

Getting it Righted: Access to Counsel in Rapid Removals

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GETTING IT RIGHTED: ACCESS TO COUNSEL IN RAPID REMOVALS

STEPHEN MANNING* & KARI HONG**

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I. INTRODUCTION

If you take the turn at the Big B Food Store and drive west out of Karnes City, Texas, you can trace along the roadside about one hundred linear miles of grassland. The grassland straddles a line between the wetter lands of central Texas and the drier climate of south Texas. The wildflowers are abundant with a mix of Virginia creeper, Mexican persimmon, and California poppies. It is easier than one would think to get lost in the grasses. From the town of Fashing to Charlotte, the road makes several ninety-degree turns, abrupt and as

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unexpected as the occasional bursts of flame from fracking wellheads hidden in the wildflowers. At Charlotte, just west of Interstate 35, the highway straightens and beelines to Dilley. As the highway enters Dilley, on the left a sign proclaims “Welcome to Dilley, Texas. ‘A Slice of the Good Life.’”¹

Underneath and between Dilley and Karnes City is the vast Eagle Ford Shale Formation—a southward sloping ancient sedimentary rock that is one of the most active oil and gas drilling sites in the United States.² The vast operations create a boomtown quality to Dilley and Karnes City with temporary housing for roughneck riggers springing up in meadows, fields, and farms.

Inside Dilley and Karnes City lie the concrete and wire realization of former-President Obama’s deportation-as-policy goals.³ The Karnes City Residential Center and the South Texas Residential Center—whose combined capacity to incarcerate small children and women who have been fast-tracked for deportation—nearly matches half the permanent free population of the towns.⁴

1. Anthony Kayruz, *A Slice of the Good Life*, THE POLITIC (Mar. 29, 2015), <http://thepolitic.org/a-slice-of-the-good-life/> [<https://perma.cc/MV26-EN64>]. See generally Jake Naughton, *Dilley, Tex., Home to the Nation’s Largest Immigration Detention Center*, N.Y. TIMES (Mar. 22, 2016), <https://www.nytimes.com/slideshow/2016/03/21/blogs/dilley-tex-home-to-the-nations-largest-immigration-detention-center/s/end.html> [<https://perma.cc/T2TY-UKES>].

2. EAGLE FORD SHALE, <https://eaglefordshale.com/> [<https://perma.cc/383K-TK8Z>] (last visited Mar. 7, 2018).

3. See Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016), <http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> [<https://perma.cc/EK5Y-LTKA>] (“According to governmental data, the Obama administration has deported more people than any other president’s administration in history. In fact, they have deported more than the sum of all the presidents of the 20th century.” (referencing U.S. DEP’T OF HOMELAND SECURITY, 2016 YEARBOOK OF IMMIGRATION STATISTICS, <https://www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20statistics.pdf> [<https://perma.cc/ETH4-BLVS>] (last visited Apr. 9, 2018))). More than 80% of individuals deported had no or no serious criminal record. See Elliot Young, *The Hard Truths About Obama’s Deportation Priorities*, HUFFINGTON POST (Mar. 1, 2017), http://www.huffingtonpost.com/entry/hard-truths-about-obamas-deportation-priorities_us_58b3c9e7e4b0658fc20f979e [<https://perma.cc/3TZ6-P4JL>].

4. According to the websites of CoreCivic and Geo Corporation (which operate South Texas Family Residential Center and Karnes County Detention Center, respectively), the combined detention capacity is 3,558 people. See *South Texas Family Residential Center*, CORECIVIC, <http://www.corecivic.com/facilities/south-texas-family-residential-center> [<http://perma.cc/CHC2-XU47>] (last visited Mar. 7, 2018); Naughton, *supra* note 1 (stating that South Texas Family Residential Center’s capacity is 2,400); *Karnes County Residential Center*, GEO GROUP, INC., <https://www.geogroup.com/FacilityDetail/FacilityID/58> [<https://perma.cc/5MU6-2QA8>] (last visited Mar. 7, 2018) (representing that its capacity is 1,158). Based on the most recent census, the population of Dilley, Texas, is 3,894, and the population of Karnes City, Texas, is 3,042. See *American Fact-Finder*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml>

If capacity is a measure of power, then the family detention centers in Dilley and Karnes City represent a significant expression of contemporary immigration power. Measured by size, they are the largest immigrant detention centers in the United States with a combined capacity equal to more than ten percent of the entire immigrant detention system.⁵ Dilley itself holds the distinction of being the largest immigrant detention center in the United States with a bed-capacity of 2,400 humans.⁶ Dilley is a converted man-camp for oil industry workers, that is now run for profit.⁷

In blunt legal force, Dilley and Karnes represent a concentrated dose of plenary power. Under a theory of plenary power, the political branches of the federal government exercise a nearly monarchical rule over noncitizens who have limited avenues for judicial review and, in theory, few substantive constitutional restraints.⁸ Section 235(b) of the Immigration and Nationality Act (INA),⁹ one of the Obama Administration's most powerful statutory provisions, was deployed in facilities such as Dilley and Karnes to create a zone of rapid removals. The statute, as we argue here, was intentionally designed for asymmetry. It maximizes executive power, minimizes process, and

[<https://perma.cc/3BF9-97MY>] (last visited Mar. 8, 2018) (enter Dilley city, Texas, into search field; and then enter Karnes City, Texas, into search field).

5. Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77, 86–88 (2016) (describing immigrant detention bed capacity); see also *supra* note 4 (noting that the combined capacity is 3,558 people).

6. Chico Harlan, *Inside the Administration's \$1 Billion Deal to Detain Central American Asylum Seekers*, WASH. POST (Aug. 14, 2016), https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html [<http://perma.cc/6X6U-YUQE>]; Naughton, *supra* note 1.

7. Harlan, *supra* note 6. CoreCivic, the new name for the Corrections Corporation of America (CCA), built and operates the facility in Dilley for the Department of Homeland Security, and earns a substantial amount of its profit from the detention of children and women. See Harlan, *supra* note 6 (“In 2015, the first full year in which the South Texas Family Residential Center was operating, CCA—which operates 74 facilities—made 14 percent of its revenue from that one center while recording record profit.”).

8. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“This Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.” (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))); *Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir. 1984) (addressing executive versus congressional authority within the plenary power doctrine); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 926 (1995) (synthesizing background principles on plenary power doctrine); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550–60 (1990) (describing foundations of plenary power).

9. Immigration and Nationality Act § 235, 8 U.S.C. § 1225 (2012).

eliminates judicial intervention—with a singular goal to deport at high velocity.¹⁰

The family detention complexes are not the only place where section 235(b)'s rapid removal regime has been deployed. In 1996, Congress created the rapid removal regime in a manner that “provid[es] comparatively fewer procedural safeguards—such as a trial attorney or an immigration judge.”¹¹ Rapid removals—also named “speed deportations” by Professor Shoba Sivaprasad Wadhia and “removal in the shadows of immigration court” by Jennifer Lee Koh—include section 235(b) expedited removal, reinstatement of removal under section 241(a)(5),¹² and administrative removal under section 238(b).¹³ Rapid removals concentrate power asymmetrically—fact-finding and law—into a structurally biased adjudicator whose decision is final and not subject to appeal.¹⁴

These rapid removal procedures have been devastatingly efficient in effectuating mass deportations. For example, in 2013, 44% of removals were expedited removals and 39% were reinstatement of removals.¹⁵ As noted by the late Judge Harry Pregerson in a dissenting opinion, “[t]hat means that 363,540 people—a staggering 83% of the people removed from the U.S. in 2013—were removed without a hearing, without a judge, without legal

10. Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 18–22 (2014) (explaining government's policy interest in speed); see David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 678–80 (2000).

11. Wadhia, *supra* note 10, at 2; accord Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017) (discussing these procedures).

12. Reinstatement of removal applies to those who have departed and reentered without permission after a prior removal order. Immigration and Nationality Act § 241(a)(5), 8 U.S.C. § 1231(a)(5); see sources cited *supra* note 11.

13. Administrative removal applies to non-lawful permanent residents who have been convicted of a crime that the officer deems an aggravated felony. Immigration and Nationality Act § 238(b), 8 U.S.C. § 1228; *Victoria-Faustino v. Sessions*, 865 F.3d 869, 871 (7th Cir. 2017) (vacating officer's determination that the criminal conviction was an aggravated felony and the non-citizen was subjected to the final administrative removal order, or FARO).

14. See Bo Cooper, *Procedures for Expedited Removal and Asylum Screening Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1501, 1502 (1997) (explaining that expedited removal represents “a colossal change” where a “months or years” long process was condensed into “hours”).

15. JOHN F. SIMANSKI, U.S. DEP'T. OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2013 (2014), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf [<https://perma.cc/CX6L-MMU2>].

representation, and without the opportunity to apply for most forms of relief from removal.¹⁶

The asymmetrical aspect of rapid removals has not gone unnoticed by the Trump Administration. Less than two weeks after his inauguration, President Trump ordered that rapid removals be considered a central component of his deportation policy.¹⁷ These rapid removals have been subjected to intense criticism for their anti-rule of law tendencies because low-level officers can make decisions without any accountability.¹⁸ There is little to no review but indelible adverse consequences for people who are deported, with and without error.¹⁹

This Article interrogates whether adequate access to counsel can partially overcome the anti-rule of law tendencies of section 235(b)'s rapid removal

16. United States v. Peralta-Sanchez, 847 F.3d 1124, 1143 (9th Cir. 2017) (Pregerson, J., dissenting) (citing SIMANSKI, *supra* note 15, at 1; ACLU, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 2 (2014), https://www.aclu.org/files/assets/120214-expeditedremoval_0.pdf [<https://perma.cc/E6GK-C6GB>]), *withdrawn on grant of reh'g*, 868 F.3d 852 (9th Cir. 2017), *memorandum disposition in* No. 14-50393, 2017 WL 3601725 (9th Cir. Aug. 22, 2017). We discuss the *American Exile* report's findings in greater detail below. See *infra* Section ILC.2.

17. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Abigail Hauslohner & David Nakamura, *In Memo, Trump Administration Weighs Expanding the Expedited Deportation Powers of DHS*, WASH. POST (July 14, 2017), https://www.washingtonpost.com/world/national-security/in-memo-trump-administration-weighs-expanding-the-expedited-deportation-powers-of-dhs/2017/07/14/ce5f16b4-68ba-11e7-9928-22d00a47778f_story.html [<http://perma.cc/7VQ7-B8FP>].

18. Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 580–83 (2007) (arguing that due process violations are exacerbated by lack of judicial review and wide-discretion given to low-level officers); see Kari Hong, *The Costs of Trumped-Up Immigration Enforcement Measures*, 2017 CARDOZO L. REV. DE NOVO 119, 124 (2017) (discussing details and costs of “President Trump’s two executive orders from January 2017, and their implementing memoranda, [which] outline his administration’s plan to prioritize up to eight million people for deportation, hire 15,000 agents to arrest them, build private prisons to detain them, and deport them by depriving them of hearings”); Koh, *supra* note 11, at 193 (“[T]he federal government has massively expanded its use of shadow proceedings which either entirely or effectively bypass immigration court adjudication.”); Michele R. Pistone & John J. Hoeffner, *Rules Are Made to be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 175–93 (2006) (describing failure of federal government to adhere to statutes and regulations governing expedited removal); Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT’L L. 117, 134–41 (2001) (arguing that expedited removal provisions violate international human rights laws).

19. Gebisa, *supra* note 18, at 580–83 (arguing that due process violations are exacerbated by lack of judicial review and wide-discretion given to low-level officers).

regime.²⁰ As a practical matter, there has been no immigration reform in over 20 years. Our country has been unable to provide status to Dreamers, one of the most sympathetic populations there is. It is not unreasonable to assume that of all the immigration reform that is needed, correcting the gross abuses that are out of the path, view, and sight of most Americans is far down the priority list. So, taking the rapid removal scheme as our immediate reality: Would adequate access to counsel mitigate against erroneous removals without undermining the statute's goal of speed?

In Part II, this Article describes the metrics of mass rapid removal. We focus on INA § 235(b)'s expedited removal regime in light of the Trump Administration's focus on its expansion. We overlay the statutory and regulatory framework with recent and current field practice for understanding how the regime actually operates. We identify three distinct moments where adjudications occur and describe the asymmetrical nature of the fact-finding and decision-making at each of these stages. Using government generated data, we outline the troubling incidence of error in the different stages of expedited removal.

In Part III, for the pragmatic concerns listed above, we take an agnostic view of the rapid removal regime's goal of velocity and argue that speed—the critical defining criteria of rapid removals—is compatible with meaningful access to counsel at three different stages of an expedited removal proceeding. We describe the process that is due to noncitizens in removal proceedings through the familiar *Mathews v. Eldridge* framework.²¹ In particular, we address a 2017 decision from the U.S. Court of Appeals for the Ninth Circuit, *United States v. Peralta-Sanchez*, where a three judge panel was faced with the question of whether access to counsel is required in expedited removal.²² A 2-1 decision initially held that, pursuant to *Mathews v. Eldridge*,²³ there is no Fifth Amendment right to counsel in expedited removal proceedings.²⁴ In response to a rehearing petition, the panel vacated this decision, and resolved the case on a different issue in an unpublished disposition.²⁵ Nonetheless, this Article

20. The statutory emphasis on speed is likely not a rational policy choice because of its anti-rule of law tendencies. To obtain speed, accountability mechanisms must be removed.

21. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

22. See *United States v. Peralta-Sanchez*, 847 F.3d 1124 (9th Cir. 2017), *withdrawn on grant of reh'g*, 868 F.3d 852 (9th Cir. 2017), *memorandum disposition in* No. 14-50393, 2017 WL 3601725 (9th Cir. Aug. 22, 2017).

23. 424 U.S. 319.

24. *Peralta-Sanchez*, 847 F.3d at 1142.

25. See *Peralta-Sanchez*, No. 14-50393, 2017 WL 3601725.

examines how the majority opinion missed critical considerations in reaching the later-vacated decision.

Analyzing examples from the pro bono attorney representation projects at the South Texas Residential Center that provide access to counsel to those in expedited removal proceedings, Ingrid Eagley and Steven Shaffer's 2015 study on access to counsel, court decisions, and published investigative reports, there is no doubt that legal representation improves the accuracy of the determinations made in expedited removal proceedings. From surveys conducted at two different detention centers where more than 35,000 non-citizens were provided legal representation in expedited removal proceedings, removals for those with legal representation dropped at rates of 97% and 99%.²⁶ Lawyers stopped removal for those who had been wrongfully subjected to expedited removal proceedings or had a basis to request legal status. This was done without sacrificing speed in the adjudication.²⁷

In Part IV we conclude that providing meaningful access to counsel throughout the expedited removal regime—at each of the critical fact-finding and adjudication moments—improves accuracy without substantially impacting speed. Not only does it improve accuracy, but the constitutional requirements of due process strongly favor meaningful access to counsel in light of the interests at stake.

II. THE METRICS OF MASS RAPID REMOVAL

The rapid removal regime works hard to remove noncitizens on a massive scale. From 1996 to 2016, there were 5,612,142 people ordered removed from

26. Stephen Manning, Innovation Law Lab, *Migration Policy Institute's Immigration Policy Enforcement Conference*, C-SPAN, at 6:28 (Sept. 12, 2016) [hereinafter Manning, *Conference*], <https://www.c-span.org/video/?415068-102/immigration-policy-enforcement> [<https://perma.cc/59SC-7BM8>] (citing the 35,000 number of women and children subjected to expedited removal); *id.* at 8:47–9:01 (explaining data and saying that “nearly universally” expedited removal orders were rescinded and fewer than 0.01% of CARA represented that clients were removed during the expedited removal process); STEPHEN W. MANNING, INNOVATION LAW LAB, *THE ARTESIA REPORT* ch. X, <https://innovationlawlab.org/the-artesia-report/the-artesia-report/> [<https://perma.cc/5F87-B2UK>] (last visited Mar. 7, 2018) [hereinafter ARTESIA REPORT] (stating that after attorney representation began, “[t]he pace of removals fell 80% within one month and, within two months, it had fallen 97%”).

27. Indeed, the available empirical data indicates that attorney participation in the expedited removal proceedings has no meaningful impact on the pace of adjudication. At the Dilley detention center, known formally as the South Texas Family Residential Center, where counsel is available to any person detained there, the expedited removal proceedings generally take two to four weeks. *See Flores v. Lynch*, 212 F. Supp. 3d 907, 910 (C.D. Cal. 2015).

the United States, which averages to 280,607 people each year.²⁸ By way of contrast, before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), in 1980 and 1990, 18,013 and 30,039 people, respectively, were ordered deported, jumping from 69,680 to 114,432 in 1997, and peaking in 2013 with 433,034 removals.²⁹

From 2010 to 2016, when data is available, rapid removals accounted for 76% of all removals.³⁰ That is a lot of humanity—extrapolating the 76% rate across all 20 years, that means 4,238,374 people were removed without a hearing, without a judge, and without a lawyer.

Most of those rapid removals originate with section 235(b)'s expedited removal statute.³¹ Once the Department of Homeland Security (DHS) opts to employ its prosecutorial discretion to use section 235(b)'s expedited removal regime against a particular non-citizen, the removal process unfolds in three key moments: (1) an initial fact-finding and adjudication of removability; (2) a credible fear screening for benefits under law; and (3) an administrative review of any adverse fear screening decision.³² Each stage of the proceedings are governed by statute and regulation.³³ If the words of the statute and regulations were properly adhered to, adjudications might result in consistently correct decision-making. Yet the asymmetrical aspect of the statute and regulations eliminate any systemic accountability and rely on the good graces—and presumed infallibility—of the low-level officials who carry out the program. Persuasive analysis of what these low-level officials do in practice, however, demonstrates troubling incidences of error at each step.

A. Adjudications in Expedited Removal

In form, section 235(b) authorizes rapid removals that bypass court oversight and review. The physical border zone of the United States is already

28. U.S. DEP'T OF HOMELAND SECURITY, 2016 YEARBOOK OF IMMIGRATION STATISTICS tbl.39 (2017), <https://www.dhs.gov/immigration-statistics/yearbook/2016/table39> [<https://perma.cc/8TZN-3S42>]. In 2016, the number fell to 340,056. *Id.*

29. *Id.*

30. See BRYAN BAKER, U.S. DEP'T. OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2016, at 8 tbl.6 (2017), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf [<https://perma.cc/RJ3N-ZTVW>].

31. *See id.* From 2010 to 2016, 38.8% of all removals were from expedited removals and 36.7% were from reinstatement of removal procedures. *Id.* The remaining 24.5% include regular removal proceedings and final administrative removal orders, in which a single immigration officer finds that a non-citizen has a prior conviction that is an aggravated felony. *Id.*

32. *See infra* Section II.A.1–3.

33. *See* Immigration and Nationality Act § 235, 8 U.S.C. § 1225 (2012).

a constitutionally dark area and, inside this obscurity, Congress built section 235(b) to distill executive immigration power by function, form, and implementation. Its function is rapid removals—really, really rapid removals. Its singular goal seems to be to get a final, unappealable, executable removal order in the shortest period of time possible.³⁴

Detention insidiously became an integral feature of the expedited removal scheme. In response to the Central American refugee crisis, President Obama himself sent the clear message that deportation would happen within ten to fifteen days of a person's arrival, a policy designed not to speed up the asylum process but to quickly reach the predestined denial. As he explained in an interview with George Stephanopoulos, "Do not send your children to the borders If they do make it, they'll get sent back. More importantly, they may not make it."³⁵ The expedited process was designed then for the deported person to be a testament to the inhospitality of the United States. To realize then the promise of velocity, it was no accident that the Obama administration chose to build detention centers from scratch in remote, isolated areas that were far from cities, towns, and, most importantly, lawyers.³⁶ The detention center was really created to serve as a deportation center.

34. See U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-98-81, *ILLEGAL ALIENS: CHANGES IN THE PROCESS OF DENYING ALIENS ENTRY INTO THE UNITED STATES* 38 tbl.2.3 (1998) (providing completion times ranging from just under 2.5 hours up to over 7 hours).

35. Juan Carlos Llorca, *Fed Says They Will Expedite Deportations to 10–15 Days at N.M. Facility*, SEATTLE TIMES (Jun. 27, 2014), <https://www.seattletimes.com/nation-world/fed-says-they-will-expedite-deportations-to-10-15-days-at-nm-facility/> [<https://perma.cc/8QP4-ZG92>].

36. ARTESIA REPORT, *supra* note 26, at ch. III ("On June 24, 2014, Artesia opened. It was designed by the Obama Administration to deport rapidly. It was the Obama Administration's carefully orchestrated machine that had been efficiently built to effectuate 'waves' of deportations—massive incidents of deportations occurring at a high velocity. Obama's officials explained that the detention center in Artesia was the tool to achieve the goal of 'processing the immigrants and hav[ing] them deported within 10 to 15 days to send a message back to their home countries that there are consequences for illegal immigration.'" (alteration in original) (citations omitted)). The expedited removal statute authorizes the DHS to detain a noncitizen during the credible fear process. 8 U.S.C. § 1225(b)(1)(B)(ii) (2012). The detention authority changes depending on how far into the credible fear process the noncitizen's claim has advanced. See 8 U.S.C. § 1225. A noncitizen may be detained incident to her apprehension and this period is generally limited to forty-eight hours. During this period of apprehension, if DHS elects to use the expedited removal process against the noncitizen, she will be ordered removed under section 235(b)(1)(A)(i) of the Immigration and Nationality Act. 8 U.S.C. § 1225(b)(1)(A)(i). There is a dispute between advocates and the DHS about the detention authority for noncitizens in the early stages of the credible fear process—a dispute that the courts have not resolved. Detention may be authorized under section 241(a)(2) of the Immigration and Nationality Act because there is a final order of removal, 8 U.S.C. § 1231(a)(2), or it may be inferred under section 235(b)'s inspection regime because there is no clear statutory authorization in the statute for detention during this period. See 8 U.S.C. § 1225(b). There is a regulation that DHS relies on to detain a credible fear applicant. 8 C.F.R. § 235.3(b) (2017). This regulation may be unlawful but, because of the jurisdictional preclusion rules, no court has actually resolved the issue. Once an applicant is found to have a credible fear, her detention is initially authorized under section 235(b)(1)(B)(ii). 8 U.S.C.

As mentioned above, in an expedited removal proceeding, there are three distinct moments where different adjudications take place based on three different factual records. First, there is an adjudication of removability and the entry of an expedited removal order by one agency.³⁷ Second, a separate agency creates a separate factual record and adjudicates whether the noncitizen has a cognizable credible fear of persecution or torture.³⁸ Third, an immigration judge, in an ex parte proceeding, conducts a de novo review of any adverse credible fear determinations.³⁹ Each is taken up separately below.

1. Removability

The first moment for an adjudication is, actually, a nearly simultaneous act of fact-finding and adjudication.⁴⁰ At the time of apprehension, an immigration officer makes an initial determination that a noncitizen is inadmissible to the United States, based on whether she falls in one or more of the dozens of grounds defined by Congress, which may range from the minor conduct of not being in possession of the right documents for admission to the United States, such as a visa or admission papers, or the more serious allegations that she has engaged in fraud or misrepresentation of a material fact to gain admission.⁴¹ The immigration officer conducts an interrogation of the noncitizen using a prescribed form, reads the form to the noncitizen, and then orders her

§ 1225(b)(1)(B)(ii). There is a dispute between the DHS and advocates as to when this detention authority ends and shifts to section 236(a), 8 U.S.C. § 1226(a) (the general, discretionary detention authority). For noncitizens who appear at a port-of-entry, the DHS asserts that this detention authority continues until the noncitizen's application for asylum is adjudicated. A better reading of the statute is that the detention authority ends (as does section 236(a), 8 U.S.C. § 1225(a)), when removal proceedings are commenced. *Id.* If an applicant is found to *not* have a credible fear, detention is authorized under section 235(b)(1)(B)(iii)(IV). 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). This section provides for detention until after an immigration judge reviews the negative credible fear finding and, if affirmed, until removal. *See id.*

37. *See infra* Section II.A.1.

38. *See infra* Section II.A.2.

39. *See infra* Section II.A.3.

40. *See* ELIZABETH CASSIDY & TIFFANY LYNCH, U.S COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL, at vii (2016) [hereinafter USCIRF STUDY 2016].

41. *See* 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. § 235.3(b)(1) (defining applicability of expedited removal procedures); Immigration and Nationality Act § 212, 8 U.S.C. § 1182. The general categories include health-related grounds (subsection (a)(1)); crimes (subsection (a)(2)); security (subsection (a)(3)); likelihood of being a public charge (subsection (a)(4)); failure to abide by certain employment conditions (subsection (a)(5)); engagement in fraud or failure to appear at hearings (subsection (a)(6)); lack of documentation or status (subsection (a)(7)); draft evaders (subsection (a)(8)); and those previously ordered removed (subsection (a)(9)). *Id.*

removed.⁴² The regulations require that “[i]n every case in which the expedited removal provisions will be applied and before removing an alien from the United States pursuant to this section, the examining officer shall create a record of the facts of the case and statements made by the alien.”⁴³ The examining officer must use a particular form, Form I-867A/B, or “Record of Sworn Statement in Proceedings under Section 235(a)(1) of the Act” to record the facts of the case.⁴⁴

Outside the presence of and without hearing from the noncitizen, the examining immigration officer presents her findings and conclusion to another immigration officer—which is her supervisor.⁴⁵ This is a markedly different process than regular removal proceedings where an impartial factfinder is charged with the determination to order someone removed.⁴⁶ Even though there are criticisms that regular removal proceedings also have a bias towards removal, the factfinder is not the same person who also made the initial determination to charge the non-citizen.⁴⁷ Statistics that show some degree of independence exists as measured by the high rates by which immigration judges grant relief to non-citizens, rates that increase dramatically when non-citizens are represented by counsel.⁴⁸

42. 8 C.F.R. § 235.3(b)(2)(i).

43. *Id.*

44. *Id.*; USCIRF STUDY 2016, *supra* note 40, at 75 app. A (reproducing Form I867A/B).

45. 8 C.F.R. § 235.3(b)(2)(i); USCIRF STUDY 2016, *supra* note 40, at 75 app. A (reproducing Form I867A/B).

46. *See, e.g.*, Immigration and Nationality Act § 240, 8 U.S.C. § 1229a.

47. Kari Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 330–42 (2014) (discussing structural biases towards removal, including the lack of independence from the prosecuting attorneys and political pressures, facing immigration judges and members of the Board of Immigration Appeals).

48. Before Trump took office, approximately half of the people in regular removal proceedings were granted status. *See* Esther Yu Hsi Lee, *Immigrants Are Winning Half of All Deportation Cases So Far This Year*, THINKPROGRESS (Feb. 18, 2014), <https://thinkprogress.org/immigrants-are-winning-half-of-all-deportation-cases-so-far-this-year-fe5a58dbd78e/#.qapy4ggom> [<https://perma.cc/9BZS-UZ5Y>]. Even under Trump, for those *with attorneys*, the granted rate is much higher. In 2017, in one New York City immigration court, a program found a lawyer for every detained case: the grant rate went from 4% percent to 24%, and is predicted to be 77% when all pending cases are counted. *See* Dara Lind, *A New York Courtroom Gave Every Detained Immigrant A Lawyer. The Results Were Staggering*, VOX (Nov. 9, 2017), <https://www.vox.com/policy-and-politics/2017/11/9/16623906/immigration-court-lawyer> [<https://perma.cc/ZBM8-R3DS>]. The profound impact that representation has on outcomes was corroborated in a national study of 1.2 million cases showing that, for those outside of detention, grant rates went from 13% to 63% if the non-citizen had an attorney. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 53 tbl.3 (2015).

Returning to section 235, the officer's supervisor then reviews the documents prepared by the examining officer, but does not hear from or directly inquire of the noncitizen.⁴⁹ Then, using a single form, Form I-860, or "Notice and Order of Expedited Removal," the examining immigration officer simultaneously serves notice of the finding of removability *and* the removal order itself.⁵⁰ Eventually everyone is expected to read everything, it all gets initialed, and that is it.⁵¹

2. Credible Fear Screening

The second adjudication within section 235(b)'s expedited removal regime is triggered if and only if the noncitizen expresses a fear of return or an intent to seek asylum.⁵² This is the credible fear screening.

Credible fear screening is supposed to "quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch."⁵³ The statute tasks an "asylum officer" with the exclusive jurisdiction to make a credible fear determination.⁵⁴ The determination can *only* be made after an interview.⁵⁵ The regulations prescribe the form and content of the interview.⁵⁶ The interview must be non-adversarial and private,⁵⁷ and the purpose of the

49. 8 C.F.R. § 235.3(b)(2), (b)(7). The supervisor has to review "the sworn statement and any answers and statements made by the alien regarding a fear of removal or return." *Id.* § 235.3(b)(7). If there is a claim of lawful permanent residence status, the supervisor is authorized to ask for additional information, in his or her discretion, and may also direct that the noncitizen be interviewed again. *Id.*

50. *Id.*

51. *See* 8 C.F.R. § 235.3(b)(2); U.S. DEP'T OF HOMELAND SECURITY, CUSTOMS & BORDER PROT., INSPECTOR'S FIELD MANUAL ch. 17.15(b) (2006) [hereinafter INSPECTOR'S FIELD MANUAL]; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 34, at 32.

52. Immigration and Nationality Act § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii) (2012) (describing referral process); 8 C.F.R. § 235.3(b)(4) ("If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with the removal of the alien until the alien has been referred for an interview by an asylum officer in accordance with 8 C.F.R. 208.30."); 8 C.F.R. § 208.30 (providing different steps of credible fear screening). *See generally* Immigration and Nationality Act § 235(b)(1)(E), 8 U.S.C. § 1225(b)(1)(E) (defining "asylum officer").

53. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999) (interim rule).

54. Immigration and Nationality Act § 235(b)(1)(B)(i), 8 U.S.C. § 1225(b)(1)(B)(i) (2012) (delegating role exclusively to asylum officer); 8 U.S.C. § 1225(b)(1)(E) (defining "asylum officer"); 8 C.F.R. § 208.30(a).

55. *See* 8 U.S.C. § 1225(b)(1)(B)(i) (stating that "[a]n asylum officer shall conduct interviews of aliens referred" for a credible screening); 8 C.F.R. § 208.30(d).

56. 8 C.F.R. § 208.30(d).

57. *Id.*

interview is to elicit all relevant and useful information regarding a credible fear of persecution.⁵⁸

The credible fear standard is a threshold screening device, or at least it was statutorily intended to be.⁵⁹ A noncitizen satisfies the credible fear standard if she proves a “significant possibility” that she could prove by a preponderance of the evidence that she is eligible for asylum.⁶⁰ “Essentially, the asylum officer is applying a threshold screening standard to decide whether an asylum claim holds enough promise that it should be heard through the regular, full process or whether, instead, the person’s removal should be effected through the expedited process.”⁶¹

What “significant possibility of persecution” means has never been tested in the courts and, in practice, is saddled with an elusive (and likely unlawful) agency interpretation.⁶² The elusive nature of the government’s interpretation

58. *Id.*

59. SARA CAMPOS & JOAN FRIEDLAND, AMERICAN IMMIGRATION COUNCIL, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT, 3–4 (May 2014), <https://www.americanimmigrationcouncil.org/research/mexican-and-central-american-asylum-and-credible-fear-claims-background-and-context> [https://perma.cc/EV7Y-YYL5] (describing persuasive evidence of government manipulation of the credible fear process for political reasons).

60. 8 U.S.C. § 1225(b)(1)(B)(v) (defining “credible fear of persecution” to mean “that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208”). To demonstrate eligibility for asylum, an applicant has the burden to prove by a preponderance of the evidence that she satisfies the refugee definition. Immigration and Nationality Act § 208(b), 8 U.S.C. § 1158(b).

61. Cooper, *supra* note 14, at 1503.

62. For purposes of this Article, we rely on the government’s asylum office’s interpretation of the statute without rendering any analysis as to the correctness of the government’s interpretation. The government’s interpretation of “credible fear” has been deeply criticized as being ideologically motivated and in derogation of the statutory standard. The government’s interpretation changed in an arguably dramatic fashion in 2014 when many Central Americans arrived at the U.S. border to apply for asylum. See CAMPOS & FRIEDLAND, *supra* note 59, at 4 (“[A] fair reading of the Lesson Plan leaves one with the clearly improper message that asylum officers must apply a standard that far surpasses what is intended by the statutory framework and U.S. asylum law.” (quoting noted scholar Bill Ong Hing)); DREE K. COLLOPY, CRISIS AT THE BORDER, PART II: DEMONSTRATING CREDIBLE FEAR OF PERSECUTION OR TORTURE (2016), Westlaw 16-04 Immigration Briefings (“Legal scholars and advocates criticized these 2014 changes as unlawfully heightening the standard of proof for demonstrating a credible fear of persecution and torture.”) [hereinafter COLLOPY, CRISIS AT THE BORDER]; Angela Edman & Dree Collopy, *Credible Fear Lesson Plans Comparison Chart: 2006 to 2014 to 2017*, AILA Doc. No. 17032901 (Mar. 29, 2017). There is a better interpretation of the statutory credible fear standard that would require that an applicant demonstrate a fear that is subjectively reasonable and not objectively unfounded. See, e.g., UNITED NATIONS HIGH COMM’R FOR REFUGEES (UNHCR), A THEMATIC COMPILATION OF EXECUTIVE COMMITTEE CONCLUSIONS

of “credible fear” is apparent in its training materials where it describes, variously, the standard as “a *substantial and realistic possibility* of succeeding,” as “not requiring the applicant to show that he or she is more likely than not going to succeed when before an immigration judge,” and a claim must have more than a minimal or mere possibility of success.⁶³ An applicant “must produce sufficiently convincing evidence that establishes the facts of the case, and that those facts must meet the relevant legal standard.”⁶⁴ These different formulations of the standard are further tugged in different directions by other important considerations in applying the agency’s interpretation of “significant possibility.”⁶⁵

The asylum officer is supposed to create a factual record that is used for the credible fear determination.⁶⁶ The record must be written, include a summary of the material facts, and should be based on the noncitizen’s testimony and “such other facts as are known to the officer.”⁶⁷ This record is memorialized, in the normal course, on either government form I-870, “Record of Determination/Credible Fear Worksheet” (for positive findings), or form I-869, “Record of Negative Credible Fear Finding and Request for Review by Immigration Judge.”⁶⁸ According to the standard operating procedures for credible fear screening at one of the family detention centers, the record of proceeding may include other documents, but not necessarily “routine” country conditions information.⁶⁹

Obviously, as a practical matter, to reach this stage requires that an expression of fear or intention for asylum is recorded properly because in the

438–39 (7th ed. 2014) (threshold asylum screenings should be adjudged by a “manifestly unfounded” or “abusive character” standard).

63. U.S. CITIZENSHIP AND IMMIGRATION SERV.’S–RAIO, ASYLUM DIVISION OFFICER TRAINING COURSE: CREDIBLE FEAR 14–15 (2014) [hereinafter USCIS CREDIBLE FEAR TRAINING 2014].

64. *Id.* at 12.

65. *Id.* at 15–16.

66. Immigration and Nationality Act § 235(b)(1)(B)(iii)(II), 8 U.S.C. § 1225(b)(1)(B)(iii)(II) (2012); 8 C.F.R. § 208.30(e)(1) (2017).

67. U.S.C. § 1225(b)(1)(B)(iii)(II), (v); *accord* 8 C.F.R. § 208.30(e)(1) (“The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officer, and the officer’s determination of whether, in light of such facts, the alien has established a credible fear of persecution or torture.”).

68. USCIS, CREDIBLE FEAR TRAINING 2014, *supra* note 63, at 1–2.

69. U.S. CITIZENSHIP AND IMMIGRATION SERV.’S, CREDIBLE FEAR PROCESSING GUIDE 3–4, https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies_and_Manuals/Credible_Fear_Guidance.pdf [<https://perma.cc/3LPA-9VNR>] (last visited Mar. 8, 2018) [hereinafter USCIS, CREDIBLE FEAR GUIDE].

supervisory review process there is no means to compare what was actually said during the examining officer's interrogation of the noncitizen with what the examining officer recorded in the record of proceedings.⁷⁰

3. Credible Fear Review

The third adjudication is triggered if the noncitizen fails the second adjudication. An immigration judge may review, at the noncitizen's request, a negative credible fear determination.⁷¹ The immigration judge receives a record of proceeding from the asylum office that must consist of the written record of the negative fear determination, the summary of material facts, and other materials on which the negative credible fear determination was based.⁷² This fear review can take place by telephone without the noncitizen's consent.⁷³ The immigration judge creates a new record of proceeding for the fear review⁷⁴ which can consist of "any oral or written statement which is material and relevant to any issue in the review."⁷⁵

Through its implementation, section 235(b) "give[s] officers a great deal of authority over removal of aliens[.]"⁷⁶ This "great deal of authority" has no accountability check other than strict adherence to the formal rules of the process because Congress has precluded judicial review over individualized expedited removal orders and created barriers to systemic challenges to its implementation that have never been overcome in its twenty-plus years existence.⁷⁷

B. Attorneys & Expedited Removal Proceedings

While this Article is about the *constitutional* right of access to counsel during expedited removal proceedings, there is strong statutory basis for a right

70. As we explain later, there are numerous documented incidences of error when the records of proceeding are created. *See infra* Section II.C.

71. 8 C.F.R. § 1208.30(g)(2)(i) (2017). While the statute and regulations place the burden on the noncitizen to request a fear review, the government's practice to date has been to presume the noncitizen wants review and requires the noncitizen to opt out of the review process. *See* USCIS, CREDIBLE FEAR GUIDE, *supra* note 69, at 47–48.

72. 8 C.F.R. §§ 208.30(g)(2)(ii), 1208.30(g)(2)(ii), 1003.42(a).

73. *Id.* § 1003.25(c).

74. *Id.* § 1003.42(b).

75. *Id.* § 1003.42(c).

76. INSPECTOR'S FIELD MANUAL, *supra* note 51, at ch. 17.15(b).

77. Immigration and Nationality Act § 242(a)(2)(A)(iii), (e), 8 U.S.C. § 1252(a)(2)(A)(iii), (e) (2012); *see* *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 429–33 (3d Cir. 2016) (collecting cases).

of access to counsel⁷⁸—statutes and regulations which the government has never seriously addressed. Though the legislative history is sparse on the point, when the expedited removal statute was enacted, a statutory grant of authority was provided for noncitizens to access non-attorneys during, at least, the credible fear proceedings.⁷⁹ This made sense in a very practical way: attorney representation at the place of the expedited proceedings was, in 1996, largely non-existent. When expedited removal was first implemented it was confined mostly to the airports and ports of entry⁸⁰—and attorneys were not then regularly appearing to represent individuals at the airports. It is easy to imagine though that clergy, religious organizations, friends, and family were often at airports and ports of entry to greet newcomers and family. Yet the rules regarding representation at immigration proceedings would not have permitted any of these individuals to assist a noncitizen trapped in expedited removal in any functional basis.⁸¹ To accommodate them, the statute included a provision providing for the right to consult prior to a credible fear interview.⁸² The government has interpreted this provision as displacing a right of access to *attorney representation* during all stages of the expedited removal proceeding.⁸³

78. See, e.g., 5 U.S.C. § 555(b) (2012).

79. 8 U.S.C. § 1225(b)(1)(B)(iv).

80. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10311, 10319–20 (Mar. 6, 1997) [hereinafter Expedited Removal Final Rule] (expressing government intent to hold most credible fear interviews at detention centers while leaving open the possibility of airports and ports of entry). A lot has changed since then. See, e.g., Margaret Taylor & Kit Johnson, “Vast Hordes . . . Crowding in Upon Us”: *The Executive Branch’s Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 185, 199 (2015) (“What changed the outcomes at Artesia was a massive mobilization of pro bono attorneys to challenge the machinery of deportation erected there. Volunteers at Artesia worked in teams to represent detained mothers and children—seeking new credible fear interviews to prevent imminent removals, petitioning for release of families on bond, and representing applicants at merits hearings.”); Jonah Engel Bromwich, *Lawyers Mobilize at Nation’s Airports After Trump’s Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html> [<https://perma.cc/R2AL-CHFJ>]; Lucy Westcott, *Thousands of Lawyers Descend on U.S. Airports to Fight Trump’s Immigrant Ban*, NEWSWEEK (Jan. 29, 2017), <http://www.newsweek.com/lawyers-volunteer-us-airports-trump-ban-549830> [<https://perma.cc/79KZ-VKU4>].

81. See 8 C.F.R. § 1292.1 (2017).

82. 8 U.S.C. § 1225(b)(1)(B)(iv) (“An alien who is eligible for [a credible fear interview] may consult with a person or persons of the alien’s choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such a consultation shall be at no expense to the Government and shall not unreasonably delay the process.”).

83. Expedited Removal Final Rule, 62 Fed. Reg. 10320 (taking the view that a noncitizen is not entitled to formal counsel or representation during the credible fear interview); COLLOPY, CRISIS AT THE BORDER, *supra* note 62, at 9 & nn.101–06; U.S. CITIZENSHIP IMMIGR. SERV.’S, RAI0 ASYLUM

It seems that in the government's view the right to access an attorney was merged into the consultant provision.⁸⁴ That, however, does not make sense, because at the time of the expedited removal statute's enactment, all noncitizens who had to appear for interrogation before an immigration officer were already entitled to be accompanied, represented, and counseled by an attorney of his or her choice.⁸⁵ The government's choice to merge the separate roles of an attorney who is a trained legal professional with clergy, friend, or family member is strikingly odd.

C. Accuracy and Incidence of Error

There is substantial evidence that the incidence of error during expedited removal adjudications is pervasive. Two important congressionally authorized studies,⁸⁶ a follow-up U.S. government commission report,⁸⁷ and an exhaustive privately-funded report based on government data and field interviews⁸⁸ demonstrates that there are errors abound in the expedited removal process—errors that have plagued the program since its inception.

1. The USCIRF Studies

In 1998, two years after the enactment of the expedited removal statute, Congress commissioned a panel of experts through the United States Commission on International Religious Freedom (USCIRF) to conduct a study of the expedited removal program.⁸⁹ Congress directed four questions to the commission with regard to how the expedited removal program was actually implemented by the responsible agencies: (1) Was the agency improperly encouraging asylum-seekers to withdraw their applications for admission? (2) Was the agency incorrectly failing to refer asylum-seekers for an interview by an asylum officer for a determination of whether they have a credible fear of persecution? (3) Was the agency incorrectly removing asylum-seekers to countries where they may be persecuted? (4) Was the agency improperly detaining asylum-seekers or detaining them in inappropriate conditions?⁹⁰

DIVISION OFFICER TRAINING COURSE: CREDIBLE FEAR 45–46 (2017) [hereinafter USCIS CREDIBLE FEAR TRAINING 2017].

84. See USCIS CREDIBLE FEAR TRAINING 2017, *supra* note 83, at 46.

85. 5 U.S.C. § 555(b) (2012).

86. See *infra* Section II.C.1.

87. See *infra* Section II.C.1.

88. See *infra* Section II.C.2.

89. International Religious Freedom Act of 1998 § 605(a), 22 U.S.C § 6474 (2012).

90. U.S.C. § 6474(a)(2).

Since then, the USCIRF has conducted three studies—in 2005, 2007, and 2016.⁹¹ In each study, the USCIRF had unprecedented access to the actual operations of the expedited removal program. The 2005 study observed and collected data from 404 secondary inspections; interviewed 194 noncitizens in expedited removal proceedings; and reviewed a random sample of an additional 339 records from ports of entry, 32 records of noncitizens who dissolved their claims, 163 records from the Board of Immigration Appeals, and 321 records for noncitizens referred for a credible fear screening.⁹² The study surveyed, among other data, all eight asylum offices and nineteen detention facilities and interviewed additional asylum-seekers.⁹³ For their 2007 report, the USCIRF addressed the impact of their findings and recommendations from 2005 on the expedited removal program.⁹⁴ The commission reviewed each major finding and recommendation by responsible agency.⁹⁵ For their 2016 study, the USCIRF conducted field studies between 2012 and 2014 at five ports of entry, four border patrol stations, five asylum offices, and fifteen immigrant detention facilities.⁹⁶ They interviewed DHS officials, facility personnel, and noncitizens at all stages of the process.⁹⁷ Their study included observation and analysis of virtual processing—the use of technology interfaces, including video and audio systems, to conduct expedited removal proceedings without in-person contact.⁹⁸

The USCIRF studies and report persuasively describe how the concentration of so much executive power into a single statute without any accountability mechanism therein has created a rapid removal anti-rule of law regime in the field. The rule of law exists in the expedited removal regime only if each officer in the regime faithfully follows the written words of the statute and regulations because Congress eliminated all checks on the individual exercise of executive power for rapid removals.⁹⁹

91. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, 1 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: FINDINGS & RECOMMENDATIONS (2005) [hereinafter USCIRF STUDY 2005]; U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, ANNUAL REPORT (2007) [hereinafter USCIRF REPORT 2007]; USCIRF STUDY 2016, *supra* note 40.

92. USCIRF STUDY 2005, *supra* note 91, at 3–4.

93. *Id.* at 4.

94. USCIRF REPORT 2007, *supra* note 91, at 4.

95. *See id.*

96. USCIRF STUDY 2016, *supra* note 40, at 9.

97. *Id.*

98. *Id.* at 9, 20, 24.

99. *See* Immigration and Nationality Act § 242(a)(2)(A)(iii), (e), 8 U.S.C. § 1252(a)(2)(A)(iii), (e) (2012); *see also* Castro v. U.S. Dep’t of Homeland Sec., 835 F.3d 422, 429–33 (3d Cir. 2016) (collecting cases).

The findings from the USCIRF are breathtaking. The 2005 study found that in 86.5% of the cases, U.S. Customs and Border Patrol (CBP) recorded false information about responses to the I-867A/B fear questions.¹⁰⁰ In seventy-two percent of the cases, CBP denied noncitizens the opportunity to review or respond before requiring the noncitizen's signature on the forms.¹⁰¹ The commission found that the I-867A/B often contained falsely recorded information indicating information was provided when it was not, and recorded answers to questions that were never asked.¹⁰² 15% of the time, a noncitizen who expressed fear (and therefore should have been referred), was falsely recorded as having not, and was removed.¹⁰³ Our editorial emphasis on "breathtaking" stems from the pervasiveness of the incidence of error and the failure of the regime's "checks" to actually provide an accountability function: in spite of the pervasive falsification of information, all of the documents required verifications and oaths by multiple sworn officers. Unsurprisingly, the 2007 report awarded a grade of F to CBP because DHS would not confirm that any of the commission's recommendations to address these errors were undertaken and there was no publicly available information indicating that any of the recommendations had been implemented.¹⁰⁴

The 2016 report found that CBP failed to read back answers to the interviewee and failed to allow the interviewee to correct errors in the forms before requiring a signature.¹⁰⁵ Direct observers found that CBP entered false responses into the fear questions and used standardized questions and answers to populate the required responses by copying and pasting from pre-prepared text.¹⁰⁶ Moreover, data from different interviews with different noncitizens was intermingled.¹⁰⁷

2. The American Exile Report

In an exhaustive, detailed report based on government-derived data and field interviews with individuals who had been subjected to deportation under a rapid removal regime, the ACLU Foundation found that the "statutory

100. ALLEN KELLER ET AL., STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: EVALUATION OF FEAR REFERRAL IN EXPEDITED REMOVAL AT PORTS OF ENTRY IN THE UNITED STATES 15 (2005) [hereinafter EVALUATION OF FEAR REFERRAL].

101. USCIRF STUDY 2016, *supra* note 40, at 19.

102. EVALUATION OF FEAR REFERRAL, *supra* note 100, at 15.

103. *Id.* at 20 tbl.3.1.

104. USCIRF REPORT 2007, *supra* note 91, at 58–59.

105. USCIRF STUDY 2016, *supra* note 40, at 20.

106. *Id.* at 24–25.

107. *See id.* at 25.

safeguards [of the expedited removal program] have proven illusory for many bona fide asylum seekers.”¹⁰⁸ Reviewing data collected from interviews with 89 individuals who had been subjected to one of the rapid removal regimes, the study found that 49 people (55% of those surveyed) were never asked about their fear of persecution or that they were not asked anything in a language they could understand.¹⁰⁹ Only 25 were asked if they were afraid, and of that group 10 people (40%) indicated that immigration officers had disregarded the fear screening protocol entirely by deporting them without a fear screening even though they had reported having a fear.¹¹⁰ The study describes instances where CBP misrepresented responses to the fear questions by marking no fear, when the noncitizen claimed a fear of harm.¹¹¹ The study found that at least 5 individuals who were U.S. citizens were deported erroneously through rapid removals.¹¹² The study described 2 U.S. citizens who were illegally subjected to expedited removal because their mental impairments prevented them from providing accurate information about their status.¹¹³

Rapid removals have been and continue to be justified because they presumably only apply to those who have no ties and no reason to be in this country. For instance, in its later withdrawn opinion, the *Peralta-Sanchez* decision explained that the adverse impact that removal has on non-citizens arises because people who developed extensive ties and roots face the potential loss of “formal legal status here, and certainly the life he or she has created here.”¹¹⁴ By contrast, those facing rapid removals have no potential loss because they “had been present in the United States for some period of time [not] longer than a few minutes or hours.”¹¹⁵

The documented errors, which are systematically designed to not be corrected, prove this justification to be legal fiction, and a dangerous one at that. Rapid removals are being used to deny protection to those with valid asylum claims, and, with its asymmetrical execution, sweep in (or rather sweep out) those who never should have been subjected to the truncated procedure because they are long-term residents, asylum seekers, and even lawful permanent residents and citizens.

108. ACLU, *supra* note 16, at 4.

109. *Id.* at 32–33.

110. *Id.* at 33.

111. *Id.* at 37–38.

112. *Id.* at 47–48.

113. *Id.* at 49.

114. *United States v. Peralta-Sanchez*, 847 F.3d 1124, 1135 (9th Cir. 2017), *withdrawn on grant of reh’g*, 868 F.3d 852 (9th Cir. 2017), *memorandum disposition in* No. 14-50393, 2017 WL 3601725 (9th Cir. Aug. 22, 2017).

115. *Id.*

In an ideal world, simply exposing the errors and procedural defects would lead to the end of rapid removals. But, assuming that will not occur, Part III calls for the significant and pragmatic intervention of establishing the right of access to counsel in these procedures.

III. SPEED AND ACCESS TO COUNSEL

Dispensing justice in a speedy manner can become a constitutionally risky endeavor when wrong decisions—wrong because the adjudicator got the law wrong or wrong because the interviewer misunderstood the facts—can put a human’s life at peril. There is a lot at stake in every rapid removal order—often life and death—and the greater the stake, normally, the greater the procedural protections. Yet, the workhorse of the rapid removal regime, the expedited removal program, is designed around the singular purpose of speed. This emphasis on velocity becomes constitutionally risky in high stakes moments because the Fifth Amendment generally requires enough process to mitigate against persistent systemic introductions of error.¹¹⁶ That is what the Supreme Court’s seminal decision *Mathews v. Eldridge*¹¹⁷ teaches us. Speed, the Supreme Court explains in *Mathews*, is just one of three factors in designing constitutionally adequate adjudications.¹¹⁸

In this section, we take an agnostic view of the rapid removal regime’s goal of velocity and argue that speed—the critical defining criteria of rapid removals—is compatible with meaningful access to counsel at each of the three moments of adjudication in expedited removal proceedings. We describe the right of access to counsel, which is related to and distinct from the right to counsel. We analyze the right of access to counsel through the lens of the three *Mathews* factors. In light of the well-documented incidences of error, the nature of the interest at stake, and the insubstantial impact on speed, we conclude that adequate access to counsel is constitutionally required during expedited removal proceedings.

A. *The Right of Access to Counsel in Expedited Removal Proceedings*

The right to counsel and the right of access to counsel are unquestionably related and certainly distinct.¹¹⁹ For civil litigants, a right to a government-provided attorney is rooted in the Fifth Amendment’s due process clause. There

116. See *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

117. *Mathews*, 424 U.S. 319.

118. See *id.* at 335.

119. Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 113, 131–32 (2008).

are also many compelling and persuasive reasons why a noncitizen has a Fifth Amendment right to appointed counsel in removal proceedings under the *Mathews* test.¹²⁰ We use “right of access to counsel” to mean that the federal government must allow a noncitizen to be accompanied, represented, and advised by counsel of her choice at her expense.¹²¹ So, although related, the right of access to counsel is distinct from a right to counsel.¹²²

This definition describes the core aspects of what it means to have a lawyer. The functional aspect of the definition comes as much from the obvious things that lawyers do as well as from what Congress thinks lawyers ought to be able to do when they are engaged in process.¹²³ To accompany, represent, and advise—to do those things that lawyers do—implies access to the moments that matter. No one needs a lawyer who cannot get into the room when the big decisions are made.

In this Article, the authors have chosen to assign the cost of representation to the person who is seeking to exercise the *right to access*. We do this for four reasons. First, we intentionally intend to distinguish the costs of providing access from the cost of providing a lawyer. Second, our definition describes the status quo of representation in the immigration space. Third, our data derives from non-appointed representation. Finally, access to counsel (as opposed to a right to appointed counsel) was the issue that recently tripped up the Ninth Circuit.

The possibility of intervention is neither theoretical nor remote. As set forth above in Stephen Manning’s work, attorneys are using technology and creativity to provide volunteer legal representation in remote detention centers.¹²⁴ Further, a growing number of states and cities are paying for a corps of attorneys to provide representation to non-citizens in detention centers.¹²⁵ In light of the reality that attorneys are organizing, and states and cities are

120. *See id.* at 134–35 (“Although there is no per se right to appointed counsel in removal hearings, the Supreme Court has recognized a right to appointed counsel in other civil contexts.”). *See generally Mathews*, 424 U.S. at 335.

121. *See* 5 U.S.C. § 555(b) (2012).

122. Kaufman, *supra* note 119, at 131.

123. *See id.* (“A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.”).

124. *See* ARTESIA REPORT, *supra* note 26, at ch. XIV; USCIRF STUDY 2016, *supra* note 40, at 54.

125. Bruce J. Einhorn, *L.A. Needs To Provide Attorneys To Immigrants Facing Deportation*, L.A. TIMES (Mar. 27, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-einhorn-immigration-lawyers-deportation-ice-20170327-story.html> [<https://perma.cc/M7DW-6HXM>].

providing funding, the right to access to counsel is reaching a growing number of people.¹²⁶

B. *The Mathews Test*

For over 100 years, Congress gave—and the Supreme Court endorsed—the general scheme whereby every non-citizen received a hearing before being deported.¹²⁷ This was true for green card holders, those seeking asylum, and also those without lawful status.¹²⁸ When extending the right to release non-citizens from the confines of immigration detention, the Supreme Court unequivocally noted that the constitution protected even those at the very precipices of our borders, those without status.¹²⁹ What is left open, however, is what is the level of protection that is due.

126. See Lind, *supra* note 48 (reporting on how 12 cities and counties are exploring programs that fund immigration attorneys for those who are detained); see also Phillipe Djegal, *Undocumented Immigrants Detained in ICE Raids to Get Legal Funding From San Francisco*, KRON4 (Mar. 1, 2018), <http://kron4.com/2018/03/01/undocumented-immigrants-detained-in-ice-raids-to-get-legal-funding-from-san-francisco/> [https://perma.cc/TF26-FGSA] (reporting on San Francisco’s provision of \$11 million to defend detained non-citizens in immigration proceedings). Access to counsel in immigration proceedings is different from the *right* to counsel that is found in criminal proceedings. Under the Fifth Amendment, those who are accused of a crime receive the right to counsel, which includes being advised that the person has the right to hire an attorney, and if the person is indigent, that the State will pay for a lawyer (usually a public defender) to represent them. Access to counsel, by contrast, is in some parts both equal and some parts lesser to this protection available to criminal defendants. As more and more courts are realizing in the bail and bond contexts, not having the financial means to secure a right, in practical ways, is a denial of that right. *Hernandez v. Sessions*, 872 F.3d 976, 990–91 (9th Cir. 2017) (“Is consideration of the detainees’ financial circumstances, as well as of possible alternative release conditions, necessary to ensure that the conditions of their release will be reasonably related to the governmental interest in ensuring their appearance at future hearings? We conclude that the answer is yes.”). In this respect, for many non-citizens, especially those newly-arriving to the country without independent financial means, the right to pay for an immigration attorney is as meaningful as the right to buy a multi-million dollar sports franchise is for the vast majority of us. But, unlike bond and bail proceedings, where a specific monetary amount is required to secure release, the right of access to counsel for those in rapid removal procedures also then includes the ability for volunteer attorneys to intervene and assist those in these rapid removal proceedings.

127. “[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citations omitted).

128. See *id.*

129. *Id.* at 693–94 (citing *inter alia* *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[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.”); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (affording due process to those ordered deported).

In 1996, Congress, mimicking the Tough on Crime initiatives, transformed immigration law, ending paths to legalization and curbing (as well as outright ending) numerous procedural protections that had been afforded non-citizens.¹³⁰ Federal courts could no longer review (and correct) abuses of discretion and factual mistakes, and a non-citizen was limited to filing only one motion within ninety days of a final order of removal to correct mistakes or introduce new circumstances that qualified someone for relief.¹³¹ The rapid removal procedures were introduced to dramatically increase the numbers of those now deportable.

Recently, in *United States v. Peralta-Sanchez*, a federal court addressed the question of whether a noncitizen has a right to access counsel during an expedited removal proceeding.¹³² In *Peralta-Sanchez*, the Ninth Circuit first considered in a published decision whether access to an attorney is a right that is due to a noncitizen who was subjected to expedited removal.¹³³ In a 2-1 decision, the panel held no access to counsel was constitutionally required.¹³⁴ Upon reconsideration, the panel vacated its prior decision and resolved the case on other grounds.¹³⁵ This then left open whether, in these rapid removal procedures, the constitution requires the right to access to counsel or not.

There are probably several factors that influenced why it took two decades for the issue to reach the U.S. Court of Appeals. Congress built the rapid removal regime asymmetrically with an intention to bar judicial review of individual decisions as well as severely constrain litigation aimed at systemic challenges.¹³⁶ The government's use of expedited removal, originally more

130. Hong, *supra* note 18, at 122–23 (“[F]or the past 20 years, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) fundamentally altered immigration law by dramatically expanding who could be deported and cutting off numerous ways people used to earn status.”).

131. Immigration and Nationality Act § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D) (2012) (limiting judicial review to legal and constitutional issues); 8 C.F.R. § 1003.2 (2017) (limiting time, number, and basis to reopen proceedings).

132. *United States v. Peralta-Sanchez*, 847 F.3d 1124 (9th Cir. 2017), *withdrawn on grant of reh'g*, 868 F.3d 852 (9th Cir. 2017), *memorandum disposition in* No. 14-50393, 2017 WL 3601725 (9th Cir. Aug. 22, 2017).

133. *Id.* at 1132–34.

134. *Id.* at 1142.

135. *Peralta-Sanchez*, No. 14-50393, 2017 WL 3601725 (holding that *Peralta-Sanchez* failed to demonstrate prejudice).

136. *See generally* Cooper, *supra* note 14, at 1523 (“No prospect exists . . . for a body of jurisprudence on the credible fear standard. Its application will likely depend upon training and supervisory review of individual asylum officers, and the review principles observed by immigration judges.”).

circumspect, has expanded rapidly and pervasively.¹³⁷ Notably, the government's use of the expedited removal statute against a class of noncitizens who are, by all descriptions, bona-fide asylum seekers, has aggravated the stakes.¹³⁸ For all these reasons and others (such as that those who had been wrongfully deported were outside of the country), the courts have not addressed the access to counsel question.

The seminal case that determines what procedural rights are due to those facing State deprivation of liberty or property is *Mathews v. Eldridge*.¹³⁹ In *Mathews*, the Supreme Court devised a three-part test, which considers: (1) the private interest that will be impacted by the official action, (2) the risk of error under existing procedures and the probable value of additional procedural safeguards, and (3) the Government interest in existing procedures, including the fiscal and administrative burdens that the proposed procedural safeguards would impose.¹⁴⁰

1. Private Interest in Accurate Adjudications

In *Peralta-Sanchez*, the majority decision initially concluded that those subjected to expedited removal proceedings have interests “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.”¹⁴¹ The majority opinion then describes how the existing administrative procedures work in that they are designed to quickly remove individuals who have no right to be in the United States and who are apprehended in the manner Mr. Peralta-Sanchez supposedly was, by the border patrol officer following a trail of “fresh footprints” from the border to the point of apprehension.¹⁴²

This understanding of rapid removals is a distortion of who it can include and what in fact is the actual stake those subject to these procedures face. Expedited removal proceedings are not limited in their physical reach only to those who have been in the country for fewer than fourteen days and for whom no remedies are available. When first created in 1996, expedited removal was

137. See Hong, *supra* note 18, at 134–35.

138. See *id.* at 138.

139. 424 U.S. 319 (1976).

140. *Id.* at 335.

141. United States v. Peralta-Sanchez, 847 F.3d 1124, 1135 (9th Cir. 2017), *withdrawn on grant of reh'g*, 868 F.3d 852 (9th Cir. 2017), *memorandum disposition in* No. 14-50393, 2017 WL 3601725 (9th Cir. Aug. 22, 2017).

142. *Id.* at 1128–30.

used by border patrol officers only at the actual ports of entry.¹⁴³ In 2004, the government expanded the geographic and temporal reach of expedited removal to individuals apprehended within 100 air miles of the U.S. land border who are unable to prove presence in the U.S. for more than fourteen days.¹⁴⁴ This sounds like a small reach, but in reality, this expansion has now brought nearly 200 million people potentially within ambit of the expedited removal.¹⁴⁵ While the expansion is limited in temporal scope, the federal government has consistently argued in litigation, and some courts have found, that there is no judicial review of expedited removal orders, including whether a person should be subject to expedited removal at all.¹⁴⁶

Therefore, denying a right of access to counsel to the large portion of the population of the United States—citizen and non-citizen alike—who could potentially be ensnared in the expedited removal program is based on the mistaken notion that expedited removal is narrow in scope. Indeed, the Trump administration has indicated an intent to expand the expedited removal statute even more to possibly include the entire geography of the United States to any individual who cannot prove, to the satisfaction of immigration agents, physical presence for more than two years.¹⁴⁷

The interests at stake in expedited removal proceedings are high and the fourteen-day temporal marker is not a barometer of the stake. Asylum seekers who are fleeing persecution have a stake to receive protections from this country if they are eligible. Long-term residents who are potentially eligible for cancellation of removal and have departed to attend to funerals or care for elderly family members, have a stake in being properly identified as eligible to

143. See Immigration and Nationality Act § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2012) (authorizing expedited removal against “aliens arriving” at ports of entry).

144. See Designated Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,877 (Aug. 11, 2004); Koh, *supra* note 11, at 197.

145. See Todd Miller, *66 Percent of Americans Now Live in a Constitution-Free Zone*, THE NATION (July 15, 2014), <https://www.thenation.com/article/66-percent-americans-now-live-constitution-free-zone/> [https://perma.cc/BLA9-YZ8N] (describing a population of 197.4 million people—or 66% of the country’s population—living within the 100-mile zone of the 2004 expansion notice).

146. See, e.g., *M.S.P.C. v. U.S. Customs and Border Prot.*, 60 F. Supp. 3d 1156, 1164–65 (D.N.M. 2014).

147. See Memorandum from John Kelly, Sec’y, Dep’t of Homeland Sec., to Kevin McAleenan, et al., Acting Comm’r, Customs & Border Protection 5–6 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf [https://perma.cc/AP8G-VF2S] (considering expansion of expedited removal); Exec. Order No. 13767, 82 Fed. Reg. 8793, 8796 (Jan. 25, 2017) (directing consideration of expansion of expedited removal).

apply for protections to which they are entitled. In 2004, the Ninth Circuit considered a claim by a father and a son who were not legally eligible for suspension of removal.¹⁴⁸ In 1993, after having lived in the United States for many years, they visited family in Mexico (without visas) and eventually returned to the United States.¹⁴⁹ The father and son were rendered ineligible to apply for relief after a short trip “was unexpectedly extended because both of his parents were injured during his visit and [the father] stayed to help care for them.”¹⁵⁰ Although the panel upheld the legal reason for disqualifying the father and son relief, the panel—convinced by their equities—*sua sponte* requested that the agency exercise discretion to permit them to remain in the United States.¹⁵¹

2. Significant Errors Occur that Attorneys Would Prevent

Adequate access to counsel can substantially reduce the incidence of error by eliminating the anti-rule of law tendencies in the expedited removal regime without meaningfully impacting the pace of adjudication. If individuals are allowed access to counsel at each of the moments of fact-finding and adjudication, there is a persuasive argument that the statutory and regulatory safeguards will be followed which are intended to produce accurate results. There is evidence to establish that legal representation for those in expedited removal processes makes an overwhelming difference.¹⁵² In two surveys, conducted by pro bono attorneys who provided representation at two separate detention centers, removal rates dropped 97% and 99% compared to those who were processed without legal representation.¹⁵³

For example, a collaborative project called the CARA Pro Bono Family Detention Project operates at the South Texas Family Residential Center in Dilley, Texas, to provide representation to any non-citizen detained at the center.¹⁵⁴ Nearly every non-citizen is in expedited removal proceedings. According to project data of the more than 35,000 noncitizens the project has

148. *Mendiola-Sanchez v. Ashcroft*, 381 F.3d 937, 938 (9th Cir. 2004).

149. *Id.*

150. *Id.*

151. *See id.* at 942.

152. *See* ARTESIA REPORT, *supra* note 26, at ch. X (stating that after attorney representation began, the “pace of removals fell 80% within one month and, within two months, it had fallen 97%”).

153. *Id.*; *see* Manning, *Conference*, *supra* note 26, at 8:47–9:01 (reporting 99% rate drop).

154. *See* CARA Family Detention Project, AM. IMMIGR. LAW.’S ASS’N (June 13, 2017), <http://www.aila.org/practice/pro-bono/find-your-opportunity/cara-family-detention-pro-bono-project> [<https://perma.cc/5A8W-N3YX>] [hereinafter CARA FAMILY PROJECT].

represented, nearly every expedited removal order—a rate of 99%—was vacated.¹⁵⁵

Attorney representation for noncitizens in expedited removal proceedings at a similar detention center (located in Artesia, New Mexico) resulted in a 97% drop in the rate of removals over the course of just a few months.¹⁵⁶ Indeed, there is no data that supports a contrary assumption that adequate access to counsel causes delays. Furthermore, the available empirical data indicates that attorney participation in the expedited removal proceedings has no meaningful impact on the pace of adjudication.¹⁵⁷ For instance, at Dilley’s detention center, where counsel is available to any person detained there, the expedited removal proceedings generally take two to four weeks.¹⁵⁸

There is also evidence that the outcomes in immigration court are significantly determined by whether a person is or is not represented by quality counsel. A comprehensive, nationwide study published in 2015 establishes that non-citizens who are represented in immigration proceedings have a significantly different outcome from those without representation.¹⁵⁹ This study, which analyzed data from 1.2 million removal cases decided between 2007 and 2012 found that represented immigrants were “almost seven times more likely . . . to be released from the detention center (48% versus 7%).”¹⁶⁰ In addition, detained immigrants were nearly eleven times more likely to seek relief such as asylum than those without representation (32% with counsel versus 3% without).¹⁶¹ Detained immigrants who sought relief with counsel were also more likely to prevail: 49% won their relief application with representation as opposed to only 23% without.¹⁶²

155. See Manning, *Conference*, *supra* note 26, at 8:47–9:01 (explaining that “nearly all” expedited removal orders were vacated and fewer than 0.01% of CARA represented clients were removed during the expedited removal process). For information about the collaborative project, see CARA FAMILY PROJECT, *supra* note 154.

156. See ARTESIA REPORT, *supra* note 26, at ch. X, (stating that after attorney representation began, the “pace of removals fell 80% within one month and, within two months, it had fallen 97%”). See generally Cindy Carcamo, *Child’s Detention Despite Citizenship Reveals Immigration Case Woes*, L.A. TIMES (Aug. 14, 2014), <http://www.latimes.com/world/mexico-americas/la-na-citizen-detained-20140815-story.html> [<https://perma.cc/KE96-VQMZ>] (describing case of 11-year old U.S. citizen who was erroneously detained for a month while being subjected to expedited removal before he found an attorney to intervene).

157. See Eagly & Shafer, *supra* note 48, at 65 tbl.6.

158. See *Flores v. Lynch*, 212 F. Supp. 3d 907, 910 (C.D. Cal. 2015).

159. See Eagly & Shafer, *supra* note 48, at 2.

160. *Id.* at 2, 70.

161. *Id.* at 51 fig.15.

162. *Id.*

These astonishing results should be of no surprise because immigration law is repeatedly described by federal judges as one of the most complex and complicated fields of law.¹⁶³ The consequences facing those in deportation proceedings are dire: “For defendants in deportation proceedings, the stakes can be life or death, since some face torture or worse upon returning to their home countries.”¹⁶⁴ Even for those who do not face persecution, a removal order may result in “permanent separation from their families.”¹⁶⁵ A resulting system that places such high stakes on complicated doctrines without the right to counsel results in removal cases being akin to “death penalty cases heard in traffic court settings.”¹⁶⁶

3. The Government’s Efficiency Costs of Time & Money

On *Mathews*’ last factor, the presence of attorneys in rapid removals has negligible impacts on time and money. The addition of an attorney to assist a non-citizen does not require the Government to hire any more attorneys or alter the screening procedure into a contested hearing. For all adjudications that currently occur before the U.S. Citizenship and Immigration Services—including affirmative asylum applications, family petitions, adjustment applications, naturalization applications, and waivers—the Government does not provide a single attorney to contest the determination made by the immigration officer tasked with the adjudication.¹⁶⁷ In these proceedings, non-citizens have the right to hire an attorney.¹⁶⁸ There then is an existing model whereby adjudications can occur without contested proceedings. This is particularly true given that, unlike the USCIS, status is never given in expedited removal proceedings. If someone is eligible for asylum or has proven facts or law that make them ineligible for expedited proceedings, the person simply is no longer subjected to expedited removal. The DHS retains jurisdiction over them to adjudicate any alleged immigration violations or confer lawful status

163. See Christina Wilkes, *Government-Funded Counsel for Children in Immigration Court?*, MD. STATE BAR ASS’N BULLETIN (Aug. 11, 2016), http://www.msba.org/Bar_Bulletin/2016/08_-_August/Government-Funded_Counsel_for_Children_in_Immigration_Court.aspx [<https://perma.cc/4ZKT-SF2V>] (commenting on class action request for attorneys to represent children, Judge Milan Smith noted, “[a]mong the most complicated of all the laws I deal with is the immigration statute”).

164. Einhorn, *supra* note 125.

165. *Id.*

166. Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2016), <http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/> [<https://perma.cc/XH86-A9B8>].

167. *Id.*

168. Kaufman, *supra* note 119, at 131.

to them.¹⁶⁹ Those proceedings are contested by Government attorneys. There has been no compelling reason why they must also be present at the preliminary adjudication that occurs in expedited removal proceedings.

As for any delay, there is no data that supports the proposition that a right to counsel causes delays. To the contrary, the available empirical data indicates that attorney participation in the expedited removal proceedings has no meaningful impact on the pace of adjudication.¹⁷⁰ As previously stated, at the Dilley detention center, where counsel is available to any person detained there, the expedited removal proceedings take about two to four weeks.¹⁷¹

In *Peralta-Sanchez*, the Government resisted the involvement of attorneys on the basis that the Government would incur costs of subjecting more people to detention.¹⁷² Putting aside the logical concerns in the asserted causation, nothing compels the Government to detain non-citizens, especially because those who are being apprehended for civil violations, are not violent, and are seeking asylum. The Federal Government has previously acknowledged in court filings in the *Flores* detention litigation that it has a variety of release mechanisms at its disposal such as “bond, release on own recognizance, orders of supervision, or parole” when addressing expedited removal proceedings for family units.¹⁷³

Indeed, alternatives to immigration detention exist, which are effective and less costly. The existing Intensive Supervision Appearance Program (ISAP) uses “electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants.”¹⁷⁴ Community support programs—not funded by ICE but operated by religious organizations in cooperation with ICE—are also effective in assisting with court appearance rates and compliance with final removal orders.¹⁷⁵

169. Marks, *supra* note 166. See generally *Victoria-Faustino v. Sessions*, 865 F.3d 869, 876 (7th Cir. 2017) (holding that the DHS improperly issued a final order of administrative removal and remanding the case to the DHS for further proceedings).

170. See *Eagly & Shafer*, *supra* note 152, at 65 tbl.6.

171. See *Flores v. Lynch*, 212 F. Supp. 3d 907, 910 (C.D. Cal. 2015).

172. *United States v. Peralta-Sanchez*, 847 F.3d 1124, 1138 (9th Cir. 2017), *withdrawn on grant of reh'g*, 868 F.3d 852 (9th Cir. 2017), *memorandum disposition in* No. 14-50393, 2017 WL 3601725 (9th Cir. Aug. 22, 2017).

173. See Declaration of Thomas Homan at 11, *Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015).

174. *Alternatives to Immigration Detention: Less Costly and More Humane Than Federal Lock-Up*, ACLU, <https://www.aclu.org/other/aclu-fact-sheet-alternatives-immigration-detention-adt> [<https://perma.cc/KL5R-FUWR>] (last visited Mar. 7, 2018).

175. *Id.*

As a constitutional matter, the most reasonable inference is that the involvement of counsel in the rapid removal proceedings that would be afforded under the right to access to counsel is very much due.

IV. CONCLUSION

In the past twenty years, rapid removals have forced over 4.2 million people to leave the United States.¹⁷⁶ This mass expulsion occurred under procedures that permitted a single immigration officer to deport a person, without an impartial fact-finder, without a right to appeal, and often without any review of the decision. As much as the authors wish Congress would simply repeal these procedures, President Obama perfected their use and President Trump is maximizing their reach. They are responsible for more than 76% of all deportations, which is a number that will only increase in the near-future.¹⁷⁷

Given that reality, their use must comport with constitutional protections: in particular, the right to access to counsel. Although legal challenges addressing this question have been rare, the dire landscape is the result of the procedures' chilling effectiveness in achieving efficiency, not in any normative measures of success that include fairness, reasonableness, and accuracy. This Article set forth the reasons why the minimal process that is due to non-citizens in rapid removals includes access to counsel. The private interest is to those with legitimate claims to secure status—which is currently wrongfully measured in how much time someone has been in the country when the proper focus is on how significant legal status will impact those fleeing persecution or those with strong familial ties. The current procedures permit mistakes without a means to correct them. When only attorneys are added, studies show that removals are reversed at rates of 97% and 99%.¹⁷⁸ The additional burdens to the Government to permit attorneys to participate in rapid removal procedures are minimal. They do not add time or expense to the process, they merely ensure that those who never belonged in these expedited proceedings are not subjected to them.

There needs to be a larger debate over our immigration policy. But in the meantime, the Constitution compels a right to access to counsel to all subjected to these rapid removals as long as they continue to be used.

176. See *supra* notes 28–30 and accompanying text.

177. See *supra* notes 28–30 and accompanying text.

178. See *supra* note 26 and accompanying text.