

Chapter 1

Introduction: Nation of Immigrants at a Crossroads



When a nation goes down, or a society perishes, one condition may always be found; they forgot where they came from. They lost sight of what had brought them along.

- Carl Sandburg (1878 - 1967)

Throughout its history, the United States has taken pride in being a beacon of freedom and opportunity – a nation that not only has strengthened its social and political fabric but also has enriched its entire economy through its generous and equitable treatment of immigrants.¹ As befits a nation settled and built by immigrants, America’s much-vaunted dedication to “liberty and justice for all” has long been extended to residents born elsewhere, including refugees who arrive on its shores to petition for asylum and immigrants who come to America to join their families and to do work that contributes to the U.S. economy. Our diversity has long been considered a national asset and an important element of the uniquely American identity.

Today, more than one in every five U.S. residents is either foreign-born or born to immigrant parents. Of the nation’s more than 33 million foreign-born residents, most are legally entitled to live and work here and more than one in three is a naturalized U.S. citizen.² Large numbers of “immigrant” families also include U.S.-born, U.S. citizen spouses and children, and over 37,000 immigrants are serving in the United States armed forces.

At the dawn of the twenty-first century, however, the nation’s promise as a truly inclusive society is at risk. In 1996, in response to calls for cracking down on illegal immigration and curbing terrorism, Congress enacted the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA)³ and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁴ These laws place obstacles in the path of desperate, and often confused, asylum seekers, and contain provisions that strip immigrants of many of the rights to fair hearings, judicial review, and relief from unreasonable detention that U.S. citizens take for granted. They have gone so far astray of their original purpose and led to such disastrous consequences for thousands of U.S. families and their immigrant loved ones that even some sponsors of the laws admit that they have gone too far.⁵

The horrific events of September 11, 2001 were a catalyst for further changes to immigration policy and the nation’s perception of immigrants. Passage of the USA PATRIOT Act⁶ and then the Homeland Security Act⁷ have resulted in the expansion of immigration enforcement powers, the dissolution of the Immigration and Naturalization Service (INS), and the transfer of its authority to three bureaus within the Department of Homeland Security (DHS). Other far-reaching post-September 11 initiatives, combined with aggressive enforcement, amplify the injustices present in the 1996 laws and run counter to our strengths, national interests and most cherished values.

American Justice Through Immigrants' Eyes

As the Supreme Court reaffirmed in 2001, due process applies “to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”⁸ The equality of this protection to all who set foot on our soil has been one of the great achievements of our democracy. The sweeping 1996 laws together with law and policy changes since 9/11 diverge from this legacy at a moment in history when more than a fifth of all U.S. residents are in families with immigrant members. A two-tiered system of justice that singles out one segment of society for less favorable treatment runs sharply against the grain of American principles and poses a threat to the integrity of the justice system as a whole.



A hallmark of the American system of justice is that important decisions are made following a fair process. This concept of due process of law is so central to our national identity that the United States invokes it to distinguish itself from authoritarian governments and sees it as essential in developing the rule of law in emerging democracies around the world. Consistent with this philosophy, guarantees of fairness and due process have long been central features of U.S. immigration policy as well as key to the respect and protection of civil rights. These guarantees historically have included a constitutional minimum standard of due process when deportation is at stake: the right to be notified of charges; timely, impartial, and individualized consideration of one’s case; the right to examine and rebut evidence; the privilege of legal representation and confidential conversations with counsel; the right to appeal an adverse decision and federal court review of the implementation of the law by the Executive Branch.⁹

However, the United States has also experienced periodic waves of anti-immigrant sentiment in which immigrants have been blamed for various societal ills, testing our basic principles of justice in the process. The nation’s earliest immigration laws listed various categories of “undesirables” to be kept out or kicked out, including not only convicts and prostitutes but also paupers and Chinese laborers.¹⁰ After World War I, hostilities towards immigrants surged, setting the stage for the round-up and deportation of thousands of innocent people and the enactment of discriminatory immigration laws that stood until 1965.

The early 1990s saw yet another resurgence of anti-immigrant feelings, culminating with the passage in 1994 of California’s Proposition 187, a ballot initiative that aimed to deny basic government services, including public education, to undocumented immigrants. The initiative, which directed educators and other service providers to report suspect families to immigration authorities, stirred widespread apprehension within the state’s immigrant communities and deterred many individuals from seeking benefits to which they were legally entitled. Later it was found to be largely unconstitutional.

Even in the midst of anti-immigrant sentiment, however, an individual facing deportation enjoyed some of the procedural safeguards afforded a criminal defendant even though immigration hearings are civil, administrative proceedings. Detention was reserved primarily for people who were deemed dangerous or likely to flee. Ordinarily a person was released on personal recognizance or a cash bond while proceedings were pending. He or she could also ask an immigration judge to lower the bond if the INS had set it too high.

Moreover, immigration judges were responsible for making deportation decisions and often had the ability to confer various forms of discretionary relief on deserving individuals who were facing deportation. In addition to granting asylum to those fearing persecution, for example, immigration judges could forgive certain deportable acts committed by longtime permanent residents who had turned their lives around and demonstrated why they should be given a second chance. In some cases, they also could excuse conduct that otherwise would prevent a person from securing lawful permanent residence.

Before the 1996 laws took effect, even a person arriving for the first time at a U.S. airport or border could request a hearing with an immigration judge before being denied entry (“excluded”) and forcibly expelled. A person fleeing human rights abuses had the right to apply for asylum, and to consult with and be represented by counsel at no cost to the government during this process. These decisions were subject to both administrative and judicial review – the traditional checks and balances that are a key feature of our system of justice.

The 1996 immigration laws changed all this and established sweeping new grounds for detention and “removal”¹¹ while greatly reducing procedural protections and eliminating opportunities for discretionary relief and judicial review. Immigration court hearings are no longer required for deportation in many cases. Youthful indiscretions for which no jail time was ordered are now deportable offenses. Hardship waivers that used to prevent the deportation of individuals with U.S. citizen family members are no longer available. Some asylum seekers must present their cases immediately upon arriving in the country or lose the protection from persecution that international law guarantees them. Retroactive provisions in the laws allow immigrants to be arrested, detained and deported today for minor crimes committed long before the laws were changed to turn their offenses into grounds for deportation. Immigration detention has increased to the point that professional men and women, refugees, children, and even nursing mothers find themselves locked up, often in the same jails as criminals, for technical immigration violations of which they may not even have been aware. To enforce these laws, the INS expanded into the nation’s largest law enforcement agency, deploying more armed agents than any other.

The 1996 immigration laws also have led to the deportation of legitimate tourists and business travelers, people fleeing genocide and torture, abandoned children, abused women, the developmentally disabled, and seriously ill individuals. Many of those deported were actually entitled under the immigration statutes and U.S. Constitution to remain in the United States but the 1996 laws so severely curtailed administrative and judicial review, and access to attorneys, that grievous errors were committed. Countless numbers of U.S. citizens have been adversely affected.

The regulations that implement the laws have continued to change and expand since 1996. The Department of Justice, prior to relinquishing power over immigration enforcement to DHS, promulgated regulations expanding its removal authority over immigrants who arrive by sea, extending the length of pre-charge immigration detention, enforcing harsh consequences for failing to notify immigration authorities of a change in home address, and weakening a Supreme Court order to release immigration detainees within a reasonable time frame. The Department also announced its view that state and local police have “inherent authority” to enforce federal immigration laws, causing alarm in immigrant communities from coast to coast. Federal immigration authorities have entered into cooperative agreements in which state and local police are deputized to enforce the immigration laws, detracting from the essential law enforcement responsibility to maintain public order and safety and eroding community trust.

The Department of Justice retains authority over the immigration courts and Board of Immigration Appeals despite the dismantling of the INS. In 2002, Attorney General John Ashcroft undertook a severe streamlining of the Board by enacting so-called procedural reforms that: 1) nearly eliminate three-judge appeal panels; 2) encourage routine affirmances without opinion; 3) forbid *de novo* review on appeal of factual findings; and 4) eliminated half of the Board of Immigration Appeals (BIA) member positions, leaving just 11 nationwide. The court of last resort is now, in the view of many, little more than a rubber stamp for many thousands of immigrants who appeal to the Board for meaningful review.

American Justice Through Immigrants' Eyes

Together, sweeping changes in law and policy wrought both in 1996 and since 9/11 reveal a perplexing hostility to immigrants and their families. This report examines these laws and practices, their grave consequences for individuals, and their implications for society as a whole:

- ***Low-level immigration officers make what can be life-and-death decisions with no minimal standards of due process and no oversight by an immigration judge.*** Life-altering decisions that were previously made only by immigration judges are now made by enforcement officers in the Department of Homeland Security who frequently do not have the qualifications or factual information on which to render individual decisions.
- ***Expanded grounds for deportation have created a dual system of justice in the United States, with far tougher penalties for those born outside its borders than for those born within.*** Long-term, legal immigrants convicted of minor first offenses are penalized as harshly as more serious offenders, and face much graver consequences than the native-born. By adopting a "zero tolerance" approach toward immigrants who have committed even minor crimes, the 1996 laws all but ignore the principle that "the punishment should fit the crime."
- ***Elimination of discretionary relief means factors that weigh against an individual's deportation are now ignored.*** In the vast majority of cases, immigration judges can no longer consider equities such as long U.S. residence, hardships to U.S. citizen spouses and children, employment history, military service, community ties, or evidence of rehabilitation. Without such discretion, immigration judges must deport immigrants who deserve a second chance.
- ***Laws are retroactive, meaning that lawful permanent residents are detained and deported for activities that occurred years ago, even if their acts were not deportable offenses when they occurred.*** Many longtime immigrants have been permanently banished for youthful run-ins with the law. Such *ex post facto*, or after-the-fact, laws are unconstitutional under U.S. criminal law, but tolerated under immigration law.
- ***Immigration laws are exceptionally complex, yet more often than not, people facing detention and deportation do not have the help of a lawyer.*** Immigration court is an adversarial setting, presided over by an immigration judge and prosecuted by an experienced government trial lawyer with the Department of Homeland Security. Despite the high stakes, asylum seekers, children, and lawful permanent residents facing deportation do not have the same Sixth Amendment right to government-appointed counsel as individuals facing criminal charges.
- ***Mandatory detention costs U.S. taxpayers nearly a billion dollars every year and disrupts the lives of American families.*** Immigrants and refugees are routinely incarcerated even if they do not present a flight risk or danger, are not charged with any crime, have lived in the United States

for many years, have U.S. families to support and have very strong incentives to resolve their immigration cases. These individuals often are locked up with criminals in state and local jails at great distances from their homes and families, where it is difficult to find a lawyer who could help.

- ***The 1996 laws severely curtailed administrative and federal court review, further increasing the possibility of erroneous and disastrous outcomes.*** The 1996 restrictions on judicial review are exceptional in scope and incompatible with the basic principles on which the nation's legal system was founded. Without judicial oversight, laws are applied inconsistently and sometimes incorrectly, with serious consequences for immigrants and their families. Reforms to the administrative appeals system in 2002, coupled with the high number of individuals in proceedings without lawyers, further reduce the chances that mistakes will be detected and corrected.
- ***Overzealous immigration enforcement compounds the dangerous inadequacy of the nation's confusing and conflicting immigration laws and administrative practices, at great risk to citizens' and legal immigrants' civil rights.*** State and local entities are being drawn into enforcing complex federal laws without proper authority or training. Experience shows that the involvement of state and local police in immigration enforcement strains police-community relations and undermines public safety.
- ***Protecting national security need not be at immigrants' expense and can be achieved without depriving any segment of the population of their basic civil rights and liberties.*** Policy changes both before and after passage of the USA PATRIOT Act have resulted in extended pre-charge immigration detention, closed hearings, special registration programs, and severe consequences for technical violations of law that previously were routinely waived or forgiven. The measures have focused on members of Arab and Muslim communities and created a climate in which suspicion, discrimination and hate-crimes flourish.

The goal of national unity is more important in the post-9/11 world than ever before; it also is more threatened. Whereas the "Fix '96" movement to restore due process to the immigration laws was once vocal and gaining significant momentum, it has lagged in the aftermath of September 11. Registration programs and detention of immigrants have replaced calls for reform. In the meantime, in the name of promoting national security, the divide between the foreign- and the native-born populations grows ever wider.

This report examines today's immigration laws, the rationales behind them, their consequences for individuals and U.S. families, and their implications for society as a whole. The report begins with a look at how newcomers are greeted upon arrival at a U.S. border and then studies more in depth the treatment of lawful permanent residents with deep roots in this country. It closes with an examination of the dramatic growth and changes in immigration law enforcement and its profound effect on entire segments of the population, and on immigrant and border communities.

American Justice Through Immigrants' Eyes

The individuals who are featured in the case studies in each chapter are real people affected by a web of laws of which most Americans are largely unaware. Some of them have been deported but continue to hope for legal reforms that will allow them to reunite with their loved ones in the United States. The report concludes with recommendations for repairing the immigration laws and recommitting to the principles crafted by our Founders.

http://www.abanet.org/publicserv/immigration/Due_Process.html