IMMIGRATION LAW — RIGHT TO COUNSEL — CALIFORNIA DISTRICT COURT FINDS DUE PROCESS MAY INCLUDE RIGHT OF ACCESS TO COUNSEL FOR DETAINED NONCITIZENS. — *Lyon v. ICE*, 171 F. Supp. 3d 961 (N.D. Cal. 2016).

No court has ever found that noncitizens in removal proceedings enjoy Sixth Amendment rights to counsel.[1] Noncitizens have separate statutory and constitutional rights to counsel at private expense, but courts usually find these rights to be coextensive.[2] Noncitizens' right to counsel as it stands looks nothing like its Sixth Amendment analogue. Courts require situations "tantamount to denial of counsel"[3] — where a noncitizen is wholly prevented from retaining counsel, or her counsel is wholly prevented from appearing — to find a violation of the right.[4] They are reluctant to question Congress's plenary power over immigration and analogize to constitutional rights outside the statutory scheme. Recently, in *Lyon v. ICE*,[5] the Northern District of California held that interference with detained noncitizens' telephone access to their attorneys could violate their Fifth Amendment right to a full and fair hearing.[6] In doing so, the court sidestepped the statutory right to counsel and relied on the Constitution to locate a right of access to counsel.[7] Through its reasoning, the court may have found a path to bring noncitizens' right to counsel in immigration proceedings closer to its Sixth Amendment criminal counterpart.[8]

The ACLU of Northern California brought suit against Immigration and Customs Enforcement (ICE), and various other officials in-

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[1] *See, e.g.*, Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008) ("[L]itigants in removal proceedings have no Sixth Amendment right to counsel.").

[2] *See, e.g.*, United States v. Reyes-Bonilla, 671 F.3d 1036, 1045–52 (9th Cir. 2012); Baltazar-Alcazar v. INS, 386 F.3d 940, 944–49 (9th Cir. 2004).

[3] Biwot v. Gonzales, 403 F.3d 1094, 1100 (9th Cir. 2005).

[4] *See id.* at 1099; *see also* Rios-Berrios v. INS, 776 F.2d 859, 862–63 (9th Cir. 1985) (finding violation of the right to counsel where a noncitizen was given two days of continuances to locate counsel although he "was in custody, spoke only Spanish, had limited education, . . . and had been removed nearly 3,000 miles from his only friend in this country"); Elinor R. Jordan, *What We Know and Need to Know About Immigrant Access to Justice*, 67 S.C. L. REV. 295 (2016) (discussing noncitizens' current right to counsel); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 133–34 (2008) (discussing noncitizens' constitutional rights to access counsel and to effective assistance).

[5] 171 F. Supp. 3d 961 (N.D. Cal. 2016).

[6] *Id.* at 980–85, 994.

[7] *See id.* at 986–87.

[8] It is hard to overstate the impact of each incremental expansion of detained noncitizens' right to counsel. Currently, ICE can hold at least 34,000 noncitizens in detention. Department of Homeland Security Appropriations Act of 2015, Pub. L. No. 114-4, 129 Stat. 39, 43 (2015). Eighty-six percent of detained noncitizens lack counsel, compared with only thirty-four percent of nondetained noncitizens. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 36 (2015). Represented detainees are almost seven times more likely than pro se detainees to be released. *Id.* at 70.

volved in immigration detention, on behalf of a class of adult noncitizens detained by ICE in four California detention facilities.[9] Because the detainees' immigration cases were docketed at the San Francisco Immigration Court, a substantial distance away from their remote facilities,[10] detainees relied on telephone contact to communicate with their attorneys and collect evidence for their cases.[11] The detainees claimed that all facilities shared telephone policies so restrictive that they interfered with detainees' ability "to retain or communicate with counsel, or to gather evidence to be presented in removal proceedings."[12] Based on these allegations, the detainees claimed violations of their statutory and constitutional rights to counsel and a full and fair hearing.[13]

The parties brought cross-motions for summary judgment.[14] Evaluating the detainees' statutory right to counsel[15] claim, Judge Chen emphasized that noncitizens have no Sixth Amendment right to counsel[16] and that the Ninth Circuit finds violations only where the conduct was "tantamount to denial of counsel."[17] Because many detainees "did eventually find counsel after months of searching and with assistance from friends or family," Judge Chen found no violation of detainees' statutory right to counsel and granted ICE summary judgment on that claim.[18]

The court next turned to the detainees' statutory claim to a full and fair hearing,[19] which the detainees maintained included the right to

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[9] *Lyon*, 171 F. Supp. 3d at 964.

[10] *See id.*

[11] *See id.*

[12] *Id.* at 965. The detainees specified several problematic practices:

> (1) [H]igh rates and fees for paid calls . . . ; (2) technical barriers and payment restrictions . . . such as a "positive acceptance" requirement where the individual being called must accept the call [which is impossible if the detainee must enter an extension]; (3) inadequacies of the free call or pro bono platforms; (4) limits on hours of telephone access; (5) lack of privacy; (6) inability to receive incoming calls or timely messages; and (7) failure to provide notice of calling options for detainees with limited English or Spanish language skills.

Id.

[13] *Id.* The plaintiffs also claimed violations of their First Amendment right to petition the government for redress of grievances. Judge Chen found the claim "essentially the same as that under the Due Process Clause" and denied summary judgment for the same reasons he denied it on the procedural due process claim. *Id.* at 994.

[14] *Id.* at 965.

[15] *See* 8 U.S.C. § 1229a(b)(4)(A) (2012) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing . . . .").

[16] *Lyon*, 171 F. Supp. 3d at 974.

[17] *Id.* at 975 (quoting Biwot v. Gonzales, 403 F.3d 1094, 1100 (9th Cir. 2005)).

[18] *Id.* at 975–76.

[19] *See* 8 U.S.C. § 1229a(b)(4)(B) ("[T]he alien shall have a reasonable opportunity to examine the evidence against the alien [and] to present evidence on the alien's own behalf . . . .").

gather evidence when preparing their cases.[20] Judge Chen rejected this assertion, finding that the statute only mentions a noncitizen's right to examine and present evidence on her own behalf, not to investigate for and gather it.[21] The court found no case law expanding the definition beyond the language of the statute and therefore granted ICE summary judgment on all statutory claims.[22]

The court then examined the due process claims, where the detainees had alleged violations of their constitutional rights to counsel and to a full and fair hearing.[23] Judge Chen noted that the parties disagreed regarding whether the detainees had to demonstrate an actual injury to make a successful procedural due process argument.[24] ICE relied on *Lewis v. Casey*,[25] where the Supreme Court required convicted prisoners to "show that they had *actually* been hindered in pursuing their legal claims."[26] The *Lyon* detainees distinguished their circumstances from those in *Lewis*, and Judge Chen agreed.[27] *Lewis* concerned postconviction prisoners' access to legal assistance programs in order to collaterally challenge their sentences.[28] Judge Chen found that the detainees' circumstances conformed more closely to those of the plaintiffs in *Benjamin v. Fraser*,[29] where the Second Circuit refused to apply *Lewis* to pretrial detainees who were actively fighting their cases.[30] Judge Chen emphasized that just as the *Benjamin* plaintiffs needed access to counsel "not to present claims to the courts, but to *defend against* the charges brought against them,"[31] *Lyon*'s noncitizen detainees sought "to gather and present evidence in *defending themselves* against the government's effort to deport them."[32] Unlike *Lewis*, which "did not concern a direct constitutional right, but an opportunity to present claimed violations of constitutional rights,"[33] the court found that the phone restrictions could violate detainees' *direct*

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[20] *Lyon*, 171 F. Supp. 3d at 976.

[21] *Id.* at 976–77.

[22] *Id.* at 977.

[23] *Id.* Judge Chen summarily rejected the substantive due process claims, finding that plaintiffs had failed to plead a claim that their confinement was unconstitutionally punitive, and failed to show that telephone restrictions had led to an unconstitutional system of prolonged detention. *Id.* at 977–78.

[24] *Id.* at 980.

[25] 518 U.S. 343 (1996).

[26] *Lyon*, 171 F. Supp. 3d at 980.

[27] *Id.* at 980–81.

[28] *See Lewis*, 518 U.S. at 346.

[29] 264 F.3d 175 (2d Cir. 2001).

[30] *Id.* at 184; *see Lyon*, 171 F. Supp. 3d at 981.

[31] *Lyon*, 171 F. Supp. 3d at 980 (emphasis added) (quoting *Benjamin*, 264 F.3d at 186).

[32] *Id.* at 981.

[33] *Id.* at 980.

constitutional "guarantee [of] a full and fair hearing, and [that] this includes access to counsel."[34]

Having rejected *Lewis*'s actual injury requirement, the court then applied the Ninth Circuit test for a procedural due process claim outside *Lewis*-like circumstances.[35] Judge Chen found that in order to satisfy the injury requirement, a plaintiff does not have to prove that an alleged violation "actually affected"[36] the outcome of a proceeding, only that it "'may' or 'potentially' affect the outcome . . . ; there are 'plausible scenarios' in which outcomes are affected."[37] The court held that detainees had submitted enough evidence that the detention centers' restrictions could have affected the outcome of their cases to satisfy the Ninth Circuit's injury requirement for a procedural due process claim.[38]

The court then examined competing legal frameworks for evaluating a due process claim in the detention context.[39] It first applied the *Mathews v. Eldridge*[40] balancing test to determine if detainees' due process rights had been impinged upon by the facilities' telephone restrictions.[41] Judge Chen concluded that the detainees had a significant interest in avoiding deportation[42] but that he could not grant summary judgment — there were still too many outstanding factual disputes for him to adequately balance the risk of erroneous rights deprivation[43] with the government's interest.[44] He then applied the *Turner v. Safley*[45] four-factor test to evaluate whether restrictions that impinge

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[34] *Id.* at 981.

[35] *See id.*

[36] *Id.*

[37] *Id.* at 983 (first quoting Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000); then quoting Zolotukhin v. Gonzales, 417 F.3d 1073, 1077 (9th Cir. 2005); and then quoting Walters v. Reno, 145 F.3d 1032, 1044 (9th Cir. 1998)).

[38] *Id.* at 985. The court relied upon evidence including detainees' inability to reach retained counsel who did not accept collect calls, and their inability to discuss their cases with counsel for fear of mentioning sensitive information on the phone in public areas. *See id.* at 982–83.

[39] *Id.* at 985.

[40] 424 U.S. 319 (1976).

[41] *Lyon*, 171 F. Supp. 3d at 987. *Mathews* requires the court to consider three factors: "(1) the interest at stake for the individual, (2) the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and (3) the interest of the government in using the current procedures rather than additional or different procedures." *Id.* (citing *Mathews*, 424 U.S. at 324).

[42] *Id.* (citing *Walters*, 145 F.3d at 1043).

[43] *Id.* at 988. The court emphasized disputes over the "actual availability of private phone options," *id.*, and the difficulty of proving risk of erroneous deprivation where detainees were completely unaware of their options, *see id.*

[44] *Id.* at 991. The government had largely failed to provide justifications for its policies at this juncture, *see id.* at 989–90, or to articulate whether it had an interest in implementing ICE's 2011 Performance Based National Detention Standards (2011 PBNDS), *id.* at 990. Experts disputed whether it was even possible to implement the 2011 PBNDS. *Id.* at 990–91.

[45] 482 U.S. 78 (1987).

on due process rights could nevertheless be upheld for being "reasonably related to legitimate penological interests."[46] The court found that the same disputes of material fact precluded summary judgment.[47]

The *Lyon* court located a new constitutional avenue to bring noncitizen detainees' right to counsel closer to that of criminal detainees. Despite the parallels between the criminal and immigration enforcement systems, noncitizen detainees have almost none of the procedural protections of criminal detainees.[48] Noncitizen detainees' constitutional and statutory rights to counsel are usually read synonymously. The *Lyon* court both separated these rights and expanded the constitutional right to counsel to include *access* to that counsel. It therefore brought noncitizens' procedural right to counsel protection one step closer to its Sixth Amendment criminal analogue.

The experience of a noncitizen awaiting deportation proceedings looks a lot like that of a criminal defendant. She will be picked up by a uniformed enforcement agency and can be locked up in jail to await the progression of her case. Yet the parallel does not extend to procedural protections — she might have no bond hearing,[49] will be assigned no counsel,[50] and might never even see a judge before being deported.[51] Although these similarities have not escaped the Supreme Court, which recognizes the gravity of deportation as a potential consequence, the Court still distinguishes deportation from punishment.[52] Removal proceedings are still civil.[53] Unlike criminal defendants,

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[46] *Lyon*, 171 F. Supp. 3d at 986 (quoting *Turner*, 482 U.S. at 89). These factors are:

> (1) [W]hether there is a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) whether accommodation of the asserted constitutional right will have significant impacts on . . . the allocation of prison resources . . . ; and (4) whether ready alternatives are absent.

Id. at 985 (citing *Turner*, 482 U.S. at 89–90).

[47] *Id.* at 993.

[48] See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007), for a discussion of the enforcement parallels and procedural disparities of the criminal and immigration systems.

[49] See *Sopo v. U.S. Attorney General*, 825 F.3d 1199, 1212–13 (11th Cir. 2016), for a discussion of the circuit split on whether constitutional avoidance requires courts to read a time limitation into statutes allowing immigration detention without a bond hearing or only an individualized habeas inquiry.

[50] In rare cases, some jurisdictions and courts provide certain classes of noncitizens with counsel at government expense. *See, e.g.*, Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013) (granting a permanent injunction requiring counsel for mentally incompetent noncitizen detainees).

[51] See Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565 (2007), for a discussion of the lack of judicial review of immigration proceedings and its impact.

[52] *See* Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

[53] *See, e.g.*, *id.* at 357.

when noncitizens defend themselves against the government in immigration proceedings, they have no Sixth Amendment right to counsel.[54]

Like other defendants in civil proceedings, however, noncitizens in removal proceedings have a constitutional due process right to a full and fair hearing.[55] Congress additionally grants noncitizens the statutory right to retain their own counsel, not at government expense.[56] Because courts usually find these constitutional and statutory rights to counsel to be coextensive,[57] when they evaluate alleged violations of the right to counsel they do not distinguish substantively the right's statutory and constitutional origins.[58]

Courts find this amalgamated right to counsel much less protective than the Sixth Amendment.[59] They accept violations only where the noncitizen has been wholly deprived of her ability to retain counsel[60] or her counsel's ability to represent her at a hearing.[61] In contrast, the Sixth Amendment both protects reasonable access to retained counsel and mandates effective assistance. The Ninth Circuit has upheld a constitutional right to effective assistance of counsel in the immigration context,[62] but the right has no teeth. The Board of Immigration

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[54] *See, e.g.*, Torres-Chavez v. Holder, 567 F.3d 1096, 1100 (9th Cir. 2009).

[55] *See, e.g.*, Colindres-Aguilar v. INS, 819 F.2d 259, 260 n.1 (9th Cir. 1987) ("[Noncitizen p]etitioner's right to counsel . . . is a right protected by the fifth amendment due process requirement of a full and fair hearing." (first citing Rios-Berrios v. INS, 776 F.2d 859, 862 (9th Cir. 1985); then citing Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977))).

[56] 8 U.S.C. § 1229a(b)(4)(A) (2012); *id.* § 1362.

[57] *See, e.g.*, Tawadrus v. Ashcroft, 364 F.3d 1099, 1103 (9th Cir. 2004) ("Congress has recognized [the right to counsel in an immigration hearing] among the rights stemming from the Fifth Amendment guarantee of due process . . . . [This right] is codified at 8 U.S.C. § 1362 . . . .").

[58] *See* sources cited *supra* note 2. Reading the rights synonymously makes analysis easier for the courts. Congress enjoys plenary power over immigration, *see generally* Chae Chan Ping v. United States, 130 U.S. 581 (1889), and by deciding that the constitutional right extends no further than the statutory right, courts can avoid the minefield of judicial review of congressional action. See Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015), for a discussion of the changing impact of Congress's plenary power in immigration over time.

[59] When the Ninth Circuit distinguished the prejudice requirement for a right to counsel claim from that of an ineffective assistance of counsel claim through an analogy to Sixth Amendment prejudice requirements in *Montez-Lopez v. Holder*, 694 F.3d 1085, 1092–93 (9th Cir. 2012), it met fierce opposition. Judge Ikuta attacked the opinion and called for en banc review. *See* Hernandez v. Holder, 545 Fed. Appx. 710, 712–13 (9th Cir. 2013) (Ikuta, J., concurring).

[60] *See* Biwot v. Gonzales, 403 F.3d 1094, 1098–99 (9th Cir. 2005) ("[Immigration Judges (IJs)] must provide aliens with a reasonable time to locate counsel and permit counsel to prepare for the hearing."); Rios-Berrios v. INS, 776 F.2d 859, 862–63 (9th Cir. 1985) (finding IJ should have continued the hearing to provide petitioner time to locate counsel).

[61] *See* Baltazar-Alcazar v. INS, 386 F.3d 940, 945–47 (9th Cir. 2014) (finding denial of counsel where IJ denied noncitizens their choice of counsel because of the IJ's personal distaste for the attorney); Castro-Nuno v. INS, 577 F.2d 577, 579 (9th Cir. 1978) (finding denial of counsel where IJ failed to continue deportation hearing to allow noncitizen to locate previously retained counsel).

[62] *See, e.g.*, Mohsseni Behbahani v. INS, 796 F.2d 249, 250–51, 251 n.1 (9th Cir. 1986). There is a circuit split about whether noncitizens possess a constitutional right to effective assistance of

Appeals (BIA) in *Matter of Lozada*[63] set out stringent requirements to reopen a case based on an ineffective assistance of counsel claim.[64] Although the right to effective assistance of counsel stems from the Constitution, courts still defer to the BIA interpretation.[65] The Supreme Court has held that a criminal defense attorney's failure to advise her client of the immigration consequences of a criminal conviction constitutes ineffective assistance of counsel.[66] Ironically, the *Lozada* standard means an immigration lawyer who fails to accurately advise her client of immigration consequences is better insulated.

The *Lyon* court's opinion broke with these implicit interpretational conventions: it split the detainees' statutory and constitutional rights. First, the court applied Ninth Circuit precedent requiring that any violation of the right to counsel be "tantamount to denial of counsel" only to the statutory right.[67] Although both cases it cited found the statutory and constitutional rights indistinguishable,[68] the court used them as evidence for a uniquely constrictive statutory right.

Second, the court also declined to find plaintiffs' statutory right to a full and fair hearing coextensive with their constitutional right. The court implicitly questioned whether the statutory right relates to the constitutional one at all. Instead, it found that the statutory language[69] bore no connection to the gathering of evidence, but only to its presentation.[70] The court refused to extend the statutory right in any direction that could have been justified by its constitutional analogue.

Third, sidestepping the debate about ineffective assistance of counsel, the court located a new constitutional right usually reserved for

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counsel in removal proceedings at all. *See generally* Walter S. Gindin, Note, *(Potentially) Resolving the Ever-Present Debate over Whether Noncitizens in Removal Proceedings Have a Due-Process Right to Effective Assistance of Counsel*, 96 IOWA L. REV. 669 (2011).

63 19 I. & N. Dec. 637 (B.I.A. 1988).

64 *See id.* at 639. The "*Lozada* factors" require an affidavit by the noncitizen setting out in detail the agreement with counsel and the counsel's failures, that the former counsel be informed and allowed to respond, and that a complaint be filed with disciplinary authorities. *Id.* For a discussion of the problems with the *Lozada* factors and recommendations for their reform, see Letter from Am. Immigration Council to Thomas G. Snow, Dir. of the Exec. Office for Immigration Review, U.S. Dep't of Justice (Nov. 12, 2009), https://americanimmigrationcouncil.org/sites/default/files/general_litigation/IAC-EOIRletter-2009-11-12.pdf [https://perma.cc/TBX6-HFWC]. Notably, the BIA tried to overrule *Lozada* and remove the constitutional right to effective assistance of counsel completely, Compean, 24 I. & N. Dec. 710, 714 (B.I.A. 2009), but vacated that decision and reverted to the *Lozada* factors within six months, Compean, 25 I. & N. Dec. 1, 2–3 (B.I.A. 2009).

65 *See* Tamang v. Holder, 598 F.3d 1083, 1090 (9th Cir. 2010) (requiring strict compliance with the *Lozada* factors unless "the ineffectiveness of counsel was plain on its face").

66 *See* Padilla v. Kentucky, 559 U.S. 356, 372–74 (2010).

67 *See Lyon*, 171 F. Supp. 3d at 975.

68 *See* Biwot v. Gonzales, 403 F.3d 1094, 1098–1101 (9th Cir. 2005); Rios-Berrios v. INS, 776 F.2d 859, 862–64 (9th Cir. 1985).

69 8 U.S.C. § 1229a(b)(4)(B) (2012).

70 *Lyon*, 171 F. Supp. 3d at 976–77.

criminal detainees: the right of access to counsel.[71] The court buried the most significant part of the opinion in its analysis of the actual injury requirement[72]: it summarily found that in the context of deportation proceedings, "detainees have a Fifth Amendment guarantee to a full and fair hearing, and this includes *access to counsel* (of their own choosing)."[73] Through finding potential violations of *access* to counsel rather than *ineffective assistance* of counsel, the court was able to avoid deference to the BIA on its constitutional determination. Instead, because the court explicitly compared the situation of detained noncitizens to that of pretrial criminal detainees,[74] it was able to look to constitutional precedent in the criminal detention context. Tellingly, the primary criminal case upon which the court relied not only evaluated due process violations, but also leaned heavily on Sixth Amendment protections.[75] The court therefore subtly brought noncitizens' constitutional right to counsel closer to criminal detainees' Sixth Amendment protections, without wading into the controversial waters of ineffective assistance of counsel.

Although the *Lyon* parties eventually settled, precluding a judgment on the merits, the court's analysis could provide a new framework to argue noncitizen right to counsel claims. By treating the statutory and constitutional rights to counsel the same, but remaining silent on whether their boundaries are exactly coextensive, the Ninth Circuit had left open the door for a court to distinguish them. The *Lyon* court used this silence to find the statutory language narrow and the constitutional right broad. But by separating the statutory and constitutional rights to counsel, the court allowed due process in removal proceedings to overlap more with its criminal analogue. Its findings may therefore represent a new avenue to bring noncitizens' right to counsel protections closer to those guaranteed under the Sixth Amendment.

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[71] Another California district court has implicitly recognized the constitutional right of access to counsel for detained noncitizens in one other case. *See* Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1510 (C.D. Cal. 1988). A class of detained Salvadorean asylum seekers brought suit on the basis that they had been provided inadequate notice of their right to apply for asylum and had therefore been denied due process. *Id.* at 1506. The court issued an injunction designed to correct a variety of factors contributing to the lack of notice, including communication with counsel. *Id.* at 1511–14. Although the Ninth Circuit endorsed the district court's reasoning by upholding the injunction, *see* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990), perhaps because the case concerned such a specific class and such a variety of egregious violations, no other court has yet followed the *Orantes-Hernandez* reasoning for access to counsel.

[72] *Lyon*, 171 F. Supp. 3d at 980–81.

[73] *Id.* at 981 (emphasis added).

[74] *Id.*

[75] *See* Benjamin v. Fraser, 264 F.3d 175, 185–86 (2d Cir. 2001).