

PROVIDING NONCITIZENS WITH THEIR DAY IN COURT

Our legal system rests upon the principle that everyone is entitled to due process of law and a meaningful opportunity to be heard. But for far too long, immigration courts have failed to provide noncitizens with a system of justice that lives up to this standard. A noncitizen has not truly had his day in court if he is removed without ever seeing a judge, if he does not have access to counsel and necessary evidence, or if the decision in his case receives only perfunctory review. The 2013 Border Security, Economic Opportunity, and Immigration Modernization Act (“S. 744”) would take significant steps toward ensuring noncitizens have a fair hearing. This fact sheet explains some of the critical policy proposals found in S. 744 and the basis for them.

A system without sufficient protections

Deportation without a judge

In the current system, many immigrants who are removed never see the inside of a courtroom. In fact, the majority of noncitizens are returned to their home countries through accelerated processes that do not include a hearing before a judge.¹ Even immigrants who are entitled to hearings may not make it to court if an immigration agent convinces them to agree to be deported before their first hearing. More than 160,000 immigrants agreed to these “stipulated removal” orders between 2004 and 2010; the vast majority were unrepresented and in immigration detention.² Those whose cases reach immigration court appear before overburdened judges with insufficient time and resources for the cases in front of them.³

Vulnerable immigrants without attorneys

Even those noncitizens who see a judge may be unable to fairly present their cases. Given the complexity of immigration law, a noncitizen without an attorney typically lacks the specialized knowledge she needs to obtain a just outcome. Immigrants represented by lawyers are much more likely to prevail in their removal cases than those who appear on their own, particularly if they are detained while their removal proceedings are pending.⁴ Yet, the system currently fails to ensure even the most vulnerable immigrants have access to counsel. At the hearing stage, nearly half of all immigrants in removal proceedings are forced to represent themselves.⁵ Even children appear in immigration court without an attorney.⁶

Hearings without access to evidence

Once they are in immigration court, immigrants – whether or not they have attorneys – are at an information disadvantage. They are not automatically

provided with access to their own immigration records, which are held by DHS.⁷ As a result, immigrants sometimes go into their hearings without having a chance to examine evidence that the government may use against them. The government, on the other hand, may be permitted to use evidence against noncitizens even when law enforcement agents obtained that evidence by violating the Constitution.⁸

Detention far from home

Immigrants who are detained, often in remote jails far from their family and homes, face additional hurdles in accessing the evidence they need to present their cases in court. Being detained also makes it much less likely the person will be able to find a lawyer.⁹ Given these obstacles, many immigrants simply give up, opting for deportation instead of fighting their cases while languishing in detention. Yet, detention is often unnecessary. In part, that is because the current laws require the detention of thousands of individuals each year, barring them from making a case for release regardless of whether they pose a risk of flight or are a danger to the community.¹⁰ Even those who are eligible for bond sometimes have to wait weeks or even longer to get a hearing before an immigration judge.

Inadequate review of decisions to deport

Finally, the system lacks adequate oversight mechanisms to ensure that immigration judges' mistakes are fixed and improper legal interpretations are corrected. Noncitizens may seek review of an immigration judge's decision by filing an appeal with the Board of Immigration Appeals (BIA), but this review often is cursory. Noncitizens also may seek federal court review, but the law restricts the types of claims that the court may hear, and as result, the court doors are shut to many.

Momentum for due process in immigration courts

S. 744 seeks to remake our broken immigration system to fit the needs of U.S. families, businesses, and society. As part of this process, the bill makes important strides towards reforming our immigration courts by:

- Mandating that immigration judges conduct an in-person hearing to ensure that a noncitizen's agreement to be deported was voluntary, knowing and intelligent before signing off on a stipulated removal.
- Significantly increasing the number of immigration judges and support staff to reduce backlogs in the court system, and improving the training, resources and technology available to judges.
- Providing that noncitizens have a right to appeal to a 3-judge panel of the BIA and an opinion that addresses all dispositive issues raised in the case.
- Requiring the provision of counsel for children, people with serious mental disabilities, and other particularly vulnerable individuals who would otherwise be forced to proceed on their own in immigration court.
- Expanding the Legal Orientation Program (LOP), which provides detainees in some facilities with basic information about immigration court and their legal rights, to cover all

immigrant detainees. Although participation in LOPs is no replacement for representation by an attorney, expanding the program to all detention facilities would provide some important information to the thousands of detainees who are deported each year without ever seeing an attorney.

- Mandating that DHS file the removal charging document (“notice to appear”) with the immigration court and make a custody determination within 72 hours of arresting someone. The bill also requires timely, bond hearings before an immigration judge for detained immigrants.
- Establishing “secure alternatives” to detention that allow DHS to maintain custody of individuals where detention is not necessary. Such alternatives may include various forms of supervision, community support, and uses of technology to help ensure that a person will appear for a court hearing.

Achieving fairness in immigration court

S.744 tackles some of the most significant due process issues facing immigrants, but would not resolve all problems. Moreover, in the course of committee mark up and floor debate, many of the positive changes proposed face challenges from Members of Congress who fail to understand the significance of due process in immigration cases. Rather than attack these proposals, Congress should work to make S.744 stronger. Immigration reform could increase access to counsel and courts for *all* noncitizens facing deportation, ensure immigrants have access to their own records, and decrease overreliance on immigration detention. If Congress strengthens, rather than cuts back, due process protections in S.744, the bill will make an important step towards ensuring immigrants in removal proceedings have their day in court.

Endnotes

¹ In FY2011, the Department of Homeland Security (DHS) reported that it removed 392,000 noncitizens from the United States; 123,000 were expedited removal orders and 130,000 were reinstatements of prior removal orders. DHS, *Enforcement Actions: 2011* (2012) at 1, available at http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf. In an expedited removal proceeding, an immigration officer issues a removal order that generally does not receive any further review. See INA § 235(b). Likewise, reinstatement of removal permits immigration officers to reinstate a previous removal order without any opportunity for a hearing. See INA § 241(a)(5).

² See Jennifer Lee Koh et al., *Deportation without Due Process* (2011), available at www.nilc.org/document.html?id=6; Jayashri Srikantiah and Karen Tumlin, *Backgrounder: Stipulated Removal* (2008), available at http://www.law.stanford.edu/sites/default/files/child-page/163220/doc/slspublic/Stipulated_removal_backgroundunder.pdf.

³ In 2008, immigration judges issued an average of 1,014 decisions per year – or almost 4 decisions every weekday. American Bar Association, *Reforming the Immigration System* (2010) at ES-28, available at http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012_510.authcheckdam.pdf. See also TRAC, *Immigration Court Backlog Continues to Inch Upward in January*, http://trac.syr.edu/immigration/reports/latest_immcourt/#backlog (finding, in January 2013, a backlog of 323,725 cases in the immigration courts, which had been pending for an average of more than 18 months).

⁴ See, e.g., New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 *Cardozo L. Rev.* 357, 363-64 (2011), available at <http://cardozolawreview.com/Joomla1.5/content/33-2/NYIRS%20Report.33-2.pdf>; Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison* (2009) at 8, available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-sum-doc.pdf>.

⁵ Executive Office for Immigration Review, *FY2012 Statistical Year Book* (March 2013) at G1, available at <http://www.justice.gov/eoir/statspub/fy12syb.pdf>.

⁶ See, e.g., Women's Refugee Commission, *Forced from Home: The Lost Boys and Girls of Central America* (2012) at 25, available at http://womensrefugeecommission.org/component/docman/doc_download/844-forced-from-home-the-lost-boys-and-girls-of-central-america.

⁷ See, e.g., *Dent v. Holder*, 627 F.3d 365, 372-75 (2010).

⁸ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984).

⁹ According to EOIR, only about 20% of detained noncitizens have an attorney in immigration court. See Katharina Obser, Importance of Counsel for Asylum Seekers and Immigrants in Detention Stressed by Faith, Civil Rights, Legal, and Other Leaders (Apr. 26, 2013), available at <http://www.humanrightsfirst.org/2013/04/26/importance-of-counsel-for-asylum-seekers-and-immigrants-in-detention-stressed-by-faith-civil-rights-legal-and-other-leaders/>.

¹⁰ 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).