

Foreigners on U.S. Soil: To Know Your Rights Is to Know Very Little

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For a nation that proclaims equal justice under law a founding principle, the United States offers a skimpy menu of legal rights and remedies to foreign citizens (and unlucky Americans thought to be unauthorized immigrants¹) facing deportation. The reasons include systemic dysfunctionality in the administration of the immigration laws, the lack of affordable legal representation, and, on the most fundamental level, the judicial rubric applied to immigration cases that deportation (now known as removal) is a civil rather than a criminal proceeding.

This article will outline limitations on the rights of individuals in removal proceedings and explore proposed enhancements to aspects of the system designed to promote procedural due process. The impetus for this focus on rights in the immigration context is the report of the Committee on Adjudication within the Administrative Conference of the United States (ACUS),² on “Enhancing the Quality and Timeliness in Immigration Removal Adjudication.”³

On June 14 and 15, 2012, the Assembly of ACUS held its 56th Plenary Session, voting to adopt the recommendations (as amended) developed in response to the report for improvement of adjudications related to reducing case backlogs, improvements in the collection and use of data about removal proceedings, increased quality representation for individuals in proceedings and “making the immigration adjudication system more modern, functional, effective, transparent and fair.”⁴

Right to Legal Services

While foreign citizens in removal proceedings (respondents) have a statutory right to retain an attorney or accredited representative at no expense to the government, many are unrepresented.⁵ Because removal proceedings have been deemed civil and not criminal

¹ See Ted Robbins, “In The Rush To Deport, Expelling U.S. Citizens,” NPR, All Things Considered (October 24, 2011), available at <http://www.npr.org/2011/10/24/141500145/in-the-rush-to-deport-expelling-u-s-citizens> (this website and all others cited in this article were last accessed on June 20, 2012).

² ACUS is an independent federal agency composed of government officials and experts from both the private sector and academia. It was created in 1968 and defunded in 1995, and then reinstated by President Barack Obama in 2010. See <http://www.acus.gov/about/the-conference/>.

³ Lenni Benson and Russell Wheeler, “Report for the Administrative Conference of the United States: Enhancing Quality and Timeliness in Immigration Removal Adjudication” (June 7, 2012), available at <http://www.acus.gov/wp-content/uploads/downloads/2012/06/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-7-2012.pdf>.

⁴ See Proposed Recommendation (June 14-15, 2012) Immigration Removal Adjudication, Committee on Adjudication, ACUS, available at <http://www.acus.gov/wp-content/uploads/downloads/2012/05/Proposed-Immigration-Rem.-Adj.-Recommendation-for-Plenary-5-22-12.pdf>.

⁵ INA § 292, 8 U.S.C. § 1362. See also 5 U.S.C. § 555(b).

proceedings, respondents have no Sixth Amendment right to counsel.⁶ Their only constitutional rights with respect to counsel have been construed under the Fifth Amendment due process clause, so that if a foreign national is able to obtain representation, that representation must meet minimum standards of competence.⁷

Recognizing the need for representation in removal proceedings, Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit (who is now also a senior fellow of ACUS⁸), initiated The New York Immigrant Representation Study (NYIRS), which reported in December 2011 that in the New York Immigration Courts (from 2005 to 2010), 74 percent of non-detained individuals with representation had successful outcomes, while only 13 percent of non-detained respondents without counsel were successful.⁹

Of those who were detained, the study determined that 18 percent of those represented had successful outcomes, while only 3 percent of those without representation were successful. Additionally, the study reported that 60 percent of detained and 27% of non-detained respondents were without counsel during removal proceedings.

Unfortunately, there is no safety net to ensure that all foreign citizens in proceedings have their cases reviewed by competent legal counsel to determine eligibility for statutory relief from removal. While the immigration judges are required to advise respondents if there is an obvious path to relief,¹⁰ the Immigration Courts' immense dockets ensure that the opportunity for the court to uncover information suggesting possible relief is very limited.¹¹ Without the assistance of a practitioner well versed in the nuances of removal proceedings and applications for relief, in complex cases the respondent simply would not have the knowledge and ability to present an adequate claim for relief from removal.

In an effort to better inform the public, organizations such as the American Civil Liberties Union (ACLU) and the Immigrant Legal Resource Center (ILRC) have disseminated brochures and hosted "Know Your Rights" presentations for foreign nationals, especially those in detention facilities.¹² With respect to counsel, the ILRC flyer advises foreign nationals who are arrested to "Insist on talking with a legal representative. If you do not have a legal representative, you can

⁶ See e.g., *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004).

⁷ See *Barthold v. INS*, 517 F.2d 689 (5th Cir. 1975); *Matter of Asaad*, 23 I&N Dec. 553 (BIA 2003). But see *Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009), overturned in *Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009).

⁸ By vote of members at the ACUS 56th Plenary Session, June 14, 2012.

⁹ New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* (pt. 1), 33 *Cardozo L. Rev.* 357 (Dec. 2011), available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

¹⁰ 8 C.F.R. § 1240.11(a)(2).

¹¹ See e.g., *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Proceedings*, American Bar Association (ABA) Commission on Immigration, p. E-19 (2010) (accessible at http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510_authcheckdam.pdf).

¹² See <http://www.ilrc.org/for-immigrants-para-inmigrantes/know-your-rights> and <http://www.aclu.org/drug-law-reform-immigrants-rights-racial-justice/know-your-rights-what-do-if-you>.

ask the Immigration Service for a list of free or low-cost lawyers.”¹³ Service of a list of free or low-cost lawyers is mandated in the opening of removal proceedings.¹⁴

What the list and brochures do not address, however, is the lack of capacity these free or low-cost lawyers have to represent or otherwise assist the massive number of individuals in proceedings. Even if a detention facility provides a list of no-fee or low-cost representatives to its occupants, the likelihood of their finding assistance is minimal. According to the NYIRS, less than 10 percent of represented non-detained and less than 40 percent of represented detained foreign nationals have counsel from non-profits, pro bono attorneys and law school clinics.¹⁵

This means that, at least in New York, the vast majority of respondents who are represented pay for attorney services. This in turn indicates that without the ability to pay an attorney, the likelihood of finding representation is very low. Given the estimated 400,000 foreign nationals expected to be deported in 2012,¹⁶ a huge population will be self-represented this year and as a result likely removed from the United States.

Moreover, the quality of the representation that is available has suffered because of the common combination of flat rather than hourly fees and high-volume caseloads of immigration lawyers who may take on more work than they can competently handle.¹⁷ Worse yet, there is little recourse for foreign nationals who are mistreated in this context.¹⁸

Under the framework spelled out in *Lozada v. INS*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, *Lozada v. INS*, 857 F.2d 10 (1st Cir. 1988), to pursue reversal of a removal order based on ineffective assistance of counsel, the respondent must file a motion with an affidavit attesting to the relevant facts, provide proper notice to the prior counsel of the ineffective assistance claim and indicate to the Court whether a complaint has been filed with disciplinary authorities (and if not, provide a justification).

Additionally, the respondent must prove that the ineffective assistance created a fundamental unfairness, substantially prejudicing the case. These requirements for appealing an adverse decision based on attorney incompetence are burdensome and tortuous, especially for a pro se litigant.

¹³ See http://www.ilrc.org/files/kyr_english.pdf.

¹⁴ 8 C.F.R. § 1003.61.

¹⁵ See *supra* N. 9 (linked version) at 18.

¹⁶ This figure has been circulated by the Associated Press. See, e.g., <http://abcnews.go.com/Politics/wireStory/obama-policy-spare-youths-deportation-16579119?page=3>, <http://www.usnews.com/news/politics/articles/2012/06/15/ap-sources-immunity-offered-to-certain-immigrants>

¹⁷ See Kirk Semple, “In a Study, Judges Express a Bleak View of Lawyers Representing Immigrants,” *The New York Times* (December 18, 2011) (accessible at <http://www.nytimes.com/2011/12/19/nyregion/judges-give-low-marks-to-lawyers-in-immigration-cases.html>).

¹⁸ See Robert A. Katzmann, “The Marden Lecture: The Legal Profession and the Unmet Needs of the Immigrant Poor,” 11 *Geo. J. Legal Ethics* 3, 9 (2008) (also accessible at <http://www.nycbar.org/pdf/report/marden9.pdf>): “For the immigrant who is ultimately deported, the consequences of faulty representation are devastating. Unlike a person in the U.S. who can sue a lawyer for malpractice, or file a bar complaint, a deported immigrant for financial, geographic or other reasons, is unlikely to pursue such recourse.”

Not surprisingly, the ACUS recommendations recognize the lack of fairness in this system: “Another challenge identified is the lack of adequate representation in removal proceedings, which can have a host of negative repercussions, including delays, questionable fairness, increased cost of adjudicating cases, and risk of abuse and exploitation.”¹⁹

To address these concerns the ACUS Committee recommended²⁰ the following measures:

- Increase federal funding for legal representation for respondents.
- Prioritize funds for the Legal Orientation Program (LOP) and Office of Legal Access Programs run by the Executive Office for Immigration Review (EOIR), the U.S. Department of Justice agency responsible for Immigration Court proceedings, appellate reviews and other administrative adjudications and functions.
- Focus on accrediting paraprofessional programs preparing legal representatives to appear before the EOIR.
- Continually assess the pro bono representative lists for accuracy and usefulness.
- Develop a tailored, national pro bono training curriculum alongside pro bono organizations and providers.
- Produce supplemental materials for the OCIJ Practice Manual explaining legal terminology.
- Distribute instructions prepared by Immigration Courts to assist individuals in preparing court submissions.
- Explore the possibility of making the Court website and instructional materials available in electronic form in the Immigration Court waiting areas.
- Ensure that “Know Your Rights” presentations to detained respondents are provided in a timely fashion in relation to their hearings.
- Consider making court dockets available to the EOIR’s LOP provider participants in the same manner that they are accessible to Department of Homeland Security attorneys.
- Consistently aggregate data on detained respondents for use by the Immigration Courts and LOP providers.
- Consider allowing limited appearances by representatives.
- Consider supporting pro se law clerk offices.

¹⁹ See supra N. 4 at 1-2.

²⁰ Id at 9-11.

- Use the Immigration Courts' contempt authority to ensure adequate representation.
- Review procedures for addressing DHS counsel's lack of preparation or other problematic conduct.
- Develop educational and training resources, which may include pro bono partnerships and subsidizing the costs with fines imposed by regulation.

The implementation of all or many of these recommendations would be a step in the right direction toward significant positive effects on foreign nationals in removal proceedings.

Otherwise Limited Rights

For most observers, an orange-jumpsuited detainee sleeping in a 7'x11' cell awaiting a removal hearing is more reminiscent of O.J. Simpson facing prosecution for the murders of Nicole Brown and Ron Goldman in 1995 than O.J. Simpson facing their family members in a lawsuit for wrongful death in 1997.²¹ Despite the parallels with criminal proceedings in terms of deprivation of liberty, for more than a century the Supreme Court has ruled that foreign citizens facing removal from the United States do not have the same protections as criminal defendants:

The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

Although subsequent legal and societal changes have tempered the language of more recent decisions (bearing in mind that the decision in *Fong Yue Ting* was issued pursuant to the xenophobic Act to Prohibit the Coming of Chinese Persons into the United States of May 1892 [27 Stat. 25]²²), the fundamental theme persists. In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-9 (1984), the Supreme Court discussed the rights that have been limited in the removal context²³:

- Under prescribed circumstances, in absentia hearings are permitted.

²¹ For a chronology of the O.J. Simpson trials related to the murder of Nicole Brown and Ron Goldman, see <http://law2.umkc.edu/faculty/projects/ftrials/simpson/simpsonchron.html>.

²² See <http://www.archives.gov/research/chinese-americans/guide.html>.

²³ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-9 (1984). For a more recent analysis, see Angelo A. Paparelli, "When Possible, Treat Immigrants As Criminal Defendants, Not As Criminals," <http://www.nationofimmigrants.com/removal-proceedings/when-possible-treat-immigrants-as-criminal-defendants-not-as-criminals/>, April 20, 2012.

- After the government demonstrates identity and alienage, the respondent carries the burden of proving the time, place, and manner of entry.
- A decision of deportability need be based only on "reasonable, substantial, and probative evidence."
- Evidence of deportability must only rise to the "clear, unequivocal and convincing" level, not proof beyond a reasonable doubt.
- Miranda warnings are an unnecessary predicate to admissibility of voluntary statements.
- Searches may be permitted incidental to an arrest pursuant to an administrative warrant issued by the INS.
- The Ex Post Facto Clause has no application to deportation.
- The Eighth Amendment does not require bail to be granted in certain deportation cases.
- Involuntary confessions may be admissible at deportation hearings.

Thus, the ILRC's "Know Your Rights" brochure advises foreign citizens to remain silent when stopped for questioning or arrested by police to avoid self-incrimination, particularly with respect to alienage.²⁴ However, the brochure also advises that in some states, a refusal to self-identify (at least by providing a name) when stopped by police is a criminal act.²⁵

Although it seems like merely a consolation prize in view of the limitations on rights in removal proceedings, the Supreme Court confirmed in *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001), that foreign nationals have a liberty interest that is "at least strong enough" to prevent their indefinite or permanent detention. In that case, the Court determined that Fifth Amendment due process is violated by indefinitely incarcerating a foreign citizen who had been ordered removed when the person's home country refused to accept repatriation.

Conclusion

Foreign nationals defending their liberty in removal proceedings are at a distinct disadvantage in comparison to individuals defending their liberty in criminal proceedings. Not only are their constitutional protections circumscribed by interpretation, but their procedural safeguards are also limited by statute. Accordingly, at the very least, the recommendations of ACUS to improve the quality and availability of representation in removal proceedings should be implemented to better ensure the fair and proper administration of justice in immigration proceedings.

²⁴ See supra N. 13.

²⁵ See *Id.* See also *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), upholding Nevada's stop and identify statute.

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