

PANEL DISCUSSION I:

THE RIGHTS OF NON-NATIONALS AND LEGAL AID

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Introduction:

Before examining the rights of non-nationals with respect to legal aid in the U.S., it is a pre-requisite to understand the social and political contexts in which American legal services are viewed, regardless of the nationality of the recipient. The services that most U.S. civil legal aid programs provide to non-nationals are extremely limited, due largely to the historical context in which such federal and state programs were established and continue to exist.² In the U.S., there are two fundamental and inter-related distinctions in the delivery of legal aid services: whether the legal services offered address civil or criminal issues and whether the legal aid agency accepts federal funding from the Legal Services Corporation for those services.

There is a federal right to counsel in criminal cases which has been recognized to exist in the Bill of Rights to the U.S. Constitution. That federal right, established through due process cases such as the U.S. Supreme Court ruling in *Gideon v. Wainwright*, 372 U.S. 335 (1963), has been extended to defendants facing state as well as federal criminal charges. The right to counsel when faced with a criminal charge has been interpreted to include the appointment of counsel, at the government's expense, when a defendant is arrested, "arraigned on [an arrest] warrant before a judge," and "committed by the court to confinement".³ Since the right to a court-appointed, government-funded attorney is a matter of federal, Constitutional right in most criminal cases, those attorneys (generally called "public defenders") are state or federal government employees and such defender programs funded through state or federal appropriations.

In stark contrast, the American legal system has not recognized a universal, government-funded right to counsel for indigents who need to participate (either affirmatively or defensively) in civil cases. The lack of a "civil *Gideon*", even in cases that affect fundamental constitutional rights, has become a major civil rights issue, which has been taken up by the American Bar Association (ABA).⁴

¹ First, I would like to express my sincere appreciation to the Legal Aid Foundation of Taiwan for selecting this timely and critical discussion topic for the 2009 International Forum on Legal Aid. While the opinions expressed in this paper are solely mine (or those of cited authors), I am especially indebted to Mr. Wilhelm Joseph, Esq., Executive Director of Maryland Legal Aid, and Ms. Joan Yeh, of the Legal Aid Foundation of Taiwan, for allowing me the privilege to discuss such a multi-dimensional topic with this esteemed group of international colleagues.

² For an excellent history of civil legal services in the U.S., see "Securing Justice for All: A Brief History of Civil Legal Assistance in the U.S.", authored by staff attorneys Alan Houseman and Linda Perle (2007) for the non-profit Center for Law and Social Policy (CLAS), and which is available online at http://s242739747.onlinehome.us/publications/legal_aid_history_2007.pdf.

³ *Rothgery v. Gillespie County*, 554 U.S. ___, Slip Opinion, p. 20.

⁴ See, for example, Howard H. Dana, Jr.'s law review article entitled, "2006 Edward v. Sparger Symposium: Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context:

Currently, the American system for the representation of the poor in civil cases remains one that relies upon governmental charity, or discretionary funding, in addition to private donations. The primary funding for civil legal services in the U.S. comes from the quasi-governmental agency, the Legal Services Corporation (LSC), which places a number of restrictions upon the use of their funds, and indeed, any other funds that an LSC-funded agency may receive. Attorneys who work for civil legal aid organizations are neither state nor federal government employees, although many are unionized. Legal aid advocates do not receive access to the generous federal or state benefits (such as government pensions and salary-scale), nor the attendant litigation budgets, which their counterparts do. Turn-over amongst staff attorneys working in civil legal aid, especially within the first five years of their legal career, and which is largely due to financial stress, is a constant concern for legal aid programs nationwide. Forced to rely upon government and private charity, there is no American state that has sufficient funding to meet the civil legal services needs of its poor domestic citizenry. Indeed, in Maryland approximately five hundred and seventy-six thousand (576,000) Marylanders are eligible for legal aid.⁵

Immigration law, and thus, foreign nationals, exists in a grey area between criminal and civil law. Technically, immigration proceedings are civil proceedings (including deportation proceedings). Nonetheless, the Immigration and Customs Enforcement (ICE) department of U.S. Homeland Security, is allowed to detain foreign nationals in jails because, according to the U.S. Supreme Court (our highest court of law), pre-trial detention and deportation of immigrants is “not punishment”.⁶ On average, “an alien is detained 30 days”, a number which is kept down by the large number of foreign nationals who agree to “voluntary departure” in exchange for no longer be confined in jails.⁷ Given the detainee’s strong desire to be released from custody as soon as possible, and the difficulty in obtaining counsel if you are indigent, it is no wonder that so many people “voluntarily” agree to allow the U.S. to remove them from the country even though they probably have never spoken to a lawyer about their case. Some civil legal aid organizations provide assistance to foreign nationals in deportation proceedings, especially those that are not LSC-funded, but given the highly technical and specialized area of that law, they are few and far between.

Thus, despite the best intentions of most legal aid programs, the legal needs of foreign-nationals are often only addressed as secondary or specialty programs (excluding immigration law assistance), if they are addressed at all. As a result, the funding for programs assisting immigrants is often even more tenuous than that of legal aid’s “core”

Introduction: ABA 2006 Resolution on Civil Right to Counsel". *Temple Political & Civil Rights Law Review* 15. In August 2006, the ABA urged states to provide a lawyer for low-income people in civil proceeding involving shelter, sustenance, safety, health, or childcare. The then-ABA President stated that “poor [civil] litigants have basic human needs which deserve as much attention as the interest in liberty found to be the basic of criminal right to counsel in *Gideon*.” *Id.*

⁵ Those who are eligible for services from Maryland Legal Aid must have incomes that do not exceed one hundred and twenty-five percent (125%) of federal poverty guidelines.

⁶ *Zadvydas v. Davis*, 533 U.S. 678, 609 (2001).

⁷ On October 6, 2009, the Secretary of the U.S. Homeland Security Administration, Ms. Janet Napolitano, released a report from the sub-agency, Immigration and Custody Enforcement, (ICE). The “Napolitano Report” is entitled “Immigration Detention Overview and Recommendations”. Page 6 of the Napolitano Report contains detailed statistics on the number and types of foreign nationals currently in U.S. immigration custody.

or general services delivery programs. Such programs often consist of targeted grants of limited tenure, narrow geographical focus and constricted scope of subject-matter (such as fellowship programs which allow recent graduates to address a legal problem, such as human trafficking, for their first two years post-law school graduation). Upon the conclusion of those two years, legal aid programs are then confronted with either raising funds to continue the program or face a loss in project services and momentum. Justifying the continuation of such pilot programs is difficult for legal aid programs when the general services being provided are already facing critical shortages.

These are by no means excuses. However, it is within this context of nationalism, limited civil and political rights and related-resource shortages (for poor nationals and non-nationals), that the discussion of the provision of legal services to foreign-nationals in the U.S. takes place. Those factors have played, and continue to play, a critical role in the American allocation of civil legal services of any kind.

1. Scope of Services:

(a) Does your organization provide legal aid services for foreign workers, foreign spouses and other non-nationals in your country?

Yes, the Maryland Legal Aid Bureau (“Maryland Legal Aid”) provides some legal aid services for particular categories of foreign workers, foreign spouses and other non-nationals. However, which types of non-nationals Maryland Legal Aid is allowed to serve, what types of legal problems we can address for those approved non-nationals, and the litigation strategies from which we may choose, are limited by one of our funder’s, the federal Legal Services Corporation’s (LSC’s), particular funding restrictions.

LSC’s federal funding restrictions do not solely apply to funds they grant to legal aid programs across the United States, such as Maryland Legal Aid. The “LSC-restrictions” have wide-reaching impact because they also limit the use of recipient program’s non-LSC funds, such as private donations and state grants, with some exceptions. The LSC restrictions regarding legal services to non-nationals begin from the presumption that services cannot be provided to foreigners. However, those ineligibility rules contain numerous exceptions, and they are some of the federal agency’s most detailed and confusing ones. For example, “certain legal aliens, including lawful permanent resident aliens, and in employment related cases, H-2A nonimmigrant temporary agricultural workers [and, recently, H-2B nonimmigrant temporary forestry workers] can be represented using both LSC and non-LSC funds [i.e. funds provided by states, private donors, etc.] In addition, recipients can use non-LSC funds to provide legal assistance to aliens who have been battered or subjected to extreme cruelty by a spouse, parent or family member and aliens whose child has been battered or subjected to extreme cruelty by a spouse, parent or family member, although the legal assistance must be directly related to the prevention of, or obtaining relief from, the battery or cruelty.”⁸

Victims of sexual assault or trafficking, and victims of crime who (might) qualify for a U-visa (immigration relief for those who cooperate with law enforcement in the prosecution of a crime), are also eligible for LSC-funded services. However, that legal

⁸ Memo by Alan W. Houseman, Esq. and Linda E. Perle, Esq., Staff Attorneys, entitled “What Can and Cannot Be Done: Representation of Clients by LSC-funded Programs”, Center for Law and Social Policy (CLASP), August 9, 2001, available at www.clasp.org.

assistance must be directly related to the prevention of, or obtaining relief from, the battery or cruelty, or the crimes listed in certain sections of the U.S. Immigration and Nationality Act (INA).⁹ Escaping from the abuse or victimization, ameliorating the current effects of the abuse or protecting against future abuse or victimization are all areas in which LSC-funded programs can assist non-nationals. For further details and examples, please see the attached Maryland Legal Aid Bureau May 2007 Policy on the Scope of Permissible Representation Assistance to Citizens and Non-Citizens.

(b) Is legal aid available for undocumented foreigners, refugees and victims of human trafficking in your country?

As discussed above, legal aid programs that receive LSC-funding are generally prohibited from providing undocumented foreigners with representation, or even legal advice, unless the legal issue involves domestic violence, human trafficking, etc. As a result of those restrictions, there are some non-federally-funded organizations that have attempted to fill this void. However, they are typically smaller legal services organizations that lack stable budgets, especially of the size necessary to fund large-scale litigation or meet large consumer demand.

Legal aid is available in the U.S. for victims of human trafficking, but the scope of those services depends, again, upon whether the legal services provider is federally funded. LSC-funded legal aid organizations may assist human trafficking victims, but only in certain circumstances. LSC-funded legal services are primarily limited to preventing or escaping battery, abuse, cruelty or victimization by certain types of crime. The fact, however, that such services are permitted at all is a testament to LSC's recognition that victims of human trafficking are uniquely deserving of assistance.

In particular, there are two LSC Program Letters that have been authored on this topic. In October 2005, LSC President Helaine M. Barnett drafted Program Letter 05-2, on the "Eligibility of Immigrant Victims of Severe Forms of Trafficking and [Their] Family Members for Legal Services" (a copy of which is attached). In that memorandum, President Barnett defined the situations in which LSC-funded programs may assist individuals who would otherwise be ineligible for LSC or non-LSC-funded services due to their status as a non-national. This October 2005 memo was significant because it not only clarified that trafficking victims are eligible for legal aid services, it also clarified that certain members of their families are eligible for legal services too. The memo clearly states that LSC-funded programs may use any funds to assist such clients with applying for trafficking or crime victims' visas (T and U visas, respectively). However, if the U.S. government denies the client's visa application process, pursuant to 45 C.F.R. 1626's restriction on the representation of aliens, the legal aid organization must discontinue their representation of that client, while remaining in accord with their local rules of attorney professional responsibility.

In February 2006, President Barnett issued another LSC Program Letter, this one entitled, "Violence Against Women Act 2006 Amendments". This memo was written in response to an expansion of the federal Violence Against Women Act (VAWA 2006).

⁹ LSC-funded legal aid programs may provide representation, without regard to immigration status, to a person who qualifies for a "U" visa (for victims of crime), as defined by the INA's section 101(1)(15)(U).

The memo explains that LSC-funded programs are now authorized to use LSC and non-LSC funds to represent an otherwise ineligible alien (under LSC regulation Section 1626) with services “directly related” to the prevention of, or amelioration of battery or cruelty, sexual assault or trafficking, crimes discussed in the U visa category (described above), or whose child has been similarly victimized. That memorandum also stated that LSC-funded legal aid programs may also use any funds to assist clients who are victims of domestic abuse, even if they are not married to (or the child of) their abuser.

Pursuant to LSC regulation Section 1626.4(c), refugees or asylees who are lawfully present in the U.S., pursuant to a lawful admission, or who have been granted asylee status, are fully eligible for federally funded legal assistance without limitation on the scope of services they may receive.

(c) In providing legal aid, does your organization distinguish between the lawfulness of foreigners’ presence in your country?

Yes, as explained above, the Maryland Legal Aid Bureau, along with all other legal services organizations that are LSC-funded, is required by federal law to distinguish between the lawfulness of foreigners who seek our legal services. Most of those federal funding restrictions are contained in Section 1626 of the federal Regulations of the Legal Services Corporation (LSC), which begin at the U.S. Code of Federal Register Chapter 45, Part 1600, *et al.* The LSC federal funding restrictions on legal assistance to aliens are contained in Part 1626, a copy of which is attached to this report.

2. Application Procedures:

(a) Are application procedures the same for local applicants and non-nationals, including foreign workers/spouses, undocumented foreigners, refugees, victims of human trafficking and other non-nationals?

Maryland Legal Aid’s application procedures are the same for citizen applicants and non-nationals, although we are required to follow the particular LSC regulations on the verification of an applicant’s citizenship or eligible alien status. Thus, while non-nationals are asked the same questions as citizens with respect to their household size and income, and are permitted to apply for our services through any of the methods available for citizens (such as by phone or in-person), non-nationals do have to answer particular screening questions regarding their immigration status. Section 1626.6 of the LSC regulations discusses the required procedures for the verification of all applicants’ immigration status. Any applicant who claims to be a U.S. citizen, and who is provided more than brief advice and consultation by telephone, must attest in writing (on an LSC-approved form) that they are a U.S. citizen.¹⁰ Further evidence of citizenship is not required, unless a legal aid staff has, “reason to doubt that an applicant is a citizen”.¹¹

In contrast, Section 1626.7(a) states that “an alien seeking representation shall submit appropriate documents to verify eligibility” unless they only receive brief advice via telephone. Copies of documents submitted by the applicant (such as their visa) must

¹⁰ LSC Restriction Section 1626.6(a).

¹¹ LSC Regulation Section 1626.6(b).

be maintained in the applicant's file. Thus, the burden for proving eligibility for LSC-funded services lies with non-nationals, whereas those who claim citizenship need only attest to that claim unless the program suspects they are being untruthful. Aside from the particular questions relating to their immigration status, the application procedure is identical for citizens and non-national.

While the application procedures are largely the same, legal aid organizations have been trying to educate intake staff and advocates about the need to identify further facts and legal problems that may uniquely impact foreign nationals. Thus, when an intake staff member is interviewing a prospective applicant regarding a wage non-payment issue, if the immigrant explains that they are in the U.S. pursuant to a work-related visa, the intake worker should know to inquire about whether the employer has unlawfully confiscated the applicant's visa documents in an effort to control the worker. Such situations are not uncommon, for example, in guest worker arrangements. However, an intake worker who has only ever assisted citizens might not automatically think to inquire about such relevant facts absent particular training on the unique legal issues that immigrants might experience.

(b) If your organization provides legal aid for refugees, what are the criteria for identifying an applicant as refugee? Is your organization responsible for making the identification, or is this done by another agency?

According to LSC regulation Section 1626.4(c), refugees or asylees who are lawfully present in the U.S., pursuant to a lawful admission, or who have been granted asylee status, are fully eligible for federally funded legal assistance without limitation on the scope of services. Those regulations require either a lawful admission (such as the prospective client's entry into the U.S. under a visa before applying for refugee or asylee status once on U.S. soil), or having obtained asylum status regardless of how the immigrant arrived. Given those restrictions, federally funded legal aid organizations are generally not primarily involved in identifying foreigners who are eligible for such statuses. Rather, federally funded legal aid organizations that have chosen to serve immigrants, such as Maryland Legal Aid, try to cultivate relationships with immigrant-oriented social service agencies. Those social service agencies, such as the Baltimore Resettlement Center in Maryland, work closely with the federal government to receive incoming refugee populations. Those organizations identify prospective clients who already have refugee or asylee status (or assist them with obtaining such status). Then the social service agencies refer those foreign nationals who are in need of other, non-immigration-related legal services, to legal aid.

Such organizations are our most reliable sources for identifying immigrant-related legal problems and directing affected community members to our offices. Cultivating relationships with social service agencies that have established ties to immigrant communities is critical to building trust in a variety of immigrant communities. Such partnerships allow legal aid organizations to begin overcoming cultural and language barriers, especially where the legal aid programs may not be able to employ multilingual and multicultural advocates from every immigrant community that resides in their service delivery area. American immigrant communities still rely heavily upon word of mouth referral and advice from community elders or respected advocates. Being able to assist a

few of those “liaisons” through a formal (or informal) partnership is the first-step in establishing credibility and comfort in foreign national communities.

(c) What are the challenges facing legal aid lawyers in providing services to foreign workers/spouses, undocumented foreigners, refugees, victims of human trafficking and other non-nationals? What are the ways of overcoming them? Does your organization provide any assistance?

The primary challenge facing legal aid lawyers in providing services to foreign workers/spouses, etc. is lack of resources, especially unrestricted federal funding for legal aid, as discussed above. However, even if eligibility for legal services were a non-issue, challenges in the representation of foreign nationals would remain. Foreign nationals, and the legal aid organizations which represent them, are constantly faced with language and cultural barriers that must be overcome both inside and outside of the courtroom.

For example, even in a world of perfect communication, the U.S. legal system, especially the civil legal system, is not set-up to easily accommodate the needs of foreign nationals, much less low-income foreign nationals lacking lawful immigration status. As civil legal services attorney Cathleen Caron stated in her groundbreaking journal article on this subject, “Justice, unlike migrants, does not easily cross borders.”¹² American legal services advocates have thus begun developing the human rights theory that there should be “portable justice”, or access to justice that is at least as easy to obtain as access to a foreign, and therefore easily exploitable, workforce. Caron’s international NGO, called the Global Workers Justice Alliance, is one of two international NGOs aimed at assisting American legal aid organizations. Her organization focuses on putting American legal services programs (both federally and non-federally-funded) in touch with advocates and workers from Central America in order to protect those workers rights when they work (or have worked) in the U.S.¹³ The companion organization, Centro de los Derechos del Migrante (the Center for Migrant Workers’ Rights), was founded by legal services attorney Rachael Micah-Jones, and focuses on establishing the same relationships between U.S. and Mexican advocates and workers.¹⁴ Both of these organizations were founded within the last ten years after U.S. worker advocates experienced widespread obstacles when trying to enforce foreign national clients’ rights.

Some American legal aid organizations lacked even the most basic litigation budgets needed to communicate with clients who had returned to their home countries once their work visas had expired. Other programs’ clients lacked telephones or mail service where they could be reached even if programs could afford it. Once a suit was filed, say to enforce the workers’ contract and wage rights, legal aid advocates lacked ways to obtain interrogatory responses or discovery (such as gathering documents from their client and other witnesses) from those in foreign countries, where many worker abuses begin or continued upon their return. Still further, securing permission for their

¹² “Portable Justice, Global Workers, and the United States”, by Cathleen Caron, attorney and Executive Director of the Global Workers Justice Alliance, Clearinghouse REVIEW Journal of Poverty Law and Policy, Jan.-Feb. 2007 edition, available online at www.globalworkers.org

¹³ The Global Workers Justice Alliance website may be viewed at www.globalworkers.org.

¹⁴ The Centro de los Derechos del Migrante (CDM) website may be viewed at www.cdmigrante.org.

clients to enter the U.S. for deposition or trial was extremely difficult. The U.S. does not have a “court visa” process and is likely to deny humanitarian or tourist visas to clients who, due to their indigence, the government considers likely to overstay their visas and/or remain in the U.S. without permission indefinitely. Assuming those obstacles are overcome, the enforcement of U.S. court judgments against foreign entities (from a jurisdictional and practical perspective) is difficult and requires knowledge of foreign law that most American legal services advocates do not usually receive in law school. If a judgment is paid (or a settlement prior to judgment is reached), sending the money to clients who reside in foreign countries, and who may lack identification or bank accounts, is also challenging. The inability to distribute settlement proceeds to all affected workers plays into employers’ hands, which often receive refunds of unclaimed compensation.¹⁵

Most importantly, it is extremely difficult for American advocates to educate prospective guest workers (or foreign nationals who may decide to work in the U.S. without legal permission) about their rights *before* they arrive in the U.S. whereupon they become particularly vulnerable. Prior to the establishment of GWJA and CDM, American advocates had an inconsistent approach to conducting community education in Mexico, for example, and little support from state or local Mexican officials who generally have a vested interest in support the U.S.’s demands for cheap labor. While the establishment of GWJA and CDM has by no means completely resolved those challenges, they have gone a long ways towards reducing many of those barriers. They now conduct regular community education programs to foreign workers who will be coming to the U.S., which helps them understand their rights from the beginning of work-contract negotiations. Their services also help put migrants in contact with U.S. advocates much earlier in the dispute process. Further, there are now several legal services organizations that are well versed in conducting depositions in their clients’ home countries. The arrangements for such events are sometimes made by GWJA or CDM who have scouted technologically appropriate facilities in numerous rural and urban locations in clients’ home countries. While many barriers remain, it has become much less difficult to vigorously represent foreign nationals, especially those who have not remained in the U.S.

(d) When non-nationals are placed in shelters that restrict their liberty under the relevant laws, are they informed of the progress of their court cases? While they are in these shelters, are they able to exercise their right of appeal? How do legal aid lawyers provide assistance on this point?

As of October 6, 2009, the guidelines for the detention of non-nationals by the American federal government have changed dramatically. Especially during the Bush administration’s tenure, immigrant advocates, including legal services advocates, worked tirelessly to publicize the inhumane and often times, deadly, conditions that many foreign nationals in U.S. immigration detention experienced. Those conditions included being held with violent post-adjudication, criminal populations even though illegally entry to the U.S., in and of itself, is a civil violation.¹⁶ Most recently, in 2008, the New York

¹⁵ Caron’s “Portable Justice” article, *id.* at page 551.

¹⁶ According to the Napolitano Report, “Ice operates the largest detention and supervised release program in the country. A total of 378,582 aliens from 221 countries were in custody or

Times published a series of articles, investigated by reporter Nina Bernstein, which exposed the thousands of foreign national deaths that occurred while they were in custody as a result of the government's medical neglect.¹⁷

Consequently, the Obama administration's Secretary of Homeland Security, Ms. Janet Napolitano, announced on October 6, 2009, that her agency was dramatically restructuring the nation's approach to foreign nationals who are taken into custody. Previous to this announcement, non-nationals in federal custody were not held in "shelters", they were held in jails. This included the pre-trial jailing of families, including their young children, who were housed in some facilities with the worst conditions, such as the now infamous T. Don Hutto Family Residential Facility, in Hutto, Texas. According to Ms. Napolitano's new policy guidelines, some of which are effective immediately, Immigration and Customs Enforcement (ICE) will "detain aliens in settings commensurate with the risk of flight and danger they present".¹⁸ Sometime this fall, ICE "will submit to Congress a nationwide implementation plan for the Alternative to Detention Program (ATD)" whereby aliens who are not considered flight risks or dangers to society will no longer be housed in jails.¹⁹ Rather, those eligible for ATD may be housed in "converted hotels, nursing homes and other residential facilities as immigration detention facilities for non-criminal, non-violent populations."²⁰

Practically speaking, foreign nationals in immigration detention in the U.S. are entitled to appeal their detention and/or conviction. However, it is their right to counsel (or lack thereof) that is critically important to ensuring that those rights are in fact exercisable. Of primary importance is the ability for family members and/or attorneys to be able to locate the detainee as soon as they are taken into custody, and before they may be transferred to a federal facility in another state (or across the country) and away from the legal and social support systems. Although Napolitano has proposed a nationwide locator system to facilitate the quick location of detainees, such program does not currently exist and many detainees therefore lose out on their ability to place a bond to be released from detention before they are transferred to a federal facility.²¹

Nor is there any guarantee, even under the Napolitano reforms, that foreign nationals are entitled to an attorney even if they are in deportation proceedings or in government custody. As the introduction of this paper explained, immigration

supervised by ICE in FY 2008; activities from 2009 remain at a similar level. On September 1, 2009, ICE had 31,075 aliens in detention at more than 300 facilities throughout the U.S. and its territories, with an additional 19,160 aliens in Alternative to Detention programs". *Id.* at page 2. The report continues that, "although the majority of the [current] population [in immigration detention] is characterized as having a low propensity for violence ... with only a few exceptions, the facilities that ICE [currently] uses to detain aliens were built, and operate as jails and prisons to confine pre-trial and sentenced felons." *Id.*

¹⁷ Indeed, the New York Times has a whole web page dedicated to their, and other press, coverage of foreign nationals' deaths while in U.S. custody. That web page may be viewed at: http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration_detention_us/incustody_deaths/index.html.

¹⁸ The U.S. Department of Homeland Security's October 6, 2009, Fact Sheet entitled, "ICE Detention Reform: Principles and Next Steps."

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

proceedings are civil proceedings under American law yet they carry severe criminal consequences if a foreign national attempts to re-enter the country illegally after having been deported. Without counsel to defend against the deportation, or adequately explain the criminal consequences of re-entry after deportation, many foreign nationals are ignorant of the full consequences of the legal proceedings to which they are subject. Napolitano's October 2009 report contained requirements for improving access to detainees for attorneys and consular officials, expanding the government's small legal orientation program (LOP), translation and interpretation services, and law library access and materials.²² However, such requirements, along with medical care tracking, have yet to be fully outlined and adopted.

As discussed above, most foreign nationals in detention are ineligible for federally funded legal aid services. Thus, what little assistance they do receive is provided through non-federally funded legal aid organizations or private attorneys (generally, for a fee). That said, the Napolitano Report contains a list of legal aid "stakeholders" who were surveyed and provided input into what changes the new administration should undertake.²³ Those agencies were instrumental in pressuring the federal government to adopt essential reforms to the American immigration system.

3. Understanding Issues Facing Non-nationals:

(a) Do lawyers and the judiciary in your country have sound understanding of the legal issues and barriers to judicial process facing foreign workers/spouses, undocumented foreigners, refugees, victims of human trafficking and other non-nationals?

Foreign nationals not only experience procedural barriers to accessing justice (i.e. the lack of a right to a civil attorney, as discussed above), they also face substantive barriers to justice as a result of their migrancy.²⁴ The American justice system is implicitly oriented towards litigants who reside in the U.S. For example, many federal courts require the parties (not just their attorneys) to appear at least once in the jurisdiction where the suit has been filed, a near impossibility for many foreign nationals who have returned to their home country or who are in state or federal custody.²⁵ State workers' compensation systems, which are provided to workers who have been injured on the job and purportedly without regard to the workers' immigration status, generally require that the worker remain in the U.S. for medical treatment. Many state laws, and therefore the judiciary, consider a claim abandoned if a patient does not consistently see a U.S. doctor, even if the patient's visa status does not permit her to remain.²⁶

So too the American law is developing on whether foreign workers may be required to admit their current immigration status when trying to claim damages for breach of their employment contract. It is a generally accepted principal in American

²² *Id.*

²³ *Id.*

²⁴ See the "Portable Justice" article by Caron, referenced above, and the answer to Question 2 (c).

²⁵ See, e.g. U.S. District Court, Middle District of Florida Local Court Rule 3.04(b) requiring nonresident plaintiffs to appear in the jurisdiction at least once for deposition.

²⁶ See Caron's "Portable Justice" article, *id.* at page 554.

employment and contract law that employees have a duty to mitigate (i.e. lessen) their damages by seeking other work if they are not provided with all of the work promised to them under their contract. However, foreigners who have worked in the U.S. for longer than their visas allowed, or for employers, who were not authorized to hire them, risk incriminating themselves if they truthfully admit to having met their civil legal obligations to reduce their damages. The use of judicial “protective orders” and invocation of the U.S. Constitution’s 5th Amendment right against self-incrimination has become increasingly common where such client’s admissions may otherwise be used to subject the worker to a permanent bar upon re-entry to the U.S. and/or criminal penalties for having entered or remained in the U.S. illegally.²⁷

(b) How does your organization improve their understanding of these issues?

Foremost, Maryland Legal Aid relies upon the strong national network of legal aid advocates to keep abreast of developing strategies to address the needs of foreign nationals. For example, Maryland Legal Aid’s farmworker advocates (who often represent guest workers) are members of an electronic listserv whereby farmworker advocates from other legal services organizations, nationwide, may discuss litigation strategies, publicize favorable court opinions, share expert witness contact information, refer prospective clients who need to know which legal services advocate to contact in a particular jurisdiction, and track and discuss common defendants. Maryland Legal Aid is also a members of the National Language Access Advocates Network (N-LAAN), a national organization comprised of legal aid advocates who focus upon the language access rights of limited-English proficiency clients (regardless of citizenship).²⁸ N-LAAN not only provides technical support to legal aid organizations on how to find a qualified interpreters for their clients, and test the language abilities of prospective employees, but also discusses substantive legal concepts such as federal or state requirements that government services be offered in a manner that is “materially the same” to those offered to English-language speakers, such as requiring that food stamp applications and personnel provide bilingual services to those applying for benefits.

Maryland Legal Aid is also a leader on immigrant issues within the state of Maryland. In 2005-2006, we conducted a statewide survey of the needs of low-income people in Maryland who have limited-English proficiency (LEP) (the report is called the “2006 Maryland Legal Aid LEP Report). As part of that study, Maryland Legal Aid advocates interviewed our staff, third-party social service providers, individuals who are low-income, surveyed state and federal data, and conducted focus groups of non-English speakers who are in poverty. As a result of that report, Maryland Legal Aid developed a statewide “task force” whereby legal services advocates from across the state meet bi-monthly to discuss the needs of the limited-English proficient communities in their various counties. Such discussions include how we can improve the bilingual capabilities

²⁷ For detailed information on immigration-related protective orders, and other legal strategies involving the representation of migrant workers in the U.S. legal system, see the Global Workers Justice Alliance training manual entitled, “Challenges in Transnational Litigation: Representing Absentee Migrant Workers in U.S. Courts”, self-published in November 2008, and available at www.globalworkers.org.

²⁸ The N-LAAN website is <http://www.probono.net/nlaan/>.

of all of our legal aid offices, what emerging legal needs seem to be especially impacting immigrant communities, and encouraging state agencies to comply with language access requirements in their own provision of government benefits.

(c) How does your organization help them become more ethnically sensitive and improve their awareness towards multi-culturalism?

Maryland Legal Aid helps the judiciary to become more ethnically sensitive and multi-cultural primarily by educating ourselves about the unique barriers immigrants face and then educating ourselves about novel legal strategies to overcome them. For example, when an attorney explains to a federal court judge that her client cannot appear for a deposition in the U.S., despite desperately wanting to do so, because the U.S. will not issue her client a visa, the advocate educates the judge about the strictness of U.S. immigration law, an area about which civil state court judges are generally unaware (immigration law being an area of specialized, federal practice). So too have our advocates been trained on the psychological and physical abuse that a batterer can wield against an immigrant victim of domestic violence, when the batterer threatens to deport them and/or refuses to sponsor their application for lawful permanent residency if a victim reports having been abused.

Aside from the particular education of the judiciary that goes on in all of our cases involving foreign nationals (or non-English-speakers who are citizens), Maryland Legal Aid also participates in state and local forums where they raise those populations' particular needs. For example, in 2009, the Court of Appeals of Maryland (Maryland's highest Court) instituted an Access to Justice Commission. That commission included a subcommittee on the needs of immigrants and non-English-speakers. Maryland Legal Aid has a representative on that commission who has provided critical information to the courts on how court rules (such inconsistent rules for the requesting of an interpreter) play out in our client's experiences with the judicial system.²⁹ We have also ensured that foreign nationals (generally our clients) appear to testify at public hearings that the Court or legislature may hold on matters impacting immigrants.

(4) International Cooperation:

(a) In providing legal aid for foreign workers/spouses, undocumented foreigners, refugees, victims of human trafficking and other non-nationals, does your organization engage in international co-operation with governmental agencies or NGOs from other countries?

Yes, at times American legal aid organizations, including those that are federally funded, such as Maryland Legal aid, engage in international co-operation with

²⁹ For a comprehensive study of American state courts' interpreter duties and policies, see the New York University School of Law's Brennan Center for Justice's July 2009 report entitled, "Language Access in State Courts", authored by Laura Abel, which is available at www.brennancenter.org.

governmental agencies or NGOs in other countries. Those efforts are described throughout this paper. However, many more such efforts are needed.³⁰

5. Marketing Activities:

- (a) **Does your organization inform non-nationals of the availability of legal aid for foreign workers/spouses, undocumented foreigners, refugees, victims of human trafficking and other non-nationals? What are the methods and channels of marketing (e.g., work with NGOs)? How does your organization overcome any language barriers?**

As discussed above, American legal aid organizations, including Maryland Legal Aid, recognize the critical importance of informing foreign nationals of their rights, especially in the foreign nationals' native language. For example, supporting GWJA and CDMs' efforts to educate guest workers before they arrive in the U.S. is one of American legal advocates' primary successes. Once in the U.S., all legal aid organizations that serve farmworkers, for example, also have some sort of "outreach plan" whereby their staff visits the migrant workers who are living in their jurisdiction. For Maryland Legal Aid, this requires staff to locate the migrant labor camps throughout the state (and which sometimes change locations annually), to enter the property (with the permission of the farmworkers, although the property is typically employer-owned), and to conduct impromptu "Know Your Rights" workshops with the workers who express interest. Given that most of those workers are required to work 10 hours a day or more, such visits usually occur in the evenings or on weekends, during what little free time the workers have available. Conducting "migrant outreach" at migrant camps therefore requires the participating legal aid advocates to have flexible work-schedules and to be brave and adventurous when finding and eventually speaking with workers who may be fearful of immigration officials and/or living in locations unfit for human habitation.

Almost all U.S. farmworker programs have literature they distribute at migrant camps. Such literature describes the particular state rights of migrants in that jurisdiction (such as the potential right to a state minimum wage which exceeds the federal wage) and should always include a toll-free phone number that migrants can call to request assistance. Outreach workers are trained to explain that the phone number operates toll-free throughout the U.S. and, if the program has one, they also provide the toll-free phone number that the worker can use to call them from their home country.

Outreach workers orally summarize as much information as possible because an estimated 85% of farmworkers have difficulty obtaining information from printed materials.³¹ Therefore, while the written literature is important, the most important educational strategy is discussing with migrant workers their rights in a conversational manner and emphasizing the phone number they can use to call for further information. Some programs are also experimenting with audio CDs or pictographic cartoon literature

³⁰ For further details, see the above-stated response to Question 2(c) and the 2008 Global Workers Justice Alliance Manual on Transnational Litigation.

³¹ The U.S. National Agriculture Workers Survey (NAWS), sponsored by the U.S. Department of Labor, March 2000. The same study found that seventy-three percent 73% of U.S. farm workers completed what education they do have in their native country of Mexico.

that may be a more culturally appropriate manner of communication than the written word. As more indigenous peoples enter the U.S., especially to perform low-wage agricultural work, it is a constant challenge for legal aid programs to keep their literature and advocates updated on regional dialects. For example, Mixteco is a native Mexican language which growing numbers of farmworkers in California speak and which has little in common with the Spanish-language.

The best method that American legal aid advocates use to communicate with current and prospective clients who have limited-English proficiency is through the hiring of bilingual staff. However, Maryland Legal Aid recognizes that knowing how to speak another language does not necessarily mean that the staff person also understands the requirements and skills of formal legal interpretation. Thus, Maryland Legal Aid makes its best efforts to provide their staff with training on how to properly work with, and serve as, an interpreter. Maryland Legal Aid has developed a formal policy against the use of children as interpreters and discourages the use of family-members as interpreters whenever possible. For advocates who do not speak their client's languages, federal law (pursuant to Title VI of the 1964 Civil Rights Act) requires all recipients of federal-funds to provide interpreters where at least five percent (5%) of their prospective client population speaks a particular language other than English. Thus, if there is no trained legal aid staff available that speaks the client or applicant's language, staff is instructed to call "the Language Line", a national company with whom we have contract for them to provide telephonic interpretation in a wide-variety of languages. A critical first-step in alerting prospective clients to the availability of this interpreter option is the display by Maryland Legal Aid of "I speak" posters, which allow people to point to a posted phrase (stating "I need an interpreter in [Arabic, Farsi, French, Spanish, Russian, etc.]). That way the intake staff can identify the language the applicant / client speaks, even without an interpreter being immediately present, and allows them to accurately identify which language the requested interpreter should speak.

6. Advocacy:

(a) Does your organization participate in the advocacy and reform of international human rights laws?

Participation in the advocacy and reform of international human rights law is not something that traditional, federally-funded, legal services organizations have done much of in the past three decades, especially since "lobbying" is prohibited by the LSC restrictions.³² While there are exceptions to those regulations, their impact seems to have had a wider "chilling effect" on advocacy undertaken outside the courtroom.

However, despite the LSC-restrictions, interest in using international law for the benefit of U.S. legal aid clients is growing. For example, Maryland Legal Aid is one of the LSC-funded (i.e. federally-funded) organizations that have recently adopted a "human rights approach" to its service delivery. Maryland Legal Aid just completed a two-year

³² According to Section 1612.1, "The purpose of this part is to ensure that LSC[-funds] recipients and their employees do not engage in certain prohibited activities, including representation before legislative bodies or other direct lobbying activity, grassroots lobbying, participation in rulemaking, public demonstrations, advocacy training, and certain organizing activities."

strategic planning process, which involved the systematic reconsideration of all the types of legal services it delivers. Rather than focusing exclusively on traditional models of legal services delivery, where the types of cases and legal problems handled by the organization are outlined in strict, and static categories, Maryland Legal Aid adopted a more flexible approach whereby the changing needs of Maryland's varied poverty population could be more precisely addressed. Maryland Legal Aid decided that, first and foremost, the legal services it provided would be those that advanced the basic human rights of its clients. This "human rights approach" was inspired in large part by Law Professor Martha F. Davis' December 2007 article in the Clearinghouse Review: Journal of Law and Poverty, entitled, "Human Rights in the Trenches: Using International Human Rights Law in "Everyday" Legal Aid Cases".³³ Maryland Legal Aid attorneys recognize that not all of the rights their clients seek to enforce are recognized under U.S. law (such as the right to health care or the right to housing). Nonetheless, framing such pleas in the language of international rights both adds substantive avenues for judicial remedies and provides important context for the parties and the judiciary alike. Thus, just as federal and state courts are becoming more willing to consider international law in U.S. cases, Maryland Legal Aid advocates are taking up the call, indeed, duty as properly trained advocates, to add that strategy to their broad arsenal of advocacy strategies.

- (b) **How good is the foreign workers brokerage system in your country? Is the system one of the important structural reasons for the legal problems of foreign workers/spouses, undocumented foreigners, refugees, victims of human trafficking or other non-nationals in your country? If so, does your organization participate in campaigns to reform the brokerage system?**

The formal foreign worker brokerage system in the U.S. is primarily one that relies upon guest workers (i.e. foreign-nationals who are admitted to the U.S. on temporary, non-immigrant visas) or undocumented workers (foreign nationals who work in the U.S. although they lack legal permission to reside in the U.S.). Many of the one-hundred thousand (100,000) guest worker visas which are issued each year are tied to the U.S.-employer, meaning that such foreign nationals lose their lawful immigration status if they choose to abandon their employment for any reason.³⁴ Of particular concern to U.S. legal aid advocates, are the American "H-2" visa programs, which allow U.S. employers to import unskilled, temporary foreign-labor for labor contracts of up to eleven months each year.³⁵ Under the H-2A program, agricultural employers (i.e. farms seeking field laborers) may import an unlimited number of foreign workers to work in agriculture each year, provided employers pass minimal standards of proof that U.S. workers are unwilling to perform the job. The corollary H-2B program allows U.S. employers to import a total of 66,000 foreign temporary workers each year to perform temporary, unskilled labor of a non-agricultural nature (such as landscaping, hotel housekeeping, and

³³ Professor Davis' article is available to online Clearinghouse REVIEW subscribers at http://www.povertylaw.org/clearinghouse-review/issues/2007/2007_nov_dec/davis.

³⁴ See Caron's "Portable Justice" article, *id.* at page 550.

³⁵ *Id.*

seafood processing).³⁶ Employers who participate in the H-2 programs primarily recruit foreign nationals from developing countries, such as Mexico, Jamaica and (until recently Haiti) where prospective employees are so desperate for work that they are willing to endure a multitude of injustices despite often earning far below the U.S. minimum wage.

Despite the fact that all H-2 visa holders are lawful immigrants, as discussed above, only H-2A workers and H-2B workers (in the forestry industry) are eligible for LSC-funded legal aid. Even then, advocates may only assist them with issues relating to enforcing their work contracts. This combination of desperate foreign-national employees, whose immigration status (and often times, housing) is tied to their employer, their bosses who are extremely powerful and “landed” domestic nationals, and limited access to legal services advocates creates the perfect recipe for worker abuse. Indeed, a recent report by the esteemed Southern Poverty Law Center’s Immigrant Justice Project called the American guest worker system one that is, “close to slavery”.³⁷

Most recently, in the spring of 2008, Maryland Legal Aid (along with a number of other federally and non-federally-funded programs) participated (using non-LSC-funds) in a “notice-and-comment” process whereby guest worker advocates submitted wide-sweeping recommendations on how to strengthen workers rights under the H-2 program. Such input was directed to the U.S. Department of Labor, one of the primary federal agencies that oversee the American foreign labor brokerage system. The effects that legal services advocates’ recommendations for improvement will have remain to be seen, largely because there has been a change in presidential administration. Unfortunately, although the Obama administration promises to better protect workers rights, it’s U.S. Department of Labor but has been slow to act thus far.³⁸

³⁶ *Id.*

³⁷ See the Southern Poverty Law Center’s 2007 report entitled, “Close to Slavery: Guestworker Programs in the U.S.”, which is available at www.splcenter.org.

³⁸ For recommendations on steps that the Obama administration’s Department of Labor should take to increase worker protections, see the December 2008 Farmworker Justice report, entitled “Litany of Abuses: More – Not Fewer – Labor Protections Needed in the H-2A Guestworker Program”, available at www.farmworkerjustice.org.