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U.S. House of Representatives Committee on the Judiciary Subcommittee on Immigration and Citizenship

Hearing: For the Rule of Law, An Independent Immigration Court

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This statement discusses some of the systemic problems with the U.S. Immigration Court system and broad-based reforms needed, including a fully independent judiciary.

The U.S. Is Deporting People Who Qualify for Asylum

The current U.S. immigration system is not designed to function fairly, but to fail. There are many examples of this, but today I will focus on examples from the U.S. Immigration Courts.

In January 2022, Transactional Records Access Clearinghouse analyzed data provided by the U.S. Government regarding outcomes for the “Dedicated Docket,” a program to funnel certain asylum court cases through a fast-track judicial process.¹ As in other immigration legal proceedings, people with cases on the Dedicated Docket are allowed to have legal representation at their own expense, but there is no guaranteed access to counsel.

The Dedicated Docket’s accelerated court process has many features that deny people a full and fair chance at asylum. With less time between court hearings, individuals also have less time to find legal counsel and obtain evidence to prove their cases in court. Also, these individuals are unable to work legally in the United States for at least six months. Therefore earning enough money to pay for legal representation, before one’s court case concludes, is practically impossible. There are nowhere near enough non-profit attorneys in the United States to represent these individuals *pro bono*, so many are forced to navigate the court process alone.

According to government data, so far only thirteen people whose cases were assigned to the Dedicated Docket won asylum or some other form of immigration relief, and 100% of those people had legal representation. In contrast, 1,557 people on the Dedicated Docket were ordered deported, and only 5% (75 in total) had lawyers.

The high percentage of case denials for unrepresented people, and the fact that every person who won relief in court had an immigration lawyer at her side, are evidence of a painful but inevitable truth. U.S. Immigration Judges are ordering the deportation of true

¹ “Unrepresented Families Seeking Asylum on ‘Dedicated Docket’ Ordered Deported by Immigration Courts,” Transactional Records Access Clearinghouse, 1/13/22, <https://trac.syr.edu/immigration/reports/674/>.

refugees because they didn't have legal guides to help them explain their cases in court, not because their experiences did not qualify for asylum.

Asylum cases are, by definition, life or death matters. We have sent and are sending refugees back to persecution they fled.

Tens of thousands of cases remain pending on the Dedicated Docket, but only 15.5% people in that program are represented by counsel. Unless changes are made immediately, such as guaranteed access to legal counsel, accelerated access to work permission, and adequate timelines for gathering evidence, more refugees will be returned to the danger they fled.

In Ohio, immigrants are ten times more likely to win their cases if they have a lawyer.² This means that people who have a right to remain here under the law are losing their cases and being deported, only because they are detained and/or do not have a lawyer to help them.

U.S. Immigration Courts: Life-Or-Death Consequences, Traffic Court Rules

Former Immigration Judge and President of the National Association of Immigration Judges, Dana Leigh Marks, famously compared the U.S. Immigration Court system to deciding "death penalty cases" in "traffic court settings."³ This is true, and all the more reason why our nation should be served by an independent Immigration Court.

Ibrahima Keita fled a dictatorship in Mali thirty years ago.⁴ He applied for asylum in the U.S. and, over the course of several years, scraped together some money to hire an immigration lawyer. But Mr. Keita's lawyer failed to show up at a crucial hearing; he waited outside the courthouse for hours, unaware he could attend the hearing alone. At this hearing, Mr. Keita's fate was sealed. His deportation was ordered *in absentia*.

The Bush and Obama administrations exercised prosecutorial discretion and allowed Mr. Keita to remain in the United States with his family, but the Trump administration deported him. Now, the future of the Keita family—including their two elementary-age sons—is uncertain. The U.S. Government issued a Level 4 Travel Advisory (Do Not Travel) for Mali because of terrorism, kidnappings, and other violence there, making it dangerous for his family to reunite in Mali. Not only dangerous, but deadly. One of Mr. Keita's two U.S. citizen sons has sickle cell anemia, and the treatments he needs to survive are not available there.

² "Mauritanian Network Reacts to Biden Announcement on Access to Counsel in Immigration Courts," Ohio Immigrant Alliance, 5/18/21,

<https://ohioimmigrant.org/2021/05/18/access-to-counsel-life-or-death-matter/>.

³ "Immigration Judge: Death penalty cases in a traffic court setting," CNN, 6/26/14,

<https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html>.

⁴ "Unraveling of Trump policies a distant hope for separated immigrant families," Reuters, 9/29/20, <https://graphics.reuters.com/USA-TRUMP/IMMIGRATION-PROFILES/gjnvwjblpdw/index.html>.

Mr. Keita is one of over 250 people we interviewed at the Ohio Immigrant Alliance for a project called #ReuniteUS. These are people who were deported from the United States after living here for years and even decades, and wish to return to their families, homes, lives, and jobs. Many have U.S. citizen children and spouses who are still in the United States. Several are eligible for legal permanent residency and other forms of immigration status under the law.

In interviewing these individuals and reviewing decisions written by U.S. Immigration Judges, we see a chilling pattern. Lack of access to legal counsel is one factor in their case denials, as indicated above. But there are other infirmities that can only be remedied through creation of an independent immigration court and other reforms.

No Check, No Balance, No Justice For All

Congress sets the laws and the Executive Branch applies them. The Judicial Branch is supposed to provide a check and balance on both, protecting constitutional rights.

The Executive Office for Immigration Review (EOIR), erroneously referred to as the U.S. Immigration “Courts,” is actually a powerful office within the Executive Branch. The Attorney General is in charge of EOIR, directing its budget, employees (including judges), and even case outcomes (through the “certification” superpower).

The Secretary of Homeland Security directs the agencies that act as adversaries to immigrants in U.S. Immigration Court. Both the Attorney General and Secretary of Homeland Security are members of the President’s Cabinet. They are colleagues who report to the same “boss,” an elected official.

In Immigration Court, there are two representatives of the U.S. Government challenging one person, the immigrant—who may or may not be represented by legal counsel, or aware of the legal defenses that can be used in their cases.

The “safety valves” in place after a case is denied by a U.S. Immigration Judge are, nominally, the Board of Immigration Appeals (also directed by the Department of Justice), the U.S. Circuit Courts of Appeals (which also require legal counsel, practically-speaking, to access), and “prosecutorial discretion.”

Prosecutorial discretion exists in numerous areas of criminal and civil law.⁵ In the immigration context, the Executive Branch retains the authority to decide whether or not to execute a deportation order issued by an Immigration Judge, as just one example.

But relying upon prosecutorial discretion as the only “check” in the system is untenable. Discretionary decisions can be impermanent and fluctuate based on political choices, not the law. Prior administrations chose not to deport Ibrahima Keita; the Trump administration did. Deportation—permanent banishment from one’s home, family, job,

⁵ See scholarship of Professor Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar and Clinical Professor of Law at Penn State Law, <https://pennstatelaw.psu.edu/faculty/wadhia>.

and life as they know it—is an extreme consequence for a paperwork problem. It should not be a life sentence, nor should it be a death sentence. Currently, it is often both.

Deporting Mr. Keita was not an exercise of justice, it was an exercise of cruelty. The pain he and his family are experiencing today is profound. A new system is needed to inject due process at all points of access, and live up to our commitment to “Justice For All.”

Systemic Racism—A Driver of Deportation—And The Need for Systemic Reform

The backdrop of the deportations we reviewed as part of the #ReuniteUS project is the system itself—a set of laws and structures that work chaotically, unfairly, and exactly as designed. Immigration laws and administrative agencies were created on a foundation of white supremacy. The goal was not to provide a fair hearing and process for people to become U.S. residents and citizens, but to present the illusion of fairness, while keeping poor people and people of color from accessing power.

Today’s U.S. immigration laws and practices are based on a white supremacist agenda that goes back over a century. For example, in 1929 Congress made unauthorized entry/re-entry into the United States a crime. This was a compromise between Nativists who did not want people from Mexico to come into the country at all, believing they would “dilute the racial purity” of the United States, and agribusiness representatives who wanted people from Mexico to work here but not have rights.⁶

The “compromise” gave authorities a tool to hold over workers’ heads: if you want to work and earn money here, do it without complaint. Otherwise, you may be charged with a crime and sent to federal prison, instead of back to your families. A businessman from Texas said bluntly: “If we could not control the Mexicans and they would take this country it would be better to keep them out, but we can and do control them.”

The Reagan administration turbocharged today’s mass immigration jail network as a response to the exodus of Black men from Haiti and Cuba seeking asylum. Rather than recognizing and treating them as people in need of protection, they were depicted as dangerous—the image reinforced by their incarceration. The U.S. government was well aware that this “could create an appearance of ‘concentration camps’ filled largely by blacks,” did it anyway, and got away with it.⁷ This successful gaslighting of the American people led to the massive network of immigration jails funded by taxpayers today.

⁶ Amicus brief for Professors Kelly Lytle Hernandez, Mae Ngai, and Ingrid Eagly, *U.S. v. Refugio Palomar-Santiago*, March 2021, https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/20-437_Amici_Brief.pdf.

⁷ “How migrant detention became American policy,” *Washington Post*, 7/19/19, <https://www.washingtonpost.com/outlook/2019/07/19/how-migrant-detention-became-american-policy/>.

This is not a system designed for humanitarian protection. It is a system designed for coercion and control; and one that has sent thousands of people back to the persecutors and dangers they ran from.

Most of the people interviewed by the Ohio Immigrant Alliance for #ReuniteUS are Black refugees who sought asylum in the United States. They came here because they thought the United States would be a safe place. Their original legal cases were denied years and even decades ago, but not because they did or do not qualify for asylum. Lack of adequate legal counsel is one factor but institutional racism is also to blame.

As previously discussed, the U.S. Immigration Court system is not an independent judicial body that provides checks and balances on actions taken by the political (executive and legislative) branches. U.S. Immigration Courts, Immigration Judges, and even the Board of Immigration Appeals are all directed, overseen, managed, and funded by the U.S. Department of Justice. Also, many Immigration Judges have no training or background in immigration law. This is a farcical “court” structure where judges are overseen by political appointees and due process is nothing but a dream.

The people whose cases we reviewed at the Ohio Immigrant Alliance were denied asylum due to arcane and arbitrary rules like the one year asylum filing deadline; mistakes made by corrupt or incompetent “legal” advisers; lack of interpreters in their true native languages; and the catch-all for asylum denials: “credibility determinations.” Credibility is a subjective standard informed by a judge’s personal background, not training or legal requirements.

In U.S. Immigration Courts, mainly white, Western-educated people of Judeo-Christian backgrounds make character judgements about people from diverse religious, cultural, social, linguistic, educational, financial, and literacy backgrounds. Some decisions are made based on ignorance and bias.

If a person does not give graphic detail about his torture and break down crying, a judge may decide he is “not credible” and deny his request for asylum. This is because the person is not exhibiting trauma the way this U.S. Immigration Judge, with no psychological training, expects him to. If he fails to look the judge in the eye, or doesn’t give specific names, dates, and sensory details about the most traumatic moments of his life in an intimidating courtroom—or worse yet, through a remote video screen from a county jail—he may be called “aloof” or “evasive” and again deemed “not credible.”

Judges have even denied asylum to refugees when their abuse was acknowledged and “credibility” affirmed, but their torture fell short of permanent physical or psychological damage.⁸ Again, this judgment is being made by a person with no medical or trauma training. Despite the life and death nature of these cases, huge deference is given to the original judges’ credibility assessments on appeal.

⁸ “US Officials Outrageously Claim Black Men Fleeing Slavery Lack ‘Credible Fear,” *Truthout*, 11/17/21, <https://truthout.org/articles/us-officials-outrageously-claim-black-men-fleeing-slavery-lack-credible-fear/>.

This is not a system designed for humanitarian protection. If we want to protect the values we claim, this system has to be discarded and redone.

Stacking the deck against people battling for their lives in U.S. Immigration Court was not enough for the architects of immigration law and policy. They added several indignities to further encourage people to “give up” and “go home”—indignities that still haunt deported people and their families today.

Immigration cases are about civil law compliance and enforcement. But the system makes broad use of tools from the criminal system when it suits the state—such as incarceration—and ignores them when they suit the individual—such as access to counsel and the right to appear in court in person, rather than through a jailhouse video feed.

Many of the people we interviewed spent months and even years in U.S. immigration jail while challenging their civil cases. Typically, these were rural county jails not equipped for long-term detention, far from people’s families, lawyers, and the Immigration Court itself.

Again, this is not by accident. The system is working exactly as designed.

The federal government uses incarceration to coerce people into accepting deportation, rather than continuing to fight their cases from jail. Being detained makes it infinitely harder to find and pay a competent lawyer, and gather documents and evidence needed in immigration cases. Incarceration is extremely expensive and emotionally taxing for families. It takes breadwinners out of homes and adds new costs like price-gouging phone and video calls, commissary accounts, and additional legal expenses, because lawyers’ costs increase when the person is detained and harder to access. Incarceration adds mental and physical stress to the lives of spouses, children, and detained people, who may never fully recover from these experiences.

On top of the procedural and financial hurdles created by incarceration, the government uses physical and psychological abuse against individuals seeking protection. Bayong Brown Bayong and Ahmed Adem were physically assaulted by Corrections Officers supervised by ICE in the Butler County Jail.⁹ ICE and their jailers denied Goura Ndiaye medical treatment for his necrotic hip for months before deporting him in shackles, his hip bone detached from his body.¹⁰ The Morrow County Jail became 100% COVID

⁹ “Witness in lawsuit alleging assaults of immigrants at Butler County Jail has been deported,” Fox 19, 12/18/20,

<https://www.fox19.com/2020/12/18/witness-lawsuit-alleging-assaults-immigrants-butler-county-jail-has-be-en-deported/>.

¹⁰ “After 20 Years in the US, I Was Suddenly Deported to a Country That Still Has Slavery,” Mother Jones, 10/29/20,

<https://www.motherjones.com/politics/2020/10/immigration-trump-miller-election-2020-deported/>.

positive after it refused to institute basic prevention measures.¹¹ Oscar Lopez Acosta died just days after being released from so-called “civil detention” there.¹²

In mass deportation charter flights, men and women are shackled at their wrists, waists, and feet for hours, even when trying to eat or use the restroom. Some are tied up in “The WRAP” restraints and forced to endure hour after hour in stress positions, barely able to breathe.¹³ After deportation, many have had to flee to other countries because they cannot live safely in their countries of deportation.

By jailing people who are requesting asylum, making it nearly impossible for them to prove their cases, and using various physical, financial, and mental coercions to get them to agree to deportation, the U.S. has criminalized the status of being a refugee. This despite the fact the United States committed to protecting refugees after our failure to do so during the Holocaust.

All this to say that there are many reasons that asylum is denied, but few have to do with the actual merits of the case. Deportation is an extreme consequence for losing an asylum case, and the U.S. government has deported many refugees to arrest¹⁴ and even murder.¹⁵ The consequences for life and families are profound.

Recommendations

Tweaks and patches will not remove racism from the U.S. immigration infrastructure or achieve justice. The Ohio Immigrant Alliance recommends the following reforms:

End the Deportation Life (And Death) Sentence

In one of its first acts in office, the Biden administration issued Executive Order 14011 to establish the Interagency Task Force on the Reunification of Families, focusing primarily on families separated at the southern U.S. border. In July 2021, the Biden administration announced a program to facilitate return after deportation for some U.S. military veterans and their families.

The Biden administration must include all separated families in its reunification policies, regardless of where the separation occurred; evaluate and expand the U.S. veteran

¹¹ “Report: 100% of Morrow County jail inmates had COVID-19,” *Mansfield News Journal*, 6/9/20, <https://www.mansfieldnewsjournal.com/story/news/2020/06/08/report-all-morrow-county-ice-jail-inmates-ohio-coronavirus-covid-19-immigration-customs-enforcement/5317798002/>.

¹² “How ICE Data Undercounts COVID-19 Victims,” PBS Frontline, 8/11/20, <https://www.pbs.org/wgbh/frontline/article/how-ice-data-undercounts-covid-19-victims/>.

¹³ “Civil Rights Complaint Reveals ICE Abuse of ‘The WRAP’ Restraints to Facilitate Deportations to Cameroon,” UndocuBlack Network, 10/13/21, <https://undocublack.org/press-releases/2021/10/13/the-wrap-complaint>.

¹⁴ “Mauritanians who sought refuge in U.S. face deportation, then jail,” Thomson Reuters, 12/17/18, <https://www.reuters.com/article/us-mauritania-immigration-usa/mauritanians-who-sought-refuge-in-u-s-face-deportation-then-jail-idUSKBN1OG1DA>.

¹⁵ “‘We sit in disbelief’: the anguish of families torn apart under Trump’s deportation policy,” The Marshall Project, 6/22/20, <https://www.theguardian.com/us-news/2020/jun/22/trump-deportation-policy-families-torn-apart>.

return policy; and enhance and create other avenues for return for individuals who are stateless, have U.S. citizen relatives or other equities in the U.S., and/or are living in unstable and violent situations due to their deportation.

Congress should also remove existing deportation penalties and barriers to return in U.S. law.

Redirect Funding from the Carceral System Toward Due Process and Human Needs

The Biden administration and Congress should redirect federal appropriations from immigration detention and deportation toward policies and practices that promote family unity and due process, and recognize the inherent dignity of all people. This includes ending contracts with the companies that jail immigrants and facilitate mass, inhumane charter flight deportations, whether by providing the planes or undignified restraints.

Instead, money should be directed towards hiring officers to adjudicate consular petitions, waivers, parole requests, and other applications for return; access to legal counsel for all people facing immigration judicial proceedings; and other pro-human due process needs.

Rewrite U.S. Immigration Laws, Systems, and Processes Based on Humanitarian Values, Not White Supremacy

Peter L. Markowitz, Professor of Law at the Benjamin N. Cardozo School of Law has proposed a new architecture for the immigration enforcement system that is more humane, functional, and cost-effective than the current one.¹⁶

This scheme is based on the goal of compliance with the law—which is supposed to be the aim of civil legal structures, no matter the topic—rather than punishment and control based on white supremacy.

He writes:

Just as the goal of criminal justice systems is to reduce crime rates, not to maximize incarceration, policymakers must judge the effectiveness of America's immigration enforcement system on the ultimate measure that matters: compliance with immigration law. By that measure, while ICE's heavy-handed tactics have succeeded in terrorizing communities and dividing the nation, they have failed as a law enforcement strategy. Thus, anyone who cares about fiscal responsibility or effective law enforcement—not simply those who care about immigrant communities—should be eager to rethink the United States' immigration enforcement strategy.

¹⁶ "A New Paradigm for Humane and Effective Immigration Enforcement," Center for American Progress, 11/30/20, <https://www.americanprogress.org/article/new-paradigm-humane-effective-immigration-enforcement/>.

Create an Independent Immigration Court, With Guaranteed Access to Legal Counsel

A system of fairer laws, proportionate consequences, paths to compliance, access to counsel, and an independent immigration court must replace the current punishment-based system created to achieve white supremacist goals.

American school children learn the value of an independent judiciary every day, because this is a fundamental tenet of a functioning democracy. Also today, more and more Americans are committed to naming and rooting out systemic racism in society, laws, and policies.

Addressing the U.S. Immigration Courts—and immigration system writ large—must be part of this reckoning.

No person should be forced to make his immigration case without access to counsel or while incarcerated, cut off from free communication and the ability to track down evidence he needs to succeed. A person should never have to face his adversary or attempt to appeal to an Immigration Judge through a jailhouse video feed. Those are characteristics of a system designed to fail the people it pretends to protect.

It's time to stop pretending and build a system that is fair and just.