

2008

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Jeremy Moorehouse

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Recommended Citation

Jeremy Moorehouse, *Due Process Rights in Removal Proceedings: ICE Raids and the True Price of Border Security*, 14 Pub. Interest L. Rptr. 88 (2008).

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DUE PROCESS RIGHTS IN REMOVAL PROCEEDINGS: ICE RAIDS AND THE TRUE PRICE OF BORDER SECURITY

by JEREMY MOOREHOUSE

Since 2006, sweeps conducted by Immigration and Customs Enforcement (ICE) agents have led to the detainment of over 2,000 illegal immigrants.¹ These individuals face removal proceedings² and sometimes criminal charges.³ As a result, substantial economic burden has fallen onto companies who have to rebuild their workforces, taxpayers who have to pay for the raids and housing of detained immigrants, and the immigrants themselves who lose their employment and acquired property and must pay for legal fees to effectuate a

defense.⁴ But beyond monetary costs, ICE raids and subsequent proceedings threaten immigrants' access to due process.⁵

EXPEDIENCY OVER RIGHTS?

ICE's mission is to protect the nation's borders through "expanded fugitive operations . . . and an expedited removal process."⁶ The "expedited removal process" allows ICE to decrease detainment times and to "quickly remove" illegal immigrants.⁷

The expedited removal process stems from the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.⁸ The IIRIRA streamlined immigration proceedings, creating expedited hearings and allowing remote proceedings via video teleconference.⁹ This raises due process concerns because immigrants may not fully apprise themselves of opportunities to appeal final orders of removal or to fully explore claims for relief in light of the streamlined process, particularly given language barriers and lack of counsel.

Current procedures are problematic for two main reasons. First, illegal immigrants have no protected right to appointed counsel in removal proceedings,¹⁰ with 58 percent proceeding *pro se*.¹¹ Second, if found to be removable, immigrants not only carry the burden of proving that they pose no risk to the community to avoid being held in custody,¹² but also have the responsibility of determining possible grounds for appeal. As a result, illegal immigrants face an uphill battle when attempting to stay in the United States.

AN ICE RAID BY THE NUMBERS: "BENEFITS" VS. COSTS

On May 12, 2008, ICE conducted one of the largest immigration raids in its history when it apprehended workers at an Iowa meatpacking plant.¹³ The raid required hundreds of agents, two helicopters, and numerous buses to transport those captured.¹⁴ The monetary cost to taxpayers alone should have been enough for ICE to reconsider the raid: 389 immigrants were taken into custody at a cost of \$13,396 to detain each individual immigrant, amounting to a total cost of \$5,211,092 to taxpayers.¹⁵

Yet \$5.2 million was not the only cost to the public. The raid and subsequent removal proceedings also implicated one of America's greatest protections: due

process. Of those captured, over 200 were charged with criminal offenses, primarily for forged documents, and remained in detention.¹⁶ Those not facing criminal charges were released from custody, but monitored.¹⁷ Due process problems arose when the immigrants, from numerous countries, needed translators merely to understand the charges against them, the removal process, and potential forms of relief.¹⁸ Additionally, the rights actually afforded to immigrants in removal proceedings, compared to immigrants or citizens in criminal prosecutions, illustrate further due process concerns. Are removal proceedings truly fair?

There is a serious disparity between the due process protections given to immigrants in removal proceedings to those enjoyed by citizens. Although the Supreme Court has held that immigrants are entitled to due process in immigration proceedings,¹⁹ it has never held that immigrants share the same level of protection as citizens.

Removal proceedings commence when an immigrant receives a “Notice to Appear” listing grounds for removability.²⁰ Immigrants then have an opportunity for a hearing before an Immigration Judge to rebut charges, present evidence, and testify.²¹ Generally, if the immigrant has been convicted of a criminal offense or if they pose a risk to the community, they are held in detention pending removal²²—a practice that the Supreme Court has found constitutional for over a century.²³ Unlike immigrant defendants in criminal cases who have the right to appointed counsel regardless of the expense to the government,²⁴ immigrants in removal proceedings will not be appointed counsel at any expense to the government,²⁵ despite the consequences at stake.

To understand the gravity of the due process implications in immigration proceedings, revisit the Iowa raid. Those detained (1) carried the burden of proving that they should not be removed,²⁶ (2) had no right to appointed counsel,²⁷ (3) did not fully understand English,²⁸ (4) were tried remotely,²⁹ and (5) were likely unrepresented at all stages of proceedings.³⁰ Anyone would be hard-pressed to find that immigrants are afforded full due process protection, including the right to present a complete defense,³¹ where they are unable to both fully understand the proceedings and to rebut charges with the assistance of counsel.

Regardless of agency policy, courts and lawmakers must reconsider immigration procedures and remember, “It is well established that the Fifth Amendment entitles immigrants to due process of law in deportation proceedings.”³²

NOTES

- 1 Justin Rood, *Meat Plant Immigration Raids Net First Exec*, ABC NEWS, Oct. 31, 2008, <http://www.abcnews.go.com/Blotter/story?id=6155212&page=1>.
- 2 Note: the terms “removal” and “removal proceeding” are primarily used in this article, but these terms are synonymous with “deportation” and “deportation proceedings.”
- 3 Justin Rood, *Meat Plant Immigration Raids Net First Exec*, ABC NEWS, Oct. 31, 2008, <http://www.abcnews.go.com/Blotter/story?id=6155212&page=1>.
- 4 See, e.g., Marissa Bostoff, *Raid on Kosher Slaughterhouse Sparks Fears of Meat Shortage*, THE JEWISH DAILY FORWARD, May 15, 2008, <http://www.forward.com/articles/13394/>.
- 5 Will Oremus, *Palo Alto to ICE: Don't Trample Immigrants' Rights*, PALO ALTO DAILY NEWS, Oct. 22, 2008, http://www.mercurynews.com/peninsula/ci_10782803.
- 6 U.S. Immigration and Customs Enforcement, Secure Border Initiative, <http://www.ice.gov/pi/topics/immref/index.htm> (last visited Oct. 31, 2008).
- 7 *Id.*
- 8 Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The use of Teleconferencing in Asylum Removal Proceedings*, 22 GEO. IMMIGR. L.J. 259, 262 (2008).
- 9 *Id.*
- 10 8 U.S.C.A. § 1362 (West 2008).
- 11 UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2007 STATISTICAL YEAR BOOK, at A1 (Apr. 2007), <http://www.usdoj.gov/eoir/stat-spуб/fy07syb.pdf>.
- 12 8 C.F.R. § 241.4(d)(1) (West 2008).
- 13 William Petroski, *Taxpayers' Costs Top \$5 million for May Raid at Pottsville*, DES MOINES REGISTER, Oct. 14, 2008, <http://www.desmoinesregister.com/article/20081014/NEWS10/810140389/-1/LIFE04>.
- 14 *Id.*
- 15 *Id.*
- 16 *Id.*
- 17 Lilia Garcia Jiminez, *Area Residents, Churches Helping Detained Immigrants*, DOS MUNDOS, Oct.30, 2008, http://dosmundos.com/welcome/index.php?option=com_content&task=view&id=2463&Itemid=1.
- 18 *Id.*
- 19 *Reno v. Flores*, 507 U.S. 292, 306 (1993).
- 20 8 U.S.C.A. § 1229(a) (West 2008).
- 21 See 8 U.S.C.A. § 1225 (West 2008).
- 22 8 C.F.R. § 241.4(d)(1) (West 2008); see also 8 U.S.C.A. §§ 1225, 1226, 1226a (West 2008).
- 23 *Wong Wing v. United States*, 163 U.S. 228, 235 (1896), *Demore v. Kim*, 538 U.S. 510, 523 (2003).
- 24 *Scott v. Illinois*, 440 U.S. 367, 372-73 (1979).
- 25 8 U.S.C.A. § 1362 (West 2008).

26 8 C.F.R. § 241.4(d)(1) (West 2008).

27 8 U.S.C.A. § 1362 (West 2008).

28 Jiminez, *supra* note 17.

29 Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The use of Teleconferencing in Asylum Removal Proceedings*, 22 GEO. IMMIGR. L.J. 259, 261-62 (2008).

30 UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2007 STATISTICAL YEAR BOOK, at A1 (Apr. 2007), <http://www.usdoj.gov/eoir/stat-spub/fy07syb.pdf>.

31 *California v. Trombetta*, 467 U.S. 479, 485 (1984).

32 *Reno v. Flores*, 507 U.S. 292, 306 (1993).