

The Civil Gideon Argument: Unaccompanied Minors Should Have a Guaranteed Right to Legal Counsel in Removal Proceedings

Immigrants do not have a categorical right to appointed legal counsel. The theoretical “Civil Gideon” argument advocates for immigrants, along with other indigent civil defendants, to have this categorical right to legal counsel by extending the *Gideon v. Wainwright* precedent to civil proceedings.

In *Gideon v. Wainwright*, the Supreme Court ruled that, under the Sixth Amendment, states are required to provide legal counsel to indigent defendants in criminal cases. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Writing for the majority, Justice Black states, “. . . reason 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.” *Gideon*, 372 U.S. at 344. This decision, however, does not extend to civil cases.

The Immigration and Nationality Act and the Sixth Amendment Do Not Confer a Right to Legal Counsel for Indigent Immigrant Defendants at the Government’s Expense

Immigrant defendants do not have a categorical right to appointed legal counsel at the government’s expense under the Immigration and Nationality Act (INA) and the Sixth Amendment. The INA, which governs immigration in the United States, provides that “the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.”¹

¹8 USC 1362. <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1362&num=0&edition=prelim>.

The only exception to the INA’s policy of not providing a right to appointed counsel is for undocumented immigrants removed by the Alien Terrorist Removal Court, which has not been used to date.² Additionally, the Sixth Amendment’s “right to . . . have the Assistance of Counsel” at government expense, only applies to indigent defendants in criminal proceedings.³ Since removal proceedings are civil in nature, immigrants involved in removal proceedings are not availed by this right.

Unrepresented Immigrants are Much Less Successful Than Their Represented

Counterparts in Court

The lack of a guaranteed right to legal counsel is a gap in our federal law, and forces some of the most vulnerable among us – including unaccompanied minors – to represent themselves in court. Regardless of an immigrant’s age, however, the outcomes of unrepresented immigrants’ cases in court are grim; unrepresented immigrants are far less successful in court than immigrants who are represented by legal counsel.

The American Immigration Council conducted a national study showing that having an attorney made it more likely for someone to:

- Be released from custody: 44% of represented immigrants were given a custody hearing, compared to 18% of unrepresented immigrants, and 44% of represented immigrants were actually released from custody, compared to 11% of unrepresented immigrants.
- Appear in immigration court: 90% of unrepresented immigrants with removal orders were removed in absentia versus only 29% of their represented counterparts with removal orders.
- Defend themselves against removal charges: 21% of represented detained immigrants fought off removal either by filing successful applications for relief

² Kate M. Manuel. “*Aliens’ Right to Counsel in Removal Proceedings: In Brief.*” Congressional Research Service. 2016. <https://fas.org/sgp/crs/homsec/R43613.pdf>.

³ *Id.*

or successfully challenging the proceedings in the first instance, compared to 2% of unrepresented detained immigrants, and 60% of never-detained represented immigrants did the same versus 17% of never-detained unrepresented immigrants.

- Win their cases: Of those that filed applications for relief from removal, 32% of detained immigrants won their case, compared to 3% of unrepresented detained immigrants, and 78% of never-detained represented immigrants won their case versus 15% of never-detained unrepresented immigrants.⁴

Unrepresented Unaccompanied Minors Are the Most Vulnerable

The above statistics account for adult immigrants and unaccompanied minors alike. However, immigrant children have even less successful outcomes, merely due to their young ages, undeveloped minds, lack of experiences, and to-be-expected immaturity. Unaccompanied alien children (UAC) in New York who are represented by legal counsel are five times more likely to have a positive outcome – meaning they ultimately receive legal status – whereas UAC without an attorney are four times more likely to have a bad outcome – meaning they are denied legal status.⁵

If unaccompanied minors in court are lucky, they may have a non-legal advocate to present their case. While non-legal advocates are better than no advocate at all, they likely are not well-versed in the legal intricacies that are necessary to prevail in court. The less fortunate children, though, with neither legal counsel nor an advocate, are forced to represent themselves. From the extreme and highly intimidating power-imbalance between an unaccompanied minor

⁴ “Committee on Immigration Representation Resolution as Approved by the House of Delegates on June 15, 2019.” New York State Bar Association. 2019. <https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Agenda%20Item%208%20Immigration%20Representation.pdf>.

⁵ “Unaccompanied Migrant Youth Service Needs and Gaps in the New York Metropolitan Area.” The Children’s Defense Fund- New York. 2018. https://www.cdfny.org/wp-content/uploads/sites/3/2018/07/unaccompanied-migrant-youth.pdf?_ga=2.16404145.66219026.1594918909-1878480470.1589480889.

and an Immigration Judge, to the unaccompanied minor's likely unfamiliarity with the United States' legal system, allowing an unaccompanied minor to proceed in court without counsel is unjust. This practice often sets unrepresented unaccompanied minors up for failure before their cases begin.

The Court Recognizes Special Exceptions for Minors in Non-Criminal Cases

The United States Supreme Court has already recognized children as particularly vulnerable and deserving of special circumstances. Further, the Court has carved out certain exceptions to the law that guarantee minors a right to counsel in specific civil cases.

In Re Gault, a juvenile delinquency case, held that “. . . the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child. . . must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.” *Application of Gault*, 387 U.S. 1, 41 (1967).

Additionally, some courts have held that children have a constitutional right to appoint counsel in termination of parental rights (TPR) hearings. In *Kenny A. ex. Rel. Winn v. Perdue*, the court held that children have a state constitutional right to appointed counsel in TPR proceedings to protect a liberty interest in the “safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having . . . biological parents. *Kenny A. ex. Rel. Winn v. Perdue*, 356 F. 2d 1353, 1360 (N.D. Ga. 2005).

While unaccompanied alien children (UAC) do not have a categorical right to appointed legal counsel, UAC do have some recognized, constitutional due process rights derived from the

Fifth Amendment. This Amendment provides “. . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .”⁶ Immigrants, both documented and undocumented, have been found to be incorporated under the Amendment’s use of “person.”⁷ Since “removal can be seen as implicating an immigrant’s interest in liberty, courts have historically viewed access to counsel at one’s own expense as required to ensure [‘]fundamental fairness[’] in formal removal proceedings.”⁸ See *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005). Additional rights UAC have under the Fifth Amendment are the right to present evidence and cross-examine witnesses and the right to have a decision before a neutral decision maker based upon substantial evidence.⁹

Therefore, establishing a categorical right to appointed legal counsel for unaccompanied minors would not be an extreme departure from the law; in both criminal and non-criminal cases, minors have already been recognized as a special entity deserving of special exceptions.

The Similarities in Removal and Criminal Proceedings

Even though removal proceedings are deemed civil in nature, the adversarial nature of removal proceedings, incarceration, and the deprivations at stake mirror those of criminal proceedings. Further, the stark discrepancy in removal and criminal proceedings regarding a

⁶ Kate M. Manuel. “*Aliens’ Right to Counsel in Removal Proceedings: In Brief.*” Congressional Research Service. 2016. <https://fas.org/sgp/crs/homesec/R43613.pdf>.

⁷ *Id.*

⁸ *Id.*

⁹ Amanda Sewanan. “*The Right to Appointed Counsel: The Case for Unaccompanied Immigrant Children.*” *Cardozo Law Review*. <http://cardozolawreview.com/the-right-to-appoint-counsel-the-case-for-unaccompanied-immigrant-children/>.

categorical right to appointed counsel is nonsensical; even though these two proceedings are categorized differently, their compositions and consequences closely align and should therefore be governed by the same laws.

Some Justices, such as Justice Breyer, argue that removal is one of the greatest forms of punishment. In his *Fong Yue Ting v. United States* dissent, Justice Breyer remarked “if a banishment of this sort [removal] 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.” *Fong Yue Ting v. United States*, 149 U.S. 698, 741 (1893). If courts recognized removal as a criminal punishment, removal proceedings would be dictated by the Sixth Amendment, and a right to appointed counsel would be guaranteed. Without this recognition, though, persuasive arguments still exist as to why a categorical right to appointed counsel should equally apply to removal proceedings based on its evident resemblance to criminal proceedings.

To begin, the structure of criminal proceedings and removal proceedings are similarly adversarial: each involves a government attorney versus a lay defendant who is likely not trained in the law.

Writing for the majority in *Gideon*, Justice Black comments on a layman's ability to represent himself: “[h]e lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he not be guilty, he faces the danger of conviction because he does not know how to establish his innocence.” *Gideon*, 372 U.S. at 345.

The court in *Castro-O’Ryan v. INS* expressed a nearly identical sentiment to Justice Black’s while commenting on a layman's ability to navigate the law, specifically when it came to the complexities of immigration: “. . . the law on deportation has not become simpler. With

only a small degree of hyperbole, the immigration laws have been termed [‘]second only to the Internal Revenue Code in complexity[’]. . . . [a] lawyer is often the only person who could thread the labyrinth.” *Castro-O’Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988). These excerpts demonstrate that a layman defendant’s ability to represent themselves in court does not vary in regard to whether that defendant is involved in a removal or criminal proceeding.

Next, just as incarceration is a common consequence of criminal proceedings, incarceration is a common consequence of removal proceedings as well. “Immigrants facing removal charges, including children, are often detained for months or even years in prisons or prison-like conditions while they await resolution of their cases.”¹⁰

Additionally, the severity of the deprivations at stake in criminal and removal proceedings are similarly detrimental and consequential. Both proceedings involve a deprivation of physical freedom which can be implicated by deportation, detainment, or incarceration.

Whether Due Process Requires a Categorical Right to Appointed Counsel in Removal Proceedings

A large difference between removal and criminal proceedings exists in how courts view whether or not a defendant’s due process rights are being honored. *Gideon*’s establishment of a categorical right to appointed counsel ensures that criminal defendants’ due process rights are protected. Illogically, though, courts do not have the same concern for civil defendants’ due process rights regarding the right to appointed counsel.

¹⁰ Benjamin Good. “*A Child’s Right to Counsel in Removal Proceedings.*” Stanford Law. <https://law.stanford.edu/wp-content/uploads/2018/05/good.pdf>.

Typically, absent a categorical right, a right to appointed counsel hinges on various factors including whether courts find that a particular defendant's due process rights are being respected in a particular case. *Mathews v. Eldridge* sets forth a unified test to determine what due process requires; the three elements of the test to be analyzed are "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981). Where appointed counsel is the procedural protection in question, the court "must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." *Lassiter*, 452 U.S. at 27. The net worth of the three *Lassiter* factors, when evaluated in the context of UAC being denied a categorical right to appointed legal counsel, outweighs the presumption.

A chief private interest at stake for UAC is the deprivation of their physical liberty, whether that be through detainment prior to, during or after proceedings, or removal. As Justice Brandeis aptly noted, ". . . [removal] may result. . . . in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276 (1922). A UAC's private interest in family integrity is additionally at stake, as detainment and removal can separate families for indefinite periods of time.¹¹

One of the government's primary interests at stake is to account for "the best interest of the child," as mandated by the Trafficking Victims Protection Act.¹² When possible, the government is obliged to do right by the child. While financial costs are also relevant, as the

¹¹ *Id.*

¹² Kate M. Manuel. "Aliens' Right to Counsel in Removal Proceedings: In Brief." Congressional Research Service. 2016. <https://fas.org/sgp/crs/homesecc/R43599.pdf>.

burden would be placed on the government to provide counsel for every indigent defendant, the Supreme Court has, in the context of a parent's right to counsel in TPR proceedings, recognized that the financial burden does not outweigh defendants' private interests. In *Lassiter*, the Supreme Court stated that although "the State's pecuniary interest [in not appointing counsel] is legitimate, it is hardly significant enough to overcome private interests as important as," "a parent's desire for and right to the companionship, care, custody, and management of his or her children."¹³ *Lassiter*, 452 U.S. at 27-28. While this statement is rooted in the context of TPR hearings rather than UAC hearings, both proceedings are civil in nature and a UAC's private interests, as outlined above, are equally, if not more, compelling.

Lastly, there is a great risk that the procedures used will result in an erroneous decision. With the current procedures, UAC defendants without legal counsel are forced to represent themselves in court. An attorney's critical role in navigating America's adversarial legal system is well-recognized in the Supreme Court's opinions. In *Miranda v. Arizona*, the Court provides, "[t]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today."¹⁴ *Miranda v. Arizona*, 384 U.S. 436, 469 (1966). An unsuccessful outcome in court for a UAC can result in catastrophic consequences for the child – ranging from being torn away from their family to having no choice but to return to the life-threatening situations from which they originally fled – simply due to a procedural error, even if their case on the merits would have otherwise prevailed.

¹³ Benjamin Good. "A Child's Right to Counsel in Removal Proceedings." Stanford Law. <https://law.stanford.edu/wp-content/uploads/2018/05/good.pdf>.

¹⁴ *Id.*

Therefore, in UAC removal proceedings, it is clear that being denied a categorical right to appointed legal counsel outweighs the *Lassiter* presumption. UAC should be granted this categorical right.

The American Bar Association and New York State Have Taken Significant Steps to Provide all Indigent Respondents in Removal Proceedings with Appointed Legal Counsel

The American Bar Association and New York recognize the essential need for UAC to have a categorical right to appointed legal counsel and have taken various steps to account for this unjust discrepancy in federal law. Among others, these steps include:

- The American Bar Association has called for both a federally funded system of appointed counsel for indigent respondents in removal proceedings as well as for states and localities to provide such counsel until the federal government does so.
- The New York Bar Association has actively promoted and participated in efforts to provide immigrants in New York with access to justice by promoting access to legal representation through the establishment of a committee specifically for that purpose, as well as through partnerships with Governor Cuomo’s Liberty Defense Project.
- The New York Immigrant Family Unity Project (NYIFUP) is New York’s pioneering public defender system that provides universal representation to detained immigrants appearing before the Varick Street immigration court in New York City.¹⁵
- Senate Bill S7261, which is currently in Senate Committee, establishes the right to legal counsel in immigration court proceedings and provides for the administration thereof.¹⁶

Indigent Immigrant Defendants Should Have a Categorical Right to Appointed Legal Counsel

¹⁵ “Committee on Immigration Representation Resolution as Approved by the House of Delegates on June 15, 2019.” New York State Bar Association. 2019. <https://nysba.org/NYSBA/Practice%20Resources/Substantive%20Reports/PDF/Agenda%20Item%208%20Immigration%20Representation.pdf>.

¹⁶ Senate Bill S7261. <https://www.nysenate.gov/legislation/bills/2019/s7261>.

“Civil Gideon” should be reflected in the law. Just as criminal indigent defendants have a categorical right to appointed legal counsel, their civil counterparts should be availed of this right as well.

There are particularly persuasive arguments for why indigent immigrant defendants – especially UAC – are entitled to a categorical right to appointed legal counsel. From the apparent similarities between criminal and removal proceedings to the requirements necessary to satisfy UAC’s due process rights, the only way for justice to ensue is for UAC to have this right. Just as New York has recognized the severity of this legal discrepancy and spearheaded numerous initiatives to right this wrong, the federal government must create its own objectives to ensure that every UAC, in every jurisdiction, has a right to appointed legal counsel.