

## **Voices Unheard: The Unfair Reality of Immigration Court Hearings**

### **Introduction**

The United States has emerged as a dream destination for immigrants worldwide. However, the apparent bias of the nation's immigration courts has characterized its extensive history. The legacy of American immigration legislation exacerbates the intricacy of immigrant justice.<sup>1</sup> Economic, social, and political factors have guided the system and its flaws. Following the fundamental tenets of American society, the modern immigrant justice system attempts to balance humanitarian values, economic interests, and national security.<sup>2</sup> Nevertheless, this research paper argues that, based on the available evidence regarding legal representation and evidentiary standards, the American immigration court system is largely ineffective, and its hearings fail to ensure justice and equality for immigrants.

United States immigration courts render life-changing decisions.<sup>3</sup> Frequently, the rulings of these courts result in deportation, familial separation, and the disruption of lives established in America.<sup>4</sup> The nation's immigration courts are confronted with an unprecedented crisis as of April 2023, boasting a backlog of almost two million cases.<sup>5</sup> The volume of cases heard has increased exponentially during the last decade. Eliminating the nearly two million pending cases would be a formidable challenge, even under ideal circumstances where no new cases are presented to the

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<sup>1</sup> Barak, Maya Pagni. *The Slow Violence of Immigration Court: Procedural Justice on Trial*. N.Y.U. Press, 2023. <https://academic.oup.com/nyu-press-scholarship-online/book/51287?redirectedFrom=PDF>

<sup>2</sup> Brownsword, Roger. "Immigrants, State Responsibilities, and Human Dignity." *Ratio juris* 34, no. 1 (2021): 6-28. <https://doi.org/10.1111/raju.12303>

<sup>3</sup> Chishti, Muzaffar, Doris Meissner, Stephen Yale-Loehr, Kathleen Bush-Joseph, and Christopher Levesque. *At the Breaking Point: Rethinking the U.S. Immigration Court System*. Migration Policy Institute, 2023. [https://www.migrationpolicy.org/sites/default/files/publications/mpi-courts-report-2023\\_final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/mpi-courts-report-2023_final.pdf)

<sup>4</sup> Brustin, Stacy L. "A Civil Shame: The Failure to Protect Due Process in Discretionary Immigration Custody & Bond Redetermination Hearings." *Brook. L. Rev.* 88 (2022): 163. <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=2327&context=blr>

<sup>5</sup> Chishti et al., 2023

courts. This is partly due to the limited number of immigration judges in the country to manage the backlog.<sup>6</sup>

### ***Research Objectives***

The primary objective of this research paper is to critically examine the inherent flaws within the American immigration court system through an analysis of various policy concepts and court cases relating to legal representation and evidentiary standards. By conducting thorough research into the matter, this paper endeavors to decipher the fundamental elements contributing to the lack of fairness towards immigrants, thereby exposing the systemic problems that sustain these inequalities. Given the insights garnered, this paper will propose strategies for revitalizing immigration courts to promote justice and fairness rather than perpetuate prejudice against an already vulnerable population.

### ***Scope and Significance***

The research scope encompasses examining immigration courts' lack of legal representation and lax evidentiary standards as reasons behind the injustice in their hearings and providing suggestions for improvement. This research may contribute to numerous reform initiatives within the immigrant justice system through its prospective influence on public discourse, policy discussions, and legal reforms. The paper also strives to increase understanding of the complexities confronting immigrants in the United States legal system and to support realistic, fair, and humane solutions that balance the rights of immigrants and those of the country by employing a targeted yet inclusive approach.

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<sup>6</sup> Ibid.

## A Slow and Inefficient System

Delays and inefficiency are evident in immigration hearings in the United States. The court process for immigrants facing adjudication under this system generally lasts at least two years.<sup>7</sup> There are waiting times that largely foster unpredictability for immigrants who have no option but to endure hardship in detention facilities.<sup>8</sup> Such horrors of the detention conditions may exert further pressure on the detained immigrants and can force them to forfeit legal claims for asylum or other forms of relief in many of these cases. This only aggravates injustice in the immigration court system, with non-detained immigrants typically affected by work permit delays.

Furthermore, deficiencies in immigration court processes encourage a climate that breeds questionable judicial findings, increasing the number of appeals, remands, and overturned verdicts.<sup>9</sup> These challenges pressure the human and financial resources of the immigration court system. Therefore, the effectiveness of the decision-making process that is objective and fair turns out to be limited. Hence, together with the processing times embedded in immigration matters, the colossal backlog and growing case volume put enormous pressure on the immigrant judicial system. With waiting times extended and processing times slowed, the movement of witnesses to where they live has become a leading cause of worsening the problems in gathering evidence.

The respondents are likely to fail to appear in court, which results in idle processes. When a case is mired with stagnant proceedings and insufficient evidence presented, immigration judges are more likely to become unaccustomed to the facts and legal environment.<sup>10</sup> This, thus, weakens

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<sup>7</sup> Ibid.

<sup>8</sup> Cho, Hyunhye, Eunice, Tara Tidwell Cullen, and Clara Long. "Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration." (2020). <https://digitalcommons.unl.edu/dhspapers/3/>

<sup>9</sup> Kennedy, Patrick. "Diffusion of Soft Immigration Law: Evidence from Asylum Adjudication in the Wake of Matter of A.B." *Mont. L. Rev.* 83 (2022): 41.

<https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=2492&context=mlr>

<sup>10</sup> Chishti et al., 2023

the probability of getting an accountable, fair, and objective judgment. Additionally, prolonging the hearing process often undermines the respondents' ability to build a robust legal defense.

### **Absence of Legal Representation**

The function of legal counsel is indispensable in ensuring justice by shaping the court's efficacy, uniformity in its rulings, and preciseness on how evidence is interpreted. The trend is even worse concerning immigrant legal representation.<sup>11</sup> Legal representation was obtained by 14% of all immigrants in detention and 37% of their counterparts in deportation proceedings between 2007 and 2012.<sup>12</sup> This pattern worsened in 2021, with an estimated 6% of detained immigrants and 22% of deportation-threatened immigrants, respectively, being represented by an attorney.<sup>13</sup> As a result, the legal representation of immigrants has experienced a decline in statistics over time. For a broader perspective, about 81% of the immigrants subject to removal orders from 2011 to 2019 lacked legal representation.<sup>14</sup> This suggests that the likelihood of an immigrant receiving an unfavorable court ruling is significantly increased in the absence of legal counsel. Furthermore, this may burden the subsequent legal proceedings within the immigrant justice system, mainly due to the heightened volume of appeals resulting from these court proceedings and rulings.

In addition, it has been established that throughout the entirety of the immigration court procedure, the efficiency of legal representation for accused immigrants is enhanced. As an illustration, represented respondents exhibit a decreased propensity to be pursued for unfounded claims, a higher likelihood of being released from detention, and a greater frequency of attending

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<sup>11</sup> Ryo, Emily, and Ian Peacock. "Represented but Unequal: The Contingent Effect of Legal Representation in Removal Proceedings." *Law & Society Review* 55, no. 4 (2021): 634–656. <https://doi.org/10.1111/lasr.12574>

<sup>12</sup> Barak, 2023

<sup>13</sup> Ibid.

<sup>14</sup> Chishti et al., 2023

court proceedings after detention. Consequently, legal representation reduces the accumulation of cases in the immigration justice system, expedites proceedings in court, and alleviates congestion in detention facilities. Furthermore, legal counsel offers an enhanced understanding of cases as the adjudicative process unfolds.<sup>15</sup> Detainees accompanied by legal counsel are more inclined to submit essential, legally pertinent documentation and deliver persuasive arguments supporting their release.

Notwithstanding the advantages of retaining legal counsel, many immigrants who appear before immigration courts remain unrepresented or inadequately represented. Moreover, unequal representation frequently occurs concerning custody categories and locations, contingent upon factors such as population density.<sup>16</sup> Due to the inability of many immigrants to afford legal representation, they are inevitably unrepresented in court.

### ***The Right to Counsel***

The Sixth Amendment assures criminal defendants the right to counsel. Regardless of their financial position, each person accused of a crime is given this right. This is, however, a benefit that is far limited in the immigration court system. Access to legal help is variable through the net of criminal and civil law.<sup>17</sup> Since immigration hearings fall under civil offenses, immigrants are usually not given the right to an attorney and, therefore, are forced to depend on pro bono legal assistance.

In the absence of legal representation for one party, namely the accused immigrant, a fair hearing is compromised and almost always denied to the unrepresented immigrant.<sup>18</sup> Furthermore, the immigration system and its statutes are rather complex, and it is not feasible for a non-citizen

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<sup>15</sup> Barak, 2023

<sup>16</sup> Chishti et al., 2023

<sup>17</sup> Brustin, 2022

<sup>18</sup> Chishti et al., 2023

to effectively negotiate the court system without competent legal representation.<sup>19</sup> Unrepresented immigrants thus cross an unknown territory without any direction, without their specialized legal training in immigration laws and relevant legal knowledge and expertise on the specific accusations against them. As a result, immigration hearings are inherently unjust to the immigrant defendant.

### ***Factors for the Limited Legal Representation of Immigrants***

The restricted availability of legal representation for immigrants is caused by various factors, including socioeconomic disadvantages and systemic flaws within the nation's legal assistance for immigrants. For instance, most deportation-threatened immigrants are unable to afford private counsel and must instead rely solely on pro bono legal assistance and legal financing from nonprofit organizations.<sup>20</sup> Nonetheless, the need for pro bono legal assistance significantly surpasses the existing resources. This causes many accused immigrants to have difficulty obtaining legal representation.<sup>21</sup> The exorbitant expenses of hiring private immigration attorneys compel these immigrants to advocate for themselves in court, notwithstanding their limited comprehension of the complexities of American legislation, judicial processes, and avenues for seeking relief. Particularly in complex cases, this self-representation hinders the immigrant's capacity to construct a persuasive argument that could prevent adverse consequences such as conviction and deportation. In the end, most immigrants still need to be represented.

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<sup>19</sup> Barak, 2023

<sup>20</sup> Ibid.

<sup>21</sup> Ryo and Peacock, 2021

## Evidentiary Standards in Immigration Courts

### *Comparing Evidentiary Standards in Immigration and Criminal Courts*

To further grasp the evidentiary laxity and intrinsic unfairness of the U.S. immigration court system, the immigration court must be contrasted with the criminal court. The criminal courts adhere to a stringent set of evidentiary standards to ensure the highest integrity in the evidence used to support court rulings.<sup>22</sup> The Sixth Amendment allows criminal defendants to confront witnesses and evidence offered against them. This ensures that the evidence given is rigorously scrutinized, that such evidence, based on criminal court decisions, is of high fidelity, and that the possibility of unfair judgment is significantly reduced.

Immigration courts, on the other hand, are civil and have more loose evidentiary standards. To that purpose, it should be underlined that the Fifth and Sixth Amendments mainly apply to criminal procedures as criteria for improving defendants' rights to fair trials. Without the safeguards provided by the Fifth and Sixth Amendments, immigration courts apply lax evidentiary standards, with evidence scrutinized less rigorously than in criminal court. This can jeopardize the integrity of immigration court procedures by undermining fundamental principles of justice and fairness.<sup>23</sup> The subsequent acceptance (and use for decision-making) of weak evidence, such as hearsay, compromises the credibility of immigration court processes. Notably, the Federal Rules of Evidence (F.R.E.) emphasize evidentiary requirements in criminal courts, which are not followed in immigration courts.<sup>24</sup> The immigration courts' evidentiary deficiencies raise the possibility of unfair and unjust outcomes. This demonstrates the disparity between criminal and

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<sup>22</sup> Selberg, Johanna. "Truth and Trauma: Exploring the Merits of Non-Adversarial Asylum Hearings." *Geo. Immigr. L.J.* 35 (2020): 929. <https://www.law.georgetown.edu/immigration-law-journal/wp-content/uploads/sites/19/2021/07/07-Selberg-GT-GILJ210047.pdf>

<sup>23</sup> Kelleher, Meagan, and Michael J Dale, "Coping with Hearsay Evidence in Immigration Proceedings," National Institute for Trial Advocacy, accessed October 30, 2023, <https://www.nita.org/s/product/coping-with-hearsay-evidence-in-immigration-proceedings/01t4W00000Da690QAB>

<sup>24</sup> *Ibid.*

immigration courts. As a result, the fate of an immigrant defendant is more commonly decided based on suspect evidence.

The differentiation between documentary and testimonial evidence further exacerbates the unfairness of immigration courts. In contrast to criminal courts, which impose rigorous authentication standards for documents and scrutinize witness statements, immigration courts often admit unverified statements and documents, thereby perpetuating an unequal system.<sup>25</sup> This is especially harmful in a legal terrain where many defendants have limited comprehension of America's complex legal system, and the divergent evidentiary requirements in immigration courts exacerbate their situation.<sup>26</sup> Immigrants are not afforded the same fundamental protection under the Sixth Amendment as criminal defendants.<sup>27</sup> The consequence of this discrepancy is an imbalanced power structure in which even flawed prosecution evidence can substantially impact the course of court proceedings.

The evidence requirements differentiating the immigration courts from criminal courts portray a vast difference across the immigration court system. A crucial basis of a fair court process and decision is the validity of evidence. As a result, improvements to the American immigration justice system should prioritize raising the evidence requirements in these courts. More robust evidence standards would ensure that immigrant defendants' rights are expanded. One conceivable solution would be to extend Fifth and Sixth Amendment protections to immigrant defendants, notwithstanding that these courts are civil. Imposing equivalent evidence requirements throughout the immigration and criminal court systems would improve equality and access to justice for

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<sup>25</sup> Selberg, 2020

<sup>26</sup> Barak, 2023

<sup>27</sup> Ibid.



immigrants, strengthening America's position as a champion of justice and fairness for all persons within its borders, regardless of citizenship status.

### ***Admissibility of Hearsay Evidence***

Immigration courts of the United States are not bound by Federal Rules of Evidence (F.R.E.). The Executive Office for Immigration Review (E.O.I.R.) provides guidelines and evidence requirements for their operations. These standards of evidence described above are under the Code of Federal Regulations (C.F.R.), the Immigration and Nationality Act (I.N.A.), Board of Immigration Appeals (B.I.A.) precedents, as well as the E.O.I.R. Operating Policies and Procedures Memoranda.<sup>28</sup> The administrative nature of these procedures and regulations deviates from the customary proceedings observed in federal or state courts. In addition, the admission of evidence is at the discretion of the immigration judge, who frequently bases their decisions on the information's pertinence and dependability. Consequently, immigration court proceedings are prone to producing subjective and unequal results.

As per the Department of Justice, hearsay refers to any statement presented in court as proof of the truth in a particular matter, excluding the declaration itself, which was made during the trial or hearing.<sup>29</sup> In immigration court, as decided in *United States ex rel. Bilokumsky v. Tod*, 236 U.S. 149 (1923), hearsay evidence is admissible despite its weak value, provided that it does not constitute inherently unfair evidence.<sup>30</sup> In these judicial systems, hearsay may serve as a foundation for decision-making, even when direct evidence contradicts its assertions. “Country condition reports, documents such as birth records, marriage certificates, or conviction records; ex

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<sup>28</sup> Catholic Legal Immigration Network. "Practice Advisory: Rules of Evidence in Immigration Court Proceedings." Catholic Legal Immigration Network, Inc. (CLINIC). Last modified March 13, 2020. <https://www.cliniclegal.org/sites/default/files/2020-03/Practice%20Advisory%20on%20rules%20of%20evidence%20in%20removal%20proceedings%203.13.2020.pdf>

<sup>29</sup> E.O.I.R. "Hearsay." Department of Justice | United States Department of Justice. Accessed December 4, 2023. <https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/hearsay.pdf>

<sup>30</sup> *United States v. Bilokumsky v. Tod*, 263 U.S. 149 (1923). <https://supreme.justia.com/cases/federal/us/263/149/>

parte affidavits and other statements of witnesses; and out-of-court admissions of the alien” are instances of the types of hearsay evidence that are frequently admitted.<sup>31</sup>

Hearings in immigration court may admit hearsay as evidence so long as its admission serves a probative purpose and does not appear fundamentally unjust. The probative value of evidence is ascertained by its ability to substantiate the claim it is presented to support.<sup>32</sup> This suggests that evidence must be considered reasonable to be considered probative and admissible. Per this provision of the F.R.E., probative evidence is admitted in immigration hearings. However, there needs to be a universally accepted criterion for assessing the fundamental inequality of proof. Due to the ambiguity surrounding the definition and assessment of what constitutes fundamental fairness, immigration courts may admit hearsay evidence that lacks sufficient credibility to ensure a fair and just outcome on the pretext that such evidence does not violate this ambiguous standard.<sup>33</sup>

Due to the lack of clarity surrounding its value in immigration courts and the absence of strict evidence standards imposed by the F.R.E., these courts may render decisions that unjustly disadvantage the immigrant in favor of other parties, such as those governed by hearsay evidence. In *Navarrette-Navarrette v. Landon*, 223 F.2d 234 (9<sup>th</sup> Cir. 1955), the appellant had previously been convicted of unlawfully assisting immigrants into the United States. The appellant contended that the deportability determinations were not supported by “reasonable, substantial, and probative evidence.”<sup>34</sup> He said the statements by the immigrants arrested in his vehicle should not have been admitted as evidence because they were hearsay. The appellant, therefore, asserted that the

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<sup>31</sup> Johnson, Kit. “Immigration Law.”

[https://kitjohnson.net/casebook/files/Immigration\\_Law\\_An\\_Open\\_Casebook\\_1.0.pdf](https://kitjohnson.net/casebook/files/Immigration_Law_An_Open_Casebook_1.0.pdf)

<sup>32</sup> Ibid.

<sup>33</sup> Kelleher and Dale, n.d.

<sup>34</sup> *Navarrette-Navarrette v. Landon*, 223 F.2d 234 (9<sup>th</sup> Cir. 1955). <https://casetext.com/case/navarrette-navarrette-v-landon>

admission of such unverified evidence violated his right to a fair hearing. It is worth noting that the statements were not provided in the appellant's presence, the documents in question were poorly translated from Spanish, the signatures on the statements could not be validated as belonging to the immigrants apprehended in his vehicle, and the arguments themselves did not constitute original documents.<sup>35</sup> The Ninth Circuit, citing *United States v. Brough*, 15 F.2d 377 (2d Cir. 1926), held that administrative hearings are not obligated to adhere to F.R.E. standards and may admit hearsay evidence. As a result, evidence that a court would otherwise deem legally insufficient could be presented to the court. Due to the lack of proof regarding the statements' veracity and probative value, the reliance on hearsay evidence promotes unfairness against the immigrant defendant.

### ***Authentication of Documents***

To augment the credibility of hearings and outcomes, courts must conduct exhaustive verifications of all documents utilized throughout the proceedings. It is more probable that decisions supported by authenticated and verified documents will be credible, unbiased and uphold the court's integrity. Documents that have undergone appropriate authentication processes are fundamental in establishing evidence, ensuring that the data presented in court is accurate, trustworthy, and credible.<sup>36</sup> Nevertheless, immigration courts frequently accept documents that have been inadequately authenticated or lack sufficient standards of evidence owing to lax evidentiary requirements and security protocols.<sup>37</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> Pierce, Sara. "Immigration-Related Policy Changes in the First Two Years of the Trump Administration." *Migration Policy Institute* (2019).  
<https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationChangesTrumpAdministration-FinalWEB.pdf>

<sup>37</sup> Kennedy, 2022

An inherent difficulty in document authentication is the wide range of document formats and derivation that immigrants bring. Immigrants often submit documents from foreign countries, including birth certificates, marriage certificates, and academic records. The absence of universally accepted protocols for international document authentication gives rise to a multifaceted environment in which authenticating such documents becomes a formidable task. As a result, documents that are unreliable or have been falsified may enter court records and influence the decisions of judges without undergoing the requisite scrutiny. Immigration courts rely on these documents when rendering critical determinations such as deportation.<sup>38</sup>

The lack of uniform protocols for verifying documents in immigration hearings exacerbates the issue. In contrast to the exhaustive scrutiny of documents for authenticity that characterizes the F.R.E.-based standards utilized in criminal courts, immigration courts do not adhere to such consistent protocols.<sup>39</sup> Inadequate document authentication has repercussions that transcend individual cases, undermining public confidence in the immigration court system. The perception of needing to improve the rigor of document authentication raises concerns regarding the overall process's credibility. Such skepticism can result in a decline in confidence in the justice system, thereby posing a substantial obstacle to developing trust between immigrants and the institutions entrusted with safeguarding their wellbeing.

Furthermore, the consequences of depending on insufficiently verified documents for identification are profoundly felt by marginalized communities, including asylum claimants who are attempting to escape persecution. Thus, individuals with valid assertions may be subjected to deportation, underscoring the extensive ramifications of loose document authentication

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<sup>38</sup> Rao, Sonya. *Privatizing Language Work: Interpreters and Access in Los Angeles Immigration Court*. University of California, Los Angeles, 2021. <https://escholarship.org/content/qt95v077n2/qt95v077n2.pdf>

<sup>39</sup> Pierce, 2019

protocols.<sup>40</sup> To increase the value of document authentication in the interest of impartiality, immigration courts should implement rigorous, standardized, and comprehensive procedures. Working with international organizations, consulates, and document forensics professionals can facilitate the development of reliable document verification processes. Furthermore, it is critical to establish unambiguous directives for legal representatives and immigrants concerning the acceptable document categories and the necessary authentication criteria. Maintaining document authenticity and credibility by immigration courts bolsters proceedings' integrity, fosters trust in the immigrant justice system, and upholds the fundamental tenets of objectivity for every immigrant.

The absence of appropriate protocols for verifying documents emphasizes the challenges Mamadu Balde faced in the case of *Balde v. Doll*, No. 1: CV-17-1446 (M.D. Penn. 2017).<sup>41</sup> After a Sierra Leonean civil conflict in 1999, Balde attempted to immigrate to the United States but was denied asylum. In 2011, I.C.E. tried to deport Balde to Sierra Leone; however, Balde was denied entry into the country due to the inability of Sierra Leonean officials to authenticate his citizenship. Nine months were subsequently added to his detention period. The contentious nature of Balde's detention and subsequent deportation stemmed directly from the immigration court officials' failure to conduct adequate document verification to determine Balde's country of origin. According to the I.C.E. detention officer in Balde's case, Balde fabricated his nationality to Ivory Coast instead of Sierra Leone.<sup>42</sup> These allegations stemmed from an unverified, undated memorandum. I.C.E. officials relied primarily on this unverified memo as evidence to continue

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<sup>40</sup> Oxford, Connie. "The Gory Details: Asylum, Sexual Assault, and Traumatic Memory." *Sexes* 4, no. 2 (2023): 188–221. <https://doi.org/10.3390/sexes4020015>

<sup>41</sup> Casemine. "*Balde v. Doll*." Casemine. Last modified September 12, 2017. <https://www.casemine.com/judgement/us/59df6a3cadd7b042cdefc2a5>

<sup>42</sup> A.C.L.U. Pennsylvania. "Case 1:17-cv-01446-YK-MCC Document 11 Filed 09/07/17." A.C.L.U. Pennsylvania. Last modified 2017. [https://www.aclupa.org/sites/default/files/field\\_documents/petitioners\\_reply\\_to\\_governments\\_response.pdf](https://www.aclupa.org/sites/default/files/field_documents/petitioners_reply_to_governments_response.pdf)

detaining Balde indefinitely. Balde was ultimately released from detention only after months of infringement of his freedom. This case provides a detailed analysis of how inadequate document verification and a failure to collaborate with source countries to verify documents result in unjust treatment for immigrants, as crucial decisions such as deportation and detention are made based on unverified documents.

### ***Implications of Evidentiary Standards***

The immigration court system's lax evidentiary requirements have numerous repercussions for justice, equality, and the courts' standing. Initially, the disregard for the stringent guidelines of evidence delineated by F.R.E. and the admission of unverified evidence undermines the credibility of these courts, the proceedings they preside over, and the results they render.<sup>43</sup> The erosion of credibility affects how immigrants and the overall public perceive the impartiality of these hearings.<sup>44</sup>

In addition, humanitarian and ethical concerns are created by the lenient evidentiary requirements. The utilization of erroneous evidence to justify crucial determinations, such as the deportation of asylum seekers, gives rise to apprehensions concerning the extent to which the American immigration court system perpetuates ethical and humanitarian ills against susceptible populations.<sup>45</sup> The denial of a fair opportunity to present one's asylum case significantly heightens the risk of wrongful deportation and the likelihood of returning to dangerous circumstances in their home countries. As a result, the American immigration court system may be regarded as a facilitator of violations of fundamental human rights, as it subjects individuals who are already vulnerable to additional infringements upon their rights, including the right to life.

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<sup>43</sup> Marouf, 2022

<sup>44</sup> Barak, 2023

<sup>45</sup> Ibid.

## The Near-Guaranteed Conviction

### *Understanding the Nature of Deportation Proceedings*

The process of deportation in the United States is intricate for an immigrant. The proceedings mentioned above involve a complex interplay of laws and regulations, which can have profound and lasting effects on the families of accused immigrants. Formally referred to as removal proceedings, deportation proceedings are civil.<sup>46</sup> The fact that these proceedings are classified as civil proceedings implies that those at risk of deportation do not enjoy the same legal safeguards as criminal defendants, including the state-provided right to counsel. Consequently, the rights of an immigrant accused and subject to deportation proceedings are notably restricted.

The civil nature of immigration courts and their role in undermining justice for immigrant defenders was brought to the forefront in *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984). In this case, the Court held that “the exclusionary rule generally does not apply to civil deportation hearings.”<sup>47</sup> The two respondents in the case – Lopez-Mendoza and Sandoval-Sanchez – were arrested by the I.N.S. in a warrantless search at their workplaces, and an immigration judge ordered their deportation. They sought a reversal of these previous deportation orders on the basis that their arrests were unlawful and should not have been used to secure deportation orders. The majority decision held that deportation hearings do not adjudicate past conduct; hence, the lawfulness of the arrests or subsequent interrogations was immaterial in the proceedings. This case acknowledges that the civil nature of deportation hearings makes the courts less rigorous. Hence, the outcomes are more likely to favor the prosecution rather than advance justice for the defendant.

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<sup>46</sup> Valdez, Tania, N. "Pleading the Fifth in Immigration Court: A Regulatory Proposal." *Wash. U.L. Rev.* 98 (2020): 1343. <https://journals.library.wustl.edu/lawreview/article/id/4400/download/pdf/>

<sup>47</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). <https://supreme.justia.com/cases/federal/us/468/1032/>

Frequently, these immigrants are compelled to navigate a convoluted legal system without the assistance of an attorney. This circumstance severely undermines their capacity to mount a vigorous defense capable of obtaining a favorable judgment.<sup>48</sup> That is to say, the deportation of an immigrant is virtually assured during removal proceedings.<sup>49</sup>

I.C.E., a Department of Homeland Security division, facilitates removal cases.<sup>50</sup> I.C.E. is heavily involved in the detention of immigrants, the preparation of legal cases against immigrants who are accused of wrongdoing, and the promotion of immigrant removal.<sup>51</sup> More authority, resources, and legal proficiency should be needed between these government agencies and the immigrants.<sup>52</sup> Therefore, the domain of removal proceedings exhibits prejudice against the defendant immigrant, resulting in the immigrant's imminent deportation as an outcome virtually predetermined by the said hearings.

The justifications for removal are multifaceted, including criminal convictions, violations of immigration laws, and suspected participation in illicit activities within the United States. Deportation, although commonly associated with severe criminal offenses, has been precipitated on occasion due to trivial wrongdoings such as traffic infractions.<sup>53</sup> The multitude of grounds for deportation renders the legal standing of immigrants in the U.S. exceedingly precarious, given their inadequacy in understanding domestic legislation and insufficient access to legal counsel throughout these delicate proceedings.

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<sup>48</sup> Barak, 2023

<sup>49</sup> Brustin, 2022

<sup>50</sup> Kelleher and Dale, n.d.

<sup>51</sup> Ibid.

<sup>52</sup> Brustin, 2022

<sup>53</sup> Valdez, 2020



### *Factors Leading to Near-Guaranteed Convictions*

The arguments thus reflect the ineffectiveness of the immigrant's legal argument based on multiple aspects that contribute to them being subject to almost certain convictions upon facing deportation. Aspects that show its ineptness revolve around restricted access to sufficient legal assistance for immigrants.<sup>54</sup> State assistance is not offered to immigrants facing deportation who cannot hire a private attorney.<sup>55</sup> As a result, immigrants are forced to seek free legal aid from nonprofit organizations and other pro bono attorneys. This constraint significantly undermines the immigrant's ability to present a thorough and productive defense that could prevent deportation.<sup>56</sup> Consequently, the likelihood of adverse court outcomes, such as deportation, increases for the immigrant.

Second, many immigrants who are at risk of deportation originate from countries where the United States is culturally and linguistically distinct. As a result, most immigrants do not possess English proficiency; however, they must hire translators whose efficacy cannot be guaranteed.<sup>57</sup> This language barrier substantially impedes justice when legal documents and proceedings are conducted in English. Immigrants may need help comprehending the intricacies of their legal case, which could hamper their ability to effectively communicate with the court and grasp the subtleties of the removal proceedings. Cultural variances also influence immigrants' perceptions and navigation of the legal system, affecting their ability to assert their rights and present a cohesive defense that could prevent deportation.

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<sup>54</sup> Valdez, 2020

<sup>55</sup> Brustin, 2022

<sup>56</sup> Barak, 2023

<sup>57</sup> Ramón, Cristobal. "Language Access in the Immigration System: A Primer." Bipartisan Policy Center. Last modified September 18, 2020. <https://bipartisanpolicy.org/blog/language-access-in-the-immigration-system-a-primer/>

Moreover, numerous immigrants on the verge of deportation frequently testify from detention. This often severely restricts the immigrant's access to legal resources and evidence required to mount a defense.<sup>58</sup> The restricted availability of legal resources essential for their defense means that even if an immigrant obtains legal representation, their attorneys cannot adequately prepare a strong defense.<sup>59</sup> In addition, detention induces in the immigrant detainee profound psychological anguish and a sense of ambiguity. The sufferings and uncertainties of the immigrants may impair their ability to effectively work with their legal advisors to collectively put up an excellent legal defense. Decreased availability of resources from detention usually increases the exposure of lack of effectiveness in legal counsel for immigrants in removal proceedings, increasing the likelihood of convictions.

The systemic and institutionalized unfairness through detention arises from the fact that detention of accused immigrants is constitutionally regarded as part of the due process in immigration proceedings, as affirmed in *Demore v. Kim*, 538 U.S. 510 (2003).<sup>60</sup> Immigrants are subject to detention regardless of the due process guarantees under the U.S. Constitution. While the deportation proceedings are protected by the constitutional due process guidelines under the Fifth Amendment, the same constitution promotes detention as part of the process. In *Demore*, the defendant Hyung Joon Kim had been convicted of first-degree burglary and petty theft with priors and charged removable by the I.N.S. The I.N.S. then detained Kim pending his removal hearing. Kim filed a habeas corpus action challenging section 1226(c) of the Immigration and Nationality Act, claiming that the detention violated due process since the I.N.S. had not determined that he

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<sup>58</sup> Cho et al., 2020

<sup>59</sup> Valdez, 2020

<sup>60</sup> *Demore v. Kim*, 538 U.S. 510 (2003). <https://supreme.justia.com/cases/federal/us/538/510/>

posed a flight risk or danger to society. Kim's petition was granted by the District Court and affirmed by the Court of Appeals.

The Supreme Court, however, overturned the lower court decisions. In a majority decision, the Court held that “the Immigration and Nationality Act does not deprive the federal courts of jurisdiction to grant habeas relief to aliens challenging their detention under section 1226(c) and that detention during removal proceedings is a constitutionally permissible part of that process.”<sup>61</sup> In justifying this decision, the Court maintained that detention is necessary since immigrants might skip out on their removal hearings and must be held indefinitely for their court proceedings. From this case, it must be noted the prolonged detention of removable immigrants is a significant concern, and the permission of such detentions promotes unfairness against immigrants in the country.

### **Case Studies**

Several instances have revealed the structural inequality of immigration court proceedings in the United States. These examples also highlight challenges towards immigrants within the legal system and the need for reaching reforms consistent with national core values of equality. Incredibly impactful was the case *Padilla v. Kentucky*, 559 U.S. 356 (2010), a landmark decision on the limited legal resources and the impact as one of the barriers to justice for immigrants. Jose Padilla, the defendant in this Supreme Court case, contended that his legal representation was ineffective. The attorney neglected to apprise the defendant of the repercussions of pleading guilty to drug charges, specifically the deportation of the defendant.<sup>62</sup> The attorney provided false information to the defendant concerning the gravity of the proceedings by reassuring him that his lengthy stay in the U.S. would not result in deportation (the defendant had been a lawful permanent

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<sup>61</sup> Ibid.

<sup>62</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010). <https://supreme.justia.com/cases/federal/us/559/356/>

resident for over four decades). This case exemplifies the critical nature of precise legal counsel in immigration proceedings. It highlights the severe, life-altering repercussions that may result from inadequate legal resources for the immigrant defendant.

In addition, it has been demonstrated that litigants suffer negative repercussions due to the varying standards of legal representation. In *Franco-Gonzalez v. Holder*, 767 F. Supp. 2d 1034, 1048 (C.D. Cal. 2010), a federal judge ordered I.C.E., the Attorney General, and E.O.I.R. to provide legal representation to mentally disabled immigrant detainees facing removal who, under their mental disability, were unable to self-represent in an immigration proceeding.<sup>63</sup> Numerous facilities in Arizona, California, and Washington housed the detainees. This case established a precedent by granting legal counsel to immigrant detainees for the first time. The immigrants would have presumably met the same fate as a significant number of others who languished in detention for years without legal counsel in the absence of such intervention. However, even in the case of *Franco-Gonzalez*, the detainees were granted relief after being denied the right to counsel, a predicament shared by all immigrants irrespective of their circumstances. Mentally disabled principal plaintiff José Antonio Franco-Gonzalez had been detained for nearly five years.<sup>64</sup> Gonzales and others did not obtain relief in his situation until the class action lawsuit was filed. The inadequacy of mental competency to self-represent and the restriction of the right to counsel for mentally disabled detainees who lack the financial resources or legal capacity to retain a private attorney illustrate how the generalization of immigration proceedings into civil procedures results in unequal access to justice.

It has also been established that the intricacy of immigration legislation hinders the achievement of justice and equality for persons accused of wrongdoing. The respondent in *In*

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<sup>63</sup> *Franco-Gonzalez v. Holder*, 767 F. Supp. 2d 1034, 1048 (C.D. Cal. 2010). <https://clearinghouse.net/case/12744/>

<sup>64</sup> *Ibid.*

*Matter of L-E-A-*, 27 I&N Dec. 40 (2017) filed an appeal against the denial of asylum by the Board of Immigration Appeals (B.I.A.).<sup>65</sup> A portion of the appeal was denied, and the record was remanded pending further proceedings. By establishing his family's membership in a specific social group, the respondent bolstered his case for asylum under subsection 1158 of section 208 of the Immigration and Nationality Act. The court determined that although the family was defined as a specific social group, membership does not automatically establish a connection to a ground protected under the Act. The respondent was required to provide evidence “that the family relationship is at least one central reason for the claimed harm” to qualify for asylum on that ground.<sup>66</sup> This was even though the respondent was at risk of death at the hands of a narcotics gang back home. In this case, the ruling represented a deviation from the established norm concerning categorizing families as a distinct social group eligible for asylum. The case considers the intricacy of defining “particular social groups,” a subtle aspect of removal proceedings that requires further clarification. This case underscores the critical need for immigration law reform to improve transparency for the immigrant population.

## **Calls for Reform**

### ***Proposals for Ensuring Access to Legal Representation***

To empower immigrants and promote equality, it is critical to implement reforms that enhance their ability to obtain legal representation.<sup>67</sup> Immigration proceedings, being civil, leave immigrants ineligible for the right to counsel. Consequently, there is an immediate need to augment their financial resources with government-funded legal aid groups. These organizations would serve as a preeminent provider of legal counsel and advocacy for immigrants needing

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<sup>65</sup> U.S. Department of Justice. "*Matter of L-E-A-*, Respondent." United States Department of Justice. Last modified 2017. <https://www.justice.gov/eoir/page/file/969456/download>

<sup>66</sup> Ibid.

<sup>67</sup> Ryo and Peacock, 2021

reduced-cost or pro bono legal services. The allocated financial resources should be directed toward safeguarding vulnerable groups, such as asylum seekers, unaccompanied minors, and survivors of domestic violence. These immigrant groups are frequently financially precarious and need help affording private attorneys. Achieving this reform necessitates the collaboration of pertinent entities, such as governmental bodies, advocacy organizations, and nonprofit organizations. This will help close the existing economic gap; hence, immigrants will have more comprehensive access to legal resources and enhance their due process in creating a more equal and fair immigration court system.

In light of *Franco-Gonzalez*, the immigration court system has to reconsider its regulations of the right to legal counsel, especially with vulnerable immigrant populations such as children that could risk automatic convictions if they lack sufficient merits only because they do not have access to competent legal support. Such a benefit applies to unaccompanied minors, defendants with identified mental health issues and documented survivors of violence and aggravated persecution. Background checks and verifications shall continuously be carried out to ensure that such benefits are given to deserving persons per the suggested document and evidence authentication standards.

This will clear all ambiguity about the eligibility conditions as led to the debate described in *Matter of L-E-A-*. The approach considers vulnerable populations and recognizes the complexity inherent in situations affecting them to ensure their protection of rights proactively. State-supported counsel wields the critical voice role for the voiceless, operating its way through the intricacies of immigration law. It provides the voices of people who will otherwise be bypassed, who can be heard no matter what, and their views of what is right, reasonable, and fair take precedence above all else.

### *Proposals for Evidentiary Standard Reforms*

Taking care of the evidentiary issues provides a critical milestone toward the reform of the immigrant justice system. There is a comprehensive need to adjust the rules for the admissibility of evidence in immigration court hearings. This should be attained through the primary closure of the hearsay loophole. Remedying this flaw of evidentiary standards would entrench strict criteria for admitting hearsay evidence. If rigid criteria are adopted, the caliber and weight of evidence would be significantly improved.

Because verifiability requires that hearsay evidence be subjected to more stringent procedures for authentication and validation, the document authentication protocols need to be revisited to avoid admitting in court documents obtained fraudulently or unreliable documents as pieces of evidence. Authentication protocols involve the due examination of a document by checking official seals, signatures, and even stamps. It is imperative to establish a standardized system for document authentication through internationally agreed-upon mechanisms to guarantee uniformity in the document authentication process.<sup>68</sup> The credibility and dependability of immigration court decisions are enhanced by using documents with a higher degree of integrity, as such decisions are more likely to be founded on facts deduced from credible documents.

Furthermore, it is imperative to incorporate specific components of F.R.E. standards into the immigration courts, given that the disputes resolved within these courts transcend the realm of civil law, notwithstanding the civil nature of the entire system.<sup>69</sup> Expert witness testimony is required to enhance the credibility of hearings and subsequent decisions. Utilizing the expertise of mental health professionals and forensic analysts can contribute significantly to the credibility, objectivity, and dependability of immigration judges' decisions. Immigration judges would be

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<sup>68</sup> Pierce, 2019

<sup>69</sup> Chishti et al., 2023

empowered to make decisions supported by expert evidence by utilizing specialized knowledge available to them through the admission of expert witnesses during proceedings.

In addition, education and training relevant to immigration hearing reforms should not be underestimated. Education in the courts and legal advocates must have continued specialized education that necessitates complex, strict evidence rules. This should encapsulate standards-based document authentication verification of hearsay evidence and expert testimony incorporated within the wide range of comprehensive perspectives to inform decision-making. This can be achieved through continuing professional development programs, which would ensure that such judges and lawyers are well-updated on the most current practices concerning impartiality when it comes into play. Quality in proceedings and decisions in immigration is always attainable through how such decision-makers stand to gain from ongoing education and training for the improvement of their skill set.

### **Conclusion**

The entire course of immigration court proceedings constitutes watershed moments in detained immigrants' lives regarding whether they will prevail with the more extended presence or limited stay within the United States. Equally, besides the immigration court proceedings and the fallout of this procedure, there is a factor of lack of justice that typifies these courts. The inequalities of the removal procedures are just two: inadequate legal representations and lax evidentiary standards in these courts. Added to this are the monumental case backlog, long delays to hearings, and the system laboring with systemic inefficiencies that only serve to ramp up these inequalities.

The civil nature of immigration litigation presents several challenges experienced in immigration courts. There is not only regular and routine acceptance and issuing of critical



decisions such as removal based on frequently deeply faulty evidence, but limiting legal support toward an already vulnerable minority ensures immigration hearings lean against immigrants. This means that the final decision on what shall be done to an immigrant accused of removal is rarely known after hearings.

Changes that would reflect the role of fairness and equality in the human rights values in most aspects of the immigration court system are urgent, and they are aimed at reversing the trend to make the immigration court an effective tool in denying immigrants before a court of establishing the truth. The reforms will put the U.S. on a better humanitarian and ethical footing within the international community. However, due to its immigration court system, which is inherently unfair, the U.S. risks undermining its duty and its position to promote on behalf of immigrants their human rights and dignity by consigning them almost invariably to the same deplorable circumstances from which they fled, that include gang violence, domestic abuse, and persecution in their home country.