# Using Immigration Court as a Trap

## ICE's Apprehension of Noncitizens at Immigration Court and Fundamental Fairness

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Immigration and Customs Enforcement (ICE), the unit within the Department of Homeland Security (DHS) that conducts interior immigration enforcement, has begun apprehending noncitizens at immigration court after the government moves to dismiss their case. Noncitizens appear in immigration court to pursue humanitarian relief or otherwise defend against deportation. Long used as a tool of prosecutorial discretion, a dismissal typically signals the provisional end of an enforcement action. However, immigrants and their attorneys are finding that ICE is coordinating with government lawyers to meet noncitizens exiting immigration court after such dismissals and detaining them. Rather than a reprieve, dismissal now functions as a tool for facilitating detention and possibly summary deportation, raising concerns about due process and fidelity to the governing statutes. Noncitizens contesting their removal lack the procedural protections applicable to criminal defendants, such as a right to legal counsel, because removal proceedings are regarded as "civil" rather than criminal.

### The pursuit of "low-hanging fruit"

Under pressure to arrest thousands of noncitizens a day, ICE has pursued removals widely and regardless of the equities in a given case, such as the presence of U.S. citizen children in the family unit, the noncitizen's lack of criminal history, or long-term residence. Although the enforcement bureaucracy has often exercised enforcement discretion to focus its limited resources on the highest value targets, it now openly pursues "low-hanging fruit," or individuals who enter the agency's crosshairs by virtue of complying: checking in with ICE as required, attending federal or state court proceedings, or appearing in immigration court. Critics contend that apprehending noncitizens doing the "right thing" creates an incentive for noncitizens to skip check-ins and hearings in order to avoid arrest, but an agency official claimed that it was too soon to evaluate that claim. Moreover, noncitizens who skip hearings face orders of removal in absentia.

### From arrest to expedited removal

Immigration courthouse arrests play a key role in ICE's pursuit of rapid deportations because they trigger a summary removal process without judicial review even in the face of errors. A centerpiece of ICE's enforcement strategy is the expansion of "expedited removal" (ER), a regime that authorizes line-level immigration enforcement officers to determine certain noncitizens' removability and issue an administrative removal order, with few avenues for judicial review. Congress adopted ER in the 1996 amendments to the Immigration and Nationality Act (INA) as an alternative to a standard removal hearing before an immigration judge. Under 8 U.S.C. § 1225(b)(1)(A)(i), if an immigration officer determines that a noncitizen is inadmissible on certain grounds related to entry documents, the officer "shall" order the noncitizen's removal, so long as they do not claim a fear of persecution. Section 1225(b)(1)(A)(iii) authorizes the DHS Secretary to apply ER to certain additional noncitizens who have "not been admitted or paroled into the United States", and who have not substantiated their continuous physical presence in the United States for the two-year period immediately preceding their arrest. As a result of these provisions, long-term residents and those who have been admitted or paroled generally fall outside of the scope of ER.

International treaty obligations prohibit the United States from applying expedited removal to noncitizens who express a "credible fear of persecu-

tion." Such persons instead are supposed to be permitted to pursue their claim for protection in a hearing before an immigration judge. However, in a fast process driven by line-level determinations of credible fear, and limited judicial review, advocates characterize ER as prone to errors. Prior administrations limited the application of ER to noncitizens apprehended within 100 miles of a U.S. land border and who have been present for fewer than 14 days. Expanded ER offers the enforcement bureaucracy a powerful tool for ramping up arrests and deportations.

## The implications of revoking immigration parole

The Trump administration's revocation of immigration parole is an essential step in channeling noncitizens arrested at immigration court into expedited removal. The INA grants the DHS Secretary the power to "parole" a noncitizen into the United States, which the DHS Secretary has subdelegated to the immigration agencies within DHS: ICE, Customs and Border Protection (CBP) and United States Citizenship and Immigration Services (USCIS). Parole is a discretionary form of temporary permission to be present in the United States; it does not amount to a formal admission. The INA authorizes parole for "urgent humanitarian reasons" or other "significant public benefit" on a case-by-case basis. In a bid to channel immigration through lawful channels, the Biden administration used the parole authority to permit some 2.8 million noncitizens to be present in the United States temporarily, a move the Trump administration has begun undoing. The Supreme Court recently stayed a lower court order enjoining the administration's revocation of parole to over 500,000 noncitizens from Venezuela, Cuba, Haiti, and Nicaragua.

Not only has the Trump administration revoked parole to render more noncitizens deportable, but it has also interpreted ER to apply to these noncitizens newly stripped of permission to be present. In guidance issued in January, Acting DHS Secretary Benjamine C. Huffman directed officials at the immigration components of the Department of Homeland Security (DHS) to consider applying ER to "any alien… who is amenable to expedited removal but to whom expedited removal has not been applied." Further, Huffman's guidance directed officers to consider whether to revoke parole, which would, on his interpretation, make the noncitizen "amenable" to ER.

This interpretation expands the potential for summary mass deportations. Given the Biden administration's extensive use of parole, its revocation – followed by the application of ER – could ensnare millions of noncitizens. Huffman's directive to consider revoking parole is of a piece with the agency's quota-driven approach to enforcement. If the agency demands that thousands must be arrested every day, revoking parole instantly creates a population to arrest – and one for which the government already possesses extensive personal information.

Similarly, by apprehending noncitizens who appear for routine ICE check-ins, local, state or federal courthouse matters, and now, immigration court, the agency functionally targets noncitizens for their compliance. By valuing the number of deportations above all else, the enforcement bureaucracy has disavowed the qualitative differences that typically underly enforcement priorities and have historically shaped the enforcement bureaucracy's efforts. Instead of calibrating enforcement efforts based on factors such as criminality or ties to the United States, the agency seeks removals of any kind and by all available means.

## The legal landscape of immigration courthouse arrests

Critics of immigration courthouse arrests contend that the practice improperly deceives noncitizens, misleading them to believe that they are appearing for a hearing before an immigration judge. Upon dismissal, they may shed tears of joy, only to find themselves in handcuffs moments later. Immigration attorneys have argued that these tactics violate fundamental fairness. However, law enforcement routinely uses deceptive tactics, and ICE has long used "ruses" in the course of investigations and to effectuate warrantless arrests. Noncitizens have challenged some of these tactics under the U.S. Constitution's Fourth Amendment, but the use of deception in enforcement is not per se illegal.

But – despite the wide latitude the government enjoys when selecting targets for immigration enforcement and conducting investigations – ICE must follow the Constitution, the INA, as well as the Administrative Procedure Act (APA). The detention and application of ER to those arrested at immigration court raise concerns under these authorities.

First, the Fifth Amendment's Due Process Clause applies to noncitizens present in the United States, regardless of their status. A three-part balancing test governs the analysis of how much process is due to a noncitizen facing removal. Under Mathews v. Eldridge, a 1976 Supreme Court decision, courts should evaluate procedural due process by balancing the private interest at stake, the government's interest in lesser procedures, and the risk of erroneous deprivation. Courts have generally regarded the weight of the noncitizen's liberty interest to vary with factors such as status, duration of presence, and ties to the United States, such that a lawful permanent resident who has lived in the United States for many years has a weightier liberty interest than a recent unauthorized entrant.

In the realm of immigration courthouse arrests, noncitizens appearing in immigration court have a liberty interest in avoiding the erroneous application of ER. Many noncitizens arrested at immigration court have had their parole revoked; others are actively seeking asylum. Although this population largely consists of noncitizens who have not been "admitted", they have a cognizable liberty interest. The government has articulated a countervailing interest in producing removal orders rapidly. And advocates claim that the risk of error, such as expelling bona fide asylum seekers, is substantial given the dearth of legal counsel in these cases and the lack of judicial review. Ultimately, this three-party test will govern challenges to the arrest, detention, and the application of expanded ER.

Second, the strategy of revoking parole to create a population of noncitizens amenable to ER raises serious questions under the INA and APA. The relevant INA provision authorizes ER for noncitizens who entered and have not been "admitted or paroled", but the applicability of ER to those who have lost parole status remains unresolved. Noncitizens, thus, might challenge expanded ER as "in excess of statutory [authority]" under the APA.

Finally, noncitizens might challenge their arrest at immigration court and the application of ER as arbitrary or capricious, echoing prior challenges to expanded ER. Given the long-standing agency practice of using dismissals to provide a reprieve from enforcement, and the uncertain statutory and constitutional basis for expanded ER, the government may be called upon to explain its novel use of dismissals to target noncitizens for detention and summary removal. In a press release, agency officials cited the safety benefits for immigration enforcement officers in making arrests in spaces where noncitizens are screened for firearms, but courts may require the agency to demonstrate that it weighed the costs and benefits of these arrests, considering the impact on noncitizens, their families and communities, as well as witnesses or others passing through the courthouse doors.

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