

## Biden Administration Poised to Eliminate Critical Safeguard Amid Escalating Reports of Erroneous Credible Fear Decisions

Across the country, non-profit legal services organizations and individual attorneys have received alarming recent reports of asylum seekers from Cuba, Haiti, Nicaragua, Venezuela, and other countries – the small portion not blocked or expelled under [Title 42](#) – being denied the opportunity to even apply for asylum through the Department of Homeland Security’s use of the fundamentally [flawed](#) expedited removal [process](#). Asylum seekers who have received negative credible fear determinations, many of which have been affirmed (or upheld) after essentially “[rubber stamp](#)” review by an immigration judge, can be deported from the United States without an opportunity to submit an asylum application and go before an immigration judge for a full asylum hearing. The Biden administration is poised to make this situation even worse, [proposing](#) to eliminate a safeguard – [requests for reconsideration](#) to the U.S. Citizenship and Immigration Services (USCIS) Asylum Office of negative credible fear determinations – that can prevent the deportation of refugees to persecution and torture.

This factsheet explains – based on [publicly available](#) government data that was analyzed by a team from the [Human Rights Center Investigations Lab at U.C. Berkeley](#)<sup>1</sup> – why immigration judge reviews of negative credible fear determinations are not sufficient to guard against wrongful deportations of refugees. These findings include:

- Analysis of immigration court [data](#) confirms that **immigration judges continue to overwhelmingly affirm negative fear determinations – 72.4 percent of negative fear determinations were affirmed between Fiscal Year (FY) 2018 and FY 2021** (through August).
- In addition, **in just the first seven months of the Biden administration, immigration judges have affirmed negative credible fear determinations for hundreds of asylum seekers from Cuba, Haiti, Honduras, Nicaragua, and Venezuela** – even though many people from these countries who are permitted to file asylum applications are granted refugee protection. For instance, in FY 2021, more than [72 percent](#) of Venezuelan asylum seekers were granted refugee protection by U.S. immigration judges, according to government data analyzed by Syracuse University’s Transactional Records Access Clearinghouse (TRAC).

Rather than employing the highly flawed expedited removal process, which endangers the lives of refugees by blocking them from even applying for asylum, governmental resources would be better devoted to [conduct full asylum office interviews](#) (outside of the expedited removal process) for asylum applicants and, while expedited removal continues to exist, retain the safeguard of Asylum Office requests for reconsideration.

### Immigration Judges Continue to Overwhelmingly Affirm Negative Fear Decisions in “Rubber Stamp” Reviews

Immigration judge reviews are often simply a “[rubber stamp](#)” for erroneous credible fear determinations and are inadequate to protect against wrongful deportation in violation of U.S. refugee law and treaty obligations. Analysis of immigration judge reviews [published](#) in July 2018 by TRAC found that immigration judges affirmed 76.4 percent of credible fear reviews conducted in FY 2014 to FY 2017. In addition, TRAC [found](#) enormous, unfair variation in

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outcomes depending on the immigration judge assigned to review the credible fear determination, with some judges affirming negative determinations in nearly every case.

Review of recent immigration court [hearing data](#) shows that between FY 2018 and FY 2021 (through August), **immigration judges affirmed on average 72.4 percent of negative credible fear determinations.**

<b>Negative Credible Fear Reviews by Immigration Judges</b>			
Fiscal Year	Denial Affirmed	Credible Fear Found	Denial Affirmance Rate <sup>2</sup>
2018	5333	1353	79.8%
2019	9861	3497	73.8%
2020	8714	4070	68.2%
2021 <sup>3</sup>	5234	2172	70.7%

As Human Rights First has previously [explained](#), immigration judge reviews are an inadequate safeguard for erroneous credible fear decisions because:

- These reviews are often conducted within 24 hours of the initial determination – leaving asylum seekers with virtually no time to prepare or consult with counsel – and fail to provide interpretation in the asylum seeker’s native or best language. In addition, immigration judges frequently bar attorneys from participating in reviews, reject additional evidence or testimony, and interpret additional information the asylum seeker did not have time or ability to present at the credible fear interview as impugning the credibility of the asylum seeker.
- Immigration judges sometimes limit their review to a few questions and prevent asylum seekers from sharing any additional information.
- Even in the rare instance where an asylum seeker does manage to secure counsel, attorneys are frequently not notified of an immigration judge review until the night before or not at all.
- Asylum seekers sometimes do not receive the credible fear decision and notes taken by the asylum officer prior to the immigration judge review, leaving them unable to identify or challenge errors in the record. They are at a major disadvantage even if they do receive these documents because the notes are in English, and a translation is not provided.

Erroneous decisions can be deadly. A [Honduran asylum seeker](#) deported through expedited removal after an immigration judge affirmed an asylum officer’s decision that the man did not have a credible fear was murdered just weeks after being deported to Honduras.

The immigration court data also shows **concerning patterns of affirmances of negative fear determinations since President Biden took office for nationals of countries from which many refugees – who are eligible for U.S. asylum protection – have fled.** For instance, in just the first seven months of President Biden’s term (late January to the end of August 2021), immigration judges have affirmed negative credible fear determinations for at least:

- **349 asylum seekers from Cuba** (affirming negative credible fear findings in 56.8 percent of immigration judge reviews conducted under the Biden administration),
- **547 asylum seekers from Haiti** (affirming negative credible fear findings in 75.5 percent of immigration judge reviews conducted under the Biden administration),
- **162 asylum seekers from Honduras** (affirming negative credible fear findings in 73 percent of immigration judge reviews conducted under the Biden administration),

<sup>2</sup> The denial affirmance rate is calculated by dividing affirmed negative credible fear determinations by the total number of affirmed and vacated negative credible fear determinations. This excludes a small number of cases where the decision was unknown, which is the same approach used by [TRAC](#). Corrupted data rows were also removed prior to analysis.

<sup>3</sup> Through the end of August 2021.

- **722 asylum seekers from Nicaragua** (affirming negative credible fear findings in 68.8 percent of immigration judge reviews conducted under the Biden administration), and
- **335 asylum seekers from Venezuela** (affirming negative credible fear findings in 45.3 percent of immigration judge reviews conducted under the Biden administration).

Without an opportunity to request reconsideration by the Asylum Office, these asylum seekers could be deported to the countries where they are fleeing persecution and torture. For instance, in summer 2021, a negative credible fear determination for [a Nicaraguan asylum seeker](#) that had been affirmed by an immigration judge was reversed only after his attorney submitted multiple requests for reconsideration to the Houston asylum office documenting a traumatic head injury that caused significant amnesia. Nicaraguan paramilitary groups had threatened to rape and kill the man for his political opposition views, according to his attorney at RAICES.

Unlawful and improper conduct by government agents has contributed to the many erroneous credible fear decisions under the Biden administration, including threatening and intimidating represented asylum seekers to undergo their interviews without their attorneys present and forcing asylum seekers—including dozens of African asylum seekers—to conduct their interviews in a language in which they are not fully fluent. For example, a Nicaraguan asylum seeker who had been arrested and jailed for her political opposition to the Nicaraguan government received a negative credible fear determination in summer 2021 after Immigration and Customs Enforcement officers persuaded her to go ahead with the interview without her attorney present. The immigration judge barred the woman’s attorney from participating in the fear review and affirmed the erroneous decision. She was forced to go into hiding, fearing for her life, after the U.S. government deported her to Nicaragua.

## Proposed Regulatory Changes Would Eliminate Safeguard Against Erroneous Deportations of Refugees

In August 2021, the Biden administration proposed a [rule](#) that would significantly [alter](#) the U.S. asylum system, including the expedited removal process. Among other changes, the regulation seeks to eliminate the requests for reconsideration [safeguard](#) that protects asylum seekers placed in expedited removal from being wrongly deported without an opportunity to present their full asylum claim to an immigration judge. This guardrail on the expedited removal process allows asylum seekers who have wrongly received a negative credible fear determination that has been affirmed by an immigration judge to ask the USCIS Asylum Office to review and reconsider its decision.

The administration claims that eliminating requests for reconsideration will render expedited removal “[more efficient and streamlined](#)” and that immigration judge reviews of negative determinations will act as a sufficient “[check](#) to ensure that individuals who have a credible fear are not returned based on an erroneous screening determination by USCIS.” In its justification for eliminating requests for reconsideration, the administration [explained](#) that when an asylum “office recommends a follow-up interview, . . . the complete review process could take more than 5 hours per request.”

Given the clear importance of requests for reconsideration as a safeguard to identify erroneous decisions, five hours is not too much ask when the very lives of people seeking refuge in the United States are stake.

## Recommendations

Rather than choosing to employ expedited removal (and eliminate crucial safeguards against wrongful deportations), the government [should focus](#) resources on adjudicating asylum claims through full USCIS Asylum Office interviews. These interviews should be conducted outside of the fundamentally flawed and inefficient expedited removal process, which should not be employed given its due process deficiencies and inherent danger of returning refugees to persecution and torture. However, as long as expedited removal exists, the safeguard of requests for reconsideration must be [retained](#).