AMERICAN IMMIGRATION COUNCIL

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How the Immigration System Falls Short of American Ideals of Justice

Two Systems of Justice

ABOUT SPECIAL REPORTS ON IMMIGRATION

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The Immigration Policy Center (IPC), established in 2003, is the policy arm of the American Immigration Council. IPC's mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy on U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at www.immigrationpolicy.org and our blog at www.immigrationimpact.com.

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The Legal Action Center (LAC) of the American Immigration Council advocates for fundamental fairness in U.S. immigration law. To this end, the LAC engages in impact litigation and appears as amicus curiae (friend of the court) before administrative tribunals and federal courts in significant immigration cases on targeted legal issues. The LAC also provides resources to lawyers litigating immigration cases and serves as a point of contact for lawyers conducting or contemplating immigration litigation. In addition, the LAC works with other immigrants' rights organizations and immigration attorneys across the United States to promote the just and fair administration of the immigration laws. More information is available on the LAC's website at www.legalactioncenter.org.

Introduction

There is a growing consensus that our immigration system is broken. Severe visa backlogs hurt U.S. businesses, undocumented workers are frequently exploited, and record levels of deportations tear families apart. While much energy is now focused on addressing these problems, one issue that is frequently overlooked is the structure and quality of justice accorded immigrants who are caught in the enforcement net. In reforming our immigration system, we must not forget that the immigration removal system—from arrest to hearing to deportation and beyond—does not reflect American values of due process and fundamental fairness.

The failure to provide a fair process to those facing expulsion from the United States is all the more disturbing given the increasing "criminalization" of the immigration enforcement system. Although immigration law is formally termed "civil," Congress has progressively expanded the number of crimes that may render an individual deportable, and immigration law violations often lead to criminal prosecutions. Further, local police now play an increasingly active role in immigration enforcement. Consequently, even relatively minor offenses can result in a person being detained in immigration custody and deported, often with no hope of ever returning to the United States.

At the same time, however, the immigration removal system lacks nearly all of the procedural safeguards we rely on and value in the U.S. justice system. Immigrants facing deportation have neither a right to appointed counsel nor a right to a speedy trial. Harsh immigration laws may apply retroactively, unlawfully obtained evidence is often admissible to prove the government's case, and advisals of fundamental rights are given too late to be meaningful. Moreover, after receiving an order of removal, immigrants have limited ability to challenge their deportation in court. Given the potentially severe consequences of removal—which can range from permanent separation from family in the United States to being returned to a country where a person fears for his life—the lack of procedural safeguards deprives countless individuals of a fair judicial process.

Last year, the Supreme Court signaled discomfort with this asymmetry. While declining to overrule the longstanding maxim that "deportation is not a punishment for a crime,"[1] the Court emphasized in *Padilla v. Kentucky* that "deportation is a particularly severe 'penalty'" and that "deportation is . . . intimately related to the criminal process."[2] *Padilla* further recognized that "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders."[3] In an apparent effort to mitigate these harsh consequences, the Court held that criminal defense attorneys must advise noncitizen clients of the immigration consequences of a plea agreement.[4]

The Court's decision in *Padilla* reflects the degree to which years of neglect have created a sub-par system of justice for immigrants who, from arrest to deportation, do not have the basic due process protections most Americans assume come into play whenever someone's liberty is at stake. For a country that prides itself on fair treatment under the law, the lack of due process is an embarrassment and a danger, as it demonstrates how easily civil liberties can be eroded. Consequently, the deficiencies in the immigration removal system are not just an issue for immigrants or the immigration bar, but for any American concerned about equal justice under the law.

The American Immigration Council is committed to preserving and enhancing the rights of immigrants in removal proceedings and the integrity of the immigration removal system as a whole. As the country begins the debate on substantive reform of our immigration laws, this report is intended to open a broader dialogue on immigration reform by focusing on procedural justice issues. Consequently, this report provides an overview of the fundamental differences between the criminal justice system and the immigration removal process. It also explains the legal justifications that have been offered for denying immigrants facing deportation the same rights as criminal defendants facing imprisonment. It concludes by emphasizing that any future immigration reform legislation must include greater procedural protections for immigrants in removal proceedings.

WHY ARE THERE TWO SYSTEMS OF JUSTICE?

To fully appreciate *how* criminal and removal proceedings are different, one must first understand *why* they are different. Since the late 1800s, the Supreme Court has maintained that deportation is a "civil" rather than "criminal" sanction—i.e., that deportation is not a punishment as such, but rather an administrative mechanism to return immigrants to their native countries. As the Court first said in 1893:

> The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend.[5]

By classifying deportation as a "civil" penalty, the Court held that immigrants facing removal are not entitled to the same constitutional rights provided to defendants facing criminal punishment. It is for this reason that immigrants facing deportation today are not read their rights after being arrested, are not provided an attorney if they cannot afford one, and are not permitted to challenge an order of removal for being "cruel and unusual punishment."

For decades, the Supreme Court's classification of deportation as a "civil" rather than "criminal" penalty has been criticized as highly artificial. Deportation to a foreign country may result in punishment that lasts far longer than incarceration in a domestic prison. Indeed, as Supreme Court Justice Louis Brandeis famously wrote, deportation may lead to the "loss of both property and life; or of all that makes life worth living."[6]

Although the Supreme Court has overruled many of its decisions from the late 1800s, it continues to treat deportation differently than criminal punishment.[7] Consequently, legislation and regulations governing immigration must also be revisited. Only by affording noncitizens greater procedural safeguards in removal proceedings will the country be assured that the same level of fairness that exists in other areas of our judicial system also are at work in our immigration removal system.

Grounds for Removal: Proportionate Punishments

Because the Supreme Court has classified deportation as a "civil" penalty, immigrants are often placed in removal proceedings for engaging in conduct that—under the Constitution and laws of most states—could never be the basis for criminal prosecution. Unlike criminal defendants, for example, immigrants may be placed in removal proceedings for engaging in conduct that did not subject them to removability at the time it took place. In addition, unlike criminal offenses and many civil claims, the grounds of deportability under the federal immigration laws have no statute of limitations—meaning that immigrants may be placed in removal proceedings on the basis of misconduct regardless of how long ago it occurred or whether an individual can show evidence of rehabilitation.

For many immigrants, the prospect of deportation is much more daunting than imprisonment. The notion that deportation is not punishment ignores its wrenching impact on longtime immigrants, particularly those with immediate family members in the United States. Accordingly, the existing distinctions between the civil and criminal systems warrant rethinking.

NO PROHIBITION ON RETROACTIVE APPLICATION

One of the most fundamental tenets of the criminal justice system is that individuals cannot be prosecuted for engaging in conduct that was not against the law at the time it took place. Indeed, the Framers believed this protection so essential to the American justice system that even before the Bill of Rights, the original Constitution itself prohibited the government from enforcing criminal laws retroactively, or "ex post facto."[8]

Because the Supreme Court has held that deportation is not "punitive," however, this basic protection has never applied in removal proceedings—meaning that immigrants may be deported for engaging in conduct that was perfectly legal at the time it took place. In a famous case from the McCarthy era, for example, the Supreme Court upheld the deportation of a man for briefly joining the Communist Party, even though it was not unlawful to do so during his period of membership.[9] According to the majority, "whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation."[10]

Today, the government regularly seeks to deport *lawfully present* immigrants based on old criminal convictions that did not render a person deportable at the time they were committed, but that Congress subsequently designated as "aggravated felonies." In expanding the aggravated felony definition in 1996, Congress imposed no limitations on its ability to reach back and designate crimes regardless of when they occurred. For example, certain misdemeanor fraud and theft offenses became aggravated felonies under the 1996 amendments to the immigration laws, so that conduct for which a person was never even imprisoned can now serve as a basis for deportation.[11]

NO STATUTES OF LIMITATIONS ON REMOVABLE OFFENSES

In the criminal system, the prosecution of all but the most serious offenses, such as murder, are subject to "statutes of limitations," or laws establishing periods of time after which the government can no longer levy charges against an alleged perpetrator. Although they sometimes allow guilty individuals to avoid prosecution, statutes of limitation serve numerous important benefits for society at large. For one thing, they reduce the number of wrongful convictions by requiring the government to initiate proceedings before memories fade or evidence otherwise disappears. For another, they eliminate the threat of prosecution against former criminals who have since rehabilitated themselves, thereby providing an incentive to continue abiding by the law.

Unlike virtually all criminal statutes, federal immigration laws impose no statutes of limitations on the various grounds of deportability. As a result, the government can—and frequently does—initiate removal proceedings against lawful permanent residents (LPRs, or "green card" holders) for relatively minor convictions that occurred decades earlier. This draconian practice can disrupt the lives of both the immigrants in question as well as their U.S.-citizen family members. It also discourages many LPRs from applying for full-fledged citizenship, an important step towards integration into American society, due to fears that discovery of an old criminal conviction could lead to deportation.

The case of Juan Rivas-Melendrez, a Mexican citizen, provides a stark example. He entered the country in 1970 as an LPR. Ten years later, at age 21, he was convicted of statutory rape based on a consensual sexual encounter with his 17-year-old girlfriend. In 2009, nearly three decades later, the Department of Homeland Security (DHS) initiated removal proceedings when it became aware of the conviction. In the interim, Rivas-Melendrez had served in the U.S. Navy, married his wife (also an LPR), and fathered four U.S.-citizen children.

In a decision dismissing a challenge to Rivas-Melendrez's removal order on jurisdictional grounds, a federal court noted that his case was "sympathetic" and questioned whether it was wise for DHS to pursue the deportation of a "long-time permanent resident, husband, and father of four who has served in the military and remained gainfully employed—on the basis of a 30-year-old statutory-rape conviction."[12] Because of the lack of a statute of limitations on the grounds of deportability, someone like Rivas-Melendez can be removed from his home and family at any point, without regard to the amount of time since the conviction or any evidence of rehabilitation or civic contributions.

Prior to Removal Proceedings: Understanding Rights and an Opportunity to be Heard

For many immigrants, the road to deportation begins at the point of arrest. Following arrest, however, noncitizens suspected of violating the immigration laws receive many fewer protections than criminal suspects. Once in the custody of the federal government, immigrants are not advised of their rights before being questioned and are subjected to preliminary examinations before immigration officers, not independent judges. While removal proceedings are pending, broad categories of immigrants are subject to mandatory detention. And tens of thousands of immigrants "agree" to deportation each year without ever appearing in person before, or having their rights explained by, an immigration judge.

LACK OF 'MIRANDA' WARNINGS PRIOR TO INTERROGATION

When criminal suspects are taken into custody, authorities are generally required to advise them prior to interrogation that they have a right to remain silent, that anything they say can be used against them, that they have a right to an attorney, and that an attorney will be provided to them if they cannot afford one.[13] As the Supreme Court explained in *Miranda v. Arizona*—the landmark decision that first recognized this requirement—providing these warnings prior to questioning ensures that criminal suspects are aware of their rights, thereby neutralizing the intimidation inherent in any police interrogation.[14]

Unlike criminal suspects, noncitizens placed under arrest for suspected violations of the immigration laws do not receive "Miranda" warnings before they are questioned. In fact, the federal government generally refuses to allow immigrants to have an attorney present at all during interrogation. The reason for this disparity is not because immigrants are more immune to coercive practices, but because courts have held that such constitutional protections are not required in "civil" proceedings.[15]

While the Constitution does not require that immigrants be given "Miranda" warnings, federal regulations adopted by the Justice Department require that they receive similar advisals regarding the reasons for arrest, the right to be represented by an attorney at their own expense, and the fact that any statement made can be used in a subsequent proceeding. Under a 2011 decision from the Board of Immigration Appeals, however, immigration officers need not provide even these watered-down warnings *before* questioning a person, but may wait until *after* removal proceedings have officially begun.[16] In many cases, the warnings are not given for days or even weeks after the questioning has concluded, which effectively defeats the purpose of the advisals.

NO PRELIMINARY HEARING BEFORE A NEUTRAL MAGISTRATE

Under the Constitution, criminal suspects who are arrested without a warrant may not languish indefinitely in jail. Instead, they must be given a preliminary hearing before a judge or other neutral magistrate within 48 hours to determine whether the police had valid justification (i.e. "probable cause") to arrest them. As the Supreme Court has explained, the purpose of such hearings is to ensure that criminal suspects are not unnecessarily detained without a review of their case by someone "independent of police and prosecution."[17]

Unlike criminal suspects, immigrants who are arrested without a warrant are not given a prompt hearing before a neutral magistrate. Under federal law, they may be examined behind closed doors by federal immigration agents,[18] including the officers who took them into custody in the first place.[19] Immigrants who are detained may request a bond hearing, which must be scheduled for the "earliest possible date."[20] Anecdotal evidence indicates that the scheduling process may take a week or more in some parts of the country, leaving immigrants stranded in detention in the meantime.

MANDATORY DETENTION WITHOUT OPPORTUNITY FOR BOND HEARING

Under the Constitution, criminal suspects are entitled to a hearing where they can argue that they should receive bail. Only if the government can demonstrate that they pose a danger to the community or are likely to flee before trial may bail be denied. By contrast, under a law passed in 1996, large classes of immigrants are subject to "mandatory detention" while their removal proceedings are pending.[21] This means that they are ineligible to receive bond—or even a bond hearing—regardless of whether they pose a risk of flight or a danger to the community.

The Supreme Court has upheld this pre-removal mandatory detention law based on the understanding that removal proceedings are generally completed within 47 days, and that any appeals are resolved within an additional four months.[22] In reality, immigrants may spend years in detention while their hearings are pending, often due to the government's own mistakes. After being arrested in 2009, for example, Cheikh Diop, a native of Senegal, was detained for 1,072 days while his removal proceedings were pending. Mr. Diop's case dragged on, and he remained in detention, while the Board of Immigration Appeals remanded the case three separate times for the immigration judge to make further findings that could have been addressed in his first decision.[23] After a federal court finally ordered the government to provide a bond hearing, an immigration judge ordered Diop released from detention on bond. In a similar case in which a noncitizen was detained for seven years while pursuing relief from removal, the Ninth Circuit Court of Appeals held that LPRs could not be detained for a prolonged period without an opportunity to contest the need for continued detention.[24]

AGREEING TO REMOVAL WITHOUT APPEARING BEFORE A JUDGE

The vast majority of criminal cases are resolved through "plea bargains," or agreements by the defendant to admit guilt in exchange for the dismissal of certain charges or a recommendation for a more lenient sentence. To ensure that criminal defendants understand the consequences of pleading guilty—and that they have not been coerced into accepting a plea—the Constitution requires that they appear in person before a judge and waive their right to a trial knowingly and voluntarily.[25]

In the immigration system, noncitizens may agree to deportation under a process, known as "stipulated removal," that lacks even the basic protections afforded criminal defendants who similarly give up their rights to a full hearing. Immigrants who "stipulate" to their deportation never appear before an immigration judge. Instead, federal immigration officers advise them of their rights and present them with forms to sign. They are often forced to make this decision quickly and without the assistance of an attorney.

Allowing immigrants to agree to removal under such circumstances creates serious potential for abuse. In a case that began in 2006, for example, immigration authorities deported a Mexican citizen named Isaac Ramos through a "stipulated" order of removal. When Ramos returned to the United States to see his wife, an LPR,

and their two U.S.-citizen children, he was indicted for unlawful reentry. However, Ramos challenged his initial removal order, and the court determined that the immigration officer who had interviewed Ramos did not speak competent Spanish—meaning that Ramos was unaware of his right to hire an attorney, to opt for removal proceedings before an immigration judge, and to appeal any unfavorable ruling.[26]

Removal Proceedings: A Fair and Speedy Trial

Certain well-known procedural safeguards are enshrined in our criminal justice system. Under the Bill of Rights, defendants are presumed innocent until proven guilty; may only be convicted if their guilt is established beyond a reasonable doubt; and are entitled to be tried by a jury of their peers. In addition to these constitutional protections, both federal and state courts adhere to extensive rules barring the introduction of hearsay and other potentially unreliable evidence. While such protections make it more difficult for prosecutors to obtain convictions, they are the foundation of a system of justice premised on the idea that it is better that ten guilty persons go free than one innocent be imprisoned.

Under the theory that deportation does not rise to the level of punishment, most protections contained in the Bill of Rights are not available in removal proceedings. Among other disparities, immigrants enjoy no presumption of innocence; may be deported on the basis of evidence that would not be admissible in criminal proceedings; and are tried by administrative law judges who are considered Justice Department attorneys. Moreover, unlike criminal trials, removal proceedings are not subject to rules of evidence limiting the types of statements the government may introduce.

Although entire volumes could be written contrasting criminal trials and deportation proceedings, this paper will focus on seven key differences: the lack of judicial independence; the lack of an adequate discovery process; the likelihood of deportation without a hearing; the lack of a right to a speedy trial; the ability to conduct removal proceedings in a state other than the state of apprehension; the lack of appointed counsel for those who cannot afford to hire a lawyer; and the government's ability to use evidence obtained in violation of the Constitution.

LACK OF JUDICIAL INDEPENDENCE

A defining feature of our government is the separation of powers. Each of the three branches of government has distinct authority and serves as a check on the other two. Inherent in this system is the notion of judicial independence, which ensures that judges are impartial and protected from the influence of the executive and legislative branches of government. Accordingly, judges in the criminal courts are neutral decision-makers wholly independent of the prosecuting agency.

Immigration courts, however, lack many of the attributes of an impartial forum. As an initial matter, they are not wholly independent of the prosecuting agency. The immigration courts are housed in the Executive Office for Immigration Review, which is located in the Department of Justice (DOJ). As employees of the executive branch, immigration judges technically are not judges, but rather DOJ attorneys. In this capacity, they are subject to DOJ performance evaluations, which emphasize case completion goals, rather than judicial standards of conduct.[27] Moreover, the

Justice Department's enforcement responsibilities include defending removal orders in the courts of appeals, and the Attorney General has authority to reverse an immigration judge's decision at any time. These roles are irreconcilable with immigration judges' obligation to "exercise … independent judgment and discretion" when deciding cases.[28]

LACK OF AN ADEQUATE DISCOVERY PROCESS

In the criminal process, the prosecutor is required to turn over "exculpatory evidence" to the defendant.[29] "Exculpatory evidence" is evidence in the government's possession that is favorable to the defendant and that may clear him or her of guilt. In addition, at the defendant's request, the prosecution must disclose certain material relevant to the case and provide a written summary of any testimony the government intends to use. If a criminal defendant requests such disclosure and the government complies, the defendant must, upon request, provide the government with certain evidence that will be used at trial.[30]

The removal process, however, lacks an adequate discovery system and fails to afford noncitizens automatic access to their immigration records. The information in the government's files may be essential to establishing that a person has lawful status in the United States or is eligible for relief from removal. Despite this, most noncitizens facing removal are forced to request copies of their files by filing Freedom of Information Act (FOIA) requests. The FOIA process—which is completely separate from removal proceedings—is inadequate because FOIA requests often take a very long time, continuances in removal hearings are discretionary, and noncitizens in removal proceedings do not always get responses to their FOIA requests before they are removed. In addition, under FOIA, the government may withhold or redact documents.

A 2010 case highlights the problem with the current system.[31] DHS initiated removal proceedings against Sazar Dent, but he maintained that he was a naturalized U.S. citizen and thus could not be removed from the country. Unfortunately, he did not have any evidence establishing his citizenship claim, which the government disputed. The immigration judge ordered him removed. On appeal, Mr. Dent, who was unrepresented, asked for assistance in obtaining documents related to his citizenship claim. The government did not turn over any documents, and his removal order was upheld. It was later discovered that Mr. Dent's immigration file contained a naturalization application that his mother had submitted on his behalf in 1982 and a copy that Mr. Dent himself had submitted in 1986. Neither the immigration judge nor the Board of Immigration Appeals was aware of these documents when they issued decisions ordering Mr. Dent's removal.

The Ninth Circuit Court of Appeals held that the government must automatically provide immigration files to all noncitizens in removal proceedings in which removal is contested, and that the failure to do so may constitute a due process violation. To date, the government has failed to apply *Dent* outside the Ninth Circuit, and has narrowly interpreted the decision even within the Ninth Circuit. As a result, most immigrants in removal proceedings still must file FOIA requests to access their immigration files.

LIKELIHOOD OF DEPORTATION WITHOUT A HEARING

The Constitution gives all criminal defendants the right to have their guilt or innocence determined during a trial before an independent decision-maker. Whether it takes place before a judge or jury, a trial affords both parties—the government and the accused—an opportunity to make their case. Although frequently waived in exchange for a lighter sentence, the right to a trial remains an important facet of the U.S. criminal justice system.

Unlike criminal defendants facing imprisonment, many immigrants who do not meet the criteria for admission to the United States do not receive a hearing before an independent decision-maker but are instead subject to an expedited process. They must plead their case to DHS employees, who under current law are empowered to issue final orders of removal. Indeed, the majority of deportations over the past decade were based on removal orders issued not by immigration judges, but by DHS officers.[32]

Today, barely one in three deportations from the United States occurred following an order of removal from an immigration judge. And after factoring in "stipulated" orders of removal, it is likely that fewer than 25% of removals involved immigrants who appeared in person before an immigration judge.

NO RIGHT TO A SPEEDY TRIAL

In the criminal justice system, the Constitution guarantees all defendants the right to a "speedy" trial. As the Supreme Court has explained, limiting delays between arrest and trial carries benefits for both suspects and society at large.[33] Allowing cases to linger not only prevents innocent defendants from having their names cleared, but can lead to extensive court backlogs. In addition, defendants who are confined pending trial must be detained at taxpayer expense. Whatever its justification, the constitutional right to a speedy criminal trial embodies the familiar maxim that "justice delayed is justice denied."

Unlike criminal defendants, immigrants facing deportation do not enjoy a right to a "speedy" removal proceeding. Today, the backlog in our nation's immigration courts has grown to historic proportions. At the end of July 2012, immigration judges were presiding over more than 320,000 deportation cases around the country that were collectively pending for an average of more than 500 days. (In California, the state with the largest immigration court backlog, the average case was pending for nearly 700 days.) According to immigration attorneys, it is not uncommon for judges to schedule hearings more than a year in advance.

As in the criminal system, significant delays in deportation proceedings raise concerns from both a legal and practical standpoint. For immigrants with no right to stay in the United States, the backlogs simply delay the point by which they must leave the country. At the same time, immigrants who were wrongly placed in removal proceedings—as well as asylum seekers whose fates hinge on the outcome of a hearing—remain stuck in legal limbo and may needlessly languish in detention until their cases are decided.[34] Finally, in hopes of reducing the backlog, immigration judges themselves may feel pressure to resolve cases quickly rather than thoroughly.[35]

HOLDING REMOVAL PROCEEDINGS ACROSS STATE LINES

In addition to guaranteeing a speedy trial, the Constitution also requires criminal defendants to stand trial in the same district in which the offense occurred. The purpose of this provision is to prevent prosecutors from placing defendants on trial in other states, where, in addition to being separated from their families and friends, they could face greater difficulty finding an attorney or gathering evidence needed to defend their cases.

In the immigration system, by contrast, noncitizens are routinely placed in removal proceedings far from the state in which they are apprehended. For example, federal immigration officials routinely transfer noncitizens who are arrested in the Northeast to detention centers in Texas, Louisiana, Georgia, and Alabama.[36] Not only does this mean that they are far from their families, lawyers, and the evidence that they need to support their

cases, but it also results in the application of the law of the Fifth and Eleventh Circuits—federal courts that are generally more conservative and less frequently rule in favor of immigrants.

NO APPOINTMENT OF COUNSEL FOR INDIGENT IMMIGRANTS

In the criminal system, defendants facing even one day in jail are entitled to an attorney if they cannot afford one.[37] The right to counsel begins as soon as a suspect is interrogated and, if the person is convicted, extends through an initial appeal of the verdict. As the Supreme Court has explained, requiring criminal defendants to represent themselves would violate the Constitution, because "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."[38]

Unlike criminal defendants, immigrants facing deportation are not provided an attorney if they cannot afford one. And, DHS often refuses to allow even a privately retained attorney to be present during a post-arrest interrogation.

Of all the differences between criminal and removal proceedings, the lack of appointed counsel may have the most profound impact on immigrants' ability to receive a fair hearing. The immigration laws are so complicated that courts have described them as a "labyrinth" and "second only to the Internal Revenue Code in complexity."[39] As studies have shown, immigrants who are represented by lawyers are much more likely to prevail in their removal case than those who are not, particularly if they are detained while their removal proceedings are pending.[40]

LIMITED ABILITY TO EXCLUDE UNLAWFULLY OBTAINED EVIDENCE

The U.S. criminal justice system enables defendants to prevent the introduction of evidence that was obtained in violation of the Fourth Amendment, which protects against "unreasonable searches and seizures." For example, if the police fail to obtain a warrant before entering a suspect's home, judges will typically exclude any piece of evidence discovered during the ensuing search. Similarly, if a suspect is arrested without "probable cause," judges will ordinarily prevent prosecutors from introducing statements made during subsequent questioning. Although this practice may prevent prosecutors from relying on otherwise reliable evidence, it has undoubtedly deterred many law enforcement officers from violating the Constitution in the first place.

By contrast, immigrants facing deportation are typically unable to prevent the introduction of evidence obtained in violation of the Fourth Amendment. In a decision issued in 1984, the Supreme Court held that immigrants generally cannot suppress unconstitutionally obtained evidence in removal proceedings (subject to a narrow exception for "egregious" violations).[41] As a result, the government often relies upon evidence in removal proceedings that prosecutors would be prohibited from using at a criminal trial. Not surprisingly, because it is more difficult for immigrants to suppress evidence in removal proceedings, federal immigration officers (and, increasingly, local law enforcement agents who play a role in enforcing immigration law) have little incentive to follow the Fourth Amendment in the course of their duties.

In one recent example, Jorge Angel Puc-Ruiz was arrested by local police in St. Charles, Missouri, after officers received a tip from his acquaintance's wife that he and other individuals were consuming alcohol inside a restaurant after hours, in violation of a local ordinance. The officers entered the restaurant without a warrant, placed Puc-Ruiz under arrest, and contacted federal immigration authorities. Although local prosecutors subsequently dropped the charges and the judge expunged the arrest record, finding that the officers had lacked

probable cause to arrest Puc-Ruiz in the first place, a federal judge determined the officers' violation of the Fourth Amendment was not sufficiently "egregious" to merit suppression of the evidence used in immigration court.[42] This watered-down constitutional protection leaves the door open for law enforcement agents to target suspected noncitizens for enforcement without fear of being held accountable for abusing their authority.

After Removal Proceedings: Checks & Balances

When criminal defendants are convicted in court, the verdict often marks the beginning rather than the end of their legal struggle. In all 50 states, a criminal defendant has the right to appeal a verdict or sentence to a higher court, where they may challenge any aspect of their trial or sentence.[43] By contrast, immigrants slated for deportation have comparatively fewer means to challenge their orders of removal. Because they possess fewer rights than criminal defendants, immigrants have fewer legal grounds on which to base an appeal. Laws passed by Congress in 1996 have further limited the types of challenges that immigrants may bring.

NO BAR ON "CRUEL AND UNUSUAL" PUNISHMENT

In the criminal system, the Constitution prohibits courts from imposing punishments that are "cruel and unusual." As a result, criminal defendants may challenge the severity of their sentences for being grossly disproportionate in relation to the crimes for which they were convicted. The Supreme Court has upheld such challenges in numerous cases. In a 1983 case, for example, the Justices overturned a sentence of life in prison without the possibility of parole imposed on a defendant convicted of writing a bad $100 check.[44]

Because removal proceedings are considered "civil" rather than "criminal," courts have found that this protection does not apply—meaning that immigrants cannot challenge orders of deportation for being "cruel and unusual."[45] Without this protection, immigrants who are *legally* in the United States may be deported for criminal convictions that did not result in a day of incarceration. Similarly, immigrants who lack authorization to be in the country may be deported regardless of how many years they have lived here or whether their U.S. citizen relatives would be adversely affected by their removal.

LIMITS ON APPEALS OF REMOVAL ORDERS

A final disparity between the criminal and removal processes relates to individuals' ability to appeal an unfavorable decision. In the criminal system, defendants are typically entitled to at least two rounds of appeal—a "direct" appeal immediately following the verdict, and a subsequent "collateral" appeal that functions as an entirely new proceeding (such as a petition for habeas corpus).

By contrast, immigrants have far fewer opportunities to challenge a deportation order. Although immigrants facing removal may file a "petition for review" with a federal appellate court,[46] Congress has strictly limited the types of arguments that can be raised in such appeals. For example, immigrants are not permitted to challenge "discretionary" determinations by immigration courts,[47] such as waivers of certain grounds of ineligibility for relief, which may be granted on humanitarian grounds. Immigration authorities are also permitted to remove immigrants while their petitions for review are pending—meaning that immigrants who prevail at the appellate

stage may be stranded outside the United States despite an ultimately favorable decision. Finally, the immigration statute precludes the right to seek review of a removal order through a habeas corpus petition.

Conclusion

It has always been a tenet of the American justice system that how we treat the most vulnerable classes of our society reflects how we value justice as a whole. Because the entire immigration system has so long been an afterthought for most Americans, violations of due process that could not occur or would not be tolerated in the criminal justice system abound in the immigration system. There was a time when these disparities might not have been as significant, because the penalties for violating the immigration laws were not as draconian. Deportation did not mean banishment one hundred years ago, before increasingly punitive laws made the consequences of unlawful entry into this country so severe. As we revisit those laws, we must also revisit the framework for enforcing them, particularly within the removal process.

Each of the issues raised in this paper merits longer discussion and more explicit analysis of the appropriate solutions. In short, however, the following must be done to address the current crisis in protecting the rights and liberties of immigrants:

- For far too long, immigration courts have failed to provide a fair, efficient, and effective system of justice. Additional procedural safeguards are necessary to ensure that all immigrants in removal proceedings have an opportunity to present their cases to impartial decision-makers and, where necessary, a right to appeal.
- Access to counsel lies at the very core of our legal system and is integral to ensuring that noncitizens facing removal receive fair process. Immigrants should have access to counsel at every stage of the removal process, including post-arrest interrogation. Counsel should be appointed in cases where an immigrant is unable to retain a lawyer, beginning with minors, persons incompetent to represent themselves due to a mental disability, and other persons deemed particularly vulnerable such that appointment of counsel is necessary to ensure fair resolution and effective adjudication of the proceedings.
- Penalties for violations of our immigration laws must be proportionate to the offenses committed. To mitigate the harsh consequences of certain violations, Congress should impose statutes of limitations on most grounds of deportability and/or adopt broad waivers for humanitarian purposes, to ensure family unity, or where such waivers are otherwise in the public interest. Penalties for immigration law violations should not apply retroactively.
- Any use of detention should be in the least restrictive setting possible, and the decision to detain must be subject to administrative and judicial review at periodic intervals. DHS should limit the use of mandatory detention and, wherever possible, employ alternatives to detention.
- As Congress considers immigration reform proposals, it must recognize the importance of procedural safeguards beyond the immigration court system. Each of the components of immigration reform—legalization, the future of the legal immigration system for family and employment-based immigrants, border and other enforcement revisions, integration and naturalization improvements—must be implemented in a way that comports with due process.

Endnotes

1 *Fong Yue Ting v. United States,* 149 U.S. 698, 730 (1893).

2 *Padilla v. Kentucky,* 130 S. Ct. 1473, 1481 (U.S. 2010).

3 *Id.*

4 *Id.* at 1486.

5 *Ting,* 149 U.S. at 730.

6 *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

7 *See*, *e.g.*, *Padilla v. Kentucky*, 130 S.Ct. at 1481.

8 U.S. Const. art. I, §9, cl. 3.

9 *Galvan v. Press*, 347 U.S. 522 (1954).

10 *Id. at* 531.

11 For instance, under current law theft offenses for which the term of imprisonment is at least one year are considered aggravated felonies, even if a judge suspends all or part of the sentence. 8 USC § 1101(a)(43)(G). Prior to the implementation of the 1996 law, only those theft offenses that carried a term of imprisonment of five or more years were considered aggravated felonies.

12 *Rivas-Melendrez v. Napolitano*, 689 F.3d 732, 739 (7th Cir. 2012).

13 *See Miranda v. Arizona*, 384 U.S. 436 (1966).

14 *Id.* at 467-68.

15 *See*, *e.g.*, *Navia-Duran v. INS,* 568 F.2d 803, 808 (1st Cir.1977) ("[T]he Constitution does not offer the same level of protection to persons subject to civil proceedings as it does to criminal defendants . . . "); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) ("*Miranda* warnings are not required in the deportation context, for deportation proceedings are civil, not criminal in nature . . . "); *Trias-Hernandez v. INS*, 528 F.2d 366, 368 (9th Cir. 1975) (saying that deportation proceedings "are civil rather than criminal in nature and rules for the latter are inapplicable").

16 *Matter of E-R-M-F- & A-S-M-,* 25 I&N Dec. 580, 588 (2011).

17 *Gerstein v. Pugh,* 420 U.S. 103, 118 (1975).

18 INA 287(a)(2), 8 U.S.C. § 1357(a)(2).

19 8 C.F.R. § 287.3(a).

20 Office of the Chief Immigration Judge, *Immigration Court Practice Manual* §9.3(d), 1 April 2008.

21 Under the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Div. C of Pub. L. No. 104-20, detention without bond is mandatory for nearly all noncitizens with criminal convictions, including non-violent misdemeanors. Michael Tan, *Locked Up without End: Indefinite Detention of Immigrants Will Not Make America Safer* (Washington, DC: Immigration Policy Center Special Report, American Immigration Council, October 2011, pp. 3-4).

22 *Demore v. Kim*, 538 U.S. 510, 528-31 (2005); *cf. Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (finding that post-removal period detention is limited to a period reasonably necessary to bring about removal, and may not be indefinite in cases where removal is not possible).

23 *Diop v. ICE*, 656 F.3d 221, 223-26 (3d Cir. 2011).

24 *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 949 (9th Cir. 2008).

25 *Brady v. United States,* 397 U.S. 742, 748 (1970).

26 *United States v. Ramos*, 623 F.3d 672, 680-82 (9th Cir. 2010).

27 *See* Hon. Dana Leigh Marks, "Still a Legal 'Cinderella'? Why the Immigration Courts Remain an Ill-Treated Stepchild Today," *The Federal Lawyer* (March 2012), pp. 29-30.

28 8 C.F.R. § 1003.10(b).

29 *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

30 Fed. R. Crim. P. 16.

31 *See Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010).

32 *See A Decade of Rising Immigration Enforcement* (Washington, DC: Immigration Policy Center, American Immigration Council, January 2013, p. 3).

33 *Barker v. Wingo*, 407 U.S. 514, 519-21 (1972).

34 *See* Lenni Benson and Russell Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* (Washington, DC: Administrative Conference of the United States, June 7, 2012, p. 41), noting that immigration court backlogs have caused many asylum applications to be rejected as time barred.

35 *Id.* at 29.

36 *See*, e.g., Nina Bernstein, "For Those Deported, Court Rulings Come Too Late," *New York Times*, July 20, 2010.

37 *Argersinger v. Hamlin,* 407 U.S. 25, 40 (1972).

38 *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963).

39 *Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987).

40 *See* New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* (December 2011, p. 19); showing successful outcomes in New York Immigration Courts by representation and detention status.

41 *Immigration & Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984).

42 *Puc-Ruiz v. Holder*, 629 F.3d 771 (8th Cir. 2010).

43*See Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

44 *Solem v. Helm*, 463 U.S. 277, 303 (1983).

45 For further discussion of this issue, see Michael Wishnie, *Proportionality in Immigration Law: Does the Punishment Fit the Crime in Immigration Court?* (Washington, DC: Immigration Policy Center, American Immigration Council, April 2012).

46 INA § 242, 8 U.S.C. § 1252.

47 INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B).