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The Right to Appointed Counsel in Deportation Proceedings

“You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one” (Solan and Tiersma 75). Most Americans are familiar with the right to have legal counsel appointed, if nothing else from the Miranda warnings given before depositions in criminal cases. There is no right for an indigent individual to have a lawyer appointed in the context of deportation proceedings. The laws on deportation describe access to counsel as a "privilege" which may be exercised "at no cost to the Government" (House of Representatives 302). While the government must provide a list of *pro bono* attorneys, they are not required to push back a court hearing in the likely case that *pro bono* services are unavailable (299-300). As a result, approximately seventy percent of detainees facing deportation do so without access to legal counsel (Matos and Gym). Even children and individuals with limited English proficiency do not necessarily have any right to an appointed lawyer (“The Right to Counsel” 1)

There are two major theories put forward by scholars and advocates to support the right of an indigent alien to appointed counsel in deportation proceedings, but neither has had any success in the courts. First are the so-called "crimmigration" theories, which argue that deportation proceedings are criminal in nature and thus the Sixth Amendment requires

appointment of counsel for indigent aliens. The second theory is that the Fifth Amendment's due process clause protects the right of indigent aliens to be represented by counsel.

Proponents of appointing counsel on the basis of "crimmigration" argue that arrests and forced detention of aliens pending deportation proceedings are criminal in nature (Nadadur 145 footnotes 26-28). Aliens may be arrested by law enforcement officers such as Immigration and Customs Enforcement (ICE), Border Patrol, or local police (if participating in the 287(g) Program). Detained individuals are usually placed in local prisons pending a court date, which could be weeks or even months out. The Sixth Amendment guarantees the right to a lawyer and speedy trial in criminal cases; it does not presently apply to individuals in prison awaiting deportation proceedings. The government does not track how many U.S. citizens have been mistakenly swept up; at least one U.S. citizen, Davino Watson, was held in detention for three and a half years. When he finally obtained counsel, he was quickly released (Rosenberg). If deportation proceedings are criminal prosecutions, then the Sixth Amendment applies, which states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to [...] to have the Assistance of Counsel for his defence" (Constitution of the United States). The Supreme Court interprets the Sixth Amendment as to require that the government appoint counsel for indigent defendants in criminal cases (United States, Supreme Court, *Johnson v. Zerbst, Warden* 462-463), thus by arguing that deportation proceedings are criminal in nature, scholars and advocates hope to extend the right to indigent aliens in immigration court.

Perhaps the first to suggest deportation is criminal by nature was James Madison. The federal government was first empowered to deport aliens with the controversial Alien Friends Act of 1798, one of the Alien and Sedition Acts that prompted Virginia and Kentucky to pass resolutions declaring the federal laws unconstitutional. In his "Report of 1800" to the Virginia

House of Delegates, James Madison defended the Virginia Resolution (which he had secretly authored) by describing deportation as a "penal" measure: "if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied" (Elliot 555). The Alien Friends Act expired without ever being used to deport an alien. Scholars of law had no occasion to revisit the topic of deportation for another hundred years.

Justice Stephen Johnson Field's opinion for a unanimous Court in *Chae Chan Ping v. United States* (also known as *The Chinese Exclusion Case*) is often cited to support Congress's plenary power over aliens, and thus the root of deportation jurisprudence, but strictly speaking the case limits itself to restrictions on entry, not deportation (United States, Supreme Court, *The Chinese Exclusion Case: Chae Chan Ping v. United States* 589-604). The Geary Act of 1892, passed three years after *Chae Chan Ping*, was the first law since the Alien Acts of 1798 to authorize deportations. Justice Field himself opines in *Fong Yue Ting v. United States* that deportation is a punishment subject to the Eighth Amendment, but his opinion does not carry the Court (United States, Supreme Court, *Fong Yue Ting v. United States*, *Wong Quan v. United States*, *Lee Joe v. United States* 748-759). The plurality opinion held that a deportation proceeding is neither a criminal trial nor a criminal sentencing, and that an order of deportation is not punishment for a crime (704-732). The judge simply ascertains whether an alien meets statutory conditions to remain in the country and enforces the determination that the conditions are not met (730). The *Fong Yue Ting* decision is still good law: the Supreme Court has reaffirmed the purely civil nature of deportation proceedings multiple times over (United States, Supreme Court, *Immigration and Naturalization Service v. Lopez-Mendoza et al.* 1038; United States, Supreme Court, *Harisiades v. Shaughnessy, District Director of Immigration and*

Naturalization 594-595; United States, Supreme Court, *Zakonaite v. Wolf, Jailor of the City of St. Louis* 275).

"The landscape of federal immigration law has changed dramatically over the last 90 years," writes Justice Paul Stevens on behalf of the Court for the 2010 case *Padilla v. Kentucky*. Padilla was a lawful permanent resident who pled guilty to criminal drug distribution charges based on faulty advice from his court-appointed lawyer (United States, Supreme Court, *Padilla v. Kentucky* 359). In the days of the Geary Act federal judges had wide discretion to order deportation in the first place; today, immigration judges are subject to stringent rules that mandate orders of deportation and offer little latitude with which to waive them (House of Representatives 302-303). As a result, deportation is virtually automatic after a guilty plea has been entered for any of a long list of crimes (286-290). The *Padilla* Court reasons that the automatic nature of deportation on the grounds of certain criminal convictions blends the lines between the criminal trial and the deportation (United States, Supreme Court, *Padilla v. Kentucky* 364-366). It was held that aliens in criminal cases have the constitutional right to be advised that a guilty plea carries a risk of deportation (360, 374), but the Court also reaffirmed previous decisions holding deportation proceedings and deportation orders themselves to be purely civil in nature (365 par. 3).

While the Sixth Amendment has been held inapplicable to deportation proceedings, the Fifth Amendment's due process clause *does* apply (United States, Supreme Court, *Zadvydas v. Davis et al.* 693). The Fifth Amendment reads in relevant part: "No person shall [...] be deprived of life, liberty, or property, without due process of law" (Constitution of the United States). The Fifth and Fourteenth Amendment have nearly identical due process clauses, with the former applying to the federal government and the latter applying to the States. Interestingly the

Fourteenth Amendment's due process clause, which is substantially identical to the Fifth Amendment's due process clause, has been used in the criminal context to protect the right to appointed counsel as "fundamental" to "a fair system of justice." In *Gideon v. Wainwright*, Justice Hugo Black writes for the Court,

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. (United States, Supreme Court, *Gideon v. Wainwright*, *Corrections Director* 344-345)

Some scholars (Black; Werlin; Nadadur) argue that lack of counsel in the context of deportation proceedings is fundamentally unfair for Fifth Amendment purposes, just like the Court has opined on State criminal proceedings for Fourteenth Amendment purposes. Current due process jurisprudence relies on *Mathews v. Eldridge*. In *Mathews*, the Supreme Court determined whether the Fifth Amendment's due process clause was violated by weighing three factors: first, the individual's private interests; second, the risk of erroneous deprivation of that interest through the procedures used, and probable value (if any); and third, the Government's interest, including administrative burdens of substitute procedures (United States, Supreme Court, *Mathews, Secretary of Health, Education, and Welfare v. Eldridge*). Under the first prong, individuals have very strong private interest proportional to the amount of time and attachment to residence in the country, stronger still if seeking asylum. Meanwhile under the third prong the Government has significant interests, notably the expense of appointing counsel. The second prong is key. Nadadur, for example, argues that deportation cases involving juveniles (157), limited English proficiency, or more difficult evidentiary burdens (such as are required for asylum-seekers) are more likely to be wrongly decided without counsel due to the increased difficulty of researching and presenting claims (164-165). The Courts disagree, for example the Ninth Circuit performed the same analysis in a case involving a minor child and reached the opposite conclusion. The Court points out that deportation proceedings are non-adversarial, and that the immigration judge is responsible for developing the record when the alien struggles to do so. Furthermore, they write, appointing counsel is not the only alternative process: when an immigration judge fails to apply fair procedure, the most common solution is for a Court of Appeals to remand the case with instructions to remove the deficiency (United States, Court of Appeals for the Ninth Circuit).

The courts do not presently recognize a right to have counsel appointed in deportation proceedings under the Fifth or Sixth Amendments, but the state of law is always subject to change in the future. As recently as 2020, a federal court in New York overturned a century of precedent by recognizing that the right to see a judge promptly after being detained is "fundamental" enough to be constitutionally protected under due process, even in a civil deportation context where the Sixth Amendment's speedy trial clause is inapplicable (“Ruling Creates 10-Day Requirement, is First in the Nation to Establish Presentment Standards in Immigration Court”). Even if judges are never fully convinced, advocacy groups hope to achieve the same goal by lobbying the political branches of government to establish a federal defender service for immigrants (Bryant; “The Right to Counsel”).

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