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When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement

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WHEN SHADOW REMOVALS COLLIDE: SEARCHING FOR SOLUTIONS TO THE LEGAL BLACK HOLES CREATED BY EXPEDITED REMOVAL AND REINSTATEMENT

JENNIFER LEE KOH*

ABSTRACT

Immigration scholarship has begun to explore the prominence of shadow removals—deportations that are executed by front-line agency officials acting outside the presence of an immigration judge—which now constitute the majority of all reported removals. This Article explores two of the most common forms of shadow removals, expedited removal and reinstatement of removal, and the collision of the two. Expedited removal has typically been perceived as a border enforcement tool, used against persons with limited ties to the United States. Reinstatement of removal exists for persons who enter the U.S. without authorization following a prior removal. The rising use of each streamlined procedure is, on its own, troubling from a fairness, accuracy, and rule of law perspective. But like chemical compounds mixing and creating new substances, expedited removal and reinstatement interact to produce unique situations in which the law renders people forever subject to immediate deportation based primarily on the existence of a brief encounter at some point in the past with a border official. These situations are akin to legal black holes in immigration law, and have not been examined in any of the scholarly literature to date.

This Article is the first to consider the interplay of expedited removal and reinstatement. It traces the operation of the two removal processes, both independently and in combination with each other. It emphasizes the harsh statutory bars on judicial and habeas review, and the resulting inability of the federal judiciary to ameliorate the harshness of removal in this context. The Article then suggests that the use of reinstatement based on prior expedited removal orders fails the basic administrative law requirement

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that federal agencies demonstrate reasoned decision-making and avoid arbitrary or capricious action. Relying on the Supreme Court's decision in Judulang v. Holder, which applied arbitrary and capricious review in the deportation context, the Article encourages courts to more closely scrutinize the use of reinstatement based on expedited removal.

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INTRODUCTION

Israel Barrios was minutes from home and on his way to work in the city of Santa Ana, California when immigration officials arrested him in early October 2017.¹ Barrios had first come to the United States in the late 1990s

1. See Gabriel San Ramon, *Children of Man Detained by Border Patrol in Santa Ana Weep for his Return*, OC WEEKLY (Oct. 4, 2017), <https://www.ocweekly.com/activists-call-on-ice-to-release-santa-ana-family-man-8475231/> [https://perma.cc/2K2V-CX9N]; *Santa Ana Father of 6 Detained by ICE*, CBS LOS ANGELES (Oct. 5, 2017, 11:13 AM), <http://losangeles.cbslocal.com/2017/10/05/santa-ana-father-of-6-ice/> [https://perma.cc/XU9M-7TUL]; *Donald Trump is Deporting Fewer People Than Barack Obama Did*, THE ECONOMIST, (Dec. 14, 2017), <https://www.economist.com/united-states/2017/>

after crossing the border without immigration papers.² He settled in the state of Georgia, had six U.S. citizen children, and worked to provide for his family. Around 2010, he pled guilty to misdemeanor driving without a license, the only offense on his record. Sensing the political tides turning against undocumented immigrants, Barrios returned to his home country of Mexico after more than a decade of living in the United States. But while in Mexico, gang violence and other dangers compelled him to return to the United States around 2012.³

The fact that Barrios returned to Mexico, only to return a second time to the United States, is not remarkable. But when he attempted to cross the U.S.-Mexico border, he was apprehended by Customs and Border Protection (CBP) officers who left Barrios with the impression that he was being ordered to return voluntarily to Mexico.⁴ He did not have an opportunity to explain that he feared persecution in Mexico, as required by law.⁵ In reality, as Barrios learned years later, he had received an expedited removal order. Barrios ultimately reunited with the rest of his family in the United States after this encounter with border officials, and settled in Santa Ana, California. After his arrest in October 2017, Barrios learned that due to the expedited removal order in 2012, federal immigration authorities could—but were not required to—designate Barrios for a truncated deportation procedure known as reinstatement of removal.⁶ A front-line immigration officer chose to place him in reinstatement. In reinstatement, Barrios's only hope of avoiding immediate deportation was to establish that he had a reasonable fear of returning to Mexico.⁷ He could not ask an immigration judge (IJ) or federal court to review the legitimacy of the expedited removal order, and he could not seek other claims to relief available under the immigration laws.⁸ Indeed, had he not received *pro bono* legal representation, media attention, and strong community support, it is quite likely that Barrios would have been deported within days of his arrest without ever seeing an IJ.

12/14/donald-trump-is-deporting-fewer-people-than-barack-obama-did [https://perma.cc/X2DE-M24U] (describing Israel Barrios' immigration arrest).

2. Email from Monika Langarica, Israel Barrios's attorney, to author (February 12, 2018) (on file with author) [hereinafter Langarica email].

3. *Id.*

4. See *infra* note 77 and accompanying text (discussing voluntary departure and voluntary return).

5. See *infra* text accompanying notes 90–94 (discussing credible fear provisions in expedited removal).

6. See Langarica email, *supra* note 2.

7. See *infra* Part I.C (explaining reinstatement).

8. *Id.*

Israel Barrios's case illustrates several trends in immigration enforcement under the Trump Administration.⁹ But this Article is focused on the process—or lack of process, rather—received by Barrios and scores of others situated at the crossroads of expedited removal and reinstatement of removal. Cases like Barrios's are not a product or phenomenon of the current Administration alone, but could become far more common if left unchecked by the courts.

A nascent literature emphasizes how deportation has increasingly moved outside the control of the immigration courts and into what I have called elsewhere the “shadows” of immigration court.¹⁰ Such removals have altered the landscape of immigration adjudication and enforcement over the past two decades. The conventional wisdom about immigration adjudication states that removal decisions are adjudicated by IJs presiding over immigration courts.¹¹ But the conventional wisdom no longer applies, with immigration judge-issued removal orders becoming the exception rather than the norm. Through a variety of mechanisms, including an

9. For instance, other than a misdemeanor conviction for driving without a license, Barrios had no criminal record. This is consistent with reports that immigration authorities have indiscriminately targeted all undocumented immigrants irrespective of their prior criminal histories. See Maria Sacchetti, *ICE Immigration Arrests of Noncriminals Double Under Trump*, WASH. POST (Mar. 16, 2017), <https://perma.cc/U543-RMMW> (reporting on doubling of immigration arrests of persons with no criminal records from January to March 2017); THE ECONOMIST, *supra* note 1 (describing arbitrary nature of ICE arrests). Barrios's arrest in the city of Santa Ana, which had enacted just months before what has been described as one of the strongest sanctuary policies in the country, highlights the inherent limitations of local sanctuary laws in a world of growing federal resources devoted to immigration enforcement. See Jessica Kwong, *Santa Ana's Status as Sanctuary City Made Official*, O.C. REGISTER (Jan. 19, 2017), <https://perma.cc/Z5B5-6D47>; Lawrence Downes, *A "Sanctuary City" Seizes the Moment, and the Name*, N.Y. TIMES (Mar. 3, 2017), <https://perma.cc/KPH4-6B5F> (describing the Santa Ana, California sanctuary ordinance as “one of the boldest and most far-reaching sanctuary ordinances in the state”). See also Press Release, Immigration & Customs Enft, Statement from ICE Acting Director Thomas Holman on California Sanctuary Law (Oct. 6, 2017) (stating that in response to State of California's enactment of SB 54, limiting nonfederal law enforcement collaboration with immigration authorities, “ICE will have no choice but to conduct at-large arrests in local neighborhoods and at worksites, which will inevitably result in additional collateral arrests, instead of focusing on arrests at jails and prisons where transfers are safer for ICE officers and the community”), <https://perma.cc/GT3Y-6TKU>. Barrios's subsequent release from ICE detention also illustrates the potential power of community organizing and moral outrage in efforts to resist the government's immigration enforcement trends. Langarica email, *supra* note 2; Jennifer Lee Koh, *Anticipating Expansion, Committing to Resistance: Removal in the Shadows of Immigration Court Under Trump*, 43 OHIO N.U. L. REV. 459, 469 (2017) (discussing role of community organizing in deportation defense strategies).

10. Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017). See also Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2014); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595 (2009); ACLU, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM (2014); DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 52, 65–67 (2012); Mary Holper, *The Unreasonable Seizures of Shadow Deportations*, U. CIN. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040929 [<https://perma.cc/Q85Z-YQKY>].

11. See Koh, *supra* note 10, at 188–92.

administrative removal process for non-lawful permanent residents with aggravated felony convictions¹² and the availability of processes in which noncitizens stipulate to their own removal,¹³ the vast majority of removals now take place with little to no participation by immigration courts and IJs.¹⁴ Expedited removal and reinstatement account for the lion's share of the panoply of shadow removals, and constituted about eighty-five percent of all removals in fiscal years 2015 and 2016.¹⁵ Most of the literature thus far has focused on recognizing the rise of summary removals, identifying their harms, tracing the judiciary's deference to their use, and comparing them to immigration court adjudication.¹⁶ Indeed, each form of summary removal is governed by a unique statutory and regulatory framework, and raises problems related to fairness, accuracy, and the rule of law.¹⁷ But no scholarly work to date has focused on the combination of two shadow removals (here, expedited removal and reinstatement of removal), how they amplify each other's deficiencies, and how they together create situations in which government power over noncitizens reaches unprecedented and under-theorized levels. This Article seeks to fill that gap.

A deeper understanding of removals that bypass the courtroom has become increasingly urgent in the current political climate. President Trump has displayed great interest in minimizing the role of the immigration courts, as shown in a June 24, 2018 tweet declaring that, "When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."¹⁸ But long before that tweet, the Trump Administration signaled that its reliance on summary removals—specifically expedited removal—could proliferate. Within days of taking office, the Trump Administration issued a series of immigration-related

12. See 8 U.S.C. § 1228(b)(2)(B) (2017); Koh, *supra* note 10, at 209–15.

13. See 8 U.S.C. § 1229a(d) (2017); Koh, *supra* note 10, at 214–18; Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475 (2013). The federal government appears to have decreased its use of stipulated removal orders since approximately 2010, but the statute and regulations remain in place, and stipulated removal orders continue to trigger criminal and civil sanctions premised on the existence of a prior removal order.

14. Koh, *supra* note 10, at 181.

15. See BRYAN BAKER & CHRISTOPHER WILLIAMS, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2014 7 (2016), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2014.pdf [<https://perma.cc/R2TG-6VUK>] (reinstatement and expedited removal accounting for 83.4 percent of all removals in fiscal year 2014).

16. See *id.*

17. See generally Koh, *supra* note 10; Wadhia, *supra* note 10; Family, *supra* note 10; ACLU, *supra* note 10. See also AM. IMMIGRATION COUNCIL, REMOVAL WITHOUT RECOURSE: THE GROWTH OF SUMMARY DEPORTATIONS FROM THE UNITED STATES 1 (2014), <https://www.americanimmigrationcouncil.org/research/removal-without-recourse-growth-summary-deportations-united-states> [<https://perma.cc/2KXX-HTD5>].

18. Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

executive orders that, read together, lay the groundwork for a period of mass deportation and detention.¹⁹ The executive orders conveyed significant shifts in the Administration's immigration and border enforcement plans,²⁰ for instance, by treating nearly all undocumented immigrants (and some legal immigrants) as deportation priorities,²¹ expanding immigration detention,²² and encouraging state and local law enforcement collaborations with federal immigration enforcement efforts.²³ Of the many shifts in immigration enforcement policy signaled by these orders, one of the most anticipated is the plan to expand the federal government's ability to use expedited removal in the interior United States.²⁴

Throughout its history, expedited removal has been viewed primarily as a border enforcement tool. The government has generally constrained its use of expedited removal to persons arriving at ports of entry or for recent arrivals apprehended within 100 miles of the border.²⁵ Indeed, defenders of expedited removal have emphasized the relatively minimal ties of individuals subject to the process.²⁶ That may change in drastic, sudden ways under Trump Administration directives. The Administration has recommended expanding the use of expedited removal against persons anywhere in the United States who are believed to lack over two years' physical presence in the country.²⁷ Expanding expedited removal could allow a front-line, nonjudicial officer of a federal immigration agency to make adjudicatory assessments on the streets throughout the United

19. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) [hereinafter Border Enforcement E.O.]; Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) [hereinafter Interior Enforcement E.O.]. Implementing memoranda authored by then-Department of Homeland Security Secretary John Kelly soon followed. See Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et al. (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/JT N2-6SYX>].

20. See generally Jennifer M. Chacon, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243 (2017) (discussing implications of immigration executive orders).

21. Interior Enforcement E.O., at § 5.

22. Border Enforcement E.O., at § 6.

23. Interior Enforcement E.O., at § 8.

24. Border Enforcement E.O. Section 11(c) states: "Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II)." See also Koh, *supra* note 9, at 462–64 (discussing possible expansion of expedited removal).

25. See *infra* text accompanying notes 66–68 (discussing existing authority to use expedited removal).

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

27. See *supra* note 23; 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (permitting Attorney General to apply expedited removal against certain noncitizens who have "not been admitted or paroled into the United States, and who [have] not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility").

States.²⁸ The fear, anxiety and social disruption already circulating amongst immigrants since Trump took office would likely multiply.²⁹

Even without large-scale regulatory expansion, expedited removal can and does routinely impact the deportation of individuals who have meaningful ties to the country. Immigration law has long been subject to critique for its draconian and unforgiving nature,³⁰ its operation as an exception to mainstream constitutional doctrine,³¹ and its dizzying complexity.³² But expedited removal and reinstatement have created a subclass of undocumented immigrants for whom these recurring problems in immigration law are exacerbated. Individuals caught at the intersection of expedited removal and reinstatement of removal are submerged into legal black holes—spaces in which executive power is particularly high but where accountability and review are almost nonexistent.

From a process perspective, those caught at the juncture of expedited removal and reinstatement receive the worst of several worlds. At the front end, the expedited removal process seems designed to produce error and arbitrariness, given its closed-door, speedy, and potentially coercive nature. At the back end, a cocktail of jurisdictional bars on judicial and habeas review deprives noncitizens of any meaningful mechanism to correct for error or provide accountability for wrongful agency action. As one court put it, the absence of judicial review in the expedited removal context is a “proposition of frightening breadth.”³³ With expedited removal, “[t]he entire process—from the initial decision to convert the person’s status to removal—can happen without any check on whether the person understood the proceedings, had an interpreter, or enjoyed any other safeguards,” and the procedure is “fraught with risk of arbitrary, mistaken, or discriminatory

28. The statute purports to allow the Attorney General to use expedited removal against persons who cannot show two years of prior physical presence in the United States, but the Administration could limit a future expansion to cases in which persons cannot demonstrate shorter periods of prior residence. Depending on the physical presence period, one estimate has concluded that an expansion of expedited removal could affect anywhere from approximately 40,000 persons (if limited to ninety days) to more than 325,000 persons (if two years’ presence required). See JOSE MAGAÑA-SALGADO, FAIR TREATMENT DENIED: THE TRUMP ADMINISTRATION’S TROUBLING ATTEMPT TO EXPAND “FAST-TRACK” DEPORTATIONS (June 2017), https://www.ilrc.org/sites/default/files/resources/2017-06-05_ilrc_report_fair_treatment_denied_final.pdf [<https://perma.cc/CD4Z-XEZW>].

29. See Chacon, *supra* note 20; Koh, *supra* note 9.

30. See generally Michael Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 431 (2011) (asserting that deportation law fails to reflect proportionality); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009) (same).

31. See David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 583 (2017) (observing that “[t]he Supreme Court’s jurisprudence is littered with special immigration doctrines that depart from mainstream constitutional norms”).

32. See, e.g., *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (comparing complexity of immigration law to “King Minos’s labyrinth in ancient Crete”).

33. *Khan v. Holder*, 608 F.3d 325, 328 (7th Cir. 2010).

behavior.”³⁴ And reinstatement and expedited removal together seem to bring out the worst in each other. Through reinstatement, the expedited removal provisions can have never-ending power to deport a person from anywhere in the United States.

The federal judiciary has recognized the structural problems associated with expedited removal in particular, but has not intervened due to statutory restrictions on judicial and habeas review. The inability of the federal courts to ameliorate the excesses of these removals also reveals limitations on the ways the judiciary has traditionally incorporated fairness norms into immigration cases. For decades, the courts have employed canons of statutory construction—particularly constitutional avoidance—in the immigration context to reach more fair results while maintaining the integrity of the immigration statutes.³⁵ Similarly, despite the fact that many mainstream constitutional rights do not apply to immigration proceedings due to the courts’ historic treatment of deportation as a civil sanction,³⁶ procedural due process has served as a gateway to the importation of otherwise inapplicable constitutional principles for immigrants.³⁷ These tools have, to a large degree, simply not worked in the context of expedited removal and reinstatement.³⁸ The absence of review, accountability, and rule of law stands in sharp contrast to the courts’ longstanding recognition that deportation is a harsh sanction, a deprivation of “all that makes life worth living.”³⁹

But other judicial interventions remain possible—and not yet explored. The courts can introduce a small but meaningful check on the reach of the expedited removal and reinstatement regime via arbitrary and capricious (A&C) review, also known as the requirement that administrative agencies demonstrate reasoned decision-making.⁴⁰ In 2011, the Supreme Court in *Judulang v. Holder* found a Board of Immigration Appeals’ (BIA) policy

34. *Id.* at 329.

35. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

36. The seminal Supreme Court case finding that deportation does not rise to the level of criminal punishment, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), has been deeply criticized throughout the history of immigration law. Commentators have observed that the Supreme Court’s decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which found that criminal defense counsel have a Sixth Amendment duty to accurately advise noncitizen clients of the immigration consequences of a guilty plea, has placed pressure upon the longstanding treatment of deportation as a purely civil sanction. *See, e.g.*, Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1306 (2011) (arguing that *Padilla* represents turning point in the judiciary’s treatment of deportation as a quasi-criminal sanction).

37. Hiroshi Motomura, *The Curious Evolution of Immigration Law Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

38. *See infra* Part III.

39. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

40. *See generally infra* Part IV.A.

on eligibility for a form of immigration relief known as the “212(c) waiver” to be arbitrary and capricious.⁴¹ In doing so, the Court repeatedly emphasized that the Board’s policy—though neither prohibited nor sanctioned by statute—failed to display the level of reasoned decision-making required by mainstream administrative law principles.⁴² *Judulang* emphasized two important dimensions of arbitrary and capricious review upon which an immigration policy might fail: first, when the policy empowers individual immigration officers’ charging decisions to disproportionately impact deportation outcomes, and second, when the policy does not demonstrate a connection to the overall purpose of the immigration laws, which includes weighing the fitness of an individual to remain in the country.⁴³ By the same logic, this Article suggests that the federal courts can invoke arbitrary and capricious review to examine—and even invalidate—the use of reinstatement in cases where the only prior removal order is an expedited removal order.⁴⁴

This Article seeks to highlight the problems associated with the collision of the expedited removal and reinstatement processes, particularly for persons with existing ties to the United States, and to provide a partial antidote by way of arbitrary and capricious review in the federal courts. Part I provides necessary background on the operation of expedited removal and reinstatement, as well as recurring criticisms, such as the deprivation of administrative hearings, delegation of authority to front-line officers, and restrictions on substantive immigration relief. Part II describes the tangle of statutory provisions that operate to choke off meaningful review in the federal courts, which results in less accountability for the agencies tasked with implementing expedited removal and reinstatement. Part III describes how the traditional tools used by courts in the immigration context, namely constitutional avoidance and statutory arguments, together with procedural due process claims, have largely failed to tame the excesses of expedited removal and reinstatement. Part IV argues that arbitrary and capricious review offers an untested but meaningful avenue for the courts to reexamine the specific interaction of reinstatement and expedited removal orders, notwithstanding the jurisdictional bars that otherwise exist in the statutes and case law. Specifically, I argue that under the reasoning of the Supreme Court’s decision in *Judulang v. Holder*, the federal courts can find reinstated removal orders to be arbitrary and capricious where they are predicated solely upon a prior expedited removal order. Although the arbitrary and capricious arguments described here may depend on the facts of individual

41. 565 U.S. 42 (2011).

42. *Id.*

43. *Id.*

44. *See infra* at Part IV.A.

cases, *Judulang* gives reason to question the use of all reinstatements based on expedited removal as a categorical matter. While the scope of this Article still leaves much larger questions about the constitutionality of judicial review limitations unresolved, judicial interventions under *Judulang* would ameliorate some of the reach of the expedited removal-reinstatement interplay.

I. WHEN SHADOW REMOVALS COLLIDE: UNDERSTANDING EXPEDITED REMOVAL AND REINSTATEMENT OF REMOVAL

This Part provides a fundamental overview of how expedited removal and reinstatement of removal work. It does so by first describing the “most formal process”⁴⁵ available to an immigrant facing deportation: regular removal proceedings in immigration court. It then explores expedited removal, which provides strikingly less process and has generally been understood as a border enforcement tool for persons seeking initial entry to the United States. By next focusing on reinstatement of removal, this Part establishes how the expedited removal provisions can impact a significant number of people beyond the border as well as the unwillingness of the courts to curb the reinstatement process’s reliance on expedited removal.

A. Regular Removal Proceedings

Regular removal proceedings that take place before the immigration courts are no model of procedural fairness, and yet the truncated process associated with expedited removal and reinstatement falls far short of what noncitizens receive in immigration court.⁴⁶ Section 240 of the Immigration and Nationality Act (INA) sets forth the procedural requirements that accompany immigration court proceedings.⁴⁷ Section 240 provides for a right to counsel (at the immigrant’s own expense),⁴⁸ the right to call and cross-examine witnesses, the right to appeal, and some rights to judicial

45. *Gomez-Velazco v. Sessions*, 879 F.3d 989, 991 (9th Cir. 2018).

46. For a more detailed overview of regular removal proceedings, see Koh, *supra* note 10, at 188–93.

47. 8 U.S.C. § 1229a (2017).

48. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7–8 (2015) (discussing empirical study of access to counsel in immigration court). In some jurisdictions, local governments have begun to fund “universal representation” programs in which every person with an immigration court case is assigned an immigration attorney if they cannot afford one. See Jose Olivares, *More Jurisdictions to Provide Legal Defense for Immigrants at Risk of Deportation*, NAT’L PUB. RADIO (Nov. 12, 2017), <https://www.npr.org/sections/thetwo-way/2017/11/12/563557712/more-jurisdictions-to-provide-legal-defense-for-immigrants-at-risk-of-deportatio> [https://perma.cc/BH7Q-KVD4].

review.⁴⁹ The protections of the procedural due process clause also apply in immigration court. Regular removal proceedings are adjudicated by immigration judges (IJs) who are attorneys, take an oath to do justice as IJs, and are required by regulation to advise noncitizens of any apparent eligibility for immigration relief.⁵⁰ The government is represented by attorneys for Immigration and Customs Enforcement (ICE), who have training in immigration law and, as members of the legal profession, swear to uphold the Constitution and follow basic norms of professional responsibility governing lawyers.⁵¹ The noncitizen can contest the government's charges of removability. Normally, even a person who is removable in immigration court can still seek relief from removal if they are statutorily eligible to do so, for instance, by seeking cancellation of removal or certain waivers of specific grounds of removability.⁵² The adjudication of a case can take months, if not years.⁵³

The law recognizes that removal orders issued by IJs may be the product of error or incomplete factual assessments. Provisions to administratively reopen removal orders entered by IJs—for instance, if the facts or law have changed—exist as of right, albeit with limitations.⁵⁴ The proceedings are recorded, so that an administrative record can be compiled for administrative or judicial review.⁵⁵ A right to appeal administratively to the

49. 8 U.S.C. § 1229a; Koh, *supra* note 13, at 485–88 (discussing application of procedural due process in regular removal proceedings).

50. See EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, ETHICS AND PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES 1–2 (2011), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf> [<https://perma.cc/XQ6A-V9RC>]; 8 C.F.R. § 1240.11(a)(2).

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

52. See, e.g., 8 U.S.C. § 1229a(a) (2017) (describing several types of cancellation of removal).

53. The existence of immigration court backlogs is a mixed bag for respondents. On one hand, requiring immigrants to wait in limbo for years to receive an initial legal judgment with respect to their deportation cases produces high levels of anxiety among immigrants, impacts the availability of evidence and the reliability of testimony, and can have other negative consequences for the noncitizen. See, e.g., Jeanne Kuang, *Immigration Court Backlogs Keep Asylum Seekers in Limbo for Years*, WASH. POST (June 6, 2016), <http://www.chicagotribune.com/news/local/breaking/ct-immigration-cases-back-log-met-20160605-story.html> [<https://perma.cc/3CTZ-ESP3>]. On the other hand, the waiting time associated with immigration court is arguably an impediment to the government's deportation goals, provides some individuals with an opportunity to receive immigration relief through applications filed with USCIS, and in other cases provides additional time in the U.S. that is of value to the noncitizen. See, e.g., Julia Preston, *Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle*, N.Y. TIMES (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html> [<https://perma.cc/2349-CL24>] (“The [immigration] courts will be a major obstacle for President-elect Donald J. Trump and his plans to deport as many as three million immigrants he says have criminal records . . . [because] [m]any of those deportations—at least hundreds of thousands—would have to be approved by immigration judges.”).

54. 8 U.S.C. § 1229a(7) (2017).

55. Immigration court proceedings were recorded on analog tapes until a digital recording system was introduced in 2010. See Press Release, Executive Office for Immigration Review, *EOIR Completes Digital Audio Recording Implementation*, (Sept. 2, 2010), <https://www.justice.gov/sites/default/files/pag>

BIA exists.⁵⁶ The right to seek judicial review over questions of law and constitutional questions, and over questions of fact and discretionary determinations in certain circumstances, exists as well.⁵⁷ While imperfect and incomplete, removal proceedings in immigration courts thus provide a measure of due process and an expectation of fairness.

Still, immigration court-based adjudication suffers from a number of structural deficiencies that undermine basic fairness principles for many immigrants.⁵⁸ Critics have described immigration courts as sites of “assembly-line injustice,”⁵⁹ arbitrariness,⁶⁰ and severe under-resourcing.⁶¹ Disparities abound, both amongst individual IJs and across immigration courts in different geographic regions.⁶² The absence of counsel leads to diminished accountability, so that the rights and remedies available to many noncitizens often go unrealized. When individuals are detained, their ability to receive a fair process in immigration court is also severely undermined.⁶³ The Trump Administration has imposed stringent case completion quotas on IJs and also restricted their ability to use basic case management tools,

es/attachments/2015/08/20/eoircompletesdar09022010.pdf [https://perma.cc/76DT-82MQ].

56. For a critique of decisional independence at the BIA, see Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006).

57. See generally 8 U.S.C. § 1252(a) (2017). The 1996 immigration laws limited judicial review of immigration court-based removal orders in various ways and have been the subject of extensive scholarly critique. See, e.g., Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1412–15 (1997).

58. See Koh, *supra* note 10, at 191–93 (describing deficiencies in immigration court); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L. J. 1635, 1640 (2010); Jayashri Srikantiah, David Hausman & Lisa Weissman-Ward, *Access to Justice for Immigrant Families and Communities: A Study of Legal Representation of Detained Immigrants in Northern California*, 11 STAN. J. C.R. & C.L. 207 (2015); ARNOLD & PORTER LLP, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010).

59. APPLESEED & CHICAGO APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA’S IMMIGRATION COURTS (2009), <http://www.appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf> [https://perma.cc/ZS4X-HFS5].

60. See Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007); Jennifer Lee Koh, *Criminalization and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1160–61 (2016) (discussing arbitrariness in immigration enforcement, including in court-based removals).

61. Memorandum from Dana Leigh Marks, President, Nat’l Ass’n of Immigration Judges 2 (Oct. 2009), https://pennstatelaw.psu.edu/_file/NAIJ%20Priorities%20Short%20List%20-%20October%202009.pdf [https://perma.cc/E2C4-26BF] (describing immigration courts as places in which cases with death penalty-like consequences are adjudicated with the resources of traffic court).

62. See Ramji-Nogales et al., *supra* note 60, at 372–73; Elise Foley, *Here’s Why Atlanta is One of the Worst Places to be an Undocumented Immigrant*, HUFF. POST (May 25, 2016), https://www.huffingtonpost.com/entry/deportation-raids-immigration-courts_us_574378d9e4b0613b512b0f37 [https://perma.cc/MKM2-WDYF] (comparing rates of denials in Atlanta, GA-based immigration court to national statistics).

63. See César Cuahtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449 (2015).

such the administrative closure of cases.⁶⁴ And yet for all of the valid and unresolved critiques of immigration court, shadow removal processes are significantly worse from a process and fairness perspective.⁶⁵

B. Expedited Removal at the Border and Beyond

Expedited removal, by contrast to regular removal proceedings, relies on front-line immigration officers—who are neither judges nor attorneys—to carry out the entire removal process from beginning to end. Eligibility for otherwise common forms of immigration relief fails to serve as protection from the issuance of a removal order. Indeed, in expedited removal, the *only* way for a person to avoid expedited removal is to establish that they have a credible fear of returning to their home country or have already been granted immigration status, such as lawful permanent residence or asylum.⁶⁶ The process takes an average of ninety minutes,⁶⁷ even though expedited removal orders issued by those officers carry the full force and effect of a removal order adjudicated by an IJ, such that criminal and civil penalties upon re-entry as well as bars to future entry apply.⁶⁸ As discussed in Part II, the process is almost entirely insulated from judicial or even administrative review, thereby leaving little room for accountability or correction for error.

Enacted in 1996 as part of broader immigration legislation that transformed and harshened much of the modern deportation framework, expedited removal has functioned primarily as a tool of border enforcement against individuals arriving at ports of entry either with false documents or no entry documents.⁶⁹ The federal government has expanded its authority to use expedited removal several times since its statutory enactment.⁷⁰ It has also implemented its expanded authority unevenly, at times focusing on

64. EOIR Performance Plan: Adjudicative Employees, Nat'l Pub. Radio, <https://apps.npr.org/documents/document.html?id=4429792-PWP-Element-3-New> (setting forth benchmarks for case completion); Castro-Tum, 27 I&N Dec. 271 (A.G. 2018) (finding that immigration judges lack authority to administratively close cases absent previous regulation or judicially approved settlement).

65. See Koh, *supra* note 10, at 222–32.

66. 8 U.S.C. § 1225(b)(1)(A) (2017).

67. RANDY CAPPS, FAYE HIPSMAN, & DORIS MEISSNER, MIGRATION POLICY INSTITUTE, *ADVANCES IN U.S.-MEXICO BORDER ENFORCEMENT: A REVIEW OF THE CONSEQUENCE DELIVERY SYSTEM 3* (2017), <https://www.migrationpolicy.org/research/advances-us-mexico-border-enforcement-review-consequence-delivery-system> [https://perma.cc/3EJQ-9VAP].

68. See 8 U.S.C. § 1182(a)(9)(A), (C) (2017) (bars to re-entry following removal order).

69. See generally 8 U.S.C. § 61225(b) (2017).

70. For the first roughly six years after the law went into effect, expedited removal was limited to individuals arriving at official ports of entry who lacked documents or presented false documents. In 2002, DHS announced its intent to apply expedited removal against noncitizens arriving by sea who failed to meet certain prior residence requirements. In 2004, expedited removal was extended to anyone apprehended within one hundred miles of the border if they entered within fourteen days prior to apprehension. Similar expansions were made in 2005 and 2006. See Koh, *supra* note 10, at 197–98 (discussing prior regulatory expansions of expedited removal).

particular geographic regions for the use of expedited removal while continuing the use of gentler sanctions in others.⁷¹ Under current regulation, federal immigration agents can use expedited removal against persons apprehended at the border, within 100 miles of the border if they cannot show a prior entry more than fourteen days in advance, or even within two years of entry if they arrived at an unauthorized entry point by sea.⁷² The federal government has not yet implemented expedited removal to the full extent authorized by statute, although the Trump Administration has indicated that it plans to increase its authority to use expedited removal⁷³—a move that will almost certainly be challenged in federal court.⁷⁴

Expedited removal is now the norm at the border. Although the expedited removal provisions were enacted into law in 1996, their implementation has been more gradual. In fiscal year 2014, expedited removals accounted for forty-two percent of all removals. As a point of comparison, in 2005 they were roughly eighteen percent of all removals.⁷⁵ One common civil alternative to expedited removal is voluntary return.⁷⁶ As the name “voluntary return” suggests, persons agree to return to their country of origin without receiving a formal order of removal, thereby exempting them from the potential civil and criminal sanctions associated with an expedited

71. For instance, in 2006, the majority of all expedited removals (eighty-one percent) were issued in three offices (Phoenix, San Antonio and San Diego). See Aaron Terrazas, *Immigration Enforcement in the United States*, MIGRATION POLICY INST. (Oct. 8, 2008), <https://www.migrationpolicy.org/article/immigration-enforcement-united-states-2> [<https://perma.cc/GDP9-6EF7>].

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

73. See *supra* note 19 and accompanying text. See also Geoffrey A. Hoffman, *Contiguous Territories: The Expanded Use of “Expedited Removal” in the Trump Era* (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3107737 [<https://perma.cc/T4G8-SDC4>].

74. Despite the statutory prohibitions on judicial review discussed *infra* at Part II, a federal court challenge raising constitutional and statutory claims with respect to the anticipated expansion of expedited removal would be possible if the action is filed in the District Court of the District of Columbia within 60 days of implementation. See 8 U.S.C. § 1252(e)(3); Oluwadamilola E. Obaro, *Expedited Removal and Statutory Time Limits on Judicial Review of Agency Rules*, 92 N.Y.U. L. REV. 2132 (2017).

75. See Doris Meissner, *The Changing Face of Immigration Enforcement*, 30 J. L. & POL. 495, 498 (2015) (“As recently as 2005, the general practice at the border was voluntary return, [representing] about 82% of people who were repatriated from the border. Today, that has fallen to about 20%.”).

76. For persons with prior expedited removal orders, CBP can issue reinstatements at the border. Border agents have additional enforcement mechanisms available to them other than expedited removal and voluntary returns. See CAPPS et al., *supra* note 67, at 77. For instance, they can issue a Notice to Appear, placing the migrant in regular removal proceedings before an immigration judge. Reinstatement is frequently used at the border, where a person has a prior removal order. Border agents sometimes use the Alien Transfer Exit Program (ATEP) to physically deport migrants through different geographic regions from the ones in which they were apprehended (a practice that appears to have decreased since 2014). And through Operation Streamline, border officers can refer migrants to criminal prosecution for illegal entry and re-entry. See Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481 (2010).

removal upon future entry.⁷⁷ In 2011, CBP developed an internal protocol known as the Consequence Delivery System (CDS), which is intended to provide guidance to CBP agents on how to respond to border apprehensions, based on factors such as the number of prior apprehensions, criminal history, and human smuggling allegations.⁷⁸ The CDS, which by 2017 appear to have been used nationally across all CBP sectors, discourages the use of voluntary return in all cases, irrespective of prior criminal or immigration history.⁷⁹ While the CDS guidance is not uniformly implemented, it demonstrates the agency's recent prioritization of expedited removal over voluntary return. Voluntary return, though discouraged, has continued in use but has decreased over the past several years.⁸⁰

From the perspective of a migrant at the border, expedited removal and voluntary return may not feel meaningfully different. In both cases, immigration officials apprehend the person. Expedited removal may involve an additional hour or two of processing time in comparison to voluntary return,⁸¹ but even some of the procedural markers of expedited removal—an interview by a border agent, fingerprinting, and an oral

77. See, e.g., ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 7 (2005) (“The majority of aliens apprehended along the southwest border are Mexican nationals who are ‘voluntarily’ returned to Mexico without a formal removal hearing.”). The practice of offering administrative voluntary return to individuals seeking admission at U.S. ports of entry has raised similar concerns related to CBP officers providing misinformation, language barriers, and the use of coercive tactics to persuade individuals to accept voluntary return, as described by the allegations in *Lopez-Venegas v. Napolitano*. Complaint at 1–2, *Lopez-Venegas v. Napolitano*, No. 13-cv-03972 (C.D. Cal. June 4, 2013). The terms “voluntary return” and “voluntary departure” have been used in the immigration literature and by the government interchangeably at times to refer to any process in which a person is permitted to leave the US without receiving a formal removal order. Consistent with prevailing practice, this Article uses the phrase “voluntary return” to refer to the practice of border officers allowing migrants to voluntarily withdraw their applications for admissions without the penalty of a removal at the border. By contrast, this Article reserves the phrase “voluntary departure” for cases taking place in the interior United States, where a person agrees to leave the country and—similar to voluntary return—avoid the entry of a formal order of removal. Unlike voluntary return, voluntary departure, when used within the United States, is subject to various limitations and eligibility requirements set forth in the statute. See 8 U.S.C. § 1229c (2017).

78. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-66, BORDER PATROL: ACTIONS NEEDED TO IMPROVE OVERSIGHT OF POST-APPREHENSION CONSEQUENCES 1 (Jan. 2017), <https://www.gao.gov/assets/690/682074.pdf> [<https://perma.cc/YG8C-97HG>].

79. See *id.* at 9 (identifying voluntary return as an option, but characterizing it as the “[l]east [e]ffective and [e]fficient” option).

80. CAPPS et al., *supra* note 67, at 2, 15 (reporting that in FY 2014, 9 percent of apprehended migrants were issued voluntary returns, compared to 74 percent who received expedited removal orders; by contrast, in FY 2011, 41 percent of apprehended immigrants received voluntary returns and 59 percent received expedited removal orders).

81. The Migration Policy Institute estimates that voluntary return takes “a few minutes” on average, while expedited removal may involve an average of 90 minutes of staff time. But with the difference between the two procedures being less than two hours, the overall time difference is minimal. See *id.* at 3.

advisal—may be present with voluntary return.⁸² Coercive tactics by border officers and an atmosphere that prevents noncitizens from making informed choices may also be present with both outcomes.⁸³ Indeed, attorneys working with immigrant clients who have at any point in the past crossed the border without a visa often expend considerable time ascertaining whether their clients have an expedited removal on their record (versus a voluntary return), given the differing legal consequences.⁸⁴

From an enforcement perspective, the purpose of expedited removal is to increase the legal sanctions associated with unauthorized entry to the United States as well as the penalties for future re-entry, and to do so efficiently.⁸⁵ Defenders of expedited removal have emphasized that the minimal procedure involved with expedited removal, such as providing a process for credible fear interviews and for identifying U.S. citizens or lawful permanent residents (LPRs), is enough to prevent error.⁸⁶ One argument presented by those favoring expedited removal has been that because the process focuses generally on individuals seeking entry at the border, the process targets those with relatively lower stakes in the country.⁸⁷ As Professor David Martin has asserted, “in most cases involving [expedited removal] at the ports of entry, the stakes for the applicant for admission are low.”⁸⁸ Professor Martin’s rationale is that border entrants have generally not yet established ties in the United States. Furthermore, he explains, if ties to the country do exist, persons who are not LPRs or U.S. citizens “would generally lack a legitimate entitlement to resume those connections.”⁸⁹

But the argument that most border arrivals have little at stake, thereby justifying the use of expedited removal, avoids the question of whether a significant number of people subject to expedited removal might actually

82. See Lopez-Venegas Complaint, *supra* note 75, at 9-11 (describing procedure used to implement voluntary return as including the presentation of forms during oral encounters between border officers and noncitizens).

83. See Complaint, *supra* note 77.

84. See, e.g., EVANGELINE ABRIEL & SALLY KINOSHITA, THE VAWA MANUAL 10–20 (2014) (“The advocate should ask the client about any prior contact with immigration and ask to see any documents the client has, but the advocate may also need to do additional investigation” to ascertain the existence of a prior removal order).

85. Martin, *supra* note 26, at 675. See also *The Southern Border in Crisis: Resources and Strategies to Improve National Security: Joint Hearing Before the Subcomm. on Immigration, Border Sec. & Citizenship and the Subcomm. on Terrorism, Tech. & Homeland Sec. of the S. Comm. on the Judiciary*, 109th Cong. 3, 24 (2005) (statement of David Aguilar, Chief, Office of Border Patrol) (explaining that with expedited removal, once the determination that a person lacks a claim to enter the United States, “these people are rapidly removed out of the country without an immigration judge coming into play”).

86. See Martin, *supra* note 26, at 683, 687 n.47, 692–94.

87. *Id.* at 684–86, 690–91.

88. *Id.* at 690.

89. *Id.*

have meaningful ties to the United States. Relatedly, it fails to address whether the existence of an expedited removal order in the past should categorically preclude those people from developing legally cognizable ties to the country in the future. In theory, the existence of a prior order could make a noncitizen's subsequent entry to the United States more objectionable. However, the flimsy manner in which expedited removal takes place—speedy adjudications, a lack of formal process, implementation in detention centers—undermines the notion that a noncitizen with a prior expedited removal is less capable of developing meaningful ties that carry weight.

In light of international refugee treaty obligations, the expedited removal statute prohibits the immediate removal of any person who expresses a fear of returning to their home country. If a person indicates such a fear, then officials “shall” refer them for an interview known as a credible fear determination, in which an officer must assess whether their fear of persecution is credible.⁹⁰ If they articulate an adequately credible fear in the interview, they are referred to immigration court proceedings for adjudication of their asylum case.⁹¹ If the officer conducting the credible fear interview determines that the fear described is not sufficient, they may seek review by an IJ to evaluate the negative credible fear determination.⁹² But if an IJ upholds the officer's assessment, then neither the statute nor regulations permit any further judicial or administrative review.⁹³ Unless the officer's negative credible fear determination is overturned, the individual will receive an expedited removal order that remains on their immigration record forever. The regulations also prohibit the use of expedited removal on persons who claim to be U.S. citizens, LPRs, or recipients of asylum status.⁹⁴ Nothing in the statute, regulations, or agency policy prevents the use of expedited removal on persons with histories of prior residence in the United States, with cognizable claims to permanent residence, or even with immigration status that is other than lawful permanent residence or asylee status (such as a nonimmigrant visa or Deferred Action for Childhood Arrivals (DACA)).

A major critique of expedited removal has centered on its failure to properly identify asylum seekers fleeing persecution in foreign countries. It seems that border officials have failed to even follow the rudimentary procedures required by statute and regulation. The most well-known review of border patrol's adherence to federal procedures in expedited removal

90. 8 U.S.C. § 1225(b)(1)(B)(iii)(I)–(III) (2017).

91. *Id.*

92. *Id.*

93. 8 C.F.R. § 1003.42(f).

94. 8 C.F.R. § 235.3(b)(5).

comes from the United States Commission on International Religious Freedom (USCIRF), which conducted periodic studies from 1998 until 2016.⁹⁵ Each time, the USCIRF found serious failures by border officials to follow the required procedures, such as failing to read relevant portions of the immigration forms that advise entrants of the rights and protections associated with seeking asylum,⁹⁶ failing to ask questions about fear required by regulatory protocol,⁹⁷ documenting on-the-record exchanges in an erroneous or incomplete manner,⁹⁸ or failing to allow individuals to review their written statements.⁹⁹ In yet other cases observed by the USCIRF, even where persons did express fear of return, officers failed to refer them for credible fear interviews, as required by regulation.¹⁰⁰

Even decades after the introduction of expedited removal, report after report has documented instances of border officials refusing to properly identify valid asylum claims or otherwise follow required protocols.¹⁰¹ One of the most common complaints is that CBP officers do not ask migrants whether they fear returning to their home country. Additionally, CBP officers have reportedly actively discouraged individuals from seeking asylum through the credible fear process through a wide range of actions, including misinforming them that asylum is not available, verbal abuse and outright physical intimidation (including physically moving individuals out

95. For an excellent analysis of the USCIRF studies, see Stephen Manning & Kari Hong, *Getting it Righted: Access to Counsel in Rapid Removals*, forthcoming MARQ. L. REV. (2018) (draft on file with author).

96. In approximately half of the cases observed by the Commission, CBP officers failed to read relevant portions of Form I-867A, despite the fact that persons who heard the information on the form were seven times more likely to express a fear if given the advisal. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: VOLUME I: FINDINGS & RECOMMENDATIONS 51 (2005).

97. See *id.* at 15–17. See also Brief of Refugee and Human Rights Organizations and Scholars as Amici Curiae Supporting Petitioners, *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422 (2017) (No. 16-812).

98. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 19 (2016).

99. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 96, at 57 (noting that in three-fourths of observed cases, asylum seekers were not given an opportunity to review and correct statements).

100. *Id.* at 54 (noting that in fifteen percent of observed cases, asylum seekers expressing fear of return were not referred for credible fear interviews).

101. See, e.g., B. SHAW DRAKE, ELEANOR ACER & OLGA BYRNE, HUMAN RIGHTS FIRST, CROSSING THE LINE: U.S. BORDER AGENTS ILLEGALLY REJECT ASYLUM SEEKERS (2017); CLARA LONG, HUMAN RIGHTS WATCH, YOU DON'T HAVE RIGHTS HERE: U.S. BORDER SCREENINGS AND RETURNS OF CENTRAL AMERICANS TO SERIOUS HARM, (Oct. 16, 2014), <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk> [<https://perma.cc/47QA-YWME>]; Am. Immigration Council et al., *Re: U.S. Customs and Border Protections Systemic Denial of Entry to Asylum Seekers at Ports of Entry on U.S.-Mexico Border* (Jan. 13, 2017), https://americanimmigrationcouncil.org/sites/default/files/general_litigation/cbp_systemic_denial_of_entry_to_asylum_seekers_advocacy_document.pdf [<https://perma.cc/4HZ8-R2M5>].

of ports of entry),¹⁰² and abusive behavior.¹⁰³ In some places, border patrol officials have developed ad hoc procedures to limit the number of individuals seeking credible fear interviews at the border, such as through “ticketing” systems aimed at discouraging migrants from seeking asylum.¹⁰⁴

Whereas expedited removal’s implementation has long given rise to concerns, the Trump Administration’s aggressive border enforcement policies have demonstrated that those concerns, when exploited, metastasize into rampant denials of procedure and accuracy. Immediately following the November 2016 election of Donald Trump, human rights observers documented cases in which border patrol officers have invoked the Trump presidency to declare that “[President] Trump says we don’t have to let you in.”¹⁰⁵

Around April 2018, Attorney General Sessions increased the Trump Administration’s public condemnation of groups of migrants seeking asylum at the border, known as “caravans.”¹⁰⁶ The international human rights obligations that inform the credible fear process were further turned on their head by the Attorney General’s plans to apply a zero tolerance policy of criminal prosecutions for illegal entry and re-entry to all persons apprehended near the border.¹⁰⁷ By May 2018, the Trump Administration had adopted a regular policy of forcibly separating children from their parents following apprehension at or near the border.¹⁰⁸ Following weeks of sharp public outcry, a federal judge ultimately ruled those separations a violation of due process.¹⁰⁹ By July 2018, images of children in cages, stories of parents struggling to even locate—much less be reunited with—their children, and reports of children being held in appalling conditions

102. Complaint, *Al Otro Lado, Inc. v. Kelly*, No. 17-CV-5111, *1, 26–29, 32 (C.D. Cal. 2017).

103. *Id.* at *1, 26–29, 41.

104. DRAKE ET AL., *supra* note 101, at 9; Amnesty Int’l, *Facing Walls: USA and Mexico’s Violation of the Rights of Asylum Seekers*, AMNESTY INT’L (June 15, 2017), <https://www.amnestyusa.org/reports/facing-walls-usa-mexicos-violation-rights-asylum-seekers/> [<https://perma.cc/EGV5-VSRH>].

105. DRAKE ET AL., *supra* note 101, at 1.

106. Press Release No. 18-553, U.S. Dep’t of Justice, Justice Department Announces First Criminal Illegal Entry Prosecutions of Suspected Caravan Members (May 1, 2018), <https://www.justice.gov/opa/pr/justice-department-announces-first-criminal-illegal-entry-prosecutions-suspected-caravan> [<https://perma.cc/UE7G-UPDG>].

107. *Id.*

108. Mary Louise Kelly, *How The Trump Administration’s Family Separation Policy Is Playing Out*, NAT’L PUB. RADIO (May 28, 2018), <https://www.npr.org/2018/05/28/615010170/how-the-trump-administrations-family-separation-policy-is-playing-out> [<https://perma.cc/NP4A-5LW9>]. Prior to the actual separation of families, border officials had reportedly used the threat of separation to coerce parents into withdrawing their asylum claims. See WOMEN’S REFUGEE COMM’N ET AL., *BETRAYING FAMILY VALUES: HOW IMMIGRATION POLICY AT THE UNITED STATES BORDER IS SEPARATING FAMILIES* (2017), <https://www.clearinghouse.net/chDocs/public/IM-CA-0092-0001.pdf> [<https://perma.cc/772V-9SXX>].

109. Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss, *Ms. L. v. ICE*, No. 18-CV-0428 (S.D. Cal. June 6, 2018).

flooded the media.¹¹⁰ Against this backdrop, on June 11, 2018, Attorney General Jeff Sessions issued *Matter of A-B-*, a Board of Immigration Appeals decision he certified to himself, and that purported to significantly restrict most asylum claims based on domestic violence and other forms of private criminal activity.¹¹¹ One of the most wide-reaching and likely impacts of *A-B-* is that far more individuals will receive expedited removal in the near future, because under the far more stringent asylum standards set forth in *A-B-*, they will be denied at the credible fear stage and prohibited from seeking asylum in immigration court.¹¹²

Despite the national attention directed towards immigration policies at the border and debates around the U.S. government's role in facilitating widespread abuse of children, expedited removal remains an understudied area that is ripe for deeper research and review. The expedited removal regime arguably fails to even abide by the minimal international treaty protections that it claims to preserve. Put differently, expedited removal is flawed not only for its procedural shortcomings, but with respect to the implementation of its substantive provisions as well. But in addition to problems taking place at or near the border, the *consequences* of expedited removal and the harshness of the overall legal framework extend beyond the border and into the lives of immigrants in the United States.

C. Reinstatement of Prior Removal Orders

Like expedited removal, reinstatement of removal allows the government to swiftly deport a person without ever providing them with a hearing before a neutral adjudicator. Any person who was previously removed—whether through an expedited removal order issued within a day or one issued after a full presentation of the person's legal claims—and subsequently enters without permission, can be reinstated for removal.¹¹³

110. See, e.g., Miriam Jordan et al., *As Migrant Families are Reunited, Some Children Don't Recognize Their Mothers*, N.Y. TIMES (July 10, 2018); Aura Bogado, Ziva Branstetter & Vanessa Swales, *Defense Contractor Detained Migrant Kids in Vacant Phoenix Office Building*, REVEAL NEWS (July 6, 2018), <https://www.revealnews.org/article/defense-contractor-detained-migrant-kids-in-vacant-phoenix-office-building/>.

111. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

112. U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., POLICY MEMORANDUM, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* 10 (July 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf> [<https://perma.cc/385R-JEWW>] (“Officers should be alert that under the standards clarified in *Matter of A-B-*, few gang-based or domestic-violence claims involving particular social groups defined by the members’ vulnerability to harm may merit a grant of asylum or refugee status—or pass the ‘significant possibility’ test in credible fear screenings . . . or the ‘reasonable possibility’ test in reasonable fear screenings.”).

113. 8 U.S.C. § 1231(a)(5) (2012).

The reinstatement statute and regulations do not limit the types of removal orders that can serve as predicate orders to reinstatement. When an order is reinstated, the immigrant has “no right to a hearing before an immigration judge,”¹¹⁴ and, similar to expedited removal, their substantive defenses to removal are limited.¹¹⁵ If the individual articulates a fear of returning to their home country and demonstrates a “reasonable fear” of return in an interview with an asylum officer, they can seek withholding of removal or Convention Against Torture relief.¹¹⁶ The statute purports to bar them from seeking any other forms of relief from removal in court, even if otherwise available under the immigration statute, including asylum.¹¹⁷ As one court put it, the “reinstatement process offers virtually no procedural protections,” providing “nothing more than a chance to make a statement opposing reinstatement to an immigration officer (not a judge).”¹¹⁸ Unlike regular removal, reinstatement is a process that “guarantees the alien no notice . . . , affords him no real opportunity to contest the facts underlying the reinstatement, and contemplates no presentation of evidence.”¹¹⁹ And given that the reinstatement statute carries no statute of limitations,¹²⁰ persons who have entered the United States after any removal order are what I have described previously as “forever deportable.”¹²¹

The federal government drastically boosted its reliance on reinstatement to increase deportations throughout the Bush and Obama Administrations, and will likely continue to do so to further Trump’s deportation agenda.¹²² The reinstatement process is heavily one-sided and favors the government. The burden on immigration officials to implement a reinstatement is remarkably low, requiring a showing of only three elements: (1) the existence of a prior removal order, (2) that the noncitizen’s identity matches that of the prior removal order, and (3) the fact of the subsequent unlawful

114. 8 C.F.R. § 241.8(a) (2016).

115. 8 C.F.R. § 241.8(d) (stating that reinstatement orders will not apply to individuals granted adjustment of status applications under the Haitian Refugee Immigrant Fairness Act of 1998 or the Nicaraguan Adjustment and Central American Relief Act); 8 C.F.R. § 214.14(c)(5)(i) (clarifying that grant of U-1 nonimmigrant status cancels prior removal orders issued by immigration officers who are not IJs).

116. Similar to expedited removal, the officer’s negative reasonable fear determination can be reviewed by an immigration judge. 8 C.F.R. § 208.31.

117. 8 U.S.C. § 1231(a)(5) (2017) (“[T]he alien is not eligible and may not apply for any relief under this chapter”); *Matter of L-M-P-*, 27 I&N Dec. 265 (BIA 2018) (holding that an applicant in withholding-only proceedings and subject to a reinstated order is not eligible for asylum).

118. *Lattab v. Ashcroft*, 384 F.3d 8, 24 n.6 (1st Cir. 2004).

119. *Id.*

120. 8 U.S.C. § 1231(a)(5) (2017) (permitting reinstatement “at any time after reentry”).

121. Koh, *supra* note 10, at 203, 206.

122. Reinstatement experienced a roughly 270 percent increase in use from fiscal years 2005 to 2013. AM. IMMIGRATION COUNCIL, *REMOVAL WITHOUT RECOURSE: THE GROWTH OF SUMMARY DEPORTATIONS FROM THE UNITED STATES 1* (2014), https://www.americanimmigrationcouncil.org/site/default/files/research/removal_without_recourse.pdf [<https://perma.cc/28H9-WG9V>].

reentry.¹²³ As a result, the reinstatement process moves quickly, making it extremely difficult to challenge the legality of the process or of the prior order. As one attorney put it, “We see reinstatements left and right, but how can you unwind all of this in 24 hours?”¹²⁴ The law nonetheless views individuals solely through the lens of their prior removal (no matter how long in the past), while giving no weight to the equities and ties that might have developed (such as family relationships, or integration into business or social communities). Once a person receives a reinstatement—whether at the border or in the interior of the United States—that reinstatement order can also be reinstated an unlimited number of times. As a result, significant portions of the immigrant population live at risk of immediate deportation at any time. For those individuals, the risks of affirmatively seeking immigration relief, such as pursuing one’s green card through an immediate family member, are high because their vulnerability to reinstatement means that the end result of any contact with immigration authorities may be summary deportation.¹²⁵

The decision to place a noncitizen in reinstatement versus regular removal proceedings is a purely discretionary one that lies with a front-line charging officer or, in some cases, with an attorney from the Office of Chief Counsel within ICE. Nothing in the reinstatement statute or regulations requires that agency officials use reinstatement in lieu of regular removal proceedings. As the Ninth Circuit has stated, “[r]einstatement of a prior order of removal is not automatic’ . . . Nor is it obligatory.”¹²⁶ Accordingly, “ICE agents, to whom § 1231(a)(5) delegates the decision to reinstate a prior removal order, may exercise their discretion not to pursue streamlined reinstatement procedures.”¹²⁷ As Professor Shoba Sivaprasad Wadhia has explained, existing agency policy does not direct agency officials to weigh equitable factors such as length of prior residence, family or community ties, criminal record, or other factors.¹²⁸ Wadhia has argued persuasively in favor of adopting prosecutorial discretion policies that would compel officers to take such factors into account before placing individuals in

123. *Id.* at 4.

124. ACLU, *supra* note 10, at 84 (quoting attorney Ken McGuire).

125. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 506 (9th Cir. 2007) (en banc) (Thomas, J., dissenting) (a “typical reinstatement case” involves a noncitizen who “has married a United States citizen and makes an appointment with the agency to discuss adjustment of status or an extension of a previously granted work authorization”).

126. *Villa-Anguiano v. Holder*, 727 F.3d 873, 878 (9th Cir. 2013) (quoting *Alcala v. Holder*, 563 F.3d 1009, 1013 (9th Cir.2009)). *See also id.* (“[A]n ICE officer may decide to forgo reinstatement of a prior order of removal in favor of initiating new removal proceedings”).

127. *Id.* at 879.

128. Wadhia, *supra* note 10, at 24 (describing internal agency documents that encourage officers to use reinstatement and other forms of summary removal over NTAs to the extent possible).

reinstatement.¹²⁹

The rudimentary process afforded during reinstatement is entirely premised on the existence of a previously executed removal order, but the statute also restricts the noncitizen's opportunities to challenge the validity of that prior order during the reinstatement process. The reinstatement statute states that the prior order "is not subject to being reopened or reviewed."¹³⁰ By contrast, where the government seeks to criminally prosecute an individual for illegal re-entry, the Constitution requires that the immigrant be permitted to bring a collateral challenge against the predicate removal order.¹³¹ Indeed, some federal courts have examined the validity of expedited removals in illegal re-entry prosecutions.¹³² But reinstatement is a civil proceeding, and so courts have rejected a similar right to challenge the validity of the prior order during reinstatement.¹³³

The federal courts have done little to require that the predicate removal order underlying a reinstatement of removal demonstrates procedural integrity. For the government, arguably all that reinstatement requires is the "existence of a prior removal order," and not its legal or constitutional validity.¹³⁴ It is thus common for one shadow removal proceeding to serve as the basis for the reinstatement. Cases in which an immigrant's reinstatement was premised upon an expedited removal have received even less scrutiny from courts, which have endorsed the executive's statutory authority to layer one summary removal procedure upon another.¹³⁵ Such cases confirm the fact that these two procedures, acting together, prevent even persons with otherwise strong ties to the United States (such as eligibility to apply for lawful permanent residence based on an immediate family relationship) from receiving meaningful administrative review of their claims.¹³⁶

129. *Id.* at 22 (arguing that DHS has discretion whether to place an individual in various forms of "speed deportation," referring to expedited removal, administrative removal of non-LPRs with aggravated felony convictions, or reinstatement).

130. 8 U.S.C. § 1231(a)(5).

131. *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). *See also* Doug Keller, *Rethinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L. REV. 65 (2012).

132. *See, e.g.*, *United States v. Raya-Vaca*, 771 F.3d 1195 (9th Cir. 2014) (finding due process violations in expedited removal order serving as predicate order for illegal re-entry prosecution); *United States v. Bayardo-Garcia*, 590 F. App'x 660, 662 (9th Cir. 2014) (same).

133. *See Garcia-Villeda v. Mukasey*, 531 F.3d 141, 150 (2d Cir. 2008).

134. *Id.* at 148 (emphasis added).

135. *See, e.g.*, *Garcia de Rincon v. U.S. Dep't of Homeland Sec.*, 539 F.3d 1133 (9th Cir. 2008); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007).

136. *See Garcia de Rincon*, 539 F.3d at 1134 (involving noncitizen married to lawful permanent resident with two U.S. citizen children, subjected to reinstatement after filing affirmative green card application through spouse); *Lorenzo*, 508 F.3d at 1281 (involving noncitizen who applied for lawful permanent residence through spouse eight years after receiving expedited removal order).

Undocumented immigrants living in the United States with expedited removal orders in their past thus reside at the intersection of two summary removal regimes. In theory, the minimal procedure associated with reinstatement of removal is justified because the fair adjudication of the immigrant's predicate removal order has already taken place. But where the predicate removal order is an expedited removal order, there is reason to believe that a fair adjudication never took place. Nonetheless, through reinstatement, expedited removal orders have continuing and lasting effects on the immigration enforcement agencies' power to deport and detain. As the next Part describes, the right to meaningful administrative or judicial review in which the person can challenge errors that might have occurred in the initial execution of the expedited removal order is extremely limited under the statutory scheme and the subject of unsettled case law.¹³⁷

II. LEGAL BLACK HOLES: THE ABSENCE OF JUDICIAL REVIEW

Having discussed the nature of expedited removal and reinstatement, including the interplay of the two, this Part explores restrictions on judicial and habeas review. Those restrictions prevent persons from seeking recourse in the federal courts to correct for error in the expedited removal process, even while empowering expedited removal to continuously deport through reinstatement.

The upshot is the arguable creation of legal black holes in immigration law. The concept of a "legal black hole" is largely undefined, but the basic idea is that spaces exist—whether defined spatially or legally—in which governmental powers are high but where the law cannot reach, particularly where the treatment of persons is concerned.¹³⁸ The phrase has been invoked most frequently in the context of the U.S. military detention complex at Guantanamo Bay.¹³⁹ As this Part demonstrates, expedited removal operates

137. Some attorneys, including the Clinic I direct, have reported success with administrative motions to reopen and rescind expedited removal orders that have been filed directly with CBP pursuant to 8 C.F.R. § 103.5.

138. See Ralph Wilde, *Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. 739, 775 (2006) ("The 'legal black hole' idea speaks to a fear that" extraterritorial state action may lead to "a partial or complete move away from the arena of necessary legal regulation as far as the treatment of individuals is concerned.").

139. *Id.* at 772–75 (discussing legal black hole comparison to Guantanamo and quoting Johan Steyn, *Guantánamo Bay: the Legal Black Hole*, 27th F.A. Mann Lecture (Nov. 27, 2003), in 53 INT'L & COMP. L.Q. 1, 8 (2004) as describing detainees in Guantánamo Bay as "beyond the rule of law, beyond the protection of any courts," characterizing Guantanamo as a "legal black hole"). See also Lisa Austin, *Technological Tattletales and Constitutional Black Holes: Communications Intermediaries and Constitutional Constraints*, 17 THEORETICAL INQUIRIES L. 451, 451–52 (May 2015) (using black hole concept to discuss public and private surveillance, and noting that "[l]aws that treat nonresident aliens differently from residents and citizens can create 'constitutional black holes' where the communications data of an individual is not protected by any constitutional constraints").

with little oversight by the federal courts, and the expedited removal-reinstatement connection likewise provides negligible opportunities for the law to correct for abuse and error. At the ground level, the expedited removal and reinstatement procedures are designed to invite abuse by taking place in backroom settings, administered by front-line officers with few administrative mechanisms for oversight. Yet Congress has insulated the very procedures most likely to result in error and abuse from further judicial or even habeas review. The layering of one shadow removal upon another thus creates an even darker space in immigration law than the operation of each process on its own.

A. Judicial and Habeas Review of Expedited Removal

The elimination of judicial review—including habeas review—to account for the legality of expedited removal is a unique and draconian feature of expedited removal. A number of judicial review provisions largely eliminate the federal courts’ ability to review and correct for errors in the expedited removal process. Immigration laws enacted in 1996 already preclude regular federal district court review of judge-issued removal orders, and have been the subject of extensive critique and litigation.¹⁴⁰ Those laws do, however, specify that the federal courts of appeal retain “sole and exclusive” jurisdiction over removal orders.¹⁴¹ But the immigration statute’s general conferral of jurisdiction over removal orders with the courts of appeal contains a short yet significant exception: “except as provided in subsection (e).”¹⁴² That subsection, at 8 U.S.C. § 1252(e), specifically addresses the availability of judicial review over expedited removal orders, and works in concert with other provisions to deprive persons of judicial and habeas review in all but the most limited instances.

8 U.S.C. § 1252(e) contains multiple provisions that prevent individuals with expedited removal orders from obtaining federal court review. One provision states that “no court” may “enter declaratory, injunctive, or other equitable relief” except as permitted by subsection (e).¹⁴³ That same provision bars any court from certifying a class for purposes of a class-action lawsuit involving expedited removal.¹⁴⁴ Courts interpreting these

140. Prior to 1996, federal district court review of removal orders was available. See Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1419–38 (1997) (describing history).

141. 8 U.S.C. § 1252(a)(4).

142. *Id.*

143. 8 U.S.C. § 1252(e)(1)(A).

144. 8 U.S.C. § 1252(e)(1)(B) (“[N]o court may . . . certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.”).

provisions have read them to bar federal appellate court jurisdiction over expedited removal orders.¹⁴⁵ Thus, claims that an expedited removal order was entered on incorrect factual grounds, or raising due process violations, have been rejected on jurisdictional grounds.¹⁴⁶

Beyond containing general bars to judicial review of individual expedited removal orders, the statute also takes aim at systematic challenges to the broader expedited removal system. Subsection (e)(3) mandates that any challenges to “the validity of the [expedited removal] system” be brought within 60 days of implementation of any statute, regulation or policy,¹⁴⁷ be filed only in the federal district court for the District of Columbia, and that the claims be limited to constitutional or statutory arguments.¹⁴⁸ Indeed, immediately following the implementation of the expedited removal statute in 1997, subsequent litigation—involving three lawsuits consolidated into a single action, *American Immigration Lawyers Association v. Reno*—resulted in the D.C. Circuit upholding the validity of the expedited removal framework.¹⁴⁹

Section 1252(a)(2)(A) further singles out expedited removal orders as a matter “not subject to judicial review” in the INA.¹⁵⁰ That provision is part of a broader section addressing removal orders deemed unreviewable by the federal courts such as certain discretionary denials of relief or orders against “criminal aliens.”¹⁵¹ Although the statute preserves judicial review over limited matters, it explicitly strips the courts of jurisdiction over individual determinations or Attorney General decisions related to *expedited* removal

145. *Shunaula v. Holder*, 732 F.3d 143 (2d Cir. 2013) (acknowledging that § 1252 “provides for limited judicial review of expedited removal orders in habeas corpus proceedings” but otherwise deprives the courts of jurisdiction to hear claims related to the implementation or operation of an expedited removal order); *Khan v. Holder*, 608 F.3d 325 (7th Cir. 2010) (declining to review case on jurisdictional grounds); *Li v. Eddy*, 259 F.3d 1132 (9th Cir. 2001) (“With respect to review of expedited removal orders, . . . the statute could not be much clearer in its intent to restrict habeas review.”); *Brumme v. INS*, 275 F.3d 443 (5th Cir. 2001).

146. *See, e.g., Shunaula*, 732 F.3d at 143 (an alien’s claims disputing that he sought to enter the country through fraud or misrepresentation and asserting that he was not advised that he was in an expedited removal proceeding or given the opportunity to consult with a lawyer “[f]ell] within this jurisdictional bar”); *Pena v. Lynch*, 815 F.3d 452 (9th Cir. 2015) (denying jurisdiction to review expedited removal where allegations of due process violations).

147. 8 U.S.C. § 1252(e)(3)(B) (“Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.”). For further analysis of the 60-day time limit, see Obaro, *supra* note 74.

148. *See* 8 U.S.C. § 1252(e)(3).

149. *Am. Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352, 1352 (D.C. Cir. 2000). *See also* Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 574 (2007) (discussing *AILA v. Reno* litigation); Obaro, *supra* note 74, at 2138–48 (same).

150. 8 U.S.C. § 1252(a)(2)(A).

151. 8 U.S.C. § 1252(a)(2)(B), (C).

orders.¹⁵² Courts have relied on section 1252(a)(2)(A), read in combination with section 1252(e), to reject arguments that other provisions of the INA or common law-based exceptions to statutory restrictions on judicial review can give rise to federal court jurisdiction over expedited removal orders.¹⁵³

Finally, the statute severely restricts the ability to seek even habeas review over expedited removal orders in the federal district courts. Throughout the history of the United States, the writ of habeas corpus has functioned to preserve federal court review over executive action, particularly where no other legal remedy exists.¹⁵⁴ While not eliminating it altogether, the statute at section 1252(e)(2) states that habeas review “is available,” but is limited to three issues: (1) “whether the petitioner is an alien,” (2) “whether the petitioner was ordered removed” pursuant to the expedited removal provisions, and (3) whether the noncitizen can demonstrate that she is a LPR, refugee, or has already been granted asylum.¹⁵⁵ The courts have read these provisions narrowly when assessing jurisdiction over expedited removal orders.¹⁵⁶ Furthermore, the only remedy available is to be placed in regular removal proceedings before an IJ.¹⁵⁷

The statutory limitations on habeas review of expedited removal raise a particularly complex series of questions related to the application of the Constitution’s Suspension Clause in the immigration context. The Suspension Clause states that “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁵⁸ The Supreme Court’s heavily commented-upon decision in *Boumediene v. Bush* found that the Suspension Clause applies to foreign nationals designated “enemy combatants” at the Guantanamo Naval Base (and thus not on U.S. soil),¹⁵⁹ and seemed to establish a theory of constitutional rights not tethered to either immigration status or physical presence in the United States.¹⁶⁰ Ironically, despite the

152. 8 U.S.C. § 1252(a)(2)(A).

153. See, e.g., *Garcia de Rincon v. U.S. Dep’t of Homeland Sec.*, 539 F.3d 1133, 1138 (9th Cir. 2008); *Khan v. Holder*, 608 F.3d 325, 329 (7th Cir. 2010); *Brumme v. INS*, 275 F.3d 443, 447–49 (5th Cir. 2001); *Turgemel v. Mukasey*, 513 F.3d 1202, 1205–06 (10th Cir. 2008).

154. See Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 60 (2012) (describing historical origins of writ of habeas corpus).

155. 8 U.S.C. § 1252(e)(2).

156. See *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 430–31 (3d Cir. 2016); *Shunaula v. Holder*, 732 F.3d 143, 145–47 (2d Cir. 2013); *M.S.P.C. v. U.S. Customs & Border Prot.*, 60 F. Supp. 3d 1156, 1163–64 (D.N.M. 2014), *vacated as moot*, No. 14–769, 2015 WL 7454248 (D.N.M. Sept. 23, 2015).

157. 8 U.S.C. § 1252(e)(4).

158. U.S. Const. art. I, § 9, cl. 2.

159. 553 U.S. 723 (2008).

160. *Id.* at 753–71; see also Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 261 (2009) (“More broadly, *Boumediene* . . . rejects formalistic reliance on single factors, such as nationality or location, as a basis for wholesale denial of

invocation of legal black holes to describe Guantanamo, Supreme Court intervention since *Boumediene* has ameliorated concerns regarding the lack of meaningful judicial process and review related the detention of enemy combatants.¹⁶¹ It would seem that the protections of *Boumediene* should extend to expedited removal, and scholars have put forth strong explorations of the role of the Suspension Clause in the immigration context following *Boumediene*.¹⁶² Professor Gerald Neuman has suggested that the judicial review restrictions associated with expedited removal may violate the Suspension Clause in light of *Boumediene*.¹⁶³ Relatedly, Professor Carolina Núñez has explored broader questions of how physical presence and attachments to the country should impact claims of Constitutional protection, relying in part on *Boumediene* to argue for a vision of membership and rights that accounts for community ties and participation in the political community, as opposed to technical grants of immigration status.¹⁶⁴

But the precise application of *Boumediene* and the Suspension Clause in the expedited removal context remains unresolved, with a pair of cases arising in the Third Circuit being the first courts to grapple with the question.¹⁶⁵ The first case, *Castro v. Department of Homeland Security*, rejected the Suspension Clause challenge to expedited removal's bar on

rights, and essentially maintains that functionalism has long been its standard methodology for deciding such questions.”).

161. See Wilde, *supra* note 138, at 775 (“The ‘legal black hole’ designations [with respect to treatment of Guantanamo detainees] are, therefore, often invoked in relation to particular areas of law and have, to a certain extent, turned out to be unfounded given the 2004 decisions of the Supreme Court”).

162. Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998); Gerald L. Neuman, *Jurisdiction and the Rule of Law after the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000); Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1668–79 (2000); Neuman, *supra* note 160; Jonathan Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509 (1998).

163. Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 567–77 (2010). See also Hafetz, *supra* note 162, at 2541 (suggesting expedited removal provisions preclusion of judicial review “could lead to the deportation of aliens based on erroneous factual findings” and that “[s]uch a result would flout the core purpose of the common law writ of habeas corpus”).

164. D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 85 (2011) (relying in part on *Boumediene* to argue for a post-territorial vision of Constitutional rights that “looks to more substantive indicators of membership, including community ties and mutuality of obligation, to afford rights”) [hereinafter Núñez, *Inside the Border*]. See also D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817 (2010) (setting forth theory of post-territorial views of membership in political community).

165. On March 8, 2018, a federal district court in California relied on *Castro* to deny the Suspension Clause claims of an asylum seeker seeking judicial review over the denial of his claims of credible fear. See *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 287 F. Supp. 3d 1077 (S.D. Cal. Mar. 8, 2018). The Ninth Circuit subsequently stayed the noncitizen’s removal pending further review.

judicial review. Issued in August 2016, *Castro* read 8 U.S.C. § 1252(e)(2) to bar habeas jurisdiction over twenty-eight women and children fleeing Central America, who claimed that they had been erroneously issued expedited removal orders despite having valid claims of credible fear.¹⁶⁶ *Castro* found that the Suspension Clause did not apply *at all* to the migrant women and children who had been processed through expedited removal.¹⁶⁷ The court emphasized the fact that the petitioners had been apprehended hours after entering the United States, and treated them as outside U.S. borders, despite their physical presence at a detention facility in Pennsylvania.¹⁶⁸ In doing so, the Third Circuit relied on case law that reflects the plenary power doctrine in its strongest form. *Castro* assimilated the plaintiffs in the case to noncitizens physically located outside U.S. borders for purposes of granting constitutional rights, a reading that enabled the court to conclude that they lacked constitutional rights as a threshold matter.¹⁶⁹

Neither the plenary power doctrine nor the entry fiction doctrine is statically and consistently applied. Indeed, a longstanding discussion over the scope, continued vitality, and weakening of the plenary power doctrine is continuously percolating amongst immigration law scholars.¹⁷⁰ But *Castro* invoked a strict version of each, grounded in two Supreme Court decisions from the Cold War era, both of which suggest heightened deference to Congress with few constitutional limits. The first case, *United States ex rel. Knauff v. Shaughnessy*, famously asserted that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”¹⁷¹ The second, *Shaughnessy v. United States ex rel. Mezei*, affirmed Congress’s plenary power to determine the procedures afforded to noncitizens seeking entry and permitted the courts to view even individuals on U.S. soil, with prior ties to the United States, as akin to being

166. *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 433–34 (3d Cir. 2016). For the most part, their asylum claims were based on domestic violence or gang-related violence. *Id.* at 427.

167. *Id.* at 433–34.

168. *Id.* at 445 (“Petitioners were each apprehended within hours of surreptitiously entering the United States, so we think it appropriate to treat them as ‘alien[s] seeking initial admission to the United States.’”) (internal citation omitted).

169. For a deeper discussion of the entry fiction doctrine, see generally Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995).

170. The academic literature on the plenary power doctrine is extensive. See, e.g., *id.* at 1004–20 (describing ambivalent public attitudes toward plenary power doctrine); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984) (tracing development of plenary power doctrine); David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 (2015) (“It almost seems an obligatory rite of passage for scholars embarking on the study of immigration law to provide their own critique of plenary power or related doctrines of deference.”).

171. 338 U.S. 537, 544 (1950).

at the border.¹⁷² *Castro* thus rejected the influence of more recent Supreme Court cases such as *INS v. St. Cyr*, which construed a federal immigration statute in light of the Suspension Clause to permit habeas review for LPRs facing deportation due to past criminal convictions.¹⁷³ The Third Circuit also elided the holding of *Boumediene* by treating the petitioners as “alien[s] seeking initial admission to the United States, request[ing] a privilege” and thus having “no constitutional rights regarding [the] applications.”¹⁷⁴ Of particular significance to the *Castro* court was the fact that the migrants were “each apprehended within hours of surreptitiously entering the United States.”¹⁷⁵ It is worth noting that there are strong arguments that *Castro* was wrongly reasoned and decided, many of which are laid out in the Petitioner’s Writ of Certiorari to the Supreme Court but fall outside the scope of this Article.¹⁷⁶

Castro explicitly recognized the possibility that constitutional rights “might apply in some future case where the alien ordered removed has been in the country for a period of time sufficient ‘to have become, in [some] real sense, a part of our population.’”¹⁷⁷ And for good reason. For persons with stronger ties to the United States, the legacy of *Mezei* and *Knauff* are by no means etched in stone, particularly in light of cases like *Landon v. Plasencia*, where the Court recognized the due process rights of a LPR returning at the border.¹⁷⁸ Similarly, the Court in *United States v. Verdugo-Urquidez* recognized that constitutional protections apply to noncitizens “when they have come within the territory of the United States and developed substantial connections with this country.”¹⁷⁹

172. 345 U.S. 206 (1953); see also *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 442–44 (3d Cir. 2016).

173. *INS v. St. Cyr*, 533 U.S. 289, 300–08 (2001).

174. 835 F.3d at 445.

175. *Id.*

176. Petition for Writ of Certiorari, *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016) (No. 16-812); see also Chloe Kim, *Comment, Castro v. Department of Homeland Security: Keeping the Suspension Clause of Out Reach*, CALIF. L. REV. ONLINE, <http://www.californialawreview.org/keeping-the-suspension-clause-out-of-reach/> [<https://perma.cc/E3L7-TD4H>] (critiquing decision); Steve Vladeck, *Third Circuit Holds Suspension Clause Does Not Apply to Non-Citizens Physically (But Not Lawfully) Present in the United States*, JUST SECURITY (Aug. 29, 2016, 3:05 PM), <https://www.justsecurity.org/32597/circuit-holds-suspension-clause-apply-non-citizens-physically-but-law-fully-present-united-states/> [<https://perma.cc/T2A7-K4T8>] (describing “breathhtaking” decision that “seems simply nuts”).

177. *Castro*, 835 F.3d at 448 n.29 (alteration in original) (quoting *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903)); see also *id.* at 448 n.30 (“[W]e simply leave it to courts in the future to evaluate the Suspension Clause rights of an alien whose presence in the United States goes meaningfully beyond that of Petitioners here.”).

178. *Landon v. Plasencia*, 459 U.S. 21, 32–34 (1982). See also Weisselberg, *supra* note 169, at 989 (discussing tensions between *Mezei/Knauff* and *Plasencia*, and observing that “*Plasencia* directly conflicts with *Mezei* and *Knauff*”).

179. 494 U.S. 259, 271 (1990). For a helpful analysis of *Verdugo-Urquidez*, see Núñez, *Inside the Border*, *supra* note 164.

On June 18, 2018, the Third Circuit in *Osorio-Martinez v. U.S. Attorney General* began to answer the question of whether an immigrant's ties to the United States might generate a Suspension Clause claim against the expedited removal provisions, and in doing limited the reach of *Castro*.¹⁸⁰ The petitioners in *Osorio-Martinez* were four children and their mothers who had unsuccessfully sought habeas review in *Castro*.¹⁸¹ Two years after *Castro*, the children had been granted Special Immigrant Juvenile Status (SIJS), an immigration classification for children who have been abused or neglected and otherwise meet certain eligibility requirements.¹⁸² *Osorio-Martinez* affirmed *Castro*'s interpretation of the expedited removal statute as foreclosing habeas review for petitioners' claims.¹⁸³ But unlike *Castro*, *Osorio-Martinez* found that the *Boumediene* framework was applicable to the SIJS grantee children.¹⁸⁴ The court emphasized the extensive federal statutory and regulatory framework associated with SIJS, which encourages the granting of lawful status to eligible youth.¹⁸⁵ Drawing from case law recognizing the existence of constitutional rights for noncitizens with ties to the United States,¹⁸⁶ the court asserted that the children were "much closer to lawful permanent residents than to aliens present in the United States for a few hours before their apprehension" to justify the application of the Suspension Clause.¹⁸⁷

In the wake of *Castro* and *Osorio-Martinez*, it remains unclear whether expedited removal's judicial review restrictions will withstand constitutional scrutiny as applied to individuals who are not seeking entry at the border if they nonetheless lack an approved claim to formal lawful status. *Osorio-Martinez* stated in dicta that its holding does not "suggest that aliens must be accorded a formal statutory designation and attendant benefits to lay claim to 'substantial connections' to this country, or indeed, than an alien must have such connections to invoke the Suspension

180. 893 F.3d 153 (3d Cir. 2018).

181. *Id.* at 158. The children's mothers were also Petitioners in *Osorio-Martinez*, but the court's analysis related only to the children who had been granted SIJS, since "all the claims asserted pertain exclusively to the children." *Id.* at 158 n.1.

182. See 8 U.S.C. 1101(a)(27)(J)(i) (defining a Special Immigrant Juvenile as a child "who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law").

183. See *Osorio-Martinez*, 893 F.3d at 164–66 (rejecting statutory arguments raised by petitioners).

184. *Id.* at 166–67.

185. *Id.* at 168–71.

186. *Id.* at 168–69.

187. *Id.* at 174.

Clause.”¹⁸⁸ However, the court also did “not address [] what minimum requirements aliens must meet to lay claim to constitutional protections,” beyond its explicit holding that approval of SIJS was sufficient.¹⁸⁹ Persons who are caught at the juncture of expedited removal and reinstatement raise particularly unresolved questions that may surface in the federal courts in the future. On one hand, individuals who are present in the U.S. following a prior removal may have meaningful ties to the country in the form of traditional positive equities such as family ties, long periods of residence, and community contributions. *Osorio-Martinez* noted that, while “not the basis for [the] decision,” the petitioners “have lived in the United States during this period and at least some of that time has been outside of detention in communities.”¹⁹⁰ On the other hand, the courts could invoke the Supreme Court’s prior characterization of individuals subject to reinstatement as having engaged in a “continuing violation” of the law that justifies the application of a “new and less generous legal regime.”¹⁹¹

The applicability of the Suspension Clause to the expedited removal provisions thus remains an open question, especially with respect to persons with a range of connections to the United States, and raises complex issues related to the relationships among territoriality, constitutional rights, and immigration status.

B. Judicial Review of Reinstated Removal Orders and the Expedited Removal Exception

Judicial review of reinstated removal orders alone is restricted, but not completely absent, and provides substantially more review compared to the expedited removal statute’s judicial review limitations. At minimum, the agency’s compliance with procedural requirements for a reinstatement order can be reviewed. Those procedural questions involve (1) whether the individual is a noncitizen, (2) whether the noncitizen was subject to a prior removal order, and (3) whether the noncitizen illegally re-entered the United States.¹⁹² Reinstated orders have been invalidated, for instance, where the agency has not established that the identity of the individual who received the predicate order is the same as the individual who received the reinstated order, or that the subsequent re-entry was unlawful.¹⁹³ To be clear, the

188. *Id.* at 170 n.13 (internal citation omitted in original).

189. *Id.*

190. *Id.* at 175 n.20.

191. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 (2006).

192. *See* 8 C.F.R. § 241.8.

193. *See, e.g., Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 (1st Cir. 2004); *Rafaelano v. Wilson*, 471 F.3d 1091, 1098 (9th Cir. 2006). For a further discussion of potential challenges to reinstatement

agency action that courts can review is the decision to *reinstate* a prior order, as opposed to the underlying removal order itself. Although the government can implement a reinstated order at any time, any petition for review must be filed within a strict thirty-day deadline.¹⁹⁴

Reinstatement is like a house of cards: if the underlying removal order cannot stand due to a legal or other error, then the agency's ability to reinstate similarly topples. But the law has made it difficult for individuals subject to reinstatement to question the validity of the underlying removal order. The prior removal order "is not subject to being reopened or reviewed"¹⁹⁵ after or during the reinstatement proceeding.¹⁹⁶ With respect to judicial review, the precise bounds of the federal courts' jurisdiction to review predicate orders is less definitive. The mere availability of judicial review over reinstated orders does nothing to independently provide an avenue for review of the predicate order.¹⁹⁷ However, a statutory provision unrelated to expedited removal orders, 8 U.S.C. § 1252(a)(2)(D), preserves review of "constitutional claims or questions of law raised" in the courts of appeals.¹⁹⁸ Accordingly, courts have suggested that constitutional questions and questions of law raised by the underlying removal order may be reviewed.¹⁹⁹ Some circuits have suggested that where a removal order serves as a predicate to reinstatement, judicial review of the predicate order

orders, see Dree K. Collopy, *Crisis at the Border, Part III: Reinstatement of Removal and Demonstrating a Reasonable Fear of Persecution or Torture*, 16-10 IMMIGR. BRIEFINGS 1 (Oct. 2016).

194. The thirty-day deadline can prevent courts from exercising jurisdiction to review defects in the underlying order, since typically the noncitizen will not have filed the petition for review within thirty days of entry of the predicate order. See *Cordova-Soto v. Holder*, 659 F.3d 1029, 1032 (10th Cir. 2011), *cert. denied*, 568 U.S. 1026 (2012); *Sharashidze v. Mukasey*, 542 F.3d 1177, 1178-79 (7th Cir. 2008).

195. 8 U.S.C. § 1231(a)(5).

196. Although the statute does not appear to bar immigration judges from hearing motions to reopen a predicate removal order prior to the completion of a reinstated order, the courts have generally read the statute to mean that the right to reopen a removal order does not exist after the order has been reinstated. See, e.g., *Zambrano Reyes v. Holder*, 725 F.3d 744, 751-52 (7th Cir. 2013). *But see* *Miller v. Sessions*, 889 F.3d 998 (9th Cir. 2018) (permitting immigration judge to exercise jurisdiction over motion to reopen in absentia order, notwithstanding existence of reinstated order).

197. See *Cordova-Soto*, 659 F.3d at 1030-31.

198. 8 U.S.C. § 1252(a)(2)(D) states: "Nothing in subparagraph (B) or (C) [precluding judicial review over denials of discretionary relief or against 'criminal aliens'], or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."

199. *Villegas de la Paz v. Holder*, 614 F.3d 605, 610 (6th Cir. 2010) (permitting review of legal and constitutional challenges to the prior immigration judge order); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007) ("Because § 1231(a)(5)'s jurisdictional limitation is clearly outside the scope of § 1252, we may no longer categorically hold that we lack jurisdiction to review constitutional and statutory claims related to *all* underlying removal orders."); *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 513-14 (5th Cir. 2006) (holding that § 1252(a)(2)(D) "prevents" the operation of § 1231(a)(5) in cases in which "an underlying order is questioned on constitutional or legal grounds").

is available, at times requiring the showing of a “gross miscarriage of justice” in the initial removal proceeding.²⁰⁰

But the result is different when the underlying order is an expedited removal order. Where reinstatement proceedings are premised on an expedited removal order, courts to have considered the question have found that judicial review—even habeas review—is not available due to the operation of the expedited removal-specific judicial review provisions.²⁰¹ Ironically, these individuals also received the least process at the outset. Nonetheless, even for a noncitizen with strong connections to the United States, the net result of the expedited removal statute combined with the reinstatement statute is a cocktail of jurisdictional bars that courts have read to deprive the federal courts of the ability to review for outright error, lawlessness, and constitutional violations.

One of the most restrictive interpretations arose in the Ninth Circuit, in *Garcia de Rincon v. DHS*.²⁰² Ms. Garcia de Rincon had meaningful ties to the United States, both before and after the entry of the expedited removal order, including a LPR husband and two U.S. citizen children.²⁰³ After marrying her spouse and having their first child in the United States, she traveled to Mexico to visit her sick mother. Upon her attempted return, she was apprehended by border officials and issued an expedited removal order. She then entered the United States without detection, had her second child, bought a home, and lived a peaceful life with no criminal record. After applying for her green card through her husband, she was taken by ICE and issued a reinstatement of the expedited removal order, which led her to file a habeas action.²⁰⁴ With respect to the expedited removal proceeding, Ms. Garcia de Rincon alleged due process violations based on the truncated procedures and her lack of understanding of the process.²⁰⁵

Deciding the jurisdictional questions, *Garcia de Rincon* read the statutory provisions to mean that both the federal appeals court (in which she sought review of the predicate order) and the federal district court (in which she sought habeas review) lacked jurisdiction over the expedited removal order. Ms. Garcia de Rincon was thus left with no judicial forum

200. See *Ramirez-Molina*, 436 F.3d at 513–15; *Debeato v. Att’y Gen.*, 505 F.3d 231, 234–35, 237 (3d Cir. 2007).

201. See *Ochoa-Carrillo v. Gonzales*, 446 F.3d 781, 782 (8th Cir. 2006) (“[T]he limited habeas review of removal orders issued under § 1225(b)(1) that is authorized by § 1252(e)(2) may not be conducted in a § 1231(a)(5) reinstatement proceeding.”); *Lorenzo*, 508 F.3d at 128; *Debeato*, 505 F.3d at 234–35.

202. 539 F.3d 1133 (9th Cir. 2008).

203. *Id.* at 1135.

204. *Id.* 1136.

205. *Id.* at 1135 (alleging that noncitizen “did not understand many of the questions or what they were talking about . . . [she] was only 22 years old and [] was very frightened and confused . . . [and] did not know if they were even going to let [her] go.”).

in which to pursue her claims that the expedited removal order had violated her due process rights.²⁰⁶ With respect to appellate review, the court acknowledged that the circuit court retained jurisdiction over constitutional claims or questions of law related solely to the reinstated order, citing the statutory provision at 8 U.S.C. 1252(a)(2)(D).²⁰⁷ But with respect to the “gross miscarriage of justice” basis for reviewing constitutional or legal questions in the underlying order recognized by some courts,²⁰⁸ *Garcia de Rincon* found that expedited removal was an exception. As the court stated, “whatever relief might be gained by the operation of § 1252(a)(2)(D) and the ‘gross miscarriage’ standard, it is unavailable to her because her underlying removal order is an *expedited* removal order that is subject to additional jurisdictional bars—8 U.S.C. §§ 1252(a)(2)(A) and 1252(e).”²⁰⁹

Garcia de Rincon also read the habeas statute narrowly and found that the district court lacked jurisdiction to exercise habeas review over the expedited removal order.²¹⁰ According to the court, the noncitizen did not raise one of the three “approved grounds” listed at 8 U.S.C. 1252(e)(2). The court rejected the argument that the statutory provisions violated the Suspension Clause, although it recognized that doing so would uphold a statute that “does not allow a habeas petition challenging an expedited removal order to be heard in any forum that could take evidence and thereby fully adjudicate the claim.”²¹¹ In reaching its conclusion that the mother of two U.S. citizens with no criminal record and over a decade of residence in the United States could not have her case heard in federal court, the Ninth Circuit recognized the “draconian,” “unsatisfying,” and “unduly harsh” result.²¹² But the case’s holding still stands, and other courts have followed suit.²¹³ For instance, in a case also involving an individual who developed family ties to the United States after receiving an expedited removal order, the Tenth Circuit held that judicial review over the underlying expedited removal order was not available during a reinstatement proceeding—even for the constitutional issue of an alleged due process violation.²¹⁴

To be sure, the mere presence of an expedited removal order does not so taint a reinstatement proceeding that judicial review of errors made during reinstatement are impossible—although courts have considered the

206. The court also relied on its precedents to find that no Suspension Clause violation had occurred. *Id.* at 1141–42.

207. 8 U.S.C. § 1252(a)(2)(D).

208. *See supra* note 200.

209. *Garcia de Rincon v. DHS*, 539 F.3d 1133, 1138 (9th Cir. 2008).

210. *Id.* at 1140.

211. *Id.* at 1141.

212. *Id.* at 1142 (“When Congress enacted IIRIRA, it adopted a number of rules which fall with an implacable, and perhaps unintended, harshness on some aliens. So it is here.”).

213. *See Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 287 F.Supp.3d 1077 (S.D. Cal. 2018).

214. *Lorenzo v. Mukasey*, 508 F.3d 1278 (10th Cir. 2007).

possibility. In May 2017, the Ninth Circuit in *Ayala v. Sessions* clarified that even where a reinstated order is premised upon an expedited removal order, the very existence of an expedited removal order does not destroy the federal courts' ability to exercise jurisdiction over the reasonable fear determination associated with a reinstatement. The court reviewed an IJ's review of a negative reasonable fear finding (initially conducted by United States Citizenship and Immigration Services), made during a reinstatement proceeding premised on an expedited removal order, and found that the IJ had erroneously applied the law.²¹⁵ The panel independently raised, and rejected, the argument that *Garcia de Rincon* should deprive the court of jurisdiction over the reinstated order purely because the predicate order was an expedited removal.²¹⁶ But the exercise of jurisdiction is modest. *Ayala* does not disturb either the unreviewability or the lasting impact associated with the expedited removal order.

Thus, although reinstatement authorizes immigration authorities to invoke the existence of an expedited removal as grounds to place a person in the reinstatement process, the very basis for the reinstatement—the prior removal order—remains immune from any judicial scrutiny. In cases where an individual had an opportunity for a court hearing that resulted in a removal order, the theory behind barring review or reopening of the predicate order carries some logic: the noncitizen has had their proverbial day in court.²¹⁷ This is not true with expedited removal. The end result of the reinstatement and expedited removal frameworks is that the legal sanction of expedited removal remains permanently in place, put into operation by the government's ability to repeatedly reinstate the expedited removal order. A never-ending cycle of enforcement remains undisturbed by the federal courts, which read the statutes as depriving them of jurisdiction to review the triggering event—the predicate expedited removal order—that gives effect to the reinstatement. Those with the least amount of process at the front end also receive virtually no avenue to seek accountability by way of federal court review at the back end.

215. *Ayala v. Sessions*, 855 F.3d 1012 (9th Cir. 2017). *See also* *Martinez v. Sessions*, 863 F.3d 1155 (9th Cir.), *amended and superseded by* 873 F.3d 655 (9th Cir. 2017) (exercising jurisdiction over BIA's dismissal of appeal seeking review of negative reasonable fear determination by immigration judge).

216. *Ayala*, 855 F.3d at 1017–18.

217. Of course, persons with prior removal orders hearings arising out of immigration court may not have had a fair day in court. *See, e.g., Garcia-Garcia v. Sessions*, 856 F.3d 27, 43 (1st Cir. 2017) (Stahl, J., dissenting) (group immigration court hearing without interpreter in noncitizen's native language); *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 488 (9th Cir. 2007) (en banc) (*in absentia* order, where noncitizen claimed lack of notice); *Cordova-Soto v. Holder*, 659 F.3d 1029, 1032 (10th Cir. 2011), *cert. denied*, 568 U.S. 1026 (2012) (stipulated removal).

III. SEARCHING FOR SOLUTIONS: THE INADEQUACY OF CONVENTIONAL CHALLENGES TO EXPEDITED REMOVAL AND REINSTATEMENT

The Constitution does not apply in conventional ways to immigration law. Traditionally, the plenary power doctrine in its most robust form has suggested that Congress has unfettered, unrestricted authority to enact immigration statutes without intervention from the judicial branch. But the plenary power doctrine no longer exists in its strongest version only. The courts have carved out limitations within the plenary power doctrine and have often invoked statutory claims, constitutional avoidance, and procedural due process to curb governmental action in the immigration context. With expedited removal and reinstatement, however, the courts have invoked particularly robust iterations of the plenary power doctrine and adopted readings of the statutory scheme that permit the legal black holes to continue.

A. *Statutory Claims and Constitutional Avoidance*

The courts have many times elided the plenary power doctrine by resolving challenges to immigration agency action on statutory grounds. Whether on matters related to immigration detention,²¹⁸ the immigration consequences of crime,²¹⁹ or even the prominent court challenges to the Trump Administration's travel ban,²²⁰ statutory arguments often seem favored by both advocates and the courts.²²¹

The constitutional avoidance canon, in which courts read statutes to avoid raising constitutional problems, is a particularly longstanding hallmark of statutory analysis in the immigration context.²²² With respect to judicial review and the Suspension Clause, the Supreme Court in *INS v. St. Cyr* invoked constitutional avoidance to read a federal immigration statute that purported to strip LPRs of the right to judicial review as instead permitting habeas review in the federal district courts.²²³ As the Court explained, it would “expect a clear indication that Congress intended” a

218. See, e.g., Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 146–47 (2015) (discussing statutory interpretation in immigration detention).

219. See, e.g., Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 264–65 (2012) (discussing prominence of statutory analysis in case law on immigration consequences of criminal activity).

220. See, e.g., *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (enjoining so-called “travel ban 3.0” on statutory grounds), *overruled by* *Trump v. Hawaii*, 585 U.S. ____ (June 26, 2018).

221. See generally Motomura, *supra* note 35.

222. *Id.*

223. 533 U.S. 289 (2001).

result in which “a particular interpretation of a statute invokes the outer limits of Congress’ power.”²²⁴ Furthermore, given a statute with alternative interpretations, one of which would “raise serious constitutional problems,” and the other of which would not, the Court stated that it was “obligated to construe the statute to avoid such problems.”²²⁵ The *St. Cyr* Court stated that “some ‘judicial intervention in deportation cases’ is unquestionably ‘required by the Constitution.’”²²⁶ Thus, the Court construed the statutory provision to permit habeas review without invalidating it.²²⁷

But when it comes to expedited removal and reinstatement, statutory arguments have thus far not overwhelmingly persuaded the judiciary to intervene. The courts have adopted the government’s reading of the statute even while acknowledging the procedural shortcomings of the expedited removal scheme or the unfairness of the outcome in an individual case.²²⁸ The courts have largely grounded their findings that judicial review of expedited removal orders does not exist in the explicit language of the statutes.²²⁹

With respect to the narrower issue of habeas review, the courts have considered statutory arguments that, for instance, they should construe the statutory restriction of habeas relief to “whether the alien was ordered removed under [8 U.S.C. 1225(b)(1)]”²³⁰ to include review of whether the agency *properly* ordered the expedited removal order.²³¹ Under this logic, the courts might exercise jurisdiction over expedited removal orders issued in error—for instance, because an officer failed to adequately inquire about or assess fear. The argument has gained traction in a handful of courts. In the Eastern District of Michigan, *American-Arab Anti-Discrimination Committee v. Ashcroft* asserted habeas jurisdiction “to determine whether the expedited removal statute *was lawfully applied* . . . in the first place.”²³² Similarly, the District of Columbia exercised jurisdiction to address whether the noncitizen had been “ordered removed” where a supervisor failed to sign the removal order issued by a front-line officer.²³³ The court found that “a determination of whether a removal order ‘in fact was issued’ fairly

224. *Id.* at 299.

225. *Id.* at 300.

226. *Id.* (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)).

227. *Id.* at 314.

228. *See, e.g.*, *Khan v. Holder*, 608 F.3d 325 (7th Cir. 2010).

229. *See, e.g.*, *Li v. Eddy*, 259 F.3d 1132, 1134 (9th Cir. 2001) (“With respect to review of expedited removal orders, . . . the statute could not be much clearer in its intent to restrict habeas review.”).

230. 8 U.S.C. § 1252(e)(2).

231. *See, e.g.*, *Brumme v. INS*, 275 F.3d 443, 447–48 (5th Cir. 2001); *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 430–31 (3d Cir. 2016).

232. 272 F. Supp. 2d 650, 663 (E.D. Mich. 2003) (emphasis in original).

233. *Dugdale v. U.S. Customs & Border Prot.*, 88 F. Supp. 3d 1, 6 (D.D.C. 2015).

encompasses a claim that the order was not lawfully issued due to some procedural defect.”²³⁴

But a comparatively larger number of courts have rejected the statutory arguments, and emphasized the particular clarity of the expedited removal statutes.²³⁵ Indeed, the Third Circuit’s *Castro* decision acknowledged *AADC v. Ashcroft* but found the district court’s “construction of the statute to be not just unsupported, but also flatly contradicted by the plain language of the statute itself. . . .”²³⁶ Indeed, as discussed in Part III.A, the expedited removal provisions on judicial review have arguably been drafted with particular severity and left the courts unwilling to engage in alternative statutory readings.

In the reinstatement context, statutory and regulatory challenges to reinstatement’s most procedurally deficient features—such as the absence of an immigration court hearing—have likewise not succeeded.²³⁷ Although the reinstatement statute is silent with respect to the right to a hearing, the relevant regulations enable non-judicial officers to issue reinstatement orders.²³⁸ The Ninth Circuit’s en banc decision in *Morales-Izquierdo v. Gonzales* upheld the validity of the regulations, and in doing so, emphasized Congress’s intent for reinstatement to operate as a “summary” and “ministerial” process that deprives noncitizens of the opportunity to seek relief.²³⁹ In a related vein, the courts have generally rejected statutory arguments that noncitizens in withholding-only proceedings should be eligible to seek asylum, and have emphasized the clarity—albeit harshness—of the reinstatement statute.²⁴⁰

With respect to the constitutional avoidance canon, the courts have also been unreceptive when interpreting the jurisdictional bars. Indeed, constitutional avoidance has been an effective tool in many an immigration context, where courts have seized upon ambiguities in the statute to carve

234. *Id.* See also *Smith v. U.S. Customs & Border Prot.*, 741 F.3d 1016 (9th Cir. 2014) (leaving open question of whether Canadian noncitizen subject to expedited removal might have claims under Suspension Clause).

235. *Brumme*, 275 F.3d at 448.

236. *Castro*, 835 F.3d at 432 (citing 8 U.S.C. § 1252(a)(2)(A)(iii) (“[N]o court shall have jurisdiction to review . . . the application of [§ 1225(b)(1)] to individual aliens.”). See also *Osorio-Martinez v. U.S. Att’y Gen.*, 893 F.3d 153, 164–166 (3d Cir. 2018) (following *Castro* with respect to statutory claims).

237. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484 (9th Cir. 2007) (en banc); *De Sandoval v. U.S. Att’y Gen.*, 440 F.3d 1276, 1283 (11th Cir. 2006); *Ochoa-Carrillo v. Gonzales*, 437 F.3d 842, 846 (8th Cir. 2006); *Lattab v. Ashcroft*, 384 F.3d 8, 20 (1st Cir. 2004).

238. See 8 C.F.R. § 241.8 (authorizing immigration officers to issue reinstatement orders without participation from immigration judges); *cf.* 8 U.S.C. § 1231(a)(5).

239. *Morales-Izquierdo*, 486 F.3d at 491. The Ninth Circuit found that Congress unambiguously expressed its desire to remove reinstatement proceedings from immigration court under step one of *Chevron*, but noted that other courts to date had decided the inquiry under step two of *Chevron*, finding that the agency’s interpretation of the ambiguous statute was reasonable. *Id.* at 492–93.

240. See *supra* note 117 and accompanying text.

out avenues for back door relief for noncitizens.²⁴¹ Not so with expedited removal. The Third Circuit's decision in *Castro*, discussed above, illustrates this dynamic.²⁴² The plaintiffs had urged the court to find the expedited removal statute ambiguous, and thus construe it to permit habeas review in order to avoid the Suspension Clause questions otherwise raised by denying them access to the federal courts.²⁴³ But the court asserted that the plaintiffs were "attempting to create ambiguity where none exists."²⁴⁴

In the reinstatement context, denying immigration court hearings to noncitizens arguably violates due process. Accordingly, the constitutional avoidance principle would require a reading of the statutory scheme to permit court hearings in order to avoid the constitutional question raised by the denial of hearings. But no court has yet adopted such a reading of the reinstatement statute. *Morales-Izquierdo* considered and rejected this argument, with the en banc court claiming that constitutional avoidance did not permit the court to construe an ambiguous statute where deference to the agency was otherwise warranted.²⁴⁵ In that case, however, a dissenting opinion by four judges from the Ninth Circuit emphatically argued in favor of applying constitutional avoidance to invalidate the regulation depriving noncitizens of immigration court hearings during the reinstatement process. The dissent argued that the regulation as written approaches a "constitutional danger zone" by failing to offer noncitizens with an opportunity to "challenge the legality of a prior removal order" or to "contest the predicates to reinstatement."²⁴⁶ Constitutional avoidance thus might serve as a source of judicial intervention in the reinstatement landscape in the future, even if it has thus far proven unsuccessful.

B. Procedural Due Process

At first blush, procedural due process seems like a natural basis for concern with both expedited removal and reinstatement.²⁴⁷ After all, the

241. See *supra* Part III.A.

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

243. *Id.* at 430–31.

244. *Id.* at 431.

245. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007) (en banc) ("When Congress has explicitly or implicitly left a gap for an agency to fill, and the agency has filled it, we have no authority to re-construe the statute, even to avoid potential constitutional problems; we can only decide whether the agency's interpretation reflects a plausible reading of the statutory text. . . . [T]he constitutional avoidance doctrine . . . plays no role in the second *Chevron* inquiry."). *But see* *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (citation omitted) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.").

246. *Morales-Izquierdo*, 486 F.3d at 505 (Thomas, J., dissenting).

247. See *Gebisa*, *supra* note 149, at 576–80.

hallmarks of both are procedurally truncated adjudications. And the specific interplay of expedited removal and reinstatement of removal creates a perfect storm in which the entry of one summary process (expedited removal) serves as a permanent justification for the imposition of another summary process (reinstatement). The circumstances surrounding these removal orders—back-room encounters with front-line officers—conspire to encourage procedural deficiencies.²⁴⁸

Moreover, procedural due process is frequently invoked by the courts to extend rights protections to noncitizens in cases in which the plenary power doctrine might suggest unlimited governmental power otherwise.²⁴⁹ Procedural due process often operates as a proxy for other constitutional rights not otherwise available to immigrants.²⁵⁰ If the plenary power doctrine states that constitutional rights do not apply to rules of admission or expulsion, then procedural due process is its antidote, stating that the procedures employed by the government to effect immigration policies must conform to the requirements of due process.²⁵¹ But by the same token, the courts have often treated noncitizens as having diminished constitutional rights if they are seeking entry at the border.²⁵² Under the entry fiction, they have applied the logic that noncitizens outside the border lack constitutional rights to find that even some immigrants physically present in the United States but legally—or rather, fictionally—still at the border also lack constitutional rights.²⁵³

Procedural due process doctrine in the expedited removal context reveals a longstanding tension in immigration law over the application of the Constitution at and near the border. The relationship between physical presence only (which can exist without legal presence), and physical presence that compels the protections of due process, is complicated. The doctrine is not static or settled. At times, the Supreme Court has suggested that Congress has unrestricted authority to define what procedures apply at the border.²⁵⁴ At other times, it has suggested that a noncitizen's preexisting ties to the United States give rise to due process rights that limit congressional dictates,²⁵⁵ and support for the position that procedural due

248. See *supra* text accompanying notes 96–107.

249. Motomura, *supra* note 37, at 1656–59.

250. *Id.* See also Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491, 493 (2011) (arguing that courts should continue to rely on procedural due process arguments under the Fifth Amendment).

251. See Motomura, *supra* note 37, at 1628.

252. See Weisselberg, *supra* note 169, at 951.

253. *Id.*

254. See *supra* text accompanying notes 171–172 (discussing holdings in *Knauff* and *Mezei*).

255. See *supra* text accompanying note 178 (discussing *Plasencia*).

process rights belong to all noncitizens irrespective of status exists.²⁵⁶ Thus, for persons who lack lawful status and have been previously ordered removed—albeit under the expedited removal framework—due process is a messy, though not settled, fit. Indeed, strong arguments exist that due process applies once a person effects a physical entry into the United States.²⁵⁷

At a more practical level, the statutory bars to judicial and habeas review discussed in Part II have prevented the courts from examining due process claims. For example, in a habeas petition filed in the District of New Mexico, a woman fleeing gangs in El Salvador with her ten-month-old baby were issued expedited removal orders.²⁵⁸ The procedural due process violations—which included failures to provide her with notice of the credible fear interview, failure to allow her to consult with her attorney, failure to provide child care during the interview, and application of the incorrect legal standard—were rejected based on those jurisdictional bars.²⁵⁹ Even in a case involving the allegation that a noncitizen was “questioned for seven hours in the dead of night without any interpreter despite the agency’s own regulations calling for one,” the Seventh Circuit acknowledged that the bars on judicial and habeas review meant that “no court has the power to consider the legality of the agency’s actions.”²⁶⁰ The Third Circuit’s decision in *Osorio-Martinez* should give courts pause to more fully consider the due process implications of expedited removal, though.²⁶¹ In finding that the Suspension Clause gave rise to a right to habeas review of expedited removal for children granted SIJS, the court noted that refusing their claims would “implicate constitutional due process concerns” by depriving the children of their ability to obtain statutory rights associated with SIJS.²⁶²

To the extent that procedural deficiencies infect an expedited removal that leads to reinstatement, judicial review over the reinstatement does not include jurisdiction over the expedited removal. Due process claims have been raised in litigation challenges of expedited removal orders, but courts

256. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (due process applies to all persons, even if their presence is “lawful, unlawful, temporary or permanent”); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to” due process).

257. See, e.g., 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. filed Apr. 4, 2018) (arguing that due process rights apply upon physical entry to the U.S.). I was a signatory to this amicus brief. The scope of the entry fiction doctrine, however, is beyond the scope of this Article.

258. *M.S.P.C. v. U.S. Customs & Border Prot.*, 60 F. Supp. 3d 1156, 1158–59 (D.N.M. 2014).

259. *Id.* at 1176.

260. *Khan v. Holder*, 608 F.3d 325, 328 (7th Cir. 2010).

261. See *supra* discussion accompanying notes 180–190.

262. *Osorio-Martinez v. U.S. Att’y Gen.*, 893 F.3d 153, 172 (3d Cir. 2018).

unable to exercise jurisdiction have not examined those claims or have viewed claimants' due process rights with skepticism.²⁶³ The courts' ability to even bear witness to the due process deficiencies during expedited removal is thus severely limited.

With reinstatement, the courts have grappled minimally with the due process implications of layering one procedurally truncated process upon a procedurally flawed removal order in immigration proceedings.²⁶⁴ The Ninth Circuit in *Morales-Izquierdo v. Holder* found, for instance, that a reinstated removal order could not be invalidated even where the underlying order—an *in absentia* removal order allegedly issued without proper notice to the noncitizen²⁶⁵—may have violated due process.²⁶⁶ The court found that whatever procedural deficiencies in the underlying order may have existed did not, by extension, infect the reinstatement itself and that the noncitizen suffered no prejudice, since reinstatement does not require a procedurally sound prior order.²⁶⁷ *Morales-Izquierdo* asserted that reinstatement did not change the noncitizen's access to legal rights or remedies, but emphasized that reinstatement simply prevented the “continuing violation” of the person's ongoing presence in the United States following a removal order.²⁶⁸ In a more recent development, on May 8, 2018, the Ninth Circuit found that an IJ does have jurisdiction over a motion to reopen an *in absentia* order based on lack of notice, notwithstanding the existence of a reinstated order and thereby limiting the reach of *Morales-Izquierdo*.²⁶⁹ But in 2017, the First Circuit in *Garcia-Garcia v. Sessions* found no due process violation in the use of reinstatement where an indigenous Guatemalan immigrant fleeing extensive violence in his home country had been

263. See, e.g., *Khan*, 608 F.3d at 329 (“The Khans . . . were at the point of initial entry where their constitutional rights were at their lowest ebb.”); *Garcia de Rincon v. U.S. Dep’t of Homeland Sec.*, 539 F.3d 1133, 1141 (9th Cir. 2008). See also *Obaro*, *supra* note 74, at 2163 (“In construing the expedited removal provisions, the courts have overwhelmingly embraced [a reading in which] noncitizens subject to expedited removal are seeking ‘admission,’ and are not actually on U.S. soil, [such that] they do not have any due process rights.”).

264. Criminal prosecutions for illegal re-entry may present stronger opportunities to present due process claims than immigration cases. See, e.g., *United States v. Ochoa-Oregel*, No. 16-50413, *4-5 (9th Cir. Aug. 2, 2018) (finding that procedural defects associated with *in absentia* removal order against former lawful permanent resident in turn “infect[ed]” subsequent expedited removal order); *United States v. Arias-Ordonez*, 596 F.3d 972, 978 (9th Cir. 2010) (reinstatement based on procedurally defective removal cannot serve as basis for illegal re-entry prosecution).

265. 8 U.S.C. § 1229a(b)(5)(A) (2015); *Koh*, *supra* note 10, at 219–222 (discussing procedural shortcomings associated with *in absentia* removal orders).

266. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495–96 (9th Cir. 2007) (en banc).

267. *Id.* at 496.

268. *Id.* at 497–98. The court asserted: “Reinstatement of a prior removal order—regardless of the process afforded in the underlying order—does not offend due process because reinstatement of a prior order does not change the alien’s rights or remedies. The *only* effect of the reinstatement order is to cause Morales’ removal, thus denying him any benefits from his latest violation of U.S. law, committed when he reentered the United States without the Attorney General’s permission” *Id.*

269. *Miller v. Sessions*, 889 F.3d 998 (9th Cir. 2018).

previously removed in a procedurally questionable manner.²⁷⁰ There, the initial removal proceedings had been conducted by an IJ, but through a group hearing in which the noncitizen did not understand the proceedings because he did not speak Spanish, and only a Spanish interpreter was provided.²⁷¹

Despite these holdings, the courts have expressed noteworthy discomfort with the manner in which the reinstatement scheme presumes the validity of the prior order, triggering subsequent removal without providing a means to ensure the procedural regularity of the predicate order. In *Garcia-Garcia*, Judge Norman Stahl's strongly worded dissent alleged that the majority "ignor[es] the fact that Garcia was denied due process in his initial removal proceedings,"²⁷² and suggested that the "mechanical and categorical" application of the reinstatement provision might implicate the Suspension Clause's prohibition on barring habeas review.²⁷³ *Morales-Izquierdo* also elicited a powerful dissent, authored by Judge Sidney Thomas and joined by Judges Pregerson, Reinhardt, and Fletcher.²⁷⁴ The *Morales-Izquierdo* dissent highlighted the "very serious due process concerns" raised by the reinstatement process.²⁷⁵ In particular, the dissent emphasized that reinstatement "does not provide any opportunity for the alien to challenge the legality of the prior removal order,"²⁷⁶ and the "regulatory procedure is so streamlined that it deprives reentering aliens of any meaningful opportunity to raise potentially viable legal, constitutional, or factual challenges to their removability."²⁷⁷ Despite the powerfully-worded concerns articulated by a handful of dissenting opinions, the courts have not fully grappled with the implications of permitting reinstatement based on

270. *Garcia-Garcia v. Sessions*, 856 F.3d 27 (1st Cir. 2017).

271. *Id.* at 43–46. The court explained: "We can surmise, as his counsel argued before the Immigration Judge in the 2015 proceedings, that Garcia had no idea what was going on at this en masse hearing at the border detention center. By the time the attorneys arrived in Texas to meet with Garcia and other similarly situated indigenous persons, it was too late, because he had already been ordered removed and waived his right to appeal." *Id.* at 46.

272. *Id.* at 43.

273. *Id.* at 52.

274. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 499 (9th Cir. 2007) (en banc) (Thomas, J., dissenting).

275. *Id.* at 505 (quoting *Castro-Cortez v. INS*, 239 F.3d 1037, 1048 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 n.5 (2006)); *Aguilar-Garcia v. Ridge*, 90 F. App'x 220, 220 (9th Cir. 2004); *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 959 (9th Cir. 2004). The dissent went on to cite concerns expressed by other circuits about the "sufficiency of process" in reinstatement, citing *United States v. Charleswell*, 456 F.3d 347, 356 n.10 (3d Cir. 2006); *Lattab v. Ashcroft*, 384 F.3d 8, 21 n.6 (1st Cir. 2004); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 867 (8th Cir. 2002), *abrogated on other grounds by Fernandez-Vargas*, 548 U.S. at 36 & n.5; *Gomez-Chavez v. Perryman*, 308 F.3d 796, 802 (7th Cir. 2002); *Bejjani v. I.N.S.*, 271 F.3d 670, 687 (6th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas*, 548 U.S. at 36 & n.5.

276. *Morales-Izquierdo*, 486 F.3d at 505.

277. *Id.* at 507.

questionable prior removal orders, particularly during a political era in which the federal government is committed to an unquestionable agenda of mass deportation.

The Ninth Circuit in *Villa-Anguiano v. Holder* placed a minor limitation on reinstatement's use of procedurally defective removal orders, finding that reinstatement of removal was improper where a federal district court had entered a formal finding in a separate criminal proceeding that the underlying removal proceedings violated due process.²⁷⁸ But even *Villa-Anguiano* did not reflect judicial consensus. Despite the limited holding of the case,²⁷⁹ Judge Tallman issued a strong dissent asserting that due process did not require the agency to engage in further procedures associated with reinstatement, even where the underlying removal order had been formally found to be legally defective.²⁸⁰ Judge Tallman's dissent emphasized the minimal procedures required by the statutory and regulatory framework in place, as well as the concern (raised by *Morales-Izquierdo*) that noncitizens who unlawfully re-enter the United States should not be placed on more advantageous legal footing than those outside the country.²⁸¹

Due process challenges to reinstatements based on expedited removal thus remain difficult and contested, albeit potentially still viable. Establishing a due process remedy raises various challenges, including problems related to establishing the requisite levels of proof and prejudice as well as the enduring problem of federal court jurisdiction.²⁸²

IV. A MODEST SOLUTION: ARBITRARY AND CAPRICIOUS REVIEW FOR REINSTATEMENT ORDERS BASED ON EXPEDITED REMOVAL

This Part looks to a different source of law to limit the excesses of expedited removal and reinstatement. The Supreme Court in *Judulang v. Holder* clarified that "ordinary principles of administrative law" might lead to the invalidation of an immigration agency policy that fails to reflect reasoned decision-making.²⁸³ The case interpreted the existing A&C standard to include immigration policies that enable the discretionary charging decisions of front-line officers to unilaterally determine an individual's eligibility for immigration relief, as well as policies that fail to

278. 727 F.3d 873 (9th Cir. 2013).

279. *Id.* at 882.

280. *Id.* (Tallman, J., dissenting).

281. *Id.* at 884.

282. *See, e.g.,* *Gomez-Velazco v. Sessions*, 879 F.3d 989, 993 (9th Cir. 2018) ("As a general rule, an individual may obtain relief for a due process violation only if he shows that the violation caused him prejudice, meaning the violation potentially affected the outcome of the immigration proceeding.").

283. *Judulang v. Holder*, 565 U.S. 42, 64 (2011).

demonstrate alignment with the overall purposes of the immigration laws.²⁸⁴ This Part draws from the logic and reasoning of *Judulang* to suggest that the Department of Homeland Security's (DHS's) practice of routinely placing individuals in reinstatement proceedings based on the existence of a prior expedited removal order constitutes an arbitrary and capricious action.

Subjecting only those cases involving reinstatements based on expedited removal to rigorous review is in many respects a limited solution that leaves harder questions unresolved, such as the independent operation of expedited removal and reinstatement, the scope of the Suspension Clause, and the thorny due process questions discussed earlier. But injecting A&C analysis into this tangled landscape presents benefits that have thus far gone unrealized by the courts. A&C review would enable the courts to confront agency power over summary removals at their zenith, and in an area where accountability has traditionally been nil in light of the jurisdictional bars to expedited removal. And A&C review allows the courts to focus more on the legitimacy of agency action, as opposed to the complex availability of rights and the nature of individual claims associated with due process.

A. Immigration Policy Subject to Arbitrary and Capricious Review Under *Judulang*

Arbitrary and capricious (A&C) review—also known as “hard look review”—originates in the Administrative Procedure Act (APA), which states that courts have authority to “hold unlawful and set aside agency action . . . [that is] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”²⁸⁵ In two seminal cases, *Overton Park, Inc. v. Volpe*²⁸⁶ and *Motor Vehicles Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*,²⁸⁷ the Supreme Court established that a critical component of A&C review is the requirement that any federal administrative agency action reflect reasoned decision-making. While the hard look doctrine is a prominent component of judicial review of agency action, courts and scholars have struggled to develop a unifying theory of A&C review.²⁸⁸ The courts have tended to apply A&C review differently

284. See discussion *infra*; see also Jeffrey D. Stein, *Delineating Discretion: How Judulang Limits Executive Immigration Policy-Making Authority and Opens Channels for Future Challenges*, 27 GEO. IMMIGR. L.J. 35, 50–51 (2012).

285. 5 U.S.C. § 706(2).

286. 401 U.S. 402 (1971).

287. 463 U.S. 29 (1983).

288. See, e.g., Lisa Schultz Bressman, *Judicial Review of Agency Discretion*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 177, 180 (John F. Duffy & Michael Herz eds., 2005) (noting the absence of “rules of thumb” for applying arbitrary and capricious review); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of*

depending on the context.²⁸⁹ A&C review in the immigration context has also surfaced more prominently in light of three federal district court rulings issued in the first half of 2018, finding that the Trump Administration’s revocation of Deferred Action for Childhood Arrivals (DACA) was an arbitrary and capricious agency action.²⁹⁰ Given the arguable fluidity in the hard look doctrine, and the uncertain future of arbitrary and capricious analysis in the DACA context, this Article focuses its discussion largely around the Court’s most exhaustive discussion of A&C review in the immigration context, *Judulang v. Holder*.

The Supreme Court’s 2011 decision in *Judulang v. Holder* resolved decades-long litigation over a policy adopted by the BIA (and advocated by DHS) known as the “comparable grounds rule,” which a unanimous Court found to constitute arbitrary and capricious agency action.²⁹¹ Understanding the comparable grounds rule requires acknowledging that two sets of statutory grounds can authorize the government to initiate removal proceedings against an LPR.²⁹² Which set of provisions apply depends on whether the individual is apprehended within the U.S. or at the border, seeking entry. When apprehended within the United States, the grounds of deportability at 8 U.S.C. § 1227 apply.²⁹³ If apprehended at the border, the grounds of inadmissibility (referred to as exclusion grounds prior to statutory changes in 1996) at 8 U.S.C. § 1182 apply.²⁹⁴ Longstanding precedent had established that certain LPRs could seek discretionary relief

Administrative Decisions, 44 DUKE L.J. 1051, 1065–66 (1995) (“[T]he arbitrary and capricious standard is relatively open-ended, and the Supreme Court has not given it more precise content.”); R. George Wright, *Arbitrariness: Why the Most Important Idea in Administrative Law Can’t be Defined, and What This Means for the Law in General*, 44 U. RICH. L. REV. 839, 850–58 (2010) (discussing incoherence in arbitrary and capricious review under the APA).

289. Louis J. Virelli, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 728 (2014) (“Since its adoption of hard look review, the Court has used relatively consistent language to describe its approach to reviewing agency policy decisions, but has in fact applied the concept of arbitrariness differently in a wide range of cases.”).

290. The primary justification for all three orders focused on the concern that the decision to revoke DACA was based upon the assertion that the program was not lawful—an assertion that the courts found to be incorrect—therefore causing the rescission to constitute an arbitrary and capricious agency action under the APA. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1025–30 (N.D. Cal. 2018); *Vidal v. Nielson*, 291 F. Supp. 3d 260, 269–73 (E.D.N.Y. 2018); *NAACP v. Trump*, No. 17-1907, at *48 (D.D.C. Apr. 24, 2018).

291. *Judulang v. Holder*, 565 U.S. 42, 43 (2011); *In re Blake*, 23 I&N Dec. 722, 728 (BIA 2005); *In re Brieva-Perez*, 23 I&N Dec. 766, 772–773 (2005); see also Kate Aschenbrenner Rodriguez, *Irreconcilable Similarities: The Inconsistent Analysis of 212(c) and 212(h) Waivers*, 69 OKLA. L. REV. 111 (2017).

292. See also Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1813–16 (2013) (describing grounds of inadmissibility and deportability).

293. See 8 U.S.C. § 1229a(e)(2) (“The term ‘removable’ means—(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or (B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.”).

294. *Id.*

from removal, known as the 212(c) waiver, irrespective of whether the grounds of inadmissibility or deportability applied.²⁹⁵ But the comparable grounds rule limited the eligibility of certain LPRs facing grounds of deportability. When applied, the comparable grounds rule meant that lawful permanent residents apprehended in the U.S. interior would be eligible for 212(c) relief only if the ground of deportability corresponded to a ground of inadmissibility. The comparable grounds rule was neither compelled, nor prohibited, by statute. As the Court put it, the comparable grounds rule arose out of “the broad discretion that the BIA currently exercises in deciding when two statutory grounds are comparable *enough*,”²⁹⁶ but the approach itself was “not an interpretation of any statutory language.”²⁹⁷

It is tempting to view *Judulang* as a case primarily about 212(c) relief, an increasingly rare defense to deportation that was eliminated in the 1996 immigration laws but preserved for those with pre-1996 convictions considered aggravated felonies through the Court’s prior decision in *INS v. St. Cyr*.²⁹⁸ But a closer examination of the case reveals that *Judulang*’s treatment of the APA’s A&C standard has potentially more far-reaching implications. As one commentator put it, *Judulang* “applied an independent [A&C] evaluation of the merits of an immigration agency’s policy, rather than just a review of the rationality of the process employed in developing that policy and a cursory check to ensure that the rule did not inexplicably depart from existing regulations or otherwise conflict with Congressional statutes.”²⁹⁹ Prior to the Court’s holding, it was not entirely clear whether the A&C standard applied directly in the immigration context.³⁰⁰ Indeed, none of the federal courts of appeals that had wrestled with the comparable grounds rule had invalidated it on A&C grounds,³⁰¹ and arguments based on A&C review did not feature prominently in the parties’ briefing to the Court.³⁰²

Yet *Judulang* referenced the generic A&C standard set forth in *State Farm*, which describes the oft-cited framework governing the requirement that agency action must reflect reasoned decision-making:

295. See *Judulang*, 565 U.S. at 45–50 (describing history associated with 212(c) relief and comparable grounds rule).

296. *Id.* at 51 n.4.

297. *Id.* at 52 n.7.

298. See *INS v. St. Cyr*, 533 U.S. 289, 315–23 (2001) (holding that 212(c) relief is still available for those with pre-1996 aggravated felony convictions); see also Transcript of Oral Argument at 49, *Judulang v. Holder*, 565 U.S. 42 (2011) (Justice Sotomayor asking, “Could I ask just a practical question? Does this issue go away finally when there are no more *St. Cyr* people?”).

299. Stein, *supra* note 284, at 48.

300. See *id.* at 40–45 (describing history of APA application in immigration context).

301. See *id.* at 50.

302. See Aschenbrenner, *supra* note 268, at 167–69 (discussing briefing in *Judulang*, which focused on agency deference and equal protection arguments over A&C arguments)

The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.³⁰³

The *Judulang* Court explained that the comparable grounds rule had “flunked that test”³⁰⁴—an indication that the comparable grounds rule was not a close case, but a clear abdication of the agency’s obligation to engage in reasoned decision-making.

The Court built upon the basic *State Farm* standard to articulate a framework for analyzing arbitrary and capricious action in the deportation context specifically. The Court emphasized that “[b]y hinging a deportable alien’s eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien’s fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.”³⁰⁵ Building upon the well-established requirement that an agency rely on “relevant factors,” the Court emphasized that the agency’s approach “must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system.”³⁰⁶ The Court acknowledged the “high stakes for an alien who has long resided in this country,” and insisted that deportation decisions not rest on “fortuitous and capricious” circumstances.³⁰⁷

Despite referencing the existence of “factors that might be thought germane to the deportation decision,” which the comparable grounds rule fails to consider by “hing[ing] § 212(c) eligibility on an irrelevant comparison between statutory provisions,” *Judulang* does not articulate with specificity what those factors are. The Court does, however, suggest that eligibility for discretionary relief should correspond in some way to the

303. *Motor Vehicles Mfrs. Ass’n v. State Farm*, 463 U.S. 29, 43 (1983) (citations omitted).

304. *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

305. *Id.* at 58.

306. *Id.*

307. *Id.* at 55.

“worthiness” of the noncitizen,³⁰⁸ as well as to their “merit,”³⁰⁹ “attributes and circumstances,”³¹⁰ and the question of whether they are “deserving.”³¹¹ The Court also explains that agency practices must comport with “the goals of the deportation process or the rational operation of the immigration laws.”³¹² A reasonable reading of *Judulang* suggests that traditional equitable factors considered elsewhere in the immigration laws and in policy memos addressing prosecutorial discretion, such as length of residence, hardship, family ties, and other discretionary considerations might be relevant, or even required.³¹³

A second factor emphasized by the Court in finding that the comparable grounds rule fails under A&C review was that the rule empowers immigration officials’ initial charging decisions to carry legal consequences that are more pronounced than permitted by the requirement of reasoned decision-making.³¹⁴ Initial charging decisions mattered in the 212(c) context because the removal ground charged by the immigration agency would determine the noncitizen’s eligibility for relief.³¹⁵ As the Court pointed out, a noncitizen with a voluntary manslaughter conviction could be charged with the “crime involving moral turpitude” ground of *inadmissibility*, which would leave him eligible for discretionary relief.³¹⁶ But he could also be charged for the same conviction with the crime of violence ground of *deportability*, which due to the absence of a statutory counterpart in the grounds of inadmissibility would render him ineligible for relief.³¹⁷

The Court explained its concern with the implications of front-line discretionary charges as follows:

And underneath this layer of arbitrariness [the lack of consideration for the overall purpose of the immigration laws] lies yet another,

308. *Id.* The Court went on to ask, “Does an alien charged with a particular deportation ground become more worthy of relief because that ground happens to match up with another? Or less worthy of relief because the ground does not?” *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 56.

312. *Id.* at 58.

313. See Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 53–55 (2013) (discussing possibility of arbitrary and capricious review for exercises of prosecutorial discretion in immigration that fail to consider certain types of equities); Jason Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029, 1072 (2017) (observing that *Judulang* “evidences the Court’s clear discomfort with a deportation system that allows agency officials to exercise prosecutorial discretion without regard to the ‘alien’s fitness to remain in the country’”).

314. *Judulang*, 565 U.S. at 53–54.

315. *Id.*

316. *Id.*

317. *Id.* (emphasis added).

because the outcome of the Board's comparable-grounds analysis itself may rest on the happenstance of an immigration official's charging decision. . . . So everything hangs on the charge. And the Government has provided no reason to think that immigration officials must adhere to any set scheme in deciding what charges to bring, or that those officials are exercising their charging discretion with § 212(c) in mind. . . . *So at base everything hangs on the fortuity of an individual official's decision.* An alien appearing before one official may suffer deportation; an identically situated alien appearing before another may gain the right to stay in this country.³¹⁸

The Court's concern with the inflated impact of charging decisions has several dimensions. First, the Court emphasized the disproportionate effect of a charging decision, finding it problematic that "everything hangs on the charge."³¹⁹ Second, the Court expressed discomfort with the lack of guidance—the absence of "any set scheme"—for charging officials to make these high-stakes decisions.³²⁰ Third, the Court's reference to the absence of any reason to believe that immigration "officials are exercising their charging discretion with § 212(c) in mind" demonstrates the Court's mindfulness to the fact that charging officials likely do not deliberate meaningfully over the consequences of their decisions.³²¹ Finally, the Court was troubled by the random and inconsistent nature of the charging decisions, which would impact identically-situated noncitizens differently. The Court quoted Judge Learned Hand, asserting that "deportation decisions cannot be made a 'sport of chance.'"³²²

In addition to framing the A&C analysis in the immigration context as requiring agency decisions to reflect the overall purposes of the immigration laws and refrain from locating excessive power in single charging decisions, *Judulang's* treatment of the government's rationale for the comparable grounds rule is noteworthy. The government had set forth three justifications for the BIA's rule. First, the government argued that the comparable grounds rule was more faithful to the statutory language.³²³ The Court rejected the government's reading of the statute, and emphasized the lack of statutory guidance in the INA on how 212(c) eligibility should be determined.³²⁴ Second, the government emphasized that the comparable

318. *Id.* at 57–58.

319. *Id.* at 58.

320. *Id.*

321. *Id.*

322. *Id.* at 59 (quoting *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947)).

323. *Id.*

324. *Id.* at 59–61.

grounds rule had been in use for decades.³²⁵ But the Court was clear that it found this argument unpersuasive, both in the case at hand and as a general principle of law. As the Court stated, “[a]rbitrary agency action becomes no less so by simple dint of repetition.”³²⁶ Indeed, the Court noted that the government’s changes in approach over the years suggested “mixed signals” with respect to the reasonableness of the policy.³²⁷ Finally, the government emphasized the efficiency and fiscal benefits of the policy. In rejecting this rationale, the Court noted that its holding “would force the Government to make additional individualized assessments of whether to actually grant relief.”³²⁸ The Court agreed that “[c]ost is an important factor for agencies to consider in many contexts.”³²⁹ But it went on to find cost an insufficient rationale to overcome the randomness of the policy: “cheapness alone cannot save an arbitrary agency policy. (If it could, flipping coins would be a valid way to determine an alien’s eligibility for a waiver.)”³³⁰

B. Reviewing the Intersection of Expedited Removal and Reinstatement Under the Arbitrary and Capricious Standard

The holding and logic of *Judulang* and prevailing A&C jurisprudence supports finding that the use of reinstatement, where the prior order is an expedited removal order, violates the requirement that administrative agencies demonstrate reasoned decision-making.³³¹ A threshold question is whether judicial review is possible. Despite the tangle of jurisdictional bars discussed earlier, A&C review appears permissible under existing statutes. Reinstatement orders can be reviewed for questions of law.³³² A&C review, as a component of the APA, is a question of law.³³³ Despite the extensive jurisdictional hurdles to direct review of expedited removal orders, the review discussed here questions the agency’s decision to invoke reinstatement based on the existence of an expedited removal order. Such

325. *Id.* at 61–63.

326. *Id.* at 61.

327. *Id.* at 62.

328. *Id.* at 63.

329. *Id.* at 63–64.

330. *Id.* at 64.

331. The reinstatement process as a whole raises a host of due process concerns that the courts have only begun to examine, particularly where the predicate orders were procedurally irregular. But the analysis in this Article is explicitly limited to instances where the agency uses reinstatement that is based on expedited removal order. Without discounting the potential for arbitrary and capricious review to apply to a broader class of reinstatement orders, the unique confluence of expedited removal and reinstatement raises arbitrariness concerns that necessitate a focused analysis. While relevant, reinstatement cases involving other types of removals fall outside the scope of this Article.

332. *See supra* text accompanying notes 192–194.

333. *See, e.g.,* *Sandoval v. Aetna Life and Cas. Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992); *Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 527 (D.D.C. 2016).

review does not, however, call for direct review of the expedited removal order and appears not directly barred by the existing judicial review provisions.

The essence of hard look review is the requirement that agency action reflect reasoned decision-making.³³⁴ DHS does not appear to have explained its decision to invoke reinstatement, or provide guidelines, even where an individual's only prior removal order was an expedited removal order, thereby making it potentially more difficult to assess whether its use of expedited removal in this context is reasonable. In the late 1990s, a series of internal government memoranda encouraged ICE and CBP agents to use expedited removal, reinstatement, and stipulated orders of removal (in which detainees agree to the entry of an IJ-issued removal order) to the greatest extent possible.³³⁵ Indeed, reinstatements and expedited removal orders have remained in the shadows both in terms of practical implementation as well as higher-level policymaking and public disclosure. While ICE and CBP published data on the number of reinstatements and expedited removals,³³⁶ they have not disclosed information related to the types of removal orders serving as the basis of those reinstatements. Without an articulated rationale, what remains is the actual practice of invoking reinstatement based on an expedited removal order, a practice that can be examined under prevailing A&C standards.

In several ways, the level of arbitrariness and the consequences resulting from agency policy are significantly more pronounced in the context of expedited removal and reinstatement relative to the comparable grounds rule at issue in *Judulang*. *Judulang* emphasized that the immigration agency's policies must bear *some* relationship to the alien's fitness to reside in the country.³³⁷ In *Judulang*, the comparable grounds rule led to certain immigrants being rendered ineligible to seek one form of discretionary relief from removal—the 212(c) waiver—due to the deportability ground applied.³³⁸ With expedited removal-based reinstatement, the mere fact that a person is placed in reinstatement makes the person entirely ineligible to seek almost *any* discretionary relief from removal before the immigration court.³³⁹

334. See *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

335. See Koh, *supra* note 13, at 505–507 (discussing internal agency memoranda directing expansion of summary removals).

336. See *supra* note 15.

337. See *supra* text accompanying notes 305–313.

338. See *supra* text accompanying notes 294–300.

339. Practically, it is highly likely that lawful permanent residents impacted by *Judulang* would not be eligible for immigration relief other than 212(c). Section 212(c) waivers were effectively eliminated by IIRIRA, but preserved for persons with pre-1996 aggravated felony convictions in *INS v. St. Cyr*. 533 U.S. 289, 326 (2001). Under those same laws, noncitizens with aggravated felony convictions are barred from seeking most forms of relief from removal. See Koh, *supra* note 219, at 266.

With respect to the consequences associated with an individual officer's charging decisions in which *Judulang* grounded a good part of its holding, the interplay of expedited removal and reinstatement also raises multiple levels of arbitrariness. In many cases, the only trait distinguishing a noncitizen subject to reinstatement due to an expedited removal order from a person who is undocumented, with no prior record and therefore subject to removal proceedings before an IJ, are the circumstances that took place upon an entry at the border. Two main charging decisions most deeply impact the outcome of an individual who was once apprehended at the border, and subsequently made the United States their home. The first is the decision made by a border patrol officer who apprehends an individual at the border during an encounter that might have taken place years or even decades in the past. That officer might have offered a voluntary return or issued an expedited removal order (in many cases, without adhering to the legal requirement that they screen the individual for possible fear of return). The second is the decision, years later upon apprehension in the interior, by an ICE officer who elects to either place a person in regular removal proceedings or put them in reinstatement. Both decisions might take less than two hours cumulatively, appear to lack meaningful internal guidelines to shape officers' discretion, and are conducted by front-line officers who are generally not attorneys and who otherwise have minimal administrative or judicial oversight.³⁴⁰

Compare the discretionary charging decisions that take place with expedited removal-based reinstatement to the charging decisions that the Court found problematic in *Judulang*. In *Judulang*, as with any immigration court proceeding, charging decisions were subject to scrutiny and review by several actors. Typically, the charging document known as the Notice to Appear is prepared by a front-line officer employed by ICE.³⁴¹ Once filed with the immigration court, the case is assigned to an attorney from ICE's Office of Chief Counsel, who must review and defend the allegations in immigration court.³⁴² The IJ must enter a finding of removability, to ensure that the evidence (or admissions of the immigrant) support the legal ground of removability.³⁴³ The findings can be challenged administratively or in the federal court of appeals, and a written and oral record of proceedings sufficient for judicial review exists.³⁴⁴ Immigration court offers an extremely rudimentary legal process, and the absence of counsel for noncitizens and the structural under-resourcing means that oftentimes,

340. See *supra* Part II.A.

341. See Koh, *supra* note 10, at 188.

342. See *id.*

343. See *id.* at 189–91.

344. See *id.* at 189, 192.

review of the charges is minimal.³⁴⁵ But immigration court still provides far more substantial procedural safeguards than expedited removal.

Indeed, the particular inadequacy of the process surrounding the charging decisions made during expedited removal should weigh in favor of an A&C finding. A CBP officer who apprehends a noncitizen at the border might first decide how to process the individual, i.e., to offer either voluntary return or to place them in expedited removal proceedings.³⁴⁶ This decision depends on a number of factors typically unrelated to their “fitness to reside” in the United States.³⁴⁷ The date on which they were apprehended may be the most relevant factor, given that CBP has in more recent years directed officers to use expedited removal over voluntary return in the majority of cases.³⁴⁸ The geographic region in which the person was apprehended may also matter, since the agency has implemented expedited removal in different phases by geographic sector.³⁴⁹ Apart from factors such as time and geography, another variable appears to be the personality and disposition of the individual officer who conducted the proceedings. Unpredictable variables, such as whether the officer actually followed agency regulations and requirements with respect to assessing fear, and whether the transcript of proceedings accurately reflects the oral exchange that took place, would also appear to deeply impact the outcome.³⁵⁰ It may seem surprising to suggest that basic traits associated with fair proceedings—such as whether fundamental rules were followed or whether a conversation was accurately recorded—cannot be taken for granted. But expedited removal has developed and expanded over time without the kind of internal review and accountability normally required for fair procedures to exist. As discussed earlier, reports suggest a process rife with error and arbitrary action.³⁵¹ Even so, the problem is not simply the failure to adhere to credible fear requirements. A broader problem lies with the failure of the expedited removal process itself to have considered individual equities otherwise valued by the immigration statutes and by the Supreme Court.

To be sure, *some* administrative process surrounds expedited removal charging decisions, but the cursory review that exists is limited to discrete parts of the process. A noncitizen subject to expedited removal can request that an IJ review a negative credible fear decision.³⁵² But to even get to the point where a person receives a credible fear interview still requires

345. See Koh, *supra* note 292, at 1855.

346. See generally *supra* Part II.A.

347. *Judulang v. Holder*, 565 U.S. 42, 53 (2011).

348. See *supra* discussion accompanying notes 79–80.

349. See *supra* note 71.

350. See *supra* discussion accompanying notes 95–100.

351. See *supra* text accompanying notes 89–101.

352. See *supra* text accompanying notes 84–88.

exercises of administrative judgment that frequently fall far into the shadows. During expedited removal, no assessment of an individual's ties to the United States takes place. Furthermore, no clear mechanism for correction for CBP officers that fail to even ask about fear—in violation of the agency's own regulations—exists.

By the same token, the decision whether to seek reinstatement or place an individual in regular removal proceedings involves a level of discretion and arbitrariness that exceeds the process in *Judulang*. The decision to seek reinstatement typically is made either by a front-line ICE officer or by an ICE attorney. Even if a case is already in regular removal proceedings, an IJ cannot prevent an ICE attorney from relying on reinstatement to terminate the case.³⁵³ And as discussed earlier, the agency has no written guidelines that govern when it uses reinstatement, despite recommendations that it consider equitable factors in doing so.³⁵⁴

A potential counterargument is that the use of reinstatement is authorized by statute. Even in *Judulang*, the Court addressed this argument by finding that the statute did not support the government's reading.³⁵⁵ Here, the statutory arguments are more challenging and have been met with skepticism by the courts. However, the reinstatement statute nowhere specifies that expedited removal orders can serve as a basis for reinstatement.³⁵⁶ By contrast, in other provisions of the immigration statute, Congress did specifically reference expedited removal orders when it meant for them to serve as the basis for additional sanction.³⁵⁷ And the purpose of A&C review is arguably not to simply examine whether an agency practice is authorized by statute.

Put differently, the mere fact that an agency's organic statute permits a particular practice does not necessarily guarantee that it should clear the "hard look" threshold. The D.C. Circuit stated in a 2017 opinion that "[a]gency action may be consistent with the agency's authorizing statute and yet arbitrary and capricious under the APA."³⁵⁸ The court went on to

353. See, e.g., *Platas-Hernandez v. Lynch*, 611 F. App'x 404 (9th Cir. 2015) (refusing to exercise jurisdiction over case in which noncitizen sought cancellation of removal in immigration court, when ICE attorney moved to terminate case in order to place individual in reinstatement). The late Judge Harry Pregerson dissented, calling the case "yet another example of the cruelty and harshness of our immigration laws and the suffering inflicted on innocent family members and children." *Id.* at 406 (Pregerson, J., dissenting).

354. See Wadhia, *supra* note 10.

355. See *supra* text accompanying notes 326–327.

356. See 8 U.S.C. § 1231(a)(5) (2016) (referencing "an order of removal").

357. See, e.g., 8 U.S.C. § 1182(a)(9)(A)(i) (2016) (specifying that "any alien who has been ordered removed under [8 U.S.C. § 1125(b)(1) (2016), governing expedited removal] or at the end of proceedings under [8 U.S.C. § 1229a (2016), governing immigration court proceedings] initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal . . . is inadmissible").

358. *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017).

explain that “[t]he court’s inquiry on the latter point depends not solely on the agency’s legal authority, but instead on the agency’s ability to demonstrate that it engaged in reasoned decisionmaking,” and “the mere fact that a regulatory scheme is generally consistent with the agency’s authorizing statute does not shield each agency action taken under the scheme from arbitrary and capricious review.”³⁵⁹ Furthermore, *Judulang* acknowledged that the comparable grounds rule was not prohibited by statute.³⁶⁰ Although the government’s argument for statutory authorization seems stronger in the reinstatement-expedited removal context than with the comparable grounds rule, the statutory scheme should not preclude an arbitrary and capricious finding.

Judulang discussed the Court’s own history of acknowledging “the high stakes for an alien who has long resided in this country”³⁶¹ and its intervention in an “agency decision that would ‘make his right to remain here dependent on circumstances so fortuitous and capricious.’”³⁶² A related strand of this argument emphasizes that the stakes are lower because persons subject to expedited removal-based reinstatement have diminished interests compared to lawful permanent residents seeking 212(c) waivers (who are long-time residents). But *Judulang* does not distinguish between lawful residents and undocumented immigrants. Furthermore, the Supreme Court’s decision in *Arizona v. United States* affirms the central role of discretion in the immigration system, as well as the related idea that deportation need not be the inevitable result for many people who have violated the immigration laws.³⁶³ Indeed, one of the problems with the interplay of the expedited removal and reinstatement provisions is that a noncitizen never receives an opportunity to demonstrate their ties to the country or to attach legal recognition to those ties. Compelling arguments favor a reading that does not use immigration status or prior immigration violations as the only factor for determining the scope of rights that attach to noncitizens. Moreover, the immigration laws do, on balance, recognize that attachments to the country can matter, for instance with family petitions, waivers, or cancellation of removal applications. In fact, the

359. *Id.*

360. *Judulang v. Holder*, 565 U.S. 42, 59–60 (2011).

361. *Id.* at 58.

362. *Id.* (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)).

363. *Arizona v. United States*, 567 U.S. 387, 395 (2012). The Court in *Arizona* additionally stated:

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service.

Id. at 396. See also Cade, *supra* note 313, at 1042–49 (analyzing treatment of discretion and equity in *Arizona*).

DACA program (as implemented) and Deferred Action for Parental Accountability (DAPA) program (as proposed, but not implemented, by the Obama Administration) did not treat the existence of a prior removal as a necessary bar to relief, in a demonstration of the types of qualities—length of residence, nature of one’s criminal history—that would presumably reflect reasoned decision-making.³⁶⁴ But neither expedited removal nor reinstatement, and in particular their intersection, allow the law to see those ties.

CONCLUSION

Given the extraordinarily high numbers of expedited removal and reinstatement orders entered in the past decade, the interaction between the two is likewise ripe for growth—particularly in light of the Trump Administration’s policy agenda of mass deportation. The courts have over time enabled these shadow removals to flourish, and have read the statutory restrictions on judicial and habeas review of expedited removal orders to prevent them from providing accountability or restraint to the immigration agencies relying on summary removals.

This Article has sought to both articulate the scope of the government’s power at the intersection of expedited removal and reinstatement, particularly but not exclusively its impact on persons with ties to the United States, and to suggest a different basis for judicial intervention via A&C review. A&C review is a limited solution to a deportation system that increasingly bypasses the immigration courts and deprives individuals of opportunities to seek relief. Ultimately, structural reforms at the statutory level are necessary, but unrealistic in the short term given the current composition of the federal government. Nonetheless, given the degree to which expedited removal and reinstatement currently operate, arbitrary and capricious arguments are worth pursuing until more systemic solutions can take place.

364. See *Consideration for Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca> [<https://perma.cc/WA9E-FDKA>] (last updated Feb. 14, 2018); *A Guide to Immigration Accountability Executive Action*, AM. IMMIGRATION COUNCIL (Nov. 30, 2014), <https://www.americanimmigrationcouncil.org/research/guide-immigration-accountability-executive-action> [<https://perma.cc/7KYV79Z3>] (describing requirements for Deferred Action for Parental Accountability).