

INFORMATIONAL HEARING  
THE SENATE COMMITTEE ON JUDICIARY

*Due Process of Law - Fundamental Principle of Justice for All  
Overview & Case Study on Immigration Proceedings*

February 28, 2017  
1:30 p.m. to 4:30 p.m.  
State Capitol, Hearing Room 112

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**BACKGROUND PAPER**

Due process of law is a bedrock upon which our legal system rests. It is fundamental to the legitimacy and sustainability of the rule of law. It is key to the protection of individual rights against government fiat and thus a bulwark against totalitarianism. It is central to the very notion of justice itself.

Distilled to its essence, due process of law is the requirement that society undertake a fair and carefully considered procedure before anyone may be deprived of life, liberty, property, or rights. The core elements of due process of law – notice and a hearing before a neutral decision-maker – are well established. Still, the details of what procedure must be followed, for whom, and under what circumstances, has evolved over time. It remains the subject of vigorous judicial and policy debate.

In an array of statements across a variety of contexts, the recently inaugurated federal executive has expressed a radically different notion of what are acceptable forms of due process of law, among them: profiling based on religion, widespread surveillance of citizens, the use of torture, and mass deportation and detention. Many of these policy proposals, if implemented, would have a profound impact on Californians. Now more than ever, therefore, California’s leaders must reflect upon what we believe constitutes due process of law and how we can ensure that it remains robust in our state and in our nation.

With this in mind, the Senate Committee on Judiciary will hold informational hearings from time to time this Session, with the aim of raising legislative awareness about emerging due process concerns and ideas for responses from California to retain the integrity of these most basic rights in our democracy.

Today’s hearing begins with an overview of due process of law from one of our state’s preeminent legal scholars. Next, to illustrate the importance of the issue to all who interact with our justice system and to coincide with consideration of pending

legislative proposals in the area, we will proceed to a case study on due process challenges in the arena of immigration proceedings and how those problems impact California's children, parents and communities. We will conclude with a presentation on model solutions and proposed action.

## **I. Overview of Due Process of Law**

The Fifth Amendment to the U.S. Constitution states: "[n]o person shall be... deprived of life, liberty, or property, without due process of law..." The Fourteenth Amendment imposes the same requirement upon the states.

What exactly is "due process of law?" The basic concept behind due process of law is simple and rooted in common sense. It is the answer to the question: "how do we resolve conflicts fairly?" As constitutional scholar and University of California, Irvine School of Law Dean Erwin Chemerinsky has summarized it, due process of law always entails "certain basic safeguards such as notice of the charges or issue, the opportunity for a meaningful hearing, and an impartial decision maker."<sup>1</sup>

But, Chemerinsky notes, from this simple formulation spring myriad questions:

what type of notice is required; must it be notice that is personally served or is notice by posting or even by publication sufficient? What type of hearing must be supplied; is a full-trial type, adversarial hearing required or is a much more informal proceeding sufficient? What procedural safeguards must be accorded at the hearing? Must the government provide the right to be represented by an attorney at the hearing and, if so, is the government required to provide indigents with a free lawyer if they cannot afford one? When must the hearing occur: must it be before the deprivation can occur or is a post-deprivation hearing sufficient? What is the standard of proof and who has the burden of proof? Who is a permissible decision maker; must it be a judge or can others suffice? And these are just some of the choices that must be made in deciding what due process requires.<sup>2</sup>

To complicate matters, the U.S. Supreme Court has not given any hard and fast meaning to "due process of law." According to the Court: "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place,

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<sup>1</sup> Chemerinsky, *Constitutional Law Policies and Principles*, Fifth Edition (2015), p. 606.

<sup>2</sup> *Id.* at 605.

and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>3</sup>

Nonetheless, to help in assessing whether the constitutional requirements of due process have been met in any particular instance, the U.S. Supreme Court has laid down a three part balancing test. Whether any given set of procedures will pass constitutional muster depends on:

1. the private interest that will be affected by the official action;
2. the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
3. the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.<sup>4</sup>

This is generally referred to as “The Mathews Test.”

Dean Chemerinsky likes that the Mathews Test frames the issues appropriately. “It seems clearly correct that the nature of the proceedings should be a function of the interest involved, the degree to which the proceedings will make a difference, and the cost to the government.”<sup>5</sup> That comports with common sense. “An expensive trial-type hearing would be out of place for a minor interest in a situation where there is little likelihood of a factual dispute. But an adversarial hearing is essential, despite its expense, if there is a fundamental right at stake, such as the rights of parents to the custody of their children.”<sup>6</sup>

Yet Chemerinsky points out that the Mathews Test remains frustratingly vague, leaving judges and policy makers without much true guidance about what constitutes sufficient due process to pass constitutional muster. “The reality is that courts have enormous discretion in evaluating each of the three factors and especially how to balance them.”<sup>7</sup>

Moreover, the test can be criticized for “giving insufficient weight to the intrinsic benefits of procedural protections.”<sup>8</sup> In other words, due process of law matters not just

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<sup>3</sup> *Mathews v. Eldridge* (1976) 424 U.S. 319, 334 (internal citations omitted).

<sup>4</sup> *Id.* at 335.

<sup>5</sup> Chemerinsky, *Constitutional Law Policy and Principles*, *supra*, p. 607.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

for achieving the right results,” it is also about treating individuals fairly and with dignity when important decisions are made about their lives.”<sup>9</sup>

Ultimately, decisions about how robust “due process” should be involve choices about our values as a society. At least in the short term, minimal due process protections may indeed be cheaper, more efficient, and more satisfying to a government eager to throw its weight around. But the degree to which we are collectively willing to invest in and have the patience for strong due process protections will impact how often our legal system gets decisions right, how much protection individuals have against the exercise of arbitrary government authority, and how much respect the public has for the rule of law.

Just what lies in the balance is well illustrated by a close examination of the due process shortcomings of our current immigration enforcement system and the devastation they unleash on California children, parents, businesses, and communities. Such a review is especially important and timely in light of the recent release of two memoranda from the Director of the Department of Homeland Security (DHS), detailing how the Trump Administration intends to carry out an immigration enforcement regime that is greatly expanded in terms of who it will target and the number of people who will be held in detention, but greatly reduced in terms of due process considerations.<sup>10</sup>

## II. CASE STUDY: DUE PROCESS OF LAW IN IMMIGRATION PROCEEDINGS

According to U.S. Supreme Court precedent, the Fifth Amendment’s protections apply to immigrants whether legally authorized to be present in the country or not.<sup>11</sup> It follows that, since forcibly removing someone from the country deprives that person of a liberty interest,<sup>12</sup> immigrants are constitutionally entitled to due process of law before they can be deported.

What due process is required? Based on the Mathews Test, one might imagine that quite robust procedural protections are required. After all, the immigrant’s private interest at stake is tremendous. It is not just physical expulsion from the country, but all that such expulsion entails: separation from family, community, and livelihood. For immigrants who have been in the U.S. for a long time, connections to their country of origin may be tenuous at best. They may have no family, no place to live, no job prospect, no community ties and no cultural frame of reference for the country to which

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<sup>9</sup> *Ibid.*

<sup>10</sup> Both the Executive Order and the Implementation Memos are available at <https://www.dhs.gov/executive-orders-protecting-homeland> (as of Feb. 22, 2017).

<sup>11</sup> *Zadvydas v. Davis* (2001) 533 U.S. 678, 690.

<sup>12</sup> *Fong Haw Tan v. Phelan* (1948) 333 U.S. 6, 10.

they are being banished. Some do not even speak the language. As the U.S. Supreme Court has acknowledged “deportation may result in the loss of all that makes life worth living.”<sup>13</sup> Thus, the private interest at stake in immigration proceedings is enormous. In many cases, it is arguably equivalent to or greater than what is on the line in criminal proceedings.

With regard to the second element of the Mathews balancing test, the risk that an immigrant will be deported erroneously is also quite high. Immigration law is notoriously complex. There are many potential legal avenues to relief from deportation, but identifying which one may be applicable requires patience and expertise. As discussed in greater detail below, immigrants with legal counsel guiding them through the process are five times more likely to obtain relief than their unrepresented counterparts.<sup>14</sup> This strongly suggests that relatively straightforward additional due process protections – the guarantee of legal counsel, in particular – would dramatically reduce the fraction of erroneous outcomes.

As to the third element of the Mathews Test, the government’s interest in immigration proceedings, the U.S. Supreme Court has found it to be “weighty,”<sup>15</sup> and the cost of administering the U.S. immigration enforcement system is substantial. Still, by the logic of the Mathews balancing test, to justify a constitutionally lower due process standard in the immigration context as compared to the criminal context, the government’s interest in enforcing immigration laws would have to be greater than its interest in protecting the public by prosecuting crime, a conclusion that seems debatable at best.

Accordingly, under the Mathews Test, it seems reasonable to assume that due process protections in immigration proceedings would be quite robust and similar to those afforded to people accused of a crime and facing time behind bars. In fact, as the following examples illustrate, due process protections in immigration proceedings are minimal and stand in stark contrast to the bond proceedings, court-appointed counsel, jury trial, full discovery, and high evidentiary standards that safeguard the due process rights of someone accused of as little as stealing a candy bar.

### **(a) Expedited Removal**

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<sup>13</sup> *Bridges v. Wixon* (1945) 326 U.S. 135, 147 (internal citations omitted).

<sup>14</sup> *California’s Due Process Crisis: Access to Legal Counsel for Detained Immigrants* (June 2016) The California Coalition for Universal Representation, p. 7 <<https://www.nilc.org/wp-content/uploads/2016/06/access-to-counsel-Calif-coalition-report-2016-06.pdf>> (as of Feb. 21, 2017).

<sup>15</sup> *Landon v. Plasencia* (1982) 459 U.S. 21, 34.

For close to half the people deported from the U.S. each year, the only legal process they will ever receive is “expedited removal.”<sup>16</sup> As the name implies, expedited removal is a summary removal procedure that allows for the deportation of some noncitizens from the United States without a hearing before an immigration judge and without the right to apply for status in the United States.<sup>17</sup> During expedited removal, an immigration officer -- usually an officer with the U.S. Customs and Border Protection -- serves as both the prosecutor and judge, making decisions regarding deportation oftentimes within no more than 24 hours. Noncitizens have no right to counsel in expedited removal and cannot apply to stay in the United States, though if the individual expresses a fear of persecution, the individual is supposed to have an interview, known as a credible fear interview, to determine whether they may seek asylum.

Expedited removal applies if the immigration officer determines that an individual committed fraud or misrepresented a material fact for purposes of seeking entry to the United States, falsely claimed U.S. citizenship, or is not in possession of a valid visa or other required documentation. But again, this determination is in the exclusive hands of the immigration officer and subject to minimal or no judicial review.<sup>18</sup> U.S. Immigration and Customs Enforcement deported nearly 101,000 people through expedited removal in fiscal year 2013.<sup>19</sup>

Originally, immigration officers applied expedited removal only to people who were seeking entry to the United States and not to those who were already in the country. In 2004, however, the Department of Homeland Security (DHS) expanded the scope of expedited removal to include all noncitizens who are encountered within 100 air miles of the southwest border and who have not been present in the U.S. for the 14 days immediately prior to the date of encounter.<sup>20</sup> Two years later, DHS expanded the policy to all U.S. borders.<sup>21</sup> Under the statute, the Attorney General may apply this provision to anyone who has not been admitted or paroled and has been present in the U.S. for less than two years. Thus, the federal government can expand the geographic area or extend the amount of time after entry to which expedited removal would apply. Indeed, on February 21, 2017, John Kelly, the recently appointed Director of the DHS, released

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<sup>16</sup> *Immigration Enforcement Action 2014 Annual Report* (January 2016) United States Department of Homeland Security p. 7 < [https://www.dhs.gov/sites/default/files/publications/Enforcement\\_Actions\\_2014.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2014.pdf) > (as of Feb. 21, 2017).

<sup>17</sup> Immigration and Nationality Act, 8 U.S.C. Sec. 1225(b).

<sup>18</sup> *Smith v. United States Customs and Border Patrol* (9<sup>th</sup> Cir. 2014) 741 F.3d 1016.

<sup>19</sup> U.S. Immigration and Customs Enforcement, FY2013 ICE Immigration Removals, December 2013, p. 4.

<sup>20</sup> 69 Fed. Reg. 4887 (Aug. 11, 2004).

<sup>21</sup> DHS Press Release, DHS Streamlines Removal Process Along Entire U.S. Border, January 31, 2006.

memoranda directing his department to implement just such expanded use of expedited removal.<sup>22</sup>

Such expansions raise serious due process concerns. As it stands, by placing total authority over the outcome in the hands of one, non-neutral arbiter and operating on such a rapid timeline, expedited removal carries a high risk of erroneous deportations of individuals who are not deportable or who would be eligible for some form of immigration relief if processed through normal immigration court procedures. But the greater immigrants' connections to the U.S. become, the greater the family, community, and economic impacts of deportation become. In terms of the Mathews Test balance, expanding expedited removal adds significant additional private interest weight to the already heavy risk of erroneous decisions.

### **(b) Pre-Trial Detention**

After apprehension by immigration authorities, many of those immigrants not subject to expedited removal are placed in "preventative" detention. This means that, while they await their hearing or trial, they are locked up, just like someone who has been convicted of a crime. "To an individual who is behind bars, the difference between 'prison' and 'detention' is purely academic. Both subject the individual to loss of freedom, separation from family, and a complete interruption of livelihood through government control. In both, an individual will undergo strip searches, visit family members from behind a glass wall, and suffer various extents of psychological, emotional, and sensory deprivation."<sup>23</sup> In fact, because ICE often rents space in jails for the purposes of immigration detention, in many instances, there is quite literally no difference between the two circumstances.<sup>24</sup>

Preventative detention raises myriad due process concerns. Most glaringly, preventative detention deprives people of liberty without an underlying finding of wrongdoing. The very existence of such preventative custody is something of an anomaly in the U.S. legal system. The U.S. Supreme Court has found pre-trial detention constitutional in the criminal context, but emphasized that it is still an "exceptional

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<sup>22</sup> Kelly, *Implementing the President's Border Security and Immigration Enforcement Improvements Policy* (Feb. 20, 2017) Department of Homeland Security

<[https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf)> (as of Feb. 22, 2017).

<sup>23</sup> Jorjani, *Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases*, 5 Intercultural Human Rights Law Review 89, 91.

<sup>24</sup> *Oversight of Intergovernmental Agreements by the United States Marshals Service and the Office of the Federal Detention Trustee Audit Report* (2007) U.S. Department of Justice Office of the Inspector General Audit Division pp. i-ii <<https://oig.justice.gov/reports/USMS/a0726/final.pdf>> (as of Feb. 21, 2017).

step.”<sup>25</sup> Given the strong due process concern with pre-trial detention in the criminal context, it is strange that pre-trial detention is commonplace – indeed mandatory in some instances – in immigration proceedings, which involve the enforcement of civil laws only.

Preventative detention has other due process implications as well. As one immigration scholar and practitioner summarizes it:

Whether one is in or out of custody can determine the strength of the claim asserted and access to critical elements in the preparation of any defense. The Supreme Court has recognized that the “traditional right to freedom before conviction permits the unhampered preparation of a defense...” Out of custody respondents have better access to legal services, time, support, and the evidence needed to support their defense – all crucial factors in any case.”<sup>26</sup>

Statistics appear to bear this contention out. According to an analysis of data from the Executive Office of Immigration Review, the rate of success for immigrants in deportation proceedings was more than double for those either released or never detained when compared against those who remained in detention.<sup>27</sup>

The conditions of preventative immigration detention are notoriously bad. Multiple human rights groups have condemned these conditions for violating international norms.<sup>28</sup> Some have been shut down.

The due process concerns associated with preventative detention are only partially addressed by the possibility of seeking release on bond. First off, a wide swath of immigrants in removal proceedings are subject to mandatory detention, for which no initial release is possible, and which can only be challenged after detention becomes prolonged. Second, even when an immigration judge rules that the detained immigrant is neither a danger to the community nor enough of a flight risk to warrant further detention, a unique aspect of immigration law gives DHS the ability to override the

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<sup>25</sup> *United States v. Salerno* (1987) 481 U.S. 739, 749.

<sup>26</sup> Jorjani, *Ignoring the Court's Order*, supra, p. 108 (citing *Stack v. Boyle* (1951) 342 U.S. 1, 4).

<sup>27</sup> *California's Due Process Crisis: Access to Legal Counsel for Detained Immigrants* (June 2016) The California Coalition for Universal Representation, p. 7 <<https://www.nilc.org/wp-content/uploads/2016/06/access-to-counsel-Calif-coalition-report-2016-06.pdf>> (as of Feb. 21, 2017).

<sup>28</sup> See, e.g. *U.S.: Deaths in Immigration Detention* (July 7, 2016) Human Rights Watch <<https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention>> (as of Feb. 22, 2017); *USA: Jailed Without Justice* (March 2009) Amnesty International <<http://www.amnestyusa.org/research/reports/usa-jailed-without-justice?page=show>> (as of Feb. 22, 2017).



judge's determination for up to nearly six months through an application for an automatic stay.<sup>29</sup> Allowing DHS to annul, for practical purposes, a judge's determination for several months seems contrary to due process, and all the more so given the liberty interest at stake."<sup>30</sup>

Ultimately, the length and conditions of detention prove too much for many. Faced with the choice between signing a stipulated order accepting "voluntary" removal from the country or months in detention, "[i]t is common for detained immigrants to altogether abandon meritorious claims as a result of an inability to cope with the physical, psychological, emotional, economic, and health effects of prolonged detention."<sup>31</sup>

On February 20, 2017, DHS Secretary John Kelly announced that DHS will dramatically expand its use of preventative detention:

The President has determined that the lawful detention of aliens arriving in the United States and deemed inadmissible or otherwise described in section 235(b) of the Immigration and Nationality Act (INA) pending a final determination of whether to order them removed, including determining eligibility for immigration relief, is the most efficient means by which to enforce the immigration laws at our borders.<sup>32</sup>

Whereas ICE officers previously had discretion in many instances to release immigrants while they awaited final determination of their case, Kelly has now limited that discretion to a narrow band of rare exceptions. Even many individuals seeking asylum and found to have a credible fear of persecution if returned to their home country, may now have to languish in detention for months – years sometimes – awaiting the outcomes of their cases.

### **(c) Lack of Access to Counsel**

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<sup>29</sup> Jorjani, *Ignoring the Court's Order*, *supra*, p. 102.

<sup>30</sup> *Ibid.*

<sup>31</sup> Jorjani, *Ignoring the Court's Order*, *supra*, pp. 108-109. See also Koh, Srikantiah, and Tumlin, *Deportation Without Due Process*, <<https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf>> (as of Feb. 22, 2017).

<sup>32</sup> Kelly, *Implementing the President's Border Security and Immigration Enforcement Improvements Policy* (Feb. 20, 2017) Department of Homeland Security p. 2 <[https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf)> (as of Feb. 22, 2017).

Immigration is one of the most complex and constantly shifting fields of law. For those facing detention and possible deportation, the maze of immigration law frequently contains a number of paths to relief, but without competent legal counsel, the chances of finding and navigating that path are limited. Statistical evidence bears this out. Studies comparing the fate of immigrants with attorneys to those who go it alone show a stark contrast. Immigrants represented by an attorney won five times as often as those who were on their own.<sup>33</sup>

This is at least partially explained by a basic structural imbalance. The government is always represented by an attorney, paid for by the government, in these proceedings. Respondent immigrants have the right to have an attorney represent them, but the general rule is that the immigrants themselves must pay for it. Most go without. In 68 percent of cases involving Californians between 2012 and 2015, the government was represented by an attorney while the immigrant respondent was not.<sup>34</sup>

Yet despite the overwhelming evidence that competent representation dramatically impacts the likelihood that a court will find that an immigrant has a right to go free and to stay in the country, U.S. courts have thus far declined to find that immigrants have a right to have an attorney appointed to them if they cannot afford one.

Recent court decisions have finally made some exceptions to this general rule. For example, the federal courts have ruled that immigrant detainees with mental disabilities who are facing deportation and who are unable to adequately represent themselves are entitled to qualified legal representatives provided by the federal government for representation during all phases of their immigration proceedings, including appeal and custody hearings.<sup>35</sup>

Yet in other contexts, despite acknowledging deep discomfort with the due process implications, federal courts have declined to find a right to court-appointed counsel for indigent respondents. For example, children frequently appear in immigration court representing themselves. In *J.E.F.M. v. Lynch*,<sup>36</sup> a panel of Ninth Circuit justices declined the petitioners request that the Ninth Circuit mandate the provision of attorneys for children in immigration court, ruling that the federal courts lacked jurisdiction given

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<sup>33</sup> *California's Due Process Crisis: Access to Legal Counsel for Detained Immigrants* (June 2016) The California Coalition for Universal Representation, p. 1 <<https://www.nilc.org/wp-content/uploads/2016/06/access-to-counsel-Calif-coalition-report-2016-06.pdf>> (as of Feb. 21, 2017).

<sup>34</sup> *Id.*

<sup>35</sup> *Franco-Gonzalez v. Holder*, 2015 U.S. Dist. Lexis 179622.

<sup>36</sup> 837 F3d. 1026 (9<sup>th</sup> Cir. 2016).

the particular way that the case was brought. But the justices urged other branches of government to act:

I cannot let the occasion pass without highlighting the plight of unrepresented children who find themselves in immigration proceedings... [T]housands of children are left to thread their way alone through the labyrinthine maze of immigration law... Additional policy and funding initiatives aimed at securing representation for minors are important to ensure the smooth functioning of our immigration system and the fair and proper application of our immigration laws.<sup>37</sup>

#### **(d) The Due Process Limitations of Administrative Proceedings: Lack of Discovery/Rules of Evidence**

In addition to being civil, rather than criminal, immigration proceedings take place in administrative courts. The formal rules of evidence, while still relevant, do not strictly apply.

Thus, for example, criminal courts will not generally consider the content of a police report. The Federal Rules of Evidence prohibit it.<sup>38</sup> State law also strongly discourages it. This reflects not only the fact that a police report is hearsay, but also that police reports are not entirely disinterested: the officer believes the suspect committed a crime, wants the suspect convicted, and writes the report accordingly. Yet despite the fact that it is routinely excluded from criminal proceedings, police report content is regularly introduced and used against defendants in immigration court.

Similarly, while discovery – the process by which the two sides of a legal dispute investigate the case by exchanging evidence in advance of a trial – is quite broad in civil court and absolutely required of the prosecution in a criminal case, defendants in immigration proceedings have only a minimal right to it. Until 2010, if you were an immigrant facing deportation, the only way you could get a sense, in advance of the trial, of what evidence the government had about you – favorable or unfavorable – was through a Freedom of Information Act request, to which you might or might not get a response in time for trial. In *Dent v. Holder*,<sup>39</sup> after the government withheld documents showing that a defendant’s adoptive mother was a U.S. citizen and that she had applied for the defendant to obtain citizenship as well, the Ninth Circuit held that defendants in immigration proceedings are entitled to see the content of the administrative file, or “A

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<sup>37</sup> Id p. 1039-1040.

<sup>38</sup> Rule 803(8)(a)(ii).

<sup>39</sup> 627 F.3d 365 (9th Cir. 2010).

file.” But no other discovery is required of ICE, so that defendants and their attorneys in immigration proceedings are largely flying blind at trial. They do not know what evidence ICE attorneys may throw at them and cannot prepare to marshal contrary evidence.

### **(e) Time Pressures/Judicial Shortages**

Increased immigration enforcement has led to lengthy immigration court backlogs. Between 2003 and 2015, such backlogs increased by 163 percent.

By 2014, each immigration judge was handling an average of over 1,400 cases, almost three times the docket load of the average federal judge.<sup>40</sup> Some immigration judges calculated that, if they decided each matter before them in a typical day, they would have an average of seven minutes to make each determination.<sup>41</sup> Describing the issue in the context of unaccompanied minor cases, one federal appeals court wrote:

Given the onslaught of cases... there is only so much even the most dedicated and judicious immigration judges... can do. Immigration judges are constrained by extremely limited time and resources. Indeed, those judges may sometimes hear as many of 50 to 70 petitions in a three-to-four hour period, leaving scant time to delve deeply into the particular circumstances of a child’s case.<sup>42</sup>

These delays and time constraints pose an obvious due process problem. For immigrants in preventative detention, the delays mean even more time behind bars, with the associated risk that some immigrants with meritorious claims will simply give them up in order to regain their freedom. Even those outside detention are left in an extended state of legal limbo. Meanwhile, the hasty nature of immigration trials and hearings themselves means that the cases only receive a fraction of the attention they deserve. Not only does this increase the risk of mistakes, it also calls into question the seriousness of the inquiries. Win or lose, participants in the process do not feel heard.

### **(f) Impact of Prior Criminal Records**

Undocumented individuals are not the only ones who end up in detention or deportation proceedings. Legal Permanent Residents and certain visa holders can find

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<sup>40</sup> Kriel, *Immigration Courts Backlog Worsens*, *Houston Chronicle* (May 15, 2015) Citing National Association of Immigration Judges President Dana Marks’ estimate).

<sup>41</sup> Boston College Center on Human Rights, *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families: A Report for the Inter-American Human Rights Court*, Aug. 2013.

<sup>42</sup> *J.E.F.M v. Lynch* (9<sup>th</sup> Circuit 2016) 837 F.3 1026, 1040 (Justice McKeown, specially concurring).

themselves facing detention or deportation if they violate the terms of their permission to be in the country. The main time this happens is when an immigrant is convicted of committing a crime. Not all criminal convictions will lead to immigration consequences, however. Whether a particular conviction has immigration consequences depends upon a combination of federal immigration laws, state criminal law, and the exact nature of the conviction. In the case of a conviction picked up through a plea bargain, the immigration consequences of the conviction may even depend on the precise terms of the plea bargain. As a result, the outcome of an immigration case is frequently predetermined by the outcome of the underlying criminal case.

Recognizing the due process concerns implicated, the U.S. Supreme Court declared in *Padilla v. Kentucky* that criminal defense counsel are constitutionally required to provide competent legal advice regarding both the criminal and immigration consequences of their clients' criminal cases.<sup>43</sup>

In fact, the role of competent criminal defense counsel goes further than just advising the client of the possible immigration consequences of the underlying criminal matter. Well-informed and skilled criminal defense counsel can negotiate and draft plea bargains with prosecutors that accept their clients' criminal responsibility while also minimizing the potential immigration consequences. In this way, well-informed and skilled criminal defense counsel can prevent unnecessary detention and deportation.

What is constitutionally mandated in theory, however, is often much more challenging to carry out in practice. The expectation of *Padilla* is that criminal defense attorneys will flawlessly understand and apply both criminal law and immigration law to each case. Given their intense, high-volume caseload and the infamously byzantine nature of immigration law, this is an especially difficult ask of public defenders. In the wake of the *Padilla* decision, public defenders' offices across California have taken additional steps to educate their attorneys about immigration law and to ensure that they are adequately carrying out their duty to apprise clients of the potential adverse immigration consequences of the criminal case disposition. Nonetheless, in California jurisdictions where public defenders cannot or have not dedicated substantial resources to it, the due process protections promised in *Padilla* may be more aspirational than actual.

### **(g) Other Due Process Concerns in Immigration Proceedings**

The list of due process concerns associated with the immigration enforcement system goes on. In addition to the issues discussed above, commentators have expressed concern about, among other things: lack of adequate language interpretation, a growing

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<sup>43</sup> *Padilla v. Commonwealth of Kentucky* (2010) 559 U.S. 356.

reliance on the use of remote, video-based adjudication of cases and the use of shackles in immigration courtrooms.

### **(h) Conclusion Regarding Due Process Challenges in Immigration Proceedings**

These due process shortcomings can be questioned as incongruous with what is at stake in immigration proceedings. Whether or not any one of these issues violates due process as a matter of constitutional law, they should be troubling to anyone who is concerned with the rule of law. The upshot of the current immigration enforcement system, as U.S. Immigration Judge Dana Marks has succinctly described it, is that “complex and high-stakes matters, such as asylum cases that can be tantamount to death penalty cases, are being adjudicated in a setting that most closely resembles traffic court.”<sup>44</sup> In this context of minimal due process, the risk of erroneous results is high: people legitimately fleeing violence and oppression are more likely to be turned away, and thousands of people will be detained and deported unnecessarily, since more careful handling of their cases would likely have revealed some avenue for legal relief. Greater due process protections would mitigate much of this effect.

### **III. IMPACTS ON CALIFORNIA CHILDREN, FAMILIES, AND COMMUNITIES**

Setting and enforcing immigration policy is a federal matter. Accordingly, the due process challenges in immigration detention and deportation proceedings are federal in nature. Regardless of federal blame for the problem, however, the impact of these challenges falls heavily on California. When Californians are detained or deported unnecessarily – that is, when more robust due process protections could have prevented their detention or deportation -- California businesses, families, and communities suffer needless economic, social, and psychological harm.

It is impossible to measure the exact magnitude of the harm to California. Estimates of the size of California’s immigrant population, particularly the undocumented population, are necessarily imprecise. For similar reasons, it is difficult to know the exact level of immigrant participation in California’s economy. In addition, social and psychological harms are, by their nature, trickier to quantify, especially long-term impacts. Nonetheless, a number of recent studies have attempted to confirm and quantify the extent of these harms. The results are clear: due process challenges in the

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<sup>44</sup> Marks, *Written Statement of Hon. Dana Leigh Marks President National Association of Immigration Judges Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary on Oversight Hearing on the Executive Office For Immigration Review* (June 17, 2010), p. 7 <[https://judiciary.house.gov/\\_files/hearings/pdf/Marks100617.pdf](https://judiciary.house.gov/_files/hearings/pdf/Marks100617.pdf)> (as of Feb. 22, 2017).

immigration detention and deportation arena have a devastating impact on parents and children and cost the state's economy millions of dollars each year.

Of course, some of these harms and costs are inherent to the enforcement of immigration laws. Not every Californian facing immigration detention or deportation has valid legal grounds on which to claim a right to stay, and even robust due process will not prevent those individuals, their children, and their communities from suffering some of the harms described below. But better due process protections could help many detained individuals to identify and raise appropriate legal grounds for why they should be returned to their families, jobs, and communities. In that way, greater due process protections could substantially mitigate the harms discussed here and greatly reduce the costs to California.

### **(a) Harms to California's Businesses and Economy**

Immigration detention and deportation hurt California's businesses and economy.

There are about 10.3 million immigrants currently living in California, of whom, about 2.9 million (28 percent) are believed to be undocumented. Immigrants as a whole make up over one third of the California workforce, and undocumented immigrants alone are believed to contribute around \$181 billion of California's gross domestic product.<sup>45</sup>

Many California industries are largely dependent on immigrant labor, both documented and undocumented. Over two thirds of agricultural workers are immigrants, as are nearly half of the employees in the manufacturing industry, for example. Undocumented immigrants represent a large fraction of workers in the agricultural and construction industries, at roughly 45 percent and 21 percent, respectively.<sup>46</sup>

To begin with the obvious, detained and deported employees cannot come to work. Their replacements must be recruited and trained and the associated turnover costs – estimated at between 16-20 percent of annual wages for low-income workers<sup>47</sup> – fall on California businesses. According to a recently released study by the National Bureau of Economic Research, the immediate deportation of all undocumented workers from the U.S. would result in a nine percent drop in agricultural production, and an eight

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<sup>45</sup> *Resilience in the Age of Inequality: Immigrant Contributions to California*, California Immigrant Policy Center p. 2 <<https://caimmigrant.org/research-and-analysis/contributions-html/>> (as of Feb. 22, 2017).

<sup>46</sup> *Id.*

<sup>47</sup> *California's Due Process Crisis: Access to Legal Counsel for Detained Immigrants* (June 2016) The California Coalition for Universal Representation, p. 2 <<https://www.nilc.org/wp-content/uploads/2016/06/access-to-counsel-Calif-coalition-report-2016-06.pdf>> (as of Feb. 21, 2017).

percent drop in both the construction, leisure and hospitality industries.<sup>48</sup> As fourth-generation California farmer Harold McLarty recently told the New York Times: “If you only have legal labor, certain parts of this industry and this region will not exist. If we sent all these people back, it would be a total disaster.”<sup>49</sup>

Immigration detention and deportation also saps tax revenues from California. According to the Institute on Taxation and Economic Policy, undocumented immigrants contribute roughly \$3.1 billion in state and local taxes in California.<sup>50</sup> That’s an average of about \$1,000 per individual annually. In fiscal year 2016, Immigration and Customs Enforcement reports deporting 240,255 individuals nationally.<sup>51</sup> Though ICE does not publicly break down these figures by state, based on California’s share of the national immigrant community, about a quarter of the nation’s undocumented population lives in California,<sup>52</sup> so it is reasonable to assume that Californians make up about 25 percent of the national deportation figure, or about 60,000 individuals. That suggests that, as a rough approximation, current levels of deportations siphon around \$60 million in state and local tax revenues from California’s coffers each year.

Finally, it is important to note that even where immigration enforcement has not yet taken place, the looming fear of such enforcement acts to distort the California economy. Fearful of the immigration enforcement retaliation, immigrant workers, especially unauthorized immigrant workers, are reluctant to report workplace abuses and demand that their employers follow the law. Unscrupulous businesses take advantage of this to bend the rules. For example, a 2008 worker survey found that unauthorized workers had “very high” overtime violation rates: “Eighty-five percent of those who worked over 40 hours a week for a single employer reporting that they were not paid the legally required time-and-a-half pay rates for those extra hours, compared to 67 percent for authorized immigrant respondents.”<sup>53</sup> Not only do such abuses

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<sup>48</sup> Ehrenfreund. *The Potentially Severe Consequences of Trump’s Deportation Plans* (Nov. 14, 2016) The Washington Post < [https://www.washingtonpost.com/news/wonk/wp/2016/11/14/what-donald-trumps-deportation-plans-would-do-to-american-businesses/?utm\\_term=.bfcddf23b9a8](https://www.washingtonpost.com/news/wonk/wp/2016/11/14/what-donald-trumps-deportation-plans-would-do-to-american-businesses/?utm_term=.bfcddf23b9a8)>

<sup>49</sup> Dickerson and Medina, *California Farmers Backed Trump, but Now Fear Losing Field Workers* (Feb. 9, 2017) The New York Times < <https://www.nytimes.com/2017/02/09/us/california-farmers-backed-trump-but-now-fear-losing-field-workers.html>>

<sup>50</sup> *Undocumented Immigrants’ State & Local Tax Contributions* (February 2016) Institute on Taxation and Economic Policy, p.1 <http://www.itep.org/pdf/immigration2016.pdf>

<sup>51</sup> FY 16 ICE Immigration Removals (U.S. Immigration and Customs Enforcement) <<https://www.ice.gov/removal-statistics/2016>>

<sup>52</sup> *Just the Facts: Undocumented Immigrants* Public Policy Institute of California [http://www.ppic.org/main/publication\\_show.asp?i=818](http://www.ppic.org/main/publication_show.asp?i=818)

<sup>53</sup> Bernhardt et al, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities* (2008)



deprive workers of their fair wages, they distort California's economy by providing an illicit and unfair competitive advantage to companies that shirk California law.

In contrast to these economic harms, it is important to note that some parts of the California economy profit from immigration detention and deportation, creating a powerful financial incentive to retain and expand these programs. For example, some California counties rent prison space to ICE for immigration detention purposes and can make several million dollars a year by doing so.<sup>54</sup> In addition, DHS employs thousands of Californians in the Border Patrol and as ICE agents. Finally, privately operated detention centers contract with ICE to hold many detainees in California. While the corporations are not based in California, they do hire some Californians in security, maintenance, health care, and other roles at their facilities.

### **(b) Impacts on California's Youth**

Immigration enforcement separates children from their parents. In the worst case scenario, in which there is no other related adult available to care for them, the children will end up in California's foster care system. The resulting trauma to the children (not to mention the parents) is emotionally and psychologically devastating.

There are significant public costs as well. In the short term, each foster care placement costs California taxpayers roughly \$26,000 per year.<sup>55</sup> According to a 2011 Urban League study, around six percent of the children in foster care in Los Angeles and San Diego counties were there because their parents had been detained or deported.<sup>56</sup> That's 1,397 youth from just those counties alone, suggesting that the annual cost of caring for children separated from their parents because of immigration detention or deportation easily exceeds \$35 million. In the longer term, if these youth become homeless and incarcerated at rates that are statistically consistent with current foster care outcomes, the results will be devastating for the youth and exceedingly costly to society overall.

Even when the children of detained or deported Californians do not end up in foster care, studies show that the impacts are still quite negative and severe. A 2010 Urban Institute study found that widespread changes in child behavior after family members were detained or deported. "In the short term, six months or less after a raid or other

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<sup>54</sup> See, e.g. <<http://www.sfchronicle.com/news/article/Bay-Area-sheriffs-schmooze-with-top-boss-Jeff-10927221.php>>

<sup>55</sup> Zill, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption* (Adoption Advocate, No. 35, May 2011) (National Council for Adoption) p.3  
<[https://www.adoptioncouncil.org/images/stories/NCFA\\_ADOPTION\\_ADVOCATE\\_NO35.pdf](https://www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf)>

<sup>56</sup> *Shattered Families: The Perilous Intersection of Immigration Enforcement and Child Welfare System* (November 2011) Applied Research Center. p. 24

arrest, about two-thirds of children experience changes in eating and sleeping habits. More than half of children in our study cried more often and were more afraid, and more than a third were more anxious, withdrawn, clingy, angry, or aggressive.”<sup>57</sup> These psychological impacts were especially pronounced when immigration officers conducted the enforcement action at the family’s home.<sup>58</sup>

Finally, even when no immigration enforcement action takes places, the looming threat of separation hangs over California children whose parents are susceptible to immigration enforcement. Not only does this lead to a constant state of fear for the children, it also has a chilling effect on the children’s access to services that impacts their growth and development. “Afraid of being apprehended and separated, families avoid interacting with officials in social service agencies, even when this means denying children the social, medical and educational services they need and are entitled to.”<sup>59</sup> Interestingly, apart from reports from parents and educators that some children missed a few days of school, the educational performance of children separated from parents by deportation or detention does not seem to have been affected. This may be because schools are generally seen as safe spaces.

### **(c) Impacts on Families**

Immigration detention and deportation actions also devastate California families as a whole. In addition to separating family members, detaining or deporting one of the adults often cripples the family’s economic security. Even when immigration authorities release detained family members, they may not be able to return to work. As a result, “households experienced steep declines in income.” In the Urban Institute study, the average household lost half or more of its income following immigration enforcement actions.

With the loss of income comes housing instability and food insufficiency. In the Urban Institute study, eight households owned homes prior to the immigration enforcement action; afterward, half lost their homes. Many households reported frequent moves. Nearly 60 percent of respondents reported difficulty paying for food “sometimes” or “frequently” after immigration enforcement action, and over 20 percent experienced hunger.<sup>60</sup>

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<sup>57</sup> *Facing Our Future: Children in the Aftermath of Immigration Enforcement* (2010) The Urban Institute p. ix. The study included Californians and other families impacted by immigration enforcement actions.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Legal Violence in the Lives of Immigrants*, Center for American Progress, p. 27.

<sup>60</sup> *Facing Our Future, supra*, p. ix.

#### **(d) Impacts on Communities**

This social isolation has broader societal impacts, most obviously as it relates to law enforcement. Unable to distinguish between immigration and other types of law enforcement, children who witness a parent being detained develop a generic fear of law enforcement.<sup>61</sup> Adults are often distrustful of law enforcement as well, uncertain of whether local police and sheriff deputies will question their legal status.<sup>62</sup> As a result, some immigrants report that some community crimes and violence go unreported.<sup>63</sup> Perhaps for this reason – and contrary to the assertions of President Donald Trump – studies show that so-called “sanctuary” jurisdictions tend to have equal or lower crime rates when compared against their non-sanctuary counterparts.<sup>64</sup>

#### **IV. SUCCESSFUL MODELS AND NEXT STEPS**

In the face of these challenges, state and local governments, legal aid agencies and public defenders’ offices have already developed responsive pilots in California. While none of these currently exist at a scale sufficient to fully address the problem, they do provide potential models that can be copied elsewhere or expanded. Bills currently pending before the Legislature offer opportunities for California to do just that.

##### **(a) Detention Representation Pilots**

Two state programs currently provide some legal assistance to Californians who are confronting the immigration system. In 2014 and 2015, the Unaccompanied Undocumented Minors (UUM) program provided for \$3 million in funding for grants to legal services organizations to represent unaccompanied minors in California. The Federal Immigration Assistance program began in July 2015. Under that program, the California Department of Social Services (CDSS) has awarded \$15 million in grants to 60 non-profit organizations to help applicants obtain Deferred Action for Childhood Arrivals (DACA) status, to naturalize as U.S. citizens or to obtain other forms of immigration relief. Both programs are operated through grants administered by CDSS.<sup>65</sup>

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<sup>61</sup> *Facing Our Future*, *supra*, p. 46.

<sup>62</sup> *Legal Violence in the Lives of Immigrants*, *supra*, p. 17.

<sup>63</sup> *Legal Violence in the Lives of Immigrants*, *supra*, p. 17.

<sup>64</sup> *Wong Study*. Center for American Progress.

<https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/> (as of Feb. 21, 2017).

<sup>65</sup> *Immigration Services*, California Department of Social Services <<http://www.cdss.ca.gov/Immigration-Services>> (as of Feb. 13, 2017).

Local governments have also teamed with private foundations to put money toward legal representation of residents facing the possibility of deportation or detention. The City and County of Los Angeles partnered with the California Community Foundation and other charitable groups to propose a \$10 million effort to fund such representation. In San Francisco, public funds support a variety of legal services for residents, including immigration assistance, and proposals to expand immigration-specific funding are currently under consideration. Other California municipalities are said to be looking into similar programs.

SB 6 (Hueso), the Due Process for All Act, would expand on these programs to include additional legal representation for California immigrants facing deportation statewide. Like the Unaccompanied Minors program and the Federal Immigration Assistance program, grants issued under SB 6 would be administered by CDSS. Like the proposed Los Angeles program, SB 6 would seek to attract matching funding from private foundations to help expand to overall volume of services. SB 6 passed out of the Senate Judiciary and Human Services Committees and is currently pending before the Senate Appropriations Committee.

Ironically, this bill, in its present form, can be criticized on due process grounds. Currently, SB 6 excludes people with particularly violent criminal convictions from getting state-funded representation. On the one hand, this choice can be defended on the policy grounds that state resources should be spent where they are most likely to be effective. Very few, if any, people convicted of violent criminal offenses would be successful challenging attempts to deport or detain them, even with the assistance of very capable legal counsel. On the other hand, as San Francisco Public Defender Jeff Adachi's Office pointed out during the Senate Judiciary Committee hearing on the bill, making the policy choice to hold some people more worthy of receiving due process than others undermines the basic premise that due process of law is universal and constitutional in nature.

### **(b) Immigration Attorneys Embedded in Public Defender Offices**

In early 2014, the Alameda County Public Defender's Office became the first public defender's office in California -- and only the second in the nation after New York -- to launch an immigration representation project. The office hired Raha Jorjani, an expert in the intersection between criminal law and immigration law, to represent clients in deportation proceedings as well as to advise deputy public defenders on the potential immigration consequences associated with the criminal cases they handle. "Too many kids today have one or both parents incarcerated or deported," Jorjani has said. "The idea of transforming the system to minimize incarceration and deportation means you'll

reunite families who will be able to stay together. Ultimately, it means securing healthy communities for all and not just some of us.”<sup>66</sup>

San Francisco City and County soon followed Alameda’s lead, hiring Francisco Ugarte as its first full-time, in-house immigration attorney. In that role, Ugarte both handles his own caseload of immigration matters and advises deputy public defenders throughout the office on the immigration implication of their cases. “Even a minor brush with the law can separate families through deportation, San Francisco Public Defender Jeff Adachi says. “Francisco’s guidance on our cases means our clients are less likely to experience these devastating consequences.”<sup>67</sup>

AB 3 (Bonta) would support similar projects. The bill would provide funding, in the form of grants to be administered by the Department of Social Services, for county public defenders offices to implement new tools to assist clients with the immigration consequences of criminal charges pending against them. With this funding, public defender offices could hire in-house immigration specialists, as Alameda and San Francisco counties have done, make outside expertise available to deputy public defenders, or some combination. AB 3 would also support public defender offices’ work on post-conviction relief designed to help mitigate the immigration consequences that a particular conviction might otherwise have. AB 3 passed out of the Assembly Public Safety and Human Services Committees and is currently pending before the Assembly Appropriations Committee.

## V. CONCLUSION

Due process of law is a core piece of the rule of law. It protects individual rights and, in the process, the health of our democracy overall. Lack of robust due process can lead to unnecessary and avoidable harm, such as that currently inflicted on California businesses, children, families, and communities by an immigration enforcement system that falls well short of providing genuine due process of law. The existing problem will become far more acute as the new Administration ramps up its immigration policy. Fortunately, there are established programs and proposals for expansion that would offer Californians representation and a fairer shake when faced with the prospect of immigration detention or deportation. This hearing will help acquaint policymakers with all of these issues, impacts, programs, and proposals.

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<sup>66</sup> *Leading Edge Idea: Expanding the Role of the Public Defender in California to Ensure Representation for Immigrants Impacted by the Criminal Justice System* < <http://leadingedge.rosenbergfound.org/leading-edge-fellows/raha-jorjani/>> (as of Feb. 13, 2017).

<sup>67</sup> Aparton, *Francisco Ugarte to be Honored by Latina Group* (May 7 2015) <<http://sfpublicdefender.org/news/2015/05/francisco-ugarte-to-be-honored-by-latina-group/>> (as of Feb. 13, 2017).