

Written by Kyle Smith in May 2024; submitted to VANDERBILT SOCIAL JUSTICE REPORTER during write-on competition

Children in the U.S. Immigration System Deserve Due Process Protections Too

Children facing proceedings in U.S. immigration courts do not have the right to government-appointed counsel and many appear in court with either their parents, with legal aid provided on a pro bono basis, or without any legal representation at all.¹ This travesty stands in stark contrast to the U.S. Supreme Court's access to counsel jurisprudence and the constitutional safeguard of due process enshrined in the Fifth Amendment.² Without remedying this issue, children within the immigration court system face the risk of unjust deprivations of their liberty and safety, psychological harms due to separation from their families, and untold traumas and abuses at the hands of the U.S. immigration system.³ As the 2024 Presidential Election nears and with immigration surging as a top concern for many Americans,⁴ we must zealously defend the ideals of due process and fundamental fairness for immigrant youth.

To remedy this long-standing injustice and bolster the public's confidence in the immigration court system, the Supreme Court must clearly and unequivocally hold that the Due Process Clause of the Fifth Amendment establishes a constitutional right to counsel for children facing immigration proceedings. If the Court fails to act, Congress should pass legislation that establishes the right to counsel for children in immigration courts and allocate funding for such a requirement. Even without the support of Congress or the Court, the Biden administration can

¹ See 8 U.S.C. § 1362 (1996); Erica Bryant et al., *No Child Should Appear in Immigration Court Alone*, VERA INST. OF JUST. (Jan. 28, 2022), <https://www.vera.org/news/no-child-should-appear-in-immigration-court-alone>; Christina Jewett et al., *Immigrant Toddlers Ordered to Appear in Court Alone*, THE TEX. TRIB., (June 27, 2018), <https://www.texastribune.org/2018/06/27/immigrant-toddlers-ordered-appear-court-alone/>.

² See U.S. CONST. amend. V; *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that indigent criminal defendants are entitled to government-appointed counsel); *In re Gault*, 387 U.S. 1, 41, 87 S.Ct. 1428, 1451, 18 L. Ed. 2d 527 (1967) (holding that children under the age of eighteen facing juvenile delinquency proceedings are entitled to counsel).

³ See Bryant, *supra* note 1; Jewett, *supra* note 1;

⁴ Jeffrey M. Jones, *Immigration Surges to Top of Most Important Problem List*, GALLUP (Feb. 27, 2024), <https://news.gallup.com/poll/611135/immigration-surges-top-important-problem-list.aspx>.

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and should amend its budget priorities to fund access to counsel for children in immigration proceedings and, through the Executive Office of Immigration Review (EOIR), instruct its immigration judges to halt cases until a lawyer is appointed.⁵

Although unaccompanied minors usually make up the smallest share of those encountered at the U.S.-Mexico border—roughly five to seven percent in any given year—families make up a growing percentage of those encountered, nearly forty percent.⁶ Because a child’s claims can be adjudicated separately from other family members, children, whether accompanied or unaccompanied, are one of the most vulnerable groups in the immigration system and they are in dire need of protection.⁷ During the surge in encounters of unaccompanied minors at the southern border in 2018 and 2019, at least five children died after being detained by U.S. Customs and Border Protection (CBP), and as recently as May 2023, an eight-year-old girl died in CBP custody.⁸ In 2020, the U.S. Government Accountability Office (GAO) released a report detailing alarming findings about the misuse of congressionally approved funds by CBP and the agency’s inadequate policies for responding to the medical

⁵ See Ahilan Arulanantham, *Immigrant Children Do Not Have the Right to an Attorney Unless They Can Pay, Rules Appeals Court*, AM. C.L. UNION, (Feb. 6, 2018), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/immigrant-children-do-not-have-right-attorney>.

⁶ See U.S. Customs and Border Protection, *Southwest Land Border Encounters*, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited May 13, 2024); John Gramlich, *Migrant encounters at the U.S.-Mexico border hit a record high at the end of 2023*, PEW RSCH. CENTER, (Feb. 15, 2024), <https://www.pewresearch.org/short-reads/2024/02/15/migrant-encounters-at-the-us-mexico-border-hit-a-record-high-at-the-end-of-2023/>.

⁷ U.S. DEP’T OF JUST. EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL § 4.21 (2018), <https://www.justice.gov/eoir/reference-materials/ic/chapter-4/21>.

⁸ Franco Ordoñez, *Deaths Of Migrant Children Haunt Former Official As Border Surge Increases*, NPR (Mar. 17, 2021), [https://www.npr.org/2021/03/17/977978891/deaths-of-migrant-children-haunt-former-official-as-border-surge-increases#:~:text=At%20least%20five%20children%20died%20in%20custody%20or%20after%20being,being%20held%20in%20border%20facilities;U.S.CustomsandBorderProtection,June1,2023Update:DeathinCustodyof8-Year-OldinHarlingen,Texas,\(June1,2023\),https://www.cbp.gov/newsroom/national-media-release/june-1-2023-update-death-custody-8-year-old-harlingen-texas#:~:text=The%20girl%20and%20her%20mother%20were%20transported%20separately%20to%20the,departed%20Harlingen%20Station%20for%20the](https://www.npr.org/2021/03/17/977978891/deaths-of-migrant-children-haunt-former-official-as-border-surge-increases#:~:text=At%20least%20five%20children%20died%20in%20custody%20or%20after%20being,being%20held%20in%20border%20facilities;U.S.CustomsandBorderProtection,June1,2023Update:DeathinCustodyof8-Year-OldinHarlingen,Texas,(June1,2023),https://www.cbp.gov/newsroom/national-media-release/june-1-2023-update-death-custody-8-year-old-harlingen-texas#:~:text=The%20girl%20and%20her%20mother%20were%20transported%20separately%20to%20the,departed%20Harlingen%20Station%20for%20the).

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needs of detainees, including children.⁹ Additionally, the GAO found that CBP lacked reliable data on deaths and did not report this data to Congress as required.¹⁰ The U.S. immigration system is also wrought with cases of child exploitation and sexual abuse.¹¹ Children entering a system with such pervasive issues must be afforded the right to counsel.

The inhumane conditions that children experience while in CBP custody, and the abysmal oversight of detention facilities are symptomatic of a larger problem, namely, the utter disregard for the civil rights of immigrant detainees, particularly children. In *C.J.L.G. v. Barr*, the U.S. Court of Appeals for the Ninth Circuit reviewed an appeal on behalf of an immigrant child asserting, among other issues, that under the Due Process Clause of the Fifth Amendment he was entitled to the provision of counsel in his hearing before an immigration court.¹² Rather than addressing the merits of the claim, the court sidestepped the issue and granted the child a rehearing on separate grounds.¹³ Notably, in his concurrence, Judge Paez disagreed with the majority's decision to avoid the issue and observed that he would have held that "the Fifth Amendment's guaranty of due process entitles children to appointed counsel in immigration proceedings."¹⁴ Although numerous Ninth Circuit precedents have held that individuals facing removal proceedings, including children, are entitled to due process protections, in *C.L.J.G.* the court failed to extend such protections to encompass the right to counsel.¹⁵ The Supreme Court's

⁹ U.S. GOV'T ACCOUNTABILITY OFF., *SOUTHWEST BORDER: CBP NEEDS TO INCREASE OVERSIGHT OF FUNDS, MEDICAL CARE, AND REPORTING OF DEATHS*, GAO-20-536, at 2 (2020).

¹⁰ *Id.*

¹¹ See Lautaro Grinspan, *For migrant girls, new lives in U.S. bring risk of sexual abuse*, THE ATLANTA J.-CONST. (July 6, 2023), <https://www.ajc.com/news/georgia-news/for-migrant-girls-new-lives-in-us-bring-risk-of-sexual-abuse/GNJANX7JJZAQFCIYB7DBC7ZVXI/>.

¹² *C.J.L.G. v. Barr*, 923 F.3d 622, 625 (9th Cir. 2019) (en banc).

¹³ *Id.* at 629.

¹⁴ *Id.*

¹⁵ See *id.* at 630 (citing *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1160 (9th Cir. 2004) (holding that "immigrant children 'in deportation proceedings are entitled to the fifth amendment guaranty of due process'"); *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (en banc) (noting that "every individual in removal proceedings is entitled to a full and fair hearing"))).

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failure to resolve the issue has allowed this travesty to persist, with immigrant youth, whose families cannot afford counsel, representing themselves in court even in high-stakes deportation cases.¹⁶ How can our nation truthfully espouse a commitment to due process and the rule of law when we routinely allow unrepresented children to come before immigration courts to present their asylum claims?

The Supreme Court, in line with its access to counsel jurisprudence, must hold that access to counsel is an element of fundamental fairness and due process for immigrant youth as it did for criminal defendants in *Gideon v. Wainwright*, and for children facing delinquency proceedings in *In re Gault*.¹⁷ Doing so not only strengthens our nation's adherence to the rule of law, it also allows immigrant youth, regardless of their family's wealth or status, to be given equal footing for litigating their claims.¹⁸ Although *Gideon* and *Gault* addressed due process protections under the Fourteenth Amendment, the expansive interpretations of due process and the doctrinal rationales embodied in both cases are equally as persuasive and applicable to the Due Process Clause of the Fifth Amendment, particularly in the context of immigration proceedings for children.

Gideon marked a seismic shift in constitutional law and particularly in due process jurisprudence. Prior to *Gideon*, the Supreme Court's holding in *Betts v. Brady* concluded that the refusal of a state to appoint counsel for an indigent criminal defendant did not necessarily violate the Due Process Clause of the Fourteenth Amendment, instead asserting that the "denial [of due process] is to be tested by an appraisal of the totality of facts in a given case."¹⁹ In *Gideon*, however, the Court recognized that the Sixth Amendment's right to assistance of counsel in all

¹⁶ See Bryant, *supra* note 1; Jewett, *supra* note 1;

¹⁷ See *Gideon*, 372 U.S. at 344; *Gault*, 387 U.S., at 41, 87 S.Ct., at 1451.

¹⁸ See Bryant, *supra* note 1.

¹⁹ *Gideon*, 372 U.S. at 339 (quoting *Betts v. Brady*, 316 U.S. 462).

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criminal prosecutions was “so fundamental and essential to a fair trial” and thus due process, that it “must be made obligatory upon the [s]tates . . .”²⁰ Writing for the majority, Justice Powell acknowledged that “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.”²¹ A few years later in *Gault*, the Court clarified that the need to protect a defendant’s personal freedom is foundational to the right to counsel, even in non-criminal cases.²² In *Gault*, the Court similarly held that due process requires assistance of counsel for children facing delinquency proceedings given that the outcome of such a proceeding could lead to a child’s “commitment to an institution in which the [child]’s freedom is curtailed.”²³

The Court’s reasoning that assistance of counsel is fundamental to a fair trial and its explanation that the liberty interests of the defendant weigh heavily in favor of counsel are equally as compelling in the context of immigration proceedings. For children like C.J.L.G., who face the potential of being deported to countries with serious issues of gang violence and who have been specifically targeted by these groups, the consequences of removal are even more dire than the consequences facing a criminal defendant.²⁴ Additionally, the high likelihood of an erroneous deprivation of an immigrant child’s liberty weighs in favor of the provision of counsel, especially given that asylum seekers who are represented by attorneys are more likely to succeed on the merits of their claims.²⁵ Navigating the complex U.S. immigration system is difficult enough for practicing attorneys, so how can we expect children to fare any better? It goes

²⁰ *Id.* at 340; see U.S. CONST. amend. VI.

²¹ *Gideon*, 372 U.S. at 344.

²² *Id.* at 343; see U.S. CONST. amend. VI.

²³ *Gault*, 387 U.S., at 41, 87 S.Ct., at 1451.

²⁴ See *C.J.L.G.*, 923 F.3d at 622.

²⁵ See Emily S. Taylor Poppe & Jeffrey J. Rachlinkski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 914 (2016) (discussing the favorable effects of legal representation in immigration proceedings).

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without saying, but when other issues are considered, like language barriers, the immaturity and youth of a child, and the difficult ordeal that many immigrant children endure as their families make the trek to the United States, it is clear that a child is uniquely unqualified to adequately represent themselves in such a high-stakes environment.

As we go into the final months of the 2024 Presidential Election cycle, we, as advocates, citizens, and members of the legal community, must amplify our voices and call for a constitutional right to counsel for children facing immigration proceedings. We must demand that the Supreme Court resolve this longstanding issue, but we cannot stop there. In addition to our voices, we also have the power of our votes. We must leverage our power to elect candidates that support protecting the rights of immigrant children and we must organize to ensure that members of Congress and the Biden administration use every tool at their disposal to ensure that no child comes before a U.S. immigration court without legal representation.²⁶

²⁶ See Arulanantham, *supra* note 5.