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## Expedited Removal and Due Process: “A Testing Crucible of Basic Principle” in the Time of Trump

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# Expedited Removal and Due Process: “A Testing Crucible of Basic Principle” in the Time of Trump

Daniel Kanstroom\*

[A]liens 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.<sup>1</sup>

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1. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

### I. Introduction

This Essay examines a twenty-year-old deportation system known as expedited removal that the government has intimated may be expanded.<sup>2</sup> Invoking Henry Hart’s famous 1953 *Dialogue*, in which he wrote, “[J]udicial review in exclusion and deportation cases . . . provides a *testing crucible of basic principle*,”<sup>3</sup> the Essay explores what that crucible is, what basic principles it invokes, and whom it is testing.

All legal enforcement regimes confront two related but distinct fundamental problems. The first problem is that of balancing efficiency against (substantive and procedural) rights. The second problem is that of protecting society against potentially dangerous accretions of government power.

Ronald Dworkin famously once referred to rights as “trumps.”<sup>4</sup> Rights, as the analogy to card games runs, demand that their holders are treated in unusual ways that may override even the most powerful social aims and government goals.<sup>5</sup> This usage may now seem humorous, ironic, and perhaps tragic in the Trump era, especially regarding expedited immigration enforcement. Previous administrations and the federal judiciary must also, however, bear responsibility for the rather deplorable current state of affairs in expedited removal (and in other “fast-track” immigration systems).<sup>6</sup> As the American Civil Liberties Union (ACLU) put it in

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2. See *infra* notes 50–53 and accompanying text (recounting the expansion of expedited removal under the second Bush administration).

3. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1389 (1953) (emphasis added).

4. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* xi (Harv. Univ. Press, 1977).

5. See *id.* at xi (“Individuals have rights when . . . a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.”).

6. See generally DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (2012) (describing the rise of fast-track mechanisms). See also AM. C.L. UNION, *AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM* 10–30 (2014) (critiquing expansion of such mechanisms); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 3 (2014) (cataloguing removal

2002, “[e]xpedited removal . . . represented a dramatic assault on the due process rights . . . . [It grants] extraordinary and unprecedented power to low-level immigration officers to remove individuals without review and without a fair hearing.”<sup>7</sup>

Such concerns transcend this specific system, as there are many other forms of fast-track deportation systems and no shortage of rights infringements even in “regular” immigration courts. Indeed, some judicial modalities raise similar concerns, such as the 2005 initiative called “Operation Streamline,” in which noncitizens faced routinized pleas and sentences before magistrate judges, in processes that raised substantial concerns about lack of proper representation, due process, among other issues.<sup>8</sup>

Rights protection in enforcement regimes is typically accomplished by describing such rights in constitutions, statutes, judicial decisions, regulations, and other authorities.<sup>9</sup> Another

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mechanisms); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 193 (2017) (“[S]hadow proceedings . . . either entirely or effectively bypass immigration court adjudication.”); Kari Hong, *The Costs of Trumped-Up Immigration Enforcement Measures*, 2017 CARDOZO L. REV. DE NOVO 119, 124 (2017) (discussing Trump’s executive orders); Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 542, 579–82 (2011) (discussing diversions from immigration court).

7. Am. C.L. Union, *ACLU Comments on INS Notice to Expand Expedited Removal*, AM. C.L. UNION (Nov. 13, 2002), <https://www.aclu.org/other/aclu-comments-ins-notice-expand-expedited-removal?redirect=aclu-comments-ins-notice-expand-expedited-removal> (last visited Sept. 19, 2018) (on file with the Washington and Lee Law Review).

8. See *United States v. Roblero-Solis*, 588 F.3d 692, 694–98 (9th Cir. 2009) (recounting procedures under Operation Streamline); see also Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J. L. & POL. 465, 472 (2015) (“Such mass processing raises serious concerns about proper representation, due process, and many other important legal values.”); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 107 (2012) (“[Since 1997 . . . approximately one million immigrants have been deported or removed from the United States as a consequence of a criminal conviction.”); JOANNA LYDGATE, *ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 4* (2010), [https://www.law.berkeley.edu/files/Operation\\_Streamline\\_Policy\\_Brief.pdf](https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf) (“Operation Streamline raises significant legal and policy concerns . . .”).

9. See, e.g., *Roblero-Solis*, 588 F.3d at 698–99 (reviewing guilty pleas under Operation Streamline for violation of Rule 11 of the Federal Rules of Criminal Procedure).

protection mode is the development of oversight systems. The latter mode aims to protect society against potentially dangerous accretions of government power. This concern, which is subtler, is commonly denominated as the “slippery slope,” the “canary in the coalmine,” and, most venerably, “guarding the guardians.”<sup>10</sup> It may also implicate concerns about “perverse incentives,” a framing that may apply both to government power and to individual actions.<sup>11</sup>

Both problems—that of protecting basic individual rights and that of worrisome accretions of government power—have become especially acute in the Trump Administration. President Trump and his minions (including most prominently Jeff Sessions, John Kelly, Kris Kobach, and Stephen Miller) seem profoundly uncommitted to the ideas of rights for noncitizens (or their families), to the legitimacy of judges, and even, perhaps, to the rule of law other than in a crudely binary, instrumental sense.

The “testing crucible” in Hart’s formulation<sup>12</sup> also implicates “Trumpism,” which—to the extent that it is a coherent political ideology—embodies a resurgent nationalism of a type also now prevalent in Europe,<sup>13</sup> Australia,<sup>14</sup> and Israel,<sup>15</sup> among other places, with impulses deeply connected to xenophobia and racism. This connects easily and fluidly to expansions of fast-track, rights-infringing systems of exclusion and deportation. Such trends fundamentally challenge the relationship between

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10. See *infra* Part IV (reviewing oversight issues within United States Customs and Border Protection (CBP)).

11. See *infra* notes 139–150 (noting CPB human rights abuses).

12. See Hart, *supra* note 3, at 1389 (presenting the crucible formulation).

13. See Simon Shuster, *Steve Bannon Takes Trumpism to Europe and Gets a Rock Star’s Welcome*, TIME (Mar. 7, 2018), <http://time.com/5189141/steve-bannon-zurich-speech-populism-tariffs/> (last visited Sept. 19, 2018) (discussing Trumpism’s reception in Europe) (on file with the Washington and Lee Law Review).

14. See Ifran Yusuf, *Trumpism Has Entered the Australia Mainstream*, SYDNEY MORNING HERALD (Nov. 24, 2016), <https://www.smh.com.au/opinion/trumpism-has-entered-the-australia-mainstream-20161124-gswift.html> (last visited Sept. 19, 2018) (discussing the rise of Trumpism in Australia) (on file with the Washington and Lee Law Review).

15. See Oren Libermann, *Israel and Trump: United Against the World*, CNN, <https://www.cnn.com/2018/01/20/middleeast/israel-us-intl/index.html> (last updated Jan 20, 2018) (last visited Sept. 19, 2018) (reviewing Trump’s relationship with Israel) (on file with the Washington and Lee Law Review).

executive power and law, especially in regard to human and civil rights, and between territorial presence and rights.

The traditional response lies within the realm of judges. However, meaningful judicial oversight of immigration enforcement has long been hindered by “plenary power,”: formalistic categories of civil/criminal and regulation/punishment, deep ambivalence about the rights of noncitizens, complexities of federalism, and—for some twenty years now—robust statutory preclusions of judicial review.<sup>16</sup> Thus, because noncitizens’ rights are largely contingent on enforcement discretion, the question of *what* rights a noncitizen has is inextricably linked to *how* the government enforces immigration laws.<sup>17</sup>

This Essay explores the contours of a debate that—to some degree—has occurred, and to a greater degree *should be* taking place within our legal system. It considers Executive Order 13768: *Enhancing Public Safety in the Interior of the United States*.<sup>18</sup> I will also consider a Memorandum authored by John Kelly, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies*.<sup>19</sup> These executive pronouncements will be examined against the backdrop of the history of expedited removal, judicial responses to various challenges of that system and of President Trump’s “travel bans,” and recent judicial decisions that have impeded expeditious deportation enforcement.<sup>20</sup>

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16. See *infra* Parts IV–V (discussing failings within CBP and potential solutions, including judicial review).

17. See *infra* Part IV (examining the apparent lack of rights in the current enforcement regime).

18. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

19. Memorandum from John Kelly, Sec’y, U.S. Dep’t Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Protection et al. (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_ment-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_ment-Policies.pdf); see also U.S. DEP’T HOMELAND SEC., 90-DAY PROGRESS REPORT TO THE PRESIDENT ON EXECUTIVE ORDER 13767: BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS 1–15 (2017), [http://altgov2.org/wp-content/uploads/DHS\\_EO13767-progress-report.pdf](http://altgov2.org/wp-content/uploads/DHS_EO13767-progress-report.pdf) (reviewing progress on implementation).

20. I refer to the creative legal strategies in such cases (with approval) as “monkey-wrench lawyering,” in that their main purpose seems to be to slow the gears of the deportation machinery.

Part II of this Essay describes expedited removal, as it was conceived, as it has developed, and as it may grow. Part III explicates President Trump's Executive Order 13768 and the Kelly Memorandum that advocated expansion of expedited removal. Part IV explores various problems expedited removal raises and the particular dangers of its proposed expansion. These problems and dangers include predictable, and perhaps inevitable, rights infringements and agency power concerns that are specific to U.S. Customs and Border Patrol (CBP). The Essay concludes with exploration of judicial solutions and secondary agency possibilities that could maintain the basic purpose of expedited removal (a system that, for all its flaws, is superior to a wall or to outsourced Mexican migration enforcement) while offering more realistic and capacious protections against rights violations and agency misconduct.

## *II. Expedited Removal, Then, Now, and Expanding*

Although history has shown that border control can never be perfect, US courts have long held—with only a technical exception known as the “entry fiction”<sup>21</sup>—that noncitizens on US soil are entitled to due process protections.<sup>22</sup> The more particular question of the process due to a “clandestine entrant,” especially a noncitizen apprehended on American soil, near the border, soon

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21. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (finding that “aliens who have once passed through our gates, even illegally,” possess certain constitutional rights, but that “an alien on the threshold of initial entry stands on a different footing”). Arrival at a port of entry does not, however, constitute entry into the country. See *id.* at 213 (“In sum, harborage at Ellis Island is not an entry into the United States.”). Thus, for due process purposes, a noncitizen at a port of entry “is treated as if stopped at the border.” *Id.* at 215. See also *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958) (noting entry fiction applies to a noncitizen who is “paroled” into the country pending determination of admissibility).

22. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (stating that “once an alien enters the country, the legal circumstance changes” because our Constitution provides due process protections “to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”); see also *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”).

after entry, has not been definitively resolved.<sup>23</sup> It is thus unsurprising that various informal, fast-track removal mechanisms have been a feature of U.S. law (especially at the southern border) for many years.<sup>24</sup> Some such systems have embodied a rough, tacit compromise in that they have allowed CBP agents to summarily remove people while not imposing the harsh consequences of formal deportation (primarily, a ban on re-entry of at least five years)<sup>25</sup> unless those same people tried to return to the U.S. again.<sup>26</sup> Such systems, were, however, politically challenging to defend, of dubious efficiency, and somewhat unstable theoretically.

As the legal category of asylum developed after 1980, formal procedures became increasingly available even to those caught at the border or at ports of entry.<sup>27</sup> Large numbers of migrants from Cuba and Haiti fleeing to Florida in the 1980s provoked some legislators to propose a program of “summary exclusion.”<sup>28</sup> The aim “was to stymie unauthorized migration by restricting the hearing, review, and appeal process for aliens arriving without proper

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23. See *Yamataya v. Fisher*, 189 U.S. 86, 94 (1903) (questioning “whether an alien . . . who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed”).

24. See, e.g., MAE M. NGAL, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA xxiv (2004) (noting that “illegal immigration is not anomalous but inherent to the regime of immigration restriction”); Marc. R. Rosenblum, *Shifts in the US Immigration Enforcement System*, HOOVER INST. (July 14, 2015), <https://www.hoover.org/research/shifts-us-immigration-enforcement-system> (last visited Sept. 19, 2018) (“In the twenty-five years before 1996, just 3 percent of all people expelled from the United States were formally removed . . . versus 97 percent who were informally returned.”) (on file with the Washington and Lee Law Review).

25. See Inadmissible aliens, 8 U.S.C. § 1182(a)(9)(A)(i) (2012) (“Any alien who has been ordered removed . . . upon the alien’s arrival . . . and who again seeks admission within 5 years . . . is inadmissible.”).

26. See Rosenblum, *supra* note 24 (discussing informal removal).

27. See 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 immigration law prior to 1996).

28. See ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 3 (2005), <http://trac.syr.edu/immigration/library/P13.pdf> (reviewing exclusion’s legislative history).

documents at ports of entry.”<sup>29</sup> Though not adopted then,<sup>30</sup> summary exclusion was revitalized in 1995 with a new name: “expedited removal of arriving aliens”<sup>31</sup> and became law as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, signed by President Bill Clinton.<sup>32</sup> As it evolved, this new system was applied both at the border and, later, to some “clandestine entrants.”<sup>33</sup>

Essentially, expedited removal now allows agents of the executive branch to remove certain noncitizens quickly and, in many cases, completely outside of immigration courts and federal courts.<sup>34</sup> It does this by drastically restricting a variety of due

29. *Id.*

30. *See id.* (“It was included and then deleted from legislation that became the Immigration Reform and Control Act of 1986.”).

31. *Id.* at 3–4.

32. “The IIRIRA provisions amended § 235 of the INA. For an earlier enacted version of expedited removal see The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA; P.L. 104-132, §422).” *Id.* at 4 n.18. *See generally* PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA (2000) (discussing immigration policy’s evolution in the United States); *see also* MARK HETFIELD ET AL., U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL VOLUME I: FINDINGS & RECOMMENDATIONS, 1–2 (2005), [http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum\\_seekers/Volume\\_I.pdf](http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf) (presenting legislative history).

33. *See* SISKIN & WASEM, *supra* note 28, at 2

Under regulation, expedited removal only applied to arriving aliens at ports of entry from April 1997 to November 2002. In November 2002, the Bush Administration extended expedited removal to aliens arriving by sea who are not admitted or paroled. Subsequently, in August 2004, expedited removal was expanded to aliens who are present without being admitted or paroled, are encountered by an immigration officer within 100 air miles of the U.S. international southwest land border, and have not established to the satisfaction of an immigration officer that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of encounter.

(footnotes omitted). These entrants are technically known as “entrants without inspection,” or EWI’s. *See* INA 212(a)(6)(A): *Entry Without Inspection (EWI)*, MESSERSMITH L., <https://messersmithlaw.com/ina-212a6a/> (last visited Sept. 19, 2018) (providing practical terminology usage) (on file with the Washington and Lee Law Review).

34. *See* AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL 1–2 (2017),

process protections that had been available to noncitizens who are caught at or (relatively) near US borders or ports of entry.<sup>35</sup> It imposes mandatory detention and essentially eliminates hearing, appeal, and judicial review processes<sup>36</sup> for most noncitizens arriving or caught (within 14 days of border crossing)<sup>37</sup> in the United States without proper documents (there are special protections for asylum-seekers, discussed below). Noncitizens who have been expeditiously removed are barred from returning to the United States for five years.<sup>38</sup>

Also, the statute *deems* certain noncitizens on U.S. soil to be “unadmitted.”<sup>39</sup> Prior to 1996, a noncitizen denied admission at a port of entry was “excluded” from entry.<sup>40</sup> The immigration statutes contained both specific exclusion grounds and special procedures that were less formal than those that governed deportations from the interior.<sup>41</sup> The first critical fact as to which

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[https://www.americanimmigrationcouncil.org/sites/default/files/research/a\\_primer\\_on\\_expedited\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/a_primer_on_expedited_removal.pdf) (describing limitations under expedited removal).

35. *See id.* (“Expedited removal’ refers to the legal authority given to even low-level immigration officers to order the deportation of some non-U.S. citizens without any of the due-process protections granted to most other people . . .”).

36. *See id.* (outlining the expedited removal process); *see also* SISKIN & WASEM, *supra* note 28, at 4–5 (describing the basics of removal). Judicial review of an expedited removal order is available in habeas corpus proceedings, but the review is limited to whether the petitioner is an “alien,” was ordered expeditiously removed, or was previously granted legal permanent resident (LPR), refugee or asylee status. *See* MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., R43226, AN OVERVIEW OF JUDICIAL REVIEW OF IMMIGRATION MATTERS 5 (2013), <https://fas.org/sgp/crs/homesec/R43226.pdf> (describing judicial review for those aliens not placed in regular removal proceedings).

37. *See* Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877, 48877 (Aug. 11, 2004) (applying the day limit).

38. *See* Inadmissible aliens, 8 U.S.C. § 1182(a)(9)(A)(i) (2012) (“Any alien who has been ordered removed . . . upon the alien’s arrival . . . and who again seeks admission within 5 years . . . is inadmissible.”).

39. This colloquial term is not in the statute. *See id.* § 1182(6)(A)(i) (“An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”).

40. *See* David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Rules*, 40 VA. J. INT’L L. 673, 689 (2000) (noting the prior scheme).

41. *See id.* (“Formerly the main statutory distinction fell between exclusion cases and deportation cases . . . clandestine entry lasting but a few minutes could vault the individual into the more favored category of deportable alien.”).

procedures applied (with some technical exceptions) was where one stood at the time of arrest.<sup>42</sup> Noncitizens who were expelled from the interior were “deported,” regardless of whether they had ever been lawfully present and regardless of how long they had been in the United States.<sup>43</sup> This system dovetailed with prevailing due process norms that protected those who had “passed through our gates, even illegally . . . .”<sup>44</sup>

The IIRIRA replaced this territorial conceptual dividing line between exclusion and deportation with the concept of “admission.”<sup>45</sup> Those who had been lawfully admitted retained formal procedural protections.<sup>46</sup> However, persons present in the interior without having attained lawful admission were treated substantively like those denied admission at a port of entry.<sup>47</sup> And some of them lost virtually all procedural protections as well.<sup>48</sup>

From April 1997 to November 2002, expedited removal only applied to arriving noncitizens at ports of entry.<sup>49</sup> Even there it was strongly criticized.<sup>50</sup> In November 2002, the Bush Administration expanded expedited removal to noncitizens caught within the United States who had arrived by sea but who had not been physically and continuously present in the country for two years prior to apprehension.<sup>51</sup> This was a very important move, as

42. *See id.* (“[T]he boundary was marked by the concept of entry.”).

43. *See id.* (“[C]landestine entry lasting but a few minutes could vault the individual into the more favored category of deportable alien.”).

44. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

45. *See* Martin, *supra* note 40, at 689 (“The 1996 amendments deleted the definition of ‘entry’ from the statute and replaced it with a definition of ‘admission,’ which now marks the major statutory boundary.”).

46. *See id.* (“[G]rounds of inadmissibility apply both to persons at the border and to clandestine entrants who have never gone through the process of formal inspection and admission . . . .”).

47. *See id.* (“[N]o matter how long they have been physically present in the United States.”).

48. *See id.* at 689–90 (“After all, there was always a certain anomaly . . . in giving greater rights to persons who completely evaded border screening, while those who presented themselves for inspection as the law required were rewarded with constitutional limbo.”).

49. *See* SISKIN & WASEM, *supra* note 28, at 2 (recounting legislative history).

50. *See, e.g.,* Laplante, *supra* note 27, at 215–16 (critiquing expedited removal in 1999).

51. *See* Notice Designating Aliens Subject to Expedited Removal Under

it internalized expedited removal. In August 2004, expedited removal was further expanded to many more people who were present in the U.S.:

[T]o aliens who are present without being admitted or paroled, are encountered by an immigration officer within 100 air miles of the U.S. southwest land border, and cannot establish to the satisfaction of the immigration officer that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of encounter.<sup>52</sup>

In January 2006, expedited removal was further expanded along all U.S. borders.<sup>53</sup> Later that year, it was applied to “illegal alien families” apprehended in areas along the nation’s southern, northern, and coastal borders.<sup>54</sup> In a remarkably Orwellian formulation, a DHS press release reported that to “house these families,” it opened a new 500-bed facility in Texas “specially-equipped to meet family needs.”<sup>55</sup> Julie Myers, Assistant Secretary for ICE, coined a strange new phrase to describe family detention and quick deportations: “This new facility enables us to have deterrence with dignity by allowing families to remain

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Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,924 (Nov. 13, 2002) (codified at 8 C.F.R. 235.3(b)(1)(ii) (2017)) (detailing the expedited removal process); *see also* SISKIN & WASEM, *supra* note 28, at 2 (recounting legislative history).

52. SISKIN & WASEM, *supra* note 28, at 2.

53. *See* ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 6–7 (2009), [https://www.everycrsreport.com/files/20090130\\_RL33109\\_0da5394ccb73e22db6286d4acd1385b88c40c35a.pdf](https://www.everycrsreport.com/files/20090130_RL33109_0da5394ccb73e22db6286d4acd1385b88c40c35a.pdf) (reviewing exclusion’s legislative history and expansion to all borders).

54. News Release, U.S. Customs & Immigration Enforcement, DHS Closes Loophole by Expanding Expedited Removal to Cover Alien Families (May 15, 2006), <http://www.fosterglobal.com/news/DHSOpensNewFacility.pdf>.

55. *Id.* The facility is named after T. Don Hutto, who co-founded the Corrections Corporation of America in 1983 in Nashville, Tennessee. *See* DETENTION WATCH NETWORK, DON T. HUTTO RESIDENTIAL CENTER: IMMIGRANT DETENTION INSPECTION SERIES 2 (2016), [https://www.detentionwatchnetwork.org/sites/default/files/Hutto%20Inspection\\_DWN%20and%20Grasroots%20Leadership\\_2017.pdf](https://www.detentionwatchnetwork.org/sites/default/files/Hutto%20Inspection_DWN%20and%20Grasroots%20Leadership_2017.pdf) (recounting the facility becoming a family detention center in 2006); *Corrections Corporation of America History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/corrections-corporation-of-america-history/> (last visited Sept. 19, 2018) (describing the founding of CCA) (on file with the Washington and Lee Law Review).

together, while sending the clear message that families entering the United States illegally will be returned home.”<sup>56</sup> To use detention as “deterrence” would itself seem a violation of dignity, as well as an unconstitutional rights violation. The purported dignity of such deterrence was further called into very serious question with respect to how detention was implemented. Researchers discovered many serious problems at the facility, and reported the following:

- Hutto . . . [looked and felt] like a prison, complete with razor wire and prison cells. . . .
- The majority of children detained in these facilities appeared to be under the age of 12.
- At night, children as young as six were separated from their parents.
- Separation and threats of separation were used as disciplinary tools.
- People in detention displayed widespread and obvious psychological trauma. Every woman we spoke with in a private setting cried. . . .
- [P]regnant women received inadequate prenatal care.
- Children . . . received one hour of schooling per day.
- Families . . . received no more than twenty minutes to go through the cafeteria line and feed their children and themselves. Children were frequently sick from the food and losing weight.
- Families . . . received extremely limited . . . recreation time . . . .<sup>57</sup>
- Access to counsel was extremely limited.<sup>58</sup>

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56. U.S. Customs & Immigration Enforcement, *supra* note 54.

57. LOCKING UP FAMILY VALUES: THE DETENTION OF IMMIGRANT FAMILIES, WOMEN’S COMM’N FOR REFUGEE WOMEN & CHILDREN & LUTHERAN IMMIGR. AND REFUGEE SERV. 2 (2007), <https://www.womensrefugeecommission.org/images/zdocs/famdeten.pdf>.

58. *See id.* at 31–32 (describing access to counsel at Hutto as available, but with much to be desired).

As a result of such reports and, following a major lawsuit, conditions were improved somewhat.<sup>59</sup> Still, family detention remains a major issue for expedited removal in the United States.<sup>60</sup> This is especially salient in the disastrous aftermath of the Trump Administration's "zero tolerance" family separation fiasco during the summer of 2018.<sup>61</sup>

Expedited removal itself raises major due process concerns because arrest, detention, being placed in expedited removal, and ultimately removal with a five-year ban on return, are all in the hands of executive agents.<sup>62</sup> In asylum cases, an immigration judge may be involved but even then federal review is essentially precluded.<sup>63</sup> In most cases, a person subject to expedited removal is detained, has no right to counsel, often has no time to communicate with her family members or to seek legal counsel and has no right to appeal.<sup>64</sup>

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59. See *ACLU Urges Congress to End Policy of Detaining Immigrant Children*, AM. C.L. UNION (Aug. 27, 2007), <https://www.aclu.org/news/landmark-settlement-announced-federal-lawsuit-challenging-conditions-immigrant-detention-center?redirect=cpredirect/31469> (last visited Sept. 19, 2018) (announcing a "landmark settlement with U.S. Customs Enforcement (ICE) that greatly improves conditions for immigrant children and their families inside . . . Hutto") (on file with the Washington and Lee Law Review).

60. Currently there are three immigration jails holding families. See *Family Detention*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/family-detention> (last visited Sept. 19, 2018) (noting the Berks, Karnes, and Dilley centers are in operation) (on file with the Washington and Lee Law Review); see also Laura Smith, *Here's the Biggest Immigration Issue That Trump Isn't Talking About*, MOTHER JONES (Jan. 12, 2017, 11:00 AM) <https://www.motherjones.com/politics/2017/01/family-detention-immigration-refugees-texas-dilley/> (last visited Sept. 19, 2018) (discussing the present state of detention) (on file with the Washington and Lee Law Review).

61. See, e.g., Maya Rhodan, *Here Are the Facts About President Trump's Family Separation Policy*, TIME, <http://time.com/5314769/family-separation-policy-donald-trump/> (last updated June 20, 2018) (last visited Sept. 19, 2018) (providing an overview of the zero tolerance policy) (on file with the Washington and Lee Law Review).

62. See *supra* notes 34–38 and accompanying text (describing the state of expedited removal).

63. See A PRIMER ON EXPEDITED REMOVAL, *supra* note 34, at 2 (noting that an immigration judge is limited to reviewing credible fear of return).

64. See *id.* at 1–2 (explaining the lack of rights or process given to those subject to expedited removal).

And yet, courts have largely acquiesced. Part of the reason for this was a preclusion of judicial review in the 1996 laws themselves. The statutes stripped the federal courts of jurisdiction to hear any challenge to the system, including challenges on due process or other constitutional grounds, other than in a lawsuit in the United States District Court for the District of Columbia filed within sixty days of the system's implementation.<sup>65</sup>

Defenders of expedited removal have long argued that federal judges would undercut the basic idea of expedited removal and would hinder the Attorney General's ability to make managerial adjustments if there were to be "sudden shifts in caseload."<sup>66</sup> Some federal judges now rather routinely reject challenges. As one judge laconically put it in 2014, "[t]he expedited removal statutes are express and unambiguous. The clarity of the language forecloses acrobatic attempts at interpretation."<sup>67</sup> A counter-tradition sometimes recognizes the deep problems expedited removal poses, while still declining to intervene due to the jurisdictional impediments congress imposed. As one court put it in 2010:

The troubling reality of the expedited removal procedure is that a CBP officer can create the . . . charge . . . then that same officer, free from the risk of judicial oversight, can confirm his or her suspicions of the person's intentions and find the person guilty of that charge. The entire process . . . can happen without any check on whether the person understood the proceedings, had an interpreter, or enjoyed any other safeguards.<sup>68</sup>

As the court rather distressingly concluded, "To say that this procedure is fraught with risk of arbitrary, mistaken, or

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65. See *Apprehension and Deportation of Aliens*, Pub. L. No. 104-132, 110 Stat. 1275, 1277, 1279 (1996) (codified as amended at 8 U.S.C. § 1252 (2012)) (codifying limited judicial review) (listing matters not subject to judicial review). In *Am. Immigr. Law. Ass'n v. Reno*, 18 F. Supp. 2d 38, 47–62 (D.D.C. 1998), *aff'd*, 199 F.3d 1352 (D.C.Cir. 2000), the court found that plaintiffs lacked standing to assert many of the challenges, and generally sustained the expedited removal system without much analysis. See *id.* (offering review of standing and removal procedures).

66. Martin, *supra* note 40, at 689.

67. Rodriguez v. U.S. Customs & Border Prot., No. 6:14-cv-2716, 2014 WL 4675182, at \*2 (W.D. La. Sept. 18, 2014), *vacated by* Diaz-Rodriguez v. Holder, No. 14-31103, 2014 WL 10965184 (5th Cir. Dec. 16, 2014).

68. Khan v. Holder, 608 F.3d 325, 329 (7th Cir. 2010).

discriminatory behavior . . . is not, however, to say that courts are free to disregard jurisdictional limitations.”<sup>69</sup>

Such judicial acquiescence and the efficiency of interior expedited removal has inspired the government to expand its use. From a start of 23,242 in 1997, numbers rose to 89,070 in 1999, just under half of all total removals.<sup>70</sup> However, from 1993–1999 there were also more than 10 million recorded “voluntary departures.”<sup>71</sup> These included both persons “under docket control required to depart” and not “under docket control,” those departures not under docket control being subject to much more informal procedures and looser record-keeping.<sup>72</sup> As noted above, until 2002, expedited removal procedures applied only to “aliens” arriving at ports of entry.<sup>73</sup> After 2004, the number of interior removals began to rise.<sup>74</sup> By fiscal year 2013, some 44% of all removals from the United States were expedited removals,<sup>75</sup> which included removals from the interior. In 2016, of some 240,255 removals ICE conducted, 174,923 were removals of individuals

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69. *Id.*

70. IMMIGR. & NATURALIZATION SERV., 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 203 (2002), [https://www.dhs.gov/sites/default/files/publications/Yearbook\\_Immigration\\_Statistics\\_1999.pdf](https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_1999.pdf).

71. *Id.* at 250.

72. *Id.* at 250 n.2.

73. See *supra* note 49 and accompanying text (describing the original application); see also IMMIGR. & NATURALIZATION SERV., *supra* note 70, at 203 (“In fiscal year 1999, the INS used these procedures with aliens arriving at ports of entry who illegally attempted to gain admission by fraud or misrepresentation, or with no entry documents, or by using counterfeit, altered, or otherwise fraudulent or improper documents.”).

74. The 2005 DHS Statistical Yearbook makes clear that removals include actions that “occur at the borders of the United States, in the interior of the country, and at designated sites outside the United States.” U.S. DEPT. HOMELAND SEC. OFF. IMMIGR. STAT., 2005 YEARBOOK OF IMMIGRATION STATISTICS 1 (2006), [https://www.dhs.gov/sites/default/files/publications/Yearbook\\_Immigration\\_Statistics\\_2005.pdf](https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2005.pdf).

75. See JOHN F. SIMANSKI, U.S. DEPT. OF HOMELAND SEC. OFF. OF IMMIGR. STAT., IMMIGRATION ENFORCEMENT ACTIONS: 2013 1 (2014), [https://www.dhs.gov/sites/default/files/publications/Enforcement\\_Actions\\_2013.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2013.pdf); see also AM. IMMIGR. COUNCIL, *supra* note 34, at 1 (describing the rise in expedited removals).

“apprehended at or near the border or ports of entry.”<sup>76</sup> This amounted to almost 73% of total removals. Of these, some 94% were apprehended by U.S. Border Patrol agents and then processed, detained, and removed by ICE.<sup>77</sup> Thus, CBP is now in many respects the lead agency for removals.<sup>78</sup> Moreover, there is now a backlog in the immigration courts of over half a million (due to years of stepped-up enforcement combined with massive underfunding of the regular immigration court system).<sup>79</sup> This has created both a legitimacy crisis and leaves room for renewed support for expanding expedited removal.<sup>80</sup> The Trump Administration has directed immigration judges to clear at least 700 cases a year in order to receive a “satisfactory” performance rating.<sup>81</sup> If taken seriously, such an order—which seems of dubious constitutionality if due process is to be taken

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76. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, FISCAL YEAR 2016 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 11 (2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf>.

77. See IMMIGR. & NATURALIZATION SERV., *supra* note 70, at 11 n.4 (“The remaining individuals were apprehended by CBP officers at ports of entry.”).

78. See Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 3 (2015) (“[M]ore than half of the total population removed from the United States has bypassed a courtroom through a speed deportation program.”).

79. See *Immigration Court Backlog Tops 500,000 Cases*, HUM. RTS. FIRST (July 21, 2016), <http://www.humanrightsfirst.org/press-release/immigration-court-backlog-tops-500000-cases> (last visited Sept. 19, 2018) (“[C]hronic underfunding, hiring challenges, and shifting enforcement strategies have led to alarming backlogs in the U.S. asylum and immigration systems with more than 620,000 pending removal and asylum cases . . .”) (on file with the Washington and Lee Law Review). For up to date statistics, see *Immigration Court Backlog Tool*, TRAC IMMIGR., [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) (last visited Sept. 19, 2018) (providing detailed backlog statistics) (on file with the Washington and Lee Law Review).

80. See *Immigration Court Backlog Tops 500,00 Cases*, *supra* note 79 (noting that wait times for resolution can be five years or more); Martin, *supra* note 40 and accompanying text (establishing expedited removal as an alternative).

81. Nick Miroff, *Trump Administration, Seeking to Speed Deportations, to Impose Quotas on Immigration Judges*, WASH. POST (Apr. 2, 2018), [https://www.washingtonpost.com/world/national-security/trump-administration-seeking-to-speed-deportations-to-impose-quotas-on-immigration-judges/2018/04/02/a282d650-36bb-11e8-b57c-445cc4dfa5e\\_story.html?utm\\_term=.7bbff467336d](https://www.washingtonpost.com/world/national-security/trump-administration-seeking-to-speed-deportations-to-impose-quotas-on-immigration-judges/2018/04/02/a282d650-36bb-11e8-b57c-445cc4dfa5e_story.html?utm_term=.7bbff467336d) (last visited Sept. 19, 2018) (on file with the Washington and Lee Law Review).

seriously—could tend to transform all removal hearings into what amounts to expedited removal.

The Trump Administration has also intimated that it may seek to expand expedited removal beyond its current scope to entrants who have been in the U.S. just shy of two years.<sup>82</sup> This would demand a serious constitutional reconsideration of the significance of such territorial presence for due process purposes.<sup>83</sup>

The issues—essentially involving a tension between efficiency and rights—are among the most fundamental in the long history of U.S. immigration law. Consider a brief recitation of the arguments from the 1903 case of *Yamataya v. Fisher*<sup>84</sup>—with which all immigration law scholars are familiar: “Here is a person found dwelling within the United States; she is arrested and imprisoned by a ministerial officer; she is not permitted to see her friends or to consult with her attorneys; she is unable to speak or understand our language . . . .”<sup>85</sup> The lawyers continue by highlighting what amount to hidden, deceptive—if not nefarious—practices:

The officer does not give her any notice of the proceedings nor any opportunity to be heard, but goes about secretly collecting evidence against her, considering only such evidence as when unexplained, will suit his purpose. He takes advantage of her ignorance of our language and makes her give unintentional answers to questions which she does not understand.<sup>86</sup>

The arguments against such practices made at the dawn of the twentieth century are worth remembering:

[O]ur records will be searched in vain for authorities sustaining such a proceeding, and its only parallel must be sought for in the history of the times antedating *Magna Charta*. Will the

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82. See JOSE MAGAÑA-SALGADO, IMMIGRANT LEGAL RES. CTR., FAIR TREATMENT DENIED: THE TRUMP ADMINISTRATION’S TROUBLING ATTEMPT TO EXPAND “FAST-TRACK” DEPORTATIONS 3–4 (2017) (detailing the proposed expansion), [https://www.ilrc.org/sites/default/files/resources/2017-06-05\\_ilrc\\_report\\_fair\\_treatment\\_denied\\_final.pdf](https://www.ilrc.org/sites/default/files/resources/2017-06-05_ilrc_report_fair_treatment_denied_final.pdf).

83. See Martin, *supra* note 40, at 688–89 (reviewing the relationship of due process and territorial presence).

84. 189 U.S. 86 (1903).

85. *Id.* at 90.

86. *Id.*

highest court of the land hold this proceeding to be due process of law? It seems to us that to do so would be to strike a blow at the very foundation of free government.<sup>87</sup>

The Court's opinion in *Yamataya* was, to say the least, brusquely unsolicitous on the merits of the due process problems for those who do not speak English: "If the appellant's want of knowledge of the English language put her at some disadvantage in the investigation conducted by that officer, that was her misfortune . . ." <sup>88</sup> However, the case did establish the baseline idea that there are fundamental limitations on executive power, at least when it is applied on our territory.<sup>89</sup> The exact limits are complicated, as interior expedited removal would be patently unconstitutional were the lines not somewhat ambiguous.<sup>90</sup>

Though some courts have tended towards a binary—right/privilege—sort of model,<sup>91</sup> later cases such as *Landon v. Plascencia*<sup>92</sup> showed that, at least as to returning lawful permanent residents, a purely binary territorial model does not suffice.<sup>93</sup> Recent challenges to the Trump "travel bans" also tend to contradict a bright-line territorial principle, albeit from a different direction.<sup>94</sup> Another due process variant is more fluid, more

87. *Id.* at 91.

88. *Id.* at 102.

89. *See id.* at 100 ("But this court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' . . .").

90. *See id.* (finding that the executive cannot take into custody and deport aliens who have "entered the country, and [have] become subject in all respects to its jurisdiction, and a part of its population" without due process).

91. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

92. 459 U.S. 21 (1982).

93. *See id.* at 32–34 (considering an alien's rights when he resides, leaves, and returns to United States soil).

94. *See, e.g., Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017) ("[T]he Supreme Court has repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over immigration or are not subject to the Constitution . . ."); *Hawaii v. Trump*, 859 F.3d 741, 755 (2017), *vacated and remanded by* 138 S. Ct. 377 (9th Cir. 2017) ("The President's authority is subject to . . . constitutional restraints."); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017), *vacated and remanded by* 138

multi-faceted, and less purely dependent on territorial presence. One might return to the words of Henry Hart: “[C]ourts [have] a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used . . . and . . . that human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion.”<sup>95</sup>

This framework directs our attention to the fundamental problem with expedited removal: Its very existence—and its expansion—inevitably cause serious errors and dangerous deprivations of rights.<sup>96</sup> The basic structure of the system, which insulates decisions of great magnitude from judicial scrutiny,<sup>97</sup> is troubling. It clearly invites—indeed it incentivizes—a transgressing of statutory authority and uncontrolled discretion by officials on the ground. As Justice Sonia Sotomayor recent asked during oral argument in *Jennings v. Rodriguez*:<sup>98</sup> “[In] what other area of law have we permitted a government agent on his or her own, without a neutral party looking at that decision, to detain someone indefinitely?”<sup>99</sup> That, she continued, is “lawlessness . . . basically saying that we’re not a country of law, that we’re a country of arbitrariness . . . .”<sup>100</sup>

Unless one has much greater confidence in Customs and Border Patrol agents than history and experience would warrant, expedited removal—especially if expanded—amounts to a systematic acceptance of arbitrariness by an agency long known for it. Indeed, the system is full of agency-perverse incentives.

This is a concern commonly directed at noncitizens, and less frequently at immigration agencies. Judge Jay Bybee<sup>101</sup> for

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S. Ct. 353 (2017) (“Congress granted the President broad power to deny entry to aliens, but that power is not absolute.”).

95. Hart, *supra* note 3, at 1390.

96. See Martin, *supra* note 40, at 700 (arguing against expansion due to overapplication risks).

97. See *supra* notes 34–38 and accompanying text (outlining the lack of judicial oversight).

98. 138 S. Ct. 830 (2018).

99. Transcript of Oral Argument at 6, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (No. 15-1204), 2017 WL 4517127, at \*6.

100. *Id.* at 8.

101. Human Rights Watch argued that Judge Bybee should have been “investigated for conspiracy to torture as well as other crimes.” *No More Excuses*:

example, recently bemoaned the “perverse incentives” that the territorial rights model might offer to “aliens attempting to enter the United States to further circumvent our immigration laws by avoiding designated ports-of-entry.”<sup>102</sup> Government lawyers made a similar argument in the Third Circuit case of *Castro v. Department of Homeland Security*:<sup>103</sup> “If the clandestine entrant were treated more favorably, that would create—and constitutionalize—a perverse incentive for aliens to cross the border surreptitiously rather than presenting themselves for inspection.”<sup>104</sup>

Leaving aside many empirical, moral, and doctrinal questions about such concerns, perverse incentives run both ways. A rather casual dismissal of realistic concerns about agency practices is a strange hallmark of some judicial opinions. Courts may accept that “expedited removal proceedings permit no judicial or administrative review, which we assume would decrease any risk of error.”<sup>105</sup> But the judicial conscience is salved by asserting that the “class of aliens” to which expedited removal applies is said to be “fairly narrow.”<sup>106</sup> Further, some assert that “the analysis required to determine whether an alien may be subject to expedited removal proceedings is straightforward” or “a relatively simple exercise” about which too much concern is unwarranted.<sup>107</sup> But for many cases, both assertions are demonstrably untrue, especially for asylum-seekers and others who face severe harm if deported.<sup>108</sup> Also, as discussed in Part IV, major mistakes are

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*A Roadmap to Justice for CIA Torture*, HUMAN RIGHTS WATCH (Dec. 1, 2015), <https://www.hrw.org/report/2015/12/01/no-more-excuses/roadmap-justice-cia-torture> (last visited Sept. 19, 2018) (on file with the Washington and Lee Law Review).

102. *United States v. Peralta-Sanchez*, 847 F.3d 1124, 1136 (9th Cir. 2017), *opinion withdrawn on grant of reh'g*, 868 F.3d 852 (9th Cir. 2017), and *on reh'g*, 705 Fed. Appx. 542 (9th Cir. 2017).

103. 835 F.3d 422 (3d Cir. 2016).

104. Brief for the Respondents in Opposition at 21, *Castro v. U.S. Dep't Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016) No. 16-812, *cert. den.* 137 S. Ct. 1581 (2017), 2017 WL 1046315, at \*21.

105. *Peralta-Sanchez*, 847 F.3d at 1136.

106. *Id.*

107. *Id.*

108. *See, e.g.*, A PRIMER ON EXPEDITED REMOVAL, *supra* note 34, at 2 (noting

frequently made and CBP, a dangerously unrestrained agency, seems unable to reform many bad practices.<sup>109</sup> Perhaps something more than a crude, conclusory utilitarian calculus is thus in order for federal judges?

Let us now consider how immigration enforcement in the Trump Administration has related to expedited removal.

### *III. The Trump Order and the Kelly Memorandum*

#### *A. Executive Order 13768*

President Trump's Executive Order 13768, Enhancing Public Safety in the Interior of the United States, appeared in the Federal Register on January 30, 2017.<sup>110</sup> Like many immigration enforcement measures, it was ostensibly aimed not simply at unauthorized migration, but more broadly at "public safety."<sup>111</sup> The Order's underlying assumptions and rhetorical tropes reveal deep implicit ideas about how deportation law should be conceived and implemented. It begins with a strikingly broad statement that links immigration control to (undefined) ideals of national security and safety: "Interior enforcement of our Nation's immigration laws is critically important to the national security and public safety of the United States."<sup>112</sup>

This is immediately followed by a set of common, if contestable assumptions: "Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States."<sup>113</sup>

Obvious basic questions about these assertions include: How many such "aliens" present such a threat? What is the exact nature

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that "credible fear" must be evaluated).

109. See *infra* Part IV (discussing abuses by CBP).

110. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

111. See *id.* at 8799 ("[I]n order to ensure the public safety of the American people . . .").

112. *Id.*

113. *Id.*

of that threat? Why does a person's immigration status matter if they commit a crime?

The main goal of the Order is articulated boldly. Asserting first—in a highly dramatic and quite unusual formulation—that, “the Federal Government has failed to discharge this basic sovereign responsibility,” the Order declares that “[w]e cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement.”<sup>114</sup>

The Order then directs executive departments and agencies “to employ all lawful means to enforce the immigration laws of the United States.”<sup>115</sup> Thus, in effect, the Order rejects any sort of discretionary, targeted, prioritized enforcement methods and aims, presumably, to exclude *all* who are subject to exclusion and to deport *all* who are subject to deportation. There is a certain superficial plausibility here—why not enforce all the immigration laws fully? The answer, of course, is that this is impossible for logistical, cost, and many other reasons. Indeed, the Constitution itself uses the word “faithfully” not “fully.”<sup>116</sup>

### *B. The Kelly Memorandum*

Such unrealistic calls for full enforcement reverberate as we consider the Kelly Memorandum. On February 20, 2017, then-Department of Homeland Security (DHS) Secretary John Kelly directed DHS to issue a Federal Register notice to expand the category of individuals subject to expedited removal.<sup>117</sup> He wrote that he had the authority to apply, “by designation *in my*

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114. *Id.*

115. *Id.*

116. See U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”).

117. Memorandum from John Kelly, Sec’y, U.S. Dep’t Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Protection et al. 7 (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf) (directing DHS to issue “a new Notice Designating Aliens Subject to Expedited Removal”).

*sole and unreviewable discretion*, the expedited removal provisions . . . of the INA to aliens who have not . . . affirmatively shown, to the satisfaction of an immigration officer, that they have been continuously physically present in the United States the two-year period . . . .”<sup>118</sup>

What might this mean? One recent study has estimated that it could subject more than 300,000 people to expedited removal with increased support for CBP.<sup>119</sup> We thus return to two fundamental questions: Is expedited removal *inherently impossible to oversee* sufficiently to avoid predictable rights infringements? Does expedited removal—*by its very nature*—pose a serious, perhaps unacceptable, risk of dangerous accretions of government agency power?

Clearly, these are both theoretical and empirical questions which must be refined by adding “in the Trump Administration.” As David Martin noted—correctly in my view—“If we are to have an honest debate on the merits of ER, critics and reformers owe the public a more accurate picture of its real functioning.”<sup>120</sup> This is undertaken in the next Section.

#### IV. Which “Basic Principles”? Whose “Perverse Incentives”?

##### A. The Recognized Problems of Expedited Removal

The main justification for expedited removal was, first, its efficacy as a border control regime, primarily as to those with “frivolous” asylum claims.<sup>121</sup> Secondly, it is justified—at the border and internally—as enhancing enforcement through deterrence because, unlike simply returning people with no consequences, it imposes penalties on future possible re-entries.<sup>122</sup>

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118. *Id.* at 6 (emphasis added).

119. See MAGAÑA-SALGADO, *supra* note 82, at 4 (“The expansion . . . could subject a minimum of 328–440 additional undocumented immigrants to expedited removal.”).

120. Martin, *supra* note 40, at 681.

121. See SISKIN & WASEM, *supra* note 28, at 16 (“Proponents . . . contend that aliens use frivolous appeals to postpone deportation.”).

122. See Martin, *supra* note 40, at 675 (“[T]o lay the groundwork for more severe sanctions if they do not take the law enforcement hint . . .”).

Finally, expedited removal is commonly justified as being focused on those with low “stakes,” as it were.<sup>123</sup> But this is a defensive justification against critics.

As noted, expedited removal has faced severe criticism from human rights advocates and immigrant rights supporters from the moment it was first conceived.<sup>124</sup> Judges, too, as noted above, have recognized that the system is “fraught with risk of arbitrary, mistaken, or discriminatory behavior . . . .”<sup>125</sup> Indeed, even the proponents of expedited removal have recognized its potential dangers. In 2000, in the most sustained and sophisticated defense of the program, David Martin offered a series of admonitions and suggestions to maintain the legitimacy of the system. Martin urged, in summary form, that we:

1. Assure humane treatment and the ability to communicate with family and friends . . . ;
2. Improve internal monitoring of secondary inspection . . . ;
3. Provide for carefully designed outside monitoring and more complete statistics . . . ;
4. Limit ER to persons with fraudulent documents or no documents . . . ;
5. Improve consultation arrangements . . . ;
6. Avoid backsliding on key protections . . . ;
7. Resist any temptation to apply ER routinely to EWIs . . . .<sup>126</sup>

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123. See Martin, *supra* note 40, at 701 (relating the location of entry to the low stakes of removal); see also Koh, *supra* note 6, at 200–01 (critiquing Martin).

124. See Martin, *supra* note 40, at 674 n.2 (collecting critiques); Karen Musalo, *Expedited Removal*, 28 HUM. RTS. 12, 13 (2001) (criticizing lack of representation during secondary inspection interrogations); 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) (cataloguing errors in the expedited removal system); 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) (offering critique of the credible fear standard, secondary inspection, and expedited removal).

125. Khan v. Holder, 608 F.3d 325, 329 (7th Cir. 2010).

126. Martin, *supra* note 40, at 695–701.

This is a thoughtful, useful, but rather optimistic list. Though this Essay will not examine each of these criteria in detail, let us focus on a few major issues.

### *B. Detention*

A major impediment to assuring “humane treatment and the ability to communicate with family and friends”<sup>127</sup> is detention. One simply cannot disaggregate the structural connections between the problems of expedited removal and detention.<sup>128</sup> Let us start with the physical conditions. In one prominent case, for example, plaintiffs credibly alleged that,

detainees are packed into overcrowded and filthy holding cells, stripped of outer layers of clothing, and forced to endure brutally cold temperatures. They are denied beds, bedding, and sleep. They are deprived of basic sanitation and hygiene items like soap, sufficient toilet paper, sanitary napkins, diapers, and showers. And they are forced to go without adequate food, water, medicine, and medical care.<sup>129</sup>

Can the government “assure humane treatment” and maintain an ability to communicate with family and friends in the context of massive detention systems, many of which house people who have been arrested great distances away? How is communication to be facilitated? Who pays for phone calls? How can families find out where a detainee is housed? As many studies and legal actions have shown, the CBP and DHS record on such matters does not inspire great confidence.<sup>130</sup>

Consider, too, whether CBP has avoided “backsliding on key protections” even for asylum-seekers, a group that is specifically protected by the legislation that created expedited removal.<sup>131</sup>

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127. *Id.* at 695.

128. *See, e.g.*, Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 27–28 (2014) (noting that 400,000 people were subject to civil immigration incarceration in 2012).

129. *Doe v. Kelly*, 878 F.3d 710, 713–14 (9th Cir. 2017).

130. *See infra* Part IV.C (identifying CBP failures).

131. *See, e.g.*, *Castro v. U.S. Dep’t Homeland Sec.*, 835 F.3d 422, 426–27 (3d Cir. 2016) (reviewing statutory protections).

Despite an ostensibly protective regime, many studies, over many years, have repeatedly found deficiencies in CBP processes to identify, adjudicate and protect asylum claims.<sup>132</sup>

A recent study has also concluded that expedited removal and detention pose particular dangers to “women and their children held in detention centers in rural, isolated locations in Texas and Pennsylvania.”<sup>133</sup> As the study noted, “Given that very few asylum-seeking families speak English, most have experienced significant trauma in their countries or during their journeys north, and they have no right to government-appointed legal counsel, the bureaucratic hurdles can be insurmountable.”<sup>134</sup> The solution is “a robust legal process and legal assistance . . .”<sup>135</sup> But this, according to Martin and others, is precisely what expedited removal was designed to avoid.<sup>136</sup> We face, in short, what seems to be an intractable dilemma.<sup>137</sup>

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132. See, e.g., ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 20 (2016), <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf> (“Despite the small sample of CBP interviews observed, USCIRF found several examples of non-compliance with required procedures . . .”); Clara Long, “*You Don’t Have Rights Here*”: US Border Screening and Returns of Central Americans to Risk of Serious Harm, HUM. RTS. 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> (last visited Sept. 19, 2018) (finding that CBP “cursory screening fails to identify [asylum seekers]” and that “border officials . . . pressured them to abandon their claims”) (on file with the Washington and Lee Law Review).

133. See KATHRYN SHEPHERD & ROYCE BERNSTEIN MURRAY, AM. IMMIGR. COUNCIL, THE PERILS OF EXPEDITED REMOVAL: HOW FAST-TRACK DEPORTATIONS JEOPARDIZE ASYLUM SEEKERS 1 (2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_perils\\_of\\_expedited\\_removal\\_how\\_fast-track\\_deportations\\_jeopardize\\_detained\\_asylum\\_seekers.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations_jeopardize_detained_asylum_seekers.pdf) (“[E]xpedited removal, in conjunction with detention often results in disadvantaging . . . women and their children held in . . . Texas and Pennsylvania.”).

134. See *id.* at 5.

135. See *id.* at 26.

136. See *supra* notes 121–123 and accompanying text (describing the rationale of proponents of expedited removal).

137. But see Kari E. Hong & Stephen Manning, *Getting it Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673, 693 (2018) (asserting that legal representation does not necessarily slow down expedited removal).

*C. The Problems of CBP*

The recent history of CBP inspires justifiable fears that a surge in hiring or an expansion of mandate (per the Kelly Memorandum) would be accompanied by inadequate supervision, misconduct, impunity, and corruption. A rather tactfully entitled 2017 report by anthropologist Josiah Heyman, *Why Caution is Needed Before Hiring Additional Border Patrol Agents and ICE Officers*,<sup>138</sup> offers useful insights and admonitions based on extensive past studies of CBP and ICE. Heyman recounts that CBP expansion—from 4,287 agents in Fiscal Year (FY) 1994 to 19,828 in FY 2016—has been accompanied by concomitant increases in civil rights and constitutional violations, misuse of force, off-duty crimes like domestic violence, and corruption, “including taking bribes to smuggle drugs or people.”<sup>139</sup> The Center for Investigative Reporting confirmed 153 investigations of CBP personnel between 2000 and 2013.<sup>140</sup>

Similarly concerning are the frequent, dramatic reports of excessive force by CBP agents. There were some 1,700 allegations of excessive force against CBP from 2007 to 2012.<sup>141</sup> Such allegations declined by 26% between FY 2013 and FY 2015; but then rose by 21% in FY 2016.<sup>142</sup> As Heyman concludes, “the agency has not adequately confronted the vulnerabilities that could result from the poor management of a mass recruitment of new agents.”<sup>143</sup>

It is undoubtedly difficult for researchers to catalogue and document abuses by CBP agents because the victims of such misconduct are often quickly deported under expedited removal.<sup>144</sup>

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138. JOSIAH HEYMAN, AM. IMMIGR. COUNCIL, *WHY CAUTION IS NEEDED BEFORE HIRING ADDITIONAL BORDER PATROL AGENTS AND ICE OFFICERS* (2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/why\\_caution\\_is\\_needed\\_before\\_hiring\\_additional\\_border\\_patrol\\_agents\\_and\\_ice\\_officers\\_final.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/why_caution_is_needed_before_hiring_additional_border_patrol_agents_and_ice_officers_final.pdf).

139. *See id.* at 2 (quoting the Associated Press).

140. *Id.* at 3.

141. *Id.* at 5.

142. *Id.*

143. *Id.*

144. *See supra* notes 34–38 and accompanying text (presenting the removal process).

However, in a 2013 survey of 1,095 deported Mexicans, more than 100 reported physical abuse by U.S. authorities and more than 200 reported verbal abuse.<sup>145</sup> Earlier surveys of deported Salvadorans yielded similar results.<sup>146</sup> In 2015, the American Civil Liberties Union (ACLU) reported “agents’ violent, reckless, and threatening conduct, including physically assaulting non-threatening motorists; driving aggressively and tailgating at high speeds; wielding weapons, including knives, electroshock weapons, and assault rifles in routine traffic encounters; threatening to shoot motorists or their pets; and mocking and insulting motorists with profane and derogatory language.”<sup>147</sup>

Moreover, there have been tremendous discrepancies between CBP and others about agency oversight of complaints of illegal and unconstitutional actions by Border Patrol agents, such as unjustified searches and seizures.<sup>148</sup> This comports with other findings of lax agency oversight and impunity. A 2014 study found that, of “809 complaints alleging abuse against Border Patrol agents between January 2009 and January 2012 . . . among those cases in which a formal decision was issued, 97% resulted in no action taken.”<sup>149</sup>

Numerous studies have also found a pervasive, dangerous “code of silence” in CBP.<sup>150</sup> Indeed, DHS itself concluded that “the ‘code’ presents an insidious challenge to workforce integrity, and requires explicit, targeted and sustained attention.”<sup>151</sup> In 2016, James Tomsheck described CBP culture as “very different from the rest of U.S. law enforcement. They were an agency that had not

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145. HEYMAN, *supra* note 138, at 7. “The Border Patrol was involved in 67 percent of the physical abuses and 75 percent of verbal abuse incidents.” *Id.*

146. *See id.* (“This corresponds closely to rates reported in two previous systematic surveys of deported Salvadorans.”).

147. *Id.*

148. *See id.* (noting mismatch in reporting incidents between Arizona Border Patrol and DHS oversight agencies).

149. *Id.* at 9.

150. *See, e.g.*, HEYMAN, *supra* note 138, at 9 (“[A]n unwritten rule not to report another colleague’s errors, misconducts, or crimes . . . .”); TODD MILLER, BORDER PATROL NATION: DISPATCHES FROM THE FRONT LINES OF HOMELAND SECURITY 83–103 (2014) (reviewing a Border Patrol officer’s difficulties within the agency after being the subject of a Report of Unethical Behavior).

151. HEYMAN, *supra* note 138, at 9.

always been held accountable.”<sup>152</sup> During the Obama Administration, DHS promulgated some reforms for CBP.<sup>153</sup> However, the agency’s problems have clearly long been deep and widespread. As Josiah Heyman reports, most of these reforms have not been implemented.<sup>154</sup>

## V. Possible Solutions

### A. Habeas Reform and Judicial Review

Short of eliminating expedited removal or drastically overhauling CBP, meaningful judicial oversight of CBP actions would seem to be a potentially effective safeguard. However, as noted above, the same 1996 statutes that authorized expedited removal severely limited the federal courts’ jurisdiction to hear challenges on due process or other constitutional grounds.<sup>155</sup> Presumably, if Secretary Kelly’s expansion were undertaken, some avenues would be open.<sup>156</sup> Still, habeas review—the main avenue for constitutional challenges—is well described as “minimal.”<sup>157</sup>

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152. *Id.* at 10.

153. *See id.* at 12 (noting that there were over fifty-three recommendations).

154. *See id.* (“Although some recommendations have been undertaken, most have not.”).

155. *See* Laura W. Murphy & Timothy Edgar, *ACLU Comments on INS Notice to Expand Expedited Removal*, AM. C.L. UNION, <https://www.aclu.org/other/aclu-comments-ins-notice-expand-expedited-removal?redirect=aclu-comments-ins-notice-expand-expedited-removal> (last visited Sept. 19, 2018) (“Expedited removal . . . currently permits the expulsion, without further review and without a hearing, of individuals who arrive at the border without valid travel documents.”) (on file with the Washington and Lee Law Review); *supra* note 65 and accompanying text (describing the courts’ limitations).

156. Federal courts have reviewed some legal questions regarding expedited removal. *See, e.g.*, *Pena v. Lynch*, 815 F.3d 452, 456–57 (9th Cir. 2016) (“[T]he jurisdiction-stripping provisions of the statute retain some avenues of judicial review, limited though they may be.”).

157. *See* NAT’L IMMIGR. PROJECT OF THE NAT’L LAW. GUILD, *EXPEDITED REMOVAL: WHAT HAS CHANGED SINCE EXECUTIVE ORDER NO. 13767, BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS* (ISSUED ON JANUARY 25, 2017) 4 (2017), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/final\\_expedited\\_removal\\_advisory-\\_updated\\_2-21-17.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory-_updated_2-21-17.pdf) (“Litigation concerning the scope of habeas review . . . is minimal.”); *Smith v. U.S.*

Perhaps the last frontier for substantial constitutional challenges to expedited removal practices is the Suspension Clause.<sup>158</sup> In the 2016 Third Circuit case of *Castro v. United States Department of Homeland Security*,<sup>159</sup> twenty-eight families sought review of their expedited removal orders based on asylum officers' negative "credible fear determinations."<sup>160</sup> They asserted that if the expedited removal statute were not construed to provide for judicial review of such claims, the Suspension Clause would be violated.<sup>161</sup> The Third Circuit held that because petitioners were "seeking initial admission to the United States," they had no right to habeas review under the Suspension Clause even though the petitioners had physically entered the United States before being arrested by CBP.<sup>162</sup> Thus, the case presented an apparent conflict between statutory designation of petitioners as seeking admission and their actual presence on U.S. soil.

The court, however, reasoned that there is "a two-step inquiry whereby courts must first determine whether a given habeas petitioner is prohibited from invoking the Suspension Clause due to some attribute of the petitioner or to the circumstances surrounding his arrest or detention."<sup>163</sup> Contrary to the government's position, which had focused on the second step in this analysis, the court ruled that petitioners failed at the first step "because the Supreme Court has unequivocally concluded that 'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.'"<sup>164</sup> This may be true for some of those who have not

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Customs & Border Prot., 741 F.3d 1016, 1020 (9th Cir. 2014) ("We nevertheless hold that Smith is not entitled to the hearing he seeks, because as applied [the statute] does not allow review beyond the confines of the statute.").

158. The Ninth Circuit avoided this issue in *Smith*, 741 F.3d at 1022 n.6 ("[W]e need not reach the question of whether . . . petitioner . . . might still have claims under the Suspension Clause . . .").

159. 835 F.3d 422 (3d Cir. 2016), *cert. den.* 137 S. Ct. 1581 (2017).

160. *Id.* at 424–25.

161. *See id.* at 429 ("Petitioners challenge on appeal the District Court's holding that it lacked subject matter jurisdiction . . . as well as the Court's conclusion that [the statute] does not violate the Suspension Clause.").

162. *See id.* at 445–46 (denying the petitioners' claims).

163. *Id.* at 445 (citing *Boumediene v. Bush*, 553 U.S. 723, 739 (2008)).

164. *Id.*

physically set foot on US soil, but it is far from clear as to those who are already physically present.<sup>165</sup>

The Third Circuit panel also thought it important that “[p]etitioners were each apprehended within hours of surreptitiously entering the United States . . . .”<sup>166</sup> This led the panel to opine that, “we think it appropriate to treat them as ‘alien[s] seeking initial admission to the United States.’”<sup>167</sup> This was surely a rather abrupt and summary resolution of a major doctrinal dilemma about which the Supreme Court has never been clear.<sup>168</sup> It requires a much more thorough, nuanced, and historically informed analysis than “we think it appropriate.”<sup>169</sup> Nevertheless, the *Castro* court found that the families could not “invoke the Constitution, including the Suspension Clause, in an effort to force judicial review beyond what Congress has already granted them.”<sup>170</sup> If accepted by the Supreme Court, such reasoning would essentially confirm that much of the United States is now a Constitution-free zone.

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165. See *supra* notes 84–90 and accompanying text (discussing the impact of location and limits on executive power).

166. *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 445 (3d Cir. 2016).

167. *Id.*

168. See *supra* notes 84–90 and accompanying text (reviewing the ambiguity).

169. *Castro*, 835 F.3d at 445. The *Castro* court also strangely conflated due process and Suspension Clause analysis—as Steve Vladeck notes, aspects of the *Castro* court’s opinion can charitably be termed “simply nuts” because the court seems to imply that non-citizens physically present within the United States are less entitled to Suspension Clause protections than enemy belligerents detained outside the territorial United States. Steve Vladeck, *Third Circuit Holds Suspension Clause Does Not Apply to Non-Citizens Physically (but Not Lawfully) Present in the United States*, JUST SEC. (Aug. 29, 2016), <https://www.justsecurity.org/32597/circuit-holds-suspension-clause-apply-non-citizens-physically-but-lawfully-present-united-states/> (last visited Sept. 19, 2018) (on file with the Washington and Lee Law Review); see also Steve Vladeck, *More Trouble for Undocumented Immigrants and the Suspension Clause*, JUST SEC. (Mar. 14, 2018), <https://www.justsecurity.org/53822/trouble-undocumented-immigrants-suspension-clause> (last visited Sept. 19, 2018) (reviewing a companion Ninth Circuit case) (on file with the Washington and Lee Law Review).

170. *Castro*, 835 F.3d at 446.

The Supreme Court denied certiorari in *Castro* in April 2017.<sup>171</sup> But the basic issues continue to percolate.<sup>172</sup> In the Ninth Circuit, for example, another challenge to expedited removal brought by an asylum seeker could result in a split from *Castro*.<sup>173</sup> Vijayakumar Thuraissigiam, a Tamil asylum seeker who fled Sri Lanka after claiming that he was abducted and tortured, was apprehended shortly after crossing the US border.<sup>174</sup> He was given an expedited removal order “after the government determined that he did not have a credible fear of persecution.”<sup>175</sup> He challenged this disposition through a habeas petition.<sup>176</sup> District Court Judge Anthony J. Battaglia found that the unavailability of habeas for noncitizens subject to expedited removal did not violate the Suspension Clause.<sup>177</sup> In a remarkably chilling passage, the court recited the facts of the case, accepted as true for these purposes:

In 2014, Petitioner was approached by men on his farm who identified themselves as government intelligence officers and called Petitioner by his name. Petitioner was then pushed into a van where he was bound, beaten, and interrogated about his

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171. See *Castro v. Dept. Homeland Sec.*, 137 S. Ct. 1581, 1581 (2017) (denying cert).

172. In *Kabenga v. Holder*, 76 F. Supp. 3d 480 (S.D.N.Y. 2015), a New York district court judge found that a petitioner with a bona fide claim that his lawful permanent resident status had not been lawfully terminated at the time he was subject to expedited removal was entitled to a stay of removal and an immigration court hearing. See *id.* at 481, 486 (establishing facts and issuing a stay); *Kabenga v. Holder*, No. 14 Civ. 9084 (SAS), 2015 WL 728205, at \*1 (S.D.N.Y. Feb. 19, 2015) (granting the habeas petition). The case is currently before the Second Circuit. *Kabenga v. Lynch*, No. 15-1367 (2d Cir. filed Apr. 27, 2015).

173. I have signed an amicus brief in support of the Petitioner in this case. See Brief of Scholars of Immigration Law as *Amicus Curiae* in Support of Petitioner, *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, No. 18-55313 (9th Cir. Mar. 8, 2018) (arguing in favor of due process for all persons within the United States).

174. See *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 287 F. Supp. 3d 1077, 1078–79 (S.D. Cal. 2018), *appeal docketed*, No. 18-55313 (9th Cir. Mar. 8, 2018) (recounting torture event before noting that, “Petitioner entered the United States where he was apprehended by a Border Patrol Agent”).

175. *Id.* at 1079.

176. See *id.* at 1080 (“Petitioner’s emergency motion for a stay of removal devotes an entire section to asserting that this Court has jurisdiction to hear his Petition . . .”).

177. See *id.* at 1082 (collecting cases to support the ruling).

political activities . . . . Petitioner then endured additional torture before he woke up in a hospital where he spent several days recovering. . . . Petitioner went into hiding in Sri Lanka and India, and then in 2016 he fled the country.<sup>178</sup>

Notwithstanding the terrible power of these facts, the court concluded that the “strict restraints on this Court’s jurisdictional reach to review expedited removal orders does not violate the Suspension Clause.”<sup>179</sup> The essential, if rather chilling principle is that “a litigant may be unconstitutionally denied a forum when there is absolutely *no* avenue for judicial review of a colorable claim of constitutional deprivation.”<sup>180</sup> The judge also expressly cited the district court opinion in *Castro*, the “analysis and ultimate conclusion [of which] are incredibly persuasive to the Court.”<sup>181</sup>

Thuraissigiam’s habeas petition was thus dismissed and his motion for an emergency stay of removal was denied.<sup>182</sup> If legal challenges of this type are indeed a “testing crucible,” it is hard to imagine a more tragic conclusion than this:

The Court does not downplay the important role courts across the nation have in safeguarding the reliability and fairness of the immigration process. However, no matter how credible Petitioner’s claims of fear may be and the purported harsh consequences that may come to him if he is removed to his native country, the limited scope of this Court’s judicial review over expedited removal orders restricts it from hearing Petitioner’s claims.<sup>183</sup>

The case is now before the Ninth Circuit on appeal.<sup>184</sup> The essence of Petitioners’ argument is that “noncitizens have *always* been able to test the legality of their removal through habeas

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178. *Id.* at 1078 (internal citations omitted).

179. *Id.* at 1082.

180. *Id.* (citing *Pena v. Lynch*, 815 F.3d 452, 456 (9th Cir. 2015)); *see also id.* (citing *Garcia de Rincon v. Dep’t of Homeland Sec.*, 539 F.3d 1133, 1141–42 (9th Cir. 2008) for the proposition that “narrow habeas review . . . does not violate the Suspension Clause”).

181. *Thuraissigiam*, 287 F. Supp. 3d at 1083.

182. *See id.* at 1083–84 (declaring final orders).

183. *Id.* at 1083.

184. *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 287 F. Supp. 3d 1077 (S.D. Cal.), *appeal docketed*, No. 18-55313 (9th Cir. Mar. 8, 2018).

corpus, and neither this Court nor the Supreme Court has ever allowed Congress to eliminate that review.”<sup>185</sup> If the District Court were to be affirmed, it would thus be the first time that either the Ninth Circuit or the Supreme Court “permitted a noncitizen who entered the country to be removed without judicial scrutiny of the legality of the removal.”<sup>186</sup>

### B. Lawyers?

One of the most problematic aspects of expedited removal cases is the extreme difficulty in obtaining counsel. As many studies have shown, counsel can make a dramatic difference in outcomes in “regular” removal cases.<sup>187</sup> And yet, claims of a mere right to *access to counsel*—not a right to appointed counsel—in expedited removal have rarely been brought and, so far as I am aware, have never succeeded.<sup>188</sup> For most of expedited removal’s existence, the agencies in charge have strenuously resisted allowing counsel to participate in the process.<sup>189</sup>

In a recent Ninth Circuit case, *United States v. Peralta-Sanchez*,<sup>190</sup> a panel found that a noncitizen had no Fifth Amendment due process right to hire counsel in expedited removal.<sup>191</sup> Although the court’s opinion has since been

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185. Opening Brief of Appellant at 17, *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, No. 18-55313 (9th Cir. Mar. 8, 2018).

186. *Id.*

187. See, e.g., Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015) (“Moreover, we find that immigrants with attorneys fared far better . . .”).

188. See KATE M. MANUEL, CONG. RESEARCH SERV., R43613, ALIEN’S RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 1 n.4 (2016), <https://fas.org/sgp/crs/homsec/R43613.pdf> (collecting unsuccessful cases).

189. See EMILY CREIGHTON & ROBERT PAUW, AM. IMMIGR. COUNCIL, RIGHT TO COUNSEL BEFORE DHS 1 (2011) (“In many encounters with immigration agencies in the non-removal context, an attorney’s access to his or her noncitizen client is limited.”).

190. 847 F.3d 1124 (9th Cir. 2017), *opinion withdrawn on grant of reh’g*, 868 F.3d 852 (9th Cir. 2017), and *on reh’g*, 705 Fed. Appx. 542 (9th Cir. 2017).

191. See *id.* at 1139 (refusing to find that “aliens who illegally enter the United States and are subject to expedited removal proceedings . . . are constitutionally entitled to counsel”).

withdrawn,<sup>192</sup> its reasoning is significant, as this issue is likely to recur. The majority conceded that Peralta was entitled to *some* due process, but the key question was: “To *what* process—statutory and constitutional—was Peralta entitled?”<sup>193</sup>

Regarding counsel, the court first concluded that there was no such statutory right, either through the immigration statutes or the APA.<sup>194</sup> After asserting that the need for deference is particularly powerful in the area of immigration and naturalization, the court then rather quickly dismissed Peralta’s due process claim.<sup>195</sup> Applying the familiar *Mathews v. Eldridge*<sup>196</sup> framework, the court first concluded, formalistically, that “[t]hese proceedings are essentially *exclusion* proceedings, even if they can in some instances be applied to aliens who may have technically effected entry into the United States—like Peralta . . . .”<sup>197</sup> Moreover, the court asserted that expedited removal only “targets aliens who have either no residence here or only a limited residence.”<sup>198</sup> “Such an alien’s interest in remaining in the United States[,]” continued the panel, “is therefore much more limited than that of an alien already living here who has been placed in formal removal proceedings and stands to lose, perhaps, formal legal status here, and certainly the life he or she has created here.”<sup>199</sup> As to the “risk of error” factor, “the class of aliens to which expedited removal applies” was said to be “fairly narrow,” and the analysis required was seen as “straightforward” and “a relatively simple exercise” (at least as to those who do not claim asylum).<sup>200</sup>

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192. 847 F.3d 1124 (9th Cir. 2017), *opinion withdrawn on grant of reh’g*, 868 F.3d 852 (9th Cir. 2017), and *on reh’g*, 705 Fed. Appx. 542 (9th Cir. 2017).

193. *Id.* at 1132.

194. *See id.* at 1134 (“Peralta has no statutory right to obtain counsel in an expedited proceeding.”).

195. *See id.* at 1142 (“Peralta had no Fifth Amendment due process right to counsel in the expedited removal proceeding . . . .”). Hong and Manning suggest that this may be incorrect. *See Hong & Manning, supra* note 137, at 696–703 (discussing *Peralta-Sanchez*).

196. 424 U.S. 319 (1976).

197. *Peralta-Sanchez*, 847 F.3d at 1135.

198. *Id.*

199. *Id.* Peralta had, in fact, first come to the United States in 1979. *Id.* at 1128.

200. *Peralta-Sanchez*, 847 F.3d at 1136.

As noted above, these are all highly contestable claims which, one hopes, may eventually achieve more thoughtful and thorough resolution by the Supreme Court.

Peralta had argued that “counsel could provide assistance in cases like his, where a subsequent change in the law calls into question a previous order of removal.”<sup>201</sup> The court disputed that expedited removal cases are sufficiently complicated to necessitate counsel.<sup>202</sup> In my experience with post-deportation cases, however, there can be quite important roles for counsel to play.

Finally, the majority saw counsel as a burden on the government in this context. There would be “costs to the government that would result from the inevitable delay if an alien is entitled to seek counsel” including detention costs, and the need for government lawyers to respond.<sup>203</sup> In short, the majority concluded, introduction of counsel risks destroying the “expedited” removal process as such.<sup>204</sup> There is clearly much with which one might argue in this analysis. But it does appear that, as of this writing, a right of access to counsel in expedited removal seems unlikely to be achieved through litigation.<sup>205</sup>

This leaves us with few realistic solutions and with real concerns for the future of expedited immigration enforcement in the Trump era. Still, energetic lawyers may find ways. One can certainly envision, for example, a continuation of creative delaying (what I have called “monkey-wrench”) legal strategies such as those illustrated by a recent New York case in which a judge agreed that there must be, at least, “the freedom to say goodbye.”<sup>206</sup> In a recent Boston case, in which I appeared as an expert witness, a judge granted a preliminary injunction to slow the deportation of

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201. *Id.* at 1137.

202. *See id.* (“Expedited removal proceedings, by design, involve none of these complications [present in removal proceedings] . . .”).

203. *Id.* at 1138.

204. *See id.* (finding that expedited removal would turn into a trial-like proceeding).

205. *But see* Hong & Manning, *supra* note 137, at 678 (arguing “that speed . . . is compatible with meaningful access to counsel at three different stages of an expedited removal proceeding”).

206. Ragbir v. Sessions, No. 18-cv-236, 2018 WL 623557, at \*1 (S.D.N.Y. Jan. 29, 2018).

a group of Indonesian asylum-seekers on the grounds that compelling them to prepare motions to reopen from abroad could constitute irreparable procedural harm.<sup>207</sup> Such strategies are clearly less capacious and optimal than a full throated acceptance of habeas corpus jurisdiction and due process protections, but they may be all that is left for the moment. Still, though they are easy to disparage and to mock, we should note the historical resonance of strategies of this type. Abolitionist lawyers famously used similar methods to oppose the Fugitive Slave laws in the 1850s.<sup>208</sup> One might return, again, to the words of Henry Hart:

The law belongs to the people of the country, and to the hundreds of thousands of lawyers and judges who through the years have struggled, in their behalf, to make it coherent and intelligible and responsive to the people's sense of justice. . . . The appeal to principle is still open and, so long as courts of the United States sit with general jurisdiction in habeas corpus, that means an appeal to them and their successors.<sup>209</sup>

### C. Post-removal Review?

On the administrative/managerial side, I also would suggest—as a stop gap solution—a new idea: a post-removal review system. Even those who support expedited removal must recognize the prevalence of errors and the history of agency problems.<sup>210</sup> It has become apparent that the number of wrongful

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207. See *Devitri v. Cronen*, 289 F. Supp. 3d 287, 295 (D. Mass. 2018), *appeal docketed*, No. 18-1281 (1st Cir. Apr. 6, 2018) (finding that reviewing motion to reopen post-removal “does not meet the requirements of due process because of the significance of the liberty interests at stake”). What was perhaps most astonishing to ponder in this case was that the same judge concluded that she had no jurisdiction to review the argument that the petitioners would also face torture and persecution abroad. See Transcript of Motion Hearing on Preliminary Injunction at 31–33, *Devitri v. Cronen*, 289 F. Supp. 3d 287 (D. Mass. 2018) (No. 17-11842) (expressing trepidation on ruling on torture claim).

208. See, e.g., *In re Sims*, 61 Mass. 285, 294, 310 (1851) (reviewing unsuccessful challenge as to the constitutionality of fugitive slave laws).

209. See Hart, *supra* note 3, at 1396 (presenting the crucible formulation).

210. See *supra* Part IV (reviewing mistakes and abuses in the system).

removals has increased and will likely continue to do so.<sup>211</sup> If we are to be wedded to expeditious enforcement models, why not build in a safeguard? Let me emphasize what should be obvious: that I would not consider this a substitute for due process or counsel. It would merely be an extra layer of protection. A person who feels that an injustice was done in their case could contact this office—which should be staffed by independent attorneys—for a review of their matter. We have done this—at relatively little cost—at the Post Deportation Human Rights Project at Boston College Law School in conjunction with staff in Guatemala, and with input from NGO’s around the world.<sup>212</sup> The complexities are not trivial; but the possible benefits are great. These post-removal attorneys might also be granted special access to the oversight authorities within DHS or, perhaps, to some special form of Motion to Reconsider by adjudicators. The oft-criticized incentives for “delay” would not be present. Presumably, only those who felt that they were truly wronged would avail themselves of this long-shot remedy. Lawyers would not spend time on such cases unless they concluded that a real injustice had been done. My belief—based on many years of experience with such cases—is that many wrongs could be righted in this way. But let me be clear: this proposal should not be taken as an endorsement or a legitimization of expedited removal, as post-removal practice is difficult, cumbersome, and clearly inferior to representation and judicial review in the first instance.

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211. See, e.g., Part V.A (reviewing modern challenges to wrongful removal).

212. See M. Brinton Lykes et al., *The Post-Deportation Human Rights Project: Participatory Action Research with Maya Transnational Families*, 34 PRACTICING ANTHROPOLOGY 22, 22–26 (2012) (detailing the project’s work with Latino and Maya families), <https://www.bc.edu/content/dam/files/centers/humanrights/pdf/Lykes%20PA34%201%20post-deportation.pdf>.