



Perspective

'Turner' Could Support Appointed Counsel for Immigrants

BY MARK NOFERI

The U.S. Supreme Court recently held in *Turner v. Rogers*, 131 S.Ct. 2507 (June 20, 2011), that indigent jailed "deadbeat dads" are not automatically entitled to a court-appointed lawyer. Yet *Turner's* reasoning may support appointed counsel for different indigents—the hundreds of thousands of immigrants detained yearly pending deportation proceedings, many from the New York area.

Immigration detention—or "imprisonment," as some call it—causes green card holders ("lawful permanent residents") living here with jobs and families to be locked away every day, most surprisingly without ever seeing a lawyer.¹ In 2009, Immigration and Customs Enforcement (ICE) detained over 380,000 aliens for various immigration violations, most in jails and prisons or detention centers much like them.²

Seventy five percent of these detained immigrants had never committed any crime. For those awaiting deportation hearings, the Department of Homeland Security, the parent agency of ICE, has general discretionary authority to detain immigrants and set bond (comparable to bail), which it overzealously uses with a "detain first, ask questions later" mentality without regard for individual circumstances.³ For many immigrants who have committed crimes, even non-violent drug crimes long ago, detention is mandatory, without bond, pending the deportation hearing which may take years. The effect on families is devastating.

Perhaps most fundamentally, "imprisonment" impairs the ability to secure counsel, which in turn frustrates meaningful challenges to deportation—the equivalent of banishment from America, causing near-permanent separation from family. Unlike a criminal case, detained immigrants are not provided a court-appointed attorney. Accordingly, while detained, the immigrant can't work to hire a lawyer, and can't gather witnesses and documents to defend deportation, lawyer or not.

Likely for these reasons, Second Circuit Judge Robert Katzmann's Immigration Representation Study Group found that representation and freedom from detention are the most important factors for success in an immigration case.⁴ While 74 percent of represented and non-detained immigrants in New York

are successful, a stunning 97 percent of unrepresented and detained immigrants are not. Worse, ICE transfers almost two-thirds of New York detainees to detention centers in states like Texas and Louisiana, where counsel is most scarce, and families who might assist are furthest away.

The *Turner* Court stated that even in civil cases, the "loss of personal liberty through imprisonment" lies "at the core of the liberty protected by the Due Process Clause." *Turner*, 131 S.Ct. at 2518. One might wonder, as the *Turner* parties briefed—if incarceration demands due process protections

Second Circuit Judge Robert Katzmann's Immigration Representation Study Group found that representation and freedom from detention are the most important factors for success in an immigration case.

such as appointed counsel, why not "imprisonment"?⁵ At oral argument, Justice Anthony Kennedy asked to "block out that category,"⁶ and the Court more narrowly ruled that a jailed indigent defendant to a child support order lacks a due process right to appointed counsel at the civil contempt proceeding, so long as "substitute procedural safeguards" ensure "fundamental fairness."

Yet the Court's reasons for declining to categorically provide counsel to an indigent child support contemnor conversely support the provision of appointed counsel to immigrant detainees.

Most notably, the Court held that in child support cases, where the parent seeking support is also typically unrepresented, providing appointed counsel to the contemnor would create an "asymmetry of representation" that might pervasively make the proceedings less fair and negatively impact families needing support.

The Court explicitly distinguished its situation from cases where the government, represented by counsel, seeks to deprive a defendant of liberty—exactly the situation immigrant detainees face. A detained immigrant not only loses his liberty temporarily, but, if unable to defend a case and deported, more permanently loses "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

Likewise, the Court explicitly distinguished the "straightforward"

factual determination of indigence in a contempt proceeding from the "unusually complex" legal case where a defendant "can fairly be represented only by a trained advocate." *Turner*, 131 S.Ct. at 2519-20. Indeed, indigence is often determined prior to provision of counsel, as in a federal criminal case. Conversely, immigration law has been termed "second only to the Internal Revenue Code in complexity," with the legal determinations that lead to detention and deportation among the most complex.⁷ *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987).

Ironically, Justice Clarence Thomas' *Turner* dissent, which highlights mothers and children needing support, implicitly supports greater access to counsel and less stringent detention for immigrant detainees. Justice Thomas cites that "children whose fathers reside apart from them are 54 percent more likely to live in poverty than their fathers," and concludes that "[w]hen fathers fail in their duty to pay child support, children suffer."

Yet "imprisonment," which renders fathers unable to work and separates them from families, causes similar negative effects.

In short, although the Court sidestepped arguments regarding immigrant detainees, its reasoning might one day support a groundbreaking right to appointed counsel for immigrants detained pending deportation proceedings, and a more humane detention policy for immigrants in America.⁸

1. Anil Kalhan, "Rethinking Immigration Detention," 110 Colum. L. Rev. Sidebar 42, 43 (2010).

2. See "Detention of Criminal Aliens: What Has Congress Bought?," TRAC Immigration, Feb. 11, 2011.

3. Kalhan, *supra* at 48.

4. See Mark Hamblett, "Study, Forum Stress Plight of New York's Unrepresented Immigrants," *New York Law Journal*, May 6, 2011.

5. See, e.g., Brief for the United States of America at 31-32, *Turner v. Rogers*, No. 10-10 (Jan. 11, 2011); Brief of Respondent Rebecca Rogers and Larry E. Price, Sr. at 18, 40-41, *Turner v. Rogers*, No. 10-10 (Feb. 8, 2011); Reply Brief for Petitioner Michael D. Turner at 21-23, *Turner v. Rogers*, No. 10-10 (Mar. 4, 2011).

6. Transcript of Oral Argument at 38-39, *Turner v. Rogers*, No. 10-10 (Mar. 23, 2011).

7. See also *Padilla v. Kentucky*, 130 S.Ct. 1473, 1488-90 (2010) (Alito, J., concurring).

8. See Cyrus D. Mehta, "Right to Appointed Counsel in Removal Proceedings? The Supreme Court May Have Opened the Door in *Turner v. Rogers*," June 29, 2011.

MARK NOFERI is an instructor of legal writing at Brooklyn Law school.