

AN ESSAY ON LEGAL REPRESENTATION OF NON-CITIZENS IN DETENTION

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The broad expansion of the detention of non-citizens by the federal government has been chronicled by Lenni Benson in her fine contribution to this symposium.¹ The question I will address is one of legal representation for these detained individuals, while they are subject to immigration proceedings. The Supreme Court has noted that this adjudicatory process is civil and not criminal.² While these persons may retain counsel, there is no provision for the routine appointment of counsel for those who are unable to afford lawyers.³ In addition, congressional action and subsequent practice has eliminated the availability of the largest provider of civil legal services to the indigent from assisting this population, Legal Services Corporation (LSC). LSC grantees have been barred from providing representation to most detained non-citizens, and, over a twenty-five year period, the restrictions have tightened.⁴

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¹ See Lenni Benson, *As Old As The Hills: Detention and Immigration*, 5 *INTERCULTURAL HUM. RTS. L. REV* 11 (2010).

² See *Ting v. United States*, 149 U.S. 698 (1893); see also *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999) (confirming principle that the adjudicatory process of deportation is civil and not criminal).

³ See Immigration and Nationality Act (INA) § 240(b)(4)(A), 8 U.S.C. § 1229(a)(1)(E) (2006); see also INA § 292, 8 U.S.C. § 1362 (1996) ("privilege of being represented (at no expense to the Government) by such counsel . . .").

⁴ Further Continuing Appropriations Act, 1983, Pub. L. No. 97-377, 96 Stat. 1833; Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321; see *Use of Non-LSC Funds, Client Identity and Statement of Facts*, 61 Fed. Reg. 45740 (Aug. 29, 1996) (codified at 45 C.F.R. pt. 1610 and 1636).

During the decades of the 1960's and 1970's, the Supreme Court expanded the reach of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, as well as the Sixth Amendment provision concerning the right to counsel. The Court required the federal and state governments to provide counsel to indigent defendants in all criminal felony cases.⁵ In addition, indigent misdemeanor defendants could not be incarcerated unless they had been furnished with counsel.⁶ The civil/criminal label did not prevent the Court from extending the right to counsel to indigent juveniles facing civil delinquency proceedings.⁷ Furthermore, lower courts expanded the right to counsel to include persons facing commitment to state mental health facilities.⁸ In 1981, the Court referred to "the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty."⁹ Indigent parents whose parental rights were being terminated at the behest of a state would only qualify for appointed counsel on a case-by-case basis.¹⁰ Individuals facing removal from the United States, whether detained or not, have been left out of these constitutional reforms. Their detention generally is not an outcome of adjudication, but a step in the process.¹¹

Federal courts began deciding cases involving immigration on a regular basis in the latter quarter of the nineteenth century. The Supreme Court articulated basic approaches to the field of exclusion and deportation during this period and established many core principles that have never been comprehensively re-examined. A core principle has been the plenary power of Congress and the

⁵ *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

⁶ *Argersinger v. Hamlin*, 407 U.S. 25, 30-31 (1972). Despite the constitutional mandate, governments have provided inadequate resources for defense services. See, e.g., *Indigent Representation: A Growing National Crisis: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 6 (2009) (statement of John Conyers, Jr., Chairman, Committee on the Judiciary).

⁷ *In re Gault*, 387 U.S. 1, 41 (1967).

⁸ See, e.g., *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968).

⁹ *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 31 (1981).

¹⁰ *Id.* at 18.

¹¹ Compare *Demore v. Kim*, 538 U.S. 510 (2003), with *Zadvydas v. Davis*, 533 U.S. 678 (2001) (post-adjudication).

executive and limited judicial review.¹²

A case from 1977,¹³ almost 100 years from the early pronouncements of the Supreme Court on the subject of power of Congress to restrict admission, illustrates the peculiar placement of immigration in the constitution lexicon. A United States citizen father wished to have his biological son join him in the United States. The difficulty was that the son was illegitimate, even though it was conceded that the father had supported him and there was no question of parentage. Had the biological mother petitioned, the visa would have issued. Had the child been legitimate, a visa would have issued. The statute, however, deprived the father from successfully petitioning for his illegitimate offspring. By this time, the Supreme Court had decided two streams of cases concerning discrimination based on gender and discrimination based on legitimacy. The federal government's ability to discriminate on either basis had been circumscribed in a series of cases using the Due Process Clause of the Fifth Amendment to fashion a robust Equal Protection doctrine applicable to the United States. Discrimination in the awarding of social security benefits based on legitimacy and gender had been struck down.¹⁴ But the issue here was immigration and the Supreme Court has treated the subject of immigration differently from other areas of the law.

Justice Powell, speaking for the majority, opened with broad language, reaching back to the turn of the 20th century: “[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”¹⁵ “[I]n the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.”¹⁶ In a footnote, the Court delivered the *coup de grace*:

¹² See Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of the Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (discussing the plenary power doctrine).

¹³ See *Fiallo v. Bell*, 430 U.S. 787 (1977).

¹⁴ Compare *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (illegitimacy), with *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (gender).

¹⁵ *Fiallo*, 430 U.S. at 792 (quoting *Oceanic Navigation Co. v. Strananhan*, 214 U.S. 320, 329 (1909)).

¹⁶ *Id.* (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

“We are no more inclined to reconsider this line of cases than we were five years ago”¹⁷ Justice Powell noted the impossible position in which the citizen father was placed, since there was no procedure for the father to prove his relationship to his son, “but the decision nonetheless remains one solely for the responsibility of the Congress and wholly outside the power of this Court to control.”¹⁸ He referred to the powerful dissent of Justice Marshall as “thoughtful,” but dismissed it with a line that could have been penned 100 years earlier: “We are dealing here with the exercise of the Nation’s sovereign power to admit or exclude foreigners in accordance with perceived national interests.”¹⁹

During the 20th century, the Supreme Court had many opportunities to begin a new approach, but steadfastly continued the course set in the earliest period of litigation. Justice Frankfurter noted the anomaly in a case²⁰ involving the deportation of a long-time non-citizen resident for having a two-year membership in the Communist Party during the 1940s. The basis of the proceeding was an act passed in 1950. He opined that “were we writing on a clean slate,”²¹ due process might be seen as a limitation on Congress. “And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto Clause, even though applicable only to punitive legislation, should be applied to deportation.”²² Reexamination was not to be: “But the slate is not clean. As to the extent of the power of Congress under review, there is not merely a page of history. . . , but a whole volume.”²³ As to the ex post facto clause, “it has been the unbroken rule of this Court that it has no application to deportation.”²⁴

¹⁷ *Fiallo*, 430 U.S. at 792 n.4.

¹⁸ *Id.* at 798–99 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952)) (Frankfurter, J., concurring).

¹⁹ *Id.* at 795 n.6; see *Cleveland*, *supra* note 12.

²⁰ See *Galvan v. Press*, 347 U.S. 522 (1954) (Petitioner resided in the United States since 1918 and was placed in deportation proceedings pursuant to charges that he had been a member of a communist party from 1944 to 1946).

²¹ *Id.* at 530–31.

²² *Id.* at 531.

²³ *Id.*

²⁴ *Id.*

One federal appellate court has considered the question since the Warren Court's expansion of the right to counsel and indicated an unwillingness to broaden the reach of the Due Process Clause. The Sixth Circuit, like the Supreme Court, indicated that counsel might be appointed as needed on a case-by-case basis.²⁵ There is no court case reporting such an appointment. As a matter of federal constitutional law, I do not foresee a re-examination of the basic right on the horizon. The format would be to use the well-traveled standard articulated by the Court in a social security case: the private interests affected by the proceedings; the risk of error created by the government's chosen procedure; and the countervailing governmental interest supporting the use of the challenged procedure.²⁶ If the Court chose to examine the question of providing counsel to indigent non-citizens being held in detention, the detained non-citizen would have powerful data in support. There is a growing body of literature on the positive impact of having an attorney represent an individual in removal proceedings and related applications for relief. The federal Governmental Accountability Office found significant disadvantages as to outcome for those detained and unrepresented.²⁷ A 2009 study by the City Bar Justice Center in New York of the population detained at the Varick Street federal detention center in Manhattan revealed that few detainees had any knowledge of possible defenses to removal, while almost 40% had colorable claims as determined by the project attorneys.²⁸ The situation is exacerbated by the fact that many persons are detained for removal proceedings because of criminal convictions resulting from guilty pleas with the assistance of counsel who knew little or nothing about the immigration consequences of a conviction. States

²⁵ *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975).

²⁶ *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). This formula has been applied to immigration cases. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

²⁷ *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES, 08-940 at 30, 32 (Sept. 2008).

²⁸ City Bar Justice Center, *An Innovative Pro Bono Response to the Lack of Counsel for Indigent Immigrant Detainees*, NYC Know Your Rights Project, at 2, 11, 14-15 (Nov. 2009), available at http://www.nycbar.org/citybarjusticecenter/pdf/NYC_nowYourRightsNov09.pdf.

have begun to address this problem.²⁹ The federal government largely has ignored this issue.³⁰ In a remarkable opinion decided as this essay went to press, Justice Stevens declared: “[w]e now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”³¹ Implementation of this holding should cut down on guilty pleas entered without knowledge of the immigration consequences.

In the short run, I can envision that a court might require appointed counsel as a matter of constitutional law for a non-citizen permanent resident with mental illness or a mental disability or an unaccompanied minor. Prior to recognizing a general right to counsel in felony cases in *Gideon*,³² the Supreme Court engaged in a case-by-case analysis. As early as 1948, the Court stated: “There are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.”³³ This would be an apt analogy for mandating the appointment of counsel in the immigration context for such individuals.

The federal statute provides for the privilege of representation by counsel, notice to the non-citizen, and providing an updated list of

²⁹ See, e.g., TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (1965) (requiring admonishment at guilty plea proceeding of immigration consequences of conviction); see also *People v. Pozo*, 746 P.2d 523 (Colo. 1987) (failure for counsel to advise non-citizen defendant of immigration consequences is ineffective assistance requiring vacation of plea).

³⁰ See, e.g., *United States v. Parrino*, 212 F.2d 919 (2d Cir. 1954). At least one federal district court has authorized the appointment of an immigration lawyer to assist a criminal defense attorney under the Criminal Justice Act when representing a noncitizen in a criminal case. (Central District of California, form on file with author).

³¹ *Padilla v. Kentucky*, No. 08-651, 2010 WL 1222274, at *11 (U.S. Mar. 31, 2010).

³² See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³³ *United States ex rel. Wade v. Mayo*, 334 U.S. 672, 684 (1948).

possible sources of counsel.³⁴ With detention centers located often far from population centers and the potential that a person might be transferred at any time for the convenience of the Department of Homeland Security, obtaining counsel often is like the proverbial search for a needle in a haystack. Being indigent makes the task all the more difficult.³⁵

With the passing of the Legal Services Corporation Act in 1974,³⁶ a possible source for representation of detained non-citizens emerged. An outgrowth of the former Office of Economic Opportunity legal services program, the LSC would make grants to programs nationwide to handle the legal needs of the indigent.³⁷ Initially, there was no limitation on the representation of non-citizens as clients. However, within a decade of creating LSC, Congress passed a legislative restriction on the use of funds. As a rider to the fiscal 1983 appropriations, the LSC was required to limit the use of its funds to non-citizens who were lawful permanent residents, asylees and others awaiting adjustment, and a few other categories.³⁸ The undocumented population could not be represented. However, the grantees could use non-LSC funds to carry out the prohibited representation, as long as programs carefully tracked the use of funds.³⁹ In 1996, the same year that Congress passed exceptionally restrictive immigration legislation,⁴⁰ it also barred any recipient field program from using any funds to represent prohibited non-citizens, whether federal LSC money, or private funds.⁴¹ Once a grant is

³⁴ See INA § 239, 8 U.S.C. § 1229 (2006).

³⁵ City Bar Justice Center, *supra* note 28, at 2.

³⁶ Legal Services Corporation Act, Pub. L. No. 93-355, 88 Stat. 378 (1974).

³⁷ See 42 U.S.C. § 2996 (1977).

³⁸ Further Continuing Appropriations Act, 1983, Pub. L. No. 97-377, 96 Stat. 1833; Restrictions on Legal Assistance to Aliens, 48 Fed. Reg. 28089 (June 20, 1983) (codified at 45 C.F.R. pt. 1626).

³⁹ Restrictions on Legal Assistance to Aliens, 48 Fed. Reg. 28089 (June 20, 1983) (codified at 45 C.F.R. pt. 1626).

⁴⁰ Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

⁴¹ Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321; Use of Non-LSC Funds, Client Identity and Statement of Facts, 61 Fed. Reg. 45740 (Aug. 29, 1996) (codified at 45 C.F.R. pt. 1610 and 1636).

accepted from the Legal Services Corporation, the “poison pill” provision kicks in and a grantee is barred from using any funds, whatever the source, for representation of the prohibited classes of non-citizens. Despite considerable support currently in the White House and Congress to at least eliminate the 1996 “poison pill” restrictions, no action has been taken.⁴²

By 2001, the federal regulations concerning limits on non-citizen representation, originally written in 1983 and revised in 1996, were outdated, with the passage of new immigration legislation in 1996 that altered the nomenclature to describe immigration procedures and classifications. In addition, LSC internally had noted some problems as a result of a report it commissioned.⁴³ LSC decided to try negotiated rulemaking to improve the language and resolve questions about the implementation of the legislative restrictions.⁴⁴ Representatives from LSC grantees, LSC staff involved with programs, compliance, and the inspector general’s office, non-government legal services support groups, two American Bar Association components, the Brennan Center for Justice at New York University School of Law and I conferred with a facilitator about modifying the regulations concerning representation of non-citizens. We had four two-day meetings and came to some consensus on certain areas, but no overall agreement on such issues as eligibility screening and group representation. During much of the period, the various employees of LSC took disparate positions.⁴⁵

⁴² See Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (“poison pill” rider remains); 74 Fed.Reg. 37159 (July 23, 2009) (Proclamation by President Obama, “I have also recommended lifting several unnecessary restrictions on funding so that more people can receive assistance.”); see also Representative David R. Obey (D-WI), Statement of Administration Policy on the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Executive Office of the President (June 16, 2009), available at http://www.whitehouse.gov/omb/assets/sap_111/saphr2847h_20090616.pdf (“[h]owever, the Administration . . . urges the Congress to also remove the riders that restrict the use of non-LSC funds by LSC grant recipients . . .”).

⁴³ See Legal Services Corporation, *The Erlenborn Commission Report*, 15 GEO. IMMIGR. L.J. 99 (2000-2001).

⁴⁴ Solicitation for Expression of Interest in Participation in Negotiated Rulemaking Working Group, 66 Fed. Reg. 46977 (Sept. 10, 2001).

⁴⁵ See, e.g., Financial Eligibility, 67 Fed. Reg. 70376 (Nov. 22, 2002).

One unfortunate aspect I observed was that with the eligibility criteria so technical, perceived close monitoring by LSC and OIG, thorough field audits, and the heavy demand for legal services for the indigent, as the LSC overall budget was pared, it often was easier for field programs to cut out immigration work or make it a low-priority. Thus, even eligible permanent residents do not receive immigration services in many areas of the country.⁴⁶ Finally, the rulemaking revision effort was disbanded, and the outmoded regulation remains with an appendix that attempts to categorize various immigration statuses for purposes of compliance.⁴⁷

The question remains—who is representing the detained population? Among the largest providers of legal services today is Catholic Charities. In 1988, the United States Conference of Catholic Bishops established an independent entity known as CLINIC (Catholic Legal Immigration Network) to coordinate and assist local programs. According to its website, there now are 290 field offices providing services to 600,000 indigent non-citizens, through 1,200 lawyers and “accredited” paralegals.⁴⁸ Various independent entities also provide services, and there are many bar organizations’ pro bono programs to assist non-citizens. Probably the most significant growth area in terms of clinical legal education has been the establishment of immigration clinics.⁴⁹ Law students,

⁴⁶ Some programs, such as the California Rural Legal Assistance and the Texas RioGrande Legal Aid, continued to represent eligible non-citizens. *See* California Rural Legal Assistance Foundation, <http://www.crlaf.org/crlaf-projects/immigration-and-citizenship>; *see also* Texas RioGrande Legal Aid, http://www.trla.org/sections/teams/index.php?page=ind_immigration.

⁴⁷ Alien Eligibility for Representation by LSC Programs, 68 Fed. Reg. 55539 (Sept. 26, 2003); Restrictions on Legal Assistance to Aliens, 72 Fed. Reg. 42363 (Aug. 2, 2007) (codified at 45 C.F.R. pt. 1626).

⁴⁸ CLINIC: About Us, <http://www.cliniclegal.org/about-us> (last visited Mar. 19, 2010).

⁴⁹ For example, both St. Thomas University School of Law and the University of Texas at Austin School of Law have immigration clinics. *See* American Bar Association, Directory of Public Interest and Pro Bono Programs, St. Thomas University School of Law, <http://www.abanet.org/legalservices/probono/lawschools/93.html> (last visited Apr. 6, 2010); *see also* American Bar Association, Directory of Public Interest and Pro Bono Programs, University of Texas at Austin School of Law, <http://www.abanet.org/legalservices/probono/lawschools/111.html> (last visited Apr. 6, 2010).

under attorney supervision, represent non-citizens in a wide variety of immigration cases; many programs include individuals currently in detention.⁵⁰ Unfortunately, the true answer to the question posed above is that most persons in detention are forced to defend themselves in immigration proceedings without any legal assistance. As noted, it is unlikely that there will be any significant improvements any time soon.

⁵⁰ See Margaret Talbot, *The Lost Children*, THE NEW YORKER, Mar. 3, 2008, available at http://www.newyorker.com/reporting/2008/03/03/080303fa_fact_talbot.