

TWO SYSTEMS OF JUSTICE

The current immigration removal system—from arrest to hearing to deportation and beyond—does not reflect American values of due process and fundamental fairness. In fact, the immigration removal system lacks nearly all of the due process protections that come into play in the U.S. criminal 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. Violations of due process that could not occur or would not be tolerated in the criminal justice system abound in the immigration system.

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 or her life—the lack of procedural safeguards deprives countless individuals of a fair judicial process. A new report from the American Immigration Council, *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice*, discusses these issues in more detail and offers a series of recommendations for creating a more balanced system. Key recommendations include:

- **Guarantee access to counsel at every stage of the removal process.**

Problem: Given the high stakes in removal proceedings and the complexity of immigration law, access to counsel is integral to ensuring that immigrants facing removal receive fair treatment. Currently, the government is not obligated to advise an immigrant of the right to counsel (at no expense to the government) in immigration proceedings until *after* questioning and the initiation of an immigration court case. At the hearing stage, nearly half of all immigrants in removal proceedings are forced to represent themselves. As studies have shown, immigrants who are represented by lawyers are much more likely to prevail in their removal cases than those who are not, particularly if they are detained while their removal proceedings are pending.

Recommendation: Immigrants should have access to counsel at every stage of the removal process, including at the time of arrest for an immigration violation. The government should appoint counsel to immigrants in removal proceedings who would otherwise be unrepresented, when it is deemed necessary to ensure a fair hearing. As a first step, counsel must be appointed for minors, persons with mental disabilities, and other particularly vulnerable individuals.

- **End disproportionate penalties for immigration violations.**

Problem: In many cases, the penalty for violating an immigration law is so severe that it amounts to permanent exile from the United States, without any consideration of the actual violation committed. Under our current laws, immigrants may be placed in removal proceedings for conduct that did not make them deportable at the time it took place. Additionally, 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 for relatively minor convictions that occurred decades earlier. Despite the drastic effect removal may have on a long time resident and his or her family, neither the amount of time since the conviction nor subsequent rehabilitation may be taken into account in adjudicating a removal case.

Recommendation: To mitigate the harsh consequences of certain violations, Congress should amend the law to prevent retroactive application of new penalties, apply statutes of limitations to most grounds of deportability, and adopt broad waivers for humanitarian purposes, to ensure family unity, or where such waivers are otherwise in the public interest.

- **Ensure that immigrants get their day in court.**

Problem: One of the hallmarks of the U.S. justice system is the right to have a day in court before an impartial decision-maker. In the current system, many immigrants who are removed never see the inside of a courtroom. Rather, the vast majority of removals occur following an expedited process in which an immigration officer issues the final order of removal without any judicial oversight. Even immigrants who are put into the immigration court process may not make it to court if they “stipulate” to deportation before their first hearing. The stipulation may occur quickly and without the assistance of an attorney.

Recommendation: To ensure that immigrants understand the consequences of stipulating to removal—and that they have not been coerced into signing the stipulation—they should be brought before an immigration judge, who can ensure that they waive their right to a hearing knowingly and voluntarily.

- **Implement additional procedural safeguards to equalize the playing field.**

Problem: During the course of immigration proceedings, immigrants do not routinely have access to their immigration records nor are they given a chance to examine any evidence the government may have against them. In many cases, evidence obtained in violation of a person’s constitutional right to “unreasonable searches and seizures” is admissible in immigration court, even though it would not be in a criminal setting. Finally, immigration court proceedings have only limited appeal procedures, meaning that many decisions are never reviewed by federal judges.

Recommendation: Statutory and regulatory procedural safeguards should be put in place to ensure automatic access to immigration records and any evidence that might be used by the

government in a hearing; evidence obtained in violation of constitutional protections should never be admissible in immigration court; and all immigration decisions should be subject to appeal in federal court.

- **Treat detention like the deprivation of liberty that it is.**

Problem: Given the gravity of pre-trial detention, criminal suspects are entitled to a hearing where they can argue that they should receive bail. But under a law passed in 1996, large classes of immigrants are subject to “mandatory detention” while their removal proceedings are pending. 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.

Recommendation: 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. Congress should limit the use of mandatory detention and require the use of alternatives to detention whenever possible.