



RIGHT TO APPOINTED COUNSEL IN REMOVAL PROCEEDINGS? THE SUPREME COURT MAY HAVE OPENED THE DOOR IN TURNER V. ROGERS

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A non-citizen placed in removal proceedings has the privilege of being represented at no expense to the government pursuant to §240(b)(4)(A) and §292 of the Immigration and Nationality Act. While every non-citizen has a right to be represented by competent counsel of his or her choosing, he or she cannot ask the Immigration Court to appoint counsel if indigent. Even though we all know that immigration law is extremely complex, and a respondent's chances to stave off removal are substantially increased if represented by counsel, this person is out of luck if he or she cannot afford a lawyer or does not have access to one if detained in a remote area where an immigration attorney may not be in close proximity.

Intuitively to one, including a lawyer, unschooled in immigration procedures, it may seem obvious that a respondent in removal proceedings, especially if incarcerated, should be afforded counsel to navigate through the labyrinthine maze of immigration law as would a defended in criminal proceedings. The Sixth Amendment clearly grants an indigent defendant the right to state appointed counsel in a criminal case, [Gideon v. Wainright](#), 372 U.S. 335 (1963), and so why not the same right to a non-citizen in a removal case? Deportation has always been classified as a civil rather than as a criminal procedure. [Harisiades v. Shaughnessy](#), 342 U.S. 580 (1952). Deportation even while harsh, which tears the person away from family and all that life is worth living for, is not seen as punishment, [Bugajewitz v. Adam](#), 228 U.S. 585 (1913), and nor is detention for the sole purpose of facilitating the deportation. [Demore v. Kim](#),

538 U.S. 510 (2003).

Not many may have noticed the Supreme Court's June 20, 2011 decision in [*Turner v. Rogers*](#), 64 U.S. ____ (2011) for its relevance in the immigration context, which held that an indigent parent threatened with incarceration for civil contempt for failure to provide child support does not have a right to counsel under the Fourteenth Amendment. Although *Turner v. Rogers* dwelt on whether a right to counsel was applicable to an indigent non-custodial parent in a civil contempt proceedings, on first brush it applies negatively to all civil proceedings, including immigration removal proceedings. But hold your breath! The Supreme Court qualified its holding that there is no right to appointed counsel only if certain other safeguards are met in child custody cases. The question is whether such safeguards even exist in immigration cases? The answer is a clear "No," and this author believes that *Turner v. Rogers* can be used favorably by immigration advocates seeking to establish a right to appointed counsel in immigration removal proceedings.

In *Turner v. Rogers* the petitioner, Michael Turner, who had been incarcerated previously for civil contempt, was again sentenced to 12 months of incarceration for civil contempt even though he tried to demonstrate that he was unable to pay the child support. Turner appealed on the ground that that the Federal Constitution entitled him to right to counsel. The Supreme Court had to decide whether Turner threatened with incarceration for civil contempt was entitled to the same right as counsel under the Fourteenth Amendment as a criminal defendant under *Gideon v. Wainwright*, *supra*. The majority acknowledged that a contempt proceeding is a civil proceeding although it still involved the indigent parent's loss of liberty through imprisonment. However, such imprisonment in a civil proceeding is not punishment, but only to coerce the defendant to do what the court had ordered him to do. While there is still a requirement of fairness in civil proceedings under the Due Process clause, it does not always require the provision of counsel even where there is a threat of incarceration. Key to this analysis, however, is the defendant's ability to pay. If the defendant parent subject to the child support order can demonstrate indigence, he or she can avoid incarceration. Thus, if the defendant is given an opportunity in the civil contempt proceeding to demonstrate the lack of ability to pay, including a meaningful opportunity to respond to questions of financial status during the hearing, such safeguards would be have been met. The Supreme Court also took into consideration that the other parent opposing the

defendant at the hearing is also mostly not represented by counsel, which was the case with Ms. Rogers, the custodial parent. Therefore, providing a lawyer to the non-custodial parent would create an asymmetry of representation, resulting in delay, making the proceeding overall less fair and increasing the risk of the depriving the family in need of support the payment it is entitled to receive. Even though Turner did not have a lawyer, he also did not receive the benefit of the alternative safeguards such as a notice that his ability to pay would make the difference between being incarcerated or not, or a finding on his ability to pay. The Supreme Court remanded the case back to the South Carolina court for further proceedings in conformance with its opinion.

Now compare these safeguards that were elaborated by the Supreme Court in the context of a civil contempt proceeding to an immigration removal hearing. The respondent charged with deportability cannot avoid incarceration by meeting a condition precedent like the non-custodial parent such as an ability to pay! Indeed, INA §236(c) makes it mandatory for the detention of a non-citizen based on the commission or conviction of an assortment of offenses, no matter even if the respondent can pay a million dollars to post bond. The respondent's opponent in removal proceedings is the government, which is always represented by a well trained counsel employed by Immigration and Customs Enforcement. Interestingly, the majority in *Turner v. Rogers* concluded, "Neither do we address what due process requires in an unusually complex case where defendant "can fairly be represented only by a trained advocate."

No one, not even opponents of due process for immigrants, can deny the fact that immigration removal proceedings are extremely complex, and can only fairly be represented by a well trained attorney conversant in immigration law. Yet, the majority of incarcerated respondents never have access to counsel. According to the [Katzmann Immigration Representation Study Group's](#) recent findings, 60% of detained immigrants in New York City and 27% of non-detained immigrants do not have counsel by the time their cases are completed. Individuals who are transferred elsewhere and who remain detained and out of New York are unrepresented 79% of the time. This is truly a crisis. It is unthinkable to allow respondents in removal proceedings to proceed without the assistance of a lawyer to navigate and help through the complex maze of statutes, regulations and legal interpretations. This same study indicates that where there is competent representation of those who have been released or never detained, 74% had a successful outcome.

Advocates must continue to press for the right to appointed counsel in removal proceedings where the respondent cannot afford his or her own lawyer. Such a cause may be too unpopular for Congress to pass legislation at this time. Only a court ruling can make this happen, and the Supreme Court's decision in *Turner v. Rogers* may provide the analytical framework to make a winning argument. *Gideon v. Wainwright* was historic as it established the right to counsel under the Fourteenth Amendment for criminal defendants in state courts. We need a civil *Gideon*, and the best place to establish this is in immigration removal proceedings.

In conclusion, the following passage from *Gideon v. Wainwright* citing Mr. Justice Sutherland's eloquent and moving need for a right to counsel in [Powell v. Alabama](#), 287 U.S. 25 (1932) will surely resonate with those seeking a right to appointed counsel in removal proceedings:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He 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 be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.