

Bearing Witness in the Moment:

Report from the Immigration Court Observation Project
2020



Executive Summary and Recommendations

EXECUTIVE SUMMARY

The Immigration Court Observation Project is a collaboration between The Advocates for Human Rights, the James H. Binger Center for New Americans at the University of Minnesota Law School, and Robins Kaplan LLP in Minnesota. The project began in April 2017 following the first Muslim Ban, seeking to harness some of the energy that erupted at airports in protest and direct it toward what was anticipated to be a volatile environment for detained people facing deportation.

The Immigration Court Observation Project draws on the international human rights practice of trial monitoring to identify and bring visibility to systemic human rights violations arising in the context of civil immigration enforcement. The project brings observers from the public into the Fort Snelling Immigration Court in Minnesota to observe and document immigration hearings of people who are currently held in Immigration and Customs Enforcement (ICE) detention.

The hope was that observers could provide a bird's eye view of emerging trends and problems. But when members of the public began observing detained removal hearings, many questioned the everyday practices and assumptions upon which the deportation system rests.

This report explores how immigration court observers have been affected by participation in the project and how inviting the public inside the workings of the deportation infrastructure can call into question the workings of that system. This report aims to illuminate court observers' motivations, experiences, perceptions, and recommendations. The report centers the voices of the court observers who participated in a survey and roundtable discussions. This report is the result of research conducted and analyzed by The Advocates, which is solely responsible for its contents, conclusions, and any errors.

VOLUNTEER ENGAGEMENT AND ACTION

Volunteers identified being motivated to participate in court observation by outrage at injustice in the immigration system; by the opportunity to take action, bear witness, and learn; and by personal connections to the issue of immigration. Once inside the courtroom, observers reported that their experiences largely aligned with their initial motivations, deepened their understanding of the immigration system, and allowed them to take action.

Volunteers reported that the experience inspired them to act. From a list of specific actions: 44% said they have recruited others to volunteer; 15% wrote letters to the editor, blog or social media posts; 38% contacted an elected representative; 51% attended other immigration trainings; 42% attended a protest, rally, or demonstration; 21% volunteered with other immigrant justice or legal aid nonprofits; and 45% donated money to these organizations.

FINDINGS

Observers reflected on their notions of justice and due process. They reported a significant disconnect between these concepts and what they observe while monitoring immigration court hearings. Observers questioned the fairness of many of the fundamental premises of the immigration system itself. Many were troubled by the consequences of a technical distinction between “criminal” and “civil” proceedings, which results in significantly more limited procedural protections to people facing deportation than those charged with criminal offenses. They identified serious barriers to justice that undermine the fairness of proceedings which result in the expulsion of hundreds of thousands of people from the United States each year. They noted the overwhelmingly disproportionate impact of immigration enforcement on Black, Latinx, and Asian refugees and immigrants and the way in which racist criminal policing and prosecution practices magnify who ends up detained by ICE. They felt the coercive power of detention on people’s ability to pursue their cases. Observers questioned the legitimacy of a system where laws appeared unable to do justice, even when procedures were followed.

Defining Justice

International law defines core standards of justice, including just laws, due process, non-discrimination, and recognition of human dignity. When asked to reflect on the immigration system and their idea of what justice means, observers identified these same elements.

Observers reported a belief that, for any court system to dispense justice, the system must be based on laws which are just. There was strong consensus among volunteers that our current immigration laws do not necessarily allow justice to be done—largely because the laws themselves do not allow for the outcomes which observers perceived to be just outcomes.

When observers reflected on the concept of “due process,” they identified two key elements: transparent, consistent rules and an understandable, accessible process. Observers noted that ensuring language access throughout hearings and in written information is essential to due process. Observers also included access to attorneys and other resources in their understanding of due process.

Observers also agreed that to achieve justice there needs to be fair treatment regardless of race, nationality, or immigration status. Systems that create or perpetuate racist practices lack legitimacy. Finally, court observers identified recognition of human dignity as essential to justice. Many noted the importance of respect, empathy, and humanity in the courtroom.

Barriers to Immigration Justice

Immigration court observers noted serious, and in some ways insurmountable, barriers to justice in the immigration enforcement system. Their concerns largely track the benchmarks for justice they identified. Observers voiced concerns resulting from an **underlying legal framework** that provides few ways for people to immigrate, myriad reasons for their expulsion, and limited defenses to deportation. Observers identified serious **due process concerns**, perceiving that the system unfairly “stacks the deck” against people by depriving them of the means to understand and participate in their cases. Observers also surfaced how policing and incarceration systems intersect with and impact deportations, amplifying **racial bias** in immigration enforcement. Finally, observers found the immigration enforcement system dehumanizing, degrading, and coercive in a way that **undermines human dignity**.

RECOMMENDATIONS

What Observers Want People to Know

Court observers were struck by the banal and brutal nature of the immigration enforcement system. Many recognized that the system’s design and implementation often leaves little room to do justice. Changes in immigration statutes, administrative policies, enforcement priorities, and appropriations—together with an end to racially-biased policing and prosecution practices which result in the criminalization of many immigrant and refugee communities—are needed.

But when asked what they wished judges to know, observers focused on the need to honor human dignity and to ensure understanding. Observers noted that when judges slow down, greet people, and take time to actively listen and check for understanding, due process is improved. Observers also acknowledged the emotional toll taken on systems personnel, including the judges, court staff, government attorneys, interpreters, and private attorneys.

Immigration court observers reported that while human rights monitoring can be emotionally challenging, it can also challenge their notions of the U.S. immigration system and the portrayal of the issue in the media. Monitoring immigration hearings also deeply affected their understanding of the impact the system has on the people facing deportation, their families, and their communities.

POLICY RECOMMENDATIONS

Immigration court observers were clear that immigration policy must meet international human rights standards by doing justice, operating fairly, being free from discrimination, and supporting human dignity. Observers pointed to several areas of particular concern, including:

- absence of meaningful defenses to deportation or avenues to move into lawful status;
- lack of access to counsel, failure to ensure understanding of and access to the process, and use of detention to effectively coerce abandonment of legal options;
- disproportionate consequences of criminal or administrative violations and amplification of the effects of racism in policing on immigrant and refugee communities; and
- degrading treatment, including use of shackling and prison attire.

The deficiencies noted by observers point to fundamental failures of U.S. immigration laws, policies, and practices to meet internationally recognized human rights standards.

Enact Just Laws

>> Develop and implement policies that ensure respect, protection, and fulfillment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle.

Congress should:

- Enact a new immigration framework that promotes the dignity and well-being of migrants and the members of communities in countries of origin, transit, and destination.
- Amend immigration laws to prevent people from falling out of status or remaining undocumented by narrowing criminal and other grounds of deportability and bars to immigration status or deportation defenses; expanding waivers of inadmissibility to facilitate adjustment of status to lawful permanent resident; and allowing undocumented people to move into non-immigrant status (such as visitor, student, or worker visa status).
- Repeal mandatory deportation provisions. Ensure that everyone who faces expulsion has access to a hearing on the impact of deportation on protection from torture, trafficking, or persecution; family unity and the best interests of the child; and other fundamental human rights. Ensure people are never returned to persecution or torture in violation of U.S. treaty obligations.

State and local governments should:

- Ensure state criminal laws, sentencing and probation schemes, post-conviction relief statutes, and pardon processes do not result in disproportionate immigration consequences.

The public should:

- Demand reforms to U.S. immigration laws to create people-centered policies that promote the dignity and well-being of migrants.

Ensure Due Process

>> Recognize that detention and exile deprive people of their liberty, separate people from their families and communities, result in loss of homes and careers, and may mean return to torture, persecution, or other serious human rights violations. Ensure that the system making such weighty decisions provides commensurate due process protections.

Congress should:

- Create statutory due process protections sufficient to protect people from human rights violations and with the aim of ensuring that people understand their legal rights and options and have a reasonable and meaningful opportunity to pursue them.
- Legislate and appropriate for universal representation of all indigent persons seeking protection or facing removal.
- Remove the immigration court from the Department of Justice with statutory protections against political interference.
- Appropriate sufficient funds to support a fully functioning immigration court system, ensuring reasonable docket loads, sufficient staff support and language access, and appropriate technology. Ensure that appropriations for adjudications is increased in proportion to appropriations for enforcement operations.
- Amend statutes to provide reasonable timelines for filing applications, motions, and appeals. Allow reopening of cases for good cause and always in the case of ineffective assistance of counsel, changed circumstances, or government misconduct.

Federal agencies should:

- Develop standard, comprehensible written instructions and oral advisals with the goal of ensuring understanding and ability to comply with instructions. Ensure accessibility to people with low or no literacy and to people who do not speak or read English. Ensure forms and instructions are accessible in detention centers for pro se applicants. Train personnel to use plain language, check understanding, and on other cultural communications skills.
- Ensure full and fair interpretation of all hearings, including off-the-record discussions and arguments.
- Promote access to counsel, including pro bono counsel, for all through consistent, professional, and accessible practices.
- Eliminate arbitrary case completion quotas and other performance measures designed to speed adjudication of cases. Create performance metrics that reward adherence to due process and other legal standards rather than focusing on fast processing of cases. Restore and expand immigration judge discretion to manage dockets, dismiss or administratively close cases, and control caseloads.
- Ensure all detention centers have sufficient attorney visitation facilities; free and confidential means of telephone, video, email, and text communication with counsel; and sufficient staffing to ensure timely access to counsel and to documents needed to pursue defenses to deportation. Terminate contracts with facilities that fail to ensure meaningful access to counsel.
- Require detention facilities to facilitate access to mental competency and chemical dependency evaluations needed to establish eligibility for release from custody or for immigration relief. Terminate contracts with facilities that do not afford access.

The public should:

- Demand federal appropriations support access to justice.

Ensure Non-Discrimination

>> Recognize that the United States has an obligation to respect, protect, and fulfill the human rights of all persons within its jurisdiction regardless of race, citizenship or immigration status, disability, class, or other protected class.

Congress should:

- Eliminate \$1,500 statutory minimum bond and require consideration of ability to pay in all bond decisions.
- Remove drug possession as a ground of removability.

State and local governments should:

- Avoid entanglement of criminal legal systems with immigration enforcement mechanisms.
- Dismantle systems which criminalize, police, prosecute, and incarcerate Black, Indigenous, and other communities of color; poverty; and mental illness.
- Take steps at all levels to reduce levels of incarceration, including probation and sentencing reform.
- Ensure access to driver's licenses and state identification documents.

Promote Dignity

>> Recognize the dignity of human beings in the design and implementation of immigration policies. Recognize the obligation to treat all detained persons with respect for their inherent dignity and value as human beings. Ensure that no one is subjected to torture or other degrading treatment or punishment. Ensure that no one is subjected to arbitrary detention.

Congress should:

- Repeal mandatory detention laws. Ensure that every person who is detained has access to an individualized custody determination before an independent judicial authority.
- Ensure accountability for human rights violations committed by immigration officials and contractors and work to eliminate a culture of tolerance for those abuses. Fully fund and empower effective, independent oversight mechanisms.

Federal agencies should:

- End detention-first practices and use detention only as a last resort, consistent with international standards. Avoid prolonged, indefinite, or arbitrary detention by ensuring regular custody review of every person held in detention. Use alternatives to detention that promote people's dignity, safety, and ability to participate in removal proceedings.
- End routine shackling and provide appropriate civilian clothing for people appearing in immigration court.
- Ensure prolonged solitary confinement is never used.
- Ensure that all facilities used for ICE detention comply with federal immigration detention standards. Do not contract with facilities that are unable or unwilling to meet these standards

and do not waive compliance with standards when entering or renewing contracts. Terminate contracts with facilities which violate these standards.

- Provide regular trauma-informed training and ongoing support designed to foster resilience for judges, attorneys, and staff.

State and local governments should:

- End use of prolonged solitary confinement. Consistent with international standards, never hold a person in solitary confinement more than 15 days and never inflict solitary confinement on people with mental or physical disabilities.
- Stop using federal immigration or other contracts as revenue streams for general county or local government operations or public safety budgets. Use funds for the safety, health, and access to justice of those detained. Provide public accountability for the contracts.
- Ensure all persons held in confinement are treated with dignity. Enact state standards for detention conditions. Create statutory oversight authority to ensure standards are met. Proactively monitor and effectively respond to complaints of violations.
- Allow and foster programs that support the health, well-being, and resilience of people held in confinement, such as pen pals and visitation programs, while working to decarcerate.
- Ensure the well-being and resilience of personnel who work with immigrants and refugees in detention.

The public should:

- Demand transparency in city, county, state, and federal policy and budget decisions relating to policing, prosecution, and incarceration.
- Hold decision-makers accountable for ensuring that violations of rights are investigated, violators are held accountable, and steps are taken to prevent violations.
- Expand immigration court observation projects in every court. Moral witness and the documentation of human rights abuses is critical in upholding human dignity.

CONCLUSION

The United States must develop and implement policies that ensure respect, protection, and fulfillment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle.

Actors at all levels—from congress to courtrooms—can take steps to prevent and address human rights violations. Public officials should take immediate actions where possible, repeal laws and policies which undermine these objectives, and redesign immigration laws consistent with human rights standards.

Members of the public have an important role in envisioning and demanding a just and fair immigration system. Bringing the public to witness immigration hearings helps to identify how laws and policies operate in practice and to articulate when they fail to meet human rights

standards. The Immigration Court Observation Project has built a more informed and impassioned corps of advocates. But in the end, responsibility is on all of us: “We are all complicit by our tax paying in a system that is costly for us and unjust to refugees and immigrants, and we need to work to change that system and to elect officials at all levels who will work to fundamentally change this system.”

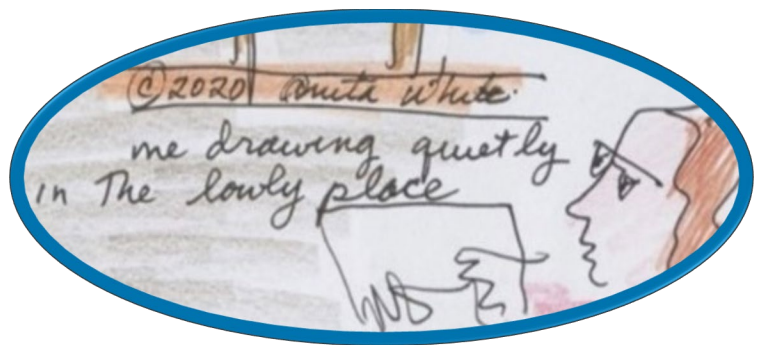
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Courtroom Artist | Anita White is a local artist from Minneapolis, Minnesota. “Drawing is a way for me to find beauty and to navigate life's challenges. I have drawn at the beach, in my garden, and I also documented my way through my late husband’s many medical challenges at Hennepin Healthcare. My motto: ‘Nothing is so scary you can't draw it!’ has helped me find courage to draw my way through many family caregiving moments. Drawing in the courts has been a way to pay attention and to bear witness to those without a voice.”



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The Advocates for Human Rights

The mission of The Advocates for Human Rights is to implement international human rights standards to promote civil society and reinforce the rule of law. By involving volunteers in research, education, and advocacy, The Advocates builds broad constituencies in the United States and select global communities.

The Advocates for Human Rights works to change systems and conditions that cause human rights abuses, improve laws and lives throughout the world, represent individual victims of human rights violations, and fight injustice. The Advocates develops partnerships and mobilizes volunteers to address some of the most pressing issues of our time because we believe that everyone has the power and responsibility to advance human rights.

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