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In Its Zeal to Deport Immigrants, the Justice Department Scraps Due Process ^[1]

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In the past month, the Department of Justice has issued a series of stunningly senseless, wasteful, and cruel immigration policies. It ended a program to notify immigrants of their rights in deportation cases. It set an arbitrary and unreasonable quota for immigration judges. It enabled judges to make asylum decisions without a hearing. And it doubled down on a failed “zero tolerance” policy that aims to prosecute everyone accused of crossing the border without authorization.

Like other Trump administration moves, these policies distort the facts, dehumanize immigrants and inflict fundamental damage on the legitimacy of our legal system.

On April 10, the Justice Department announced that it is ending its Legal Orientation Program, which started during the George W. Bush administration to provide people who are detained and facing deportation with basic information about immigration laws and their rights. The LOP was an important yet inadequate lifeline, since only 14 percent ^[2] of detained immigrants manage to obtain an attorney, and others must defend themselves against government lawyers who specialize in the infamously complex immigration code.

The LOP has long had bipartisan support ^[3] from Congress, and from the National Association of Immigration Judges ^[4], because it was also a lifeline for the under resourced immigration courts. Without providing this basic information to immigrants, immigration judges would find it even more difficult to do their job of ensuring that people understand their rights and are making informed decisions. But in today’s Justice Department, even that flimsy lifeline has been cut. The aim is clear: to speed up deportation, without due consideration of the law or facts in a person’s case.

The impact of LOP’s end is multiplied by Sessions’ other recent policies. On March 5, he took the unusual step of unilaterally reversing a 2014 decision by the Board of Immigration Appeals that had required immigration judges to hold a hearing before deciding asylum cases. This cleared the way for asylum applicants — most of whom

don't have lawyers, don't understand the legal system, and may not speak English — to be deported without ever having a chance to state their case to a judge. Soon after, he announced that immigration judges should meet an arbitrary quota of deciding 700 deportation cases a year.

Sessions has said his intent is to clear a backlog in immigration courts. But his chosen methods undermine the fundamental role of those courts: to determine whether the government is correct in its assertion that a person is deportable or has a legal right to remain, such as a valid asylum claim.

What's behind Sessions' "streamlining" ideas? He wants to falsely cast immigrants and refugees as criminals. He made that clear with the last of his April announcements when he called for a "zero tolerance" policy mandating criminal prosecution of every person accused of crossing the border without authorization. In an April 11 speech to the Texas Border Sheriffs' Coalition and the Southwestern Border Sheriffs' Coalition, Sessions justified charging anyone who crosses the border with a misdemeanor by suggesting they are all violent criminals and drug smugglers.

In fact, illegal entry and reentry — now holding third- and first-place among all federal crimes charged in the United States — by definition do not entail violence or drugs. Between March 2017 and February 2018, prosecutions of illegal entry increased more than 448 percent ^[5], even though border crossings are at an all-time low. Our government is spending an estimated \$1 billion a year ^[6] just on the cost of incarcerating people convicted under these statutes, which does not include the costs of diverting federal agents, prosecutors, and court resources from actually stopping violent crimes. And Border Patrol's claim that these prosecutions deter people from crossing has been debunked ^[6] by empirical data.

The Justice Department's past experiments show what "zero tolerance" will do. Some U.S. Attorney's Offices along the southern border have implemented some form of "Operation Streamline" since 2005, improvising short cuts to process a high volume of misdemeanor illegal entry cases. Operation Streamline caused the U.S. District Court in Arizona to declare a judicial emergency in 2011 because of the overwhelming strain on the court's resources, and led the court to bypass the federal Speedy Trial Act's protections for criminal defendants.

The U.S. Court of Appeals for the Ninth Circuit found that the policy resulted in gross violations of federal law. Courtrooms full of 50 or more people accused of illegal entry were forced to go through assembly-line proceedings, responding to a judge's questions in chorus with dozens of others and making enormously important decisions without full information. The entire process of defending against a federal criminal charge would be collapsed into a single proceeding in which people meet their attorneys for the first time and get a coercive "exploding" plea offer that forces them to choose immediately between taking the plea and getting a reduced sentence or remaining jailed for months in order to stand trial. This process gives even defendants who have valid defenses every incentive to plead guilty. In Sessions' "zero tolerance" world, these injustices will multiply.

A fair day in court can make all the difference. When I was a public defender, I represented a man charged with illegally reentering the United States after deportation. He had been a lawful permanent resident since he was a toddler, but was deported to the country of his birth, where he knew no one. He tried for years to make a life there, but he finally could not bear to be separated from his family and returned home to New York. Because we were not in a “streamlined” district, I had time to actually defend him. I discovered, after interviewing family members and researching immigration laws, that he had automatically attained citizenship as a child when his mother naturalized. He had been a U.S. citizen the whole time. I got his federal indictment dismissed, though I could not get back the years he was lost in exile by deportation.

In Sessions’ world, people like my client would have no chance. Our society cannot tolerate such unfairness.

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[2]

https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review

[3] https://www.washingtonpost.com/local/immigration/ice-praised-legal-aid-program-for-immigrants-that-justice-dept-plans-to-suspend/2018/04/17/c0b073d4-3f31-11e8-974f-aacd97698cef_story.html?utm_term=.66a9aef757f7

[4] <https://www.naij-usa.org/about>

[5] <http://trac.syr.edu/tracreports/bulletins/immigration/monthlyfeb18/fil/>

[6] <https://www.aclu.org/other/operation-streamline-issue-brief>