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Justice for Noncitizens: A Case for Reforming the Immigration Legal System

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Abstract

The immigration legal system exists as a function of the executive branch rather than the judicial branch, and many of the constitutional rights guaranteed in a judicial court do not continue into the immigration legal sphere. Noncitizen defendants in the immigration court system are not guaranteed the same due process rights or right to appointed counsel as United States citizens, which severely limits their chance of a successful outcome. Moreover, while many noncitizens await their trials in these courts, they are often placed in one of the 234 immigration detention facilities across the nation, which further exacerbates the direness of their situations. When combined together, detainment and the immigration legal system cripple noncitizens attempting to challenge their removal cases. Defendants are too often denied, through various barriers, access to a just process to try to seek relief. The current United States immigration court and detention systems are grossly inadequate for providing fair treatment for noncitizens because they operate on the assumption that noncitizens do not possess the same rights as United States citizens. It is imperative to reform the immigration system in a way that more accurately represents the ideals set forth by the American Constitution.

Tags: immigration law, detention, noncitizen, due process, appointed counsel, Constitution

Justice for Noncitizens: A Case for Reforming the Immigration Legal System

Although immigration policy continues to be a highly contested issue, this conversation often overlooks the immigration legal system, which ultimately determines United States noncitizens' fates.¹ Interestingly enough, the immigration legal system, or the Executive Office for Immigration Review (EOIR), evolved as a function of the executive branch rather than the judicial, and many of the constitutional rights guaranteed in a judicial court do not carry over into the immigration legal sphere. Constitutional guarantees such as the right to a speedy trial, the right to an attorney, and statutes of limitations are nonexistent in immigration court. Moreover, while many await trial, noncitizens are placed in one of the 234 immigration detention facilities across the nation. According to the American Bar Association, the purpose of detention is to "ensure court appearances and effect removal." However, because immigration detention is considered 'civil' detention, individuals are not entitled to the same protections under the law as those who committed a crime and are serving time in 'criminal' detention ("Unlocking" 167). When combined together, the immigration legal and detainment system severely disadvantage noncitizens' attempts to challenge their cases, and defendants are too often denied even the access to justice to try to seek relief. The current United States immigration court and detention systems are grossly inadequate for providing just treatment for noncitizens because they operate on the assumption that noncitizens do not possess the same rights as United States citizens. Thus, it is imperative to reform the immigration system in a way that more accurately represents the ideals set forth by the United States Constitution.

¹ The term "noncitizen" shall be defined throughout this paper as, "any individual who is not a national of a State in which he or she is present." A noncitizen is not necessarily an undocumented person; one could be a greencard holder yet still not possess citizenship.

A Blurred Line: Civil vs. Criminal Detainment

The immigration system in the United States, featuring the immigration detention and court subsystems, is broken. Twelve million undocumented immigrants currently live in the United States, and the number of foreigners trying to enter the country illegally increases each year. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) have quadrupled their spending between the years 2003 and 2015 in an attempt to further secure the southern border and increase immigration enforcement personnel. However, as enforcement and thus detainments have increased, courts have been slow to adapt to this growth. Between those same years of 2003 to 2015, immigration court spending increased by only 74%, and the numbers of judges and courts have remained unchanged. To properly account for the increased number of noncitizens being detained, the National Association of Immigration Judges President Dana Leigh Marks maintains that the immigration courts should be doubled or even tripled in size immediately (“Empty”).

Today there are 254 full time immigration judges operating in 58 immigration courts across the nation, but the conditions in which they are expected to work are unsustainable. The average caseload per judge is 1,200 cases per year, compared to 380 cases per year for federal district judges (Abbott 3). Four to six judges often share one law clerk and, as immigration law is considered only second in complexity to tax law, those clerks do not have time to study international developments and case precedent to aid in informed decisions (Abbott 1). This reality can lead to inconsistent rulings through judge and clerk burnout and daunting odds for the defendant (Abbott 3). Moreover, because Congress is spending more money to arrest noncitizens but not adequately funding the EOIR to account for these changes, backlogs have increased by

163% in the past twelve years (“Empty Benches”). As of February 2016, 474,025 cases are pending for an average of 1,071 days each, and noncitizens in Chicago have started receiving court dates for 2019 (“Reducing,” “Empty”). In many cases, noncitizens remain detained throughout this waiting period, which in turn burdens the government, costs taxpayers, and hurts the noncitizen and his or her family. These two factors—a noncitizen facing the immigration court system while being detained in an immigration detention center—render detained noncitizens one of the most disadvantaged and vulnerable groups in the country.

ICE often holds noncitizens in either one of the 234 detention centers throughout the country or in one their designated immigrant beds in a criminal jail as they await their next court date. Immigration detention in the United States is considered civil detention; because the Supreme Court considers this “not imprisonment in the legal sense,” noncitizens do not enjoy the protections set forth by the 4th, 5th, and 6th Amendments to the Constitution. The concept of civil detention for immigrants was first raised with the Supreme Court case *Wong Wing v. United States* (1896), which defined civil detentions for immigrants as “detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens.” By insisting that immigration detention is solely a governmental holding mechanism used to fulfill civil immigration enforcement goals, it becomes easier to justify denying detainees their fundamental human rights (Chacón 623).

But the line between civil and criminal detention and treatment is frequently blurred. Immigrant detainees are commonly placed in criminal facilities and subject to the same treatment and conditions as criminals, yet studies demonstrate that 61% of noncitizens detained do not have criminal records. Furthermore, of those that do have criminal records, 50% of them

committed nonviolent crimes, such as traffic offenses (Plus).² Dora Schriro, a senior official at the Department of Homeland Security, even admitted that more than half of immigrant detainees were detained under punitive conditions inappropriate for civil detainees (Chacón 623). The everyday reality of someone in an immigration detention center, then, is glum.

A joint report filed in 2004 acknowledged the shortcomings of immigration detention centers in comparison to legal expectations. The Leadership Conference for Civil Rights and American Bar Association report described, “The combination of physical isolation, substandard conditions at facilities, limited access to lawyers, and the lack of legal information demoralizes many detainees—some even to the point that they give up their cases and agree to be deported rather than continue to be imprisoned” (“Unlocking” 172). In the detention centers, men and women are housed separately, so families are frequently separated. Each person is designated a specific bed, given an alien registration number, which, rather than their name, becomes their identifying label throughout detention, and stripped of any personal belongings. Uniforms range from different colored t-shirts to full jumpsuits, and detainees must be present for several “counts” throughout the day. Communicating with the outside world also proves difficult. To talk on the phone, detainees must have a credit or calling card, for which their family members have to pay, and receiving calls is very difficult to arrange as an entire dormitory usually shares a single phone. Mail delivery is no easier, as all incoming and outgoing mail is screened and inspected, creating a slow and frustrating process (Shahshahani). A report conducted by the U.S. Civil Rights Commission further condemns the criminal nature of these detention centers.

² It is important to note that undocumented presence in the United States is not a federal crime in and of itself. Illegal entry into the country can be either a misdemeanor or felony, depending on the circumstances, but the Pew Research Center has found that 45% of undocumented immigrants did not enter the US illegally. They instead may have overstayed their Visa, worked without authorization, etc. (“Criminalizing”).

This report makes it clear that the current conditions of adult immigration detention centers violate the standards of civil detention. Many detainees call their cells *hieleras*, or freezers, as the dormitories are frequently frigid. Living conditions are often unhygienic, and medical care is usually delayed, if not denied altogether. Transgender women regularly are placed with male detainees, subjecting them to mistreatment and harassment, and religious practices, like Muslim prayer times, are usually interrupted by counts or meal times (Misra). Moreover, a New York Times report found that over 300 detained immigrants are held in solitary confinement on any given day, which the United Nations said indeed constituted as torture (Urbina).

Detention of a family member has consequences for those outside of detention as well, as detainment often puts families into deep economic and psychological distress. According to a Pew Hispanic Center study using statistics from the 2008 Census Bureau, the 2007 median household income for a noncitizen family was \$36,000, as compared to \$50,000 for citizen families. This means that a third of noncitizen children and a fifth of noncitizen adults live in poverty and rely on public assistance (Passel). So when a member of that family enters detention, a significant chunk, if not all, of that family income is affected. A study by the Urban Institute researching the effects of immigration on noncitizens' children with U.S. citizenship found that in 2011 alone, over 5,000 children were in foster care due to an immigrant parent's detention or removal, and the emotional toll of the situation negatively affected the children's behavior, anxiety, and eating and sleeping patterns ("Accessing" 14). All of these factors suggest that immigration detention cannot truly be considered a civil detention and instead must be classified as criminal in nature.

Although evidence suggests that immigration detention centers are punitive and equal to criminal imprisonment, the number of detainees, and thus cost, continues to increase. Between the years of 1994 and 2013, the immigrant detention system grew more than five times, and the average daily-detained population increased from 6,785 to 34,260 (“Unlocking” 162). The increase in the detained population began in 2007 when President George W. Bush ended “catch and release” policies at the southern border. Rather than merely turning away those trying to enter the United States without authorization, ICE would detain immigrants before formally deporting them. Another spike in the detainee population occurred in 2010 when Congressional appropriations language in ICE’s budget ensured funding be available for 34,000 filled immigration detention beds at all times. ICE has interpreted and enforced this as a mandatory 34,000 bed quota per night, and about half of those beds are located inside actual criminal jail facilities (“Immigrant Detention”). Since the enactment of this policy, the number of detainees across that nation has never been lower than 30,000 per day (Chacón 622). Monetarily, the government currently spends over \$2 billion per year on immigration detention, breaking down to approximately \$158 per day per detained immigrant: twice the cost of incarcerating an inmate in criminal jail for a day (Eagly 31).

Worst of all, it is difficult for detainees to seek justice and lawfulness in detention because they are not entitled to the same protections as persons in criminal detention. For example, detainees lack Sixth Amendment rights that guarantee criminal defendants the right to appointed counsel. Because noncitizens in immigration court are considered civil defendants, they are excluded from this right and thus must either represent themselves in court *pro se* or pay for their own representation. The process of actually obtaining a representative if one chooses to can pose enormous additional challenges, particularly when in detention. The process for

obtaining an attorney usually begins at the first calendar hearing, or the “master calendar hearing,” where immigration judges are required to advise immigrants of their right to obtain representation (Eagly 14). The judges then distribute a compiled list of low-cost and free legal services in the area to the defendant (Eagly 15). However, as over 40% of immigration detention centers in the nation are located more than 60 miles outside a city center, the possibility of finding willing representation diminishes significantly (Eagly 35). The statistics show that immigrants with court hearings conducted in rural areas and smaller cities had a fourth of the representation rates of detained immigrants held in larger cities (Eagly 2, 8). Exposure to this issue has led many nonprofit organizations to organize detention center visits for representatives from law school clinics and larger firms to conduct know-your-rights presentations and perform intakes with any new detainees. From this, some detainees are assigned pro bono representation and at least have an opportunity to learn more about the legal options available to them (Eagly 30). For those in detention facilities where these types of interventions are not possible, a mere 36% of detained immigrants who sought counsel actually obtained it, likely due to a plethora of factors including financial hardship and inability to travel to attorney appointments (Eagly 34). These inadequacies in the immigration court system, the punitive and criminal nature of immigration detention centers, and the barriers to access to justice once inside those detention centers may seem shocking, but they are all to be expected given the history of the court system and detention centers.

An Inadequate System: the Immigration Legal System and the Executive Branch

Beginning with the Immigration Act of 1891, the Department of the Treasury established the Office of Immigration, which first placed the sector of immigration under federal control.

Within this office, inspection officers questioned foreigners entering United States territories, and the Office of Immigration had the authority to deport any foreigners who violated the law back to their country of origin. After deciding this deportation power was too much for a single individual to hold, Congress enacted the Immigration Act of 1893, which created the Board of Special Inquiry comprised of three inspection officers. This change came during the same year the Supreme Court upheld the constitutionality of the 1892 Geary Act with *Fong Yue Ting v. United States* (1893), affirming that immigration law indeed fell under the executive branch of government and that Congress held the exclusive ability to establish and regulate all national immigration policy (Reyes 136). In 1903, all immigration responsibilities moved into the Department of Commerce and Labor, and ten years later it moved exclusively to the Department of Labor when the former department divided into two (“Evolution”). In 1921 a revised Immigration Act became the first of its kind to set a quota of persons for each nationality and limit the number of persons that could enter the country. Earlier laws had only barred immigrants with contagious diseases or undesirable political views from entering the country, rather than excluded people based on their nationality (Motomura 6). Even with this new legislation, immigration to the United States continued to increase, and there were a growing number of appeals from cases decided by the Office of Immigration. To account for this growth, the Secretary of Labor created the Board of Review to hear immigration case appeals. The Department of Labor further expanded in 1933 with the creation of the Immigration and Naturalization Service (INS), and this new department moved to the Department of Justice in 1940. To simplify legal matters, Congress combined all previous immigration and naturalization law into the Immigration and Nationality Act of 1952, which gave special inquiry officers (later known as immigration judges) the sole ability to decide deportation matters. Ultimately, the

culminating event for the development of the immigration court system into what it is today was the establishment of the Executive Office for Immigration Review (EOIR) in 1983 (“Evolution”).

The most recent large-scale expansion of immigration law took place in 1996 with the Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA). Prior to these reforms, most immigration cases were either exclusion or deportation cases. In exclusion cases noncitizens attempt to enter the United States but are stopped by the INS and deemed inadmissible; in deportation cases, noncitizens violate some condition of their entry visa. With immigration numbers increasing and cases growing more complicated, however, the IIRAIRA created six additional types of cases: removal, credible fear review, reasonable fear review, claimed status review, asylum only, and withholding of removal (“FY 2014” B1). Moreover, Congress created quick, streamlined ways to deport noncitizens wherein the immigrant bypasses a hearing with an immigration judge. Perhaps most significantly, within these reforms, the federal government authorized for the first time mandatory immigration detention. This, of course, had huge consequences on immigration detention numbers and costs. However, many do not consider these changes to be forms of relief for noncitizens and argue instead that the IIRAIRA has in turn made it harder for noncitizens. In recent years, President Obama’s Executive Orders of Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA) are two examples that emerged as possibilities for relief thanks to evolving societal demands, but they are also contrary to the efforts of the IIRAIRA in that they attempt to provide relief for the undocumented. Most recently, the new administration of President Donald Trump leads with a very different immigration tone than his predecessor; throughout his campaign, Trump promised to deport all undocumented immigrants and, since his

inauguration, he has increased ICE enforcement and deportations, promised stricter standards for foreigners entering the country, and tried to enact a ban on persons from certain countries entering the United States. The immigration legal system will face its greatest test yet in dealing with the consequences of the new immigration policies enforced by this presidential administration.

The actual workings of immigration courts can also vary depending on the political party in power and the current president. Because the EOIR falls under the Department of Justice, a part of the executive branch, the Attorney General of the United States appoints immigration judges, and the prosecutors in immigration court are always attorneys from Immigrations and Customs Enforcement (ICE) and Department of Homeland Security (DHS) (“Two Systems” 7). Additionally, any attorney accredited by the Board of Immigration Appeals as well as reputable individuals may serve as defense counsel (“FY 2014” F1). Immigrants themselves could come to DHS’s attention and be placed in the immigration system through anything from an unsuccessful adjustment of immigration status application, to DHS enforcement measures within the borders of the United States, to an arrest or conviction in judicial court (“Accessing” 7). From here DHS charges an immigrant with a Notice to Appear either via mail or in-person by an ICE officer. ICE oftentimes detains the individual, as well, to avoid any chance of fleeing while the case is pending. However, the likelihood of a noncitizen skipping court is small; federal data from 2013 shows that 74% of non-detained noncitizens appeared for their immigration court hearings, and for those with legal representation nearly 100% appeared (“FY 2013”). This Notice to Appear hearing begins a removal proceeding in EOIR court where the DHS and ICE attorneys make a recommendation to the immigration judge on whether the immigrant should be deported (“Reimagining”). Finally the trial portion of the court begins that could last between weeks and

years where immigrants either find representation or represent themselves *pro se* to seek various forms of relief. Undoubtedly, this is a lengthy and complicated process.

With the surge in undocumented immigration in recent years and therefore the increase in immigration court proceedings, the United States government has pushed the EOIR to decide more cases even more rapidly. Unfortunately for the noncitizen in the hearing, this accelerated process translates into the fact that many case outcomes are largely dependent on the judges before whom the cases are tried rather than the actual merit and claims of the cases. The Justice Department recognizes the problem and is trying to minimize judge bias by holding an annual anti-bias conference for all federal immigration judges (the first of which was held in August 2016), but many say this measure is not nearly enough (Dickerson). Situations like Mr. Naing Tun's experience in the courtroom as a Burmese immigrant seeking asylum from an abusive government are all too commonplace. Mr. Tun's immigration judge excluded submitted-evidence and testimony, disregarded evidence that the translator had mistranslated Burmese, and handed down a hasty judgment later overturned by an Appeals Court who criticized the immigration judge (Benedetto 467). In Mr. Tun's case and many others, the court proceedings become stacked against the defendant, as successful claims for immigration relief require the collection of extensive evidence and the use of long and complicated legal arguments.

The chance of a successful outcome in court is improved for the few defendants that can afford representation, but unlike in criminal judicial proceedings, all defendants are required to testify and subject to cross-examination by government attorneys regardless of language abilities or mental capacity. Interestingly enough, however, in criminal cases, the 5th Amendment guarantees the right against self-incrimination so the defendant on trial never has to testify against himself. Since an immigration case is not a criminal proceeding, however, the immigrant

is forced to do so. Following the presentation of evidence, the judge can either decide that the defendant is not removable, thus terminating proceedings and releasing the defendant to remain in the United States, or find them removable. If the judge deems the defendant removable, that judge can either order deportation or decide that the immigrant qualifies for some form of relief, either cancellation of removal, asylum, or adjustment of status with a green card, for example (“Accessing” 8). Additionally, if the judge deems the defendant removable, he or she can opt to voluntarily depart the country, a kind of voluntary deportation, which eases the restrictions on reapplying for immigration relief in the United States in the future. Immigrants deemed both removable and non-removable hold the right to appeal to the Board of Immigration Appeals within the department of the EOIR, and following this appellate decision, immigrants may leave the EOIR’s jurisdiction to ask for judicial review by the federal courts of the United States Court of Appeals. In very rare cases, the decision can be further appealed to the United States Supreme Court which renders a final verdict. The decisions in these courtrooms have created case precedent for other immigration claims and provided evidence for reform of the immigration court system.

Reforming the Immigration System: the Rights of *All* Persons

As seen through the history and current state of immigration courts and the immigration detention system, the federal government currently operates on the belief that noncitizens do not possess the same rights under the Constitution as United States citizens. Some precedent, however, does seem to suggest that noncitizens enjoy the same rights as citizens. The key factor in this debate rests on the interpretation of the word “person” in the Equal Protection Clause of Section One of the 14th Amendment to the Constitution:

No state shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any state deprive any *person* of life, liberty or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws (U.S. Constitution, Amendment XIV, §1).

Theoretically, if one could show that “person” in this context implies the inclusion of all people including noncitizens, due process would be extended to citizens and noncitizens alike, and the current immigration system would be deemed unconstitutional. Even before the creation of the Equal Protection Clause, beginning with the discussion of the Alien and Sedition Acts in 1798, James Madison, representing the Anti-Federalist standpoint on the issue, argued that, “...it will not be disputed that, as [aliens] owe, on the one hand, a temporary obedience, they are entitled, in return, to their [constitutional] protection and advantage” (Boyd 326). One of the most influential Founding Fathers, then, rejected the interpretation that noncitizens do not have constitutional rights because they entered the United States illegally. Given James Madison’s interpretation of the entitlements of noncitizens, a basis exists for interpreting the word “person” to include more than strictly U.S. citizens.

In the interpretation of any law, many judges try to consider the original intent of that law; such practice is most noticeable in the work of Supreme Court justices to interpret the U.S. Constitution. In the Equal Protection Clause, the Constitution identifies two types of individuals in its language: “persons” and “citizens.” Remarkably enough, the only rights reserved exclusively for “citizens” in the Constitution are the right to vote and hold public office; all other rights listed, including those in the Bill of Rights, use the term “person.” While some argue that writers of the Constitution intended for these two terms to be interchangeable, others express the importance and intentionality of this distinction. Senator Jacob Howard, for example, one of the sponsors of the 14th Amendment, introduced the Amendment and its purpose on the Senate floor on May 23, 1866 by describing,

The last two clauses of the first section of the amendment disable a State from depriving *not merely a citizen* of the United States, *but any person*, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one [group] of persons to a code not applicable to another (Boyd 328, emphasis mine).

The Supreme Court itself has waived on its interpretation of the distinction between these two terms, but key decisions provide clear evidence to support Senator Howard’s understanding of noncitizens’ rights.

In *Yick Wo v. Hopkins* (1886), the Court ruled for the first time on the matter of infringement on Equal Protection rights. Although largely disregarded after *Plessy v. Ferguson* (1896) ten years later, the majority opinion in *Yick Wo* suggested that noncitizens have at least some claim to constitutional protection by explaining that if a fair law is administered unfairly “so as practically to make unjust and illegal discriminations between persons of similar circumstances...the denial of equal justice is still within the prohibition of the [14th Amendment].” The decision in *Wong Win v. United States* (1896) furthered this application of equal protection by holding that noncitizens in criminal proceedings were guaranteed the same constitutional protections as United States citizens. While both cases involved Chinese noncitizens and the Chinese Exclusion Act, the *Wong Win* decision described how these protections extended far further than simply one racial or ethnic group. The court stated, “It must be concluded that *all persons* within the territory of the United States are entitled to the protection by [the Fifth and Sixth Amendments] and that even aliens shall not be...deprived of life, liberty or property without due process of law” (emphasis mine). The Supreme Court in *Yamataya v. Fisher* (1903) reaffirmed these two decisions, holding that anyone present inside United States territory was entitled to constitutional protection. Specifically, Justice John Harlan reiterated in the majority opinion that,

It is not competent for...any executive officer...to cause an alien who has entered the country, and has become subject in all respect to its jurisdiction...to be taken into custody and deported without giving him all opportunity to be heard...involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized (Boyd 332).

After these three progressive rulings, interpretations of immigration decisions became increasingly strict with the World Wars and their aftermath, reflecting the nation's often-xenophobic tone fearful of outsider intrusion. A realignment with the interpretations of the three Supreme Court decisions detailed above did not occur until the second half of the 20th century.

In recent years, the Court has reinforced its opinion that there is a difference in meaning between the terms "person" and "citizen" in three notable cases. With *Almeida-Sanchez v. United States* (1973), the Court held that any elements of the Constitution related to criminal charges protected noncitizens, both legally and illegally present (Contreras). Additionally, in 1982, the Court held in *Plyler v. Doe* that Texas's denial of free public school education to undocumented immigrant children violated the Equal Protection Clause. The Texas statute had indeed discriminated on the basis of illegal immigration status, and the Supreme Court clarified this position by stating, "Whatever his status under immigration laws, *an alien is a 'person'* in any ordinary sense of the term...the undocumented status of these children does not establish a sufficient rational basis for denying benefits that the state affords other residents" (Contreras, emphasis mine). The most recent Supreme Court decision, however, is directly relevant to the relationship between the Equal Protection Clause and immigration detention. In *Zadvydas v. Davis* (2001), the Court ruled that the United States could not detain immigrants under an order of deportation for longer than six months unless removal was in the foreseeable future or under special circumstance. The central clarification for this argument, however, was Justice Stephen Breyer's majority opinion that held, "... the Due Process Clause applies to all 'persons' within

the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent” (Zadvydas). While this decision seems straightforward, in practice ICE and EOIR together have interpreted the parameter of the “foreseeable future” broadly, and they continue to detain immigrants for periods longer than six months. Read together though, legal evidence and Court precedents suggest that noncitizens have many constitutional rights, excepting the right to vote and hold political office.

Many blame a single clause from the Congressionally-enacted Immigration and Nationality Act for the lack of real progress in immigration system reform. The most recent revision to the Immigration and Nationality Act (INA) came in 2011; Congress reaffirmed Section 292 of the Act stating that a defendant in immigration court had the right to counsel as long as it was “at no expense to the Government” (Adams 176). These six words have greatly undermined efforts to show that defendants in removal proceedings have the right to assigned counsel, even with sufficient case precedent in criminal cases, which many maintain are applicable to immigration cases due to their similarities in the treatment of those being tried. The challenge to this comes from the fact that because the EOIR falls under the executive branch rather than judicial, some believe this Congressional Act holds more weight than Supreme Court decisions. There also exists little case law on the very specific subject of right to assigned counsel for *noncitizens* specifically. Three federal courts of appeals, however, have acknowledged that at least in some cases, noncitizens’ rights could be substantially impaired without access to counsel. The Sixth Circuit Court of Appeals noted that, “Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government’s expense. Otherwise, ‘fundamental fairness’ would be violated” (Adams 176). This decision rejected Section 292 of

the INA and supported a case-by-case approach to determining the right to counsel. Similarly, the Ninth Circuit Court of Appeals decided, “Congress’ treatment of indigent aliens...may not be constitutional as applied in individual cases. The Fifth Amendment guarantee of due process applies to immigration proceedings, and in specific proceedings, due process could be held to require that an indigent alien be provided with counsel...” Also advocating for the individual determination for appointed counsel, the Fifth Circuit Court of Appeals ruled that a noncitizen could successfully argue that the deprivation of assigned counsel in immigration court infringed on his right to due process under the Fifth Amendment (Adams 177). Therefore at least three Circuits recognize the potential for violating the Fifth Amendment that exists in the lack of a right to appointed counsel in immigration court . Looking at this issue holistically, the INA statute should not undermine the constitutional claims for right to counsel for noncitizens. There is sufficient precedent to call the current system of immigration court and detention into question.

Additionally, the current immigration system is unjust on ethical grounds. This claim can be substantiated using John Rawls’ theory of justice, which requires treating noncitizens as equals under the law. Behind Rawls’ hypothetical “veil of ignorance,” people do not know anything about their personal characteristics including religion, race, sex, talents, or values. From this perspective they must decide on the principles of justice and because, their personal outcome is unknown, Rawls believes that people would voluntarily choose to guarantee the maximum amount of liberties to all people—the Principle of Equal Liberty. Rawls also believes that from this perspective, people would choose to permit inequalities as long as they were to the advantage of the least well off and attainable for anyone through equal opportunity—the Difference Principle (Garrett).

The immigration detention and court systems currently violate these principles. The first principle fails because, following Rawls' lead, citizenship status should also be included behind the veil of ignorance. Citizenship is like all other personal characteristics Rawls deems sources of advantage and disadvantage, and if it was included behind the veil, people would choose to include the full protection of the Constitution to all. Additionally, even citizens' liberties are threatened by the current immigration system, as shown most effectively through the negative effects on noncitizens' US citizen children described previously. The second principle also fails as it compounds rather than mitigates the disadvantages faced by noncitizens and their families, members of one of the least advantaged populations in society. Therefore, the current state of the immigration system fails Rawls' theories on fairness and justice, further supporting the argument that the current immigration system is unjust.

It is clear the federal government classifies immigration law and detention as civil, as opposed to criminal. However, the Supreme Court decisions used to justify a criminal defendant's right to appointed counsel use language that make them seem applicable to a civil defendant in immigration court. The Court first recognized a constitutional right to appointed counsel in state criminal prosecutions with *Powell v. Alabama* (1932) upon realizing the fundamental unfairness in placing an educated and trained lawyer against a layperson, and six years later *Johnson v. Zerbst* (1938) extended this court appointed counsel to all federal prosecutions. The landmark case that truly solidified the constitutionality of a right to appointed counsel in all criminal trials, however, was *Gideon v. Wainwright* (1963). Here the Supreme Court unanimously ruled that the Sixth Amendment right to counsel for indigent criminal defendants was a fundamental right applied to the states through the 14th Amendment's due process clause.

This right is made questionable in the immigration sphere, however, with the decision of *Turner v. Rogers* (2011). In this case the Supreme Court in fact rejected the civil claim for appointed counsel for the unrepresented petitioner: a father facing imprisonment for civil contempt for failure to complete child support payments. This ruling conflicted with the decision of *Argersinger v. Hamlin* (1972) that had extended the right to appointed counsel in criminal cases where incarceration is a possibility. In *Turner v. Rogers*, the Court adjusted its position in claiming that the possibility of incarceration alone was not sufficient to qualify for appointed counsel in civil cases and additionally, the majority opinion stressed that civil contempt proceedings are usually simple in nature with the state not represented in the proceedings (Guttentag). In immigration proceedings, though, the proceedings are almost always very complex, and the government is always represented with counsel! Thus the Court's logic in *Turner*, if applied to EOIR immigration court, would likely support rather than deny detained immigrants' right to appointed counsel.

There are also numerous Supreme Court decisions that outline the severity of deportation in immigration proceedings. Notably, the decision in *Bridges v. Wixon* (1945) acknowledged that deportation could deprive immigrants of "all that makes life worth living" and ordered that extraordinary care be practiced to ensure that the "depriv[ation] of liberty...meet the essential standards of fairness" (Guttentag). Unfortunately, this advice has consistently been ignored as one standard of fairness—appointed legal representation—continues to be denied in immigration court, even though the same reasons the Supreme Court cited in its decisions to appoint counsel for indigent criminal defendants could be applied to civil noncitizen defendants. Adding to this, in both *Immigration and Naturalization Service v. St. Cyr* (2001) and *Padilla v. Kentucky* (2010), the Court reaffirmed that for noncitizens facing deportation, removal is often a more severe

punishment than even a criminal sentence (Guttentag). Today, many try to use the logic of both *Gideon* and *Turner* to extend the right to appointed counsel to the most vulnerable immigrant populations, such as those detained. Linking the logic argued above that noncitizens indeed have constitutional rights as seen through both Supreme Court decisions and John Rawls's theory of justice, it is imperative to extend due process protections to noncitizens in immigration court.

Various reforms need to be enacted in order to uphold the United States' ideals constitutionally, morally, and ethically. Focusing first on the immigration detention system, rather than using this costly and punitive detention measure as a "holding tool" for noncitizens awaiting trial, the government should invest more resources into alternatives to detention. Since 2009, ICE has invested some funds into a significantly lower cost alternative-to-detention option called Intensive Supervision Appearance Program II (ISAP), and the trial period was deemed a success by ICE ("U.S. Immigration and Customs"). Operated by a for-profit firm, ISAP used electronic ankle monitors, surprise home visits, employer verification, and in-person reporting to supervise its participants, and at the end of 2014 ICE renewed its five-year contract with the firm. This indicates at least a partial commitment to alternative-to-detention options. In 2013, ISAP monitored about 40,000 persons, or around a tenth of the individuals ICE detained, for as low a cost as 17 cents per person per day (Epstein 1). That same year, 99.6% of those being monitored by ISAP appeared in immigration court, and 79.4% complied with deportation orders (Epstein 2). This shows, then, that alternatives-to-detention can be extremely effective in accomplishing the same goal of government detention measures: to ensure that noncitizens appear at their EOIR court dates and comply with removal orders. Furthermore, even considering the highest estimate of ISAP at a cost of \$17 per person per day, this is \$150 less than detaining a person for a single day in an immigration detention center. The political feasibility of ISAP

monitoring is high, as well, as implementation of ISAP has already started at least on a small scale.

Within the immigration court system, however, reforms are more difficult to achieve. In the immigration court system, there are only a few proposals that promote justice for noncitizens while at the same time promise benefits for the government in terms of cost and efficiency. To reduce case backlogs, lighten immigration judges caseloads, and more quickly adjudicate immigration removal matters, the government should “right-size” the immigration courts by adding 150 immigration judge teams (consisting of at least an immigration judge, language specialist, law clerk, and legal technician) to the system. With 254 judges already working for the EOIR, Congress recently funded 55 additional immigration judge teams for the 2016 Fiscal Year. The addition of the 150 immigration judge teams between the years of 2017 and 2018 would be initially costly—about a \$150 million investment—but this would ultimately increase the courts’ efficiency and fairness and likely lower costs within the immigration system as a whole. More timely hearings thanks to an appropriately staffed court system could reduce detention costs by hearing cases more quickly and increase savings for alternative ISAP measures. And even with this additional staff, the budget for immigration courts would still only be 4% of the total \$18.5 billion immigration enforcement budget (“Reducing” 1-7).

Perhaps the most controversial proposal, but also the most impactful, is the idea of implementing a public-defender-type system in the immigration court system. Appointing counsel to noncitizens in immigration court would speed up the trial process and thus lower costs of detention and intensive supervision. In a 2011 survey, immigration judges nearly unanimously agreed that if an immigrant had representation, that person’s case was adjudicated more quickly and efficiently (Eagly 59). Rather than prolonging court cases when the defendant must request

more time to explore immigration relief options, the appointed counsel could meet with the noncitizen prior to the first scheduling hearing and be prepared to inform the judge of how they should proceed in the case (Eagly 62). While this would entail an expensive startup cost, the program could soon pay for itself by saving money from reduced time spent in detention and by using immigration judge's time more efficiently. Rather than an unrepresented detained noncitizen having six hearings over the course of two years, for example, appointed counsel could ensure that same client had two hearings over the course of only six months, all while being released on bond or alternative supervision.

One groundbreaking study found that between 2007 and 2012, over the course of 1.2 million deportation cases, only 14% of detained immigrants secured representation due to geographic or financial barriers to obtaining counsel (Eagly 2). Detainees with counsel succeeded in obtaining relief in 21% of cases: 10.5 times greater than the 2% rate of those representing themselves *pro se* (Eagly 9). The chance of success was even greater when nonprofit organizations, larger law firms, or law school immigration clinics represented the immigrant, as immigration judges agree they are oftentimes more skilled than private immigration attorneys (Eagly 9, 52). This evidence indicates that many noncitizens would in fact qualify for immigration relief, had they not lacked the legal knowledge, language abilities, and means to defend themselves in court. Unfortunately, even with the obvious benefits for the government, taxpayers, and noncitizens alike coupled with constitutional evidence and case law, the feasibility of implementing a program of appointed counsel in immigration court is simply not politically possible. This does not mean, however, that a system of appointed counsel in immigration court should not be the ideal to strive for in future immigration reforms.

Overall, today's immigration court and detention systems do not provide just treatment for noncitizens. The average case in the EOIR takes 1,000 days from intake to completion. Immigration detention centers have evolved into increasingly punitive, criminal-like facilities. Noncitizens are repeatedly left to fend for themselves in a broken system that deprives them of due process rights. By examining constitutional language, Supreme Court and Appeals Court case law, and Rawlsian ethical principles, it is clear that constitutional protections need to be extended to noncitizens in immigration law. Since noncitizens enjoy the same rights as citizens such as due process and appointed counsel when facing criminal charges in the judicial system, there is a strong basis for the application of those same rights in legal matters relating to immigration. This blatant inconsistency is both unconstitutional and unjust, and our government must correct this wrong by reforming the immigration legal system immediately.

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