REMOVAL IN THE SHADOWS OF IMMIGRATION COURT

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ABSTRACT

The crisis in immigration court adjudication is well-documented. This Article contends that critiques of immigration adjudication are incomplete and understated because they have failed to account for the following reality: the vast majority of persons ordered removed never step foot inside a courtroom. In addition, even when cases are filed with the immigration courts, a substantial number result in removal orders without adjudication of the merits of the case. Removal in what this Article calls the "shadows of immigration court" have far eclipsed standard removal proceedings. The Article provides a descriptive account of five types of removal orders that comprise immigration court's shadows: (1) expedited removal at the border, (2) reinstatement of prior removal orders, (3) administrative removal of non-lawful permanent residents with aggravated felony convictions, (4) stipulated removal orders following waivers of the right to a court hearing, and (5) in absentia *orders for failure to appear in immigration court. The Article identifies several concerns that apply to mainstream immigration court proceedings and asserts that those critiques are amplified in such shadow proceedings. It concludes by arguing for more sustained inclusion of shadow proceedings in reform proposals directed at improving immigration adjudication.*

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INTRODUCTION

Critiques of immigration court adjudication have become all too familiar. Heavy caseloads and insufficient funding impose burdens on immigration judges, so much so that the President of the National Association of Immigration Judges describes immigration court as a venue in which death penalty-like cases receive adjudication with the resources of traffic court.[1] The game of roulette also serves as an apt point of comparison for the immigration court system, in light of the stark disparities in discretionary adjudication among immigration judges.[2] In addition to resource constraints and outcomes heavily affected by venue and immigration judge assignment, the procedural protections available in immigration court strike many as insufficient when compared to the human

1. Memorandum from Dana Leigh Marks, President, Nat'l Ass'n of Immigration Judges 2 (Oct. 2009), https://pennstatelaw.psu.edu/_file/NAIJ%20Priorities%20Short%20List%20-%20October%202009.pdf.

2. *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 372–73 (2007).

consequences at stake with deportation.[3] The right to government-appointed counsel, for example, does not exist despite the notorious complexity of immigration law—even for young children forced to navigate the immigration bureaucracy.[4] The rule against double jeopardy, right to a jury trial, or full application of the exclusionary rule are also absent in immigration courts.[5] Substantively, the immigration laws place severe limitations on available defenses to removal,[6] and administrative and judicial review of immigration court decisions is arguably inadequate.[7] It logically follows that the lion's share of reform proposals have focused on improving the law, policies, and resources associated with the immigration courts.[8]

Yet the vast majority of cases in which the government issues removal orders against noncitizens never reach the immigration courts.[9] While the Obama administration's record deportation numbers have captured national

3. *See, e.g.*, Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 511–15 (2007).

4. *Id.* at 515–16, 516 n.229. On July 9, 2014, immigration advocates filed a nationwide class-action lawsuit challenging the federal government's failure to provide children with legal representation in removal proceedings. Complaint at 3–4, J.E.F.M. v. Holder, No. 14-cv-01026 (W.D. Wash. July 9, 2014).

5. Legomsky, *supra* note 3, at 515–16.

6. *See infra* Part III.D.

7. *See infra* Part III.C.

8. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7–8 (2015) (discussing empirical study of access to counsel in immigration court); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1640 (2010) (proposing the creation of an Article III immigration court); Jayashri Srikantiah, David Hausman & Lisa Weissman-Ward, *Access to Justice for Immigrant Families and Communities: A Study of Legal Representation of Detained Immigrants in Northern California*, 11 STAN. J.C.R. & C.L. 207, 232 (2015) (proposing project for legal representation of detained immigrants in removal proceedings). *See generally* APPLESEED & CHICAGO APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS (2009), http://www.asserlaw.com/articles/article_164.pdf (proposing reforms to immigration courts); ARNOLD & PORTER LLP, A.B.A. COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2012) (same).

9. ALISON SISKIN, CONG. RESEARCH SERV., R43892, ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS 8 (2015) ("In recent years, these streamlined removal processes [including expedited removal, reinstatement, and administrative removal] have accounted for a higher percentage of total removals than standard removals, and are responsible for most of the growth in the overall number of removals . . . .").

attention (particularly during the first term),[10] the mechanisms used to effect the administration's high rates of removal have received far less attention. A variety of discrete but related practices—all sanctioned by distinct and complex statutory and regulatory provisions—explain this state of affairs. In fiscal year 2013, approximately 83% of all formal removal orders took place through either reinstatement of prior removal orders[11] or expedited removal of individuals seeking admission at the border.[12] That 83% figure reflects removal orders issued by front-line immigration officers acting as investigator, prosecutor, and judge, thus bypassing the immigration courts entirely.[13] Another subset of formal removal orders issued against non-lawful permanent residents with convictions deemed to be "aggravated felonies" are referred to as administrative removal,[14] and these similarly require no immigration court involvement.[15]

Even in the minority of cases where an individual does appear for regular removal proceedings—meaning those in which an immigration judge adjudicates a proceeding in immigration court—the substantive content of the immigration court proceeding can become irrelevant. In cases taking place at the periphery of immigration court, one can easily receive a removal order without any adjudication on the merits. Stipulated removal orders,[16] while nominally signed by immigration judges after a noncitizen has waived her rights to a court hearing, accounted for nearly 20% of all judge-issued removal orders in fiscal year 2008, and continued to be entered at varying rates across the country until the Department of

10. *See, e.g.*, Alejandra Marchevsky & Beth Baker, *Why Has President Obama Deported More Immigrants Than Any President in US History?*, NATION (Mar. 31, 2014), https://www.thenation.com/article/why-has-president-obama-deported-more-immigrants-any-president-us-history.

11. 8 U.S.C. § 1231(a)(5) (2015).

12. *Id.* § 1225(b); JOHN F. SIMANSKI, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 5–7 (2014). As this Article was being published, the Department of Homeland Security ("DHS") Office of Immigration Statistics reported similar statistics for fiscal year 2014. *See* BRYAN BAKER & CHRISTOPHER WILLIAMS, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2014, at 7 (2016), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2014.pdf (showing that 83.4% of removals were expedited removals or reinstatements of prior removal orders).

13. *See* SIMANSKI, *supra* note 12, at 1–3, 5–7.

14. 8 U.S.C. § 1228(b) (2015).

15. *See* SIMANSKI, *supra* note 12, at 2.

16. 8 U.S.C. § 1229a(d).

Homeland Security ("DHS") curtailed their use around 2012.[17] The practice of issuing *in absentia* removal orders,[18] which in fiscal year 2015 amounted to over 43% of all removal orders issued by immigration judges, affects individuals who fail to appear for even a single court hearing.[19]

Thus, under the current legal landscape, noncitizens with cases that the immigration courts adjudicated on the merits have become the privileged and the few. Given such staggering numbers, this Article contends that the narrative surrounding immigration adjudication has become misplaced, particularly when compared to the descriptive reality at hand. Yet most of the immigration law literature, from both academic and policy perspectives, emphasizes the deficiencies in the immigration courts.[20] Some might contend that sustained attention on the immigration courts is both necessary and appropriate. After all, the dysfunction in the immigration courts is well-documented and still in need of repair. But the proliferation of procedures that lead to the formal removal of noncitizens with no or minimal immigration court involvement warrants a level of attention that does not yet match the scale of the practice.

Immigration law scholarship has only scratched the surface with respect to the immigration agency's implementation of various enforcement measures that effectively bypass the immigration courts. As Daniel Kanstroom has stated, "a bewildering array of . . . fast-track mechanisms" have led to the "deformalization" of the immigration laws governing deportation,[21] a trend that amounts to a "major but largely untold

17. Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 479 (2013) [hereinafter Koh, *Stipulated Removal*].

18. 8 U.S.C. § 1229a(b)(5)(A).

19. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2015 STATISTICS YEARBOOK, at C2, P1 (2016), https://www.justice.gov/eoir/page/file/fysb15/download (showing total of 88,128 removal orders issued by immigration judges, of which 38,229 were *in absentia* orders).

20. *See* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 944 (2015) ("[D]eportation by order of a federal immigration judge is but one component of current immigration enforcement efforts."); IMMIGRATION POLICY CTR., REMOVAL WITHOUT RECOURSE: THE GROWTH OF SUMMARY DEPORTATIONS FROM THE UNITED STATES 1 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/removal_without_recourse.pdf ("[S]ummary procedures have eclipsed traditional immigration court proceedings, accounting for the dramatic increase in removals overall.").

21. DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 52, 65–67 (2012) (describing reinstatement of removal, expedited removal, administrative removal, stipulated removal, and voluntary departure as examples of the deformalization of

story of deportation in recent years."[22] Writing in a similar vein, Shoba Sivaprasad Wadhia has used the term "speed deportation" to describe three forms of removal that do not involve the immigration courts and called for the exercise of prosecutorial discretion in the deployment of these removals,[23] while Jill Family has used the word "diversions" to describe the diminished role of the immigration courts in adjudicating removal.[24] In December 2014, an advocacy report issued by the American Civil Liberties Union ("ACLU") highlighted the severe human and legal costs associated with the rise of what it called "summary removal procedures."[25] Whatever the term, immigration enforcement and issuance of removal orders now take place largely in the shadows of immigration court.

Understanding how removal takes place outside the purview of the courts takes on added urgency in light of the Trump administration's unapologetic calls for mass deportation and immigration detention, which will likely involve the aggressive use and expansion of the types of removal described in this Article. This Article maps the laws, policies, and politics that have given rise to what it calls "shadow proceedings," and asserts that the critiques that typically apply to the standard removal processes that take place in the immigration courts are far more pronounced, and far more common, in immigration court's shadows. Part II provides necessary context for understanding shadow proceedings by

immigration law).

22. *Id.* at 65.

23. Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 6–7, 22–25 (2014) (discussing expedited removal, reinstatement of removal, and administrative removal through the lens of prosecutorial discretion) [hereinafter Wadhia, *Speed Deportation*].

24. Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 542, 579–82 (2011) (identifying diversions from immigration court as contributing to the crisis in immigration adjudication). *See generally* Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595 (2009) (exploring waivers in immigration law including voluntary departure, expedited removal, and criminal prosecution for immigration offenses as examples of "diversions" away from the immigration court system) [hereinafter Family, *Broader View*].

25. AM. CIVIL LIBERTIES UNION, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 10–30 (2014) [hereinafter AMERICAN EXILE] (critiquing expansion of administrative removal, reinstatement of removal, expedited removal, stipulated removal, and administrative voluntary departure). *See also* ALISON SISKIN, *supra* note 9, at 1–2 (discussing "standard" removal proceedings before the immigration courts as distinguished from "streamlined" removal procedures consisting of reinstatement of removal and expedited removal).

describing the standard removal proceedings that take place in immigration court. Part III sets forth basic history, legal frameworks, and court challenges associated with five discrete enforcement tools that make up this conglomerate of removals, which this Article places into two categories.[26] The first category involves removals that take place with no immigration court involvement: *expedited removal* (for individuals apprehended at or near the border); *reinstatement of removal* (for individuals who have previously been removed pursuant to a formal removal order, and subsequently re-entered the country); and *administrative removal* (for non-lawful permanent residents with criminal convictions deemed to constitute "aggravated felonies" under the immigration law). The second category reflects removals that are issued by immigration judges, but that take place at the periphery of immigration court adjudication: *stipulated orders of removal* (in which noncitizens agree to the entry of a formal removal order) and in absentia *removal orders* (for individuals who do not appear for any immigration court hearing).

Part IV identifies five critiques of standard removal proceedings that apply with even greater force to removals in immigration court's shadows: (1) the coercive effects of immigration detention, (2) the absence of counsel, (3) limitations on administrative and judicial review, (4) access to relief and discretion, and (5) the simplification of removability assessments. Each of these themes have been identified as a deficiency associated with immigration court adjudication, and arguably constitute reasons to question the legitimacy of the regular immigration court system. This Article argues that each deficiency is worse where the shadows of immigration court are concerned, thereby casting deeper doubt upon the integrity of the system than previously acknowledged. The Article concludes with a discussion of several implications of including shadow proceedings in broader conversations about immigration adjudication.

26. This Article focuses only on mechanisms that result in the entry of a formal order of removal, and thus does not give full treatment to the practice of administrative voluntary departure (also referred to as voluntary removal). Some scholars and advocates have—for good reason—also treated voluntary departure as part of the growing trend of minimizing the role of immigration courts in adjudicating physical removal. *See* KANSTROOM, *supra* note 21, at 65–66; Family, *Broader View*, *supra* note 24, at 615–16; AMERICAN EXILE, *supra* note 25, at 23–25. *See also infra* note 187 (discussing concerns regarding use of coercion and misinformation in administrative voluntary return, and similarities to stipulated orders of removal).

I. THE STANDARD NARRATIVE: IMMIGRATION COURT ADJUDICATION

This Part sets forth necessary context and background for understanding immigration court's shadows by highlighting the commonly told story about immigration adjudication. The conventional wisdom states that immigration judges ("IJs") presiding in immigration courts adjudicate the merits of the case and, where appropriate, issue formal orders of removal.[27] The term immigration "court" is a misnomer, in the sense that immigration courts are not associated with the judicial branch of government at all, but are part of the administrative agency known as the Executive Office for Immigration Review ("EOIR"), a sub-agency of the Department of Justice ("DOJ").[28] Immigration and Customs Enforcement ("ICE"), a sub-agency of the DHS, prosecutes removal cases through attorneys affiliated with ICE's Office of the Principal Legal Advisor ("OPLA").[29]

Under the standard narrative, front-line immigration enforcement agents, who are employed either by Customs and Border Protection ("CBP") or ICE—both sub-agencies of DHS—play a minimal role. Enforcement agents apprehend the noncitizen prior to the initiation of proceedings, often due to an encounter with the criminal justice system[30] or after the noncitizen files an immigration benefits application with the government that is denied. According to this story, DHS agents file the charging document (known as the Notice to Appear) with an immigration

27. *See* STEPHEN H. LEGOMSKY & CRISTINA M RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 681–83 (Robert C. Clark et al. eds., 6th ed. 2015) (describing deportation procedure).

28. *Executive Office for Immigration Review: About the Office*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/about-office (last updated Sept. 8, 2015).

29. Congress created the DHS in 2002 through the Homeland Security Act. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2142 (2002) (codified at 6 U.S.C. § 111 (2006)). Many of the immigration functions of the former Immigration and Naturalization Service, including immigration enforcement, were assumed by DHS following the enactment of the Homeland Security Act. *See id.* at 2192 (codified at 6 U.S.C. § 251 (2006)) (listing the functions transferred from the Commissioner of Immigration and Naturalization to the Under Secretary for Border and Transportation Security).

30. A significant amount of literature has examined "crimmigration," including the increased entanglement between the criminal justice system, particularly state and local criminal justice entities, and federal immigration enforcement. *See, e.g.*, Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 80 (2013); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381 (2006).

court, thereby officially commencing removal proceedings and allowing the IJ to ultimately determine the outcome of the case.[31] Attorneys employed by ICE's OPLA represent the government through the removal proceedings and appear at every immigration court hearing.[32] Where noncitizens are detained, ICE enforcement agents remain involved by overseeing the terms of the detention, but have little interaction with the court case beyond making logistical arrangements for their appearances in court.

Immigration court proceedings reflect a bifurcated process in which the IJ first adjudicates removability and then evaluates eligibility for relief.[33] The proceedings are recorded,[34] and the IJ maintains a written record of submissions. Technically, removability refers to whether the noncitizen has violated the federal immigration provisions that can trigger deportation.[35] Noncitizens can also challenge removability, for instance by arguing that the conviction deemed to trigger adverse immigration consequences does not fall within the list of inadmissible or deportable offenses.[36] As I have argued elsewhere, although much of the discourse over immigration adjudication tends to treat removability as simple and settled, upon close examination, the first phase of removability can involve complex, contested questions of law and fact that have occupied the attention of the federal courts.[37] If the ICE cannot prove that the noncitizen is removable, then the IJ must terminate the removal proceedings.[38]

If deemed removable, in some cases, the noncitizen may apply for relief from removal, such as cancellation of removal or asylum.[39] Many noncitizens in standard removal proceedings do not qualify for discretionary relief from deportation, despite longstanding ties to the country or other positive equities. Scholars have issued extensive criticisms

31. LEGOMSKY & RODRÍGUEZ, *supra* note 27, at 677–78, 683.

32. *Id.* at 680–83.

33. *Id.* at 681–83. IJs might also adjudicate custody redetermination hearings, which are treated as a separate proceeding from the removal proceeding. *Id.* at 679.

34. *Id.* at 681.

35. *See* 8 U.S.C. § 1229a(e)(2) (2015) (defining removability).

36. *See* Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 271–72 (2012) [hereinafter Koh, *Case for the Categorical Approach*].

37. Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1808–09 (2013) [hereinafter Koh, *Rethinking Removability*].

38. Koh, *Case for the Categorical Approach*, *supra* note 36, at 270.

39. LEGOMSKY & RODRÍGUEZ, *supra* note 27, at 682.

of the harsh restrictions on statutory eligibility to apply for discretionary relief from removal.[40] Nonetheless, IJs play a critical role in providing noncitizens with access to relief from removal. A *pro se* immigrant may not learn about the opportunity to apply for relief until she sees an IJ, as federal regulations impose an affirmative obligation on the IJ to inform the immigrant of any apparent eligibility for relief from removal.[41]

Standard removal proceedings can end in several different ways. On one end of the spectrum of outcomes, the IJ may order the noncitizen removed. The issuance of a removal order may result because the noncitizen was not eligible for relief from removal, because the IJ declined to grant the relief for which the noncitizen applied, or because the noncitizen failed to appear for one court hearing.[42] At the other end of the spectrum, the IJ may grant relief from removal, which can result in immigration benefits and status for the noncitizen that are significantly better than prior to the start of the proceedings.[43] The IJ might also grant voluntary departure, which allows a noncitizen to return to their country of origin without triggering the legal penalties associated with a formal removal order.[44] Some find it surprising that the immigration laws treat voluntary departure as a form of relief from removal. The classification attaches because voluntary departure does not carry the civil and criminal consequences of a formal removal order,[45] namely civil bars to re-entry and the possibility of criminal prosecution for illegal re-entry.[46]

In other cases, the IJ might not grant relief or issue a formal removal order because the IJ can either administratively close or terminate proceedings. Since the use of prosecutorial discretion in the immigration context expanded under the Obama administration,[47] for instance, the

40. *See, e.g.*, Koh, *Case for the Categorical Approach*, *supra* note 36, at 270–71.

41. 8 C.F.R. § 1240.11(a)(2) (2016).

42. *See infra* Part II.B.2 (discussing *in absentia* removal orders).

43. *See* 8 U.S.C. § 1229b(b)(1) (2015) (establishing that a grant of cancellation of removal for certain nonpermanent residents results in a person who previously lacked immigration status receiving lawful permanent resident status).

44. 8 U.S.C. § 1229c(b).

45. *See* David S. Rubenstein, *Restoring the Quid Pro Quo of Voluntary Departure*, 44 HARV. J. ON LEGIS. 1, 2 (2007) (describing benefits of voluntary departure for noncitizens).

46. *See generally* Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L.J. 65 (2012) (describing historical and modern increases in illegal entry and reentry prosecutions).

47. *See* Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 43 (2013).

number of cases that have ended in administrative closure has increased. Administrative closure results in the court removing the case from the scheduling docket, but leaving DHS with the authority to re-calendar the case at any time without issuing a new charging document.[48] Termination results in the IJ removing the case from the court's calendar completely, which typically occurs if DHS has failed to establish the noncitizen's removability.[49] Termination may also occur at the immigration agency's request, for instance if DHS chooses to invoke a summary removal procedure (such as administrative removal) that enables the agency to remove the noncitizen without an order or other findings from an IJ.[50]

The administrative hearing process of the immigration courts offers important procedural protections, albeit far less protection than available to criminal defendants. Procedural due process applies with full force to removal proceedings.[51] Due process claims have thus become a focal point of many challenges to deficiencies in the removal process, operating as a substitute for constitutional rights that do not apply in the immigration context.[52] Immigration attorneys around the country have used procedural

48. *See* Avetisyan, 25 I. & N. Dec. 688, 692 (B.I.A. 2012) ("Administrative closure . . . is used to temporarily remove a case from an Immigration Judge's active calendar or from the Board's docket. . . . [A]dministrative closure may be appropriate to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time.").

49. Koh, *Case for the Categorical Approach*, *supra* note 36, at 270.

50. Koh, *Rethinking Removability*, *supra* note 37, at 1806 n.12. *See infra* note 157 (describing use of administrative removal after issuance of a Notice to Appear).

51. *See* Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903). *See also* Zadvydas v. Davis, 533 U.S. 678, 688 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("[D]eportation . . . visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . . Meticulous care must be exercised lest the procedure by which [the alien] is deprived of that liberty not meet the essential standards of fairness.").

52. Hiroshi Motomura has influentially explained how the plenary power doctrine in immigration law, which states that the judicial branch will not review congressional actions in the area of immigration under normal constitutional principles, has led procedural due process claims to operate as a surrogate for constitutional claims that might otherwise apply in the absence of Congress's plenary power. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Right*s, 92 COLUM. L. REV. 1625, 1634–38 (1992). *See also* Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 930–31 (1995) (describing "the applicability of procedural due process in deportation

due process to argue—with some success—for the right to appointed counsel (including effective assistance of counsel),[53] limitations on immigration detention,[54] the right to protection against unreasonable searches and seizures,[55] and the constitutional right to discovery[56] in immigration court proceedings.

Procedural due process has also animated a number of statutory rights that apply to standard immigration court proceedings.[57] In its current form, section 240 of the Immigration and Nationality Act ("INA") sets forth the requirements for immigration court proceedings and includes protections that apply to all noncitizens in such proceedings.[58] For instance, individuals in standard removal proceedings have a statutory right to counsel (at no government expense), a right to examine the evidence presented by the government, a right to cross-examine witnesses, and a right to present evidence.[59] These rights only become a reality when the immigrant appears for a court hearing. Similarly, the right to appeal an IJ's decision is protected by statute, grounded in procedural due process.[60] Appeals of immigration court decisions go to the Board of Immigration Appeals

cases" as "[o]ne clear exception to the principle of plenary congressional power [that] had emerged early on"); Anne R. Traum, *Constitutionalizing Immigration Law on its Own Path*, 33 CARDOZO L. REV. 491, 493 (2011) (arguing that courts should continue to rely on due process "to ensure that immigration proceedings are fair, just, and sufficiently transparent" rather than seek to expand the application of the Sixth Amendment).

53. *See* Lozada, 19 I. & N. Dec. 637, 638 (B.I.A. 1988) (allowing ineffective assistance of counsel claims in removal proceedings under Fifth Amendment).

54. *See* Rodriguez v. Robbins, 804 F.3d 1060, 1089 (9th Cir. 2015) (upholding right to bond hearings after six months of immigration detention).

55. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–52 (1984) (holding that although the Fourth Amendment does not apply in the immigration context, the U.S. Supreme Court and other courts have suggested that "egregious" Fourth Amendment violations should lead to application of the exclusionary rule).

56. *See* Dent v. Holder, 627 F.3d 365, 374–75 (9th Cir. 2010) (finding that the failure of the government to provide a copy of the noncitizen's "A-file" to the noncitizen violated due process).

57. *See* Ardestani v. INS, 502 U.S. 129, 132–33, 139 (1991) (explaining that sections 554, 556, and 557 of the Administrative Procedure Act, which supplies procedural rights for many federal adjudications, do not apply to removal proceedings).

58. *See generally* 8 U.S.C. § 1229a (2015) (describing requirements for immigration removal proceedings).

59. *Id.* § 1229a(b)(4)(A)–(C).

60. *Id*. § 1229a(c)(5)–(6).

("BIA").[61] Review of final removal orders only reach the federal judiciary through petitions for review to the federal courts of appeal,[62] whose jurisdiction over immigration matters is limited by statute in multiple ways.[63] Indeed, limitations on judicial review of immigration matters—created by legislation enacted in 1996—have been widely critiqued by scholars and challenged in federal court.[64]

II. THE GROWTH OF SHADOW PROCEEDINGS

The basic thrust of this Article is that the standard narrative about immigration adjudication is incomplete. This Part discusses five distinct types of removal that take place in the shadows of immigration court. The Article divides these five practices into two categories. First, it describes summary processes, resulting in a formal order of removal, that take place with no immigration court involvement: *expedited removal* (for individuals apprehended at or near the border); *reinstatement of removal* (for individuals who have previously been removed pursuant to a formal removal order, and subsequently re-entered the country); and *administrative removal* (for non-lawful permanent residents with criminal convictions deemed to constitute "aggravated felonies" under the immigration law). Second, it discusses removals that take place at the periphery of immigration court adjudication: *stipulated orders of removal* (in which noncitizens agree to the entry of a formal removal order) and in absentia *removal orders* (for individuals who do not appear for any immigration court hearing).

Immigration court adjudication has thus become the exception rather than the norm. Through statute, regulation, and agency policy, the federal government has massively expanded its use of shadow proceedings which either entirely or effectively bypass immigration court adjudication. Despite the problems associated with the immigration courts, this expansion means that the noncitizens with cases before the immigration

61. 8 C.F.R. § 1003.1(b) (2016).

62. 8 U.S.C. § 1252(a)(5).

63. *See, e.g.*, *id.* § 1252(a)(2)(B) (denying judicial review of certain forms of discretionary relief); *id.* § 1252(a)(2)(D) (preserving judicial review of constitutional claims or questions of law); Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57, 57 (2010) (stating that appeals by noncitizens facing deportation are restricted to questions of law).

64. *See, e.g.*, Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1412–15 (1997).

courts are the comparatively fortunate ones.

A. FORMAL REMOVAL OUTSIDE THE PURVIEW OF THE IMMIGRATION COURTS

Each form of summary removal described here is governed by its own statute, regulations, and case law, thus necessitating a separate discussion of each. Shoba Sivaprasad Wadhia collectively refers to this trio of removal procedures as "speed deportations."[65] Despite their different statutory and regulatory bases, several common traits exist across all three forms of speed deportation. Front-line immigration officers act as investigator, judge, and jury, with the immigration courts completely uninvolved in the removability determination.[66] Expedited removal, administrative removal, and reinstatement of removal impose limitations on whether an individual can apply for any relief, and if so, what kinds of relief, thus guaranteeing automatic losses in cases that might otherwise lead to meritorious claims if adjudicated in regular removal proceedings. Noncitizens in these shadow proceedings are even less likely to have access to an attorney in comparison to their counterparts in immigration court due to the swift nature of the processes and consequent threat or reality of either imminent deportation or immigration detention. Each form of speed deportation also places restrictions on judicial review, at times above existing statutory bars to judicial review. Finally, the federal courts have generally declined to place meaningful due process or other checks on these forms of removal, allowing them to mushroom over the past decade.

1. The Expanding Border: Expedited Removal

Each year, CBP officers apprehend hundreds of thousands of individuals seeking to enter the United States without a valid visa or entry

65. Wadhia, *Speed Deportation*, *supra* note 23, at 6.

66. In *Withrow v. Larkin*, the Supreme Court set forth the administrative law principle that although the right to an unbiased decisionmaker is a fundamental principle of due process, the combination of investigatory and adjudicative functions in a single administrative agency official does not "create[] an unconstitutional risk of bias." 421 U.S. 35, 46–54, 58 (1975). The Court suggested that establishing a due process violation would require overcoming "a presumption of honesty and integrity in those serving as adjudicators[,]" which includes "a realistic appraisal of psychological tendencies and human weakness [that] conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 47. The constitutionality of shadow proceedings under *Withrow v. Larkin* lies beyond the scope of this Article.

document.[67] In most cases, these individuals are subject to expedited removal procedures that authorize CBP officers to issue formal removal orders with minimal process or review, but which carry the full legal consequences of a removal order. In fiscal year 2015, out of 235,413 total removals, over half—or 165,935—appear to have taken place at or near the border and ports of entry through the use of expedited removal.[68] The overwhelming majority—98%—of expedited removal recipients came from Mexico, Guatemala, Honduras, and El Salvador in fiscal year 2013,[69] a rate of use that has likely continued with the dramatic increases in migration from Central America in 2014 and 2015.[70]

The physical border—particularly the United States-Mexico border—has long operated as a central and contested site in immigration law.[71] Under the entry fiction doctrine, courts have expressed less tolerance for those seeking entry at the border, particularly those with no preexisting ties to the United States. A line of Supreme Court cases involving the procedural due process rights of noncitizens, for instance, distinguishes the rights of those considered by the courts to be outside the border seeking to enter, even when the noncitizen's location vis-à-vis the physical territory is malleable.[72] Nonetheless, prior to the statutory creation of expedited

67. *See* U.S. BORDER PATROL, NATIONWIDE ILLEGAL ALIEN APPREHENSIONS FISCAL YEARS 1925–2016, https://www.cbp.gov/sites/default/files/assets/documents/2016-Oct/BP%20Total%20Apps%20FY1925-FY2016.pdf (stating that in fiscal year 2014, CBP reportedly apprehended 486,651 individuals without immigration status). From fiscal years 2004–2014, the level of CBP apprehensions has been as low as 340,252 (fiscal year 2011) and as high as 1,189,092 (fiscal year 2006). *Id.*

68. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FY 2015 ICE IMMIGRATION REMOVALS, https://www.ice.gov/removal-statistics/2015. ICE did not report on expedited removal orders issued in fiscal year 2015, but stated that 165,935 removals that year involved "individuals apprehended at or near the border or ports of entry." *Id.*

69. SIMANSKI, *supra* note 12, at 6.

70. Margaret H. Taylor & Kit Johnson, *"Vast Hordes . . . Crowding in Upon Us": The Executive Branch's Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 185, 190–92 (2015) (describing migration from Central America). *See generally* Marc R. Rosenblum & Isabel Ball, *Trends in Unaccompanied Child and Family Migration from Central America*, MIGRATION POL'Y INST. (Jan. 2016), http://www.migrationpolicy.org/research/trends-unaccompanied-child-and-family-migration-central-america (same).

71. *See, e.g.*, Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J.C.R. & C.L. 165, 170, 189–91 (2007).

72. *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. . . . But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure

removal, noncitizens apprehended at the border could challenge the decision to deny them entry in proceedings before an IJ, and seek administrative and judicial review of those decisions.[73]

The creation of expedited removal in 1996, as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), transformed removal procedures at the border as well as the very definition of the border itself. The expedited removal statute now states that when a noncitizen seeks to enter the United States and either lacks valid entry documents[74] or presents false documentation,[75] the inspecting officer "shall order the alien removed from the United States without further hearing or review."[76] The expedited removal provision thus allows front-line immigration officers patrolling the border to issue removal orders that have the same legal effect as a removal order issued by an IJ, such as a five-year (or in some cases permanent) bar on reentry.[77] However, expedited removal orders lack the procedural protections or opportunities for appeal associated with immigration court. As the phrase "without further hearing or review" suggests, in the vast majority of cases an expedited removal order is not reviewable by either an IJ or the BIA.[78]

Noncitizens seeking entry might avoid immediate removal if they "indicate[] either an intention to apply for asylum" or express a credible "fear of persecution."[79] Under the credible fear provision, an asylum officer—not an IJ—reviews whether a noncitizen expresses a sufficiently credible fear of persecution to warrant moving forward with an application

authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" (quoting Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

73. Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213, 214, 219–20 (1999) (discussing law prior to enactment of expedited removal in 1996).

74. 8 U.S.C. § 1182(a)(7)(A)(i) (2015).

75. *Id.* § 1182(a)(6)(C)(i).

76. *Id.* § 1225(b)(1)(A)(i).

77. *Id.* § 1182(a)(9)(A)(i) (establishing five-year bar on reentry following a removal order issued under § 1225(b)(1) or § 1229a of this title); *id.* § 1182(a)(9)(C) (establishing permanent bar to reentry if noncitizen has been unlawfully present in the United States following a removal order).

78. 8 C.F.R. § 235.3(b)(2)(ii) (2016) (explaining that noncitizens issued expedited removal orders are "not entitled to a hearing before an immigration judge in proceedings conducted pursuant to section 240 of the Act, or to an appeal of the expedited removal order to the Board of Immigration Appeals").

79. 8 U.S.C. § 1225(b)(1)(A)(i).

for asylum before an IJ.[80] However, if an applicant fails to convince the interviewing officer of his or her credible fear, then expedited removal follows unless the applicant can convince an IJ to overturn the officer's negative credible fear determination.[81] The expedited removal statute thus makes evident its purposes: to prevent unauthorized migration at the border, to reduce judicial review of border officials' determinations, and to provide the government with the opportunity to impose stricter penalties on individuals who seek to return.

How did expedited removal come to account for over half of all removals? Congress, through the expedited removal statute enacted in 1996, sought to streamline and strengthen border officials' ability to prevent unauthorized migration at the border,[82] but a series of regulatory and policy shifts in the early 2000s significantly expanded the statute's reach. When initially implemented, federal officials limited the use of expedited removal to noncitizens arriving at official ports of entry. Even then, border officials continued to offer noncitizens the option to voluntarily depart in addition to using expedited removal. In 2002, DHS announced that it would apply expedited removal against noncitizens arriving by sea (not necessarily through formal ports of entry) who have not been physically and continuously present in the country for two years prior to apprehension by immigration officials.[83] Two years later, DHS expanded expedited removal to include individuals apprehended within one hundred miles of any international border, so long as they had entered the country within the previous fourteen days.[84] Throughout much of the late

80. *Id.* § 1225(b)(1)(B)(i)–(ii) ("If the officer determines at the time of the interview that an alien has a credible fear of persecution . . . the alien shall be detained for further consideration of the application for asylum.").

81. *Id.* § 1225(b)(1)(B)(iii)(I)–(III). If the IJ agrees with the asylum officer that no credible fear exists, then the subsequent removal order is not subject to further review. *See* 8 C.F.R. § 1003.42(f) (2016); Dree K. Collopy, *Crisis at the Border: Securing Access to Protection Following CBP Screening Interviews*, 15-11 IMMIGR. BRIEFINGS, Nov. 2015, at 3.

82. Laplante, *supra* note 73, at 214.

83. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924, 68924 (Nov. 13, 2002) (to be codified at 8 C.F.R. pt. 235.3(b)(1)(ii)).

84. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48880–81 (Aug. 11, 2004) (expanding expedited removal to include aliens "encountered by an immigration officer within 100 air miles of any U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the 14-day period immediately prior to the date of encounter"); MARY KENNEY, AM. IMMIGRATION LAW FOUND.,

1990s and early 2000s, the agency's implementation of expedited removal was inconsistent, with certain sectors of the country using it more readily than others. By 2005 and 2006, DHS indicated that it would issue expedited removal orders along all parts of the border, including interior parts of the United States within one hundred miles of the border.[85] By 2014, the Obama administration was aggressively using expedited removal against individuals fleeing violence in Central America.[86] Expedited removal thus so grew in scope that political theorist Ayelet Shachar points to the regulatory expansion of expedited removal as an example of the shifting nature of the immigration border and the border's increased disassociation from settled physical boundaries.[87] As this Article was going to publication, the Trump administration announced its plans to expand DHS's authority to use expedited removal as fully authorized by the state, which would allow it to issue expedited removal orders throughout the entire interior of the United States and against all persons who have not been previously admitted or paroled and cannot show that they have been continuously physically present in the country for two years.[88] Such an expansion would constitute a radical boost to the scope of CBP's powers.

Since its statutory revision in 1996, commentators have expressed concern with the constitutional problems, human rights impact, and potential for error associated with expedited removal.[89] Following the

PRACTICE ADVISORY: DHS ANNOUNCES UNPRECEDENTED EXPANSION OF EXPEDITED REMOVAL TO THE INTERIOR 1 (2004), http://shusterman.com/pdf/ailf81304.pdf.

85. '*Expedited Removal' of Aliens Expanded*, WASH. TIMES (Jan. 30, 2006), http://www.washingtontimes.com/news/2006/jan/30/20060130-113212-2189r.

86. Taylor & Johnson, *supra* note 70, at 197–98.

87. Shachar, *supra* note 71, at 172–74.

88. *See* 8 U.S.C. § 1225(b)(1)(A)(iii)(II); Memorandum from John Kelly, Sec'y, Dep't of Homeland Security, to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., Thomas Hannon, Acting Dir., U.S. Immigration & Customs Enf't., Lori Scialabba, Acting Dir., U.S. Citizenship & Immigration Servs., Joseph B. Maler, Acting General Counsel, Dimple Shah, Acting Assistant Sec'y for Int'l Affairs, Chip Fulghum, Acting Undersecretary for Mgmt. 6 (Feb. 20, 2017), https://www.dhs.gov/sites/ default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

89. *See, e.g.*, Laplante, *supra* note 73, at 221–31 (describing concerns with expedited removal); Michele R. Pistone & John J. Hoeffner, *Rules Are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 175–93 (2006) (describing failure of agency officials to follow mandatory procedural safeguards associated with expedited removal); Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 134–41 (2001) (arguing that expedited removal

initial implementation of expedited removal, critics argued that the expansion of power to low-level officers coupled with the limitations on relief and judicial review amounted to violations of procedural due process.[90] Others decried the credible fear process's inability to effectively identify individuals with viable asylum claims.[91] Concerns regarding border officials' commitment to following the credible fear procedures required by law have arguably been realized in disturbing ways. In the early 2000s, for instance, a panel of outside observers from the United States Commission of International Religious Freedom found numerous deficiencies in the process. The Commission found that, even in the presence of outsider observers, border officials failed to follow basic mandatory agency procedures, such as asking questions designed to assess whether individuals might be eligible for asylum, providing information about available proceedings and legal remedies, refraining from issuing expedited removal where individuals expressed a fear of returning to their home country, providing individuals with an opportunity to review statements after signing them, and only including assertions in the written record that were actually conveyed by the immigrant.[92]

The potential for abuse, possibility of error, and lack of oversight inherent in the expedited removal process have only continued in more recent years. A 2016 report issued by the U.S. Commission on International Religious Freedom found that a number of the concerns identified by the Commission's earlier report had not been adequately addressed, such as significant deficiencies in the reliability of transcripts produced by CBP officers, and that subsequent human rights problems associated with the expedited removal process had arisen in more recent years.[93] Recent advocacy reports contain examples of border officials failing to properly

provisions violate international human rights laws).

90. *See, e.g.*, Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 576–80 (2007).

91. *See generally, e.g.*, Ramji, *supra* note 89 (describing the failure of expedited removal procedures to adequately identify viable asylum claims).

92. *See* Pistone & Hoeffner, *supra* note 89, at 175–93 (describing findings reported in MARK HETFIELD ET AL., U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: VOLUME I: FINDINGS & RECOMMENDATIONS (2005) and MARK HETFIELD ET AL., U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: VOLUME II: EXPERT REPORTS (2005)).

93. ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 19–23, 50–53 (2016).

identify asylum seekers, either due to agency officials not asking the requisite questions or due to the intimidating atmosphere associated with interviews taking place at the border.[94] One advocate has stated that "[e]xpedited removal as it exists today takes place in a black box, with unchecked deportation authority by gun-wielding Border Patrol agents and immigration inspectors."[95] Lawful permanent residents and lawful visa holders, individuals with family ties to the United States, and immigrants with claims to lawful status have reportedly been erroneously or unfairly subjected to expedited removal and left with little recourse to undo the removal orders once entered.[96] Allegations related to the detention conditions used to hold individuals seeking credible fear determinations—including the notorious use of extremely cold holding cells known as "*hieleras*" or "ice boxes"—also raise questions about the legitimacy of the process.[97]

Defenders of the expedited removal process as implemented at the border have argued that it efficiently balances the government's interests in border enforcement and provides sufficient procedural safeguards to prevent erroneous issuance of expedited removal orders. The government's primary justification for the expansion of expedited removal has been efficiency and stronger border enforcement.[98] David Martin has asserted

94. *See* AMERICAN EXILE, *supra* note 25, at 32–40. *See also* Clara Long, *"You Don't Have Rights Here": US Border Screening and Returns of Central Americans to Risk of Serious Harm*, HUMAN RIGHTS WATCH (Oct. 16, 2014), https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk. Human Rights Watch found that between October 2010 and September 2012, "[o]nly 0.1% of Mexicans, 0.8% of Guatemalans, and 5.5% of Salvadorans in expedited or reinstatement of removal were referred to a credible or reasonable fear interview by CBP." *Id.*

95. AMERICAN EXILE, *supra* note 25, at 15 (quoting Mark Hetfield, *The Wall Street Journal Misplays the 'Asylum Card'*, HUFFINGTON POST (Oct. 28, 2013), http://www.huffingtonpost.com/mark-hetfield/the-wall-street-journal-misplays_b_4158840.html).

96. *See id.* at 50–54 (describing examples of asylum holder and U visa recipients who were erroneously subject to expedited removal at the border). Some attorneys (including the author) have filed motions to rescind expedited removal orders directly with CBP pursuant to 8 C.F.R. § 103.5, with some success.

97. *See* CASSIDY & LYNCH, *supra* note 93, at 40–42, 58–59 (describing poor detention conditions).

98. *See, e.g.*, *The Southern Border in Crisis: Resources and Strategies to Improve National Security: Joint Hearing Before the Subcomm. on Immigration, Border Sec. & Citizenship and the Subcomm. on Terrorism, Tech. & Homeland Sec. of the S. Comm. on the Judiciary*, 109th Cong. 3, 24 (2005) (statement of David Aguilar, Chief, Office of Border Patrol) (explaining that with expedited

that by focusing enforcement resources on entrants at the border, the process targets those with relatively lower stakes in the country.[99] In addition to enabling the government to more efficiently issue an initial removal order, the process lays the groundwork for stiffer civil and criminal sanctions upon future reentry attempts.[100] "In most cases involving [expedited removal] at the ports of entry," writes Martin, "the stakes for the applicant for admission are low."[101] The rationale is that border entrants have either not yet established ties in the United States, or, if ties do exist, "they would generally lack a legitimate entitlement to resume those connections."[102] Finally, Martin emphasizes that the procedural safeguards in place already provide sufficient mechanisms to filter out claims of asylum, as well as prevent erroneous removals of citizens and lawful residents.[103] While Martin's claim that expedited removal enhances the government's arsenal of enforcement tools is true, his assurances about the sufficiency of the procedural safeguards associated with expedited removal and the relatively lower ties to the United States that characterize targets of expedited removal have not been supported by recent reports and experiences.

Judicial challenges to expedited removal have been largely unsuccessful at curtailing the expansion of the practice. Court challenges have failed in part due to statutory limitations on judicial review of expedited removal embedded in the INA. For instance, 8 U.S.C. § 1252(e) specifically divests the federal courts of jurisdiction to hear individual and class-action challenges to expedited removal,[104] leaving limited habeas

removal, "[t]hey don't have to go in front of a judge . . . the agent on the ground will make that determination as to whether that person has any claim to be in the United States or right to be in the United States. . . . [O]nce [tha]t determination is made, these people are rapidly removed out of the country without an immigration judge coming into play").

99. David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 684–86, 690–91 (2000).

100. *Id*. at 675.

101. *Id.* at 690.

102. *Id.*

103. *See id.* at 683, 687 n.47, 692–94.

104. 8 U.S.C. § 1252(e)(1)(A)–(B) (2015) ("Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with [8 U.S.C. § 1225(b)(1)] except as specifically authorized in [8 U.S.C. § 1252(e)(2)], or (B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection."); *Id.* § 1252(a)(2)(A)

review as the principal avenue for challenging the practice. Shortly following the implementation of the expedited removal statute and regulations in 1997, advocates brought three separate lawsuits that were eventually consolidated into one action, *American Immigration Lawyers Association v. Reno*.[105] Both the district court and D.C. Circuit Court held that the plaintiffs lacked standing to bring the claims, and the circuit court affirmed the district court's denial of the plaintiffs' causes of action for failure to state claims.[106] To the extent the due process claims were considered, the district court emphasized the long line of entry fiction and plenary power doctrine cases holding that aliens not yet admitted to the country had no due process rights.[107] *American Immigration Lawyers Association v. Reno* thus gave the government the green light to implement and expand expedited removal. With respect to habeas review, in an August 29, 2016 decision, the Third Circuit held that a federal district court lacked jurisdiction to hear the habeas petitions of twenty-eight families issued expedited removal orders after DHS officers and IJs found a failure to meet the credible fear standard.[108]

(listing expedited removal provision at 8 U.S.C. § 1225(b)(1) under "matters not subject to judicial review"). *See also, e.g.*, Khan v. Holder, 608 F.3d 325, 329–30 (7th Cir. 2010) (finding lack of jurisdiction to review validity of expedited removal order despite concern that the "entire process" involving expedited removal—"from the initial decision to convert the person's status to removal—can happen without any check on whether the person understood the proceedings, had an interpreter, or enjoyed any other safeguards"); Garcia de Rincon v. Dep't of Homeland Sec., 539 F.3d 1133, 1135 (9th Cir. 2008) ("Although we are sympathetic to the hardships resulting from de Rincon's subsequent removal from this country, § 1252(e) does not allow us to indulge those sympathies.").

105. Am. Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352, 1352 (D.C. Cir. 2000).

106. *Id.* at 1356–57, 1364. For further analysis of *American Immigration Lawyers Association v. Reno*, see Gebisa, *supra* note 90, at 574–75.

107. Am. Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38, 59 (D.D.C. 1998) ("Because such aliens are not considered to be within the United States, but rather at the border, courts have long recognized that such aliens have 'no constitutional right[s]' with respect to their applications for admission." (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982))).

108. Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 433–34 (3d Cir. 2016). The opinion went on to hold that the statutory provision precluding habeas review, 8 U.S.C. § 1252, did not violate the Suspension Clause of the U.S. Constitution. *Id.* at 444–45, 450. One commentator described the court's Suspension Clause holding as a "breathtaking" decision that "seems simply nuts." Steve Vladeck, *Third Circuit Holds Suspension Clause Does Not Apply to Non-Citizens Physically (But Not Lawfully) Present in the United States*, JUST SECURITY (Aug. 29, 2016, 3:05 PM), https://www.justsecurity.org/32597/circuit-holds-suspension-clause-apply-non-citizens-physically-but-lawfully-present-united-states.

A primary negative consequence of receiving a formal removal order at the border is that receipt of a removal order enables the government to later criminally prosecute an individual for illegal reentry into the United States under 8 U.S.C. § 1326.[109] However, the availability of judicial review over removal orders in the context of collateral attacks on illegal reentry convictions has enabled a small—and potentially growing—number of individuals to obtain some review of expedited removal orders, at least in the Ninth Circuit.[110] For example, in *United States v. Raya-Vaca*,[111] the Ninth Circuit found due process violations resulting from a border official's failure to follow required regulatory advisals during the expedited removal process by neglecting to advise the noncitizen of the charges against him and permit him to read the sworn statement presented to him for signature.[112] With respect to prejudice, the Court found that the noncitizen could have received relief in the form of being permitted to withdraw his application for admission—rather than receive an expedited removal order—thus rendering his collateral attack on the removal order successful.[113] Future challenges to expedited removal in individual cases involving subsequent criminal prosecutions thus appear possible, but the structural deficiencies of expedited removal remain in place and are likely to intensify if expanded nationwide under the Trump administration.

2. Forever Deportable After Reentry: Reinstatement of Removal

The entry and execution of a final order of removal imposes many negative legal consequences, but does not necessarily result in permanent physical exclusion from the United States. The reality is that the call of

109. *But see* United States v. Mendoza-Lopez, 481 U.S. 828, 839 (1987) (creating the right for an alien to collaterally attack a prior removal order as defense to prosecution for illegal reentry).

110. United States v. Barajas-Alvarado, 655 F.3d 1077, 1079, 1091 (9th Cir. 2011). In *Barajas-Alvarado*, the Ninth Circuit emphasized that the Due Process Clause requires an individual to have "some meaningful review" of a removal order that serves as the predicate order for an illegal reentry conviction under 8 U.S.C. § 1326. *Id.* After providing a lengthy discussion of the legal framework governing judicial review of expedited removal orders, the court found that the expedited removal statute contravened the Due Process Clause. *Id.* at 1081–87. In that case, however, the court declined to vacate the conviction due to the failure to show prejudice resulting from the due process violation. *Id*. at 1091.

111. United States v. Raya-Vaca, 771 F.3d 1195 (9th Cir. 2014). In *United States v. Bayardo-Garcia*, 590 F. App'x 660, 662 (9th Cir. 2014), the Ninth Circuit also found due process violations resulting from an expedited removal order in which the border officer conducting the expedited removal procedure failed to advise the noncitizen of the "drastic consequences" of a removal order.

112. *Raya-Vaca*, 771 F.3d at 1203–06.

113. *Id*. at 1206–11.

family and home leads many people to return or attempt to return to the United States, even after being ordered removed. Indeed, a 2011–2012 survey of those apprehended at the border found that individuals with longstanding ties to the United States were twice as likely to plan an attempt to reenter the country, and that people with families in the United States were two to three times more likely to do so than those without similar ties.[114] One possible consequence, discussed earlier, is criminal prosecution for illegal reentry.[115] Illegal reentry prosecutions, while one of the most frequently prosecuted federal crimes, tend to take place in jurisdictions located near the border and relatively close in time to an individual's apprehension by a border or port of entry.[116] In the eyes of the law, those who return to the United States following deportation are not only potentially criminals, but forever subject to immediate re-deportation without a hearing.

For those who reenter the country following removal, reinstatement of removal is a far more common outcome than criminal prosecution.[117] Reinstatement's use has proliferated in recent years, with an increase of approximately 270% between fiscal years 2005 and 2013.[118] The reinstatement of removal process allows immigration enforcement officials to reissue a prior order of removal through a showing of three elements: (1) the existence of a prior removal order, (2) that the noncitizen's identity matches that of the prior removal order, and (3) the fact of the subsequent unlawful reentry.[119] The reinstatement statute purports to suggest that there

114. MARK GRIMES ET AL., UNIV. OF ARIZ. NAT'L CTR. FOR BORDER SEC. AND IMMIGRATION, REASONS AND RESOLVE TO CROSS THE LINE: A POST-APPREHENSION SURVEY OF UNAUTHORIZED IMMIGRANTS ALONG THE U.S.-MEXICO BORDER 9 (2013), http://www.borders.arizona.edu/cms/sites/default/files/Post-Aprehension-Survey-REPORT%20may31-2013_0.pdf.

115. *See generally* Keller, *supra* note 46 (discussing the criminalization of illegal entry and reentry in the United States).

116. *Id*. at 67–68.

117. SIMANSKI, *supra* note 12, at 6–7. In fiscal year 2013, DHS reported 159,634 reinstatements of removal. IMMIGRATION POLICY CTR., *supra* note 20, at 2. In the same year, 18,498 prosecutions for illegal reentry took place. U.S. SENTENCING COMM'N, ILLEGAL REENTRY OFFENSES 1 (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf. It is worth noting that the majority of illegal reentry offenders (67.1%) had relatives other than their children in the United States, while nearly half (49.5%) had children in the United States. *Id*. at 25.

118. IMMIGRATION POLICY CTR., *supra* note 20, at 2.

119. *See* 8 U.S.C. § 1231(a)(5) (2015). *See also* Wadhia, *Speed Deportation*, *supra* note 23, at 7.

is little room for further review, stating that "the prior order of removal is reinstated . . . and is not subject to being reopened or reviewed."[120] The reinstatement provision rules out the possibility of a statute of limitations by noting that the reinstatement may occur "at any time after the reentry."[121] The statute goes on to specify that the noncitizen "is not eligible and may not apply for any relief under" the federal immigration laws.[122]

The federal regulations governing reinstatement of removal further explain the summary nature of the proceedings and the limitations on relief. The regulations state, for instance, that "[t]he alien has no right to a hearing before an immigration judge,"[123] and that an immigration officer will determine whether the individual qualifies for reinstatement.[124] The regulation provides for minimal notice and opportunity to be heard. Officers are required to "provide the alien with written notice of his or her determination," "advise the alien that he or she may make a written or oral statement contesting the determination," and, if the noncitizen "wishes to make such a statement, . . . allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination."[125] The regulations provide no waiting period in which the noncitizen is permitted to obtain counsel to determine whether contesting the reinstatement order is possible.[126] In fact, the entire process could take, as Lee J. Terán has put it, "a matter of hours."[127] The regulations do not require that the statements be provided in a language that the noncitizen can understand.[128]

With respect to limitations on relief, despite the statutory language suggesting that an individual subject to reinstatement may not apply for any relief, extremely narrow avenues to pursue protection from removal exist.

120. 8 U.S.C. § 1231(a)(5).

121. *Id.*

122. *Id.*

123. 8 C.F.R. § 241.8(a) (2016).

124. *Id.* The immigration officer's role is limited to determining (1) "[w]hether the alien has been subject to a prior order of removal," (2) "[t]he identity of the alien," and (3) "[w]hether the alien unlawfully reentered the United States." *Id.* § 241.8(a)(1)–(3). So long as the requirements are met, the noncitizen "shall be removed." *Id.* § 241.8(c).

125. 8 C.F.R. § 241.8(b).

126. *See generally* 8 C.F.R. § 241.8 (describing reinstatement of removal order process).

127. Lee J. Terán, *Mexican Children of U.S. Citizens: "Vignes Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 SCHOLAR 583, 661 (2012).

128. *See generally* 8 C.F.R. § 241.8 (describing reinstatement of removal order process).

Most notably, an individual undergoing the reinstatement process who expresses "a reasonable fear of persecution or torture" in his or her home country will not face automatic removal.[129] While awaiting a reasonable fear interview and decision, individuals are typically incarcerated, and have been held for over a year.[130] Following a reasonable fear determination, noncitizens are referred to restricted immigration court proceedings—known as "withholding-only" proceedings—in which they may apply only for withholding of removal or protection under the Convention against Torture.[131] The regulations also provide that certain Haitian and other Central American nationals are not subject to reinstatement.[132] And while not discussed in the regulations, other provisions of immigration law suggest that noncitizens with claims for victim-based humanitarian relief, such as U visas, can move forward despite being subject to the reinstatement process.[133] Nonetheless, some courts have excluded entire bodies of immigration law that otherwise contemplate the availability of relief from removal, such as asylum (for individuals fearing persecution abroad), cancellation of removal (for those with strong equities and ties to the United States), or "245(i)" adjustment of status (for persons with certain immigration petitions filed on or before April 30, 2001).[134]

129. *Id.* § 241.8(e).

130. *See* Complaint at 7, Alfaro Garcia v. Johnson, No. 14-cv-01775 (N.D. Cal. Apr. 17, 2014) (alleging in a class action lawsuit challenging the delays in adjudicating reasonable fear interviews that "delays in providing reasonable fear determinations . . . can range from several weeks and months in some locations to over a year in southern states such as Arizona and Texas" and "are common," with an average wait time of 111 days). The District Court for the Northern District of California approved a settlement agreement in which the government agreed to process reasonable fear determinations within ten days of referral to the United States Citizenship and Immigration Service ("USCIS") for such a determination. *See* Settlement Agreement at 5, Alfaro Garcia v. Johnson, No. 14-cv-01775 (N.D. Cal. Oct. 9, 2015).

131. Wadhia, *Speed Deportation*, *supra* note 23, at 11. Withholding of removal and the Convention against Torture offer protection from physical removal, but do not allow an individual to adjust their status to that of a lawful permanent resident later on, thus providing a status that is significantly less beneficial than asylum. *Id.* at 11, 13. The number of withholding-only proceedings has increased significantly in the last several years, from 240 cases in 2009 to 2,269 in 2013. *Id.* at 13.

132. 8 C.F.R. § 241.8(d) (stating that reinstatement orders will not apply to individuals granted adjustment of status applications under the Haitian Refugee Immigrant Fairness Act of 1998 or the Nicaraguan Adjustment and Central American Relief Act).

133. The grant of U nonimmigrant status, for instance, cancels prior removal orders issued by immigration officers who are not IJs. *See* 8 C.F.R. § 214.14(c)(5)(i).

134. *See, e.g.*, Padilla v. Ashcroft, 334 F.3d 921, 923, 925 (9th Cir. 2003).

The law did not always view deportees as forever deportable. Although the immigration laws have long reflected the notion that an individual who unlawfully returned following deportation could face reinstatement of a prior removal order,[135] for nearly half a century prior to 1996, noncitizens subject to reinstatement were entitled to a hearing before an IJ.[136] In that hearing, the individual could examine and contest the charges and evidence, present evidence, and even apply for relief from deportation for which they were eligible.[137] Furthermore, the individual could appeal to the BIA and the federal courts of appeal.[138]

Immigration advocates have long expressed due process and fairness concerns with the current reinstatement procedure. The process leaves very little room to correct for error, for instance by permitting an individual to seek review of legal defects in an original removal order. The removal order serving as the basis for reinstatement might be the product of a shadow removal proceeding. In many instances, especially where the individual never appeared before an IJ, the individual subject to reinstatement may be unaware that they had a prior removal order because of the summary manner in which it was issued.[139] Thus, even though petitions for review of reinstated orders may be filed, they often offer little by way of a remedy. As a dissenting judge in the Ninth Circuit stated in a 2007 en banc decision upholding the reinstatement procedures, a "typical reinstatement case" involves a noncitizen who "has married a United States citizen and makes an appointment with the agency to discuss adjustment of status or an extension of a previously granted work authorization."[140] During that appointment, based solely on boxes checked on a form, the noncitizen "is immediately taken into custody" and "the reinstatement is

135. *See* KANSTROOM, *supra* note 21, at 115. The reinstatement provision was originally created during the McCarthy era, through the Internal Security Act of 1950. *Id.*

136. Morales-Izquierdo v. Gonzales, 486 F.3d 484, 499 (9th Cir. 2007) (en banc) (Thomas, J., dissenting) (discussing 8 C.F.R. § 242.23 (repealed 1997)).

137. *Id.*

138. *See* Castro-Cortez v. INS, 239 F.3d 1037, 1044 (9th Cir. 2001) (discussing judicial review of reinstatement orders prior to 1996), *abrogated by* Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006).

139. *See* AMERICAN EXILE, *supra* note 25, at 21 ("Some individuals were not actually aware they had a prior deportation order, either because they never received the paperwork or had their order explained; in some cases, individuals interviewed for this report had *in absentia* orders from an immigration judge but said they never received notice of the hearing where their deportation order was issued . . . .").

140. *Morales-Izquierdo*, 486 F.3d at 506 (Thomas, J., dissenting).

effected without further ado."[141] The dissent went on to observe that "[t]he very real and practical consequence . . . is that families in the United States are broken apart, with the father or mother summarily removed from the country without any opportunity to contest the government's charges."[142] Nearly ten years later, the expanded use of reinstatement has made even more common such scenarios.

Reinstatement procedures as they exist today were challenged in court following their implementation in the late 1990s, but the federal judiciary has largely endorsed the practice. Although some courts expressed concerns with the lack of due process protection in reinstatement procedures, ultimately the courts of appeal upheld those procedures, generally because the noncitizens in those cases could not establish prejudice.[143] And in 2006, the Supreme Court expressed little sympathy for a noncitizen subject to reinstatement, despite the fact that he had lived in the United States for twenty years since reentering, had married a U.S. citizen, had children, and presented a strong history of employment.[144] In *Fernandez-Vargas v. Gonzalez*, Mr. Fernandez-Vargas's original deportation order had predated the 1996 reinstatement statute.[145] He challenged the application of the new reinstatement provision on retroactivity grounds.[146] In ruling that retroactivity principles would not bar

141. *Id*.

142. *Id*. at 507.

143. *See* TRINA REALMUTO, AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: REINSTATEMENT OF REMOVAL 23 & n.35 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal_4-29-13_fin.pdf (citing Ponta-Garcia v. Att'y Gen. of the U.S., 557 F.3d 158, 162–65 (3d Cir. 2009); Avila v. U.S. Att'y Gen., 560 F.3d 1281, 1285–86 (11th Cir. 2009); Garcia-Villeda v. Mukasey, 531 F.3d 141, 149–50 (2d Cir. 2008); *Morales-Izquierdo*, 486 F.3d at 495–98; De Sandoval v. U.S. Att'y Gen., 440 F.3d 1276, 1285 (11th Cir. 2006); Ochoa-Carrillo v. Gonzales, 437 F.3d 842, 847–48 (8th Cir. 2006); Lattab v. Ashcroft, 384 F.3d 8, 20–21 (1st Cir. 2004); Warner v. Ashcroft, 381 F.3d 534, 539 (6th Cir. 2004); Duran-Hernandez v. Ashcroft, 348 F.3d 1158, 1162–63 (10th Cir. 2003); Briones-Sanchez v. Heinauer, 319 F.3d 324, 327–28 (8th Cir. 2003); Gomez-Chavez v. Perryman, 308 F.3d 796, 802 (7th Cir. 2002); Ojeda-Terrazas v. Ashcroft, 290 F.3d 292, 302 (5th Cir. 2002)).

144. Fernandez-Vargas v. Gonzales, 548 U.S. 30, 35, 45–47 (2006).

145. *See id*. at 35–36. Prior to 1996, federal immigration laws placed individuals subject to immigration enforcement action in either "deportation" proceedings or "exclusion" proceedings, depending on their manner of entry. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 replaced deportation and exclusion proceedings with the single term "removal proceedings," although cases commenced prior to April 1, 1997 still used the former terminology. *See id.* at 33 & n.1.

146. *Id*. at 35–36.

the government from reinstating the prior removal order, the Supreme Court emphasized a theory of "continuing violation" to describe Mr. Fernandez-Vargas's legal position.[147] For the majority, an individual's act of remaining in the United States following a final deportation order constitutes the predicate violation on which reinstatement becomes necessary, such that retroactivity analysis hinges not on the date of the underlying order (issued prior to 1996, when the reinstatement statute changed), but on the fact that he continued to remain in the United States after 1996, the effective date of the law.[148] The majority treated Mr. Fernandez-Vargas as one whose "choice to continue his illegal presence . . . subjects him to [a] new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out."[149] The Supreme Court's decision thus interpreted the reach of summary reinstatement to apply even to cases where the predicate order was issued prior to the 1996 changes to the law.

3. Non-Lawful Permanent Residents with Alleged Aggravated Felony Convictions: Administrative Removal

Any noncitizen with a criminal conviction that is deemed an "aggravated felony" under the federal immigration laws almost certainly faces a panoply of negative immigration consequences.[150] But for individuals who are not lawful permanent residents ("LPRs"), an aggravated felony conviction means not only the possibility of deportation, but also a strong likelihood of being subject to "administrative removal" proceedings in which they receive no immigration court hearing and limited opportunities to apply for relief or fight their deportation.[151] Non-LPRs may include individuals with *conditional* lawful permanent residence due to having acquired status through less than two years of marriage,[152] valid temporary visa holders (such as those for students or high-skilled workers), and individuals with limited immigration relief, including

147. *Id.* at 45.

148. *Id.* at 45–47.

149. *Id.* at 44.

150. Twenty-one subsections and over eighty sub-definitions of the INA set forth the categories of crimes that may constitute an "aggravated felony." *See* 8 U.S.C. § 1101(a)(43) (2015).

151. *See id.* § 1228(b)(2)(B).

152. *See id.* (subjecting those with "permanent resident status on a conditional basis" to administrative removal); *id.* § 1186a(h) (defining those subject to conditional lawful permanent residence).

Deferred Action for Childhood Arrivals or withholding of removal.[153]

The administrative removal statute permits immigration officers to issue removal orders to non-LPRs with aggravated felony convictions.[154] It is worth emphasizing that the statute states that officers "may" use administrative removal in lieu of immigration court proceedings, and nowhere requires the use of a shadow proceeding.[155] The implementing regulations authorize officers opting to bypass regular removal proceedings to issue a removal order "without a hearing before an immigration judge."[156] Unlike expedited removal at the border, administrative removal can take place anywhere and at any time, for example, even where ICE has already placed an individual in regular removal proceedings.[157] Administrative removals typically take place when the noncitizen is behind bars, either completing a criminal sentence or in immigration detention.[158]

The administrative removal statute and regulations do provide some opportunities for the noncitizen to contest the charges filed against them. This limited series of procedures loosely replicates—but does not rise to the level of—the protections available to noncitizens in immigration court. Instead of a charging document filed with the immigration court, for instance, an immigration officer must provide notice of the administrative removal by issuing a form directly to the noncitizen, advising them of the government's intent to remove them.[159] This form must contain written notice of the individual's right to a lawyer ("at no expense to the government"), their right to seek limited immigration relief in the form of withholding of removal, right to inspect the evidence accompanying the charges, and right to rebut the charges within ten days of service of the notice.[160]

153. *See* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1119–20, 1123 (2015). Other scholars have also examined the growth and implications of limited forms of immigration relief such as deferred action. *See, e.g.*, Jennifer M. Chacon, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 718–30 (2015).

154. *See* 8 U.S.C. § 1228(b)(1).

155. *Id.*

156. 8 C.F.R. § 238.1(b) (2016).

157. *Id.* § 238.1(e) (permitting an IJ to terminate regular removal proceedings at the government's request so that administrative removal may be pursued).

158. *See* AMERICAN EXILE, *supra* note 25, at 26 (noting that administrative removal can take place when individuals are still in criminal custody).

159. *See* 8 C.F.R. § 238.1(b)(2)(i). *See also* 8 U.S.C. § 1228(b)(4)(A) (requiring notice).

160. 8 C.F.R. § 238.1(b)(2)(i). The immigration officer must also provide the individual with a list

The regulations also specify the procedures that follow if an individual chooses to rebut the charges within the ten-day time period.[161] Should the noncitizen include in their rebuttal a request to review the evidence against them, then the government must provide him or her with the documentary evidence supporting the charges, such as criminal conviction records or evidence of immigration status.[162] But the corollary of this regulatory requirement seems to be that for noncitizens who forgo or do not understand their right to rebut the charges, the government can establish its case for removal without providing any, or more than minimal, documentary evidence in support of the allegations. To be sure, where the individual does not contest the charges, the regulations specify that a "deciding Service officer"—who must be a different person from the officer who issues the initial notice of charges, but not necessarily an officer with specialized training or knowledge—should make a final determination of deportability based on "clear, convincing and unequivocal evidence" "in the record of proceeding."[163] And where the noncitizen contests the evidence, the deciding Service officer must also make a final determination to either proceed with the administrative removal or—if the evidence raises a question about the propriety of administrative removal—to refer the case to an IJ for further adjudication.[164]

After DHS issues an administrative removal order, several other procedures attach. For noncitizens fleeing persecution abroad, an officer employed by Citizenship and Immigration Services ("USCIS") must determine that they have a "reasonable fear" of persecution.[165] If the USCIS officer believes they demonstrate such a reasonable fear, then the individual is referred to a "withholding-only" proceeding before an IJ, similar in nature to the limited proceedings available for individuals subject to reinstatemement of removal who are found to have a reasonable fear of

of available free legal services and must provide either a written or oral translation of the notice. *See id.* § 238.1(b)(2)(iv)–(v). *See also* 8 U.S.C. § 1228(b)(4)(B).

161. *See* 8 C.F.R. § 238.1(c). It is worth noting the burdens imposed on the noncitizen by the regulations, which require that any rebuttal of the allegations be "accompanied by affidavit(s), documentary information, or other specific evidence supporting the challenge." *Id.* § 238.1(c)(2). It is extraordinarily difficult for noncitizens, particularly those without lawyers, to compile the evidentiary support necessary to rebut charges of immigration status and conviction records within ten days.

162. *Id.* § 238.1(c)(2)(ii).

163. *Id.* § 238.1(a), (d)(1).

164. *See id.* § 238.1(d)(2)(iii).

165. Wadhia, *Speed Deportation*, *supra* note 23, at 11. *See* 8 C.F.R. § 238.1(f)(3).

persecution.[166] As with reinstatement cases, individuals subject to administrative removal's truncated processes have no opportunity to apply for forms of protection other than withholding of removal and the Convention against Torture, even if they might otherwise be eligible to seek other forms of relief in regular removal proceedings.[167]

Unlike expedited removal at the border, the administrative removal procedures contemplate a right to judicial review of the removal orders.[168] For those not seeking withholding of removal, the government must abide by a fourteen-day temporary stay of the removal order so that the noncitizen has an opportunity to seek judicial review.[169] The fourteen-day period can be waived by the noncitizen in writing.[170] The government must also maintain a record of proceedings for purposes of judicial review, which is available by filing a petition for review with the relevant court of appeals.[171] Compared to expedited removal and reinstatement of removal, administrative removal offers more procedure and protections to the noncitizen. However, like the other summary removal processes that completely bypass the immigration courts, administrative removal raises similar concerns regarding the potential for coercion, lack of access to counsel, and competence of immigration officers responsible for issuing the removal orders. Since administrative removal typically takes place from behind bars, noncitizens have very little access to documentary evidence, legal claims, and lawyers that may be critical to contesting their cases.

The information deficits facing noncitizens in the administrative removal process—where the key legal issues turn on the immigration status of the individual and whether a prior conviction constitutes an "aggravated felony"—are particularly pronounced. As the courts have recognized repeatedly, determining whether a particular conviction is or is not an

166. Wadhia, *Speed Deportation*, *supra* note 23, at 11.

167. *Id.* Persons with aggravated felony convictions are already barred from seeking many forms of immigration relief. Koh, *Case for the Categorical Approach*, *supra* note 36, at 270–71. However, individuals subject to administrative removal still have access to fewer forms of relief than similarly situated persons in regular removal proceedings. *See, e.g.*, United States v. Arrieta, 224 F.3d 1076, 1080 (9th Cir. 2000) (finding that 8 U.S.C. § 1228(b) bars non-LPRs with aggravated felony convictions from relief from removal under 8 U.S.C. § 1182(h), but only where the individual is subject to summary removal procedures). *See also* Wadhia, *Speed Deportation*, *supra* note 23, at 11.

168. Wadhia, *Speed Deportation*, *supra* note 23, at 9.

169. 8 U.S.C. § 1228(b)(3) (2015).

170. *Id.*; 8 C.F.R. § 238.1(f)(1) (2016).

171. 8 U.S.C. § 1228(b)(4)(E); 8 C.F.R. § 238.1(h).

aggravated felony can lead to a complex, legally dense, and ever-changing analysis that generally involves close scrutiny of the elements of the individual's prior conviction.[172] The methodology used to assess the immigration consequences of crime, known as the "categorical approach," is the subject of case law that changes often, within and among circuits, and is subject to intervention by the Supreme Court. Since 2004, for instance, the Supreme Court has issued eight published decisions addressing whether particular convictions constituted aggravated felonies in the immigration context.[173] In the 2017 term, the Court is expected to issue two more decisions that will affect the scope of the aggravated felony definition.[174] An even larger string of published Supreme Court decisions have directly addressed the categorical approach in non-aggravated felony immigration cases[175] or (more frequently) in criminal sentencing cases that impacted the

172. *See generally* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011) (arguing for use of categorical analysis based on history and administrative law principles); Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 GEO. MASON L. REV. 625 (2011) (defending the use of the categorical approach and its results); Koh, *Case for the Categorical Approach*, *supra* note 36 (arguing that the categorical approach provides meaningful benefits to noncitizens and the immigration system).

173. *See* Torres v. Lynch, 136 S. Ct. 1619, 1623 (2016) (holding that a state conviction for attempted arson was an aggravated felony); Moncrieffe v. Holder, 133 S. Ct. 1678, 1693–94 (2013) (holding that a state conviction for possession of marijuana with intent to distribute was not an aggravated felony); Kawashima v. Holder, 132 S. Ct 1166, 1170 (2012) (holding that federal convictions for willfully making and subscribing a false tax return and for aiding and assisting in the preparation of a false tax return did trigger an aggravated felony classification); Carachuri-Rosendo v. Holder, 560 U.S. 563, 566 (2010) (holding that a second drug possession conviction, when not charged as a recidivist, was not an aggravated felony); Nijhawan v. Holder, 557 U.S. 29, 32 (2009) (holding that federal fraud convictions involving loss to the victim of over $10,000 constituted an aggravated felony); Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 185, 187 (2007) (ruling that a state conviction for vehicle theft was an aggravated felony); Lopez v. Gonzales, 549 U.S. 47, 51, 59–60 (2006) (holding that a single drug possession conviction was not an aggravated felony); Leocal v. Ashcroft, 543 U.S. 1, 3–4 (2004) (holding that a state DUI with a bodily injury conviction was not an aggravated felony).

174. On October 28, 2016, the Supreme Court granted certiorari in *Esquivel-Quintana v. Lynch*, No. 16-54, which will address whether a conviction for consensual sexual intercourse between a twenty-one-year-old and a minor under the age of eighteen constitutes an aggravated felony for "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A). On September 29, 2016, the Court granted certiorari in *Lynch v. Dimaya*, No. 15-1498, which will address whether a portion of the "crime of violence" definition of an aggravated felony at 18 U.S.C. § 16(b) is unconstitutionally void for vagueness. *See also* Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1171–75 (arguing that 18 U.S.C. § 16(b) is unconstitutionally vague).

175. *See* Mellouli v. Lynch, 135 S. Ct. 1980, 1985 (2015) (holding that a state drug paraphernalia

aggravated felony definition.[176] The federal judiciary has been unable to agree in many cases on whether convictions amount to aggravated felonies, but administrative removal places the exact same legal determination into the hands of front-line immigration officers, who are not required to be lawyers.

The question of whether an individual is a U.S. citizen or lawful permanent resident, and thus not subject to administrative removal, can also raise complicated legal questions that low-level agency officials may not have the expertise to assess. The erroneous deportation and detention of U.S. citizens have affected all levels of immigration enforcement.[177] In

conviction did not trigger controlled substance grounds for removability).

176. The Supreme Court's June 2016 decision in *Mathis v. United States*, a criminal sentencing case involving the Armed Career Criminal Act ("ACCA"), will have important implications for the immigration context. *See* Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (holding that a prior conviction does not qualify as the generic form of a predicate violent felony under the ACCA if an element of the crime of conviction is broader than an element of the generic offense). The Court's analysis in ACCA cases has deeply influenced its approach in immigration cases. *See generally* Shepard v. United States, 544 U.S. 13 (2005) (ruling on an ACCA case involving the scope of a modified categorical approach); Taylor v. United States, 495 U.S. 575 (1990) (setting forth a categorical approach in the ACCA context). The Court has repeatedly confronted the scope of the violent felony provision of the ACCA, and those cases in turn have affected immigration law cases involving convictions alleged as aggravated felonies under the "crime of violence" and other immigration law provisions, such as the burglary definition. *See* Descamps v. United States, 133 S. Ct. 2276, 2282–83, 2293 (2013) (holding that a state burglary conviction was not a "violent felony" under ACCA); Sykes v. United States, 131 S. Ct. 2267, 2270, 2277 (2011) (holding that a state conviction for flight from a police officer was a "violent felony" under the ACCA); Johnson v. United States, 559 U.S. 133, 135, 139–45 (2010) (holding that a state battery conviction was not a "violent felony" under the ACCA); Chambers v. United States, 555 U.S. 122, 123 (2009) (holding that a state failure-to-report offense was not a "violent felony" under the ACCA); Begay v. United States, 553 U.S. 137, 139 (2008) (holding that driving under the influence was not a "violent felony" under the ACCA); James v. United States, 550 U.S. 192, 195 (2007) (holding that a state attempted burglary conviction was not a "violent felony" under the ACCA). In 2015, in *Johnson v. United States*, the Court held the one portion of the ACCA's violent felony definition—known as the "residual clause"—to be unconstitutionally void for vagueness, thereby overturning its prior holdings in *Sykes*, *Chambers*, *Begay*, and *James*. Johnson v. United States, 135 S. Ct. 2551, 2562–63 (2015). For the relationship between criminal sentencing cases and the categorical approach in immigration, see Koh, *Case for the Categorical Approach*, *supra* note 36, at 274–78.

177. Koh, *Rethinking Removability*, *supra* note 37, at 1823–29; Wadhia, *Speed Deportation*, *supra* note 23, at 18. *See generally* Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965 (2013) (discussing how errors in the deportation and detention of

2001, Deolinda Smith-Willmore, who suffered from partial blindness and schizophrenia, was subjected to an administrative removal order and deported to the Dominican Republic despite being a U.S. citizen.[178] The administrative removal regulations permit immigration officers to rely on evidence obtained from the individual in support of the requirements,[179] but it is common for individuals—especially those with physical or mental disabilities—to not fully understand the intricacies of their immigration status.

The federal courts have heard and rejected due process challenges in individual petitions for review involving administrative removal.[180] In addition, the courts have heard cases involving illegal reentry prosecutions in which the noncitizen presented a collateral attack on the prior administrative removal order that served as the basis for the illegal reentry prosecution.[181] The federal courts have thus allowed administrative removal to proceed within the immigration enforcement system and have not cast serious doubt on its legitimacy.

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Expedited removal, reinstatement of removal, and administrative removal thus comprise one subset of summary removal procedures in which individuals never go before the immigration courts. As noted, they constitute the vast majority of shadow proceedings, as well as of all removals.

U.S. citizens occur in both adjudicatory and administrative settings); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606 (2011) (discussing the detention and deportation of U.S. citizens).

178. Renata Robertson, Note, *The Right to Court-Appointed Counsel in Removal Proceedings: An End to Wrongful Detention and Deportation of U.S. Citizens*, 15 SCHOLAR 567, 583 (2013) (describing Deolinda Smith-Willmore's case).

179. 8 C.F.R. § 238.1(d)(2)(ii) (2016) (enabling the government to obtain additional evidence "from any source, including the alien," if additional evidence is deemed necessary to support the use of administrative removal).

180. Graham v. Mukasey, 519 F.3d 546, 548 (6th Cir. 2008) (finding that due process was satisfied by the rights provided in administration removal regulations); Flores-Ledezma v. Gonzales, 415 F.3d 375, 381–82 (5th Cir. 2005) (holding that the statutory scheme for administrative removal did not violate due process).

181. United States v. Rangel de Aguilar, 308 F.3d 1134, 1138–39 (10th Cir. 2002) (finding no due process violation from a waiver of rights taken before an immigration officer). *But see* United States v. Arrieta, 224 F.3d 1076, 1079 (9th Cir. 2000) (finding that due process was violated due to the invalidity of a waiver taken in an administrative removal).

B. REMOVAL AT THE PERIPHERIES OF IMMIGRATION COURT

It is also worth discussing removal that takes place at the *peripheries* of immigration court. This Part focuses on two discrete removal orders: (1) stipulated removal orders, in which noncitizens agree to accept a removal order and waive their right to an immigration court hearing, and (2) *in absentia* removal orders, for individuals who miss even a single court date. Stipulated removal orders and *in absentia* removal orders involve token adjudication by IJs; the orders are signed by IJs and take place under the auspices of the immigration courts, but involve no actual merits-based assessment.

While the peripheries of immigration court offer comparatively more process than expedited removal, administrative removal, and reinstatement, they are still part of immigration court's shadows. Like the summary removals discussed above, they too carry the full force of removal orders under the law, such as bars to reentry, as well as the possibility of a reinstatement or an illegal reentry prosecution.

1. Waiving Due Process: Stipulated Orders of Removal

The stipulated removal statute that gave rise to its modern form was enacted in 1996 and allows an IJ to enter a removal order "stipulated to by the alien (or the alien's representative)" and the government.[182] The regulations promulgated pursuant to that statute authorize an IJ to "enter such an order without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and supporting documents, if any."[183] The regulations also eliminate most of the procedural protections typically offered to respondents in immigration court by indicating that written waivers associated with stipulated removal should include an admission of any factual allegations against the individual, a waiver of any rights to discretionary relief, and a waiver of the right to an appeal.[184]

Although the regulations require an IJ to find, prior to signing a stipulated removal order, that the individual's waiver of rights was

182. 8 U.S.C. § 1229a(d) (2015).

183. 8 C.F.R. § 1003.25(b).

184. *Id.* § 1003.25(b)(1), (3), (8). *See also* Koh, *Stipulated Removal*, *supra* note 17, at 497–99 (discussing stipulated removal regulation).

"voluntary, knowing, and intelligent,"[185] DHS's expansion of stipulated removal in the early 2000s very intentionally bypassed the use of in-person hearings, leaving IJs to conduct paper reviews in order to assess the validity of respondents' waivers. Stipulated removal, at its height, was used primarily against respondents in immigration detention who did not have lawyers and who faced noncriminal grounds of removal.[186] Internal government records obtained through the Freedom of Information Act ("FOIA") suggested that DHS did little to ensure that immigration officers who conducted the bulk of a stipulated removal proceeding refrained from allowing misinformation about the law, language barriers, and the coercive atmosphere of immigration detention to affect detainees' decisions to accept stipulated removal orders.[187]

Like expedited removal, administrative removal, and reinstatement of removal, the stipulated removal process, as implemented after 1996, relied heavily on low-level immigration officers to secure waivers and signatures from immigration detainees. Most IJs who ultimately signed stipulated removal orders never saw the respondent at all and relied solely on the preprinted form's statement that the waiver was "voluntary, knowing, and intelligent" to find that the waiver was voluntary, knowing, and intelligent.[188] Some IJs did, in fact, express opposition to the practice of approving detainees' waivers without an in-person hearing.[189] In one of the more egregious aspects of the program, internal government records showed that in some jurisdictions, DHS routed all stipulated removal orders only to those IJs known to be willing to sign the orders absent a court hearing.[190]

Stipulated removal grew most significantly around the mid-2000s and peaked around 2009.[191] By 2010, EOIR issued a memorandum encouraging

185. 8 C.F.R. § 1003.25(b).

186. *See* Koh, *Stipulated Removal*, *supra* note 17, at 510.

187. *See id.* at 512–15. The practice of offering administrative voluntary departure to individuals seeking admission at U.S. ports of entry has raised similar concerns related to CBP officers providing misinformation, language barriers, and the use of coercive tactics to persuade individuals to accept voluntary return, as described by the allegations in *Lopez-Venegas v. Napolitano*. Complaint at 1–2, Lopez-Venegas v. Napolitano, No. 13-cv-03972 (C.D. Cal. June 4, 2013). However, this Article focuses exclusively on enforcement actions that result in a formal order of removal, and does not address administrative voluntary return.

188. *See* Koh, *Stipulated Removal*, *supra* note 17, at 516.

189. *Id.* at 517–19.

190. *Id.* at 518–19.

191. *Id.* at 479.

greater use of stipulated removals.[192] However, that same month, a decision from the Ninth Circuit Court of Appeals cast serious doubt on the validity of the program. In *United States v. Ramos*, the court noted that the immigration officer who presented Mr. Ramos with the stipulated removal order that served as the basis for his illegal reentry conviction spoke Spanish that was "nonsensical in part" and incapable of being translated.[193] The court went on to find that many of the commonly used aspects of stipulated removal—reliance on immigration officers for information about the immigration laws, waivers of the right to counsel, and the IJ's failure to conduct an independent inquiry to determine the validity of the waiver—violated procedural due process.[194]

Following *Ramos*, DHS appears to have reduced its use of stipulated removal orders (although the agency does not regularly make public its stipulated removal statistics); however, the effects of stipulated removal orders remain. Even in 2011, stipulated removal orders accounted for up to one-third of all judge-issued removal orders in select geographic areas.[195] More importantly, the legal consequences of stipulated removal—including serving as the predicate to a reinstatement order or illegal reentry prosecution—continue. While the Ninth Circuit has viewed stipulated removal orders with skepticism, other circuits have allowed subsequent enforcement actions predicated on stipulated removal orders to go forward.[196] Whether the Trump administration chooses to expand stipulated removal remains to be seen.

192. *See generally* Memorandum from Brian M. O'Leary, Chief Immigration Judge, Dep't of Justice, Exec. Office for Immigration Review, to All Immigration Judges, Court Administrators, Attorney Advisors, Judicial Law Clerks, and Immigration Court Staff (Sept. 15, 2010), http://www.justice.gov/eoir/efoia/ocij/oppm10/10-01.pdf (discussing procedures for handling requests for a stipulated removal order).

193. United States v. Ramos, 623 F.3d 672, 678 (9th Cir. 2010).

194. *Id.* at 680–83. *See also* Koh, *Stipulated Removal*, *supra* note 17, at 521–23.

195. Koh, *Stipulated Removal*, *supra* note 17, at 479 & n.19.

196. United States v. Baptist, 759 F.3d 690, 696–98 (7th Cir. 2014) (affirming an illegal reentry conviction based on a stipulated removal order and finding no due process violation where the noncitizen spoke English); Juarez-Chavez v. Holder, 515 Fed. App'x 463, 467 (6th Cir. 2013) (finding no jurisdiction to review the reinstatement of the stipulated removal order); Cordova-Soto v. Holder, 659 F.3d 1029, 1032 (10th Cir. 2011) (same), *cert. denied*, 133 S. Ct. 647 (2012).

2. One Missed Court Date: *In Absentia* Removal Orders

An individual in regular removal proceedings can expect to have multiple court hearings, at times taking place over the course of several years.[197] Unless the IJ grants a change of venue, which is not guaranteed as of right, the hearing could take place hundreds of miles away from the individual's primary residence.[198] In the criminal court system, defendants who fail to appear for a court hearing are typically issued a bench warrant, which may result in restrictions on individual liberty, or may face additional criminal penalties.[199] These defendants do not, however, face automatic conviction for the original charges. In contrast, in immigration court, the consequence of failing to appear is an automatic loss for the noncitizen, even if the individual has appeared for prior court hearings.

Under the *in absentia* removal statute, enacted as part of the Immigration Act of 1990, missing even one court hearing "shall" result in the person receiving a final order of removal.[200] The only requirements that the government must prove to secure an *in absentia* order against a noncitizen who fails to appear for one court date are that (1) notice was provided and that (2) removability was established.[201] The statute notably omits any evaluation of the individual's eligibility for, or strength on the merits of, applications for relief from deportation based on humanitarian factors or other positive equities. Like the other removals discussed in this Article, *in absentia* orders impose limitations on an individual's ability to seek immigration relief. In addition to the consequences that attach to any removal order, the statute bars recipients of *in absentia* orders from seeking many forms of immigration relief for ten years.[202] The statute also indicates that judicial review of *in absentia* orders is limited to "the validity of the

197. *See generally Ballooning Wait Times for Hearing Dates in Overworked Immigration Courts*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Sept. 21, 2015), http://trac.syr.edu/immigration/reports/405 (showing backlogs in immigration court).

198. *See generally* Rahman, 20 I. & N. Dec. 480, 480 (B.I.A. 1992) (setting forth factors that IJ should balance in motions to change venue).

199. *See* Jack K. Levin et al., *Bail; Release and Detention Pending Proceedings*, *in* 8 CORPUS JURIS SECUNDUM § 125, at 161–62 (Janice Holben et al. eds., 2005).

200. 8 U.S.C. § 1229a(b)(5)(A) (2015).

201. *See id.* (requiring the entry of an order of removal so long as the government "establishes by clear, unequivocal, and convincing evidence that" written notice of the hearing was provided and "that the alien is removable").

202. 8 U.S.C. § 1229a(b)(7). The ten-year bar on seeking relief after the issuance of an *in absentia* order applies unless the noncitizen successfully rescinds the order based on exceptional circumstances. *Id.*

notice provided to the alien," "the reasons for the alien's not attending the proceeding," and "whether or not the alien is removable."[203]

In fiscal year 2015, *in absentia* removal orders accounted for over 43% of all court-issued removal orders,[204] a number which has fluctuated from year to year but at times reached over 45%.[205] IJs have issued *in absentia* removal orders against individuals who arrived in court minutes after the entry of the removal order,[206] were present in the courthouse (but not the courtroom),[207] and even against individuals with mental incompetence who failed to follow the judge's directives.[208] Even though some federal courts ultimately have reversed such *in absentia* orders, the fact remains that an IJ believed it appropriate at the time to enter a removal order in those circumstances.

Limited avenues to rescind an *in absentia* removal order exist. First, an individual can contest that they did not receive notice of the proceeding at all.[209] In cases where the immigration court sends a notice to the wrong address, an *in absentia* order can still be entered if the noncitizen did not comply with the requirement to file an updated address with the court.[210]

203. *Id.* § 1229a(b)(5)(D).

204. U.S. DEP'T OF JUSTICE, *supra* note 19.

205. *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2005 STATISTICS YEARBOOK, at D2, H2 (2006), https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/18/fy05syb.pdf (showing 222,360 removal orders issued in fiscal year 2005, of which 100,994 were *in absentia* orders).

206. Perez v. Mukasey, 516 F.3d 770, 772–73 (9th Cir. 2008); Thomas v. INS, 976 F.2d 786, 788, 790 (1st Cir. 1992) (per curiam) (finding no reasonable cause to invalidate *in absentia* order where respondent and counsel arrived ten minutes after IJ entered *in absentia* removal order).

207. *In re* Chaman Singh, No. A72-567-465, 2004 WL 3187212, at *1–2 (B.I.A. Dec. 20, 2004) (finding no exceptional circumstances where respondent was inside the courthouse, but outside the courtroom waiting for attorney to appear).

208. *See* Nina Bernstein, *Mentally Ill and in Immigration Limbo*, N.Y. TIMES (May 3, 2009), http://www.nytimes.com/2009/05/04/nyregion/04immigrant.html (describing case in which IJ Rex Ford ordered a mentally ill noncitizen to be removed for failure to appear because she did not properly follow his directions regarding use of a court interpreter).

209. 8 U.S.C. § 1229a(b)(5)(C)(ii) (2015). Rescission is also possible if the individual was in federal or state custody at the time of the immigration court hearing and can show that they were not at fault for not appearing. *Id.*

210. *Id.* § 1229a(b)(5)(B). Federal regulation has been interpreted to require that DHS provide notice of all immigration court hearings to both juveniles and any adult custodians to whom they are released. *See* Flores-Chavez v. Ashcroft, 362 F.3d 1150, 1157 (9th Cir. 2004) (interpreting 8 C.F.R.

Generally, notice served upon an individual's attorney will satisfy the notice requirement, even in cases where the attorney failed to notify their client—a particularly acute concern in immigration, where allegations of fraud by attorneys and notarios pervade immigrant communities.[211] Second, an individual can argue that they did not appear for the hearing due to "exceptional circumstances" that are "beyond the control of the alien."[212] The statute contemplates exceptional circumstances as including "battery or extreme cruelty" or "serious illness" to the individual, the individual's child, or the individual's parent, or the death of the individual's spouse, child, or parent—but "not including less compelling circumstances."[213] Taking their lead from the statute, courts have generally interpreted "exceptional circumstances" narrowly.[214] Traffic, for instance, generally will not amount to an exceptional circumstance, and serious illness only if adequately documented for the court.[215] The Ninth Circuit found in 2016 that car mechanical failure alone was not an exceptional circumstance.[216] Furthermore, no federal court has ever found that the broader practice of entering *in absentia* removal orders falls short of due process.

The *in absentia* removal statute is generally perceived as a means to discourage individuals from absconding from immigration court when they are released from immigration detention or not detained. It is unclear how well the practice of entering *in absentia* removal orders accomplishes this goal. Statistics do suggest, however, that access to counsel increases appearance rates in immigration court. Indeed, Ingrid Eagly and Steven Shafer found in a six-year study period that "only 32% of nondetained pro se respondents showed up to court, compared to 93% of nondetained respondents with counsel."[217] Despite the fact that the data suggests that

§ 242.24).

211. *See* Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 615–17 (2009).

212. 8 U.S.C. § 1229a(b)(5)(C)(i), (e)(1).

213. *Id.* § 1229a(e)(1).

214. Rebecca Feldmann, *What Constitutes Exceptional? The Intersection of Circumstances Warranting Reopening of Removal Proceedings After Entry of an In Absentia Order of Removal and Due Process Rights of Noncitizens*, 27 WASH. U. J.L. & POL'Y 219, 229–30 (2008).

215. BETH WERLIN, AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: RESCINDING AN *IN ABSENTIA* ORDER OF REMOVAL 10 (2010), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_092104.pdf.

216. Arredondo v. Lynch, 824 F.3d 801, 806 (9th Cir. 2016).

217. Eagly & Shafer, *supra* note 8, at 73–74. *See also* AM. IMMIGRATION COUNCIL, TAKING ATTENDANCE: NEW DATA FINDS MAJORITY OF CHILDREN APPEAR IN IMMIGRATION COURT 1–2

government-appointed counsel might be more effective at ensuring appearances in court than *in absentia* removal orders, the practice of entering *in absentia* orders nonetheless persists.

III. WORSE OFF IN THE SHADOWS

Commentators with good reason frequently deploy the word "crisis" to describe the state of the immigration courts.[218] The deficiencies of the immigration court system are well-documented and arguably cast doubt on the legitimacy and integrity of mainstream immigration adjudication. These concerns, however, typically do not substantially incorporate the forms of summary removal described above. This Part uses critiques of mainstream immigration court adjudication as a framework from which to reflect on deficiencies in shadow proceedings. These critiques are (1) the coercive effect of immigration detention, (2) the absence of counsel, (3) limitations on administrative and judicial review, (4) restrictions on relief and discretion, and (5) the simplification of removability assessments. Each of these critiques exists powerfully in the context of regular removal proceedings, where basic markers of procedural regularity—such as in-person hearings, IJs, a record of proceedings, and some administrative and judicial review—are present. As this Part shows, each of these issues is heightened where alternate forms of removal are concerned.

A. COERCIVE EFFECT OF IMMIGRATION DETENTION

The number of immigrants behind bars, in immigration detention, on any given day has gone from about 34,000 in recent years to as high as 45,000 by the last months of 2016.[219] The sheer number of persons incarcerated in civil immigration detention has reached historic highs, exacerbated by congressional mandates that ICE maintain minimum bed

(2014), https://www.americanimmigrationcouncil.org/research/taking-attendance-new-data-finds-majority-children-appear-immigration-court (finding that almost 95% of unaccompanied children who are represented by lawyers appear in immigration court).

218. Michele Benedetto, *Crisis on the Immigration Bench*, 73 BROOK. L. REV. 467, 467–71 (2008).

219. Devlin Barrett, *Record Immigrant Numbers Force Homeland Security Officials to Search for New Jail Space*, WALL ST. J., Oct. 21, 2016, http://www.wsj.com/articles/record-immigrant-numbers-force-homeland-security-to-search-for-new-jail-space-1477042202 (discussing increase in immigration detention numbers to 45,000). *See also* Ted Robbins, *Little-Known Immigration Mandate Keeps Detention Beds Full*, NAT'L PUBLIC RADIO (Nov. 19, 2013), http://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full (describing 34,000 statistic).

spaces[220] and by statutory provisions that mandate detention for certain persons.[221] The rationale typically given for immigration detention is that the government must secure the noncitizen's appearance for the next court date, notwithstanding the inevitability of an *in absentia* removal order if the person fails to appear. While the use of detention certainly assures the noncitizen's appearance, detention also fundamentally changes the outcomes in immigration court proceedings. It is extraordinarily difficult for detained noncitizens to access lawyers, especially *pro bono* lawyers, particularly where the detention centers are in remote locations far from home and legal services.[222] IJs face stricter case completion deadlines with detained cases,[223] thus leaving detained noncitizens with less time to gather the facts and witnesses necessary for relief applications. Often, noncitizens in detention give up their legal claims out of desperation or due to lack of knowledge. As César Cuauhtémoc García Hernández writes, immigration detention "is so coercive, widespread, and racially skewed that it causes numerous independent harms—not only to migrants, but also to communities, and to the legitimacy of the immigration law system itself."[224]

Detention is also indispensable to the growth of the shadows of immigration court. With the exception of *in absentia* orders, the summary removals discussed here often take place in detention centers or against noncitizens for whom the threat of detention—and prolonged detention—looms as a direct consideration. The speedy nature of these removals, coupled with the detention setting, leaves noncitizens at severe information deficits and thus heavily reliant on legal information provided by the low-level immigration officers administering those removals.

The example of stipulated removal, in which immigration officers convince detained noncitizens to waive their hearing rights, demonstrates how language barriers, misinformation, and coercion can easily penetrate

220. César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1452 & n.11 (2015) (suggesting that the immigration detention population in fiscal year 2012 likely reflects the "largest civil immigration detention population in modern times").

221. 8 U.S.C. § 1226(c) (2015).

222. *See* HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 43–57 (2009).

223. U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GEN., MANAGEMENT OF IMMIGRATION CASES AND APPEALS BY THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW 7 (2012), https://oig.justice.gov/reports/2012/e1301.pdf.

224. Hernández, *supra* note 220, at 1455.

the process in the detention setting.[225] One internal agency script uncovered through a Freedom of Information Act request on stipulated removal, for instance, was written in broken Spanish and contained assertions of law that were unequivocally wrong.[226] Reinstatement of removal and administrative removal of non-LPRs with aggravated felony convictions also take place in the punitive environment of detention centers. Expedited removal occurs after agency officials apprehend border crossers, in a setting in which agency officials easily and regularly threaten prolonged detention in detention conditions that are often extremely cold and unsanitary.[227] To the extent that the expansion of shadow proceedings is fueled by the existence of immigration detention, the discourse surrounding the legitimacy and excessiveness of immigration detention should thus incorporate immigration court's shadows.

B. ABSENCE OF GOVERNMENT-APPOINTED COUNSEL

Much has been written on the problems associated with access to counsel in the immigration context.[228] Study after study confirms that although many noncitizens in removal proceedings—particularly detained individuals—do not have lawyers, the presence of counsel is correlated with higher success rates.[229] The right to government-appointed counsel, for instance, does not exist, even for vulnerable populations such as children.[230] The government, by contrast, is represented 100% of the time by ICE's OPLA attorneys in immigration court and the BIA, and by government attorneys, typically from the Office of Immigration Litigation, in federal court proceedings.[231] Scholars, commentators, and advocates

225. *See* Koh, *Stipulated Removal*, *supra* note 17, at 510–15.

226. *Id.* at 513–14.

227. *See* CASSIDY & LYNCH, *supra* note 93, at 58–59.

228. *See, e.g.*, Eagly & Shafer, *supra* note 8, at 30–47; *Developments in the Law: Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1658–72 (2013); Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J.C.R. & C.L. 113, 126–30 (2008); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 76–80 (2012).

229. *See* Eagly & Shafer, *supra* note 8, at 30–47, 49–50.

230. *See* Complaint at 2–4, J.E.F.M. v. Holder, No. 14-cv-01026 (W.D. Wash. July 9, 2014).

231. *See* Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 5–8, 16–28 (2014) (examining the role of the ICE's OPLA attorneys in the immigration court system).

have repeatedly issued recommendations in favor of appointed counsel.[232]

Disparities also plague access to counsel. One study found, for instance, that nearly 90% of nondetained noncitizens in removal proceedings in New York City had attorneys, while 0.002% of detained noncitizens in Tucson, Arizona had counsel.[233] The quality of adjudication and lack of accountability for IJs has also been severely criticized by scholars, policymakers, and federal courts.[234] The use of videoconferencing in the immigration courts—in which detained immigrants appear via video before an IJ (and often, their attorney) in another location—has increased, and Ingrid Eagly has argued that videoconferencing leads to immigrants' decreased engagement with the legal process.[235]

The tide may be slowly changing though, with respect to appointed counsel in removal proceedings. In the Ninth Circuit, mentally incompetent individuals now receive government-appointed counsel pursuant to a class-action settlement.[236] For unaccompanied children, a host of federal- and state-led initiatives have focused on creating access to lawyers which, even if not sufficient to meet the demand, has resulted in greater resources than would otherwise exist.[237] In New York City, nearly all immigration respondents have counsel through the Immigrant Justice Corps initiative, a result of years of study and advocacy.[238] And in March 2015, an IJ's claim that he had successfully trained three-year-old children to competently

232. *See* sources cited *supra* note 228.

233. Eagly & Shafer, *supra* note 8, at 8.

234. *See, e.g.*, Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370–85 (2006) (raising concerns about decisional independence of IJs). A number of federal appeals court judges have openly criticized the quality of IJ decisionmaking. *E.g.*, Guchshenkov v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004) (Posner, J.) (criticizing IJ's analysis as "one more indication of systemic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum").

235. Eagly, *supra* note 20, at 933, 977–1000.

236. *See* Franco-Gonzalez v. Holder, 767 F. Supp. 2d 1034, 1052–53 (C.D. Cal. 2010). *See also* M-A-M-, 25 I & N Dec. 474, 481–83 (B.I.A. 2011) (noting that IJs must institute the appropriate safeguards for mentally incompetent respondents).

237. Alex Dobuzinskis, *California Sets Up Fund for Legal Representation of Immigrant Children*, REUTERS (Sept. 27, 2014), http://www.reuters.com/article/us-usa-immigration-california-idUSKCN0HN00B20140928; Stephanie Francis Ward, *Federal Government Announces $9M in Funding for Unaccompanied Minors' Counsel*, ABA JOURNAL (Oct. 1, 2014), http://www.abajournal.com/news/article/federal_government_announces_9_million_in_funding_for_unaccompanied_minors.

238. *See Our Story*, IMMIGRANT JUSTICE CORPS, http://justicecorps.org/our-story (last visited Oct. 25, 2016).

represent themselves in immigration court provoked widespread outrage and disbelief in the media.[239]

Where summary removal is concerned, the access to counsel situation is even worse. Although the immigration statute provides no right to government-appointed counsel, noncitizens in removal proceedings have a statutory right to "counsel of [their] choosing,"[240] a right for which IJs must provide an oral advisement at an in-person hearing.[241] IJs typically grant a limited number of hearing continuances so that an individual can obtain counsel.[242]

No provision requires officials administering expedited removal, reinstatement, administrative removal, stipulated removals, or even *in absentia* orders to first advise noncitizens of their right to counsel. Yet ironically, the presence of an attorney could materially change the outcome of the removals that take place in immigration court's shadows. Expedited removal occurs at the border, often within a matter of hours, and the individual's failure to express fear of returning to their country means the difference between immediate removal and a credible fear interview. The outcome of a credible fear or reasonable fear interview, for instance, turns on the noncitizen's ability to recall and describe facts that fall within complicated case law governing asylum, withholding of removal, and Convention against Torture claims.[243] The efforts—and successes—of *pro bono* immigration lawyers to prepare Central American asylum seekers for credible fear interviews and IJ review of negative credible fear determinations since 2014 lend credence to the value of counsel.[244] Administrative removal and stipulated removal orders may concern

239. Jerry Markon, *Can a 3-Year Old Represent Herself in Immigration Court? This Judge Thinks So*, WASH. POST, Mar. 5, 2016, https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html.

240. 8 U.S.C. § 1229a(b)(4) (2015).

241. 8 C.F.R. § 1240.11(a)(2) (2016).

242. *See* C-B-, 25 I & N Dec. 888, 889–90 (B.I.A. 2012) (requiring IJs to provide reasonable continuances so that respondents may seek counsel).

243. Some immigration advocacy organizations have begun to more systematically encourage *pro bono* attorneys to provide legal services to individuals prior to and at credible fear and reasonable fear interviews. *E.g.*, *Become a Pro Bono Partner*, CAP. AREA IMMIGRANTS' RIGHTS COALITION, https://www.caircoalition.org/become-a-pro-bono-partner (last visited Jan. 19, 2017).

244. *See* Taylor & Johnson, *supra* note 70, at 199–200.

complex questions involving the immigration consequences of crime.[245] The existence of due process violations—particularly those that hinge on the agency's failure to follow its own regulations—requires knowledge that often only immigration lawyers have.

In absentia orders arguably raise qualitatively different access to counsel issues insofar as respondents have an opportunity to appear in immigration court and receive advisals about the right to counsel of one's choosing. But *in absentia* orders also raise unique access to counsel issues that require an acknowledgment of how the quality of counsel matters. The courts view notice to one's attorney as sufficient notice, such that a failure of the attorney to communicate a court date to the noncitizen client does not justify nonappearance.[246] Given that immigration is fraught with immigration fraud, the lack of access to quality counsel compounds the effects of *in absentia* orders. Nonetheless, the existence of counsel tends to decrease the likelihood of an individual receiving an *in absentia* order at all.

C. ADMINISTRATIVE AND JUDICIAL REVIEW

The quality and availability of administrative and judicial review of regular removal orders is an ongoing concern in the immigration adjudication literature. Due to legislative changes in 1996, the immigration statute has eliminated judicial review for certain types of matters.[247] The current immigration statute also eliminated federal district court review of final orders, leaving only limited habeas review of certain expedited removal challenges.[248] Yet even in regular removal proceedings, federal appeals courts recognized cases in which IJs erred in their application and interpretation of the law and fact, as well as discretionary determinations.

Administrative review before the BIA, too, has elicited concerns related to decisional independence and the quality of such review, largely

245. Koh, *Stipulated Removal*, *supra* note 17, at 535. *See also supra* notes 172–176 and accompanying text.

246. *See supra* text accompanying note 211.

247. *See* 8 U.S.C. § 1252(a)(2)(A)–(C) (2015).

248. Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 235, 244 (1998) (describing judicial review of immigration matters following 1996 immigration laws); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 704–07 (1997) (critiquing the elimination of judicial review of discretionary determinations in immigration court).

as a result of streamlining reforms enacted in 2002.[249] For instance, the BIA engages in a practice of single member affirmances without opinion, which in effect means that in many cases, the BIA issues a single-sentence opinion that does not explain the reasons for the decision affirming the IJ's action.[250] Furthermore, the political independence of the BIA and IJs are subject to question, particularly in light of 2008 findings that officials in the Bush administration had allowed candidates' political leanings to overtly influence hiring decisions.[251]

And yet, for all the critique of administrative and judicial review of regular removal proceedings, the opportunities to seek review of removal orders issued in shadow proceedings are significantly worse. These difficulties are particularly pronounced with expedited removal, given that the expedited removal statute on its face eliminates judicial review and severely curtails habeas review.[252] While a petition for review of a reinstated order may be available if filed within days of the entry of the order, if the predicate order was issued via a shadow proceeding, then judicial review may not be a practical solution because the courts will generally not permit substantive review of the underlying order.[253] Even *in absentia* orders, which are entered on the record in immigration court and can be reopened administratively or reviewed in federal court, limit the interventions that the BIA and federal court can make due to statutory limits on the content of judicial review, along with narrow interpretations of the notice or exceptional circumstances requirements.[254] Where review

249. Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice Is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 832–37; *supra* note 234 and case cited.

250. *See* Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309 (Feb. 19, 2002) (to be codified at 8 C.F.R. pts. 3, 280); DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR: THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 20–39 (2003) (describing procedural streamlining reforms enacted by BIA and raising due process, administrative law, and statutory concerns); Rana, *supra* note 249, at 832–33, 836 (arguing that BIA's 2002 streamlining reforms undermine rule of law).

251. *See* OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 110–11, 115–16 (2008).

252. *See* sources cited *supra* note 104 and accompanying text.

253. *See* cases cited *supra* note 196.

254. *See supra* text accompanying notes 203, 209–216.

of reinstatement, administrative removal, and stipulated removal exist, reliable transcripts or recordings of the oral exchanges that took place between the immigration officer and the noncitizen do not. Reviewing bodies are thus left with little but a minimal paper record to review, along with the testimony of the noncitizen. As a result, even fewer opportunities for accountability and transparency exist, with fewer opportunities to correct errors that occur behind closed doors.

D. RESTRICTIONS ON RELIEF AND MEANINGFUL DISCRETION

Another critique of regular immigration court proceedings involves the availability of, and noncitizens' access to, legal claims to fight removal. Many outsiders to immigration law are surprised to learn, for instance, that the avenues for an individual to legalize their status or to defend their removal case are extremely limited and subject to detailed—at times hypertechnical—rules.[255] A lawful permanent resident may seek cancellation of removal for certain prior convictions, for instance, but only if no convictions falling within the grounds of inadmissibility or deportability took place within the first seven years of residence in the United States.[256] An asylum applicant must not only establish one's affirmative eligibility, but also must prove the absence of numerous bars to asylum.[257] In many cases, noncitizens facing removal are simply not eligible for applications that might enable them to fight their cases, leading many scholars to decry the elimination of discretion from immigration adjudication.[258]

The Obama administration's use of prosecutorial discretion arguably sought to infuse immigration proceedings with a meaningful view of individuals' circumstances and to account for the fact that a meaningful subset of the undocumented population has no avenue by which to legalize their status.[259] Much of the attention related to President Obama's use of

255. *See, e.g.*, Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 392–94 (1999); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1698–703 (2009).

256. *See* 8 U.S.C. §§ 1229b(a), (d)(1) (2015).

257. *See* REGINA GERMAIN, ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 162 (2010) (discussing bars to asylum).

258. *See, e.g.*, Bill Ong Hing, *Re-examining the Zero-Tolerance Approach to Deporting Aggravated Felons: Restoring Discretionary Waivers and Developing New Tools*, 8 HARV. L. & POL'Y REV. 141, 142, 157 (2014).

259. *See* Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285, 1291–92 (2015).

prosecutorial discretion in the immigration context has focused on the legality of the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program.[260] DAPA would have offered temporary reprieves from deportation and work authorization to parents of U.S. citizens and lawful permanent residents, but a lower court order enjoining DAPA[261] was affirmed by a divided Supreme Court in a single-sentence per curiam decision on June 23, 2016.[262] Another piece of the prosecutorial discretion debate involves how ICE attorneys under the Obama Administration treated cases in immigration court that were technically enforcement priorities. By early 2016, it appears that many ICE prosecutors focused less on the existence of personal equities (e.g., length of residence, family ties, underlying circumstances), and relied far more heavily on the absence of factors—particularly criminal history and the date of entry—that would render an individual an "enforcement priorit[y]" pursuant to DHS Secretary Jeh Johnson's November 2014 memorandum.[263]

In shadow proceedings, however, individuals have fewer opportunities to pursue arguments in favor of relief and to have their equities considered. With respect to relief, the rules governing summary removal operate as a blunt gavel, denying individuals the ability to seek relief at all—even where they are otherwise eligible under the immigration statute. Reinstatement of removal and administrative removal, for instance, only permit individuals to seek protection in the form of withholding of removal or the Convention against Torture. The administrative removal regulations contemplate that a noncitizen's only recourse to fight the administrative

260. For a compelling argument in favor of implementing DAPA, see Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 142–46 (2015).

261. Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015). *See also* Texas v. United States, 809 F.3d 134, 187–88 (5th Cir. 2015).

262. United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (per curiam).

263. Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't; R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot.; Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs.; and Alan D. Bersin, Acting Assistant Sec'y for Pub. Policy 1–4 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. The Western State College of Law Immigration Clinic requested and was denied prosecutorial discretion for a young person who had entered the United States as an infant, was a mother of two U.S. citizen children, and a survivor of domestic violence due to a single conviction for burglary that resulted in no jail time and was connected to the domestic abuse (email correspondence on file with author).

removal process will be to argue—to a low-level immigration officer—that the prior conviction is not an aggravated felony. And while stipulated removal and *in absentia* orders of removal do not explicitly prohibit noncitizens from seeking relief, nothing in the legal authorities governing those removal orders restrains an IJ from entering an *in absentia* or stipulated removal order even where the noncitizen is eligible to seek relief. In other words, immigration court's shadows exacerbate the restrictions on relief in an area of law already characterized by limited relief.

Shoba Sivaprasad Wadhia has called for greater application of prosecutorial discretion in the expedited removal, administrative removal, and reinstatement of removal contexts.[264] Specifically, she has argued that immigration agencies should evaluate an individual's equities in determining whether to invoke speed deportation procedures against allegedly removable noncitizens and should refer individuals to regular immigration court proceedings where equitable and humanitarian factors exist.[265] Without meaningful prosecutorial discretion guidance, agency officials will place individuals into immigration court's shadows notwithstanding the presence of otherwise compelling humanitarian factors.

E. SIMPLIFYING REMOVABILITY CLAIMS

A noncitizen's ability to contest removability at the outset also relates to the availability of immigration relief. Removability, used here, refers to the initial determination that immigration courts must make as to whether a threshold violation of the immigration laws has taken place.[266] An example of removability might involve whether the individual is a foreign national at all or whether a prior conviction falls within one of the immigration categories that trigger removal. At first blush, removability might seem simple and settled. But closer examination of the law reveals that removability can—if fully litigated by counsel with the time to develop legal and factual claims—be contested, complex, and difficult to identify.[267] The problem is that the law on the ground tends to reflect a "simple removability" view, whereas an analysis of the law on the books suggests the existence of "complex removability," as I have called it in

264. Wadhia, *Speed Deportation*, *supra* note 23, at 22–25.

265. *Id.*

266. *See supra* text accompanying notes 33–38.

267. *See* Koh, *Rethinking Removability*, *supra* note 37, at 1809–10.

another article.[268] As a result, many immigration court cases on the ground go forward without recognizing the potential claims available at the removability phase due to the pressures of detention, counsel, and time.[269]

The expeditious nature of immigration court's shadows reinforces the misperception that removability assessments can and should be made quickly, without the need for expertise or further investigation. Expedited removal, reinstatement, and administrative removal treat the removability of individuals subject to those categories—individuals seeking entry at the border, those previously removed, and non-LPRs with certain convictions—as akin to legislative fact, not subject to individualized fact-finding. That shadow proceedings move so quickly—often within a matter of hours or days, with no counsel—means that removability is prone to being inaccurately assessed even more often than in regular removal proceedings presided over by an IJ. Furthermore, federal court jurisprudence reflects the difficulty of certain removability assessments (including deceptively complex questions, such as whether an individual is a U.S. citizen).[270] Yet, an entire swath of removal cases are relegated to front-line immigration officers, who are generally not lawyers and who (unlike IJs) do not take oaths to do justice or maintain impartiality.[271] Instead, with expedited removal, reinstatement, and administrative removal, the agency officials responsible for performing both a prosecutorial and adjudicative function typically operate within agency cultures that prioritize enforcement first.[272] As a result, removability claims and relief applications likely receive less consideration and deliberation than they would in the immigration courts.

CONCLUSION: SHIFTING THE CONVERSATION

Despite the overwhelming numbers of removals that take place in the shadows of immigration court, the literature on immigration adjudication focuses almost exclusively on mainstream removal proceedings. This

268. *Id.* at 1803.

269. *Id*. at 1855–56.

270. *Id.* at 1821–30 (discussing citizenship claims as an example of complex removability).

271. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, ETHICS AND PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES 1–2 (2011), https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf.

272. Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 199 (2014).

Article advocates incorporating summary removals and the peripheries of immigration court more comprehensively into conversations over immigration adjudication. The numbers alone call for far more sustained evaluation than has previously taken place. Relatedly, many of the underlying concerns animating the current discussion over immigration adjudication—detention, access to counsel, the availability of review, and access to legal claims—are amplified in immigration court's shadows. Rather than offer specific prescriptions for reform, this Article concludes with several implications of such a shift.

First, the immigration enforcement agencies that implement expedited removal, reinstatement, administration removal, and stipulated removal—namely ICE and CBP—must also feature as part of the discourse around immigration adjudication. In particular, a better understanding of how front-line immigration officials receive training and oversight when issuing such removal orders is critical. Critiques of immigration enforcement agency culture, too, should become more prominent subjects of study for immigration adjudication. Nina Rabin's close examination of ICE concludes that agency culture in the immigration context tends to view all noncitizens—particularly those with any conviction—as a criminal threat, regardless of the circumstances.[273] ICE and CBP culture is likely to further view immigrants as criminals under the Trump administration. If so, then delegating the power to issue removal orders with no immigration court involvement raises serious questions of fairness and legitimacy.

Second, taking account of immigration court's shadows heightens the existing mismatch between the over-resourcing of immigration enforcement and the under-resourcing of the immigration court system. It is with good reason that Judge Dana Marks stated that immigration court cases carry death-penalty-like consequences that are adjudicated with the resources of traffic court.[274] Immigration court backlogs routinely result in noncitizens waiting for as long as four years before their next hearing date.[275] At first blush, it would seem tempting to treat immigration court's resource constraints as a justification for the *greater* use of removal orders that never reach or remain at the peripheries of immigration court. After all, placing even more cases in immigration court would seem to add fire to an already burning crisis. However, a deeper critique of the current status quo

273. *Id.* at 199–200.

274. *See supra* note 1 and accompanying text.

275. *Ballooning Wait Times for Hearing Dates in Overworked Immigration Courts*, *supra* note 197.

would challenge the allocation of resources toward increasing deportation and immigration enforcement in the first instance, particularly if the government is unwilling to set aside appropriate resources for adjudication.

Third, a potential danger of bringing immigration court's shadows into the immigration adjudication conversation is the dilution of the problems associated with immigration court itself. Emphasizing the shortcomings of summary removal may have the unintended effect of making immigration court seem like a relatively favorable venue. For individuals facing expedited removal, reinstatement, or administrative removal, an initial case strategy goal may involve being placed in regular removal proceedings. This Article suggests that where deficiencies in immigration courts exist, their shadows are likely even worse. Accordingly, improving the quality of adjudication in the immigration courts and the nature of procedural protections that exist might bring greater relief to the dark spaces of immigration enforcement.

Fourth, direct reforms to the removal programs discussed in this Article should surface more regularly as well, as it would be naïve to assume that improvements in immigration court will necessarily address the problems raised by summary removal. Each of the removal procedures described in this Article is governed by its own statutory, regulatory, and case law framework, a good deal of which exists independent of the legal authorities that govern standard removal proceedings.

Accordingly, reforms initiated by each branch of government are both necessary and possible. Legislatively, for instance, Senate Bill 744—passed by the Senate in 2013 but never considered by the House of Representatives—would have introduced small but significant due process improvements to certain procedures.[276] In the reinstatement area, the bill would have created exceptions to reinstatement for actions taken against children and in light of public interest considerations and family ties.[277] The bill would have amended stipulated removal orders to require that IJs hold an in-person hearing to assess the validity of the individual's waiver

276. *See generally* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013) (providing for comprehensive immigration reform).

277. *Id.* § 2314 (creating an exception to reinstatement if "the alien reentered prior to attaining the age of 18 years, or reinstatement of the prior order of removal would not be in the public interest or would result in hardship to the alien's United States citizen or permanent resident parent, spouse, or child").

of rights.[278]

With respect to the judicial branch, the courts have in many cases condoned the growth of immigration court's shadows. The example of stipulated removal—where the Ninth Circuit raised significant due process concerns with the practice—illustrates the ongoing authority of the courts to curtail the practices discussed here.[279] Indeed, stipulated removal in particular shows how a combination of judicial intervention and executive policy can prevent the excessive growth of immigration court's shadows given that stipulated removals appear to be used far less frequently after 2010.[280] The likelihood of the courts reversing course with respect to direct challenges to practices such as expedited removal, reinstatement of removal, or administrative removal is low. However, one area in which the courts can make meaningful interventions exists where noncitizens challenge the legitimacy of the government relying on multiple summary removal orders in order to impose civil consequences (such as deportation or bars to reentry) and criminal penalties in the illegal reentry context.[281] Courts should adopt a presumption against the validity of the prior removal order where the government's entire case rests upon the legitimacy of a removal order entered in the shadows of immigration court.

Within the executive branch, each removal mechanism illustrates how the growth of immigration court's shadows is deeply contingent on executive policy, both in terms of enacting rules that facilitate and expand their use and in terms of an administration's propensity to rely on the shadows to accomplish enforcement goals. Indeed, executive branch policy may have the most immediate effect on summary and other removals given the slow pace of judicial intervention and the gridlock that has characterized legislative reform of immigration. President Obama's successor could have drastically reduced the scope of immigration court's shadows through policy directives that result in front-line immigration officers placing allegedly removable individuals in immigration court proceedings. However, more humanitarian exercises of prosecutorial immigration power in immigration court's shadows are highly unlikely under the Trump administration. Advocacy strategies aimed at defending against and responding to the removal orders described in this Article will become critical to resisting the administration's plans for mass deportation.

278. *Id.* § 3717(c).

279. *See* sources cited *supra* notes 193–194 and accompanying text.

280. *See supra* text accompanying notes 187–198.

281. *See supra* text accompanying notes 193–196.

Finally, transparency and access to information present a particularly formidable obstacle to shifting the discourse around immigration adjudication.[282] Obtaining reliable information and data about most forms of removal discussed in this Article is difficult. By comparison, immigration court proceedings are open to the public and the subject of uniform annual reporting by the EOIR (which includes *in absentia* orders), and thus are more amenable to empirical study by scholars. Immigration court's shadows are difficult to assess through methods other than anecdotal evidence or time-consuming efforts, such as requests for disclosure under the FOIA. The federal government has, in some years, revealed statistics related to the use of expedited removal, administrative removal, and reinstatement. But in other (and more recent) years, it has not provided such information to the public, thereby making consistent analysis difficult to conduct. Efforts to reform the immigration system should thus include mandatory statistical reporting by DHS on its execution of the removal orders discussed here.[283]

We still have much to learn about removals taking place in the shadows of immigration court. What little that is known, however, raises troubling concerns about the disconnect between law and reality, the nature of immigration agency culture, and the human costs of immigration enforcement. As reform efforts to improve the nation's immigration courts continue, removals taking place outside and at the peripheries should receive full consideration in those discussions.

282. *See* Amanda Frost, *Learning from Our Mistakes: Using Immigration Enforcement Errors to Guide Reform*, 92 DENV. U. L. REV. 769, 780–82, 787–89 (2015) (discussing rates of error in summary removals, but noting the problem of transparency and access to information).

283. S. 744 also would have explicitly required the government to include expedited removal, administrative removal, stipulated removal, and reinstatement in its annual reporting on statistics. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3720 (2013).