COMMENT

UNHEARD AND DEPORTED: THE UNCONSTITUTIONAL DENIAL OF HABEAS CORPUS IN EXPEDITED REMOVAL *

ABSTRACT

The Trump Administration's hostility towards immigrants is apparent in many of its policies, including Zero Tolerance and the Travel Ban. But, an unknown policy is the attempt to expand an already unforgiving system: expedited removal. Expedited removal is the executive policy responsible for most removals from the United States each year. Hundreds of thousands of immigrants are removed from the United States without due process. The decision is carried out by biased ICE and CBP officials without judicial oversight. In 2004, President Bush expanded the application of expedited removal to 100 miles of the border and to immigrants without documentation that entered the United States in the previous fourteen days. President Trump aims to expand this policy to the entire United States and to immigrants without documentation that entered in the previous two years.

The writ of habeas corpus, ensured by the Constitution, is the only avenue for immigrants contesting an unlawful detention under expedited removal. But, the congressional limitations on jurisdiction in § 1252(e), along with the expansion of expedited removal to noncitizens detained in the United States, as opposed to ports of entry, deny noncitizens the protection of the writ and

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due process. Detention in the United States triggers additional due process protections, regardless of status. When President Bush expanded the application of expedited removal without also increasing the procedures, he violated the Suspension Clause and due process.

This Comment analyzes the history and application of expedited removal. Because noncitizens in expedited removal cannot meaningfully contest erroneous detentions, the current and proposed expedited removal regimes raise serious constitutional issues. There are three ways to overturn this: declare the statutes unconstitutional; declare the executive policies unconstitutional; or provide an avenue for judicial review to ensure that the rights of individual noncitizens are protected. This Comment explores each of these options.

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> Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal *disinterested* in the outcome . . . . These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. . . . [T]he writ must be effective.[1]

I. INTRODUCTION

Expedited Removal is the process by which most immigrants are removed from the United States each year. Under expedited removal, a noncitizen is removed from the United States by an order either from an Immigration and Customs Enforcement (ICE) officer or a Customs and Border Patrol (CBP) agent. Immigration Judges (IJ) have no role in the expedited removal process. Judicial review of the underlying removal order and the underlying executive policies are severely restricted, producing a constitutional void in immigration law and policy. This Comment argues that the lack of judicial review violates the habeas rights of noncitizens detained in the United States because upon entering the jurisdictional bounds of the United States, noncitizens are entitled to procedural safeguards against unlawful detention.

"[T]he majority of aliens arriving at the border are processed under the provisions of expedited removal and are removed quickly . . . ."[2] In 2009, there were 105,787 expedited removals, accounting for 27% of removals; but by 2013, the number of expedited removals had increased to 193,032—44% of total

1. Justice Kennedy emphasized the necessity of heightened judicial scrutiny when a person is detained by executive order. Boumediene v. Bush, 553 U.S. 723, 783 (2008) (emphasis added).

2. U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2017 ICE ENFORCEMENT & REMOVAL OPERATIONS REPORT 12 (2017), https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf [https://perma.cc/8EPW-Z8ZX] [hereinafter 2017 ICE REPORT].

removals.[3] In 2016, of 240,255 persons subject to removal (colloquially known as deportation), 174,923 of those individuals were removed under an expedited removal order.[4] This accounted for 72.8% of all deportations in 2016.[5]

Part II explains the expedited removal process from its inception in 1996 to the 2004 expansion by President Bush. Beginning with statutory authorization and extended by executive action, expedited removal is used to detain tens of thousands of immigrants every year. Part III highlights the Supreme Court cases addressing immigrants' right to habeas corpus, holding that immigrants, regardless of their status, are entitled to habeas protections. This Comment references two key statutory provisions: § 1225(b)(1), which authorizes expedited removal; and § 1252(e)(2) and (5), which limit habeas relief for noncitizens in expedited removal. The interplay between the two statutes creates the constitutional void discussed throughout this Comment.

Part IV analyzes various judicial responses to the habeas limitations imposed on expedited removal, showing that noncitizens are denied a meaningful review of the expedited removal process. Part V reviews the constitutionality of executive policies in regard to expedited removal. Because § 1252(e) effectively nullifies any judicial review of executive policies, President Bush's 2004 executive expansion and President Trump's proposed expansion are in violation of our system of checks and balances. Part VI applies the *Mathews v. Eldridge* due process balancing test to determine if the current expedited removal scheme is constitutionally deficient. Finally, Part VII suggests cost-effective solutions that the government can implement today that increase procedural protections afforded to noncitizens detained in the United States without imposing burdensome costs on the federal government.

II. THE EXPEDITED REMOVAL REGIME

Expedited removal was created by Congress in 1996 to

3. *Id.*

4. U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2016 ICE ENFORCEMENT & REMOVAL OPERATIONS REPORT 11 (2016), https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf [https://perma.cc/4VUF-PQ2Z] [hereinafter 2016 ICE REPORT]. ICE removed 94% of the individuals and CBP removed the remaining 6% at a port of entry. *See infra* Section II.A–C (explaining that CBP enforces expedited removal at ports of entry and ICE enforces expedited removal within 100 miles of the border).

5. *See id.*

facilitate quicker removals at ports of entry.[6] Previously, immigration enforcement officials were required to transfer noncitizens that presented fraudulent or improper documentation to immigration courts for a formal removal order by an immigration judge.[7] The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) gave executive immigration officials the authority to generate removal orders at the border and at ports of entry to ease the delay in immigration courts.[8] Under IIRIRA, Congress also gave the Attorney General the discretion to extend expedited removal authority to certain noncitizens in the United States without proper documentation and within two years of their entry.[9] Congress did not issue guidelines for the implementation of expedited removal, giving field officers and the Executive wide discretion to implement the policy.[10] Initially, expedited removal was only employed at ports of entry against noncitizens that did not have the proper documentation to enter the United States.[11] However, after

6. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302, 110 Stat. 3009-546, 579–84 (codified as amended at 8 U.S.C. § 1225 (2012)).

7. 8 U.S.C. § 1225(b)(1); *Immigration Inspections When Arriving in the U.S.,* TRAC IMMIGR. (Apr. 4, 2006), http://trac.syr.edu/immigration/reports/142/ [https://perma.cc/R6EY-43UH] [hereinafter *TRAC Report*]. Aliens not subject to expedited removal are placed in immigration court proceedings to await a determination by an immigration judge. The procedures in immigration court resemble judicial proceedings in criminal courts, including bond hearings, merit hearings, and an ultimate decision by a neutral arbiter. *See generally* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL (2008).

8. *See* 8 U.S.C. § 1225.

9. *Id.* § 1225(b)(1)(A)(iii)(I)–(II) ("The Attorney General may apply clauses (i) and (ii) of this subparagraph to any [alien] . . . who has not been admitted or paroled into the United States, and who has 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 determination of inadmissibility . . . .").

10. *See id.* § 1225(b)(1). See also 8 C.F.R. § 1235.3 (2017) for the Department of Homeland Security's guidelines on enforcement of expedited removal.

11. ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 11 (2016). The 2016 study is a continuation of the U.S. Commission on International Religious Freedom's (USCIRF) comprehensive study of the expedited removal procedures in 2005. The 2005 report found numerous violations by immigration officials, including encouraging aliens who had valid asylum claims to withdraw their applications for admission, failing to refer aliens to credible fear interviews, and removing aliens to countries where they may be persecuted. 1 MARK HETFIELD ET AL., U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 5–7 (2005), http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf [https://perma.cc/SP7H-GYVG]; Clara Long et al., *"You Don't Have Rights Here" US Border Screening and Returns of Central Americans to Risk of Serious Harm*, HUM. RTS. WATCH (Oct. 16, 2014), https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk [https://perma.cc/RP2L-

September 11, 2001, the Executive expanded the application of expedited removal to aliens detained within the physical borders of the United States.[12]

In 2002, the Immigration and Naturalization Services (INS), now housed under the Department of Homeland Security (DHS),[13] expanded expedited removal to noncitizens who had entered the United States by sea and who had not been present in the United States for the previous two years.[14]

In 2004, President Bush further expanded expedited removal to noncitizens detained within 100 air miles of any land or water border and within fourteen days of their entry into the United States.[15] This is the current policy and the focus of the rest of this Comment. It is important to note, however, that on February 20, 2017, a DHS memo was released indicating President Trump's proposal to expand expedited removal to all noncitizens present in

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12. *TRAC Report*, *supra* note 7 ("Expedited Removals were authorized by Congress to get tough on egregious violators of entry laws by sending them back out of the country as quickly as possible with a record in their immigration file that prevents them from returning for five years."). Clara Long et al., *supra* note 11.

13. The Homeland Security Act of 2002, in response to 9/11, abolished INS. Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (codified at 6 U.S.C. § 291 (2012)). The duties and responsibilities of INS are now housed in the Department of Homeland Security (DHS). *Id.* DHS is further broken into various departments: United States Citizenship and Immigration Services (USCIS), which processes all immigrant and nonimmigrant applications for visas, lawful permanent residency, and citizenship, among others; Customs and Border Patrol (CBP), which enforces immigration laws at the border; and Immigration and Customs Enforcement (ICE), which enforces immigration laws within the United States. *Operational and Support Components*, U.S. DEP'T OF HOMELAND SECURITY (Nov. 20, 2018), https://www.dhs.gov/operational-and-support-components [https://perma.cc/GY35-463U].

14. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,925 (Nov. 13, 2002) (expanding expedited removal to "aliens who arrive in the United States by sea, either by boat or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility by a Service officer . . . ."). Expedited Removal did not apply to Cuban noncitizens. *Id.* at 68,926. The United States government, however, eliminated the exception for Cuban nationals who arrive by airport so that "Cuban nationals who arrive in the United States at a port of entry by aircraft will be subject to expedited removal proceedings . . . ." Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air, 82 Fed. Reg. 4771, 4771 (Jan. 17, 2017) (to be codified at 8 C.F.R. pt. 1235).

15. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004) (applying expedited removal to the southwestern border). In 2006, expedited removal was expanded to 100 miles of all U.S. borders. *See Department of Homeland Security Streamlines Removal Process Along Entire U.S, Border*, U.S. DEP'T OF HOMELAND SECURITY (Jan. 30, 2006) https://www.hsdl.org/?abstract&did=476965. Because this policy was announced via press secretary instead of Executive order, this Comment references the 2004 memo as the current policy.

the United States who had entered within the previous two years.[16] This policy would eliminate the current 100 air mile and fourteen-day requirements, thereby subjecting at least 328,440 additional noncitizens living in the United States to expedited removal.[17] It is unclear whether President Trump's intended expansion is currently in effect.[18]

Due to President Bush's executive order, most individuals removed under expedited removal are noncitizens detained *within* the jurisdictional bounds of the United States as opposed to noncitizens detained at the border or a port of entry.[19] The most recent statistics, for 2016, show that 94% of expedited removals were of individuals detained within 100 miles of the border.[20] Furthermore, in 2017, ICE "removed 25 percent more aliens arrested during interior enforcement activities in FY2017 compared to the previous year."[21] Because expedited removal is the most commonly employed tool to remove noncitizens from the United States and because expedited removal mostly affects those detained within 100 miles of the border, the impact of procedural deficiencies in the expedited removal process affects most noncitizens removed from the United States each year.

16. 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_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [https://perma.cc/A57U-JKRA] [hereinafter Trump's Proposed Expedited Removal Policy]; Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

17. *See* JOSE MAGAÑA-SALGADO, IMMIGRANT LEGAL RES. CTR., FAIR TREATMENT DENIED: THE TRUMP ADMINISTRATION'S TROUBLING ATTEMPT TO EXPAND "FAST-TRACK" DEPORTATIONS 3–4 (2017), https://www.ilrc.org/sites/default/files/resources/2017-06-05_ilrc_report_fair_treatment_denied_final.pdf [https://perma.cc/CB5Q-CPAW]. The study also analyzes the impact of a one-year expansion (placing an additional 163,995 undocumented immigrants at risk for expedited removal); 180-day expansion (80,646); and 90-day expansion (40,098). *Id.*

18. Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 260–62 (2017) (stating that if Trump's proposal were to go into effect, the expansion would raise serious constitutional questions regarding habeas rights that the courts would need to address); Kristin Macleod-Ball et al., *Expedited Removal: What Has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements (Issued on Jan. 25, 2017)*, AM. IMMIGR. COUNCIL 8–10 (Feb. 20, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory-_updated_2-21-17.pdf [https://perma.cc/7JVB-8K9G].

19. CASSIDY & LYNCH, *supra* note 11, at 14.

20. 2016 ICE REPORT, *supra* note 4, at 11 n.4.

21. 2017 ICE REPORT, *supra* note 2, at 12.

A. Historical Context

An alien is subject to expedited removal[22] in three ways: (1) the noncitizen tries to enter the United States through the border or a port of entry with improper or fraudulent documentation;[23] (2) the noncitizen enters the United States by sea without immigration inspection and has not been continuously present in the United States for the previous two years;[24] or (3) the noncitizen enters the United States in the previous fourteen days without passing through immigration inspection and is encountered within one 100 miles of any U.S. land or water border.[25] It is under the third form of expedited removal that most noncitizens are removed from the United States each year[26] and thus the focus of this Comment.

An immigration official will place a noncitizen in expedited removal proceedings if the noncitizen is caught at or within 100 miles of the border and the *immigration official is not satisfied* that the noncitizen has been in the United States for longer than fourteen days.[27] The initial determination of whether a noncitizen

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22. 8 U.S.C. § 1225(b)(1)(A) (2012). Expedited removal can be applied in other contexts not explored in this Comment. For example, 8 U.S.C. § 1228(a)(3)(A) authorizes the use of expedited removal in federal, state, and local courts against aliens convicted of an aggravated felony. An immigrant under these provisions will serve his criminal sentence and then be immediately deported to his country of origin without removal proceedings in front of an immigration judge.

23. *Id.* § 1225(b)(1) (mandating that expedited removal proceedings be initiated "if an immigration officer determines that an alien . . . is inadmissible under section 1182(a)(6)(c) or 1182(a)(7) of this title"). This statute represents the original intended use of expedited removal to noncitizens with fraudulent or invalid entry documents at the border or a port of entry. *Id.* § 1182(a)(6)(c), (7).

24. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,925 (Nov. 13, 2002).

25. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004).

26. *See supra* notes 20–21 and accompanying text.

27. 69 Fed. Reg. at 48,880 (providing that aliens may be subject to expedited removal if they have, among other conditions, 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 the encounter") (emphasis added). Although § 1225(b)(1) grants the Attorney General the authority to apply expedited removal to noncitizens detained within two years of entry, previous administrations never expanded expedited removal to this full statutory period, until now. 8 U.S.C. § 1225(b)(1)(A)(iii); *see* 8 C.F.R. § 1235.3(b)(1)(ii) (2017) ("The expedited removal provisions shall apply to . . . aliens who arrive in, attempt to enter, or have entered the United States without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, and who have not established to the satisfaction of the immigration officer that they have been physically present in the United States continuously for the 2-year period immediately prior to the date of determination of inadmissibility.").

is subject to expedited removal, therefore, is based solely on the immigration official's discretion. Noncitizens subject to expedited removal are afforded an initial interview with a field officer who is tasked with explaining the expedited removal process to the noncitizen.[28] Federal regulations require an interpreter, though one is not always provided.[29] More often, another immigration officer acts as an interpreter.[30] Once ICE or CBP[31] determines that the immigrant is subject to expedited removal, the officer must remove the noncitizen from the United States unless the noncitizen "indicates either an intention to apply for asylum . . . or a [credible] fear of persecution."[32]

The immigration officer must find that the noncitizen "demonstrate[s] a *substantial and realistic possibility* of succeeding" in his asylum claim to make a positive, credible fear determination.[33] If it is determined that there is no credible fear of persecution, the noncitizen is immediately removed from the United States without further process. If ICE or CBP determines that the noncitizen demonstrates a credible fear, the noncitizen is

28. 8 C.F.R. § 1235.3(b)(2)(i) ("The examining immigration officer shall advise the alien of the charges against him or her on Form I-860, Notice and Order of Expedited Removal . . . .").

29. *Id.* ("Interpretative assistance shall be used if necessary to communicate with the alien."); *see also* CASSIDY & LYNCH, *supra* note 11, at 27–28 (relating situations where interpreters were not used).

30. CASSIDY & LYNCH, *supra* note 11, at 27.

31. The immigration official will either be an agent from the Office of Field Operations, if the alien is detained at a port of entry, or an agent from the Customs and Border Patrol, if detained after crossing the border. ICE then facilitates the detention and removal from the United States. CASSIDY & LYNCH, *supra* note 11, at 11.

32. 8 U.S.C. § 1225(b)(1)(A)(i). Form I-867B lists four questions immigration officials must ask before determining whether the noncitizen has a credible fear of persecution: (1) "Why did you leave your home country or country of last residence"; (2) "Do you have any fear or concern about being returned to your home country or being removed from the United States"; (3) "Would you be harmed if you are returned to your home country or country of last residence"; and (4) "Do you have any questions or is there anything else you would like to add?" CASSIDY & LYNCH, *supra* note 11, at 11, 76.

33. Memorandum from John Lafferty, Chief, U.S. Citizenship & Immigration Servs. Asylum Div., to Asylum Office Personnel 15–16 (Feb. 13, 2017), https://shusterman.com/pdf/Trump-cracksdown-on-asylum.pdf [https://perma.cc/6Z93-T797]. It is important to note that asylum law is incredibly complex and varies across the circuits. For example, in most circuits, an immigrant who wishes to obtain asylum as a member of a particular social group must show that his or her membership in the group is visible to the public. *See* Orellana-Monson v. Holder, 685 F.3d 511, 519–21 (5th Cir. 2012); Lizama v. Holder, 629 F.3d 440, 447 (4th Cir. 2011); Scatambuli v. Holder, 558 F.3d 53, 58–60 (1st Cir. 2009); Davila-Mejia v. Mukasey, 531 F.3d 624, 628–29 (8th Cir. 2008); Koudriachova v. Gonzales, 490 F.3d 255, 260–62 (2d Cir. 2007). The Seventh Circuit has explicitly rejected the visibility requirement. Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009). The Ninth Circuit questions the visibility requirement but has not explicitly rejected the requirement. Henriquez-Rivas v. Holder, 707 F.3d 1081, 1087–89 (9th Cir. 2013).

referred to the United States Citizenship and Immigration Services (USCIS) for an additional interview with a trained asylum officer. The noncitizen may appeal a denial from an asylum officer to an immigration judge. If the immigration judge finds no credible fear of persecution, then the noncitizen is immediately removed from the United States. Only noncitizens that were first determined to have a credible fear by ICE or CBP obtain immigration judge review.[34]

B. Detention[35]

A noncitizen is detained throughout the entire expedited removal process.[36] There are two possible scenarios: (1) a noncitizen is detained within 100 miles of the border by ICE or CBP, the officer finds that there is no credible fear of persecution, and the alien is removed from the United States without further process—detention lasts from initial capture until removal, a period ranging from as little as forty-eight hours to five days;[37] or (2) the noncitizen is detained within 100 miles of the border by ICE or CBP, the officer finds that there is a credible fear of persecution, and the alien is referred to USCIS for an asylum interview—detention lasts from initial capture until an immigration judge administers bail (if at all), relief is granted, or removal is enforced, a period averaging fifty-eight days,[38] but potentially lasting two years or more.[39]

Children who were separated from their parents following

34. CASSIDY & LYNCH, *supra* note 11, at 11.

35. Professor Kanstroom, an expert on deportation defense and co-director of the Center for Human Rights and International Justice at Boston College, recently published an article analyzing due process and expedited removal. He argues that detention of persons in expedited removal poses procedural and substantive due process concerns. Daniel Kanstroom, *Expedited Removal and Due Process: "A Testing Crucible of Basic Principal" in the Time of Trump*, 75 WASH. & LEE L. REV. 1323, 1347–49, 1351–56 (2018).

36. 8 C.F.R. § 1235.3(b)(2)(iii) (2018) ("An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal."); *see also* CASSIDY & LYNCH, *supra* note 11, at 11–12. The length of time that an alien is detained while awaiting removal varies greatly. The Supreme Court held in *Demore* that mandatory detention before removal proceedings is constitutional because there is an end to detention, namely removal. Demore v. Kim, 538 U.S. 510, 531 (2003). Most recently, the Supreme Court expanded its previous holding by denying the right to bond determinations for noncitizens subject to mandatory detention, including expedited removal. Jennings v. Rodriguez, 138 S. Ct. 830, 847–48 (2018).

37. CASSIDY & LYNCH, *supra* note 11, at 11 & n.9, 43.

38. According to USCIS, it takes ICE nine days to conduct a credible fear determination. CASSIDY & LYNCH, *supra* note 11, at 38 & n.53.

39. Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 785, 843 n.264 (2018).

President Trump's Zero Tolerance Policy fall into the second category of detention. The Zero Tolerance Policy sought to criminally prosecute all noncitizens who entered the United States unlawfully.[40] Children, who cannot be criminally prosecuted for immigration crimes, were separated from their parents and detained pending their parents' criminal proceeding.[41] The children are subject to expedited removal, but because ICE is required to reunify these children with their parents or hold the children that have a valid asylum claim, ICE cannot remove them to their home country. The children remain detained until they are reunited with their parents or are connected with a sponsor in the United States. Due to this policy, 2,737 children were separated from their parents.[42] A federal judge ordered that the children be reunified with their parents on June 25, 2018. Yet, as of October 15, 2018, 245 children remain separated from their parents. 125 have decided to remain separated to pursue their asylum claims and 120 are in the custody of the Office of Refugee Resettlement (ORR) attempting to unify with their parents, but their parents were either deported or are detained in the United States. The 120 children in ORR custody will remain detained until they can be reunited with their parents.[43]

The physical conditions of detention rival prisons. Noncitizens are packed into overcrowded and freezing cells. Basic hygiene items, such as bedding, toilet paper, and soap, is often not provided.[44] The United States uses systemic detention as a means of processing immigration applications at the fiscal cost of $343

40. Memorandum from Jeff Sessions, U.S. Attorney Gen., to Federal Prosecutors along the Southwest Border (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download [https://perma.cc/F3WJ-WSMS].

41. *See, e.g.*, Amna Nawaz & Joshua Barajas, *What New Family Separation Policy Is Trump Considering?*, PBS (Oct. 16, 2018, 5:44 PM), https://www.pbs.org/newshour/nation/trump-is-considering-a-new-family-separation-policy-heres-what-we-know-about-children-still-under-u-s-custody [https://perma.cc/8HLY-HE88].

42. The number of children affected by the Zero Tolerance policy may in fact be larger than originally estimated. DHS's inaccurate reporting and evasive communication makes it impossible to determine the exact number of children affected. Miriam Jordan & Caitlin Dickerson, *End of a Policy Wasn't the End of Migrant Family Separations*, N.Y. TIMES, Mar. 9, 2019, at A1. *See* Colleen Long & Ricardo Alonso-Zaldivar, *Watchdog: Thousands More Children May Have Been Separated*, U.S. NEWS & WORLD REP. (Jan. 18, 2019), https://www.usnews.com/news/politics/articles/2019-01-17/watchdog-many-more-migrant-families-may-have-been-separated (finding that 2,737 children were separated from their families but there in fact may be thousands more).

43. *Family Separation: By the Numbers*, ACLU, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/family-separation [https://perma.cc/VK8N-9C4W] (last visited Mar. 3, 2019).

44. Kanstroom, *supra* note 35, at 1347 (citations omitted).

per person per day[45] and the social cost of trauma, depression, and human rights violations.[46]

Detention is not the only consequence of the expedited removal scheme. A noncitizen is not allowed to apply for a visa or admission for a period of five years following an expedited removal order.[47] Generally, if the noncitizen is detained following another unlawful entry, he is permanently barred from receiving lawful permanent status in the future.[48] More importantly, the noncitizen is subject to criminal imprisonment at taxpayer expense.[49] Considering the dire consequences of a removal order,[50] civilly and criminally, it is disconcerting that ICE and CBP agents, without a legal education or formal training in immigration law, [51] are given full discretion to determine which noncitizens have the opportunity to present their asylum claim before an immigration judge.

C. Practical Implications

> [T]he deportation process can begin and end with a CBP officer untrained in the law. . . . There is no hearing, no

45. *Family Detention During Obama Administration*, AM. IMMIGR. LAWS. ASS'N (Oct. 12, 2016), https://www.aila.org/infonet/detention [https://perma.cc/4BPB-S49C].

46. Eagly et al., *supra* note 39, at 825–27, 841–45; Nick Cumming-Bruce, *Taking Migrant Children from Parents is Illegal, U.N. tells U.S.*, N.Y. TIMES (June 5, 2018), https://www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html [https://perma.cc/K6HP-TK8N].

47. 8 U.S.C. § 1182(a)(9)(A)(i) (2012) ("Any alien who has been ordered removed under section 1225(b)(1) [expedited removal statute] of this title . . . and who again seeks admission within 5 years of the date of such removal . . . is inadmissible.").

48. *Id.* § 1182(a)(9)(C)(i)(II) ("Any alien who . . . has been ordered removed . . . and who enters or attempts to reenter the United States without being admitted is inadmissible.").

49. *Id.* § 1326. See *infra* Section IV.G for a discussion concerning collateral attacks against an expedited removal order when it is used as an element in a criminal offense.

50. A removal order prohibits a noncitizen from entering the United States for five years or from obtaining many types of lawful status in the future. 8 U.S.C. § 1182(a)(9). For example, a noncitizen who has been removed cannot obtain a visa through a U.S. citizen family member, even though he has no criminal record and would otherwise be eligible for a visa. *Id.* Additionally, if the noncitizen is convicted of a crime while unlawfully in the United States, he will be subject to criminal sentencing enhancements, ranging from two levels to ten levels. U.S SENTENCING GUIDELINES MANUAL § 2L1.2 (U.S. SENTENCING COMM'N 2016).

51. In order to be a border patrol agent, the individual must pass a polygraph test, have U.S. citizenship, reside in the United States for the last three years, pass a background investigation, have a valid driver's license, cannot have been convicted of a misdemeanor crime of domestic violence (other crimes may be waived), and must be under forty years old. *Border Patrol Agent (Direct Hire)*, U.S. DEP'T OF HOMELAND SECURITY, https://www.usajobs.gov/GetJob/ViewDetails/487584500 [https://perma.cc/K59N-K95M] (last visited Mar. 19, 2019).

> neutral decision-maker, no evidentiary findings, and no opportunity for administrative or judicial review. This lack of procedural safeguards in expedited removal proceedings creates a substantial risk that noncitizens subjected to expedited removal will suffer an erroneous removal.[52]

Noncitizens are not afforded many procedural protections during an expedited removal proceeding.[53] A noncitizen detained within 100 miles of the border or a port of entry is not afforded the right to an attorney,[54] even at his own expense,[55] and he is not able to contact family members or other representatives.[56] Even if the noncitizen is able to produce documentation to show continuous presence, there is no check to ensure that field officers comply with protocol.[57]

Noncitizens living in almost every major U.S. city, including New York, Los Angeles, Chicago, and Houston are at risk for erroneous detentions.[58] Noncitizens that have been in the United States longer than fourteen days have a very difficult time presenting evidence of their continuous presence.[59] This problem arises from the fact that undocumented immigrants cannot lawfully obtain a government-issued identification or driver's

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52. United States v. Peralta-Sanchez, 847 F.3d 1124, 1143–44 (Pregerson, J., dissenting), *aff'd*, 705 F. App'x 542 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 702 (2018) (applying the *Mathews v. Eldridge* test for due process to argue that aliens in expedited removal proceedings should be afforded the right to counsel).

53. 8 U.S.C. § 1252(e)(1) (2012) ("[N]o court may . . . enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) [expedited removal].").

54. *Peralta-Sanchez*, 847 F.3d at 1130, 1139; *see Peralta-Sanchez*, 705 F. App'x at 544–45 (finding that the lack of counsel is not prejudicial to noncitizens in expedited removal proceedings); *see also* Gomez-Velazco v. Sessions, 879 F.3d 989, 994–95, *reh'g en banc denied*, 890 F.3d 1194 (9th Cir. 2018).

55. *See* CASSIDY & LYNCH, *supra* note 11, at vii; *see also infra* note 159 and accompanying text.

56. CASSIDY & LYNCH, *supra* note 11, at vii.

57. *See, e.g.*, United States v. Raya-Vaca, 771 F.3d 1195, 1205 (9th Cir. 2014) ("[N]o immigration officer explained to him either the nature of the removal proceedings or that he could be ordered removed from the United States. . . . [T]he immigration officer neither read to him nor permitted him to review the information in the sworn statement.").

58. *Know Your Rights: In the 100-Mile Border Zone*, ACLU, https://www.aclu.org/sites/default/files/field_document/kyr-100mileborderzone-en.pdf [https://perma.cc/7Q5K-KMY7] (last visited Mar. 19, 2019) (illustrating the major cities within 100 miles of any U.S. land or water border).

59. For a list of acceptable documents to show continued physical presence in the United States, see Leslie Berestein Rojas, *One Big Deferred Action Challenge: How Does One Prove They've Lived in the U.S. for 5 Years?*, 89.3KPCC (Aug. 15, 2012), https://www.scpr.org/blogs/multiamerican/2012/08/15/9822/one-of-the-biggest-deferred-action-challenges-how [https://perma.cc/ZQ3W-9BYK].

license in most states.[60] Noncitizens without proof of their presence are erroneously placed in expedited removal proceedings instead of removal proceedings in an immigration court.[61] Under Trump's proposed expansion, the continuous presence problem is exacerbated because the burden of proof increases from a showing of fourteen days to a showing of two years.[62]

Moreover, ICE continually fails to refer noncitizens with valid asylum claims to USCIS for an asylum interview, even if the noncitizen has established a credible fear of persecution.[63] Immigration officials *must* refer a noncitizen to an asylum interview with USCIS if the official finds that the noncitizen's asylum claim has a "substantial and realistic possibility of succeeding" in immigration court.[64] Yet, the success of an asylum claim depends entirely on whether the Fifth, Seventh, or Ninth Circuit adjudicates the case.[65] Asking immigration officials who lack institutional knowledge of asylum law to make these

60. Real ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stat. 231, 313 (codified as amended at 49 U.S.C. § 30301 note (2012)) ("EVIDENCE OF LAWFUL STATUS.—A State shall require, before issuing a driver's license or identification card to a person, valid documentary evidence that the person—(i) is a citizen or national of the United States; (ii) is an alien lawfully admitted for permanent or temporary residence in the United States; (iii) has conditional permanent resident status in the United States; (iv) has an approved application for asylum in the United States or has entered into the United States in refugee status; (v) has a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States; (vi) has a pending application for asylum in the United States; (vii) has a pending or approved application for temporary protected status in the United States; (viii) has approved deferred action status; or (ix) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States."); *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. ST. LEGISLATURES (Nov. 30, 2016), http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx [https://perma.cc/F9YY-6QZP].

61. United States v. Peralta-Sanchez, 847 F.3d 1124, 1144 (Pregerson, J., dissenting), *aff'd*, 705 F. App'x 542 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 702 (2018).

62. Trump's Proposed Expedited Removal Policy, *supra* note 16, at 6.

63. CASSIDY & LYNCH, *supra* note 11, at 7 (noting key problems with the current expedited removal process include "incorrect interviewing and unreliable record-keeping practices by immigration officers at ports of entry; failures to refer asylum seekers for credible fear determinations; inappropriately punitive detention conditions; wildly varying rates of parole (release) of asylum seekers from detention; and inconsistent asylum adjudications by immigration judges"); *A Primer on Expedited Removal*, AM. IMMIGR. COUNCIL 3–4 (Feb. 3, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/a_primer_on_expedited_removal.pdf [https://perma.cc/AJS7-654X]; SARA CAMPOS & JOAN FRIEDLAND, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT 9–10 (2014).

64. Memorandum from John Lafferty, Chief, USCIS Asylum Div., to Asylum Office Dirs. et al. (Feb. 28, 2014), http://www.aila.org/infonet/uscis-asylum-revised-credible-fear-lesson-plan [https://perma.cc/7PGX-U6MG].

65. *See supra* note 33 and accompanying text (referencing also decisions from the Second, Fourth, and Eighth Circuits).

decisions creates a high risk of erroneous credible fear determinations, and subsequently, erroneous removals.[66] The reality is that many noncitizens with demonstrable asylum claims are removed from the country in less than forty-eight hours.[67]

D. Limits on Judicial Review

There is absolutely zero involvement by the judiciary at any point in the expedited removal process.[68] CBP and ICE agents make two key determinations without judicial review: (1) whether a noncitizen is subject to expedited removal and (2) whether the noncitizen has a credible fear of persecution.[69] Congress limits judicial review of the expedited removal process in four key ways. First, noncitizens cannot appeal the two ICE/CBP determinations.[70] Second, noncitizens cannot collaterally attack the determinations in a subsequent proceeding.[71] Third, a noncitizen's right to challenge the determinations in a habeas proceeding is limited.[72] And fourth, an individual's right to bring a constitutional suit against an expedited removal policy is severely restricted.[73]

The absence of a judicial intervention is a strong incentive for the Executive to disregard due process and habeas protections. Because there is no opportunity for appellate or collateral,[74] noncitizens must rely on the Suspension Clause to challenge an erroneous detention under expedited removal. Habeas corpus

66. 8 U.S.C. § 1252(e)(1)(A) (2012) ("[N]o court may . . . enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) . . . ."); *id.* § 1225(b)(1)(B)(iii)(I) ("[T]he officer shall order the alien removed from the United States without further hearing or review.").

67. CASSIDY & LYNCH, *supra* note 11, at 11 (noting that after the initial interview, noncitizens are turned over to ICE for detention and removal typically within 24 to 48 hours).

68. 8 U.S.C. §§ 1252(e)(1), 1225(b)(1)(C)–(D).

69. 8 C.F.R. § 1235.3(b)(2)(i) (2018).

70. 8 U.S.C. §§ 1225(b)(1)(B)(iii)(I), 1252(e)(1); Alvaro Peralta, Note, *Bordering Persecution: Why Asylum Seekers Should Not Be Subject to Expedited Removal*, 64 AM. U. L. REV. 1303, 1315–17 (2015). For examples of cases where noncitizens challenged their removal orders, see Shunaula v. Holder, 732 F.3d 143 (2d Cir. 2013); Khan v. Holder, 608 F.3d 325 (7th Cir. 2010); Brumme v. U.S. Immigration & Naturalization Serv., 275 F.3d 443 (5th Cir. 2001).

71. 8 U.S.C. §§ 1252(g), 1225(b)(1)(C). *But see infra* Section IV.G (describing how the Ninth Circuit has preserved due process considerations for individuals subject to expedited removal orders by permitting noncitizens to challenge the validity of an expedited removal order in a subsequent criminal proceeding).

72. 8 U.S.C. § 1252(e)(2).

73. *Id.* § 1252(e)(3).

74. *Id.* § 1225 (limiting the right to appeal, seek administrative review, and collaterally review the underlying order).

proceedings must provide those protections where Congress has stripped the courts of judicial review. By failing to provide additional procedural safeguards for noncitizens detained in the United States, the Executive has erroneously deprived noncitizens of their right to Suspension Clause protections.

III. NONCITIZENS SUBJECT TO EXPEDITED REMOVAL ARE ENTITLED TO SUSPENSION CLAUSE PROTECTIONS

A. Supreme Court Protection

The Supreme Court preserves habeas protections for noncitizens detained by the government despite preclusion. In *St. Cyr*, the Supreme Court stated that the Suspension Clause requires "judicial intervention in deportation cases";[75] and in *Boumediene*, the Supreme Court affirmed the habeas rights of noncitizens, holding that, at a minimum, noncitizen enemy combatants are entitled to a meaningful review of the habeas procedures in place and an opportunity to present evidence opposing their detention.[76]

In *St. Cyr*, a noncitizen relied on a waiver from deportation to plead guilty to a charge of controlled substance.[77] While his removal proceedings were ongoing, Congress passed two acts that together eliminated St. Cyr's ability to obtain the waiver and made him deportable.[78] In these acts, Congress also stripped the courts of appellate review, leaving a habeas proceeding as the only avenue to challenge the elimination of the waiver.[79] At the Supreme Court, INS argued that the two acts had also stripped the federal courts of jurisdiction to hear St. Cyr's habeas corpus petition.[80] The Supreme Court disagreed. Justice Stevens articulated three reasons why federal courts continue to have jurisdiction over habeas petitions from noncitizen aliens even if appellate review of the removal order is no longer available: First,

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75. I.N.S. v. St. Cyr, 533 U.S. 289, 300 (2001) (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)).

76. Boumediene v. Bush, 553 U.S. 723, 789 (2008).

77. *St. Cyr*, 533 U.S. at 293.

78. *Id.* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-208, § 304(b), 110 Stat. 3009-597 (repealing 8 U.S.C. § 1182(c) (2012)); Pub. L. 104-208, § 304(a)(3), 110 Stat. 3009-594 (codified as 8 U.S.C. § 1229b (2012)) (eliminating the Attorney General's ability to waive a controlled substance conviction from deportation).

79. *St. Cyr*, 533 U.S. at 297–99, 311.

80. *Id.* at 298 ("The INS argues, however, that four sections of the 1996 statutes—specifically, § 401(e) of the AEDPA and three sections of the IIRIRA (8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C), and 1252(b)(9) (1994 ed. Supp. V))—stripped the courts of jurisdiction to decide the question of law presented by respondent's habeas corpus application.").

the history of the writ has always protected aliens as well as citizens; second, the writ acts as a check on executive power; third, the Constitution requires a writ of habeas to all persons except in cases of rebellion or invasion.[81]

In *Boumediene*, the Supreme Court ruled that inadmissible aliens detained at Guantanamo Bay as enemy combatants are entitled to a "meaningful review of both the cause for detention and the Executive's power to detain."[82] The Court created a two-step analysis to determine if Congress or the Executive violated the Suspension Clause: first, a court must weigh three factors to determine if the noncitizen is prohibited from invoking the writ; and second, the court must weigh the procedures in place to determine if the writ conforms with due process.[83] For the first step, courts must weigh:

> (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made;
>
> (2) the nature of the sites where apprehension and then detention took place; and
>
> (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[84]

Noncitizens in expedited removal proceedings are not prohibited from asserting their right to the writ under the *Boumediene* three-factor test. Under the first factor pertaining to the status of the detainee, noncitizens detained at Guantanamo Bay and noncitizens subject to expedited removal are both foreign nationals without citizenship.[85] As to the adequacy of the process,

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81. *Id.* at 300–07. While the *St. Cyr* holding was subsequently limited by the REAL ID Act of 2005, noncitizens maintain the right to contest unlawful detentions in habeas proceedings. 8 U.S.C. § 1252(a)(5) (2012). *See generally* Veena Reddy, *Judicial Review of Final Orders of Removal in the Wake of the REAL ID Act*, 69 OHIO ST. L.J. 557, 571 (2008) ("The REAL ID Act of 2005 was enacted in part to 'cure the anomalies' created by *St. Cyr* and its progeny by depriving criminal aliens of the opportunity to bring petitions pursuant to 28 U.S.C. § 2241, but permitting a circuit court to review 'those issues that were historically reviewable on habeas.' Passed in 2005, the REAL ID Act stripped district courts of jurisdiction to hear any final orders of removal and placed review of all final removal orders for both criminal and non-criminal aliens in the courts of appeals." (footnotes omitted)). *See also* Jennings v. Rodriguez, 138 S. Ct. 830, 859 (2018) (Thomas, J., concurring) ("The Suspension Clause protects '[t]he Privilege of the Writ of Habeas Corpus,' not requests for injunctive relief. Because respondents have not sought a writ of habeas corpus, applying § 1252(b)(9) to bar their suit does not implicate the Suspension Clause.").

82. Boumediene v. Bush, 553 U.S. 723, 783 (2008).

83. *Id.* at 873. *See infra* Part VI (applying *Mathews v. Eldridge* to determine if the current procedures provide due process).

84. *Id.* at 766.

85. 8 U.S.C. § 1225(b)(1) (authorizing expedited removal for non-U.S. citizens). *See*

noncitizens at Guantanamo Bay were provided more protections at the time of the Supreme Court's decision in 2008 than noncitizens in expedited removal are afforded today, including a representative and an independent tribunal.[86] Noncitizens in expedited removal are never afforded a "representative" to contest whether they are subject to expedited removal, nor is the decision made by a neutral arbiter.[87] Because the procedures afforded to noncitizens in *Boumediene* exceed those provided to noncitizens in expedited removal, the first factor weighs in favor of Suspension Clause protections for individuals in expedited removal.

The second factor, sites of apprehension, also weighs in favor of habeas protections for noncitizens in expedited removal.[88] The detainees in *Boumediene* were captured in Afghanistan and detained in Guantanamo, a jurisdictionally run territory of the United States.[89] In contrast, most noncitizens in expedited removal are apprehended and detained in the United States, where federal, state, or county courts are readily accessible to ICE and CBP.[90] This second factor provides full support for habeas protections as noncitizens in expedited removal are detained *within* the United States, not a jurisdictionally run territory.

The third factor similarly weighs in favor of preservation of habeas protections for noncitizens in expedited removal. The single biggest obstacle to increased protections for noncitizens in expedited removal is expense.[91] This obstacle pales in comparison

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Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (plurality opinion).

86. Enemy detainees were not always present at these proceedings and could not appeal the tribunal determination to any court. Enemy detainees received their enemy combatant status from Combatant Status Review Tribunals, a panel of three officers. These proceedings afforded the noncitizen a "representative" who was charged with presenting evidence on behalf of the alien to contest the enemy combatant determination. Neil A. Lewis, *Scrutiny of Review Tribunals as War Crimes Trials Open*, N.Y. TIMES (Aug. 24, 2004), http://www.nytimes.com/2004/08/24/us/scrutiny-of-review-tribunals-as-war-crimes-trials-open.html [https://perma.cc/J47U-GRS6]. In contrast, noncitizens in expedited removal are detained in the United States. 8 C.F.R. § 1235.3(b) (2018).

87. 8 C.F.R. § 1235.3 (2017); Gomez-Velazco v. Sessions, 879 F.3d 989, 994–95, *reh'g en banc denied*, 890 F.3d 1194 (9th Cir. 2018) ("[W]e see no reason to conclusively presume prejudice when an individual is denied the right to counsel during his initial interaction with DHS officers . . . .").

88. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004); Trump's Proposed Expedited Removal Policy, *supra* note 16, at 6.

89. Geoffrey A. Hoffman & Susham M. Modi, *The War on Terror as a Metaphor for Immigration Regulation: A Critical View of a Distorted Debate*, 15 J. GENDER, RACE, & JUST. 449, 491 (2012).

90. 69 Fed. Reg. at 48,879; Trump's Proposed Expedited Removal Policy, *supra* note 16, at 6.

91. Other practical obstacles in providing habeas proceedings for aliens in expedited removal include the sheer number of cases a year and the severe backlog in the immigration courts. *See generally* MALCOLM RICH ET AL., APPLESEED NETWORK IMMIGR.

to the practical challenges of providing habeas proceedings to enemy combatants detained in active war zones who are held with little, if any, access to federal courts.[92] The costs for providing habeas proceedings to all noncitizens subject to expedited removal are extraordinary and are further discussed in Parts VI–VII. Though costs play an integral part in determining the types of procedures due to noncitizens, costs as a sole factor should not prevent the extension of a constitutional right, especially one so fundamental as liberty from erroneous detention by the government.

B. What Are the Limits to Writ?

There are two issues at play here: (1) whether § 1252(e), which limits habeas corpus review in expedited removal, violates the Suspension Clause; and (2) whether the executive's expansion of expedited removal to noncitizens detained within 100 miles of the border unconstitutionally deprives them of the writ.

Congress may suspend the writ if (1) the intention to limit the protections is clear and (2) the substitution is constitutionally adequate and effective.[93] However, Congress cannot limit habeas rights to such a degree that the writ is practically ineffective.[94] Congress clearly intended to limit the writ for noncitizens in expedited removal proceedings, thereby meeting the first step:

> Judicial review of any determination made under section 1225(b)(1) [expedited removal] of this title is available in habeas corpus proceedings, but *shall be limited* to determinations of—(A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under such section, and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is

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COLLABORATIVE, GETTING OFF THE ASSEMBLY LINE: OVERCOMING IMMIGRATION COURT OBSTACLES IN INDIVIDUAL CASES 45 (2016), https://www.appleseednetwork.org/wp-content/uploads/2017/02/APPLESEED__Getting-Off-Assembly-Line_122116.pdf [https://perma.cc/G22H-6JDA].

92. Al Maqaleh v. Gates, 605 F.3d 84, 96–98 (D.C. Cir. 2010). Detainees captured and held in Afghanistan were denied Suspension Clause rights because the practical obstacles weighed in favor of the government. "We therefore conclude that under both *Eisentrager* and *Boumediene*, the writ does not extend to the Bagram confinement in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign." *Id.* at 98.

93. Swain v. Pressley, 430 U.S. 372, 381 (1977) ("[T]he substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus.").

94. U.S. Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 300 (2001).

> an alien lawfully admitted for permanent residence . . . admitted as a refugee . . . or has been granted asylum . . . .[95]
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> * * *
>
> In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.[96]

The more pressing concern is addressed by step 2: whether 1225(b)(1) along with the limitations imposed by 1252(e) render the writ practically ineffective for noncitizens in expedited removal. If the answer is yes, then either statute or both statutes are unconstitutional. District and circuit courts' attempts to answer this question are discussed at length in Part IV.[97]

The other argument against expedited removal is that the executive's expansion of expedited removal to noncitizens detained within 100 miles of the border is an "erroneous application or interpretation of statutes" because the Executive failed to provide a "meaningful review of both the cause for detention and the Executive's power to detain" when it expanded expedited removal to noncitizens detained in the United States without also increasing the procedural protections afforded to noncitizens.[98] This second argument is discussed at length in Part VI.[99]

IV. COURTS STRUGGLE TO CREATE A UNIFORM RULE

The biggest obstacle for noncitizens wishing to contest an unlawful detention is having their petition heard in the first place.

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95. 8 U.S.C. § 1252(e)(2) (2012) (emphasis added). Courts have interpreted this provision literally, either limiting review to the questions prescribed or denying further substantive review for lack of subject matter jurisdiction. Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 434 (3d. Cir. 2016); *see also* Shunaula v. Holder, 732 F.3d 143, 146 (2d Cir. 2013) ("[D]eprives [the courts] of jurisdiction to hear challenges relating to . . . the 'implementation or operation' of a removal order"); Khan v. Holder, 608 F.3d 325, 329–30 (7th Cir. 2010); Li v. Eddy, 259 F.3d 1132, 1134–35 (9th Cir. 2001), *vacated as moot*, 324 F.3d 1109 (9th Cir. 2003); Brumme v. U.S. Immigration & Naturalization Serv., 275 F.3d 443, 448 (5th Cir. 2001).

96. 8 U.S.C. § 1252(e)(5).

97. *See infra* Sections IV.A–G (analyzing different responses to expedited removal).

98. *Swain*, 430 U.S. at 381.

99. See *infra* Part VI (using the *Mathews v. Eldridge* due process factors to analyze whether the current executive procedures adequately provide constitutional protections).

Federal courts generally dismiss constitutional challenges to expedited removal, citing a lack of jurisdiction.[100] The few federal cases that address habeas rights for noncitizens in expedited removal employ varied constitutional reasoning, leaving the law in this area unclear.[101] This Part takes an in-depth look at the various constitutional interpretations, concluding that the lack of judicial oversight of expedited removal procedure leaves noncitizens vulnerable to executive overreach.

First, this Part looks at federal court decisions that address the merits of noncitizens' habeas claims under § 1252(e). Second, it reviews two recent cases from the Third Circuit that apply *Boumediene* to noncitizens subject to expedited removal and to special immigrant juveniles. Third, it examines a recent Ninth Circuit case that finds § 1252(e) unconstitutional because it does not provide review of the executive procedures. Last, it investigates a unique approach by the Ninth Circuit that reviews the merits of an expedited removal order in a subsequent criminal proceeding. Ultimately, these cases show that noncitizens are repeatedly deprived of a meaningful opportunity to challenge the

100. *Khan*, 608 F.3d at 328–29; Dugdale v. U.S. Customs & Border Prot., 88 F. Supp. 3d 1, 8–9 (D.D.C. 2015); Garcia de Rincon v. U.S. Dep't of Homeland Sec., 539 F.3d 1133, 1140–41 (9th Cir. 2008). *But see* 8 U.S.C. § 1252(a)(1)(2)(D) ("Nothing in subparagraph (B) or (C), 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.").

101. Smith v. U.S. Customs & Border Prot., 741 F.3d 1016, 1020–21 (9th Cir. 2014) (arguing that under § 1252(e) the court could not order removal because petitioner was a lawful immigrant); Kabenga v. Holder, 76 F. Supp. 3d 480, 487 (S.D.N.Y. 2015) (arguing that petitioner could not have been removed under expedited removal because he was not convicted of a crime of violence). The Fifth Circuit reviewed the constitutionality of administrative expedited removal in 2005, finding that, because the expedited removal of a noncitizen raised a constitutional question, review of the order was not barred by statute. Flores-Ledezma v. Gonzales, 415 F.3d 375, 380 (5th Cir. 2005). In *Flores-Ledezma*, Petitioner was convicted of an aggravated felony. *Id.* at 378. When Petitioner applied for adjustment of status based on his marriage to a United States citizen, the government issued a "Notice of Intent to Issue a Final Administrative Removal Order" which subjected the petitioner to expedited removal without a judicial proceeding. *Id.* Petitioner challenged the Attorney General's decision by arguing that it violated the Equal Protection Clause because the decision was arbitrary. *Id.* at 380–81. The Fifth Circuit found that it had jurisdiction because Petitioner challenged the statutory scheme and not an individual decision within the scheme: "Flores is not simply challenging the discretionary decision of the Attorney General to commence removal proceedings or execute removal orders, but rather he challenges the constitutionality of the statutory scheme allowing for such discretion." *Id.* at 380. The Fifth Circuit then applied the rational basis test and found the Attorney General's decision rational. *Id.* at 382. The constitutional standards of review in immigration law are outside the scope of this Comment. See Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U. L. REV. 563, 603–11 (2017) for additional information on the complicated standards of review in the immigration context.

expedited removal process.

A. Section 1252(e) in Practice

Whether Detention Matters. In *Smith v. U.S. Customs and Border Protection*, a Canadian citizen filed a habeas petition after his expedited removal to Canada.[102] He argued that he was erroneously subjected to expedited removal under the fraudulent or misrepresentation document requirement because certain Canadian citizens are exempt from immigration documentary requirements.[103] And because Smith was erroneously subject to expedited removal, the second basis in § 1252(e)(2) permitted merit review of his underlying removal order.[104] The Ninth Circuit rejected this argument, finding that aliens can only file habeas claims *while in detention*[105] and that § 1252(e)(2) does not permit inquiry into whether Smith *should* have been removed under § 1225(b)(1); rather, the court may only ask if he was actually removed under the statute: "Because we are reviewing Smith's petition under 1252(e)(2), we need not reach the question whether and under what circumstances a petitioner who establishes none of the permissible bases under 1252(e)(2) might still have claims under the Suspension Clause . . . ."[106] Even though the court noted that ICE may have incorrectly removed Smith from the United States under § 1225(b)(1), Smith was unable to contest this unlawful removal.[107]

Whether Lawful Permanent Residence Status Matters. In *Kabenga v. Holder*, a New York district court stayed the execution of an expedited removal order to determine if the petitioner was a lawful permanent resident at the time of removal.[108] ICE ordered Kabenga expeditiously removed, but it was unclear whether

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102. *Smith*, 741 F.3d at 1018.

103. *Id.* at 1021 (discussing 8 C.F.R. § 212.1(a) (2018)). Smith never gained entry to the United States and was subject to expedited removal at a port of entry. *Id.* at 1019. This is significant because his removal was based on statutory, not executive, authority. *See supra* note 6 and accompanying text. It is unclear whether this fact influenced the Ninth Circuit's harsh holding. The due process requirements for noncitizens removed under statutory versus executive authority is analyzed in further detail in Part VI.

104. *Smith*, 741 F.3d at 1021.

105. Physical custody is traditionally not a requirement for a habeas corpus petition in other immigration contexts. *See* LEGAL ACTION CTR., AM. IMMIGR. COUNCIL, INTRODUCTION TO HABEAS CORPUS 4 (2008), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_0406.pdf [https://perma.cc/LT39-QCN3] [hereinafter HABEAS CORPUS].

106. *Id.* at 1022 n.6.

107. *Id.* at 1020–21.

108. Kabenga v. Holder, 76 F. Supp. 3d 480, 481, 487 (S.D.N.Y. 2015).

Kabenga's crime was one which would subject him to expedited removal under Fifth Circuit case law (the jurisdiction where the crime occurred).[109] Kabenga argued that, as a lawful permanent resident at the time of removal, he should be able to contest the expedited removal order in a habeas proceeding—the third basis for habeas review under § 1252(e)(2).[110] In response, DHS argued that once a noncitizen is ordered removed, his status as a lawful permanent resident is extinguished and that review of Kabenga's expedited removal order was not permitted *even if he had been a lawful permanent resident at the time DHS placed him in expedited removal proceedings*.[111] The district judge disagreed, asserting that the correct inquiry is whether Kabenga had lawful status *before* removal, not after.[112] The district judge granted a stay of removal and required an inquiry into the merits of the removal order to determine whether Kabenga was a lawful permanent resident at the time he was removed.[113]

Whether the Type of Relief Sought Matters.[114] In *Meza v. LaRose*, a Honduran teen entered the United States seeking asylum, was found not to have a credible fear, and was issued an expedited removal order.[115] The district judge dismissed the habeas claim, relying, in part, on an unsettling Sixth Circuit case that prevents noncitizens from asserting habeas relief for a stay of

109. *Id.* at 481–82; *see supra* note 27 and accompanying text.

110. *Kabenga*, 76 F. Supp. 3d at 481–82.

111. *Id.* at 483–84.

112. *Id.* at 481; *see also id.* at 483–85 ("The difference between 'show[ing] the [] court' a green card, and 'show[ing] the [] court' a set of statutory materials, cannot be the basis of a jurisdictional distinction. The Government has offered no authority to support the implicit premise of its argument: that the form of evidence used to *answer* a given question—in this case, whether an alien is an LPR—determines if the Court has authority to entertain the question. This lack of authority is not surprising. Whether a court is authorized, in the first instance, to hear a given case cannot depend on the evaluation of evidence yet to be submitted.").

113. *Id.* at 487; *see also* Kabenga v. Holder, No. 14 Civ. 9084(SAS), 2015 WL 728205, at *5 (S.D.N.Y. Feb. 19, 2015) ("Accordingly, Kabenga's removal was improper and therefore constituted a 'gross miscarriage of justice.' . . . For the foregoing reasons, Kabenga's petition for a Writ of Habeas Corpus is GRANTED, and the Government is ordered to provide Kabenga with a hearing—within thirty days—in accordance with section 1229a of the INA and the Due Process Clause of the United States Constitution.").

114. Additionally, whether any form of relief is available may matter. *See* Thuraissigiam v. U.S. Dep't of Homeland Sec., 287 F. Supp. 3d 1077, 1082 (S.D. Cal. 2018) ("[T]he Supreme Court and this Circuit 'have suggested that a litigant may be unconstitutionally denied a forum when there is absolutely *no* avenue for judicial review of a colorable claim of constitutional deprivation.' Here, § 1252(e) still 'retain[s] some avenues of judicial review, limited though they may be.'" (quoting Pena v. Lynch, 815 F.3d 452, 456–57 (9th Cir. 2016)), *rev'd*, No. 18-55313, 2019 WL 1065027 (9th Cir. Mar. 7, 2019).

115. Meza v. LaRose, No. 4:18-CV-2743, 2019 WL 233616, at *1 (N.D. Ohio Jan. 16, 2019).

removal.[116] According to the Sixth Circuit, the Suspension Clause is available only when the common law writ would have granted "release from custody."[117] In the immigration context, this means "released into and *remain* in the United States."[118] In his petition, Meza sought:

> A. [Declaratory judgment] that the negative credible fear review hearing did not comply with Due Process, the APA, the applicable immigration and asylum statutes, and the Rehabilitation Act; [and]
>
> B. [to] . . . enjoin defendants from removing petitioner/plaintiff from the United States or transferring him out of this District unless and until a Constitutionally sufficient and statutorily and regulatorily compliant review is conducted.[119]

Because Meza had not yet been granted immigration status, his release would not allow him to *remain* in the United States and, thus, he was prohibited from raising a claim under the writ.[120] If this argument were taken to its logical conclusion, immigrants would be entirely prohibited from invoking the writ for any type of relief unless they already had status. This is completely counterintuitive. In an effort to deny noncitizens constitutional rights, courts engage in legal gymnastics that endanger constitutional doctrine.

B. The Third Circuit's Approach Post Boumediene *in* Castro

In *Castro v. U.S. Dep't of Homeland Security*, twenty-eight families filed habeas proceedings under § 1252(e)(2).[121] The

116. A stay of removal prevents ICE from enforcing a removal order. Hamama v. Adducci, 912 F.3d 869, 872–73 (6th Cir. 2018), *appeal filed*, No. 19-1080 (2019). The court's reliance on a case that limits habeas corpus for immigrants who have a stay of removal is an entirely separate issue from the expedited removal scheme discussed throughout this Comment. Because the two are entirely different legal questions, the Sixth Circuit's reasoning fundamentally misinterprets habeas and immigration law.

117. *Hamama*, 912 F.3d at 875–76 (holding that the Suspension Clause is not available as an argument for a stay of removal where the stay of removal does not grant petitioners status to remain in the United States). *But see* Compere v. Nielsen, No. 18-CV-1036-PB, 2019 WL 332193, at *6 n.10 (D.N.H. Jan. 24, 2019) (finding the Sixth Circuit unpersuasive because "it has long been accepted that a habeas corpus petitioner may seek a stay of removal as a permissible form of habeas corpus relief where the stay is needed to protect the petitioner's rights under federal law").

118. *Meza*, 2019 WL 233616, at *3 (emphasis added) (quoting *Hamama*, 912 F.3d at 876).

119. *Id.*

120. *Id.* at *4.

121. Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 424, 427–29 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017).

families, from El Salvador, Honduras, and Guatemala, fled their countries for fear of violence and domestic abuse.[122] After crossing the border without documentation, the families were apprehended and referred to an asylum officer for a credible fear interview. Upon finding that petitioners did not have a credible fear, they were ordered removed.[123] Petitioners argued that they were entitled to review of the underlying removal order under the Suspension Clause per *Boumediene*.[124] The Third Circuit found that the Suspension Clause was not violated because *Boumediene* does not provide habeas protections to "recent surreptitious entrants deemed to be 'alien[s] seeking initial admission to the United States.'"[125] According to the Third Circuit's logic, enemy combatants detained in Guantanamo are entitled to the writ, but noncitizens caught within the physical borders of United States are not. The court did not reach the question of whether the current procedures are constitutionally adequate.[126]

The Third Circuit identified several holes in its reasoning. First, the Third Circuit noted that its decision does not follow *St. Cyr* and other cases regarding the scope of due process protections for unlawful aliens. To differentiate, *Castro* relies on the fact that those cases involved lawful permanent residents or aliens admitted to the United States, rather than aliens "seeking initial entry to the country or who were apprehended immediately after entry."[127] Second, the Third Circuit admitted that it appears to ignore Supreme Court jurisprudence addressing removals for

122. *Id.* at 427–28.

123. *Id.* at 428, 430–31 (stating that "[p]etitioners argue that because [8 U.S.C. § 1252(e)(5)] explicitly prohibits review of only two narrow questions, we should read it to implicitly authorize review of other questions related to the expedited removal order, such as whether the removal order resulted from a procedurally erroneous credible fear proceeding," and referencing the second sentence of 8 U.S.C. § 1252(e)(5) that says "[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal").

124. *Id.* at 428–29.

125. *See id.* at 448 (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.")).

126. *Id.* at 445 n.25 ("In evaluating Petitioners' rights under the Suspension Clause, we find *Boumediene*'s multi-factor test, referenced earlier in this opinion, to provide little guidance. As we explain above, the Court derived the factors from its extraterritoriality jurisprudence in order to assess the reach of the Suspension Clause to a territory where the United States is not sovereign. In our case, *of course, there is no question that Petitioners were apprehended within the sovereign territory of the United States*; thus, the *Boumediene* factors are of limited utility in determining Petitioners' entitlement to the protections of the Suspension Clause." (emphasis added) (citation omitted)).

127. *Id.* at 446–47.

noncitizen aliens already in the United States.[128] The Third Circuit justifies its departure from previous doctrine by stating that physical presence in the United States alone does not entitle aliens to the writ.[129] These arguments are misplaced.

First, the Supreme Court in *St. Cyr* clearly protected the writ for noncitizen aliens: "the writ of habeas corpus [is] available to nonenemy aliens as well as to citizens."[130]

The Third Circuit claims that *St. Cyr* stands for what the "Clause 'might possibly protect,' not what the Clause most certainly protects."[131] This application of *St. Cyr* confuses the Executive's plenary power to exclude noncitizens[132] with the Executive's unconstitutional and uncontrolled exercise of detention without due process.[133] Habeas is not an aspirational goal; it is a constitutional right. Under *Castro*, aliens without status may be detained by the government and forcibly removed without constitutional limitation.[134]

The Third Circuit's *Castro* holding contradicts even Congress's own statutory regime. With § 1252(e)(2), Congress preserved the writ for aliens in expedited removal proceedings,[135] indicating that Congress well understood that the Suspension Clause applies to all persons in the United States, including noncitizens. Failure to protect the writ would have made expedited removal unconstitutional.[136]

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128. *Id.* at 447–48 ("Another potential criticism of our position—and particularly of our decision to treat Petitioners as 'alien[s] seeking initial admission to the United States' who are prohibited from invoking the Suspension Clause—is that it appears to ignore the Supreme Court's precedents suggesting that an alien's physical presence in the country alone flips the switch on constitutional protections that are otherwise dormant as to aliens outside our borders." (quoting Mathews v. Diaz, 426 U.S. 67, 77 (1976))).

129. *Id.*

130. U.S. Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 301 (2001).

131. *Castro*, 835 F.3d at 446 (citation omitted). To make this determination, the Third Circuit cites a different case concerning whether an alien should have been provided deportation instead of exclusion proceedings (a distinction that no longer exists). *Id.*

132. Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").

133. U.S. CONST. art. I, § 9, cl. 2 ("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."); U.S. CONST. amend. V ("No person shall be . . . deprived of . . . liberty . . . without due process of law.").

134. *Castro*, 835 F.3d at 445–47.

135. *See* 8 U.S.C. § 1252(e)(2) (2012) (establishing the availability of habeas proceedings for noncitizens in expedited removal).

136. *See supra* Part III.

Second, physical presence in the territorial United States is the only formalistic distinction that will create uniformity in application of constitutional and immigration law. In fact, the Supreme Court has recognized that the Fifth and Fourteenth Amendments protect the due process rights of noncitizens the minute they enter the United States:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.[137]

The Third Circuit in *Castro* relies heavily on the fact that the aliens were detained within hours of their entry and no more than four miles from the border[138] yet fails to clarify at which mile from the border or at which hour aliens begin to receive Suspension Clause protections.[139] The Third Circuit misquotes Supreme Court language from other cases to base habeas protections on nebulous determinations of when an immigrant has developed "substantial connections with this country"[140] or has "been here some time even

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137. Mathews v. Diaz, 426 U.S. 67, 77 (1976) (citations omitted). Due process protections for noncitizens are recognized in other areas of the law, as well. For example, certain U.S. labor laws protect all employees regardless of lawful status. *See* Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 L. & SOC. INQUIRY 561, 567 (2015) ("[L]abor standards enforcement agencies such as the National Labor Relations Board (NLRB), the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), and the Occupational Safety and Health Administration (OSHA) (as well as their state and local counterparts) enforce workplace protections for all workers, generally regardless of immigration status."). Undocumented immigrants are also entitled to representation in criminal proceedings. Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (recognizing the right of alien defendants to be informed of their immigration consequences, including deportation, to ensure due process in their criminal proceedings); Gideon v. Wainright, 372 U.S. 335, 342–43 (1963) (recognizing the right to counsel for indigent defendants in criminal proceedings, regardless of lawful status).

138. *Castro*, 835 F.3d at 427 ("[N]o petitioner appears to have been present in the country for more than about six hours, and none was apprehended more than four miles from the border."); *see also id.* at 427 n.6 ("[W]e consider the facts regarding Petitioners' entry and practically-immediate arrest by immigration enforcement officials to be crucial.").

139. *Id.* at 448 n.30 ("This is not to say that an alien's location relative to the border is *irrelevant* to a determination of his rights under the Constitution. Indeed, we think physical presence is a factor courts should consider; we 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."); *see also infra* Section IV.C (discussing the Third Circuit's subsequent decision in *Osorio-Martinez*).

140. *Castro*, at 448 (emphasis omitted) (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (finding that, although U.S. citizens have constitutional rights abroad and undocumented immigrants have constitutional rights in the United States,

if illegally."[141] These vague limits provide no clear legal definition for uniform application across the United States. Even the Third Circuit recognizes that, had it utilized *Boumediene*'s three-part test, noncitizens would be entitled to Suspension Clause protections because they were detained in the United States.[142] Because of this flawed reasoning, the Third Circuit pulled back its holding only two years later.

C. The Third Circuit Revisits Castro*, Creating a Carveout for Children with Special Immigrant Juvenile Status*

In an unanticipated decision only two years after *Castro*, the Third Circuit held § 1252(e) unconstitutional as applied to special immigrant juveniles (SIJS). In *Osorio-Martinez v. Attorney General United States*, the Third Circuit refined its holding in *Castro*, finding that "only aliens who have developed sufficient connections to this country may invoke our Constitution's protections."[143] By carving out special protections for immigrant juveniles, the Third Circuit opened the door for additional carveouts as other immigrants with statutory coverage "develop sufficient connections" to invoke habeas protections.

In *Osorio-Martinez*, four children and their mothers, who were originally part of the *Castro* class, filed and were approved for SIJS while awaiting a decision from the Third Circuit in *Castro*.[144] SIJS is an immigration status given to children that are abused, neglected, or abandoned by one or both of their parents.[145] In order to qualify for SIJS, the children must obtain a state court order finding that it is not in the best interest of the child to be returned to his country of origin and that the child is dependent on the state or on someone appointed by the state.[146] Once

Mexican citizens without ties to the United States do not have Fourth Amendment protections in Mexico)).

141. *Id.* (emphasis omitted) (quoting Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n.6 (1953) (finding that a lawful permanent resident who left by sea and returned to the United States was entitled to notice of the evidence against him and a hearing before a neutral arbiter)).

142. *Id.* at 445 n.25 ("In our case, of course, there is no question that Petitioners were apprehended within the sovereign territory of the United States: thus, the *Boumediene* factors are of limited utility in determining Petitioners' entitlement to the protections of the Suspension Clause.").

143. Osorio-Martinez v. Attorney Gen. U.S., 893 F.3d 153, 158 (3d Cir. 2018)

144. *Id.*

145. 8 U.S.C. § 1101(a)(27)(J) (2012); Yeboah v. U.S. Dep't of Justice, 345 F.3d 216, 221 (3d Cir. 2003).

146. 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c) (2012). For an in-depth discussion about SIJS and the rigorous application process, see generally Jennifer Baum et al., *Most in Need but Least Served: Legal and Practical Barriers to Special Immigrant Juvenile*

approved for SIJS, these children are eligible for lawful permanent residence as soon as a visa is available.[147] SIJS is powerful because it provides children with statutory protections including the right to receive federal welfare;[148] the ability to obtain a waiver from deportation for fraudulent misrepresentation (the very thing that authorizes the government to place these children in expedited removal proceedings);[149] and, most importantly, lawful permanent residence.[150]

According to the Third Circuit ruling in *Osorio-Martinez*, SIJS applicants are not "alien[s] seeking initial admission to the United States" because Congress has provided them with the statutory protections outlined above.[151] SIJS applicants, therefore, have met the necessary ties to the United States to invoke the writ. This holding clearly illustrates a paradox in immigration law and the mortal flaw in the Third Circuit's reasoning in *Castro* and *Osorio-Martinez*: these children were eligible for SIJS the minute they entered the United States, but because they were "seeking initial admission" they were also subject to expedited removal. However, because *Castro* provided them with the opportunity and time to apply for SIJS, these children now receive additional habeas constitutional protections. Our constitutional regime cannot be

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Status for Federally Detained Minors, 50 FAM. CT. REV. 621, 622–24, 626 (2012) and Dalia Castillo-Granados & Yasmin Yavar, *A New Legal Framework for Children Seeking Special Immigrant Juvenile Status*, 20 RICH. PUB. INT. L. REV. 49, 51–53, 55, 58–60 (2017). *See also* Liz Robbins, *A Rule Is Changed for Young Immigrants, and Green Card Hopes Fade*, N.Y. TIMES (Apr. 18, 2018), https://www.nytimes.com/2018/04/18/nyregion/special-immigrant-juvenile-status-trump.html [https://perma.cc/3KVQ-4MP5]. The requirements for SIJS can be found online at the Department of Homeland Security's website. *Special Immigrant Juveniles*, U.S. DEP'T OF HOMELAND SECURITY, https://www.uscis.gov/green-card/sij [https://perma.cc/2296-9KP7] (last visited Mar. 19, 2019).

147. 8 U.S.C. § 1255(a).

148. ALISON SISKIN, CONG. RESEARCH SERV., RL33809, NONCITIZEN ELIGIBILITY FOR FEDERAL PUBLIC ASSISTANCE: POLICY OVERVIEW 8–10, 12–13 (2016) (showing that the special immigrants and abused children are eligible for many federal funds once approved for the status).

149. *See* 8 U.S.C. § 1255(h) (allowing waiver of documentary requirements); 8 U.S.C. § 1182(a)(7)(A)(i)(I) (requiring valid entry documents for admission).

150. 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c).

151. Osorio-Martinez v. Attorney Gen. U.S., 893 F.3d 153, 159 (3d Cir. 2018) (quoting Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 448–49 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017)).

> As we explained in *Castro*, only aliens who have developed sufficient connections to this country may invoke our Constitution's protections. By virtue of satisfying the eligibility criteria for [Congressionally granted status] and being accorded by Congress the statutory and due process rights that derive from it, Petitioners here, unlike the petitioners in *Castro*, meet that standard and therefore may enforce their rights under the Suspension Clause.

Id. at 158.

based on such tenuous status determinations or luck.

Expedited removal strips noncitizens of any opportunity to apply for the immigration status that they would otherwise be eligible for *at the time of entry*. Because they are removed before they can apply for status, noncitizens are denied the opportunity to obtain the statutory protections that would enable them to invoke habeas.

The immigration status paradox is exacerbated by serious delays in the processing of lawful permanent resident applications. Most immigrants with lawful status have waited years, if not decades, for their lawful permanent status,[152] and even the "quickest" way to obtain lawful permanent status—through an immediate relative—requires extensive paperwork, months of processing, and thousands of dollars.[153] And because immigration status is based on a single moment in time, a noncitizen may be an unlawful immigrant subject to expedited removal one day and a lawful permanent resident the next day.[154]

Under *Osorio-Martinez*, expedited removal is unconstitutional as applied to all immigrants with statutory protections.[155] In addition to the SIJS protections at issue in *Osorio-Martinez*, Congress has promulgated other humanitarian

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152. The Department of State (DOS) releases a monthly bulletin outlining who is eligible for a visa. The dates listed represent the date of the original application by the U.S. citizen or lawful permanent resident. Generally, categories of "Married Sons and Daughters of U.S. Citizens" and "Brothers and Sisters of Adult U.S. Citizens" have the longest wait time for a visa; as of March 2019, the DOS was processing applications from 1996. *Visa Bulletin – Immigrant Numbers for March* 2019, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS. (Mar. 2019), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-march-2019.html [https://perma.cc/J289-VU9Q]. China, India, Mexico, and the Philippines far surpass other countries in their visa petitions and thus must wait longer for a visa to become available. *Id.*

153. ILRC STAFF ATT'YS, THE IMMIGRANT LEGAL RES. CTR., FAMILIES & IMMIGRATION: A PRACTICAL GUIDE 1-2 to 1-4 (5th ed. 2017). "Immediate relatives" are certain immigrants that obtain preferential treatment for their relationship to a U.S. citizen. *Id.* at 1-6 to 1-7. There are three categories of "immediate relatives": spouses of U.S. citizens, unmarried children of U.S. citizens under twenty one, and parents of U.S. citizens. *Id.* These immediate relatives do not have to wait for a visa, they immediately receive one. *Id.* at 1-7; *U.S. Citizen Petition for Other Relatives Inside of the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://my.uscis.gov/exploremyoptions/us_petition_for_other_family_members_inside_us [https://perma.cc/535Y-9NJP] (last visited Mar. 19, 2019).

154. *See* IMMIGRANT LEGAL RES. CTR., NON-LPR CANCELLATION OF REMOVAL: AN OVERVIEW OF ELIGIBILITY FOR IMMIGRATION PRACTITIONERS 1 (2018), https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf [https://perma.cc/ZZU8-NDUB] (describing a defense to deportation available to certain noncitizens facing removal in immigration court who have family in the United States; if successful, a person who is granted cancellation of removal for Non Permanent Residents under § 240A(b)(1) of the INA receives lawful permanent residence status).

155. *Osorio-Martinez*, 893 F.3d at 158.

statutory protections for certain vulnerable immigrant populations—protections which could potentially fall under the statutory carveout analysis set forth by the Third Circuit.[156] Asylum, in particular, is statutorily protected in the expedited removal statute itself,[157] readily meeting the "sufficient connections" test outlined in *Osorio-Martinez*. As the procedural defects in the expedited removal regime become increasingly apparent, courts should protect *all* noncitizens' due process rights through competent habeas proceedings, instead of creating untenable tests for some vulnerable populations but not others.

D. The Ninth Circuit's Approach in Thurassigiam

"We do not think the statute can bear a reading that avoids the constitutional problems it creates."[158] In an extremely timely decision relevant to the timing of this Comment's publication, the Ninth Circuit found that § 1252(e) violates the Suspension Clause because it fails to provide review of the procedures and legal standards employed by CBP officials during credible fear interviews. Relying on *Boumediene* and *St. Cyr*, the panel found that noncitizens in expedited removal are entitled to the writ of habeas corpus, including review of the procedures leading to their detention. "Because the statute prevented the district court from considering whether the agency lawfully applied the expedited removal statute,[159] it *a fortiori* precluded review of 'the erroneous

156. Congressionally promulgated statutory humanitarian protections include: (1) Non-LPR Cancellation of Removal, IMMIGRANT LEGAL RES. CTR., *supra* note 154, at 1; (2) Violence Against Women Act (VAWA) Self-Petition for immigrant victims of domestic violence, 8 U.S.C. § 1154(a) (2012); *Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime*, AM. IMMIGR. COUNCIL (May 7, 2012), https://www.americanimmigrationcouncil.org/research/violence-against-women-act-vawa-provides-protections-immigrant-women-and-victims-crime [https://perma.cc/F93N-V9CH]; (3) SIJS for abused, neglected, or abandoned children, *see supra* note 146 and accompanying text; and (4) Asylum for refugees fleeing persecution, 8 U.S.C. § 1158; AM. IMMIGRATION COUNCIL, ASYLUM IN THE UNITED STATES 1 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states.pdf [https://perma.cc/443L-383G].

157. 8 U.S.C. § 1225(b)(1)(A)(i) ("[T]he officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.").

158. Thuraissigiam v. U.S. Dep't of Homeland Sec., No. 18-55313, 2019 WL 1065027, at *18 (9th Cir. Mar. 7, 2019).

159. Thuraissigiam argued that CBP violated his statutory and regulatory rights by failing to "elicit all relevant and useful information" and "failed to consider relevant country conditions" during his credible fear interview. *Id.* at *4. The Ninth Circuit found the following process insufficient:

> First, the credible fear interview is initiated only after the CBP officer identifies a noncitizen who fears persecution and refers that individual to a USCIS

application or interpretation of relevant law.'"[160]

Thurassigiam, a native of Sri Lanka, fled to Mexico and then crossed the border into the United States. CBP captured him and placed him in expedited removal proceedings. Thuraissigiam intimated his credible fear[161] of returning to Sri Lanka to CBP and was referred to an asylum officer. The asylum officer made a negative credible fear determination, which was affirmed by a supervisor and then by an immigration judge. Thuraissigiam filed a habeas petition under § 1252(e)(2)(B) stating that CBP violated his statutory and regulatory procedural rights and thereby erroneously removed him under expedited removal—the second basis for habeas relief in the statute.[162]

In its decision, the Ninth Circuit ran through the *Boumediene* two-part test: first, analyzing if noncitizens are entitled to the writ; and second, asking whether the statute provided an adequate substitute for the writ. Instead of running through the three factors outlined in part one of *Boumediene*'s test, which "do[es] not map precisely onto this case because Thuraissigiam was apprehended and detained on U.S. soil," the court followed *St. Cyr* and analyzed whether Thuraissigiam would have been provided the writ in 1789.[163] Citing historical Supreme Court cases providing the writ to and "noncitizens stopped at the border,"[164] the Ninth Circuit determined that Thuraissigiam is entitled to the writ.

The Ninth Circuit moved to step two of the *Boumediene* test to analyze whether Congress unconstitutionally deprived noncitizens in expedited removal the right to habeas corpus. Again, it looked to the history of the writ as applied to immigrants

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> officer. . . . A noncitizen can consult with someone at his own expense before his asylum officer interview, but only as long as such consultation does not "unreasonably delay the process and is at no expense to the government." . . . Before the IJ hearing, a noncitizen in expedited removal may again consult with someone at his own expense, but the period to obtain such assistance is extremely abbreviated: an IJ "shall conclude the review to the maximum extent practicable within 24 hours" of the supervisory officer's approval of the asylum officer's determination. . . . Indeed, in this case, the IJ simply checked a box on a form stating that the immigration officer's decision was "Affirmed."

Id. at *17 (citations omitted).

160. *Id*. at *18 (quoting Boumediene v. Bush, 553 U.S 723, 779 (2008)).

161. Thuraissigiam based his credible fear on torture by the Sri Lankan government for his support of a Tamil politician. Thuraissigiam was kidnapped, bound, and beaten for supporting the candidate. The Sri Lankan government engaged in simulated drowning and threatened him with death because of his political connections. *Id*. at *4.

162. *Id*. at *4–6.

163. *Id*. at *10.

164. *Id*. (citing United States v. Jung Ah Lung, 124 U.S. 621, 628–32 (1888)).

to find that habeas provides review of both "claims for statutory as well as constitutional error in deportation proceedings" and "claims that deportation hearings were conducted unfairly."[165] Because § 1252(e) fails to provide noncitizens the means to contest unlawful executive detention, the statute is unconstitutional as applied to noncitizens whose credible fear interviews did not comport with established statutory and regulatory procedure.[166]

The court remanded the case for review of the executive procedures to determine if Thuraissigiam was unlawfully subject to expedited removal. The Ninth Circuit did not provide guidance on what procedures are due, leaving the district court with the difficult task of reviewing the expedited removal process.[167]

E. The New Boumediene *Test: Three Interpretations in Three Years*

In the span of three years, two circuits have addressed whether expedited removal violates the Suspension Clause with each decision yielding a radically different approach. Why the courts have failed to run through the defined *Boumediene* test is unclear.

Both circuits misinterpret *Boumediene* by placing the burden on the detainee instead of the government. Under the original test, the court must first determine whether a given habeas petitioner is "*prohibited* from invoking the Suspension Clause due to some attribute of the petitioner[] or to the circumstances surrounding [their] arrest or detention."[168] This squarely places the burden on the government to show why the detainee is *not* entitled to the writ. The Third Circuit's rulings in *Castro* and *Osorio-Martinez* reformulated the *Boumediene* test by finding that noncitizens must establish their ties to the United States *before* invoking the writ. *Thuraissigiam* similarly places the burden on the detainee to show that he would have been entitled to the writ in 1789. This significant shift perverts the original intent of the Suspension Clause and turns the writ into a privilege, not a right.

Moreover, neither circuit runs through the three-factor test outlined in *Boumediene*. *Boumediene* prohibits the writ only in extreme circumstances dependent on a balance between the

165. *Id*. at *17 (citations omitted).

166. *Id*. at *16–18.

167. Id. at *18–19.

168. Osorio-Martinez v. Attorney Gen. U.S., 893 F.3d 153, 167 (3d Cir. 2018) (emphasis added) (quoting Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 445 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017)).

petitioner's status, location of detention, and other practical obstacles.[169]

Castro. The Third Circuit in *Castro* failed to balance the *Boumediene* factors established by the Supreme Court and instead applied its own "unequivocal[] conclu[sion] that 'an alien seeking initial admission to the United States . . . has no constitutional rights regarding his *application*.'"[170] With this departure, the Third Circuit's distortion of the *Boumediene* test is clear and extremely dangerous:[171] Applications by aliens seeking initial admission prompts Plenary Power Doctrine analysis, but habeas rights in detention triggers Due Process Clause analysis—the two issues are not synonymous. Plenary Power gives the political bodies the ability to exclude any noncitizen from the country by delineating the application process for lawful permanent residency. In contrast, the Due Process Clause protects persons from unlawful government action, including detention. The Enemy combatants could not be admitted to the United States; yet, even without the possibility of lawful admittance, they were entitled to the writ.[172] The same is true for noncitizens subject to expedited removal.

Osorio-Martinez. Again, the Third Circuit failed to run through the balancing test and concluded that because the noncitizens with SIJS have established "sufficient [statutory] connections" to the United States, they are entitled to the writ.[173] Nowhere in *Boumediene* does the Supreme Court make this distinction.

Thuraissigiam. The Ninth Circuit's interpretation mostly aligns with *Boumediene*. The panel correctly criticizes the Third Circuit for conflating the Plenary Power doctrine and the Suspension Clause, but the court incorrectly states that the Due Process Clause has no bearing on a habeas analysis.[174] In order to

169. *See supra* Section III.A (discussing the two-part test created in *Boumediene* and the three-factor balancing test for part one).

170. *Osorio-Martinez*, 893 F.3d at 167 (emphasis added) (quoting *Castro*, 835 F.3d at 445).

171. *E.g.*, Bansci v. Nielson, 321 F. Supp. 3d 729, 737 (2018) (finding that petitioners had a lack of "sufficient connections" to the country to invoke constitutional protections under the first part of the new *Boumediene* test set forth in *Osorio-Martinez*).

172. *See* 8 U.S.C. § 1182(a)(3)(B) (2012) (barring admission to noncitizens that engage in terrorist activities); *see also* Boumediene v. Bush, 553 U.S. 723, 771 (2008) (providing the writ of habeas corpus to enemy combatants).

173. *Osorio-Martinez*, 893 F.3d at 158, 176–77.

174. Thuraissigiam v. U.S. Dep't of Homeland Sec., No. 18-55313, 2019 WL 1065027, at *13 (9th Cir. Mar. 7, 2019) ("*Boumediene* itself clearly recognized the distinction between the Fifth Amendment's due process rights and the Suspension Clause–providing further

determine whether habeas proceedings provide a "meaningful review of both the cause for detention and the Executive's power to detain," detainees must have due process to effectuate review of Executive determinations. The Supreme Court's guidance on the interplay between the two is imprecise, stating only that "[t]he idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context."[175] The Supreme Court suggests that courts use *Mathews v. Eldridge* to determine the process due to noncitizens during habeas proceedings.[176] By punting the due process analysis to the district court,[177] the Ninth Circuit left noncitizens vulnerable to continued deprivation of constitutional rights.

Whether other circuits reviewing the constitutionality of § 1252(e) follow *Boumediene*, *Castro*, and *Thuraissigiam* or create another convoluted test remains to be seen. The present circuit split will create chaos in the immigration community as some district courts provide habeas review of Executive expedited removal procedures to all noncitizens, other district courts continue to summarily dismiss habeas claims, and yet other district courts may create carveouts for special groups.

F. President Trump's Zero Tolerance Policy Case Study

It is unclear whether the children who were separated from their parents following President Trump's Zero Tolerance Policy can invoke habeas proceedings in the tests outlined above.

The 125 children who decided to remain separated in order to pursue their asylum claim may be eligible for habeas protections under *Osorio-Martinez* (because many may qualify for SIJS) and *Thuraissigiam* (because in order to apply for asylum the children had to undergo a credible fear interview). For the 120 children awaiting reunification with their parents, the determination is less clear. On one hand, because they declined to pursue asylum,

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reason not to treat *Landon*'s discussion of due process rights as having any bearing on the application of the Suspension Clause.").

175. *Boumediene*, 553 U.S. at 781–82 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

176. *See infra* Part VI (applying the procedural due process test outlined in *Mathews v. Eldridge*).

177. *Thuraissigiam*, 2019 WL 1065027, at *18 ("[W]e do not profess to decide in this opinion what right or rights Thuraissigiam may vindicate via use of the writ. The district court has jurisdiction and, on remand, should exercise that jurisdiction to consider Thuraissigiam's legal challenges to the procedures leading to his expedited removal order.").

they are subject to expedited removal. However, these 120 children have lived in detention centers in the United States for months with humanitarian support from ORR. Do extended detention and support services from a congressionally created federal program meet the "sufficient connections" test outlined in *Osorio-Martinez*? Could President Trump's Executive Order providing for the "housing and care of alien families pending court proceedings for improper entry" yield sufficient connections to invoke habeas protections?[178] Are these children protected because they have had credible fear interviews per *Thuraissigiam*? Confusion in the courts will continually promote the detention of vulnerable populations.

G. Collateral Attacks in Subsequent Criminal Proceedings

Some courts have preserved due process considerations for individuals subject to expedited removal orders by permitting noncitizens to challenge the validity of an expedited removal order in a subsequent criminal proceeding.[179]

Noncitizens that reenter the United States after a deportation order are subject to sentence enhancements[180] and felony criminal convictions.[181] The resulting illegal reentry convictions account for nearly 1/3 of the federal docket and over $500 million annually in taxpayer money.[182] Both a removal order pursuant to an

178. Exec. Order No. 13841, 83 Fed. Reg. 29,435, 29,435–36 (June 25, 2018). Although the executive order states that it does not intend to "create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States," the executive provision for housing signifies a more permanent status than the "recent surreptitious entrants deemed to be 'alien[s] seeking initial admission to the United States'" at issue in *Castro*. *Id.*; Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 448–49 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017) (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982)). These children may not be subject to expedited removal because they have been in the United States for more than fourteen days, but as mentioned in Part II, it is also unclear if President Trump's expedited removal policy is in effect, which would increase the time period to two years.

179. United States v. Ochoa-Oregel, 904 F.3d 682, 685 (9th Cir. 2018) (finding that the limitation for collateral attacks of expedited removal orders does not apply to lawful permanent residents and stating that "[a] person should not be stripped of the important legal entitlements that come with lawful permanent resident status through a legally erroneous decision that he or she had no meaningful opportunity to contest. Among those protections is that lawful permanent residents cannot be removed on an expedited basis").

180. *See supra* note 50 and accompanying text.

181. 8 U.S.C. § 1326(a) (2012) ("[A]ny alien who—(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter (2) enters, attempts to enter, or is at any time found in, the United States . . . shall be fined . . . or imprisoned not more than 2 years, or both.").

182. *See infra* notes 233–37 and accompanying text.

immigration court proceeding and an expedited removal order qualify as a predicate for the illegal reentry conviction. This is the case even though noncitizens in immigration court proceedings are afforded judicial review and an opportunity to apply for relief from deportation while noncitizens subject to expedited removal orders are not.[183] In response to this inconsistency, one circuit allows noncitizens to challenge the expedited removal order that constitutes the basis for the illegal reentry charge in his subsequent criminal proceeding.

In *United States v. Barajas-Alvarado*, a noncitizen plaintiff had been removed under an expedited removal order, unlawfully reentered the United States, and was charged with the criminal offense of illegal reentry.[184] He argued that his expedited removal order was deficient because ICE failed to translate the expedited removal proceedings into Spanish in violation of federal regulations. Specifically, Barajas-Alvarado argued that had he known about the consequences of the expedited removal order, he would have instead applied for voluntary departure, a designation that does not qualify as a removal order, and thus could not have been the basis for his illegal reentry conviction.[185]

The *Barajas-Alvarado* court relied on the Supreme Court's decision in *United States v. Mendoza-Lopez*, which makes clear that any administrative order without judicial review cannot be used as a predicate for a criminal conviction.[186] Without "some

183. 8 U.S.C. § 1229a; *id.* § 1229(d).

184. United States v. Barajas-Alvarado, 655 F.3d 1077, 1080 (9th Cir. 2011).

185. *Id.* at 1087–89; *see* Voluntary Departure, 70 Fed. Reg. 4743, 4749–50 (Jan. 31, 2005).

186. *Barajas-Alvarado*, 655 F.3d at 1079, 1081–83 (finding that it is "clear that the alien is entitled to judicial review of a claim that the prior proceeding was 'fundamentally unfair' and thus cannot be used as a predicate for a criminal case, where the prior proceeding was not previously subjected to judicial review" (quoting United States v. Mendoza-Lopez, 481 U.S. 828, 839–40 (1987), *superseded by statute*, Antiterrorism and Effective Death Penalty Act 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1279, *as recognized in* United States v. Gonzalez-Flores, 804 F.3d 920, 926 (9th Cir. 2015))); *Mendoza-Lopez*, 481 U.S. at 837–38 ("Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding." (citations omitted)). In response to *Mendoza-Lopez*, Congress passed 8 U.S.C. § 1326, which allows an immigrant to collaterally challenge a deportation order if (1) the alien exhausted all administrative remedies; (2) deportation proceedings improperly deprived the alien of judicial review; and (3) "the entry of the order was fundamentally unfair." 8 U.S.C. § 1326(d). The expedited removal statute explicitly prohibits collateral attacks under § 1326, in clear violation of the Supreme Court's holding in *Mendoza-Lopez*. 8 U.S.C. § 1225(b)(1)(D) ("[T]he court shall not have jurisdiction to hear any claim attacking the validity of an order of removal entered under subparagraph (A)(i) [expedited removal] or (B)(iii) [removal without further review if no credible fear is found].").

meaningful review" of an expedited removal order, it is unconstitutional to criminally penalize noncitizens that were deported pursuant an expedited removal order.

While the Ninth Circuit ultimately decided against habeas relief for Barajas-Alvarado, the Court permitted the challenge despite congressional attempt to expressly "prohibit[] courts from reviewing a collateral challenge to expedited removal orders used as predicates to [criminal proceedings for illegal reentry]."[187]

V. CHECKS AND BALANCES

Perhaps more stunning is the unchecked use of executive power in the context of expedited removal. If the judiciary does not have the opportunity to evaluate the constitutionality of executive detentions, then the policy violates the principle of judicial review.[188]

In expedited removal proceedings, the judicial branch is unable to conduct a "meaningful review of . . . the Executive's power to detain."[189] As Justice Kennedy notes in *Boumediene*, executive detentions are subject to heightened judicial scrutiny because the detention lacks the procedural protections inherent in criminal proceedings.[190]

Expedited removal detentions made at the border are authorized by statute[191] while expedited removal detentions made within 100 miles of the border are authorized under President Bush's executive memo.[192] Because of this distinction in authorization, detentions made within 100 miles of the border are subject to stricter judicial review than the expedited removal detentions made at the border or a port of entry. This logic is sound because the border represents the zenith of the Executive's power to exclude.[193] However, once persons enter the United States, the

187. *Barajas-Alvarado*, 655 F.3d at 1082–84.

188. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

189. Boumediene v. Bush, 553 U.S. 723, 783 (2008); 8 U.S.C. § 1252(a)(1).

190. *Boumediene*, 553 U.S. at 783; *see* CASSIDY & LYNCH, *supra* note 11, at 2, 20–25 (outlining concerns regarding the expedited removal interviewing and record keeping practices).

191. 8 U.S.C. § 1225(b)(1).

192. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004); Trump's Proposed Expedited Removal Policy, *supra* note 16, at 6 (noting President Bush's expedited removal policy, but indicating plans to expand expedited removal to all noncitizens present in the United States who had entered within the previous two years); Kristin Macleod-Ball et al., *supra* note 18, at 2, 8–12.

193. United States v. Flores-Montano, 541 U.S. 149, 152 (2004) ("The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.").

Executive's power to exclude is diminished, and due process protections are increased.[194]

Congress made it exceedingly difficult for noncitizens to challenge the constitutionality of an expedited removal policy.[195] The noncitizen must file the challenge in the D.C. District Court within sixty days of the enactment of any policy.[196] Standing to bring these challenges presents another obstacle. Only noncitizens injured by an expedited removal order may file suit, but injury necessitates removal or detention, meaning that noncitizens may already be in another country before they can bring suit.[197]

Noncitizens are largely unsuccessful in challenging their detention through the Suspension Clause and are also unable to challenge the executive policies that authorize the detention. The judiciary must act as a check on the Executive to ensure that the powers exerted respect the limits instituted by the constitution.[198] Failure to do so violates out system of checks and balances.

VI. THE CURRENT EXPEDITED REMOVAL PROCESS IS CONSTITUTIONALLY DEFICIENT: APPLYING *MATHEWS V. ELDRIDGE*

Aliens in expedited removal proceedings are provided the writ in writing, but in practice the writ is ineffective. Per *Boumediene*, once it is determined that noncitizens in expedited removal are entitled to Suspension Clause protections, courts must engage in a second analysis to determine if the procedures provided by the Executive are constitutionally adequate.[199]

194. Mathews v. Diaz, 426 U.S. 67, 77 (1976); *see also* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

195. YULE KIM, CONG. RESEARCH SERV., RL34444, REMOVING ALIENS FROM THE UNITED STATES: JUDICIAL REVIEW OF REMOVAL ORDERS 5–6, 12–15 (2009).

196. 8 U.S.C. § 1252(e)(3)(A)–(B).

197. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (recognizing the minimal requirements to establish standing under the Constitution: plaintiffs in a civil case must demonstrate an injury in fact, a causal connection between the injury and the conduct, and it must be likely that the injury can be redressed by a favorable decision). Because of the standing issue, the Executive may elect to wait 60 days after a pronouncement to begin removing aliens to evade a constitutional challenge. *See also supra* note 105 and accompanying text (discussing the requirement for detention).

198. U.S. Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.").

199. *See supra* Section III.A (showing that the Supreme Court preserves the writ for noncitizens in expedited removal). *See* Boumediene v. Bush, 553 U.S. 723, 781–84 (2008); Brief for Scholars of the Law of Habeas Corpus, the Federal Courts, Citizenship, & the Constitution as Amici Curiae Supporting Petitioners at 10–16, Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422 (3d Cir. 2016) (No. 16-812) (reviewing the history of

Noncitizens are afforded due process rights under the Fifth Amendment,[200] but the nature of those rights is not clear. First, aliens are not citizens of the United States, meaning the courts need to interpret the degree of protection each constitutional right affords noncitizens.[201] Second, when the government violates a noncitizen's constitutional rights, what is the remedy?[202]

The Court in *St. Cyr* ruled that noncitizen aliens are entitled to habeas corpus rights, at a minimum, to the same degree that was available to noncitizen aliens in 1789.[203] In 1789, all foreigners were provided with the opportunity to challenge their detention, including "erroneous application or interpretation of statutes" by the Executive.[204] Similarly, in *Boumediene*, the Supreme Court found that noncitizen aliens are entitled to a "meaningful review of both the cause for detention and the Executive's power to detain."[205] These cases show that Trump's questionable reinterpretation of the expedited removal statute would likely be reviewable in court.

The Court in *Boumediene* instructed lower courts to apply the *Mathews v. Eldridge* procedural due process balancing test to determine whether the procedures provided to noncitizens constitute due process.[206] The court must look at the "sum total of procedural protections afforded to the detainee at all stages, direct and collateral" in its analysis.[207] The balancing test weighs three factors: (1) the importance of the private interest at stake; (2) the risk of an erroneous deprivation of the private interest because of

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preserving the right as an example of the writ).

200. Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." (citation omitted)).

201. Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").

202. *See Castro*, 835 F.3d at 450–51 (Hardiman, J., concurring) ("Petitioners here seek to alter their status in the United States in the hope of *avoiding* release to their homelands. That prayer for relief, in my view, dooms the merits of their Suspension Clause argument . . . .").

203. U.S. Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 301–02 (2001); HABEAS CORPUS, *supra* note 105, at 1–2.

204. *St. Cyr*, 533 U.S. at 301–02; 8 U.S.C. § 1225(b)(1)(A)(i) (2012); *see* Brief for Scholars of the Law of Habeas Corpus, the Federal Courts, Citizenship, & the Constitution as Amici Curiae Supporting Petitioners, *supra* note 199, at 4–9; *see also* 8 U.S.C. § 1252(e) (preserving the right to habeas review of Executive detention).

205. Boumediene v. Bush, 553 U.S. 723, 783 (2008).

206. *Id.* at 781–82.

207. *Id.* at 783.

the procedures used, and the probable value of additional procedural safeguards; and (3) the government's interest.[208]

Under the test set forth in *Mathews v. Eldridge*, it is evident that expedited removal procedures are constitutionally deficient. As to the first factor, freedom from detention is the utmost private interest.[209] Noncitizens detained pursuant to expedited removal may not face the indefinite detention that detainees in Guantanamo Bay faced,[210] but many noncitizens are detained for years and many are indefinitely expulsed from the United States.[211] The risk is the greatest for women and children who have colorable asylum claims but are denied an interview because immigration officials do not recognize their valid claims.[212] These vulnerable persons are detained even though they qualify for referral to an asylum officer at USCIS. This unlawful detention is an incredibly important private interest.

The second *Mathews v. Eldridge* factor, the risk of an erroneous deprivation of the liberty interest, is greater under expedited removal than in detention proceedings against enemy combatants because of the number of individuals subject to expedited removal, the biased arbiters, and the lack of judicial oversight.[213] Post *Boumediene*, enemy combatants are prosecuted

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208. *Id.* at 781–82 (citing Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976)).

209. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (describing "the interest in being free from physical detention by one's own government" as "the most elemental of liberty interests").

210. Jennings v. Rodriguez, 138 S. Ct. 830, 837–38 (2018); Demore v. Kim, 538 U.S. 510, 527–29 (2003).

211. 8 U.S.C. §§ 1182(a)(9)(A)(ii)(I), (a)(9)(C)(i)(II) (2012 & Supp. I 2014).

212. CASSIDY & LYNCH, *supra* note 11, at 56–58 (discussing a surge of female headed households and unaccompanied children placed in the expedited removal process); *see also id.* at 21–22, 63–64 (describing CBP noncompliance with credible fear interview procedures and unique problems adjudicating the claims of mothers and children). A noncitizen has the right to not be returned to his country of origin if the country presents a risk to his life. G.A. Res. 217 (III) A, at 14, Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to seek and to enjoy in other countries asylum from persecution."); Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons art. 33, July 28, 1951, 189 U.N.T.S. 138, 176.

213. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a)–(b), 125 Stat. 1298, 1562 (2011) ("Congress affirms . . . the authority for the Armed Forces of the United States to detain . . . (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks. (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."); *Hamdi*, 542 U.S. at 516 (defining enemy combatant as "an individual who, it alleges, was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there"

through military commissions or are afforded habeas proceedings in federal courts.[214] In contrast, in expedited removal proceedings, the only way a noncitizen may contest an unlawful detention is through the narrowly defined habeas proceeding discussed throughout this Comment.[215] Noncitizens can file a habeas petition disputing the procedures only after a removal order has been issued[216] or while in custody.[217] However, a noncitizen is likely in his country of origin soon after the removal order is issued and thus does not have the opportunity to contest the determination. Or the noncitizen does not know that he is entitled to the writ during detention and thus does not file a petition.[218] In either case, the noncitizen has foregone his limited right to a habeas proceeding contesting the detention. This assumes, of course, that the reviewing court would not dismiss the suit for lack of jurisdiction.[219]

The third *Mathews v. Eldridge* factor, the government's interest, is less severe in the expedited removal context than in *Boumediene*. The national security threat present in *Boumediene*[220] is simply not present for noncitizens in expedited removal proceedings. Critics argue that the presence of undocumented immigrants threatens citizens' access to jobs,[221]

(quoting Brief for Respondents at 3, *Hamdi*, 542 U.S. 507 (No. 03-6696))).

214. National Defense Authorization Act for Fiscal Year 2012 § 1024(b) ("The procedures required . . . in the case of any unprivileged enemy belligerent who will be held in long-term detention under the law of war . . . : (1) A military judge shall preside at proceedings for the determination of status of an unprivileged enemy belligerent. (2) An unprivileged enemy belligerent may, at the election of the belligerent, be represented by military counsel at proceedings for the determination of status of the belligerent. . . . (c) . . . The Secretary of Defense is not required to apply the procedures required by this section in the case of a person for whom habeas corpus review is available in a Federal court.").

215. 8 U.S.C. § 1252(e) (2012).

216. *Id.* § 1252(b)(9) ("Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions . . . shall be available only in judicial review of a final order under this section.").

217. Smith v. U.S. Customs & Border Prot., 741 F.3d 1016, 1019 (9th Cir. 2014) (referencing 28 U.S.C. § 2241(c)(1)–(3)).

218. *Id.* at 1019 ("Smith's claim for habeas relief fails because Smith was not in the custody of the United States at the time he filed his habeas petition. . . . Smith falls squarely within our precedent: a noncitizen who has 'already been removed' prior to filing a habeas petition 'do[es] not satisfy the "in custody" requirement of habeas corpus jurisdiction.'" (quoting Miranda v. Reno, 238 F.3d 1156, 1159 (9th Cir. 2001))).

219. *See supra* notes 113–15 and accompanying text.

220. Boumediene v. Bush, 553 U.S. 723, 796 (2008). The Supreme Court recognized the government interest relating to national security threats and release of its "sources and methods of intelligence gathering." *Id.*

221. *Illegal Aliens Taking U.S. Jobs*, FED'N FOR AM. IMMIGR. REFORM (Mar. 2013), https://fairus.org/issue/workforce-economy/illegal-aliens-taking-us-jobs [https://perma.cc/LGH6-49JX].

increases levels of drugs and violence,[222] and exacerbates government welfare programs, which are all important government interests.[223] These effects are exaggerated.[224] Undocumented immigrants from Mexico and Central America are more often victims of violence and abuse.[225] Comparing enemy combatants actively engaged in terrorist activities against the United States with migrants that cross the Southwestern desert is misleading political rhetoric.

However, there is an important government interest in expedited removal that is not a factor in *Boumediene*: cost. In 2016, the budget for the Executive Office of Immigration Review (EOIR), the administrative agency that oversees all immigration courts, was $420.3 million.[226] As of this publishing, there are 829,608 pending cases in immigration courts across the nation with an estimated average wait time of 796 days, or more than two

222. Ian Schwartz, *Trump: Mexico Not Sending Us Their Best; Criminals, Drug Dealers and Rapists Are Crossing Border*, REALCLEARPOLITICS (June 16, 2015), https://www.realclearpolitics.com/video/2015/06/16/trump_mexico_not_sending_us_their_best_criminals_drug_dealers_and_rapists_are_crossing_border.html [https://perma.cc/989P-EG5W] (quoting then-presidential candidate Donald Trump as stating that "[w]hen Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems, and they're bringing those problems with us. [sic] They're bringing drugs. They're bringing crime. They're rapists. . . . It's coming from all over South and Latin America, and it's coming probably—probably—from the Middle East.").

223. Dylan Baddour, *Tom Delay Says Most Illegal Immigrants Draw 'Welfare Benefits,' Send Children to Public Schools*, POLITIFACT (Sept. 28, 2016), http://www.politifact.com/texas/statements/2016/sep/28/tom-delay/tom-delay-says-most-illegal-immigrants-draw-welfar/ [https://perma.cc/R6WS-RA5M] (quoting Tom Delay, who stated in an MSNBC interview on September 1, 2016 that "[m]ost of these illegals are drawing welfare benefits, they're sending their kids to school, they're using the public services . . . . [T]he impact is monumental.").

224. David Green, *The Trump Hypothesis: Testing Immigrant Populations as a Determinant of Violent and Drug-Related Crime in the United States*, 97 SOC. SCI. Q. 506, 513 (2016); Julia Preston, *Americans Aren't Being Squeezed Out of Jobs by Immigrants, Report Finds*, N.Y. TIMES, Sept. 22, 2016, at A16; Julián Aguilar & Alexa Ura, *Border Communities Have Lower Crime Rates*, TEX. TRIB. (Feb. 23, 2016), https://www.texastribune.org/2016/02/23/border-communities-have-lower-crime-rates/ [https://perma.cc/T87N-8L2G]; Steven A. Camarota, *Welfare Use by Legal and Illegal Immigrant Households: An Analysis of Medicaid, Cash, Food, and Housing Problems*, CTR. FOR IMMIGR. STUD. (Sept. 9, 2015), https://cis.org/Report/Welfare-Use-Legal-and-Illegal-Immigrant-Households [https://perma.cc/5WPP-WW28] (finding that less educated *legal* immigrants account for three quarters of all use of welfare programs by immigrant households).

225. UNITED NATIONS HIGH COMM'R FOR REFUGEES, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO 16–19 (2015), http://www.unhcr.org/publications/operations/5630f24c6/women-run.html [https://perma.cc/T2E7-CY6G].

226. EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP'T OF JUSTICE, FY 2017 BUDGET REQUEST: ADMINISTRATIVE REVIEW AND APPEALS EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, https://www.justice.gov/jmd/file/821961/download [https://perma.cc/8RYS-3Z4A].

years.[227] Referring all persons detained pursuant to expedited removal would add at least 174,923[228] noncitizens to the immigration docket, an increase of 21%. Moreover, referring all cases to EOIR would defeat the very purpose of the expedited removal regime.[229] Because the current procedures are constitutionally deficient, but the costs of providing formal immigration proceedings to all noncitizens in expedited removal are financially impractical, what can the government do?

VII. SOLUTIONS

The government has many options to increase procedural protections to noncitizens detained within the United States without significantly increasing costs. As discussed throughout this Comment, judicial review of all policies in necessary to ensure compliance with the Suspension Clause. This Part, however, focuses on two congressional and executive solutions that would alleviate the main constitutional deficiencies in the expedited removal regime: erroneous detention of persons with valid asylum claims and the subsequent imprisonment of individuals who were never afforded judicial review of the underlying administrative order used as an element of their illegal reentry charge.

First, the government could refer to the USCIS all aliens for credible fear interviews. Cases referred to USCIS for a credible fear interview with an asylum officer who has comprehensive training in asylum law[230] will yield better results. The asylum official should also create a stronger record of facts for collateral challenges. A significant portion of noncitizens subject to expedited removal are already referred to a credible fear interview.[231] In 2017, USCIS received 78,564 referrals from ICE and CBP to conduct credible fear interviews.[232] We can estimate that almost half of the persons in expedited removal proceedings are already referred to an interview with USCIS. While this would increase the workload of USCIS by 100%, the costs of conducting

227. *Immigration Court Backlog Tool*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/ [https://perma.cc/3648-KY3W] (last visited Mar. 19, 2019).

228. *See supra* note 4 and accompanying text.

229. *See* s*upra* note 6 and accompanying text.

230. In fact, many asylum officers are attorneys. *E.g.*, *Asylum Officer Ladd*, U.S. CITIZENSHIP & IMMIGR. SERVICES, https://www.uscis.gov/about-us/careers/asylum-officer-ladd [https://perma.cc/3WJG-5UHT] (last visited Mar. 19, 2019).

231. CASSIDY & LYNCH, *supra* note 11, at 14.

232. ASYLUM DIV., U.S. CITIZENSHIP & IMMIGRATION SERVS., CREDIBLE FEAR WORKLOAD REPORT SUMMARY FY 2017 TOTAL CASELOAD, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_FY17_CFandRFstatsThru09302017.pdf [https://perma.cc/DRL3-UMJ7] (last visited Mar. 19, 2019).

a credible fear interview are far less than a full immigration court proceeding with the added benefit of securing more accurate results. While mandatory referral to USCIS addresses the concern that ICE agents fail to recognize valid asylum claims, there is still a need to address erroneous applications of the expedited removal statute to lawful immigrants.

Second, noncitizens removed pursuant an expedited removal order should not be subject to criminal penalties because there is no avenue for judicial review of an element for which the crime is based. Noncitizens would remain ineligible for lawful status but would not be criminally detained by a removal order that lacked procedural due process protections, including the right to an attorney, the right to present evidence, or the right to judicial review. This collateral protection would give immigrants due process in their criminal proceeding while deterring noncitizens from entering unlawfully. Additionally, lowering the number of illegal reentry offenses would save the federal government millions of dollars. The average cost to detain an individual in federal prison in 2015 was $31,977.65 per year.[233] In 2017, the federal government sentenced 15,767 individuals to imprisonment for an average period of 12 months for illegal reentry.[234] Using those statistics, we can estimate that the federal government spends roughly $504 million on illegal reentry offenses (more than EOIR's 2016 budget of $420.3 million). Immigration crimes account for almost 1/3 of federally detained individuals in the United States.[235] If cost is the single largest deterrent for reforming the expedited removal process, then allowing noncitizens to collaterally attack an expedited removal order in their criminal proceeding will certainly save the federal government millions annually.

VIII. CONCLUSION

Most individuals removed from the United States are removed pursuant expedited removal. When the Executive expanded the application of expedited removal to noncitizens encountered within 100 miles of the border and within fourteen days of entry, the risk of unlawful detentions by the Executive

233. Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46,957, 46,957 (July 19, 2016).

234. U.S. SENTENCING COMM'N, QUICK FACTS: ILLEGAL REENTRY (June 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Illegal_Reentry_FY17.pdf [https://perma.cc/PEJ9-TRT8].

235. There were 66,873 criminal sentences in 2017, and 19,330 of them involved immigration offenses. *Id.*

dramatically increased. To counterbalance the effect of this policy, the political branches should have increased the level of procedural protections afforded to noncitizens detained within the territorial jurisdiction of the United States or provided a meaningful review of its procedures in the courts. As additional circuits question the constitutionality of the habeas proceedings for noncitizens subject to expedited removal it has become increasingly apparent that the current statutory and regulatory scheme insufficiently protects the writ. The lack of oversight of DHS's actions and the complete absence of judicial review of Executive policies renders the current regime and any expansion of expedited removal into the jurisdictional United States unconstitutional as a violation of the Suspension Clause.

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