

Deported Without Seeing A Judge: One of the Worst Parts of the Immigration System

BY [NORA CAPLAN-BRICKER](#)

Barack Obama wanted to be the president who signed immigration reform into law. Instead, six years into his presidency, he finds himself under attack from some of his would-be allies in the immigrant rights community. They call him the “deporter-in-chief”—a reference, primarily, to the two million deportations that have already taken place during his presidency.

But advocates are upset about more than the sheer number of deportations. They are also unhappy with the way these deportations are taking place. In most cases, the government doesn’t provide immigrants with due process before returning them. At least three-quarters of people deported in 2012 didn’t get a hearing from an immigration judge, according to [statistics](#) from the Department of Homeland Security (DHS).

This practice isn’t really new. Agents from the Border Patrol and Immigration and Customs Enforcement (ICE) have long had the authority to send immigrants home without a hearing through an informal, voluntary “return.” Would-be immigrants who went back to their countries this way didn’t end up with marks on their permanent immigration records. Border officers made wide use of this procedure during the Bush Administration.

But [starting in 2005](#), the Department of Homeland Security increased use of a second procedure known as “expedited removal.” This is a formal process, in which the deportee never sees a judge, but the removal still goes on his or her permanent record. That’s a big deal, because it can trigger much harsher penalties if that person ever tries to enter the country again.

Immigration advocates say that rendering a judgment with such steep consequences—if you’ve been deported once, returning to the U.S. makes you a candidate for felony charges and a top priority for ICE agents—without a trial violates the fundamental values of U.S. society. But they have a more immediate concern, too—that many of the immigrants sent home without a hearing don’t know their rights, and don’t realize they could make a legal case to stay in the U.S. if they could only get before a judge.

With the prospects of new immigration legislation increasingly small, advocates want Obama to curb deportations on his own, through unilateral executive action. As they press for reform of the deportations system, they point to the failure of due process as a sign of its deep flaws.

Why do fewer than a quarter of deportees ever get to see a judge? In part, because it’s the only way for ICE to [reach its goal](#) of deporting somewhere in the ballpark of 400,000 people a year. While funding for ICE and the Border Patrol swelled in the Bush years, funding for the system of

immigration courts, which handle removal hearings, remained low—and it has in the Obama years, too. As a result, there are [363,239 immigration cases pending](#) nationwide, according to the latest count by TRAC, a data analysis project at Syracuse University. The only way for ICE stay on schedule is to bypass the courts.

In theory, would-be immigrants facing deportation are supposed to get due process—or something approximating it—even if they don't see a judge. Even in cases where “expedited removal,” or one of the handful of other deportation procedures that don't involve a judge, is possible, agents are supposed to check carefully for reasons an immigrant might be eligible for asylum—for example, from a violent home country—and to hand them over to the immigration courts if the situation doesn't look straightforward. But lawyers who work with asylum seekers told *The New York Times* last week that those protocols are unevenly applied: Often, the Border Patrol doesn't ask if the immigrants are fleeing large dangers, or their captives are “[too exhausted or intimidated](#)” to tell their stories. “A lot of times these people had very real, legitimate fears,” Kimi Jackson, director of the South Texas Pro Bono Asylum Representation Project, told the *Times*. “But it seems to them they were not asked the questions by the Border Patrol in the type of situation where they could talk freely.”

Those “expedited removals,” which were first introduced by the [1996 Illegal Immigration Reform and Immigrant Responsibility Act \(IIRIRA\)](#), can take place only when authorities apprehend an immigrant within 100 miles of the border and within two weeks of entering the country. There's a reason to restrict the practice in that way: It's supposed to focus only on people who haven't yet established roots and family ties within the U.S. But experts say that a [growing number of people](#) who brave the increasingly dangerous border crossing into the U.S. have been deported before and are trying to return to families here. Overall, expedited removals accounted for 39 percent of all deportations in 2012, [according to DHS](#). Any of those people who enter the country again could be subject to even quicker removal next time—again, without seeing a judge—through a process called “reinstatement of final orders.” These accounted for [36 percent](#) of removals in 2012. “There's an intuitive sense that if someone got an earlier removal order, they got their day in court,” said Mark Fleming, the National Litigation Coordinator at Heartland Alliance's National Immigrant Justice Center. “That's not necessarily true.”

Immigration officials told the *Times* that they are careful not to unilaterally remove people who might have a legal argument for staying in the U.S. Among other things, they said, they “had set the bar intentionally low for the initial ‘credible fear’ test, to avoid turning away a foreigner in danger.” Immigration rights advocates disagree. Many describe clients who would have qualified to stay the first time they were deported, but never saw a lawyer or a judge. These immigrants crossed back into the U.S., often to reunite with family here. Now, there's no way to fight the reinstated effort to deport them—they effectively waived their rights without knowing they had. (Unlike U.S. citizens who get in trouble with the law, immigrants are not provided with free counsel by the government; if they can't afford a lawyer or find one to work pro bono, they must represent themselves.)

Expedited removals accounted for [21 percent](#) of deportations in 2004 and had nearly doubled to [40 percent](#) by 2006. Since then, the level has stayed more or less the same. The current immigration fight centers on the question of whether Obama has made the deportations system more humane. When it comes to due process, immigration advocates have no trouble arguing that he has a long way to go.

<http://www.newrepublic.com/article/117355/expedited-removal-deportations-immigrants-dont-get-due-process>