CASE COMMENT

A WORLD WITHOUT FONG YUE TING: ENVISIONING AN ALTERNATIVE REALITY IF THE DISSENTERS PREVAILED

CHRIS WESTFALL*

ABSTRACT

If the dissenters had written Fong Yue Ting, our immigration system would have many more protections for lawful permanent residents. This would promote fairness and increase the legitimacy of our immigration system. Procedurally, immigration cases would be adjudicated by the judiciary, instead of the executive branch. This would remove appellate decisions from the Attorney General's control and insulate these decisions from an administration's policy goals. Further, the Fong Yue Ting dissent would provide a right to a jury trial for the severe punishment of deportation. This differs substantially from the current system, but it would reasonably realign immigration consequences and recognize the seriousness of banishment. Finally, the dissent would provide indigent lawful permanent residents facing removal with appointed counsel. This would result in increased appearance rates, a fairer adversarial system, more efficient court proceedings, and less wasteful spending on detention.

The dissent would also open up the possibility for lawful permanent residents to benefit from currently unavailable constitutional protections. The prohibition on ex post facto laws would foreclose deportation law changes being applied retroactively. Non-criminal offenses, such as drug addiction, could not be punished with the consequence of deportation (which is reserved as a criminal punishment). The Eighth Amendment would also allow the judiciary to block minor offenses from resulting in the disproportionate

* Christopher Westfall, J.D. Candidate, 2019 Georgetown University Law Center; B.A. Political Science- Public Policy, University of California San Diego, magna cum laude, 2015.

punishment of deportation. Beyond the direct application of Fong Yue Ting, the case would likely have broader influence, establishing similar precedent in exclusion jurisprudence.

It is unclear how our population and politics would have developed along this parallel historical track. Unless there was a strong political backlash against the dissenting justices, the decision would have led to more equitable treatment of immigrants. Hopefully, these legal protections would have prompted communal acceptance of immigrants.

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I. INTRODUCTION

In 1892, Congress passed a law that required Chinese immigrants to obtain a certificate of residence.[1] To obtain this certificate, the applicant was required, among other conditions, to prove that he or she resided in the United States since 1879.[2] Fong Yue Ting produced a Chinese witness to prove his residency but did not provide a white witness, as required by statute.[3] As such, the State removed lawful residents, such as Fong Yue Ting, from the country.[4] The Court in Fong Yue Ting held that removal was not a

1. Fong Yue Ting v. United States, 149 U.S. 698, 726 (1893).
2. *Id.* at 1017.
3. *Id.* at 731.
4. *See generally id.*

criminal punishment and any Chinese laborer without a certificate could be removed without a trial.[5] Because deportation was not banishment or a punishment for a crime, due process and other constitutional rights did not apply to Fong Yue Ting's removal.[6] This case is the foundation of the procedures and jurisprudence of immigration law.

If *Fong Yue Ting v. United States* was written by the dissenters, the process by which lawful residents would be removed would be fundamentally altered. Instead of allowing the arbitrary expulsion of lawful Chinese residents, the government could not have retracted the right to remain from lawful residents without due process.[7] Beyond this minimal judgement about a law from 1892, the dissent would change the removal process systematically. The dissenters characterized the deportation of a lawful resident as a criminal punishment.[8] So, the constitutional rights of a criminal proceeding would attach for deportation proceedings, protecting lawful residents with "all the guaranties of the Constitution."[9] This would materialize in a few ways.

The most substantial procedural differences in deportation cases would be the following: the jurisdiction of Article III courts; the right to a jury trial; and the provision of counsel to indigent respondents. Further, lawful permanent residents would be protected by substantive, constitutional doctrines that do not currently apply to deportations, such as, the restriction on ex post facto laws, deportations from non-criminal actions, and cruel and unusual punishments. Also, broader due process rights would likely be guaranteed for exclusion proceedings. These changes would have altered the framing of other cases, but only the most significant and direct changes are discussed.

II. PROCEDURAL CHANGES

The procedures by which we currently remove lawful permanent residents are civil and do not resemble the robust protections that many would expect. Unlike criminal proceedings, immigration law is not administered by Article III courts, does not occur in front of a jury, and does not carry the right to counsel. These procedures would be added if *Fong Yue Ting* was written by the dissenters. This would result in a more just and a more efficient immigration system.

A. *Judicial Proceedings and Review*

Because they are civil, removal proceedings are adjudicated by the Executive Office for Immigration Review (EOIR), a unit of the Department of Justice, and not by Article III courts. EOIR immigration judges, appointed

5. *Id*. at 728-30.
6. *Id*. at 730.
7. *Id*. at 741-42 (Brewer, J., dissenting).
8. *Id*. at 737-38, (Brewer, J., dissenting), 746 (Field, J., dissenting), 763 (Fuller, J., dissenting).
9. *Id*. at 754 (Field, J., dissenting).

by the Attorney General, hear adversarial cases between noncitizens and Department of Homeland Security trial attorneys.[10]

Immigration judges, law enforcement officers, and Department of Homeland Security attorneys all operate under the executive branch's control. This allows the executive to influence immigration proceedings in many ways, including by changing procedures,[11] firing individuals with contrary ideologies,[12] and requiring law enforcement officers to consider traditionally political issues such as deterrence when making bond determinations.[13] Removal decisions can be appealed to the Board of Immigration Appeals, but this body is appointed by the Attorney General, and decisions are directly reviewable by the Attorney General.[14] The immigration appeals process has failed to create uniformity in decision making,[15] and immigration adjudications are influenced by varying administrative policy goals.

The judiciary has been particularly deferential to the political branches' control over immigration law and reluctant to intervene in immigration decisions. Because of the plenary power doctrine (first articulated in *Chae Chan Ping*), the lowered standards of process and constitutional protections in immigration matters,[16] and the doctrine of consular absolutism,[17] the judiciary has asserted little review of immigration legal questions, immigration procedures, and specific immigration decisions. This has allowed the political branches to avoid scrutiny for many of their policy decisions.

If *Fong Yue Ting* had decided that deportation was a criminal punishment,[18] then executive administrative control over deportation proceedings would be completely restructured. Because Article III of the Constitution gives the judicial branch power over criminal trials,[19] the judiciary would decide whether to deport a lawful permanent resident.[20] This would add deportation proceedings for lawful permanent residents to the caseload of federal judges; it would insulate immigration legal jurisprudence from the political whims of each executive's administration; and it would provide independence from politics when deciding specific immigration matters. Shifting control over immigration adjudications from the executive to the judiciary is logical and would add legitimacy to the immigration system.

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10. THOMAS ALEXANDER ALEINIKOFF, ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 898 (8th ed. 2016).

11. JAYA RAMJI-NOGALES, ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 62 (2011).

12. *Id*. at 63.

13. R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 175 (D.D.C. 2015).

14. 8 C.F.R. § 1003.1.

15. David Hausman, The Failure of Immigration Appeals, 164 U. Pa. L. Rev. 1177, 1216 (2016).

16. Aleinikoff, et. al., *supra* note 10, at 194.

17. Stephen Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 Tex. L. Rev. 1615, 1620 (2003).

18. *Fong Yue Ting*, 149 U.S. at 737-38 (Brewer, J., dissenting), 763 (Fuller, J., dissenting).

19. U.S. CONST. art. III, § 2, cl. 3.

20. For the purposes of this analysis, the term "lawful permanent residents" will be used to encompass lawful residents before status was required by the INA.

B. *Jury Trial*

Based on the *Fong Yue Ting* majority's decision that deportation is a civil penalty, the right to a jury trial guaranteed by the Sixth Amendment also does not apply. The basic standard to determine when the right to a trial by jury is guaranteed depends on whether the criminal punishment charged carries a sentence of more than six months imprisonment.[21] The Court has recognized that "deportation is a particularly severe penalty,"[22] but because it is not a criminal punishment, the right to a trial by an impartial jury does not attach. In 2010, the American Bar Association estimated that immigration judges face on average 1,243 proceedings per year,[23] as they attempt to deal with a massive and growing backlog of cases.[24] These noncitizens facing removal are not provided a right to a trial by jury.

If the dissent controlled, then deportation would likely be considered as a criminal punishment with the equivalent of a six-month sentence. The dissenters in *Fong Yue Ting* described deportation as "oftentimes [the] most severe and cruel [punishment]"[25] and a "legislative sentence of banishment."[26] Adding the right to a trial by jury would break significantly from today's status quo. While trial by jury seems like a stark alternative to the current procedures, these dissenting justices considered deportation as one of the most drastic punishments that a country could apply and demanded a trial for Fong Yue Ting. Given the precedential value of the severity of this punishment, trial by jury would likely have been extended to deportation proceedings for lawful permanent residents.

C. *Provision of Counsel*

In *Padilla*, the Court recognized that "deportation is nevertheless intimately related to the criminal process," and that deportation is "uniquely difficult to classify as either a direct or a collateral consequence."[27] The Court imposed a duty of counsel to inform criminal defendants of the risk of deportation arising from a criminal plea.[28] This differentiated that noncitizens deserve some advice from counsel because of the Court-recognized seriousness of the penalty of deportation,[29] and the practically automatic removal for aggravated felony convictions.[30]

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21. *Baldwin v. New York*, 399 U.S. 66, 69 (1970).
22. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).
23. Am. Bar Ass'n, REFORMING THE IMMIGRATION SYSTEM, EXECUTIVE SUMMARY 5 (2010).
24. Human Rights First, TILTED JUSTICE: BACKLOGS GROW WHILE FAIRNESS SHRINKS IN U.S. IMMIGRATION COURTS 4 (2017).
25. *Fong Yue Ting* 149 U.S. at 740 (Brewer, J., dissenting).
26. *Id*. at 763 (Fuller, J., dissenting).
27. *Padilla*, 559 U.S. at 365-66; *see generally* Peter L. Markowitz, Deportation is Different, 13 U. Pa. J. Const. L. 1299 (2011).
28. *Padilla*, 559 U.S. at 374.
29. *Id*.
30. *Id*. at 366; Markowitz, supra note 27, at 1303.

Despite this imposition on counsel appointed for criminal proceedings, due process today has not been interpreted to require indigent noncitizens in deportation proceedings to be provided the assistance of counsel.[31] Despite statistics and examples of legal claims that counsel could have argued, which were presented by dissenters,[32] the *Aguilera* court was not convinced that counsel would have helped the noncitizen to obtain a different result. Therefore, the court decided that fundamental fairness and due process did not require the appointment of counsel.[33] While noncitizens are guaranteed the right to be represented by counsel in removal proceedings, the government may not fund an immigrant's counsel.[34]

Considering immigration as a criminal punishment would nullify the decision to decline to provide counsel to indigent lawful permanent residents that are subject to deportation proceedings. The Sixth Amendment guarantees "in our adversary system of criminal justice, 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."[35] Under the *Fong Yue Ting* dissent, indigent lawful permanent residents would be provided counsel during deportation proceedings because they would be considered criminal prosecutions. This would make INA § 292 a violation of the Sixth Amendment.[36] As a result, criminal defense counsel would need to do much more than inform their client of a risk of deportation, and a public defender (or the immigration equivalent) would represent the client at any deportation proceeding.

Between 2007 and 2012 only 37% of immigrants were represented by counsel at removal proceedings and only 14% of detained immigrants were represented.[37] Those with counsel are fifteen times more likely to seek relief, and five times more likely to obtain relief from removal.[38]

In addition to the inequities of results from of the provision of counsel, the lack of access to counsel leads to inefficiencies in the immigration system. Currently, pro se applicants cause unnecessary strain on courts because an immigration judge must fully develop a record from an unrepresented noncitizen.[39] This requires a judge to navigate language barriers, to screen apprehensive noncitizens for vital evidence, and to analyze legal claims that would have been made by counsel if the individual was represented. The immigration system is also burdened by requests for continuances, which give

31. *See Aguilera-Enriquez v. Immigration & Naturalization Serv.*, 516 F.2d 565, 569 (6th Cir. 1975).
32. *Id.* at 573 (Demascio, J., dissenting).
33. *Id.* at 568-69.
34. 8 U.S.C. § 1362 (2012).
35. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).
36. Or at least under the current interpretation of 8 U.S.C. § 1362 as applied to denying indigent people the right to counsel.
37. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 2 (2015).
38. *Id.* at 76.
39. *Jacinto v. Immigration & Naturalization Serv.*, 208 F.3d 725, 733-34 (9th Cir. 2000).

respondents more time to obtain counsel.[40] The immigration court's time is wasted by these requests, detained individuals' time held in detention is extended while searching for counsel, and counsel has less time to prepare for cases because of the delay in retention of counsel.[41] Also, 93% of non-detained respondents with counsel appeared in court, whereas only 32% of non-detained pro se respondents appeared in court.[42] Not providing counsel wastes the court system's time screening for legal claims, unnecessarily expends government resources on detention while waiting for continuances, and dissuades nonimmigrants from showing up to court.

The provision of counsel would produce better results for lawful permanent residents in deportation proceedings. Lawful permanent residents would be more likely to be released on bond,[43] more likely to apply for relief from removal, and more likely to obtain relief from removal.[44] Counsel would also screen clients to present more coherent arguments to immigration judges, which would lead to less confusion and time wasted in the system. Finally, lawful permanent residents would spend less time in detention because they would be more likely to be released with higher rates of bond granted, higher rates of avoiding removal (and detention while awaiting removal), and less time detained while immigrants seek legal counsel through continuances. This would lower costs that the government spends detaining lawful permanent residents for deportation proceedings.

The provision of counsel would also create new expenses for the government to fund the legal representation of lawful permanent resident respondents. Logically, it would seem that this provision of counsel would require a substantial amount of funding. But a study of the cost of federally funding counsel for all respondents (including undocumented immigrants) in removal proceedings today estimates that the cost of the counsel would be almost entirely offset by the costs saved by lowered rates of detention.[45]

III. DOCTRINAL CHANGES

Some Constitutional rules from the criminal context have been applied to immigration law, such as the void for vagueness rule and the rule of lenity.[46] Other Constitutional rules have been ignored as inapplicable in the immigration context. *Fong Yue Ting's* dissent would likely result in courts recognizing these doctrinal protections for lawful permanent residents.

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40. Eagly, *supra* note 37, at 60.
41. *Id*. at 62.
42. *Id*. at 73.
43. *Id*. at 59.
44. *Id*. at 76.
45. JOHN D. MONTGOMERY, COST OF COUNSEL IN IMMIGRATION: ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC COUNSEL TO INDIGENT PERSONS SUBJECT TO IMMIGRATION REMOVAL PROCEEDINGS 37 (2014).
46. *Leocal v. Ashcroft*, 543 U.S. 1, 384 n.8 (2004) (applying the rule of lenity in the noncriminal deportation context); Markowitz, supra note 27, at 1320-21.

A. *Ex Post Facto Laws*

The prohibition on ex post facto laws has been ignored for lawful permanent residents in removal proceedings.[47] Deportation laws can be changed retroactively, resulting in the deportation of lawful permanent residents for conduct that was not deportable at the time that the offense occurred.[48] Article I, Section 9 of the Constitution forbids ex post facto criminal laws. If a lawful permanent resident was within the "express protection of the Constitution," as declared by the dissenters in *Fong Yue Ting*, then a criminal punishment of deportation could not be issued against a lawful permanent resident retroactively. This would invalidate legislation making a lawful permanent resident's past conduct affect deportation.

B. *Criminal Punishment for Non-Criminal Offenses*

Some actions that are not criminal offenses render a noncitizen deportable. Today, drug abusers and addicts are deportable under INA § 237(a)(2)(B)(ii).[49] Our jurisprudence accepts that conduct such as drug abuse can result in the revocation of the right to remain with little process. In addition to this disproportionate punishment, lawful permanent residents are not required to be informed at entry of the actions that render a lawful permanent resident deportable; this subjects a lawful permanent resident to a criminal punishment for conduct without notice of the consequences.[50] According to the *Fong Yue Ting* dissenters' logic, it would be unacceptable to punish criminally for an action that is not even a crime.[51]

C. *Cruel and Unusual Punishments*

Prior to 1996, the judiciary could recommend against deportation despite a conviction for a deportable offense through judicial recommendation against deportation (JRAD).[52] Congress removed both JRAD and practically all executive discretionary relief by statute.[53] This raised the stakes of criminal convictions and increased the likelihood of disproportionate penalties for minor offenses. Because Congress removed discretion from the executive and judiciary, and the government has aggressively attempted to deport noncitizens for minor offenses,[54] resulting in unjust results from deportation

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47. Markowitz, supra note 27, at 1315.

48. DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 6 (2007); ALEINIKOFF, ET AL., *supra* note 10, 681.

49. 8 U.S.C. § 1227(a)(2)(B)(ii).

50. KANSTROOM, *supra* note 48, at 6.

51. *See Fong Yue Ting* 149 U.S. 698, 737-38 (Brewer, J., dissenting); *Fong Yue Ting* 149 U.S. at 746 (Field, J., dissenting).

52. *Padilla v. Kentucky*, 559 U.S. 356, 363 (2010).

53. *Id.* at 363-64.

54. *See, e.g., Carachuri-Rosendo v. Holder*, 560 U.S. 563, 566 (2010) (attempting to deport a lawful permanent resident for two misdemeanor offenses: simple possession of less than two ounces of marijuana, and possession of one tablet of a common antianxiety medication).

proceedings. If the Eighth Amendment protected lawful permanent residents from cruel and unusual punishments, as the dissenters urged,[55] then these disproportionate results could be challenged.

IV. SOCIETAL IMPACT

A contrary decision in *Fong Yue Ting* could have also influenced future cases outside of protections for lawful permanent residents, such as providing greater procedural protections for deportation of undocumented immigrants. If Article III courts handled the removal of lawful permanent residents, then those courts might also handle other, similar cases such as: the exclusion of lawful permanent residents, the deportation of undocumented immigrants, or the exclusion of undocumented immigrants. If *Fong Yue Ting's* dissenters prevailed, then courts would likely have been receptive legal challenges within Article III courts as well.

A. *Exclusion of Lawful Permanent Residents*

If *Fong Yue Ting* applied robust constitutional protections to lawful permanent residents subject to deportation, then exclusions of lawful permanent residents might require higher standards for due process. While each dissenter recognized the power of the political branches to exclude,[56] the effect of excluding a lawful permanent resident upon their return to the U.S. is equivalent to deportation. *Mezei* decided that lawful permanent residents due process rights do not convey the right to a hearing upon reentry to the country.[57] If *Fong Yue Ting* had decided to process deportation as a criminal punishment, then exclusion of lawful permanent residents without a hearing would be less likely to fulfill adequate due process.

The effect of exclusion of a lawful permanent resident upon their return to the United States is the equivalent punishment as deportation. Mezei's exclusion would have the same effects as being deported from the country—comparable to banishment.[58] Especially in *Mezei*, the lawful permanent resident was not given sufficient notice of his forfeiture of status by travelling abroad, and further he was not notified of the reason for his exclusion.[59]

If our system provided lawful permanent residents a criminal trial for removal, then Mezei likely would deserve some sort of hearing and opportunity to contest the reason for his exclusion. The line between a "clear break" from residence and an acceptable "temporary absence" is arbitrary.[60] Mezei never

55. *See Fong Yue Ting* 149 U.S. at 739-40 (Brewer, J., dissenting); *Fong Yue Ting* 149 U.S. at 759 (Field, J., dissenting).
56. *See Fong Yue Ting* at 738 (Brewer, J., dissenting); *Fong Yue Ting* at 746 (Field, J., dissenting); *Fong Yue Ting* at 762 (Fuller, J., dissenting).
57. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210-12 (1953).
58. *See id.* at 217-18 (Black, J., dissenting).
59. *See id.* at 208-09.
60. *See id.* at 213-14.

acted contrary to the country's consent as a lawful permanent resident, and his charges, which arose while he was abroad were insufficient to warrant expulsion.[61] His exclusion was the equivalent of expulsion and indeterminate detention.[62] If our system treated expulsion as a criminal punishment, then it would likely treat exclusion as a criminal punishment. Under this reasoning, the Court probably would have recognized that Mezei's lawful permanent resident status was revoked without notice. The Court would have been more likely to provide due process protections to excluded lawful permanent residents if *Fong Yue Ting's* precedent provided stronger rights to lawful permanent residents subject to expulsion.

Similarly, in *Plasencia*, a lawful permanent resident's minimal hearing upon return to the country from a short trip abroad would not have sufficed if *Fong Yue Ting*'s dissenter's prevailed. *Fong Yue Ting*'s dissent would have required a full criminal hearing for a deportation, and an exclusion would need a similar proceeding. Even with today's limited due process rights, the *Plasencia* Court was unsure of whether the proceedings were sufficient.[63] Given *Fong Yue Ting*'s dissent setting the context for fuller due process rights, a lawful permanent resident would be guaranteed more than the limited civil consideration that today's exclusion proceedings warrant. The juxtaposition between *Plasencia*'s minimal exclusion hearing after a few days abroad and a full criminal jury trial for a deportation proceeding would have been stark.[64] If we provided robust due process protections for typical removal, then it would seem ridiculous for a lawful permanent resident to sacrifice their due process rights after a short trip across the border. This difference might have swayed more justices to denounce this hearing as insufficient process. While the *Plasencia* Court remanded and alluded to the process being insubstantial, Justice Marshall's dissent would seem much more reasonable and might have had enough votes to prevail. When comparing difference in rights allocated for the same stakes, the Court might have demanded stronger process due for exclusion.

B. *Societal Reactions*

The societal reaction is the most unpredictable result of the *Fong Yue Ting* dissent. The country might have accepted broader protections for lawful permanent residents during removal proceedings. Hopefully, this would have led to acceptance of lawful permanent residents as community members, instead of being viewed as eternal guests.[65] The public also might have rejected the dissenters' views through a regressive backlash, motivating future courts to chip away at protections. Citizens could have rejected *Fong*

61. *See id*. at 217 (Black, J., dissenting).
62. *See id*. at 219-20 (Jackson, J., dissenting).
63. *See Landon v. Plasencia*, 459 U.S. 21, 36-37 (1982).
64. *See id*. at 34 (1982).
65. *See* KANSTROOM, *supra*, note 48 at 6.

Yue Ting and insisted that justices be appointed to overrule the decision, the judiciary's role may have been questioned, or there could have been major political responses restricting other areas of immigration law. In the face of these added procedural and substantive rights for lawful permanent residents, our jurisprudence might have extended protections for undocumented immigrants. It is futile to speculate about these reactions, but they would determine the longevity and scope of the dissenters' decision. These procedural and doctrinal changes from *Fong Yue Ting* would have completely transformed our immigration system.

V. CONCLUSION

A world without *Fong Yue Ting* would be preferable to our current immigration system. Limiting procedural and doctrinal protections for lawful permanent residents is unfair, inefficient, and delegitimizes our immigration laws. The dissent would have provided procedures that would recognize the severity of deportation. The dissenters would also resolve the harmful denial of constitutional protections to lawful permanent residents. Hopefully, the *Fong Yue Ting* dissent would have even broader jurisprudential and societal impacts. The dissenters' views would improve our country's acceptance of undocumented and lawful permanent residents as members of our community. Today's unacceptable handling of immigration cases can be traced back to *Fong Yue Ting*.