ABA human rights

Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel

Vol. 39 No. 4

By Lucas Guttentag, Ahilan Arulanantham

Lucas Guttentag is the founder and former director of the American Civil Liberties Union (ACLU) Immigrants' Rights Project. He now teaches at Yale Law School, where he is Robina Foundation Distinguished Senior Fellow, and at Stanford Law School, where he is a lecturer in law.

Ahilan Arulanantham is senior staff attorney at the ACLU Immigrants' Rights Project, deputy legal director of the ACLU of Southern California, and counsel for the class in Franco-Gonzalez v. Holder.

The authors wish to express their gratitude to Benjamin Good at Stanford Law School for his outstanding research and assistance.

Long before Gideon, the U.S. Supreme Court recognized that deportation may deprive an immigrant of "all that makes life worth living" and that "meticulous care" is required to ensure that the "depriv[ation] of liberty . . . meet the essential standards of fairness." Bridges v. Wixon, 326 U.S. 135 (1945). Yet one of the most essential guardians of fairness—a lawyer to represent immigrants in deportation (now called "removal") hearings against government prosecutors—is denied in nearly fifty percent of all cases, and even more often in cases involving detained immigrants. See Executive Office Of Immigration Review, FY2011 Statistical Yearbook, at G1 [hereinafter FY2011 Statistical Yearbook]. That denial persists even as the Court has recognized and reaffirmed repeatedly in the last dozen years that for noncitizens facing expulsion, deportation is often a far more severe consequence than a criminal sentence. See Padilla v. Kentucky, 559 U.S. 356 (2010), and INS v. St. Cyr, 533 U.S. 289 (2001).

This year, the fiftieth anniversary of Gideon coincides with the

most serious prospect for congressional immigration reform in a generation. Today, the effort to pursue appointed counsel is proceeding both in the courts and in Congress, where recognition of the need for counsel—at least for some especially vulnerable immigrants—is growing. As we grapple with an immigration system mired in failure, the Gideon anniversary is a reminder that despite salient similarities between the immigration and criminal systems, the right to appointed immigration counsel lags far behind the right in criminal cases—not only as it exists now, but even as it existed before Gideon was decided. At a moment when the criminal justice system has been justifiably criticized for failing to fulfill Gideon's promise of appointed counsel, we should pause to consider that the right is essentially nonexistent in the immigration courts.

Superficially, any person charged with being "removable" is entitled by statute to be represented by counsel—but only "at no expense to the Government." 8 U.S.C. § 1362 (2012). As a result, half of those who face the drastic sanction of deportation have no lawyers. See Fy2011 Statistical Yearbook, supra, at G1. A recent study of New York immigration courts published in Cardozo Law Review showed that immigrants who are compelled to proceed without representation are five times more likely to lose their cases as those who have counsel. See New York Immigrant Study Report, Accessing Justice II: a Model For Providing Counsel To New York Immigrants In Removal Proceedings 11 (2012).

That should not be surprising. First, immigration law is notoriously complex and continually changing—comparable to the tax code, as federal judges have often observed. Castro O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987). Second, the United States is always represented by counsel in removal hearings. Lawyers from the Department of Homeland Security's Bureau of Immigration and Customs Enforcement (ICE) appear in every case as immigration prosecutors and, with rare exception, aggressively pursue removal. Third, immigration judges (IJ) charged with overseeing the hearings lack the legal authority to adequately supervise ICE prosecutors, are subordinate to the attorney general, and are notoriously overworked and underresourced. Appellate judges across the ideological spectrum have issued scathing critiques of IJs who have failed to ensure even a modicum of fairness.

Despite the fundamental unfairness that unrepresented immigration defendants face, the immigration courts do not provide for court-appointed counsel. Though several courts of appeals have strongly suggested that due process may require IJs to appoint counsel in at least some cases, in practice no such appointments ever occur. As a result, immigrants facing deportation do not even have the benefit of the rule that the

Supreme Court had adopted before Gideon for the criminal justice system, where counsel was required in at least some cases.

The Doctrinal Birth of Gideon

The indigent criminal defendant's right to appointed counsel evolved as judges came to recognize that proceedings pitting a well-trained "repeat player" against an untrained layperson are fundamentally unfair. In the criminal setting, courts first explicitly pronounced this principle in cases involving particularly vulnerable defendants and defendants facing particularly severe forms of deprivation. The Supreme Court first recognized a constitutional right to appointed counsel in state criminal prosecutions in 1932, holding in Powell v. Alabama, 287 U.S. 45, 71 (1932), that defendants facing capital punishment must receive appointed counsel. In 1938, when the Court held in Johnson v. Zerbst, 304 U.S. 458 (1938), that court-appointed counsel was constitutionally required in all federal prosecutions, the Court acknowledged the "obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." Id. at 462–63.

Yet, a few years later in Betts v. Brady, 316 U.S. 455, 472 (1942), the Court declined to recognize a categorical right to appointed counsel in every state felony prosecution under the Fourteenth Amendment. Instead it imposed a case-by-case approach that required judges to appoint counsel only under special circumstances. Gradually, the Court recognized such circumstances in a variety of settings, including where complex legal issues were presented, or where the defendant was mentally disabled, particularly young, uneducated, or unable to understand English. See, e.g., Chewning v. Cunningham, 368 U.S. 443 (1962) (complex legal issues); Cash v. Culver, 358 U.S. 633 (1959) (defendant's lack of education); Palmer v. Ashe, 342 U.S. 134 (1951) (defendant's mental disability); Wade v. Mayo, 334 U.S. 672 (1948) (defendant's youth); Marino v. Ragen, 332 U.S. 561 (1947) (defendant's inability to understand English). It appears that these rules did result in the actual appointment of counsel in at least some cases. Commonwealth v. Ashe, 86 A.2d 61, 62 (Pa. 1952) (directing the trial court to appoint counsel to the defendant). Twenty years after Betts, in 1963, Gideon adopted a more categorical approach by requiring appointed counsel for all felony cases. Finally, almost a decade later, Argersinger v. Hamlin, 407 U.S. 25 (1972), extended Gideon to all cases resulting in incarceration as punishment.

Developments in the "Civil Gideon" Doctrine

The Supreme Court first extended Gideon to the civil context in In re Gault, 387 U.S. 1 (1967), which held that juveniles in delinquency proceedings facing civil confinement had a right to appointed counsel. However, subsequent cases declined to continue Gideon's expansion in this context.

The most striking evidence of the retreat from Gideon in the civil context may be Lassiter v. Department of Social Services, 452 U.S. 18 (1981), a case in which the Supreme Court denied a claim for appointed counsel on behalf of an indigent parent who lost custody of her child in a parental termination proceeding. The decision suggested, in dicta, that the critical factor justifying the denial of appointed counsel was that the case involved no loss of "personal freedom." However, just two years ago the Court rejected a claim for appointed counsel in Turner v. Rogers, 131 S. Ct. 2507 (2011), even though the unrepresented litigant—a father facing imprisonment for civil contempt based on failure to pay child support—was jailed.

After Turner, the deprivation of physical liberty standing alone appears to be insufficient to compel appointed counsel in civil cases. But Turner did not rule out the possibility of appointed counsel in civil proceedings altogether; on the contrary, it stressed several factors that militated against appointed counsel in that case. The Court noted that the issue in a civil contempt proceeding is typically simple—whether the parent has the financial means to pay the child support—and, perhaps most importantly, focused heavily on the fact that the state is typically not represented in those proceedings. In contrast, immigration proceedings often involve extremely complex issues, and the government is always represented by counsel.

Meaningful Appointed Counsel in Immigration Court

Today, advocates are trying to extend the logic of both Gideon and Turner to the deportation context by establishing a right to appointed counsel for especially vulnerable immigrant populations, through both legislation and litigation. For example, the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) requires the secretary of Health and Human Services to "ensure, to the greatest extent practicable . . . that all unaccompanied alien children who are or have been in the custody [of the federal government] . . . have counsel to represent them in legal proceedings or matters. . . ." 8 U.S.C. § 1232(c)(5) (emphasis added). These children are under eighteen and without a parent or legal guardian to provide "care and physical custody." 6 U.S.C. § 279(g)(2)(C)(ii). The Ninth Circuit has also strongly encouraged immigration judges to ensure legal representation for unaccompanied minors. Lin v. Ashcroft, 377 F.3d 1014, 1034 (9th

Cir. 2004) (holding in the context of unaccompanied minors in immigration proceedings that "[a]bsent a minor's knowing, intelligent, and voluntary waiver of the right to counsel, the IJ may have to take an affirmative role in securing representation by competent counsel").

In addition, both the current administration and a prominent figure from the recent Bush administration have made statements generally favorable toward the concept of appointed counsel in at least some removal proceedings, thus giving rise to hopes that the current legislative effort will lead to counsel for other especially vulnerable immigrants.

Advocates are also trying to establish the right to appointed counsel though litigation in a case involving individuals with serious mental disabilities. In Los Angeles, the American Civil Liberties Union and a coalition of organizations are litigating Franco-Gonzales v. Holder, a 2010 class action lawsuit brought to compel appointed counsel for immigrants whose serious mental disorders render them not competent to represent themselves. [One of the authors here—Mr. Arulanantham—is counsel for the class in that case.] Those individuals present a particularly compelling case for appointed counsel because the existing system plainly cannot produce fair outcomes for individuals whose serious mental disorders—including severe cognitive impairments and psychotic disorders—render them incapable of effectively advocating for themselves without counsel.

In some cases, ICE detained noncitizens with serious mental disabilities for years with no active proceedings taking place, apparently because the government was (understandably) unwilling to proceed against a defendant who could not understand the proceedings. In other cases, immigration courts have "appointed" family members or even deportation officers to act as "representatives" for individuals not competent to represent themselves. Even when IJs have terminated proceedings because of an immigrant's mental illness, ICE has sometimes appealed, thereby leaving the incompetent individual to defend the finding of his own incompetence on appeal. See First Amended Class Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at ¶¶ 11–16, 30–82, Franco-Gonzales v. Holder, No. 10-CV-02211 (C.D. Cal. Aug. 2, 2010). On the basis of extensive evidence, District Judge Dolly Gee issued preliminary injunctions requiring the federal government to ensure legal representation for several plaintiffs in the lawsuit under the federal Rehabilitation Act, thereby leaving unaddressed (for now) the constitutional due process claims for appointed counsel. See Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034 (C.D. Cal. 2010);

Franco-Gonzales v. Holder, 828 F. Supp. 2d 1133, 1147, 1149 (C.D. Cal. 2011) (two preliminary injunction orders requiring government to ensure legal representation for plaintiffs with serious mental disabilities facing deportation).

While efforts have focused on the most vulnerable immigrant populations, the ultimate goal should include appointed counsel for many, if not all, immigrants. To give just two obvious examples where the right to appointed counsel should apply: individuals facing complex deportation proceedings and those for whom the stakes may be particularly high, either because they have a fear of persecution or torture upon return or because they have deep ties to this country that render them eligible for relief. Although the rationale for appointed counsel is especially compelling for some—such as those with serious mental disorders, or unaccompanied children—the requirements of fundamental fairness must be assessed in all cases in light of the complexity of immigration law, the role of government prosecutors, and the severity of the harm caused by deportation.

Some may suggest that the immigration removal system is too vast, the numbers too overwhelming, and the cost too high to provide counsel for every immigrant at government expense. However, it is easy to overstate the dimensions of that challenge. The immigration courts hear approximately 300,000 cases a year covering an array of issues and claims. FY2011 Statistical Yearbook, supra, at B7. Of that number, about half the individuals are unrepresented, id. at G1, but many may need only fairly perfunctory representation that does not involve a great expenditure of legal resources. Advocates have also shown that speedy appointment of counsel can save substantial detention costs if detained immigrants have qualified lawyers to promptly assess their claims. Under any calculus, the number of immigration cases is dwarfed by the size of the criminal justice system, where counsel is compelled. Bureau of Justice Statistics numbers indicate that in 2007, state-level public defender offices received nearly 5.6 million cases. See Donald J. Farole Jr., a National Assessment Of Public Defender Caseloads 5 (2010). By way of comparison, the Los Angeles County public defenders alone typically handle 490,000 criminal cases per year. See Nancy Albert-Goldberg, Los Angeles County Public Defender Office in Perspective, 45 Cal. W. L. Rev. 445, 451 (2009). That is larger than the entire immigration docket.

From Gideon to Appointed Counsel in Deportation Cases

While Gideon has plainly not cured the ills of the criminal justice system, its promise remains the essential starting point for

ensuring fairness to immigrants facing expulsion. The vulnerability, language impediments, and cultural barriers that immigrants face make fairness more difficult to achieve and oversight of systemic failures more difficult to accomplish. In this context, the presence of lawyers is the fundamental starting point for ensuring fairness in the deportation system.

In the criminal justice system, the right to appointed counsel began where it was most urgently needed. Immigrants' rights advocates and lawyers are making that same case today. Legislative initiatives may bear fruit, and Franco stands as a beacon for how the constitutional claims can evolve. As those efforts proceed, the laudable efforts to expand pro bono counsel and programs are critical to filling the continuing gap.

The due process rights of noncitizens continue to lag far behind the evolution of constitutional principles that has occurred since Gideon. See generally Louis Henkin, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny," 100 Harv. L. Rev. 853 (1987). The absence of court-appointed counsel is one striking example. The procedural protections afforded immigrants today are fewer even than those provided for criminal defendants in the pre-Gideon era. Yet, the similarities are clear and the need is compelling, as counsel for immigrants facing removal must be understood as "implicit in the concept of ordered liberty." Gideon v. Wainwright, 372 U.S. 335, 341 (1963).