feb. 22, 2021).

⁸⁰ *Id.*

⁸¹ *Id.*

5. *Successes*

Despite the challenges that come with representation, Ms. Yi shared that her job is a rewarding one—the success stories make her job worthwhile.⁸² For instance, at the end of the Trump Administration, United States Citizen and Immigration Services (USCIS) attempted to eliminate citizenship fee waivers.⁸³ Once the unit found out, the officer quickly evaluated all past and present post-conviction clients and helped low-income clients immediately apply before the fees increased.⁸⁴ Another success story involved a veteran client who would face deportation if convicted with a one-year sentence and the unit successfully advocated for the conviction to be reduced to 364 days.⁸⁵

C. RAHA JORJANI: ALAMEDA COUNTY PUBLIC DEFENDER IMMIGRATION REPRESENTATION PROJECT

The Alameda County Public Defender’s Office made history when it launched the first Public Defender Immigration Representation Project since it was the first of its kind within the state of California.⁸⁶ The project was initiated and developed by Raha Jorjani, who, to this day, leads the unit in its mission of providing representation for immigrants in deportation proceedings within Alameda County, which contains roughly 1,671,329 people across Oakland, Dublin, San Leandro, Hayward, and Fremont.⁸⁷

1. *Beyond Adequate Representation: The First California Defender Office to Provide Removal Representation*

Although many public defender’s offices have some immigration specialists to whom they could refer clients in order to meet their *Padilla*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Telephone Interview with Su Yon Yi, Immigr. Pub. Def., Santa Clara Cnty. Pub. Def. Off. (Feb. 22, 2021).

⁸⁵ *Id.*

⁸⁶ *Immigration*, ALAMEDA CNTY. PUB. DEF., <http://www.acgov.org/defender/services/immigration.htm> [<https://perma.cc/3QYH-Q5XK>] (last visited Dec. 1, 2020); IMMIGRANT LEGAL RES. CTR., PROTOCOLS FOR ENSURING EFFECTIVE DEFENSE OF NONCITIZEN DEFENDANTS IN CALIFORNIA (2015), https://www.ilrc.org/sites/default/files/resources/protocols_for_ensuring_effective_defense_of_noncitizen_defendants_in_ca_oct_2015.pdf [<https://perma.cc/D6BD-SBM2>] (noting that prior to starting the Immigration Representation Project, “Raha worked for eight years as a deportation defense attorney, including six years as faculty at the U.C. Davis School of Law Immigration Clinic”).

⁸⁷ *Quickfacts: Alameda County, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/alamedacountycalifornia> [<https://perma.cc/9M3D-U7FW>] (last visited Aug. 24, 2021).

advisal requirements, most defender's offices have not been able to represent noncitizens defendants in both criminal and immigration matters.⁸⁸

Rather than merely providing *Padilla* advisals, Ms. Jorjani realized her office could and should do more to cater to the needs of their immigrant community.⁸⁹ Thus, the office made it their responsibility to provide direct removal defense for select clients in immigration court, a truly unique and ambitious goal.⁹⁰ In effect, their office represents a noncitizen client throughout all stages of their immigration court proceedings.⁹¹ Unlike most defender offices that only represent clients at their criminal and immigration trial hearings, the Alameda County Defenders sought to provide comprehensive representation.⁹² They accomplish this by working with a given client as the client's case works its way through Immigration Courts, Board of Immigration Appeals, and even the Ninth Circuit Court of Appeals.⁹³ Notably, since the office provides so many levels of representation, the actual representation for any given client can take years.⁹⁴ Ultimately, this proves taxing on public defender's resources but remains critical for adequate representation under a correct interpretation of procedural due process.⁹⁵

2. *Additional Work*

Aside from representing clients in removal proceedings, the office also takes on post-conviction relief, appellate civil rights litigation, and *Padilla* advisals.⁹⁶

After returning to the office from a bond hearing in 2016, where the office's client was found to be a danger to the community, Ms. Jorjani and her team decided they needed to be able to sue immigration judges and the Department of Homeland Security when the deciding entities made gross errors in judgment.⁹⁷ Thus, the office added a federal litigation unit and since

⁸⁸ Telephone Interview with Raha Jorjani, Immigr. Pub. Def., Alameda Cnty. Pub. Def. Off. (Nov. 19, 2021).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Telephone Interview with Raha Jorjani, Immigr. Pub. Def., Alameda Cnty. Pub. Def. Off. (Nov. 19, 2021).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

2016 has filed twenty-three lawsuits challenging things like improper detention, undisclosed transportation of clients of the state without warning, and others.⁹⁸ The office's federal litigation practice is another example of how the office sets itself apart from other defenders in going beyond providing the bare minimum that is *Padilla* advisals.⁹⁹

The office's *Padilla* practice conducts on average around 1,100 advisals per year for the public defenders in the county.¹⁰⁰ Ms. Jorjani characterized *Padilla* advisals as an art: "We must balance enough information to form the legal analysis and advise, without overwhelming the public defender with immigration treatises."¹⁰¹ The public defenders also undergo mandatory training about *Padilla* and their expected duties associated with representation of noncitizen clients.¹⁰² Thus, defenders know to reach out to Ms. Jorjani and her staff anytime they have a noncitizen client.¹⁰³

Generally speaking, the immigration unit handles a wide breadth of responsibilities ranging from removals, post-conviction relief, and sometimes even select lawsuits in federal court on behalf of their clients.¹⁰⁴

3. *The Team*

The Immigration Representation Project has six total attorneys and one legal secretary devoted to noncitizen representation.¹⁰⁵ Ms. Jorjani serves as the managing attorney, one attorney focuses entirely on *Padilla* alsadvials, three are removal defense attorneys, and one is the federal litigation fellow.¹⁰⁶ Caseloads vary for the attorneys; on average, each individual juggles between twenty to thirty-five cases.¹⁰⁷

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Telephone Interview with Raha Jorjani, Immigr. Pub. Def., Alameda Cnty. Pub. Def. Off. (Nov. 19, 2021)..

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ To illustrate how expansive the office's representation truly is, Ms. Jorjani shared how the office has represented one client who upon losing their DACA and immigration relief, was represented by the office in varied removal proceedings and beyond. The representation included all different stages such as: BIA, the Ninth Circuit, DACA preliminary injunction in a different state, and a bond hearing. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Telephone Interview with Raha Jorjani, Immigr. Pub. Def., Alameda Cnty. Pub. Def. Off. (Nov. 19, 2021).

¹⁰⁷ *Id.*

4. *How Does the Office Decide Which Cases to Take On?*

Since the office assumes great responsibility that can last for years, they must be selective in deciding which clients they take on.¹⁰⁸ To that end, clients must meet at least three minimum criteria.¹⁰⁹ First, there must exist “some nexus between the client and the County of Alameda.”¹¹⁰ Second, since the office only represents indigent clients, the clients must be financially eligible.¹¹¹ Third, the client must pass a conflict screening.¹¹²

If a client meets the minimum criteria, the office has additional tiered priority representation considerations that emphasize people whom the government has identified for deportation.¹¹³ At the top of the list, with the highest priority, are noncitizens who are detained and face deportation.¹¹⁴ Next are nondetained noncitizens who face deportation.¹¹⁵ Third are noncitizens who have been arrested but may not have been discovered by the Department of Homeland Security (DHS) as eligible for deportation.¹¹⁶ Finally are juveniles with Special Immigration Juvenile Status (SIJS).¹¹⁷ This final category of juvenile clients are a high priority because their status is under a time limit.¹¹⁸ When a juvenile court takes jurisdiction, the court can make a special finding in limited circumstances to provide the youth with a pathway to a green card, and eventually citizenship.¹¹⁹

5. *Representation Today*

Ms. Jorjani believes that President Trump’s Administration’s policies made her office’s work much more challenging.¹²⁰ Cases have become much less predictable because of the many policy changes and resulting court

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Telephone Interview with Raha Jorjani, Immigr. Pub. Def., Alameda Cnty. Pub. Def. Off. (Nov. 19, 2021)..

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Telephone Interview with Raha Jorjani, Immigr. Pub. Def., Alameda Cnty. Pub. Def. Off. (Nov. 19, 2021).

¹¹⁹ *Id.*

¹²⁰ *Id.*

decisions.¹²¹ Thus, a lot of the office's time and focus has shifted from the important task of representation to the necessary task of reading new immigration policies and immigration case law.¹²²

However, the representation provided by the Alameda Public Defenders is not an equitable process.¹²³ Although Ms. Jorjani believes her office does a fantastic job of representing their clients, they cannot possibly represent everyone.¹²⁴ Across the nation, most immigration representation is even more limited.¹²⁵ However, Ms. Jorjani believes it would be possible to allocate resources toward immigration removal defense, stating:

The United States provides nearly \$740.5 billion to national security. We have the money. It's inaccurate and dishonest to claim we don't have the resources. We need to invest in our communities and in public defense to provide justice and due process to our community members because it makes us safer. It's about who and what we are investing in. Historically, this country has failed to invest in people of color and low-income communities. But that needs to change. We cannot afford to be a nation that disregards due process—we cannot be proud of that. We need to begin by fixing our immigration system.¹²⁶

Public defender offices like Alameda's have an ambitious goal of representing noncitizen criminal defendants both in their criminal and their immigration proceedings. However, this is not the norm; most offices are unable to go beyond the *Padilla* mandate and instead offer other forms of immigration representation.¹²⁷

D. GRACIELA MARTINEZ: LOS ANGELES PUBLIC DEFENDER IMMIGRATION UNIT

The final public defender's office surveyed that offers in-house immigration support for indigent noncitizen criminal defendants is the Los Angeles County Public Defender. The Los Angeles County Public Defender's Office is the oldest and largest public defender's office in the nation, boasting a roster of more than 700 attorneys, paralegals, investigators,

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Telephone Interview with Raha Jorjani, Immigr. Pub. Def., Alameda Cnty. Pub. Def. Off. (Nov. 19, 2021).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ THE IMMIGRANT LEGAL RES. CTR., *supra* note 86.

social workers, and administrative staff.¹²⁸ The office includes a dedicated immigration unit. The Los Angeles County Public Defender Head Deputy of the Immigration Unit, Graciela Martinez, provided additional context on the office's stature and commitment to the immigrant community.

1. Aspirations

The Immigration Unit and Graciela Martinez's broad goal is providing holistic representation to clients in a way which honors a lawyer's Sixth Amendment duty to properly represent and defend criminal charges.¹²⁹ This means that they actively look beyond criminal matters to the systemic issues that land people into the criminal system.¹³⁰ Part of her office's obligation is compliance with the *Padilla* mandate to properly advise and defend against immigration penalties that may result for their clients.¹³¹

2. The Team

Ms. Graciela Martinez is the supervising attorney and oversees nine different attorneys, two paralegals, and two administrative staff.¹³² When other Los Angeles County public defenders have a criminal case that implicates potential immigration consequences, this flags the *Padilla* advisal requirement and Ms. Martinez's team steps in.¹³³ Since the unit's goal is to support other public defenders, they set up an internal email and phone line made available to the Los Angeles County Public Defender's Office.¹³⁴ On any given day, the lawyers in the unit address the flood of emails, calls, and texts the office receives from the 700 lawyers in the unit—the office provides thousands of consultations per year, if not more.¹³⁵

3. What Does Representation Look Like?

When asked what the final analysis looks like, Ms. Martinez shared that “it depends on a variety of factors like the severity of the charge and the

¹²⁸ *About Us: Vision and Mission Statement*, LAW OFFS. OF L.A. CNTY. PUB. DEF., <https://pubdef.lacounty.gov/about-us/> [https://perma.cc/SW8B-6H5P] (last visited Aug. 24, 2021).

¹²⁹ Telephone Interview with Graciela Martinez, Immigr. Pub. Def., L.A. Cnty. Pub. Def. Off. (Nov. 11, 2020).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *PD's Immigration Unit*, LAW OFF. OF L.A. CNTY. PUB. DEF. (Oct. 25, 2020), <https://pubdef.lacounty.gov/pds-immigration-unit/> [https://perma.cc/KLD4-3SEV].

stability of the client's current immigration status."¹³⁶ While the office handles some simple immigration questions, more recently, Trump Administration policies complicated the required filings. The final reports to lawyers include analysis on deportability, inadmissibility, eligibility for relief from removal, and post-conviction relief options.¹³⁷ A significant portion of the unit's daily efforts are devoted to *Padilla* advisals on pending cases. Additionally, the office also does affirmative representation for post-conviction matters, legislative work supporting California immigrant communities, appellate litigation, and local advocacy.¹³⁸

4. Challenges

Despite the support offered to noncitizens, the Immigration Unit cannot represent individuals in immigration proceedings.¹³⁹ At most, they only engage in post-conviction relief for clients, and never beyond the state court level, so long as there is no conflict.¹⁴⁰ The office's hope was to expand the scope of their responsibilities to include an immigration civil representation unit, which would include immigration representation.¹⁴¹ However, Ms. Martinez shared that the office isn't quite there yet—especially with the rise of the COVID-19 pandemic.¹⁴²

Finally, when asked whether an immigration public defender system was a feasible goal at a behemoth defender's office such as the Los Angeles County Public Defender's Office, Ms. Martinez shared that the key question comes down to funding.¹⁴³ In Los Angeles, the County and Board of Supervisors have a commitment to representing their local constituents.¹⁴⁴

¹³⁶ Telephone Interview with Graciela Martinez, *supra* note 129.

¹³⁷ Post-conviction relief generally includes identifying potential waivers against automatic deportation or grounds for inadmissibility. *Id.*

¹³⁸ The Immigration Unit works with the Appellate Division to file briefs on numerous issues in both federal and state court. One example of local advocacy involved getting the Sheriff's Board to pass protocol to stop the officers from turning people over without a judicial warrant. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*; *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (holding that the Sixth Amendment's guarantee of a right to assistance of counsel also applies to state court). Literature has argued that the "importation of Gideon-inspired right to counsel" might be extended to an immigration defender system. See Ingrid V. Eagly, *Gideon's Migration*, 34 IMMIGR. & NAT'Y L. REV. 2282, 2286 (2013).

¹⁴⁴ Telephone Interview with Graciela Martinez, *supra* note 129.

However, many times, immigrants in removal proceedings might be transported by Immigration and Customs Enforcement (ICE) across the state, or even nation, to a detention center while they await removal proceedings. One problem is who pays the bill to represent those who are detained.¹⁴⁵ According to Ms. Martinez, “everything comes down to money and there would need to be a nexus between Los Angeles County and the noncitizen facing removal proceedings.”¹⁴⁶

III. LIMITATIONS OF THE *PADILLA* HOLDING & FAILURES TO UPHOLD THE FIFTH AMENDMENT

The *Padilla v. Kentucky* Supreme Court holding importantly clarified how noncitizen criminal defendants are entitled to constitutional rights afforded through the Sixth Amendment right to adequate legal counsel. Other literature also suggests the possibility that noncitizen criminal defendants are protected by the Fifth Amendment right to procedural due process.¹⁴⁷ Notably, however, the *Padilla* holding was limited—it only extended a criminal defense attorney’s responsibility to advise on the immigration consequences of a criminal charge, but not to provide counsel for (quasi-civil) immigration-related proceedings. But the reality is that hundreds of thousands of noncitizens require legal representation but are unable to acquire any relief or adequate counsel in their removal proceedings.¹⁴⁸

In 2018, ICE removed 256,085 noncitizens.¹⁴⁹ Some of the highest priority candidates for removal include noncitizens who engage in criminal acts, are a threat to public safety, violate their visa, or those who enter the

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Austin T. Fragomen, Jr., *The “Uncivil” Nature of Deportation: Fourth and Fifth Amendment Rights and the Exclusionary Rule*, 45 BROOK. L. REV. 29, 34–35 (1978) (arguing that removal proceedings should be deemed quasi criminal); Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT’L L. REV. 29, 32 (2003) (arguing that immigration removal proceedings are criminal in nature).

¹⁴⁸ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 22 (chart); see also Matt Adams, *Advancing the “Right” to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. SCI. 169, 171–72 (2010) (noting how many noncitizens must represent themselves pro se as they are unable to retain legal counsel for their removal proceedings).

¹⁴⁹ U.S. IMMIGR. AND CUSTOMS ENF’T, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 11 (2018), <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf> [<https://perma.cc/F9WW-CWQ2>] (noting that removals in 2018, also known as deportations, were the highest since 2014).

United States without lawful travel documents.¹⁵⁰ In such cases, the noncitizen facing removal has the option between voluntary departure or to go through the court removal proceedings.¹⁵¹

If a noncitizen were to accept the voluntary departure option, their detention process proves unpredictable. Legal scholars familiar with the process share that the vast majority of people facing removal proceedings do not contest their charges.¹⁵² However, if a noncitizen were to contest the removal proceeding before an immigration judge, they are “subjected to . . . prolonged detention that can stretch out over a period of years.”¹⁵³

Additionally, if a noncitizen facing removal were to choose to pursue removal proceedings, the noncitizen would face an immigration court judge who is part of the United States Department of Justice. Unfortunately, even immigration judges may fail to set aside their personal prejudices.¹⁵⁴ On average, immigration judges have a docket of more than 700 cases a year.¹⁵⁵ Despite there being 227 immigration judges, they have a combined backlog of more than half a million cases.¹⁵⁶ Given their tremendous caseloads, it is unsurprising that “[w]hen the brain has to process large volumes of information quickly, there is a tendency to rely on experiences rather than on unique details in the present. In judging people, for instance, this can mean falling back on generalizations about race, age, country of origin, religion, or gender.”¹⁵⁷

In addition to problems of prejudicial attitudes or interpretations to certain cases, immigration judges must also conform to guidelines set by the Department of Justice. In a concerted effort to speed up noncitizen removals and reduce the staggering backlog, the Department of Justice imposed quotas for immigration judges.¹⁵⁸ Critics like the National Association of

¹⁵⁰ *Deportation*, USAGov, <https://www.usa.gov/deportation#item-34837> [<https://perma.cc/S7EH-FGWF>] (last visited Dec. 2, 2020) (defining some of the categorical priorities for removal from the United States).

¹⁵¹ *Id.*

¹⁵² Adams, *supra* note 148, at 174.

¹⁵³ *Id.*

¹⁵⁴ Caitlin Dickerson, *How U.S. Immigration Judges Battle Their Own Prejudice*, N.Y. TIMES (Oct. 4, 2016), <https://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html> [<https://perma.cc/963K-5PBH>].

¹⁵⁵ *Id.* (noting that immigration judges handle twice as many cases as federal district court judges).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018, 1:09 PM), <https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out->

Immigration Judges opined that these quotas “could undermine judicial independence and erode due process rights for immigrants.”¹⁵⁹ Constitutional red flags are raised in the precise moment a noncitizen faces the immigration court judge without legal representation.

As detailed earlier, the Due Process provision of the Fifth Amendment applies to noncitizen representation, regardless of whether they are facing an Article III judge or a Department of Justice immigration judge. In those instances, noncitizens are entitled to the constitutional protection of adequate legal representation. In fact, even Congress has recognized how noncitizens must be afforded the right to legal representation. The statutory provision states:

In any removal proceeding before an immigration judge and in any appeal proceeding before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being representing (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose.¹⁶⁰

With as few as six words—“at no expense to the Government”¹⁶¹—Congress effectively crippled the purpose of the “right to counsel” statute. Noncitizens are told: “Sure, you can have legal representation. Good luck finding it!”

The somber reality is many noncitizens facing removal proceedings simply will not have any access to legal counsel, much less adequate legal counsel. In many situations, noncitizens face an uphill battle, alone. Noncitizens desperately want and need legal representation throughout their immigration proceedings. Yet, “in light of the liberties at stake and the complexity of the immigration system, it is striking that most respondents must appear pro se as they are unable to retain a private attorney.”¹⁶² More specifically, among “[t]he majority of respondents in removal proceedings, more than sixty-five percent, were detained. Of those who were detained, more than ninety percent were unrepresented.”¹⁶³

One problem with criminal defense attorneys representing noncitizens facing immigration removal proceedings is the lack of knowledge and

quotas-for-immigration-judges [<https://perma.cc/U53D-58HJ>] (describing the quota guidelines and noting that the standard for a “satisfactory” rating requires immigration judges to decide at least 700 cases per year with fewer than fifteen percent of those cases overturned on appeal).

¹⁵⁹ *Id.*

¹⁶⁰ 8 U.S.C. § 1362 (2020) (emphasis added).

¹⁶¹ *Id.*

¹⁶² Adams, *supra* note 148, at 171.

¹⁶³ *Id.* at 172.

training. Criminal defense attorneys are untrained in the complexities of American immigration law.¹⁶⁴ Thus, for many noncitizen criminal defendants, if they lack the financial resources to retain legal counsel and cannot secure an attorney to represent their case pro bono, then they would need to represent themselves. Moreover, “removal proceedings are complex and adversarial, [because] in each case the unrepresented individual is pitted against a U.S. trial attorney trained in immigration law.”¹⁶⁵ Sometimes, “[t]he imbalance of power is further exacerbated by the fact that the respondents generally do not speak English and often have limited education.”¹⁶⁶ Finally, “without legal representation, most respondents do not have access to obtain the necessary supporting documents to appropriately present their cases.”¹⁶⁷ Studies on the adequacy of representation in removal proceedings have been depressing—noncitizens face an uphill battle in seeking representation since it is tough to find someone who will do it for free.¹⁶⁸

Noncitizens who cannot afford legal counsel, speak little to no English, lack access to necessary documentation, and must represent themselves against a trained attorney seeking their removal do not truly have adequate representation. Collectively, these issues run afoul of the Fifth Amendment right to due process, which includes adequate representation.

IV. THE CASE FOR FULL LEGAL REPRESENTATION: NONCITIZENS DESERVE REPRESENTATION

Time and time again, the Supreme Court has affirmed that noncitizens are entitled to adequate legal representation in their removal proceedings pursuant to their Fifth Amendment right. Ironically, Congress has also recognized this right, but has declined to pay for the services required to fulfill it.

¹⁶⁴ Carlos J. Martinez, George C. Palaidis & Sarah Wood Borak, *You Are The Last Lawyer They Will Ever See Before Exile: Padilla v. Kentucky and One Indigent Defender Office's Account of Creating a Systematic Approach to Providing Immigration Advice in Times of Tight Budgets and High Caseloads*, 39 *FORDHAM URB. L.J.* 121, 129–30 (2012).

¹⁶⁵ Adams, *supra* note 148, at 179.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Ingrid & Shafer, *supra* note 148, at 7–8 (noting how researchers found that “only 2% of immigrants facing removal secured pro bono representation from large law firms, nonprofits, or law school clinics. The lion’s share of immigrant representation—90% during the six-year study period—was provided by solo or small firm practitioners. Finally, discussions of attorney representation often assume that representation is necessarily complete, but we find that only 45% of immigrants we count as ‘represented’ had an attorney appear at all of their court hearings.”).

Under the Trump Administration's immigration policies, some congressional representatives have recognized the disconnect between the constitutional requirement for representation.¹⁶⁹ Presumably, congressional leaders understand that "[r]emoval proceedings are legally complex, adversarial in nature, and can result in consequences that have been found by this nation's highest Court to be severe and harsh, including 'the loss of property and life[,] or of all that makes life worth living.'"¹⁷⁰

Congress is fully empowered and should take action to revisit this issue. More specifically, Congress should fund the creation of a federal immigration public defender position and pass legislation in support of this. Evidenced by the Santa Clara Public Defender's Office, Los Angeles Public Defender's Office, and Alameda County Public Defender's Office—housed in geographic areas that cater to some of the highest noncitizen populations—there has been great success in both providing effective immigration counsel via *Padilla* advisals or even providing full representation for noncitizens facing removal proceedings. These offices have demonstrated a commitment to *upholding Padilla's* constitutional requirements. Going forward, Congress should recognize these deficits by enacting legislation that mandates federal defender offices to create immigration public defender units or positions catered to providing noncitizens with adequate legal representation regarding both their criminal and immigration charges.

As of this writing, at least four pending federal bills address this precise issue. Some of this legislation is more narrowly tailored to a subset of especially vulnerable noncitizens, but all address the need for government-funded legal counsel to address the constitutional rights of noncitizens facing removal proceedings. Below is a brief analysis of the most prevalent bills.

¹⁶⁹ See Abigail Abrams & Alana Abramson, *Trump's Immigration Plan Won't Pass Congress. But It Could Be the Future of the GOP*, TIME MAG. (May 16, 2019, 10:19 PM) <https://time.com/5590730/trump-immigration-plan-congress/> [<https://perma.cc/GQ7F-9XRZ>] (“The White House says it has drafted bill language, but is keeping it strictly under wraps. No lawmakers have stepped forward offering to sponsor the bill and no legislative text is being drafted.”).

¹⁷⁰ *Briefing Paper: Access to Counsel and Due Process for Detained Immigrants*, NAT'L IMMIGRANT JUST. CTR. (Apr. 16, 2007), <https://immigrantjustice.org/sites/default/files/Briefing%20Right%20to%20Counsel.pdf> [<https://perma.cc/9NU5-HZ2D>]; see also Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

A. H.R. 3775—EQUAL JUSTICE FOR IMMIGRANTS ACT OF 2019

The Equal Justice for Immigrants Act of 2019 was introduced by Representative Anthony Brown on July 16, 2019.¹⁷¹ Considered the most expansive of the current pending legislation, this bill would propose to modify the Immigration and Nationality Act (8 U.S.C. § 1228(b), § 1229a(b) (2020)) by striking the phrase “at no expense to the government.”¹⁷² Within the bill, there is a proposed section that speaks to the issue of indigent noncitizens who require legal representation. In relevant part, the bill states: “in the case of an indigent alien, an immigration judge shall appoint, at the alien’s request, counsel to represent the alien in any proceeding”¹⁷³

B. S. 2936—REFUGEE PROTECTION ACT OF 2019

S. 2936, otherwise known as the Refugee Protection Act of 2019, was introduced by Senators Patrick Leahy and Cory Booker, Representative Zoe Lofgren, and then-Senator Kamala Harris.¹⁷⁴ Notably, all the legislators noted that this was a direct response to President Trump’s immigration policies.¹⁷⁵ Section 113 of the bill, titled Fair Day in Court for Kids, is tailored to increasing access to legal representation for children. It proposes amending the Immigration and Nationality Act (8 U.S.C. § 1229a(b)) “by striking, ‘at no expense to the Government.’”¹⁷⁶ More broadly, however, the bill would also authorize the Attorney General to “provide counsel to aliens in immigration proceedings” but does not define who would assume the responsibility.¹⁷⁷

¹⁷¹ Equal Justice for Immigrants Act of 2019, H.R. 3775, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/3775/text> [<https://perma.cc/3RC5-J449>].

¹⁷² *Id.* at § 202(a).

¹⁷³ *Id.*

¹⁷⁴ Press Release, U.S. Senator Patrick Leahy of Vermont, Leahy, Lofgren, Harris And Booker Lead Bicameral Protection Act of 2019 (Nov. 11, 2019), <https://www.leahy.senate.gov/press/leahy-lofgren-harris-and-booker-lead-bicameral-refugee-protection-act-of-2019> [<https://perma.cc/Z7NS-H5XV>].

¹⁷⁵ *Id.* (citing Senator Leahy: “[a]s the world faces the worst refugee crisis in recorded history, the United States should be embracing our role as the humanitarian leader of the world – not retreating from it, as the Trump administration has shamefully done” and citing then-Senator Harris: “[t]he United States must always be a place where refugees are welcomed and encouraged to contribute to society . . . [b]ut, from day one, the Trump administration turned its back on refugees and abdicated our nation’s moral responsibility to welcome children and families fleeing ongoing persecution”).

¹⁷⁶ Refugee Protection Act of 2019, S. 2936, 116th Cong. (2019–20), <https://www.congress.gov/bill/116th-congress/senate-bill/2936/text> [<https://perma.cc/ZCH8-EJU7>].

¹⁷⁷ *Id.* at § 113(a)(1)(B).

C. S. 2389—FAIR PROCEEDINGS ACT

S. 2389, titled FAIR Proceedings Acts, was sponsored by Senator Kirsten Gillibrand on July 31, 2019. Similar to the previous bill, it would require the Attorney General to “appoint or provide counsel, at the expense of the Government, if necessary, at the beginning of immigration proceedings, or as expeditiously as possible.”¹⁷⁸ This bill would afford representation across all immigration detention and border facilities.

D. S.2113—STOP CRUELTY TO MIGRANT CHILDREN ACT

Finally, S. 2113, also known as the Stop Cruelty to Migrant Children Act, was proposed on July 15, 2019 by Senator Jeff Merkley. This bill authorizes the Attorney General to enter into contracts with “nonprofit agencies with relevant expertise in the delivery of immigration-related legal services to children . . . including providing legal orientation, screening cases for referral, recruiting, training, and overseeing pro bono attorneys.”¹⁷⁹ Moreover, this particular bill also provides clarity on the specific duties of counsel: they must represent their noncitizen child client in all proceedings related to their immigration status, appear in individual merits hearings before the Executive Office for Immigration Review, and also appear for Department of Homeland Security Interviews.¹⁸⁰

E. RECOMMENDATION

The above congressional bills should be lauded as steps in the right direction. However, only proposed bill H.R. 3775—the Equal Justice for Immigrants Act—comports with the constitutional requirement for adequate representation outlined in the Fifth Amendment. Adoption of this expansive bill, coupled with the creation of a dedicated immigration public defender across all defender’s offices catered to indigent clients, is the gold standard.

Although all of the bills propose different stances—most only address children since they are the most vulnerable type of noncitizen—these bills still take an important step in the right direction. This type of legislation addresses the constitutional rights that all people within the United States hold, regardless of their citizenship status. To respect the Due Process right to counsel, the government must take initiative and provide representation to

¹⁷⁸ FAIR Proceedings Act, S. 2389, 116th Cong. (2019–20), <https://www.congress.gov/bills/116/2389/text> [<https://perma.cc/H882-FXDQ>].

¹⁷⁹ Stop Cruelty to Migrant Children Act, S. 2113, 116th Congress (2019–20), <https://www.congress.gov/bills/116/2113/text> [<https://perma.cc/D8WL-HY6X>].

¹⁸⁰ *Id.*

noncitizens. The United States cannot claim to follow certain parts of the Constitution only where convenient.

When faced with the decision about establishing dedicated immigration public defender positions or units across the nation, Congress will have a difficult time overcoming the financial challenges associated with this legislation. However, as the interviews with the local defenders demonstrated, this process can start small and perhaps begin with individual positions devoted to this work. What matters most is that noncitizens receive adequate representation.

CONCLUSION

Padilla v. Kentucky was the first time the Supreme Court considered the question of whether noncitizens were entitled to adequate representation or supplemental information beyond their criminal case. Today, defense attorneys have an affirmative responsibility to understand and inform their clients of potential adverse immigration consequences. In arriving at this decision, the Court relied primarily on the Sixth Amendment Right to counsel, comparing deportation with banishment, a historical means of punishment.

This Comment argues that in addition to the Sixth Amendment, the Fifth Amendment grants relevant procedural due process protections. This Comment further qualifies this responsibility to noncitizens facing removal proceedings, arguing that the Fifth Amendment ought to also apply in those instances. The Comment evaluates some existing public defense models that represent noncitizens in removal proceedings or in post-conviction. Offices across California cater to high immigrant populations yet are still able to execute their representation responsibilities—they are the model for going beyond the minimum of “adequate representation.” Finally, this Comment argues that Congress should and must take legislative action to ensure that noncitizens receive adequate representation for removal proceedings, as required by the Fifth Amendment.

The dialogue on this topic must not stop here. The United States of America has long prided itself on its integration of immigrants.¹⁸¹ In fact, the United States is home to more than 44.8 million immigrants.¹⁸² As a nation,

¹⁸¹ The text engraved on the Statute of Liberty reads: “Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!”

¹⁸² Abby Budiman, Christine Tamir, Lauren Mora & Luis Noe-Bustamante, *Facts on U.S. Immigrants, 2018*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants/#:~:text=There%20were%20a%20record%2044.8,of%20the%20total%20U.S.%20population> [<https://perma.cc/8KDW-R3NU>].

the United States should embrace its immigrants and offer comprehensive legal protections afforded by the Constitution, found within the Fifth Amendment's text. Congressional leaders have taken the first steps in expanding the protections, but more can and must be done. The time to act is now.