

The Procedural Fortress of US Immigration Law

JILL E FAMILY*

Immigrants face many obstacles. This paper reveals a less obvious one: the procedural system designed to adjudicate immigration removal cases. In the United States, the procedural system itself has become a barrier for immigrants. A structure intended to provide procedural safeguards for immigrants has instead become an obstruction. Instead of facilitating fair and efficient process, the system is dysfunctional. It is collapsing under its own weight and is unable to adjudicate consistently in a fair and competent manner. This failed procedural system is a barrier to immigration that needs to be fixed. The failure to fix it, despite longstanding and well-known shortcomings, reveals that procedural fairness is not a policy priority in the United States.

Introduction

Substantive law is a fairly obvious barrier to immigration. US immigration law lays out categories of individuals who are eligible for legal immigration, including because of a family or employment relationship.¹ If an individual does not fall into a category recognised by law, the law blocks movement. Substantive law also determines who is not admissible to the United States because of some undesirable characteristic, such as a criminal history.² Even if an individual fits into a lawful immigration category, the substantive admissibility grounds may block immigration. The spouse of a US Citizen, for example, qualifies in a legal immigration category due to the close

* Professor of Law and Director, Law and Government Institute, Widener University Commonwealth Law School, USA.

¹ 8 USC § 1153(a)-(b).

² 8 USC § 1182(a).

family relationship. If the foreign national spouse has a criminal history, however, the spouse may not be admissible to the United States regardless of the marriage. Additionally, substantive law provides for quotas; it sets numerical limits on the number of individuals who may legally enter the United States each year in a given legal immigration category.³ Even if an individual fits into a legal category and is admissible, if the quota is full the quota would bar legal entry. Substantive law therefore sets border walls. Those walls may be raised or lowered in various situations depending on political forces.

While substantive law does create barriers to immigration, procedural law presents barriers as well. This paper focuses on the barriers created by immigration law procedure in the United States. Foreign nationals must not only decipher how to manoeuvre through these procedural systems. In the case of the US adjudication system established to decide who should be removed from the United States, the removal adjudication system *itself* is so flawed that the procedural mechanism has become a barrier. The system is dysfunctional, is collapsing under its own weight, and it is unable to adjudicate consistently in a fair and competent manner. This failed system is its own barrier to immigration that needs to be fixed.

At times procedural barriers receive less attention than their substantive counterparts, however this paper argues that these procedural barriers are just as important, and that any substantive law reform not accompanied by procedural reform will lead to unsatisfactory results. Additionally, study of the procedural barriers reveals that procedural fairness is not a policy priority in the United States.

1. The United States Immigration Adjudication System

Immigration adjudication is faced with discrete tasks. One is to determine whether someone who is knocking on a country's door, seeking legal entry into a country, is entitled to that legal entry. Another is to determine whether someone who is physically inside of the country should be removed to another country. In the United

³ 8 USC § 1151.

States, we divide up these tasks among our three co-equal branches of government: legislative (Congress); executive (President) and judiciary (federal courts).

While Congress creates statutes that establish categories of legal immigration, legal immigration quotas, and removal grounds, it has delegated most of the task of immigration adjudication and the authority to administer immigration laws to the executive.⁴ Following statutory directives, federal administrative agencies under the President's control conduct day to day immigration law decision-making. Executive branch employees in the Department of Homeland Security, for example, adjudicate whether the foreign national spouse of a US citizen is entitled to lawful permanent residence (a 'green card'). Executive branch employees in the Department of Labor decide whether an employer who wishes to hire a foreign national will pay an adequate wage. Executive branch employees in the Department of State decide whether to issue a visa to someone who wishes to travel to the United States.

The Department of Justice is another executive branch agency with power over immigration adjudication. Headed by the US Attorney General, the Department of Justice houses an entity called the Executive Office for Immigration Review (EOIR).⁵ The immigration courts and the Board of Immigration Appeals are a part of EOIR. As such, they are administrative adjudicatory bodies and not a part of the independent, constitutionally authorised US judiciary. They are a part of the executive branch, and the adjudicators are Department of Justice employees.⁶

Immigration judges, who preside over immigration courts, decide whether to remove someone from the United States.⁷ An attorney from the Department of Homeland Security represents the government in these proceedings. The Department of Homeland Security charges a foreign national with removal based on one of the statutory grounds of removal, and the Department of Justice (through its employee, the immigration judge) decides whether that

⁴ 6 USC § 202(5); 8 USC § 1103(a).

⁵ The United States Department of Justice, 'Executive Office for Immigration Review' <<http://www.justice.gov/eoir>> accessed 22 October 2015.

⁶ 8 CFR §§ 1003.10; 1003.1(a)(1).

⁷ 8 CFR §§ 1003.10; 1003.37.

individual should be removed.⁸ In removal cases, immigration judges are the trial level adjudicators; they are the first adjudicator to decide whether an individual should be removed.⁹

To make that decision, the immigration judge applies statutes, agency regulations, and sub-regulatory documents such as agency policy memoranda.¹⁰ Congress has recrafted the immigration statutes to take discretion away from immigration judges. For example, in 1996, Congress narrowed the ability of an immigration judge to weigh positive and negative factors to make an independent decision whether a specific individual should be removed. After 1996, the cancellation of removal statute creates a rigid, 'check the box' type of analysis that leaves little room for immigration judges to exercise discretion. One type of cancellation of removal (accessible only to those who have lawful permanent residence and are now facing removal) is available if: (1) the individual has had lawful permanent residence status for at least five years; (2) the individual has at least seven years of continuous residence in the United States; and (3) the individual has no aggravated felony convictions.¹¹ The other type of cancellation of removal (available both to lawful permanent residents and others) requires: (1) at least 10 years of physical presence; (2) good moral character; (3) no criminal convictions from a long list; and (4) that removal of the individual would cause 'exceptional and extremely unusual hardship' to a spouse, parent, or child, who is either a US citizen or a lawful permanent resident.¹²

Cancellation of removal is the closest American cousin (although distantly related) to the Article 8 right to family and private life guaranteed by the European Convention on Human Rights. Under cancellation of removal, however, the source of protection is a statute. So far, the US Constitution has not provided a similar

⁸ Jill E Family, 'A Broader View of the Immigration Adjudication Problem' (2009) 23 Georgetown Immigration Law Journal 595, 599.

⁹ *ibid.*

¹⁰ For example, many rules regarding a statutorily-created concept of 'unlawful presence' are contained in a 51-page policy memorandum: United States Citizenship and Immigration Services, 'Interoffice Memorandum' <http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF> accessed 22 October 2015.

¹¹ 8 USC § 1229b(a).

¹² 8 USC § 1229b(b).

protection.¹³ Also, the statute demands a high level of ‘exceptional and extremely unusual’ hardship, and the hardship factor is just one requirement among others. ‘Exceptional and extremely unusual’ hardship has been described as hardship substantially beyond the hardship one would expect of a family facing separation caused by immigration troubles.¹⁴ In other words, the prospect of separation is an expected consequence, and by itself is not exceptional or extremely unusual. There has to be something else that makes this family substantially unique among families facing separation caused by immigration law. Even if there is ‘exceptional and extremely unusual’ hardship to a qualifying relative, that hardship will not result in cancellation of removal if the other requirements are not met (physical presence, good moral character, and an absence of certain criminal convictions). Finally, there is a quota on the number of foreign nationals who may receive cancellation of removal in any given year.¹⁵

The Board of Immigration Appeals hears appeals of immigration judge decisions.¹⁶ We have not yet entered the realm of the independent, Article III judicial branch as the Board of Immigration Appeals is still a part of the Department of Justice. The Board reviews immigration judge findings of fact under a clearly erroneous standard.¹⁷ The Board reviews *de novo* questions of law, challenges to the application of law to facts, and discretionary determinations.¹⁸ The Board consists of 17 members, sits in Virginia, outside of Washington DC, and mostly decides cases based on paper submissions. The Attorney General reviews decisions of the Board in limited cases.¹⁹

The great majority of immigration adjudication occurs within the executive branch. The role of the judiciary in immigration adju-

¹³ See *Kerry v Din*, 135 S Ct 2128 (2015), in which Justice Scalia, in a plurality opinion, stated that there is no constitutional right to live in the United States with one’s foreign national spouse.

¹⁴ See *Matter of Monreal*, 23 Immigration & Naturalization Decisions 56 (BIA 2001).

¹⁵ 8 USC § 1229b(e).

¹⁶ 8 CFR §§ 1003.10; 1003.3.

¹⁷ 8 CFR § 1003.1(d)(3)(i).

¹⁸ 8 CFR § 1003.1(d)(3)(ii).

¹⁹ 8 CFR § 1003.1(g)-(h).

dication is limited. An appeal of a Board of Immigration Appeals decision (or of the Attorney General's decision if the Attorney General reviews the Board's decision) is the first chance for independent review of a removal order by the judiciary.²⁰ During judicial review, the judiciary decides both the merits of the appeal and any constitutional challenges. For example, the federal court would decide both whether an immigration judge made an erroneous finding of fact and whether any applicable statutes are constitutional. As the United States does not have the doctrine of parliamentary sovereignty, it is up to the federal courts to decide whether statutes are constitutional.²¹ As described below, however, Congress has used its power to check the courts (its co-equal branch) by limiting the judiciary's jurisdiction over immigration removal cases.

In terms of procedural design, the US has a system to adjudicate removal cases that features two levels of adjudication within the executive branch, and the judiciary provides a last level of independent review at the end. So how has this system itself become a procedural barrier for foreign nationals?

2. A Troubled System

This chapter explains the deficiencies of the US immigration adjudication system. These deficiencies contribute to a procedural system that itself has become a barrier for foreign nationals. The troubles with the US immigration adjudication system reveal that a system designed to promote procedural fairness values actually *operates* to diminish procedural fairness.

²⁰ 8 USC § 1252(a).

²¹ See *Marbury v Madison*, 5 US 137 (1803), which recognised constitutionally authorised judicial review and the declaring of a statute as unconstitutional; and Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (2nd edn, Aspen Law & Business 2002) 39-46.

2.1 Problems with the Executive Branch Immigration Adjudication System

Even the director of the Executive Office for Immigration Review agrees that the removal adjudication system is broken.²² The system faces extreme challenges, including a lack of resources, tremendous backlogs, a lack of decisional independence, a lack of representation for foreign nationals, a lack of esteem, a disconnect between the simplicity of procedure afforded and the complexity of the substantive law to be applied, an inability to fully commit to the importance of procedural protections for foreign nationals, and efforts to divert foreign nationals from the adjudication system in favour of mechanisms that provide even fewer procedural protections.

2.1.1 Immigration Courts

The Executive Office for Immigration Review has stated that it 'is currently managing the largest caseload the immigration court system has ever seen.'²³ There are over 450,000 cases awaiting adjudication in the immigration courts.²⁴ About 260 immigration judges hear removal cases,²⁵ and there are simply not enough judges to keep

²² Stephen Stock and David Paredes, 'Immigration Court Director Calls for Overhaul of Broken System' (*NBC Bay Area*, 26 May 2015) <<http://www.nbcbayarea.com/investigations/Immigration-Court-Director-Calls-for-Overhaul-of-Broken-System-305053461.html>> accessed 22 October 2015.

²³ The United States Department of Justice, Executive Office for Immigration Review, 'Expanding the Size of the Board of Immigration Appeals', 80 Fed Reg 31461, 31462 (3 June 2015) <<http://www.gpo.gov/fdsys/pkg/FR-2015-06-03/html/2015-13459.htm>> accessed 22 October 2015.

²⁴ TRAC Immigration, 'Immigration Court Backlog Tool' <http://trac.syr.edu/phptools/immigration/court_backlog> accessed 22 October 2015.

²⁵ The United States Department of Justice, 'Office of the Chief Immigration Judge' <<http://www.justice.gov/eoir/office-of-the-chief-immigration-judge>> accessed 22 October 2015. After the expiration of a government-wide hiring freeze, the Department of Justice hired 25 new immigration judges in 2014 and has plans to hire more. More than half of all immigration judges are eligible to retire, placing greater pressure on the system. See Molly Hennessy-Fiske, 'As Immigration Backlog Surges, Some Overwhelmed Judges Retire', *LA Times* (Los Angeles, 18 August 2015).

up with enforcement efforts. As of July 2015, the average wait time for a hearing was over 600 days.²⁶

More immigration judges are needed, but fiscal restraints prevented that until recently, even as the Obama administration set records for the number of individuals removed (438,000 in 2013).²⁷ As Dana Marks, President of the National Association of Immigration Judges, has explained: ‘immigration judges have described themselves as “legal Cinderellas,” mistreated stepchildren in the Department of Justice. Chronically resource-starved, the immigration courts are an oft-forgotten piece of the immigration enforcement puzzle.’²⁸ In 2008, immigration judges scored higher on a workplace burnout survey (higher meaning more burnout) than any other professional group who had ever taken the test.²⁹ In 2015, EOIR held a training conference for immigration judges, but that was the first training conference in five years.³⁰

This is all especially disturbing given what immigration judges are deciding. Referring to asylum cases, a popular refrain when discussing the immigration courts is to say that the system is like deciding death penalty cases in traffic court.³¹ The saying is informative because it highlights the point that the procedure is insufficient to handle the substance of the law. The US immigration courts are a procedural barrier to foreign nationals because the system is underfunded and overloaded. Immigration judges simply do not have the resources they need.

²⁶ TRAC Immigration (n 24). See ‘Average Days’, under ‘What to Tabulate’.

²⁷ The United States Department of Homeland Security, ‘Immigration Enforcement Actions: 2013’
<http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf> accessed 22 October 2015; see also 80 Fed Reg 31461 (n 23) 31462.

²⁸ Dana Leigh Marks, ‘Immigration Judge: Death Penalty Cases in a Traffic Court Setting’ (CNN, 26 June 2014)
<<http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html>> accessed 22 October 2015.

²⁹ Family, ‘A Broader View’ (n 8) 601.

³⁰ Hennessy-Fiske (n 25).

³¹ Marks (n 28).

Aside from resources, immigration judges lack decisional independence.³² Because they are employees of the Department of Justice, they report eventually to the President. The Department of Justice is a law enforcement agency. Under the Bush administration, the US Inspector General found instances of unlawful politicisation of hiring for immigration judge positions.³³ Candidates were selected based on political ties in violation of civil service laws. Again, immigration judges are not members of the constitutionally authorised judiciary. Immigration judges do not have lifetime tenure. In fact, they do not even have job protections granted to other types of executive branch adjudicators.³⁴

Because immigration law and immigration courts are civil bodies, courts have held that there is no constitutional right to government funded counsel in US immigration courts.³⁵ That means that while the government is always represented by an attorney who works for the Department of Homeland Security, the foreign national is not always represented. In fact, foreign nationals are not represented in 45 per cent of cases before immigration courts.³⁶ The complexity of immigration law makes this scenario preposterous, yet it goes on every day. There has been some movement on this front. A

³² See Stephen H Legomsky, 'Deportation and the War on Independence' (2006) 91 Cornell Law Review 369, 389, in which he explores, 'the threat of personal consequences for the adjudicator' in the context of immigration adjudication. Professor Legomsky observes: 'Under this constraint, the case is presumed to be one that the law clearly allows the adjudicator to decide, and there is no attempt by a superior to directly dictate the outcome of that case, but there are general threats, real or perceived, that decisions which displease an executive official could pose professional risks for the adjudicator.' Professor Legomsky argues also that decisional independence is necessary, at a minimum, at some point in the immigration adjudication system to uphold the rule of law. See *ibid* 386, 394-401, 403.

³³ Family, 'A Broader View' (n 8) 601-603.

³⁴ *ibid* 599.

³⁵ See, for example, *Aguilera-Enriquez v INS*, 516 F 2d 565 (6th Cir 1975); or 8 USC § 1362, which states that, in removal proceedings, 'the person concerned shall have the privilege of being represented (at no expense to the Government)' by counsel.

³⁶ The United States Department of Justice, Executive Office for Immigration Review, 'FY 2014 Statistics Yearbook' F1 <http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14s_yb.pdf> accessed 22 October 2015.

federal court has held that mentally incapacitated individuals have a right to counsel, and the Department of Homeland Security has begun to implement this directive.³⁷ While recognising any right to counsel is a big deal in the United States, there is still a long road to a universal right to counsel.³⁸

Unrepresented foreign nationals are left to the mercy of the overworked immigration judge to take the time to explain to the foreign national what is going on. Such explanations more than likely will take place through an interpreter, which the government does pay for, but the quality is not guaranteed.³⁹ Also, the foreign national may not be appearing in the same room as the immigration judge, but rather will appear as a two-dimensional image ‘beamed into’ the immigration judge’s courtroom from a far off detention centre.⁴⁰

2.1.2 *The Board of Immigration Appeals*

The Board of Immigration Appeals, aside from juggling the current caseload percolating up from the immigration courts, has faced its own challenges. In 2002-2003, then Attorney General John Ashcroft introduced ‘streamlining’ reforms to the Board, including reducing the size of the Board from 23 to 11, even though the Board had a

³⁷ *Franco-Gonzalez v Holder*, 2013 WL 3674492 (CD Ca 24 Apr 2013) <https://www.aclu.org/sites/default/files/field_document/order_re_permanent_injunction_04.23.13_final.pdf> accessed 22 October 2015; ‘Notice of Proposed Partial Class Action Settlement’ <<http://www.justice.gov/sites/default/files/pages/attachments/2015/07/22/summary-class-notice-final-20150722.pdf>> accessed 22 October 2015.

³⁸ For example, the Immigrant Justice Corps, based in New York City, receives funding from the New York City Council and other sources to provide representation to foreign nationals. See Liz Robbins, ‘Program Providing Legal Help to Immigrants Will Expand Beyond New York City’, *The New York Times* (New York, 13 May 2015).

³⁹ Laura Abel, ‘Language Access in Immigration Courts’ (Brennan Centre for Justice 2011) <http://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf> accessed 22 October 2015.

⁴⁰ Ellen Garrison, ‘Beamed into Court: The Drawbacks of Videoconferencing’ (*Immigrant Connect Chicago*, 17 June 2013) <<http://www.immigrantconnect.org/2013/06/17/beamed-into-court-the-drawbacks-of-videoconferencing>> accessed 22 October 2015.

backlog of over 56,000 cases. Attorney General Ashcroft also directed the remaining members to issue something called an ‘affirmance without opinion.’⁴¹ Such an opinion uses boilerplate language and does not provide a reasoned opinion in every appeal. These streamlining reforms also abandoned reliance on three member opinions in favour of single Board member hearing a case.⁴² One analysis concluded that Attorney General Ashcroft removed members of the Board who were more likely to rule in favour of foreign nationals.⁴³

After the streamlining reforms were implemented, the number of petitions for review filed in the federal courts began to skyrocket. Some evidence points out that the increase in petitions for review was the result of dissatisfaction with the summary adjudication before the Board.⁴⁴ As the consequences of a spike in judicial review cases took hold, pressure mounted to roll back the streamlining reforms. In 2006, for example, the Board rebounded to 15 members.⁴⁵ Also in 2006, the Department of Justice began to allow for more reasoned opinions and greater use of three member opinions.⁴⁶ This episode is an example of the type of procedural ‘experiments’ that are common in US immigration law. This experiment was eventually rolled back, but it left scars; the experiment damaged the reputation of the Board and heightened distrust of the administrative appeal process.

2.1.3 *Other Troubles: Esteem and Complexity*

There are two problems that affect both the immigration courts and the Board: a lack of esteem, and a disconnect between the simplicity of procedure afforded and the complexity of the substantive law to be applied. Immigration law has an esteem problem in the United States because it is seen, at times, as a non-prestigious area of law

⁴¹ Family, ‘A Broader View’ (n 8) 604-608.

⁴² *ibid.*

⁴³ Peter J Levinson, ‘The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications’ (*Bender’s Immigration Bulletin*, 1 October 2004) 1154.

⁴⁴ Family, ‘A Broader View’ (n 8) 606.

⁴⁵ 80 Fed Reg 31461 (n 23) para 1.

⁴⁶ Family, ‘A Broader View’ (n 8) 606-607.

that is accessible only to experts.⁴⁷ The complexity of the law can make it seem inhospitable to outsiders; it is daunting for an attorney who does not regularly practise immigration law to take on an immigration law case. While there are many excellent immigration law practitioners in the United States, there are also some whose inadequate practice draws attention.⁴⁸ This esteem issue creates problems both for the availability of private immigration law counsel and for the quality of the pool of potential immigration law adjudicators.⁴⁹

The procedural investment in the US removal adjudication system would seem to match a simple substantive law scheme that allows for easy and fast decisions in a high volume atmosphere. But US immigration law is far from simple. It is extremely complex and requires advanced statutory reading skills to begin to decipher it. Also, many immigration law adjudications turn on questions of credibility, which require methodical and careful determinations.⁵⁰ Therefore, there is a disconnect between the way the procedural system is structured and the complexity of the substantive law that the system is called on to apply. This is related to, or perhaps symptomatic of, a failure in the United States to fully commit to procedural protections for foreign nationals. Elsewhere I have detailed the ‘conflicting signals’ of immigration adjudication in the United States.⁵¹ In some ways, the system presents itself as committed to procedural protections. In other ways, however, the system undercuts any protections. The sense is that the United States wants to say that it has procedural protections, but closer examination reveals that many of those protections are hollow or superficial.

Other scholars have extensively studied the immigration adjudication system and registered concern. For example, Professors Ramji-Nogales, Schoenholtz, and Schrag produced a study that

⁴⁷ Jill E Family, ‘Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis’ (2011) 59 *Kansas Law Review* 541, 569-572.

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ See, for example, 8 USC § 1158(b)(1)(B)(iii), which addresses credibility determinations in asylum cases.

⁵¹ Family, ‘Beyond Decisional Independence’ (n 47) 569-576; see also Jill E Family, ‘Conflicting Signals: Understanding US Immigration Reform through the Evolution of US Immigration Law’ (2010) 40 *Catalan Journal of Public Law* 145.

detailed inconsistencies in asylum law decision-making at all levels of adjudication.⁵² Professor Steve Legomsky recommended a complete redesign of the removal adjudication system.⁵³ Professor Lenni Benson and Russell Weaver conducted a comprehensive study for the Administrative Conference of the United States that documented problems throughout the immigration adjudication system and made recommendations to improve fairness and efficiency.⁵⁴ Most of Benson and Weaver's recommendations revolve around a central theme: EOIR is underfunded, resulting in a severe mismatch between resources to do work and work to be completed.

2.1.4 *An Even Deeper Problem: Diversions*

As bad as this all sounds, unfortunately things are even worse because there are major efforts to divert foreign nationals from ever entering the immigration court system.⁵⁵ Examples of such diversions include waivers, the expedited removal program, and Operation Streamline.

At times, the United States government insists on a waiver of access to adjudication in exchange for status. When one enters the United States under the Visa Waiver Program, one must sign a waiver. The program allows nationals of certain countries to come to the United States to visit without having to obtain a physical visa in his or her passport. The accompanying waiver requires the individual to waive any right to challenge a border officer's determination regarding admissibility or any future effort to remove that person from the United States, except for an asylum claim. That means if an individual enters the US under the Visa Waiver Program, falls in love, and marries a US citizen, that individual may not challenge any

⁵² Jaya Ramji-Nogales and others, *Refugee Roulette* (NYU Press 2009).

⁵³ Stephen H Legomsky, 'Restructuring Immigration Adjudication' (2010) 59 *Duke Law Journal* 1635.

⁵⁴ Lenni B Benson and Russell R Weaver, 'Enhancing Quality and Timeliness in Immigration Removal Adjudication' (*Report for the Administrative Conference of the United States*, 7 June 2012) <<https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>> accessed 22 October 2015.

⁵⁵ Family, 'A Broader View' (n 8).

removal proceeding taken against them. The signed waiver ensures there is no opportunity to even make arguments about whether one should be able to stay. In the fiscal year 2013, there were over 19 million entries under the visa waiver program.⁵⁶ That means there were over 19 million waivers of access to process.

Expedited removal is another example of a diversion from immigration adjudication. This program dates back to 1996, under the Clinton administration.⁵⁷ Those who arrive at a US border whom the border officer believes to be inadmissible under the misrepresentation or lack of proper documentation grounds (which frequently is the case with asylum seekers) are summarily removed without a hearing before an immigration judge.⁵⁸ The decision of the front-line border officer stands, with review only by a supervisory border officer. Those who express intent to apply for asylum or who express fear of persecution are required to be referred to a credible fear interview before an asylum officer (an employee of the Department of Homeland Security).⁵⁹ If the individual passes the credible fear hearing, the individual is funnelled back into the immigration adjudication system and will receive a hearing before an immigration judge.⁶⁰ The individual may be detained while he or she waits for this hearing.⁶¹ If the individual fails the credible fear hearing, the person is removed (denied entry) without further review.⁶² An immigration judge may review a negative credible fear determination, but there is no review of that determination in the independent federal courts.⁶³ In the fiscal year 2013, expedited removals accounted for 44 per cent of all removals.⁶⁴

⁵⁶ Katie Foreman and Randal Monger, 'Nonimmigrant Admissions to the United States: 2013' (*The United States Department of Homeland Security*, 2013) Table 1 <http://www.dhs.gov/sites/default/files/publications/ois_ni_fr_2013.pdf> accessed 22 October 2015.

⁵⁷ 8 USC § 1225(b).

⁵⁸ 8 USC § 1225(b)(1)(A)(i).

⁵⁹ 8 USC § 1225(b)(1)(A)(ii).

⁶⁰ 8 USC § 1225(b)(1)(B)(ii).

⁶¹ *ibid* (iii)(IV).

⁶² *ibid*.

⁶³ *ibid* (b)(1)(C), 1252(e).

⁶⁴ Immigrant Enforcement Actions (n 27).

Operation Streamline is another diversion because it favours criminal prosecution of foreign nationals over proceedings in the civil immigration adjudication system. In 2005, the government introduced Operation Streamline along the US Southwest border.⁶⁵ Under the program, foreign nationals are charged with an immigration crime (such as illegal entry or illegal reentry)⁶⁶ and may agree to civil removal as a part of the criminal adjudication.⁶⁷ In the criminal proceedings, foreign nationals plead guilty often as a part of a mass hearing, where tens of people appear at once before a judge.⁶⁸ A term of the plea bargain may be that the foreign national agrees that he or she may be removed from the United States, thus bypassing the civil adjudication system.

This program is disturbing because it allows the government to pressure a foreign national to bargain away civil immigration adjudication rights. The program also raises due process concerns because of the fast track nature of the criminal proceedings and the lack of individualised justice. The program has also raised anxiety about asylum seekers. The Department of Homeland Security Inspector General recently expressed concern (and this is a concern that has been consistently raised by others over the years) that individuals who express a fear of returning home are pushed through the Operation Streamline hearing regardless, and are not afforded an appropriate opportunity for a credible fear interview.⁶⁹

2.2 Restrictions on Judicial Review

Given all of the problems with adjudication within the Executive Branch, one might expect a robust system of judicial review, where the independent, constitutionally authorised federal courts can keep an eye on the quality of decision-making. Judicial review does exist,

⁶⁵ Family, 'A Broader View' (n 8) 628.

⁶⁶ *ibid* 627-629.

⁶⁷ *ibid* 627.

⁶⁸ *ibid*.

⁶⁹ *ibid* 629. See also 'Streamline: Measuring Its Effect on Border Crossing' (The United States Department of Homeland Security, 15 May 2015) <https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf> accessed 22 October 2015.

but there are statutes that eliminate or narrow the scope of the federal courts' ability to review the decisions of the immigration courts.⁷⁰

There are substantive and timing limits on judicial review in the immigration statutes. The substantive limits eliminate review based on the substance of the removal ground. For example, if one is deemed removable based on the commission of certain criminal acts, that person's ability to obtain judicial review is limited.⁷¹ One timing restriction shortened the period in which judicial review may be sought to 30 days.⁷² One substantive limit provides that 'no court shall have jurisdiction to review any final order of removal' against an individual who committed certain criminal offences.⁷³ When this provision first became law it was unclear whether it solely limited the availability of statutory judicial review, or whether it also extinguished the availability of *habeas corpus* review to challenge the legality of the executive's actions in removing the individual.⁷⁴ The US Supreme Court held that the statute did not speak clearly enough to eliminate *habeas* review, and that eliminating all avenues to raise a constitutional claim would raise serious constitutional questions.⁷⁵ Congress responded by redrafting the statute to make clear that it *did* intend to eliminate *habeas corpus* jurisdiction, but at the same time it softened the bar on judicial review to allow for review of constitutional claims and questions of law.⁷⁶ Therefore, now, for example, an individual who has a criminal conviction that bars judicial review may still seek review of constitutional questions and questions of law, but perhaps not questions of fact or discretion.⁷⁷ This back and forth between Congress and the Supreme Court shows clear congressional intent to limit access to the independent judiciary in removal cases.

⁷⁰ 8 USC § 1252.

⁷¹ *ibid* (a)(2)(C).

⁷² *ibid* (b)(1).

⁷³ *ibid* (a)(2)(C).

⁷⁴ *INS v St Cyr*, 533 US 289 (2001) 292-93.

⁷⁵ *ibid* 314.

⁷⁶ 8 USC § 1252(a)(2)(D).

⁷⁷ See, for example, *Luna v Holder*, 637 F 3d 85, (2d Cir 2011) 94.

Additionally, there have been consistent efforts to restrict judicial review even further. These arguments are often made with the justification that court review of removal decisions merely delays removal. These arguments fail to see the intrinsic value of judicial review. Elsewhere I have criticised this ‘delay rationale’ and have also examined the existence of a similar rationale behind efforts to curb court review in the United Kingdom.⁷⁸

2.3 Immigration Detention

Immigration detention is another procedural barrier. Immigration detention may take place in a facility dedicated to immigrant detainees, but it may not; it may take place at a local county prison. This is despite the US Supreme Court’s determination that immigration detention is civil detention, not criminal detention.⁷⁹ If it were criminal detention, that would trigger constitutional rights that are otherwise not available in immigration law.

The decision whom to detain during removal proceedings may belong to substantive law,⁸⁰ but detention means that a foreign national will have more trouble accessing any procedural protections.⁸¹ For example, immigrants in detention in the United States are less likely to have a lawyer during a removal hearing.⁸² That may seem backwards, but there generally is no right to government funded counsel in immigration cases, and detention centres are often

⁷⁸ Jill E Family, ‘Removing the Distraction of Delay’ (2014) 64 *Catholic University Law Review* 99.

⁷⁹ *Zadvydas v Davis*, 533 US 678 (2001).

⁸⁰ See, for example, 8 USC § 1226(c), which mandates detention for certain foreign nationals.

⁸¹ See Peter L Markowitz, ‘Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility—A Case Study’ (2009) 78 *Fordham Law Review* 541.

⁸² See, for example, ‘Access to Justice for Immigrant Families and Communities’ (*Northern California Collaborative for Immigrant Justice*, October 2014) 9, which found that about two-thirds of detained foreign nationals had no representation during their removal proceedings before the San Francisco immigration court <<http://www.lccr.com/wp-content/uploads/NCCIJ-Access-to-Justice-Report-Oct.-2014.pdf>> accessed 22 October 2015.

in the middle of nowhere, where there simply are not many lawyers—especially with immigration law expertise.

This is distressing because lawyers can make a big difference in these cases. Last summer, in response to an increase in women and children crossing into the United States from Central America, the US government set up a mandatory detention, no bond policy as a form of deterrence and to ensure that arriving women and children were deported as quickly as possible.⁸³ The Obama administration hoped to quickly process and return the arriving individuals, and that those quick returns would deter future migrants.⁸⁴ The administration used the expedited removal provisions to attempt to achieve its goals. Because many of these women and children were seeking asylum, the United States was obligated to conduct credible fear interviews. As explained above, because these individuals do not arrive with proper documentation (for example, a passport), they are subject to the expedited removal provisions. They are entitled to a credible fear interview, however. If they pass the credible fear interview, they should be placed into line for a full removal hearing where the application for asylum would be fully considered. Also, if they pass the credible fear interview, they may be released on bond while they wait for their removal hearing if they are not a public safety risk.

The administration opened a detention camp in Artesia, New Mexico to house these women and children. Artesia sits in a remote corner of southeastern New Mexico. It is a three-and-a-half hour drive from Albuquerque, an eight-and-a-half hour drive from Phoenix, and a seven hour drive from Dallas. When the Artesia camp opened, there were ten lawyers in Artesia. None of them practised immigration law.⁸⁵

Because of statements from the Obama administration, worry grew that the US government had prejudged these cases and that individuals would not be given a fair shot at a credible fear interview. Because of the isolation of Artesia, it took a huge effort on the part of groups of immigration lawyers to organise volunteer expeditions

⁸³ *Flores v Johnson*, No 2:85-cv-04544 (CD Ca 24 July 2015) 2.

⁸⁴ *RILR v Johnson*, No 1:15-cv-00011 (D DC 20 February 2015) 8-11.

⁸⁵ Stephen Manning, 'Ending Artesia' (*Innovation Law Lab*)

<<https://innovationlawlab.org/the-artesia-report>> accessed 22 October 2015.

to the detention camp. In the end, about 300 lawyers and legal professionals rotated through Artesia, standing up for procedural protections.⁸⁶ They tried to make sure that the credible fear hearings were fair, and that those who passed their interviews were given a reasonable bond. The lawyers were successful in slowing down the process and publicising the procedural shortcuts and the poor conditions in the camp.

These recent events are a good example of procedure as a barrier for immigrants. It is probable that many, if not most, of these women and children hold valid asylum claims, as they are fleeing severe violence. But the US government attempted to use procedure, or rather the absence of procedure, to prevent the spotlight from shining on the forces that motivated these individuals to seek safety in the United States. Procedural protections became politically cumbersome, especially in the months leading up to a congressional election.

The US government eventually closed the Artesia camp and began to detain arriving women and families at other facilities in Texas and Pennsylvania. A court ruling persuaded the administration to abandon general deterrence as a reason to deny bond.⁸⁷ Another ruling determined that the government's detention practices violated a settlement agreement the government had previously agreed to in 1997, but the government has appealed this order.⁸⁸ During the summer of 2015, the administration announced that it would 'generally not detain mothers with children, absent a threat to public safety or national security, if they have received a positive finding for credible or reasonable fear.'⁸⁹ While the situation might be improving for detained families, individual detention is still a mainstay of the removal system.

⁸⁶ *ibid.*

⁸⁷ *RILR v Johnson* (n 84).

⁸⁸ *Flores v Johnson* (n 83).

⁸⁹ Franco Ordonez, 'Members of Congress Say that Release of Detained Mothers and Children Not Enough,' (*McClatchy DC*, 13 July 2015) <<http://www.mcclatchydc.com/news/nation-world/national/article27184060.html#storylink=cpy>> accessed 22 October 2015.

2.3 Procedural Fairness is Not a Priority, but is a Necessity

Acknowledging that the immigration adjudication system is dysfunctional is not controversial. In fact, the deficiencies in the system have been familiar to immigration law experts for years. This status quo—a system that many agree is not working but is allowed to continue on in its current state—reveals that procedural fairness is not a policy priority, or, at best, that procedural reforms are subject to the same reform paralysis that affects substantive immigration law reform in the United States. Despite the fact that there have been several in-depth studies of the immigration adjudication system with nuts and bolts recommendations for improvement, EOIR remains troubled and underfunded. Even with recent additional hires, there is no plan to dramatically address the problems facing the system.

Efforts at reform face an uphill battle because there is no strong urgency to make sure that foreign nationals receive robust procedural protections. This is evident in enacted statutes that diminish judicial review, in agency actions that ‘streamline’ procedures, in the failure to fund EOIR commensurate with increased enforcement efforts, and in proposals to further limit access to courts. There is a sense that procedural protections are not deserved and, in fact, are abused by foreign nationals. For example, proponents of proposals to further limit judicial review frequently assert that foreign nationals seek judicial review to delay removal.⁹⁰ That perceived delay is characterised as a distasteful response to a removal charge. The exercise of procedural protections becomes itself a negative action and one worthy of criticism. Elsewhere I have argued that this approach is tied to a traditional view of the relationship between the foreigner and the state that gives the state all of the power and does not allow room for individual rights.⁹¹ A more modern conception of immigration sovereignty must make room for individual rights and must expect and promote foreign nationals to exercise their procedural protections, rather than show disdain for it.

Procedural fairness is a necessity and must be a priority as a part of any reform of immigration law. Legislators and advocacy groups must take care to make sure that any substantive reform is

⁹⁰ Family, ‘Removing the Distraction of Delay’ (n 78) 104-109.

⁹¹ *ibid* 110-119.

accompanied by appropriate procedural protections, including a well-functioning adjudication system. For example, suppose the cancellation of removal provisions was reformed to interject some level of discretion back into the process. Immigration judges would have more room to weigh positive and negative factors in deciding whether to remove. While that would be a welcome change, that change is neutered if there are not enough immigration judges to hear cases. That change is neutered, too, if individuals are diverted from the civil immigration adjudication system and they never see an immigration judge.

What would make the system fairer? As many others have concluded, there needs to be a substantial increase in resources. EOIR is an essential piece of the removal system. Given the seriousness and importance of what EOIR adjudicators decide, EOIR's needs should not be ignored. The United States should want to have (and should feel obligated to have) the strongest, most well respected immigration adjudication system in the world.

To achieve that goal, immigration adjudicators need greater independence and status. Others have argued persuasively that these adjudicators should be more than employees of the Department of Justice.⁹² Immigration law decision-making needs to be depoliticised. One way to do that is to provide adjudicators with more decisional independence through job protections and increased status. But decisional independence alone is not enough.⁹³ Judicial review needs to be strengthened. Without robust judicial review, we lose important oversight and the system loses legitimacy. Judicial review takes time, of course, but that time is a worthy investment. Additionally, there needs to be a universal right to representation in immigration cases.⁹⁴ The lack of government funded counsel means the system is steeped in unfairness, as individual foreign nationals are left on their

⁹² See, for example, American Bar Association Commission on Immigration, 'Reforming the Immigration System' (February 2010) <http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf> accessed 22 October 2015.

⁹³ Family, 'Beyond Decisional Independence' (n 47) 541.

⁹⁴ In 2006, the American Bar Association called for government funded counsel in immigration removal cases. See <http://www.americanbar.org/content/dam/aba/migrated/publicserv/immigration/107a_right_to_counsel.authcheckdam.pdf> accessed 22 October 2015.

own to manoeuvre through a complicated procedural system that applies substantive law that rivals the US tax code in complexity. It should not be left to the shoulders of private immigration attorneys to mobilise and to donate time and money to create a representation system. While the work of US immigration attorneys in mobilising to Artesia is worthy of high praise, the system should not require that type of action. The government's attempts to process newly arrived families without basic procedural protections are evidence that the government needs oversight. If private immigration attorneys had not responded with such generosity and motivation, the government would have further steamrolled the procedural rights of families.

In addition, there are two tangential improvements that would improve the fairness of the system. First, the US government needs to rethink its immigration detention system and to consider how detention practices create hurdles to procedural fairness. The perspective needs to change from a system that seemingly ignores how detention affects procedural fairness to one where a desire to promote procedural fairness plays a prominent role. Second, the perspective on diversions from the immigration adjudication system needs to change as well. The problems with EOIR should not be used as an excuse to circumvent the civil immigration adjudication system. The system should be fixed, and 'speed deportation'⁹⁵ procedures should be viewed with suspicion, rather than embraced as something that allows the United States to shortcut procedural protections.

Conclusion

US immigration law contains procedural barriers in addition to substantive barriers. The system built to adjudicate removal cases in the United States has become a procedural barrier for foreign nationals. The fact that the system is dysfunctional, and that it has remained so for many years, evidences that procedural fairness for foreign nationals is not a policy priority in the United States. This mindset needs to change. Procedural fairness is a core American value.

⁹⁵ Shoba Sivaprasad Wadhia, 'The Rise of Speed Deportation and the Role of Discretion' (2015) 5 *Columbia Journal of Race and Law* 1.

The need for procedural fairness is sometimes seen as incompatible with the goal of super efficiency in immigration cases. While efficiency is a necessary and important goal for any adjudication system, it is not the only goal. Accuracy and acceptability are important goals too. We should not expect less of the immigration adjudication system, or allow for less, because it hears immigration cases. We should not shed our procedural fairness heritage, or allow ourselves to cut corners, merely because these cases involve foreign nationals.