Bordering Persecution: Why Asylum Seekers Should Not be Subject to Expedited Removal

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NOTE

BORDERING PERSECUTION: WHY ASYLUM SEEKERS SHOULD NOT BE SUBJECT TO EXPEDITED REMOVAL

ALVARO PERALTA*

TABLE OF CONTENTS

Introduction .................................................................................................................. 1304
I. Background ............................................................................................................. 1307
   A. Expedited Removal Under the INA ............................................................... 1307
   B. Expedited Removal Imposes Significant Procedural Hurdles Resulting in the Denial of Meritorious Asylum Claims ............................................................. 1310
II. The Expedited Removal of Asylum Seekers Violates Federal Immigration Law and the U.S. Constitution .......... 1313
   A. Statutory and Regulatory Analysis ................................................................. 1314
      1. Section 235(b) of the INA prohibits the application of a more stringent credible fear standard facilitated by expedited removal .................. 1315
      2. Expedited removal runs counter to other INA statutory and regulatory safeguards ................................................................. 1317
   B. Constitutional Analysis .................................................................................. 1320
      1. The application of a more stringent credible fear standard violates the constitutional guarantee of procedural fairness ............................................ 1320

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2. The lack of access to counsel throughout the USCIS screening process contravenes asylum seekers’ constitutional right to counsel ..................................1323

III. Recommendations ........................................................................................................1325
   A. The President of the United States Should Issue an Executive Order Adding the Protection of Asylum Seekers at U.S. Borders to the Priority List for Immigration Enforcement .......................................................1326
   B. USCIS and CBP Should Amend their Lesson Plan and Field Manual, Respectively, to More Accurately Reflect Statutory and Constitutional Requirements ..............................................1327
   C. Congress Should Amend the Immigration Statute to Provide More Robust Protections for Asylum Seekers ....1329

Conclusion ..............................................................................................................................1330

Everyone has the right to seek and to enjoy in other countries asylum from persecution.

- Universal Declaration of Human Rights

INTRODUCTION

In 2013, a Guatemalan woman sought protection in the United States because she was being persecuted on account of her ethnicity. She was harassed, abused, and raped several times before she fled Guatemala. When she expressed her fear to U.S. border patrol agents, she was told, “[D]on’t talk. These are all lies... All Guatemalans are telling the same lies.” Border patrol agents forced her to sign a removal order and prevented her from speaking to an asylum officer about her fear of persecution. They ordered her removed from the United States, and she returned to Guatemala where she suffered additional abuse. She filed various police

3. Id.
4. Id. (internal quotation marks omitted).
5. Id.
6. Id.
reports, but authorities dismissed them.\textsuperscript{7} In 2014 she attempted to re-enter the United States, this time with her young son.\textsuperscript{8} After being forced to recount various occasions of rape and abuse next to her son, the asylum officer determined she did not have a credible fear of persecution, thus preventing her from presenting her asylum claim before a judge.\textsuperscript{9}

Similar stories permeate across U.S. southwest border sectors. Often, immigrants fleeing from persecution have valid asylum claims that would allow them to stay in the United States temporarily, and yet they find themselves blocked by an immigration system that aims to protect them. Indeed, the United States's expedited removal process has increasingly narrowed the right to apply for asylum. The expedited removal proceeding is a more streamlined process for removing noncitizens than the regular removal proceedings under section 240 of the Immigration and Naturalization Act (INA).\textsuperscript{10} Civil rights groups have criticized this statutory procedure, claiming that it illegally denies asylum status in favor of expediency in immigration proceedings.\textsuperscript{11} Conversely, detractors claim that the expedited

\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Pub. L. No. 82-414, § 240, 66 Stat. 163, 204 (1952) (codified as amended at 8 U.S.C. § 1229a (2012)). Section 240 of the Immigration and Nationality Act (INA) governs the standard process under which a noncitizen is placed into removal proceedings. Under that system, the noncitizen receives a full hearing before an Immigration Judge (IJ) and is entitled to an administrative appeal to the Board of Immigration Appeals (BIA or “the Board”). Noncitizens may then seek judicial review of an adverse administrative decision by filing a petition for review in the court of appeals for the circuit in which their immigration judge completed proceedings. 8 U.S.C. § 1252(a)-(b).
\textsuperscript{11} Advocates also claim that persons establishing a credible fear of persecution in their home countries receive inhumane treatment under this process. For instance, the U.S. government detained more than six hundred women and children in the now-closed family detention center in Artesia, New Mexico, the government detained individuals in Artesia at length, refused them meaningful access to counsel and interpreters, hurled them through proceedings with predetermined results, and, ultimately, sent them expeditiously back to the dangers from which they fled. Julia Preston, \textit{As U.S. Speeds the Path to Deportation, Distress Fills New Family Detention Centers}, \textit{N.Y. Times}, Aug. 5, 2014, http://www.nytimes.com/2014/08/06/us/seeking-to-stop-migrants-from-risking-trip-us-speeds-the-path-to-deportation-for-families.html. The Department of Homeland Security (DHS) recently closed the family detention center in Artesia but replaced it with a permanent and larger detention center in Dilley, Texas. \textit{See Press Release, Immigration & Customs Enforcement, ICE’s New Family Detention Center in Dilley, Texas to Open in December} (Nov. 18, 2014), \textit{available at} http://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december (announcing the opening of the Dilley family detention
removal process is in line with the nation’s immigration priorities and
the federal government’s goal to increase border protection at a time
when illegal migration is rising.\textsuperscript{12}

Currently, persons seeking admission to the United States at a
port of entry or near the border who express a fear of return to
their countries must, at a minimum, be referred by U.S. Customs
and Border Patrol (CBP) for an interview with a U.S. Citizenship
and Immigration Services (USCIS) asylum officer to determine
whether there is a significant possibility that they can establish
persecution or a fear of persecution before an immigration judge.\textsuperscript{13}
If the applicant meets the “credible fear” of persecution standard
during the screening interview, the case proceeds to a removal
hearing in immigration court.\textsuperscript{14} There, the applicant may apply for
asylum or other protections from removal based on persecution or
torture.\textsuperscript{15} If the applicant cannot meet this initial threshold during
the screening interview, she is deported immediately under an
order of expedited removal.\textsuperscript{16}

Expedited removal contributes to a fast-track deportation scheme
that unduly disrupts the asylum process previously outlined.
Specifically, the expedited administration of asylum claims has made
it increasingly difficult for applicants to obtain screening interviews
and to meet the initial “credible fear” threshold. As a consequence of
this widespread mishandling of asylum claims, asylum applicants are
deprived of various statutory, regulatory, and constitutional
safeguards. Furthermore, shattering all hope for prospective asylum
seekers, President Barack Obama’s most recent executive order on
immigration reform failed to address this systemic shortcoming,
allowing the expedited removal of asylum applicants to continue despite serious legal concerns.\textsuperscript{17}

This Note argues that the expedited removal system violates various legal safeguards for noncitizens seeking protection from persecution in their home countries. Part I introduces the statutory framework governing asylum applications and the expedited removal provision. This Part also provides context for some of the abuses taking place with respect to the referral and screening processes for asylum applicants. Part II argues that the expedited removal of asylum seekers violates statutory, regulatory, and constitutional safeguards as a result of the procedural barriers it imposes. Specifically, this Part discusses three barriers to statutory, regulatory, and constitutional due process: the application of a more stringent credible fear standard, the failure to refer eligible aliens for screening interviews, and a lack of access to counsel throughout the asylum process. Lastly, Part III proposes ways to correct the mistreatment of asylum seekers in the United States.

I. BACKGROUND

A. Expedited Removal Under the INA

In order to apply for asylum under the INA, an individual must be present in the United States and demonstrate a well-founded fear of persecution based on one of five grounds: race, religion, nationality, political opinion, or membership in a particular social group.\textsuperscript{18} Individuals may apply for asylum defensively when they are placed in removal proceedings in immigration court after being apprehended

\textsuperscript{17} The President's new policies apply only to immigrants who have been in the United States for more than five years. See Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Alan D. Bersin, Acting Assistant Sec'y for Policy 4 (Nov. 20, 2014) [hereinafter November 2014 Prosecutorial Discretion Memo], available at http://www.dhs.gov/sites/default/files/publications/14_1120_memoProsecutorial_discretion.pdf (listing aliens apprehended at the border 'and aliens who pose threats to national security and public safety as among DHS's highest enforcement priorities).

by CBP or U.S. Immigration and Customs Enforcement (ICE) agents. \(^19\) Individuals are normally deportable unless they can show that they are eligible for a remedy such as asylum, withholding of removal, or relief under the United Nations (UN) Convention Against Torture (CAT). \(^20\) Both withholding of removal and CAT have higher burdens of proof than asylum. \(^21\) Additionally, neither of these remedies offers a path to permanent resident status, which the federal government offers asylees after one year of residence in the United States. \(^22\)

In 1996, Congress enacted a new provision called “expedited removal” \(^23\) as part of the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA). \(^24\) Expedited removal involves a more streamlined process than regular removal proceedings under

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19. See 8 C.F.R. § 1208.4(b)(1) (2014) (providing that asylum applicants can apply for asylum at “the land border port-of-entry through which the alien seeks admission to the United States”).

20. See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113 (constituting a multilateral international treaty wherein the signatories made various agreements to promote the dignity of human beings and prevent torture and inhumane treatment); 8 C.F.R. § 208.14 (outlining requirements for approval of an asylum application); id. § 208.16 (describing the requirements for applying for withholding of removal).

21. INS v. Cardoza-Fonseca, 480 U.S. 421, 430-32, 450 (1987) (explaining that to show a well-founded fear of persecution for purposes of asylum, the foreign national need not show that persecution is more likely than not and implying in dicta that a ten percent chance might suffice); INS v. Stevic, 467 U.S. 407, 429-30 (1984) (holding that the foreign national’s burden of proof for withholding of removal is “more likely than not” and the standard for proof is a showing of a “clear probability of persecution” (internal quotation marks omitted)); 8 C.F.R. § 208.16(c)(2) (requiring that under CAT, the foreign national must show that he would “more likely than not” be tortured).


23. Id. § 1225(b)(1)(A)(i) (authorizing DHS to remove an alien without a hearing if the alien is arriving without documents and has not asked to apply for asylum or expressed a fear of returning). In addition to expedited removal, the Illegal Immigration and Immigrant Responsibility Act (IIRIRA) also created two provisions that affect and bar asylum. The first is a one-year filing deadline pursuant to which an applicant who does not file for asylum within a year of entering the United States is generally barred from doing so. Id. § 1158(a)(2)(B); 8 C.F.R. § 208.4(a)(2). The second bar is Reinstatement of Removal. If an individual is removed or voluntarily leaves under an order of removal and subsequently re-enters illegally, he or she faces the reinstatement of the previous removal order. 8 U.S.C. § 1231(a)(5). Upon return, DHS bars the individual from asylum and other remedies except for withholding of removal or CAT protection. Id.

24. Pub. L. No. 104-208, 110 Stat. 3009-546. Prior to 1997, individuals with asylum claims arrested at the border or inside the country could simply present their cases at a hearing before an immigration judge.
INA section 240.25 This provision allows for the immediate removal of noncitizens who have not been admitted or paroled into the United States,26 have been in the United States for less than two years,27 and are inadmissible because they presented fraudulent documents or they have no documents.28 Such individuals may be removed expeditiously and will be barred from returning to the United States for at least five years.29 However, if an individual expresses an intention to apply for asylum or a fear of persecution or torture upon returning to his or her home country, the immigration officer must refer the individual to a USCIS asylum officer for a credible fear interview.30 To assess the legitimacy of the alleged fear, the asylum officer applies a credible fear standard that requires a showing of "a significant possibility... that the alien could establish eligibility for asylum."31 Neither the statute nor the immigration regulations define the "significant possibility" standard of proof, but the standard used during the screening process is much lower than the well-founded fear standard applied to asylum claims in immigration court.32 If the individual cannot demonstrate a credible fear of persecution or torture and the asylum officer enters an unfavorable credible fear determination, the individual can ask an immigration judge to review the negative decision.33 If the judge

25. See supra note 10 and accompanying text (describing the removal procedure under INA section 240).
27. Id. § 1225(b)(1)(A)(iii)(II).
28. Id. § 1182(a)(6)(C) (limiting expedited removal to foreign nationals who sought admission to the United States through fraud or willful misrepresentation).
29. See id. § 1182(a)(9)(A), -(C)(i) (prohibiting readmission of individuals ordered removed within the past five years); id. § 1231(c) (providing for expedited removal at points of entry).
30. 8 C.F.R. § 235.3(b)(4) (2014).
32. See U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM DIVISION OFFICER TRAINING COURSE: CREDIBLE FEAR 17 (2014) [hereinafter USCIS CREDIBLE FEAR LESSON PLAN], available at https://s3.amazonaws.com/s3.documentcloud.org/documents/1115241/credible-fear-of-persecution-and-torture.pdf ("Because the credible fear determination is a screening process, the asylum officer does not make the final determination as to whether the applicant is credible. The immigration judge makes that determination in the full hearing on the merits of the claim."); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 430–32 (1987) (suggesting that even a one-in-ten chance of anticipated persecution would suffice under the well-founded fear standard). Presumably, then the credible fear standard connotes a burden that requires less than ten percent likelihood of persecution.
33. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 208.31(g).
agrees with the prior negative decision, the individual must be removed from the United States and has no right to appeal. If the asylum officer instead enters a favorable credible fear determination, the officer issues a Notice to Appear requiring the alien to present her asylum claims in immigration court for removal proceedings.

In enacting the expedited removal provision of the INA, Congress expanded DHS's power by authorizing its officers to summarily remove certain noncitizens without affording them the opportunity of a hearing or review in immigration court. However, when creating this scheme, Congress was clear that it did not want the expedited removal system to result in the expulsion of bona fide refugees.

B. Expedited Removal Imposes Significant Procedural Hurdles Resulting in the Denial of Meritorious Asylum Claims

While illegal migration in southwest border sectors has steadily declined since its peak in 2000, there has been a sudden influx in recent years, with an increased number of individuals coming from Honduras, Guatemala, and El Salvador. According to an April 2014 New York Times report, CBP agents made more than 90,700 apprehensions near the Rio Grande in 2014, a sixty-nine percent increase from the previous year. The number of minors with parents apprehended nearly tripled to more than 22,000 in 2014 from about 8500 in 2013. Much of this increase is attributed to

34. 8 C.F.R. § 1208.30(g)(2)(iv)(A).
36. See H.R. REP. NO. 104-469, pt. 1, at 158 (1996) ("Under this system, there should be no danger that an alien with a genuine asylum claim will be returned to persecution.").
39. Preston, supra note 11 (citing a report by the Pew Research Center). Much of the debate over the recent influx of illegal migration has focused on the increase in the apprehension of unaccompanied alien children from Central America. See AM. IMMIGRATION COUNCIL, CHILDREN IN DANGER: A GUIDE TO THE HUMANITARIAN CHALLENGE AT THE BORDER 1 (2014), available at http://www.immigrationpolicy.org/sites/default/files/docs/children_in_danger_a_guide_to_the_humanitarian_challenge_at_the_border_final.pdf. DHS has taken some steps to address this situation
rampant gang violence across Central America. Currently, three of the five highest murder rates in the world are in Central America, which has cultivated a humanitarian crisis in the region.

Since the recent influx of immigrants crossing the southern border, the Obama administration has shifted to a strategy of deterrence by moving families to isolated facilities and placing them in fast-track deportation proceedings authorized under the INA. As of August 2014, nearly 300 women and children had been deported from family detention centers along the southwest border.

(explaining that “unaccompanied minors” are individuals less than eighteen years old who do not have legal U.S. status and who lack parents or legal guardians in the U.S.); see also Press Release, Dep’t of Homeland Sec., Statement by Secretary Johnson on Increased Influx of Unaccompanied Immigrant Children at the Border (June 2, 2014), available at http://www.dhs.gov/news/2014/06/02/statement-secretary-johnson-increased-influx-unaccompanied-immigrant-children-border (detailing a multi-federal agency effort to care for unaccompanied minors while still maintaining security at the U.S. borders).


41. UNITED NATIONS OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE 24 (2013), available at http://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf (reporting that the three countries with the highest murder rates in Central America—from highest to lowest—are Honduras, Belize, and El Salvador).

42. Senior government officials have openly promoted the rushed adjudication of asylum claims. Secretary of Homeland Security Jeh Johnson has stated that the goal of the expedited removal system is to return certain Central American migrants to their home countries more quickly. Press Release, Dep’t of Homeland Sec., Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations (July 10, 2014), available at http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations. Similarly, Department of Justice officials have stated that they “must do whatever [they] can to stem the tide” of immigrants. Press Release, Dep’t of Justice, Department of Justice Announces New Priorities to Address Surge of Migrants Crossing Into the U.S. (July 9, 2014) (internal quotation marks omitted), available at http://www.justice.gov/opa/pr/2014/July/14-dag-711.html.

In 2005, the U.S. Commission on International Religious Freedom (USCIRF) conducted a legally mandated study of expedited removal to determine whether it resulted in the erroneous removal of aliens to countries where they may be persecuted. Most strikingly, the study revealed systemic inadequacies in CBP agents’ referrals for screening interviews with USCIS asylum officers. Specifically, the study found that there was “frequent failure on the part of CBP officers to provide required information to aliens during . . . [i]nspection interview[s] and occasional failures to refer eligible aliens for [c]redible [f]ear interviews when they expressed a fear of returning to their home countries.” USCIRF also concluded that some CBP agents dissuaded people from requesting asylum and did not record their fears of persecution. Additionally, although the regulations direct CBP to refer for a credible fear interview any alien expressing fear of persecution, the CBP’s internal Inspectors’ Field Manual (“IFM”) instructing CBP officers not to refer a case if “the alien asserts a fear or concern which is clearly unrelated to an intention to seek asylum or a fear of persecution.” The CBP’s mishandling of asylum claims is further compounded by its policy to limit access to counsel in family detention centers.

More than a decade after the USCIRF report, there is no indication that CBP has remedied the problems USCIRF identified. In fact, a recent Human Rights Watch report revealed that a disproportionate number of Central American asylum applicants are being denied

44. ALLEN KELLER ET AL., U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 3 (2005) http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/ERS_RptVolII.pdf. Section 605 of the International Religious Freedom Act of 1998 authorized the USCIRF to study how the U.S. treats asylum seekers under expedited removal. Id. This study integrated data from independent interviews with aliens and from, inter alia, official U.S. Customs and Border Patrol (CBP) records. Id.
45. Id.
46. Id. See generally 8 C.F.R. § 235.3(b)(2) (2014) (requiring immigration officers to create a record of the case facts in expedited removal proceedings).
48. Id. at 114; cf. 8 C.F.R. 235.3(b)(4) (prohibiting immigration officers from “proceed[ing] further with removal” if an alien expresses intent to seek asylum or “a fear of persecution or torture” until the alien has been referred for an asylum interview).
49. See infra Part II.B.2 (bringing to light the lack of access to counsel throughout the screening process and arguing that this contravenes statutory and constitutional rights to counsel).
credible fear interviews as compared to asylum seekers from other regions of the world.\textsuperscript{50}

USCIS asylum officers have also failed to provide proper treatment to asylum seekers caught in the expedited removal system. In fact, a new USCIS lesson plan describes major changes in the credible fear standard that are deeply troubling.\textsuperscript{51} The tone and content of the lesson plan undermine the asylum process set forth in the INA by misleading asylum officers with respect to the appropriate standard to be applied. For example, the lesson plan asserts that the "significant possibility" standard for credible fear requires the applicant to "demonstrate a substantial and realistic possibility of succeeding" on the merits, noting concerns that previous standards had been wrongly interpreted to require only a minimal or "mere possibility of success."\textsuperscript{52} However, this interpretation of "significant possibility" wrongly instructs asylum officers to impose a burden on applicants that effectively surpasses the well-founded fear standard, which is a higher standard used to prove asylum claims once in court.\textsuperscript{53} This instruction has resulted in the application of a more rigorous standard than what is envisioned in the INA, and anecdotal evidence suggests that many more individuals have genuinely viable asylum claims than are able to prove them in court.\textsuperscript{54}

In Part II, this Note argues that because expedited removal facilitates these procedural hurdles plaguing the asylum process, the expedited removal of asylum seekers in the United States is statutorily and constitutionally deficient.

II. \textsc{The Expedited Removal of Asylum Seekers Violates Federal Immigration Law and the U.S. Constitution}

Credible fear interviews have become more cursory in nature because of the expedited removal system. This practice prevents the

\textsuperscript{50} See Human Rights Watch, "You Don't Have Rights Here" (2014), available at http://www.hrw.org/print/reports/2014/10/16/you-don-t-have-rights-here (noting that twenty-one percent of migrants in expedited removal proceedings generally are flagged for credible fear interviews, yet migrants from Mexico, Honduras, Guatemala, and El Salvador are only flagged 0.1% to 5.5% of the time).

\textsuperscript{51} See generally USCIS CREDIBLE FEAR LESSON PLAN, supra note 32.

\textsuperscript{52} See id. at 14–15 (internal quotation marks omitted).

\textsuperscript{53} In fact the lesson plan correctly points out that the credible fear screening is to "quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch." Id. at 11 (internal quotation marks omitted).

\textsuperscript{54} See id.; see also Preston, supra note 11 (arguing that many Central American migrants in Artesia had viable claims).
adequate screening of asylum seekers and, in turn, impedes asylees' statutory, regulatory, and constitutional rights to a fair and meaningful hearing.55 Specifically, procedural barriers such as USCIS's application of a more stringent credible fear standard, CBP's failure to refer eligible aliens for screening interviews, and the lack of access to counsel prevent detainees from pursuing bona fide asylum claims. This Part highlights how the expedited removal system and the procedural barriers it imposes result in clear violations of statutory, regulatory, and constitutional safeguards.

A. Statutory and Regulatory Analysis

First, the categorical prejudgment of asylum claims in expedited removal proceedings offends statutory safeguards. As a result of the U.S. government's increased dependence on the expedited removal process, careless errors and a mishandling of minimal procedures undermine the government's processing of arriving asylum seekers.56 This mishandling of asylum claims plainly violates section 235(b) of the INA and also hinders an alien's enjoyment of statutory and regulatory safeguards such as the right to counsel at the alien's own expense57 and the alien's right to an interpreter during screening interviews, respectively.58

55. The essence of adequate due process is notice and an opportunity to be heard. See U.S. CONST. amend V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard. And it is to this end, of course, that summons or equivalent notice is employed." (citations omitted)).

56. See supra note 42 and accompanying text (discussing the Obama Administration's emphasis on expediting the removal process).

57. 8 U.S.C. § 1362 (2012) (providing that individuals in removal proceedings have a right to counsel but not to counsel at the government's expense).

58. 8 C.F.R. § 208.30(d)(5) (2014) (requiring assistance of an interpreter during the screening interview). Another relevant statutory safeguard is the right "to be heard and questioned by the immigration judge, either in person or by telephonic or video connection." 8 U.S.C. § 1225(b)(1)(B)(iii)(III); see United States ex rel. Brancato v. Lehmann, 239 F.2d 663, 666 (6th Cir. 1956) ("Although it is not penal in character . . . deportation is a drastic measure, at times the equivalent of banishment or exile . . . .").
1. **Section 235(b) of the INA prohibits the application of a more stringent credible fear standard facilitated by expedited removal**

Most significantly, the expedited removal of aliens with valid asylum claims directly contravenes section 235(b) of the INA, which stipulates that an "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."^59^  

The screening of asylum applicants in southwest border sectors has been utterly deficient due to the systemic failure of immigration officers to comply with their statutory directive under section 235(b) of the INA. ^60^ The anecdotal evidence demonstrates that CBP and USCIS are expeditiously and carelessly processing asylum claims,^61^ resulting in the application of a more burdensome credible fear standard than the one provided in INA section 235(b)—which requires only that an alien show a significant possibility that she could establish eligibility for asylum. ^62^ A stricter standard prevents the government from considering meritorious asylum claims and violates the procedural safeguard explicitly contained in section 235(b) of the INA.

Furthermore, this practice prevents many asylum seekers from passing the credible fear stage and from having their asylum claims fully considered in immigration court. Attorneys report that USCIS found that roughly only ten percent of those detained in the Artesia family detention center had "a credible fear."^63^ However, advocates have noted that many more individuals have genuinely viable asylum claims today than did their predecessors. ^64^ For instance, there are numerous anecdotal reports of detainees receiving negative credible fear findings despite having revealed stories of rape and sexual

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60. See *supra* notes 45–54 and accompanying text (demonstrating that many migrants in detention centers receive negative credible fear findings even though advocates believe the migrants' asylum claims could prevail in front of an immigration judge).
61. See *supra* notes 45–51 and accompanying text.
63. See Catalina Restrepo, *Here Are Some of the Stories of Women Held at Artesia*, IMMIGR. IMPACT (Aug. 27, 2014), http://immigrationimpact.com/2014/08/27/here-are-some-of-the-stories-of-women-held-at-artesia (internal quotation marks omitted) (listing stories of women who feared returning to their home countries because gang members had, for example, threatened to rape, kidnap, or kill them).
64. See id.; see also Preston, *supra* note 11 (asserting that migrants in Artesia had many more viable claims than Central Americans who came to the United States in the past).
assault, gang violence, and kidnappings in their home countries. In one case, an asylum officer made a negative credible fear determination even though the potential asylee, a woman, claimed that gang members in El Salvador vandalized her home, attempted to recruit members of her family, and threatened to kill her and her son if she returned home. The officer made this negative determination even though well-founded fear of persecution based on membership in a particular social group, which can include a group based on gender or persecution by gangs, is among the listed grounds that may qualify one for asylum.

Additionally, CBP officers often fail to refer a case to the USCIS asylum office even when the applicant provides any expression of fear. Immigrant rights advocates report clear disparities in the treatment of asylum claims that share identical

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65. See Excerpts from Artesia Declarations, AM. IMMIGR. COUNCIL, http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/excerpts-artesia-declarations (last visited May 13, 2015). Recently, several civil rights groups filed a complaint with DHS raising concerns regarding the expedited removal of individuals fleeing to the United States from persecution. Letter from Nat'l Immigrant Justice Ctr., supra note 2, at 1. The complaint recounts the stories of several deportees who were denied the opportunity to seek asylum as a result of CBP's screening process. In one case, a young Honduran man was threatened by the Mara Salvatrucha (MS-13) gang and attacked by the Mara 18 gang after he was deported. Id. at 13–14. In another case, a Peruvian woman was stalked, raped multiple times, and threatened with the killing of family members after she was deported. Id. at 16. As gang and political violence continues to wreak havoc across Central America and Mexico and with the recent massacre of forty-three students in Guerrero, Mexico, more people are likely to flee to the United States for their lives. See Joshua Partlow, Outrage in Mexico over Missing Students Broadens into Fury at Corruption, Inequality, WASH. POST (Nov. 17, 2014), http://www.washingtonpost.com/world/protests-over-missing-students-planted-in-guerrero-spread-across-mexico/2014/11/17/0ab952b8-69fc-11e4-ba6d-659b192a448d_story.html.


67. See, e.g., Crespin-Valladares v. Holder, 632 F.3d 117, 125–26 (4th Cir. 2011) (recognizing that persecution based on one's relationship to a family member targeted by a gang is a cognizable basis for asylum); Perdomo v. Holder, 611 F.3d 662, 667 (9th Cir. 2010) (concluding that "women in a particular country, regardless of ethnicity or clan membership, could form a particular social group").

68. 8 U.S.C. § 1158(b)(1)(B)(1) (2012). Moreover, the new USCIS lesson plan describing a stricter credible fear standard will result in the continued denial of meritorious asylum claim. See supra text accompanying notes 51–54.

69. KELLER ET AL., supra note 44, at 20, 23 (finding that referrals to an asylum office are not guaranteed even when a noncitizen expresses fear and adding that some officers even encourage potential asylees to retract their fear claims).
facts during this screening phase and have noted that officers conduct screening interviews too rapidly and without properly translating application documents.\textsuperscript{70}

INA section 235(b) clearly mandates that these individuals have the right to interview with an asylum officer the moment that they express a fear of persecution.\textsuperscript{71} If they establish a credible fear, they then have a right to a fair hearing with an Immigration Judge.\textsuperscript{72}

2. Expedited removal runs counter to other INA statutory and regulatory safeguards

Immigration officers violate other statutory and regulatory rights for asylum seekers, including the right to counsel at the alien's own expense in removal proceedings\textsuperscript{73} and, relatedly, the right to an interpreter.\textsuperscript{74} Noncitizens have a right to consult with an individual of their own choosing prior to any interview or review of an interview.\textsuperscript{75} Additionally, the INA requires that applicants for asylum be advised of the privilege\textsuperscript{76} of being represented by counsel and given a list of persons who can provide pro bono representation.\textsuperscript{77}


\textsuperscript{71.} See \textsection 8U.S.C.\textsection 1225(b)(1)(A)(ii).

\textsuperscript{72.} See \textsection 8 C.F.R. \textsection 208.30(f) (2014) (providing that if the USCIS asylum officer issues a favorable determination of “credible,” the officer must issue the alien a Notice to Appear (NTA), which requires the individual to appear in immigration court for a removal proceeding).

\textsuperscript{73.} See \textsection 8 U.S.C. \textsection 1362 (governing aliens’ right to counsel); see also \textsection 8 C.F.R. \textsection 292.5(b) (“Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative . . . .”); \textsection id. \textsection 1240.10(a) (“In a removal proceeding, the immigration judge shall . . . [a]dvise the respondent of his or her right to representation at no expense to the government, by counsel of his or her choice . . . .”).

\textsuperscript{74.} See \textsection 8 C.F.R. \textsection 208.30(d)(5) (requiring assistance of an interpreter during interviews if the alien cannot speak English and the immigration officer cannot otherwise communicate in the alien’s spoken language).

\textsuperscript{75.} \textsection 8 U.S.C. \textsection 1225(b)(1)(B)(iv); \textsection 8 C.F.R. \textsection 208.30(d)(4).

\textsuperscript{76.} While some of the statutory provisions describe aliens’ retention of counsel at their own expense as a “privilege,” the implementing regulations suggest that this is a legal right to counsel. See supra note 73 (showing that the implementing regulations use the term “right” as opposed to “privilege”).

\textsuperscript{77.} \textsection 8 U.S.C. \textsection 1158(d)(4).
Courts have generally upheld aliens’ statutory right to counsel at their own expense as well as held that failure to advise aliens of their due process rights violates the right to counsel. Specifically, courts have found violations of an alien’s right to counsel in circumstances where the government did not advise the alien of her right to counsel “in a language he could understand” and where the government exercised “unexplained” haste in beginning removal proceedings.

Although federal law clearly provides a right to legal representation in proceedings before DHS, that right is often unrecognized or even restricted. Detained noncitizens are frequently prevented from meeting with counsel, and pro bono legal services are not easily attained. Pursuant to a nationwide survey of immigration attorneys conducted by the American Immigration Council, attorneys are limited in their ability to communicate with their clients, to obtain seating during USCIS interviews, and to submit documents to interviewing officers. The lack of access to counsel inhibits noncitizens’ ability to prepare their legal claims for presentation to the USCIS screening officer and later to an immigration judge. This lack of representation is a barrier to asylum applicants’ statutory and regulatory due process rights.

78. See, e.g., United States v. Ramos, 623 F.3d 672, 675, 682 (9th Cir. 2010) (concluding that DHS and an immigration judge violated an alien’s Fifth Amendment due process right by depriving him of the right to counsel but affirming the trial court’s decision not to dismiss an indictment against the alien because the constitutional violation did not prejudice him); Tawadrus v. Ashcroft, 364 F.3d 1099, 1103 (9th Cir. 2004) (explaining that aliens’ right to counsel stems from the Due Process Clause of the Fifth Amendment rather than from the Sixth Amendment).

79. See, e.g., United States v. Reyes-Bonilla, 671 F.3d 1036, 1046 (9th Cir. 2012) (“[T]he record fails to show that Reyes was advised of any of his due process rights, including his right to counsel, in a language he could understand.... This procedural error in Reyes’s expedited removal constitutes a violation of his due process right to counsel.”).  

80. Id.

81. Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985).

82. PENN STATE LAW & LEGAL ACTION CTR., BEHIND CLOSED DOORS: AN OVERVIEW OF DHS RESTRICTIONS ON ACCESS TO COUNSEL 11 (2012), available at http://www.legalactioncenter.org/sites/default/files/docs/lac/Behind_Closed_Doors_5-31-12.pdf (citing one attorney’s account that many interviews now take place via videoconference and argument that this practice undermines client confidentiality and inhibits adequate review of documents).


The government's lack of effort to address language barriers presents another hurdle for some asylum seekers. Pursuant to the INA implementing regulations, if the noncitizen "is unable to proceed effectively in English, and . . . the asylum officer is unable to proceed competently in a language chosen by the alien," the officer "shall arrange for the assistance of an interpreter in conducting the interview." Federal appellate courts have also expressed concern about the language barrier in screening interviews. Specifically, courts have held that a detainee cannot waive her rights, including the right to appeal, unless she is first advised of that right in a language she can understand.

A consequence of the hasty administration of asylum claims is the improper translation of documents for applicants who cannot speak English. Most detainees in family detention centers also have no understanding of the technical legal questions posed during the screening process. For instance, asylum officers have not found "credible fear" when an applicant was unable to articulate the particular social group to which he legally belongs. However, "particular social group" is a complicated legal concept and an evolving issue in immigration law. The U.S. government should not expect detainees, particularly those with limited to no English skills, to understand a concept that even academics and courts have struggled to develop and coherently define. Having an interpreter

the courts have "broadened the notion of due process to include statutory entitlements or other forms of new property, such as welfare benefits" (internal quotation marks omitted).

85. 8 C.F.R. § 208.30(d)(5) (2014).

86. See e.g., United States v. Reyes-Bonilla, 671 F.3d 1036, 1046 (9th Cir. 2012) (noting that the IJ failed to provide Reyes-Bonilla notice of his rights in a language he could understand); Ramsameachire v. Ashcroft, 357 F.3d 169, 180 (2d Cir. 2004) ("[T]he BIA and reviewing court should use the [screening] interview in judging the alien's credibility . . . in light of the alien's particular circumstances and language ability, and concluding that it represents a reliable source of the alien's statements and actual beliefs.").

87. E.g., United States v. Ramos, 623 F.3d 672, 680 (9th Cir. 2010).

88. See CAMPOS & FRIEDLAND, supra note 70, at 11. (finding that CBP improperly conducted interviews too rapidly and without appropriately translating documents for applicants).


90. Ramos-Lopez v. Holder, 563 F.3d 855, 859 (9th Cir. 2009) (internal quotation marks omitted) (indicating that "'[p]articular social group]' . . . is an amorphous term"); In re Acosta, 19 I. & N. Dec. 211, 212 (BIA 1985) (defining "particular social group" as "a group of persons all of whom share a common, immutable characteristic").
present to explain the meaning of specific terms is a statutory right that currently goes unprotected.

Pursuant to the INA, expedited removal should not apply to asylum applicants seeking protection in the United States. Yet, the government often denies meritorious asylum claims because it administers these claims in a careless and hasty manner. Consequently, the expedited removal system, as applied to asylum applicants, violates section 235(b) of the INA and hinders additional statutory and regulatory safeguards intended to protect due process.

B. Constitutional Analysis

The expedited removal system also raises constitutional due process concerns. Similar to the statutory and regulatory protections discussed above, the constitutional guarantee of due process protects asylum applicants from the unlawful implementation of the expedited removal system.

1. The application of a more stringent credible fear standard violates the constitutional guarantee of procedural fairness

Noncitizens, having entered the United States, are entitled under the Due Process Clause of the Fifth Amendment to a fair hearing of their claims. The Fifth Amendment guarantees that “[n]o person shall . . . be deprived of life, liberty, or property without due process of law.” Aliens have been found to fall within the meaning of “person” under the Fifth Amendment, and removal implicates an alien’s interest in liberty. Thus, immigrants have constitutionally protected interests in applying for asylum.

91. See 8 U.S.C. § 1225(b)(1)(A)(ii) (2012) (requiring immigration officers to refer aliens for interviews if they express intent to apply for asylum or fear of persecution); 8 C.F.R. § 235.3(b)(4) (2014) (providing that the government must halt removal proceedings against an alien if the alien seeks to apply for asylum or indicates fear).

92. See supra notes 45–54 and accompanying text.

93. Aliens’ statutory right to counsel has been seen as embodying the Fifth Amendment right to counsel at their own expense. See, e.g., Leslie v Att’y Gen., 611 F.3d 171, 180–81 (3d Cir. 2010) (“[Aliens’] statutory and regulatory right to counsel is also derivative of the due process right to a fundamentally fair hearing.”).

94. See Reno v. Flores, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”).

95. U.S. Const. amend. V.

96. See, e.g., Bridges v. Wixon, 326 U.S. 135, 154 (1945) (requiring “[m]eticulous care” to ensure aliens are not deprived of their due process rights because removal is “a great hardship”).
Notably, however, the Supreme Court has not provided much guidance on whether those held at the border are, in fact, considered "admitted" for immigration purposes and thus protected under the constitution. Historically, the extent of an alien's due process protection turned on whether the alien classified as "excludable" or "deportable."\textsuperscript{97} Aliens in exclusion proceedings were entitled to very little due process protection,\textsuperscript{98} while aliens in deportation proceedings were entitled to higher protection.\textsuperscript{99} Although, Supreme Court case law has somewhat softened this distinction. While the Court has expressed that an alien at a port of entry is not guaranteed traditional standards of fairness encompassed in due process,\textsuperscript{100} it has also recognized—primarily in the context of duration periods for detention—that "aliens' liberty interest is not diminished by their lack of a legal right to live at large."\textsuperscript{101} Asylum seekers likely stand on a different footing than other immigrants because asylum is available to a unique subset of immigrants: refugees who are physically present in the U.S. or at a port of entry.\textsuperscript{102} Indeed, this particular status places asylum seekers in a more privileged position as a matter of public policy.\textsuperscript{103}

Due process is a flexible concept, and courts examine procedural sufficiency in light of the facts before them.\textsuperscript{104} In the administrative context, a person subject to an agency action can invoke procedural due process protections if the government action implicates a liberty

\textsuperscript{97} Landon v. Plasencia, 459 U.S. 21, 25 (1982) ("The deportation hearing [was] the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing [was] the usual means of proceeding against an alien outside the United States seeking admission.").

\textsuperscript{98} United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (stating that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned").

\textsuperscript{99} Plasencia, 459 U.S. at 32 (explaining that a "continuously present resident alien is entitled to a fair hearing when threatened with deportation").

\textsuperscript{100} See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 209, 215 (1953) (holding that a legal permanent resident who was attempting to make an "entry" for immigration purposes could not invoke constitutional due process rights even though he was being held at Ellis Island).


\textsuperscript{103} Id. § 1225(b)(1)(A) (i) (subjecting an alien to removal except when the alien indicates an intention to apply for asylum).

\textsuperscript{104} Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
or property interest protected by the Fifth Amendment. Because aliens have a protected Fifth Amendment interest in applying for asylum, their inability to do so as a result of government interference puts into question the integrity of their constitutional right to procedural fairness.

Indeed, throughout southwest border sectors, immigration officers continue to violate immigrants’ constitutional right to due process by applying an unlawful, more burdensome legal standard to immigrants’ asylum claims than is statutorily permitted. By creating a windmill-deportation scheme, the expedited removal system prevents access to due process for many immigrants that have genuinely viable asylum claims who are apprehended at the southern border. USCIS asylum officers too often make negative credible fear determinations even when immigrants’ stories clearly demonstrate a “significant possibility” of persecution under one of the grounds for asylum. CBP officers also often fail to even refer asylum seekers to the USCIS asylum office when they express fear of persecution, and expression of fear is all that is necessary for referral. Moreover, many of these applicants are still within the one-year period allowed for applying for asylum. Consequently, the government robs asylum seekers of their due process rights when it hurls them into expedited removal proceedings notwithstanding their potentially valid asylum claims.

105. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (requiring, for example, “some form of hearing” before the government can deprive an individual of a property interest). Additionally, once due process is implicated, courts evaluate the sufficiency of the available procedures by balancing three factors: (1) the private interest in question; (2) the risk of erroneous deprivation under existing procedures and the probable value of additional procedures; and (3) the government’s interest in the action and proceeding. Id. at 335.

106. See supra note 96 and accompanying text.

107. See supra notes 45–51 and accompanying text (suggesting the application of this standard violates the INA).

108. See supra note 63 and accompanying text (noting that USCIS found that only about ten percent of detainees at the former Artesia detention center had “a credible fear”).

109. See supra notes 63–68 and accompanying text.

110. See supra notes 69–70 and accompanying text (suggesting that CBP’s disparate treatment of asylum seekers contributes to this problem).

111. 8 U.S.C. § 1225(b)(1)(A)(ii) (2012) (providing that if the alien indicates either an intention to apply for asylum or a fear of persecution, then the “officer shall refer the alien for [a credible fear] interview by an asylum officer”).

112. See id. § 1158(a)(2)(B) (requiring aliens to apply for asylum within one year of arriving in the United States).
2. The lack of access to counsel throughout the USCIS screening process contravenes asylum seekers’ constitutional right to counsel

Perhaps more concretely, expedited removal also undermines asylum seekers’ constitutional right to counsel. The scope of immigrants’ constitutional right to counsel in removal proceedings is a frequent topic of legal scholarship. The term “right to counsel” can refer to either (1) the right to counsel at one’s own expense under the Fifth Amendment or (2) the right of indigent persons to counsel at the government’s expense under the Sixth Amendment. Generally, courts and academics have found that the Fifth Amendment’s Due Process Clause provides aliens with a constitutional right to counsel at their own expense and that the Sixth Amendment right to appointed counsel for indigent persons applies only in criminal proceedings and not in civil proceedings such as removal. As such, courts have generally not recognized a


114. E.g., Lajuana Davis, Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings, 58 DRAKE L. REV. 123, 130–31 (2009) (arguing that “[w]hile there is currently no right to appointed counsel in immigration proceedings,” the INA grants individuals the right to counsel of their choice “[i]n any removal proceedings before an immigration judge, provided that the representation is at no cost to the government” (second alteration in original) (footnote omitted) (internal quotation marks omitted)).

115. The Sixth Amendment applies only to criminal defendants, but some scholars have argued that immigration proceedings are more criminal than civil in nature. For instance, the notion of “crimmigration,” or the “criminalization of immigration law,” is rapidly becoming a topic of controversy among scholars. See, e.g., Juliet P. Stumpf, Doing Time: Crimmigration Law and the Perils of Haste, 58 UCLA L. REV. 1705, 1726–27 (2011) (explaining that crimmigration occurs when “criminal and immigration law combine to expand the circumstances under which the government imposes immigration consequences for crimes, including expulsion, detention, or incarceration”); Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 AM. U. L. REV. 367, 376 (2006) (“Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct.”).
constitutional right to counsel at the government's expense in administrative removal proceedings.\footnote{116 See, e.g., Al Khouri v. Ashcroft, 362 F.3d 461, 464 (8th Cir. 2004) (acknowledging that an alien has a right to a fair proceeding even though he or she lacks a Sixth Amendment right to appointed counsel); Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003) (same). While no court has yet found that the Due Process Clause requires the appointment of counsel for an individual alien, the Supreme Court has undermined the position that a state will violate the Due Process Clause if it does not provide an indigent access to counsel in criminal proceedings. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).} An alien's right to counsel at her own expense\footnote{117 See Rosales v. Bureau of Immigration & Customs Enforcement, 426 F.3d 733, 736 (5th Cir. 2005) (per curiam) (affirming that "due process requires that [deportation] hearings be fundamentally fair"); Borges v. Gonzales, 402 F.3d 398, 408 (3d Cir. 2005) (asserting that due process of law applies in deportation hearings); Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1273 (11th Cir. 2005) (per curiam) ("It is well established in this Circuit that an alien in civil deportation proceedings... has the constitutional right under the Fifth Amendment Due Process Clause... to a fundamentally fair hearing... ").} has been described as "so fundamental to the proceeding's fairness that a denial of that right could rise to the level of fundamental unfairness."\footnote{118 While the Supreme Court has held that an alien needs to have "entered" the United States,\footnote{119 See, e.g., United States v. Barajas-Alvarado, 655 F.3d 1077, 1088 (9th Cir. 2011) (holding that Congress did not provide for a right to representation for non-admitted aliens, so the petitioner's lack of representation during a removal proceeding was not "a procedural error at all, let alone a due process violation").} even an alien who has run some fifty yards into the United States has entered the country\footnote{120 United States v. Raya-Vaca, 771 F.3d 1195, 1203 (9th Cir. 2014).} for purposes of constitutional due process.\footnote{121 Zadvydas, 533 U.S. at 693.} Once an alien enters the country, her "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."\footnote{122 See id. (explaining that due process applies to "persons within the United States," irrespective of whether they are in the country legally or illegally (internal quotation marks omitted)).} While the Supreme Court has held that an alien needs to have "entered" the United States,\footnote{119 See, e.g., United States v. Barajas-Alvarado, 655 F.3d 1077, 1088 (9th Cir. 2011) (holding that Congress did not provide for a right to representation for non-admitted aliens, so the petitioner's lack of representation during a removal proceeding was not "a procedural error at all, let alone a due process violation").} even an alien who has run some fifty yards into the United States has entered the country\footnote{120 United States v. Raya-Vaca, 771 F.3d 1195, 1203 (9th Cir. 2014).} for purposes of constitutional due process.\footnote{121 Zadvydas, 533 U.S. at 693.} Once an alien enters the country, her "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."\footnote{122 See id. (explaining that due process applies to "persons within the United States," irrespective of whether they are in the country legally or illegally (internal quotation marks omitted)).} Although asylum seekers enjoy this legal right to consult with an attorney once they enter the United States,\footnote{125 United States v. Charleswell, 456 F.3d 347, 360 (3d Cir. 2006).} many individuals at family detention centers are often unable to meet with an attorney prior to their credible fear interviews and immigration judge review
hearings. For instance, depending on the detention center, defense attorneys might be given only a few minutes to meet with their clients. At Artesia, moreover, the legal services list that CBP officers provided to detainees at times did not contain information about attorneys or organizations that were willing or capable of representing them. Although some volunteer immigration attorneys provided legal assistance to a small portion of the families at Artesia, many families at Artesia were unrepresented by counsel during critical stages of the asylum process. Additionally, family detention centers are often located in remote locations that are far from legal services offices. For instance, attorneys driving to the Artesia family detention center from El Paso, Texas had to take a six- to seven-hour round trip drive to see their clients. Consequently, the expedited removal system, which focuses more on executing hasty deportations than on fundamental fairness, has created a hostile environment where access to counsel is lacking.

III. RECOMMENDATIONS

The expedited removal system’s accelerated administration of immigration proceedings results in “assembly-line justice” that deprives migrants of statutory and regulatory rights and due process. Flaws in the screening process impede the proper identification of valid asylum seekers in the United States. Moreover, asylum seekers should not be subject to expedited removal at all because they are explicitly statutorily exempted from that process.

124. See Joanna Jacobbi Lydgate, Assembly-Line Justice: A Review of Operation Streamline, 98 CALIF. L. REV. 481, 533 (2012) (discussing the lack of effective assistance of counsel in southern border sectors); Declaration of Laura L. Lichter, AM. IMMIGR. COUNCIL (Aug. 20, 2014), available at http://americanimmigrationcouncil.org/sites/default/files/Declaration%20of%20Laura%20Lichter_FINAL.pdf (“[W]hat was particularly troubling regarding the legal process was that, other than a handful of attorneys, there were no legal resources to help these women and children through what is an incredibly challenging process. This complicated process of determining whether an individual has a ‘credible fear’ was made even more challenging given the speed with which the government was pushing families through it.”).

125. Lydgate, supra note 124, at 534.


127. See Lydgate, supra note 124, at 534 (examining the limitations of the attorney-client relationship resulting from the extreme time constraints of the process).

128. CAMPOS & FRIEDLAND, supra note 70, at 12.

129. See generally Lydgate, supra note 124, at 487 (internal quotation marks omitted).

Prosecutors should instead focus on channeling law enforcement resources toward prosecuting actual immigration offenders, particularly those border crossers who are apprehended with drugs or weapons or that may pose a security threat to the United States. In order to avoid running into problems with the statutory, regulatory, constitutional, and policy considerations mentioned previously, there are certain options worth considering.

A. The President of the United States Should Issue an Executive Order Adding the Protection of Asylum Seekers at U.S. Borders to the Priority List for Immigration Enforcement

The President of the United States should issue a new executive order reflecting the government’s commitment to protect all refugees with valid asylum claims in the United States. Previous executive actions reflect a political willingness to make exceptions in the general immigration laws and implement deferred action programs in circumstances that warrant them. However, these efforts have done nothing to correct the emerging crisis at the border today and neglect altogether the effect that expedited removal has had on immigrants with meritorious asylum claims. For instance, the Deferred Action for Childhood Arrivals program defers removal action for certain individuals who came to the United States as children and meet several guidelines. Additionally, in November 2014, the Obama Administration implemented a new deferred action program, the Deferred Action for Parents of Americans and Lawful Permanent Residents, which allows parents of U.S. citizens and lawful permanent residents to request deferred action and work authorization. The President should also exercise his prosecutorial discretion to implement a deferred action program for individuals

131. See Consideration of Deferred Action for Childhood Arrivals (DACA), U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca (last updated Mar. 10, 2015) (listing seven requirements that an applicant must satisfy to request relief under the Deferred Action for Childhood Arrivals (DACA) program, including that the individual came to the United States prior to reaching the age of sixteen and is not a convicted felon).

fleeing from persecution and who have valid asylum claims. The most recent executive action on immigration reform neglected to address this issue.

As opposed to waiting for congressional action on this matter, the President should exercise his power to provide asylum seekers with immediate relief from the abusive expedited removal system. The executive order would not need to implement new rules or procedures but should simply make it a priority for DHS to ensure the effective screening of all valid asylum claims as required under the INA. Such an executive order could serve as a political tool by which to make the government accountable for potential violations of the immigration laws.

B. USCIS and CBP Should Amend their Lesson Plan and Field Manual, Respectively, to More Accurately Reflect Statutory and Constitutional Requirements

USCIS and CBP should also introduce a new lesson plan and field manual, respectively, that are more consistent with the rules and procedures under the immigration statute and implementing regulations and the U.S. Constitution.

The current revised version of the USCIS lesson plan on credible fear is grossly misleading and does not accord with Supreme Court precedent requiring a much lower standard. The lesson plan asserts that the "significant possibility" standard for credible fear requires the applicant to demonstrate a "substantial and realistic possibility of succeeding" on the merits. However, this interpretation of "significant possibility" wrongly instructs asylum officers to impose a burden on applicants that effectively surpasses the well-founded fear standard. Asylum officers therefore apply a more rigorous credible fear standard than what is prescribed in the INA.

More specifically, throughout the text the lesson plan fails to sufficiently acknowledge that establishing eligibility for asylum by showing a well-founded fear is a relatively low threshold when compared to other burdens of proof such as preponderance of the evidence or beyond a reasonable doubt. In fact, the well-founded fear threshold requires only a ten percent likelihood of persecution.

133. See USCIS CREDIBLE FEAR LESSON PLAN, supra note 32, at 14-15 (internal quotation marks omitted).
134. In fact the lesson plan correctly points out that the credible fear screening is to "quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch . . . ." Id. at 11 (internal quotation marks omitted).
135. See supra text accompanying notes 61-62.
Additionally, the lesson plan says that the applicant “must produce sufficiently convincing evidence that establishes the facts of the case, and . . . those facts must meet the relevant legal standard.” This language suggests that each and every fact must be established by convincing evidence, which points to a preponderance standard which is improper for credible fear determinations. The lesson plan also misleadingly posits that a “mere possibility” standard is insufficient for determining credible fear, when in fact the Supreme Court has suggested that it is, in fact, sufficient. Consequently, DHS should require USCIS to revise its lesson plan on credible fear to more accurately reflect the correct statutory standard as interpreted by the Supreme Court and in relation to the higher well-founded fear standard for asylum claims.

Additionally, CBP should revise its internal IFM to instruct CBP officers to refer a case when an alien asserts a fear of persecution. While the IFM stipulated that inspectors should “err on the side of caution” and refer any questionable cases to the asylum officer, the current practice does not reflect this policy. CBP should also adopt a new set of directives to better guide CBP officers and to ensure they understand and comply with existing laws regarding the treatment of asylum seekers. CBP officers seem to be concerned primarily with deporting noncitizens as quickly as possible, overlooking the fact that they are responsible for identifying noncitizens with potential viable protection claims. An improved field manual would emphasize to CBP officers that they cannot evaluate individuals’ asylum claims themselves but must defer to the USCIS asylum office instead. As such, any field manual should clearly note CBP officers’ responsibility to refer those with fear to an asylum office.

137. Id. at 12.
138. INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) (stating that a reasonable possibility of persecution is sufficient to satisfy an asylum claim, which intuitively suggests that a mere possibility of persecution might satisfy a showing of credible fear).
139. See U.S. Customs & Border Prot., supra note 47 (providing links to the manual).
140. Id. The IFM has now been replaced by the Officer Reference Tool, which has not yet been made available to the public.
141. Id.
142. CBP officers have a statutory duty to acknowledge any indication that an immigrant may have a fear of returning to his or her home country. 8 U.S.C. § 1225(b)(1)(A) (2012).
C. Congress Should Amend the Immigration Statute to Provide More Robust Protections for Asylum Seekers

Congress should also amend the INA to provide more robust protections for asylum seekers by mandating that each person be afforded meaningful opportunity to apply for asylum in the United States. An emphasis on this privilege would reflect a longstanding history of aiding vulnerable individuals facing potential persecution in their home countries and would fall more in line with the United States's international obligations. Specifically, the United States has an obligation to comply with the UN Protocol Relating to the Status of Refugees, which sets the standard for the international protection of refugees and states that no country shall return a refugee to a country "where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion."\(^{143}\)

During the 113th Congress, Representative Lucille Roybal Allard introduced legislation that would have required CBP to improve short-term detention conditions and to establish humane practices for the repatriation of aliens at the border.\(^{144}\) Additionally, the U.S. Senate passed reform legislation during the 113th Congress that would have "improve[d] long-term detention conditions by requiring all facilities contracting with ICE to comply with ICE's immigration detention standards."\(^{145}\) That bill—the Border Security, Economic Opportunity, and Immigration Modernization Act\(^{146}\)—provided a broad-based proposal for reforming the U.S. immigration system. Had it passed, 

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144. See Protect Family Values at the Border Act, H.R. 3130, 113th Cong. § 4 (2013) (requiring CBP to establish standards for detention conditions, including, among other things, access to clean and safe surroundings, adequate lighting, adequate climate control, immediate mental and physical health screenings and treatment); see also Senator's New Bill Would Set Detention Standards at US Border Facilities, CENTER FOR INVESTIGATIVE REPORTING (Dec. 12, 2013) http://cironline.org/blog/post/senator's-new-bill-would-set-detention-standards-us-border-facilities-5653 (reporting on a bill sponsored by U.S. Senator Barbara Boxer that would have required DHS to establish more standards for inspection procedures, including to stop detaining immigrants apprehended near the border in overcrowded rooms, called "las hieleras," or "the freezers," with cold temperatures and insufficient food and water (internal quotation marks omitted)).
the Senate legislation would have, among other things, provided “particularly vulnerable” individuals subject to removal proceedings with appointed counsel. It would also have promoted fairness and compliance with the law regarding the treatment of certain vulnerable immigrants such as children and pregnant women.

Proposed legislation is unlikely to gain traction soon, however, because immigration reform is losing urgency in Congress. Nevertheless, with sixty-nine percent of voters favoring congressional action on immigration, a push to achieve meaningful changes in the immigration laws is bound to persist.

CONCLUSION

Too little attention has been paid to the significant flaws in the asylum process. Over the last several years, the Obama Administration claims to have undertaken an effort to transform the immigration enforcement system into one that focuses on national security, public safety, border security, and the integrity of the immigration system. Yet, the expedited removal system continues to violate the immigration laws and the U.S. Constitution when it is applied to certain noncitizens with meritorious asylum claims. This issue can be corrected only through a fair process allowing asylum cases to be heard in court. Getting there requires the referral and credible fear phases to operate fully and fairly and for its deficiencies to be recognized and remedied. It is a dangerous policy to sacrifice fundamental fairness and justice for political expediency, especially in matters of life or death. Consequently, to preserve the integrity of the U.S. immigration system, Congress must amend the INA to bolster protections for asylum seekers, and the executive branch must formally prioritize the aid of vulnerable asylum applicants and modify internal training guides to this end.

147. Id. § 3502(b) (internal quotation marks omitted).
150. November 2014 Prosecutorial Discretion Memo, supra note 17, at 2–4 (prioritizing DHS’s civil immigration enforcement goals, listing threats to national security and public safety as among the Department’s top priorities, and directing DHS personnel to prioritize their resources accordingly).