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IRLI IMMIGRATION REFORM LAW INSTITUTE

Investigative Note:

The Migration Policy Institute (MPI) has completely misdiagnosed the problems that have brought the Immigration Courts to the Breaking Point.

Key Takeaway: Experts at MPI recently attempted to get to the root of the problems plaguing the U.S. Immigration Courts. In fact, they simply sidestepped the real issues facing the court: too many aliens; too little time; and an absurd insistence on providing aliens with "rights" to which they are not entitled under the law.

INTRODUCTION

The Migration Policy Institute (MPI), a pro-migrant research organization, recently published a report titled *At the Breaking Point: Rethinking the U.S. Immigration Court System.* Amongst the authors of this document are Doris Meissner, a former Commissioner of the Immigration and Naturalization Service and Stephen Yale-Loehr, an immigration law professor at Cornell University. With heavy hitters like that on its staff, one would think MPI might have something insightful to say about the current state of the Executive Office for Immigration Review, the branch of the Department of Justice that administers the Immigration Court system. That,

however, is most certainly not the case. MPI's analysis is nothing but a propaganda piece that rests on tired clichés.

QUANTITY AND QUALITY ARE NOT THE PROBLEM

The central thesis of MPI's report is that the Executive Office for Immigration Review (EOIR) – which consists of the Immigration Court and its appellate counterpart the Board of Immigration Appeals (BIA) – is facing two key issues: an overwhelming caseload and a decline in the quality of the decisions issued by these tribunals. MPI refers to these as the "quantity issue" and the "quality issue."

According to MPI the quantity issue is primarily the result of two actions taken by the Trump administration: 1) arresting more immigration violators, both in the interior and at the border; and 2) re-opening the huge number of cases that were erroneously closed by the Obama administration. In short, effective enforcement of our immigration laws has led to a larger number of cases in our immigration courts. It's profoundly unclear why professional researchers should find something so self-evident to be so shocking.

When it comes to the quality issue, MPI's logic is even more fuzzy. As evidence in support of its argument that decisions from the immigration court apparatus are declining in quality, MPI claims that in 2005, the U.S. Court of Appeals for the Seventh Circuit reversed 40 percent of the BIA decisions appealed to it that year. But, aside from being stale evidence that is 18 years out of date, that's also a profoundly misleading claim. Appellate courts rule not on the merits of a particular case but on legal issues that range from procedural requirements to the interpretation of evidence. And it's not uncommon for an appellate court to remand a case to a tribunal of first instance, only for that tribunal to issue the same decision based on a different legal rationale or a different interpretation of the relevant evidence. Furthermore, there are 13 federal judicial circuits. Therefore, the fact that one of those circuits, two decades ago, reversed a higher percentage of BIA decisions than another circuit is not indicative of anything.

MPI's ANALYSIS IS SKEWED

It is really not surprising that MPI has presented a skewed take on the problems affecting EOIR as it clearly believes that both the Immigration Court and the BIA should be rubber stamp operations that permit most immigration violators to remain in the United States. If one has any doubts about this, one only need read MPI's summary of the challenges it believes the quality and quantity issues create:

"Waiting more than two years on average for an immigration court decision means that noncitizens, referred to as respondents in removal proceedings, lack certainty in their lives. Those who are detained may experience serious negative health effects, both physical and mental, and often give up valid claims for asylum or other relief due to the pressures and conditions of detention. For those who are not detained, frequent delays in receiving work authorization jeopardize their ability to support their families and create other hardships."

What MPI neglects to mention is that the vast majority of these complaints would be immediately negated if the aliens in question simply returned home, where they possess full rights of citizenship. But MPI, like the rest of the anti-borders contingent appears to be convinced that any foreign national who is dissatisfied with life in his or her home country, has an unfettered right to come to the United States.

Of course, that simply isn't the case. And the Supreme Court has been very clear on this point from its 1892 holding in *Ekiu v. United States,* to its 1972 decision in *Kliendienst v. Mandel*, to its 2018 opinion in *Trump v. Hawaii*. Unadmitted, non-resident aliens have no constitutional or other legal claim to be admitted to the United States. And, as a sovereign nation, America has the unfettered authority to determine who it will admit into its territory, as well as the conditions under which they may stay.

THE REAL PROBLEM: UNDUE PROCESS

So what is the real problem hobbling EOIR? The answer to that question is fairly simple. Organizations like MPI have insisted that deportation proceedings require a complex analysis of a host of "immigration rights" allegedly possessed by foreign nationals. However, none of these alleged "rights" stem from anything that is required under the Constitution or any of our immigration laws.

Many legal advocates would claim that its not possible to receive too much process. But that isn't true. Due process is a balancing act that ensures both parties to a lawsuit have a fair shot at proving their claim. When the interests of one party are consistently prioritized, then the interests of the opposing party will inevitably suffer. Call it a case of "undue process."

Deportation proceedings are not at all like a criminal trial. Neither the life nor the property of the respondent alien is in jeopardy. And the legal questions to answer are fairly straightforward: Does the alien respondent have authorization to be in the

United States? If so, has he or she complied with the terms of that authorization? If the answer to either of these questions is "No," then the alien is subject to removal from the United States unless the alien can affirmatively demonstrate that he or she qualifies for some form of relief.

In this respect, deportation proceedings are very similar to a drivers' license revocation hearing, where the sole issue is the revocation of a privilege, not the vindication of any "right." Foreign nationals who either: 1) crossed the border unlawfully; or 2) crossed the border lawfully but later violated their terms of admission have no right to remain in the United States.

Ultimately, aliens have a right to due process and a fair hearing before being removed from the United States. They are, as a matter of law, entitled to little else.

CONCLUSION

The simplest way to solve the problems affecting the immigration court system is to stop according more due process to aliens than the law requires. The Immigration Court must stop pretending that every deportation proceeding is the equivalent of a murder trial where an obviously innocent defendant is being persecuted by the state on the basis of flimsy evidence. The reality is that the Immigration Court is a tribunal of limited jurisdiction. And the vast majority of claims made before it are Hail Mary passes made by alien lawbreakers who simply don't want to return home.

Dismissing matters that on their face fail to state a justiciable claim would be both just and highly efficient. It would also have the salutary effect of bringing to heel the longstanding abuse of our immigration system that is perpetrated by both foreign nationals and domestic anti-borders advocates like MPI.