

## BARRICADING THE IMMIGRATION COURTS

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### INTRODUCTION

The nation's immigration courts are rapidly deteriorating. The American Bar Association has characterized the Department of Justice-run court system as “irredeemably dysfunctional” and “on the brink of collapse.”<sup>1</sup> Historic highs in the immigration court backlog,<sup>2</sup> coupled with the stridency of the federal government's immigration enforcement agenda, have prompted a series of government-led efforts to hasten the speed of adjudication in immigration court. These efforts include the imposition of strict case completion quotas,<sup>3</sup> attempts to severely reduce immigration judges' (“IJs”) authority to manage their dockets,<sup>4</sup> the elimination of in-person interpreters at early stages of the proceedings in some courts,<sup>5</sup> sudden and unexpected changes in court

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1. AM. BAR ASS'N., COMM'N ON IMMIGRATION, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM 2–3 (2019), [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/2019\\_reforming\\_the\\_immigration\\_system\\_volume\\_1.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf) [<http://perma.cc/KK8N-YSVB>].

2. See, e.g., Transactional Records Access Clearinghouse, *Immigration Court's Active Backlog Surpasses One Million*, TRAC REPORTS (Sept. 18, 2019), <https://trac.syr.edu/immigration/reports/574> [<http://perma.cc/6Z78-43GH>]. The scope of that backlog arguably undermines the federal government's immigration enforcement agenda. Nick Miroff & Maria Sachetti, *Burgeoning Court Backlog of More than 850,000 Cases Undercuts Trump Immigration agenda*, WASH. POST (May 1, 2019), [https://www.washingtonpost.com/immigration/burgeoning-court-backlog-of-more-than-850000-cases-undercuts-trump-immigration-agenda/2019/05/01/09c0b84a-6b69-11e9-a66d-a82d3f3d96d5\\_story.html](https://www.washingtonpost.com/immigration/burgeoning-court-backlog-of-more-than-850000-cases-undercuts-trump-immigration-agenda/2019/05/01/09c0b84a-6b69-11e9-a66d-a82d3f3d96d5_story.html) [<http://perma.cc/4CZ7-P7QY>].

3. See Liz Robbins, *In Immigration Court, It is Judges v. Justice Department*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/nyregion/nyc-immigration-judges-courts.html> [<http://perma.cc/FS6W-8659>] (describing performance dashboard used to monitor IJs' compliance with a quota of 800 case completions per year).

4. See, e.g., *Matter of L-A-B-R-*, 27 I&N Dec. 405, 412–13 (A.G. 2018) (narrowing the “good cause” standard for granting continuances in immigration court); *Matter of S-O-G-* and *F-D-B*, 27 I&N Dec. 462, 463 (A.G. 2018) (narrowing discretion of IJ to terminate removal proceedings); *Matter of Castro-Tum*, 27 I&N Dec. 271, 273 (A.G. 2018) (finding IJs lack general authority to administratively close cases). *But see* *Romero v. Barr*, 937 F.3d 282, 297 (4th Cir. 2019) (vacating *Castro-Tum*).

5. See Tal Kopan, *Confusion, Delays as Videos Replace Interpreters at Immigrants' Hearings*, S.F. CHRON. (Sept. 5, 2019), <https://www.sfchronicle.com/politics/article/Confusion->

dockets,<sup>6</sup> and an influx of newly hired IJs.<sup>7</sup> As a result, these government-led efforts have collectively pushed the immigration courts into new territory. The so-called Migrant Protection Protocols, which have required many asylum seekers to remain physically in Mexico for the duration of their proceedings, have effected radical shifts in our understanding of immigration court adjudication while imposing high human costs.<sup>8</sup> Amidst these changes, longstanding structural deficiencies associated with the immigration courts—decision-making disparities across IJs and courts, the absence of counsel, limited resources, and the excessive use of detention, to name a few—have persisted and exacerbated.<sup>9</sup> Indeed, the influence of the current Administration’s political agenda over immigration court adjudication implicates a host of values long understood as central to administrative law.<sup>10</sup>

But focusing exclusively on the immigration courts reveals only

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delays-as-videos-replace-interpreters-14414627.php [https://perma.cc/X9L2-8P6M] (describing the announcement of the policy in June, followed by its implementation in four cities, and the resulting confusion and delay).

6. See INNOVATION LAW LAB & S. POVERTY LAW CTR., THE ATTORNEY GENERAL’S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 14–15 (2019) (assessing the negative impact surrounding docket changes in immigration courts) [hereinafter *The Attorney General’s Judges*].

7. See Molly O’Toole, *Justice Department Touts New Immigration Judges Amid Struggle to Reduce Backlog*, L.A. TIMES (Mar. 15, 2019), <https://www.latimes.com/politics/la-na-pol-trump-immigration-judges-backlog-20190315-story.html> [https://perma.cc/C9NF-JHEU] (“The Trump administration has hired more immigration judges in two years than was done in the previous seven years . . .”).

8. See Alicia A. Caldwell, *Trump’s Return-to-Mexico Policy Overwhelms Immigration Courts*, WALL ST. J. (Sept. 5, 2019), <https://www.wsj.com/articles/trumps-return-to-mexico-policy-overwhelms-immigration-courts-11567684800> [https://perma.cc/H995-ZPXD] (explaining that, under the Migrant Protection Protocol program, “migrants who enter the U.S. illegally . . . [are sent] to Mexico to await future American court dates”); see also Jonathan Blitzer, *How the U.S. Asylum System is Keeping Migrants at Risk in Mexico*, NEW YORKER (Oct. 1, 2019), <https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico> [https://perma.cc/7L2H-ACMW]. The Migrant Protection Protocols, also known as the Remain in Mexico policy, are a deep, fundamental change in the immigration courts. Because cases proceeding under the Remain in Mexico policy nonetheless appear before IJs, the policy falls outside the scope of this Essay.

9. See generally *The Attorney General’s Judges*, *supra* note 6 (describing a range of problems in the immigration courts).

10. Catherine Y. Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1, 7 (2018) (discussing impact of the executive branch influence’s on immigration court as implicating “individual fairness, democratic accountability, accuracy, efficiency, and fidelity to separation-of-powers principles”). Catherine Kim and Amy Semet’s empirical study of immigration court adjudication suggests that IJs are more likely to order removal under the Trump Administration than in prior administrations, irrespective of which President originally appointed the IJ. Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, 108 GEO. L. J. (forthcoming 2020).

part of the urgency, and tells only part of the story, associated with how deportation adjudication is unfolding in the Trump era. This Essay pivots away from the state of the immigration courts and instead focuses on multiple executive branch efforts that prevent noncitizens from accessing those courts altogether.<sup>11</sup> In doing so, the Essay reveals even greater dysfunction in the current state of immigration adjudication than commonly appreciated, as well as the heightened importance of reform efforts for the future.

The use of deportation mechanisms that bypass the modest procedural requirements associated with the immigration courts is not a new phenomenon.<sup>12</sup> For well over a decade, the executive branch has steadily expanded its use of what I have called “shadow removals” by exercising its discretion to place more noncitizens into procedurally truncated proceedings without effecting major changes in law or policy.<sup>13</sup> Today, the executive branch is using a wide array of tools—unwritten practices, revisions of substantive asylum law through regulation, agency guidance to officers, and direct expansion of applicable rules—to effectively block access to the immigration courts. The Administration’s efforts to prevent adjudication in the immigration courts thus resemble a barricade: an improvised barrier, subject to dismantling and enjoining, and yet still effective in creating short-term obstacles amidst the chaos.

This Essay identifies four categories of activity that together reflect the rapidly developing trend referred to here as the barricading of the immigration courts. Each of these developments intersects in

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11. Professor Fatma Marouf has examined federal government policies and practices that prevent immigration adjudication as part of a project that examines multiple forms of executive branch overreaching in immigration adjudication, both in and outside of immigration court. See Fatma Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TULANE L. REV. 707, 760–76 (2019) (treating metering, the criminal prosecution of asylum-seekers, and family separation practices as forms of preventing adjudication). This Essay builds upon Professor Marouf’s article but does not include deterrence policies aimed at discouraging access to the immigration courts through the maximization of human suffering or the imposition of additional legal sanctions for entry to the US as part of its description of barricading, and instead focuses on governmental policies or practices that either literally or legally foreclose a person’s ability to have their case adjudicated before an immigration judge.

12. See Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 183–85 (2017) [hereinafter Koh, *Removal in Shadows*]; Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337, 340–41 (2018) [hereinafter Koh, *When Shadow Removals Collide*].

13. See generally Koh, *Removal in Shadows*, *supra* note 12 (describing expansions in use of removals that bypass the immigration courts, namely expedited removal, reinstatement, and administrative removal as well as stipulated removal and in absentia removal orders, which involve nominal immigration judge involvement).

some way with expedited removal (the process governing persons who lack entry documents at the border), which allows the government to formally issue removal orders with minimal process or immigration court participation. First, through an informal metering system in Mexico, U.S. border officials physically prevent individuals seeking asylum from entering ports of entry. Second, the Administration has issued nearly wholesale bans on asylum eligibility via regulation, with immediate impact on government officers conducting credible fear interviews (“CFIs”) at the border, thereby facilitating the entry of expedited removal orders. In a third category also amounting to an indirect expansion of expedited removal, DHS has pursued subregulatory changes to the CFI process, both by issuing intra-agency guidance related to CFIs and through organizational reforms to allow Customs and Border Patrol (“CBP”) officers to conduct CFIs. Finally, the Administration has attempted to directly expand its regulatory authority to use expedited removal against any person throughout the United States who cannot prove their physical presence in the country for the prior two years.

To be sure, many of the developments described here have purposes and ends distinct from preventing access to the immigration courts. The changes to asylum reflect only a portion of an expansive series of changes aimed at drastically revising the law of asylum. The rules and practices discussed in the Essay also have a strong racial component, insofar as they target and impact immigrants of color, particularly from Central America and Mexico, and also contribute to ongoing conversations about the criminalization of multiple forms of migration. The impact on immigration court adjudication might constitute a consequence, but not necessarily the primary motivation associated with a given policy. Nevertheless, the impact on the immigration courts remains an essential component of the developments discussed here and merits our attention.

The Essay proceeds as follows. Part I provides necessary background on expedited removal, the cornerstone of the executive branch’s barricading of the immigration courts. Part II discusses four types of barricading currently underway, as well as the legal challenges they have invoked, and constitutes the bulk of the Essay. Given that many of the developments discussed here have taken place in July 2019 or later and are the subject of ongoing federal court litigation, it remains too early to accurately predict the extensiveness of the barricading. Indeed, a number of the policy moves described here also illustrate the prominence of the federal judiciary in shaping the implementation of federal immigration policy. Part III briefly analyzes

the implications of the barricading of the immigration courts for our understanding of contemporary immigration adjudication, judicial review, and future-looking immigration reform and advocacy.

### I. EXPEDITED REMOVAL AND CREDIBLE FEAR: REGULATING ACCESS TO THE IMMIGRATION COURTS

This Part briefly sets forth the legal landscape governing expedited removal and the credible fear process. Expedited removal was enacted into statute in 1996 as part of sweeping immigration legislation that enhanced sanctions for immigration violations, restricted relief from removal, and reduced procedural rights for noncitizens facing removal.<sup>14</sup> Expedited removal allows border officials to directly issue removal orders against persons who lack proper entry documents and arrive at the border. This occurs through an informal encounter that can take minutes to complete.<sup>15</sup> Unlike immigration court proceedings presided over by IJs and subject to modest procedural protections described in § 240 of the Immigration and Nationality Act (“INA”),<sup>16</sup> expedited removal takes place under a different statutory section and with significantly fewer procedural safeguards.<sup>17</sup> Since 1996, DHS has expanded its regulatory authority to use expedited removal steadily and has also exercised its discretion to place more people into expedited removal.<sup>18</sup> By fiscal year 2016, expedited removals constituted more than 40 percent of all removals.<sup>19</sup> While the most heavily utilized, expedited removal is not the only tool that allows the government to deport people with minimal process and is part of a

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14. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254(d) (2018)); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 div. C, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1231 (2018)).

15. See RANDY CAPPS, FAYE HIPSMAN & DORIS MESSNER, MIGRATION POL’Y INST., ADVANCES IN U.S.-MEXICO BORDER ENFORCEMENT: A REVIEW OF THE CONSEQUENCES DELIVERY SYSTEM 3 (2017), <https://www.migrationpolicy.org/research/advances-us-mexico-border-enforcement-review-consequence-delivery-system> [https://perma.cc/ZK7S-85DV] (stating ninety minutes as the average time to complete expedited removal).

16. See 8 U.S.C. § 1229a(b)(4)(A) (2018) (providing right to counsel of own choosing at no expense to the Government); § 1229a(b)(4)(B) (affording opportunity to examine evidence and cross-examine witnesses); § 1229a(b)(4)(C) (requiring basic recordkeeping).

17. 8 U.S.C. § 1225(c); see also Koh, *Removal in Shadows*, *supra* note 12, at 195–97 (describing statutory and regulatory framework governing expedited removal).

18. See Koh, *Removal in Shadows*, *supra* note 12, at 197–98 (discussing expansion of expedited removal through regulation).

19. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2016, at 8 (2017), [https://www.dhs.gov/sites/default/files/publications/Enforcement\\_Actions\\_2016.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf) [https://perma.cc/4Q88-VE9T].

broader constellation of removal procedures that bypass the immigration courts, all of which have risen over the past two decades.<sup>20</sup>

Under the legal framework in place for most of expedited removal's history, CFIs constitute the primary defense to expedited removal orders. CBP officials, who initially process individuals who lack entry documents at the border, must ask whether they fear return to their home countries.<sup>21</sup> If the person answers affirmatively, they must be referred for a CFI.<sup>22</sup> CFIs are informal, nonadversarial adjudications in which an asylum officer—an employee of United States Citizenship and Immigration Services (“USCIS”), the benefits-adjudicating agency within DHS—determines whether the person has a credible fear of returning to her home country. While credible fear assessments do not intend to serve as full-fledged asylum adjudications, the statutory definition of a “credible fear of persecution” is “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.”<sup>23</sup> The legal standards governing asylum can thus directly impact the outcome of CFIs.

DHS statistics suggest that significant numbers of individuals—approximately 75 percent in fiscal year 2018—who are referred for CFIs ultimately receive positive dispositions and are thus permitted to apply for asylum before the immigration courts.<sup>24</sup> Trump Administration officials have seized upon this statistic to suggest that something is amiss in the system, implying that too many unmeritorious claims result in positive credible fear findings, particularly since the overall number of people who ultimately receive asylum is lower.<sup>25</sup> Although evidence remains scant, it appears that the barricading has been effective. For example, in a complaint filed in federal district court on September 16, 2019, plaintiffs alleged that credible fear approval rates at one Texas facility dropped from a 97 percent approval

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20. See Koh, *Removal in Shadows*, *supra* note 12, at 197–98 (describing types of summary removal orders).

21. § 1225(b)(1)(A)(i).

22. § 1225(b)(1)(A)(ii).

23. § 1225(b)(1)(B)(v).

24. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,839 (July 16, 2019).

25. See, e.g., Jeff Sessions, Att’y Gen., U.S. Dep’t of Justice, *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review* (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> [https://perma.cc/LSH3-587H]; see also *infra* notes 50–60 and accompanying text.

rate to fewer than 10 percent from mid-July 2019 to mid-September 2019.<sup>26</sup>

But the fact that many people referred for CFIs went on to receive positive credible fear determinations does not mean that the expedited removal process, either before or after the 2016 election, accurately screens people with valid claims of persecution for asylum. Numerous studies of expedited removal since its inception have led to longstanding concerns that initial border screenings conducted by CBP are rife with error for failing to properly refer people for CFIs in the first instance, meaning that many are turned away at the outset of the multistep process.<sup>27</sup> The experience of border screenings points to widespread structural failures on the part of CBP in complying with agency requirements and also illustrates the stark differences in agency culture between CBP (which handles initial border screenings) and USCIS (which has traditionally conducted CFIs).<sup>28</sup> In some cases, the disregard for truth exhibited by border officers tasked with conducting initial screenings and preparing the records of sworn statements would, as one journalist put it, “be laughable, if the consequences weren’t so dire.”<sup>29</sup> In other cases, trauma compounded by detaining people in abysmal conditions, including days of detention in ice-cold rooms and caged fencing, deprivation of sleep and hygiene, and separation from family members, prevents people with valid claims from articulating their fear.<sup>30</sup>

No administrative, much less judicial, review of the border decisions that operate as gatekeepers to CFIs exists. Even at the

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26. Complaint for Declaratory and Injunctive Relief at 2, *M.M.V. v. Barr*, No. 1:19-cv-2773 (D.D.C. filed Sept. 16, 2019) [hereinafter *M.M.V. Complaint*].

27. U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 19 (2016); see also Kari Hong & Stephen Manning, *Getting it Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673, 691–92 (2018) (summarizing USCIRF studies that showcase CBP failures); Lindsay Harris, *Withholding Protection*, 50 COLUM. HUM. RTS. L. REV. 1, 32–37 (2019) (describing abuse and error during expedited removal).

28. See John Washington, *Bad Information: Border Patrol Arrest Reports are Full of Bad Information that can Sabotage Asylum Claims*, INTERCEPT (Aug. 11, 2019), <https://theintercept.com/2019/08/11/border-patrol-asylum-claim> [https://perma.cc/5N22-8EUG] (describing errors in border patrol summaries of interviews, such as repeatedly indicating that babies and toddlers had come to the U.S. to work). See generally Brief of Amici Curiae Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners, *Hernandez v. Mesa*, No. 17-1678 (U.S. filed Aug. 9, 2019), 2019 WL 3854465 (linking excessive use of force amongst CBP agents to increased militarization of agency, failure to providing adequate screening and training, and history of corruption and misconduct amongst Border Patrol).

29. Washington, *supra* note 28.

30. *Id.*

credible fear stage, the playing field is not even. Most individuals appear at CFIs without the benefit of counsel, despite studies suggesting that the existence of counsel has a tremendous impact on the likelihood of being granted a positive credible fear determination.<sup>31</sup> And while IJ and supervisory review of negative credible fear denials is available,<sup>32</sup> a number of courts have read the statute to preclude further federal court review of credible fear determinations.<sup>33</sup>

Despite the long list of structural problems in immigration court, some noncitizens receive relief. In fiscal year 2018, 38 percent of all asylum cases presented in the immigration courts were granted, leading to asylum for 13,248 people.<sup>34</sup> The 2018 numbers reflect the lowest cumulative asylum grant rate for the immigration courts,<sup>35</sup> and severe disparities across immigration courts and individual judges persist.<sup>36</sup> Despite the decreasing likelihood of being granted asylum and the systemic deficiencies in the process, for many, the immigration courts still represent hope.

## II. BARRICADING THE IMMIGRATION COURTS

This Part identifies four categories of agency action that reflect the executive branch's attempts to barricade the immigration courts. The metering/turnback policy involves physically preventing people from accessing the entry points to the immigration court system. The remaining three—the asylum bans, subregulatory changes to credible

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31. See Hong & Manning, *supra* note 27, at 699–701 (describing impact of attorney representation in credible fear interviews as leading to decrease in removal rates by 97 to 99 percent); Stephen Manning & Juliet Stumpf, *Big Immigration Law*, 57 U.C. DAVIS L. REV. 407, 431 (2018) (describing the impact of access to counsel during the credible fear process).

32. See generally Katherine Shattuck, *Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 WASH. L. REV. 459 (2018) (discussing error during credible fear process and availability of IJ and supervisory review of credible fear decisions).

33. See Koh, *When Shadow Removals Collide*, *supra* note 12, at 361–67 (discussing judicial review provisions). But see *infra* notes 119–19 and accompanying text (discussing pending Supreme Court consideration of the constitutionality of statutory restrictions on habeas review in the expedited removal context in *Thuraissigiam v. Dep't of Homeland Sec'y*, 917 F.3d 1097 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 427 (2019)).

34. U.S. DEP'T OF JUSTICE, STATISTICS YEARBOOK FISCAL YEAR 2018 26–27 (2018), <https://www.justice.gov/eoir/file/1198896/download> [<https://perma.cc/R5SS-UGK9>] [hereinafter *2018 Statistical Yearbook*].

35. Transactional Records Access Clearinghouse, *Asylum Decisions and Denials Jump in 2018*, TRAC REPORTS (Nov. 29, 2018), <https://trac.syr.edu/immigration/reports/539> [<https://perma.cc/M54K-6K5R>].

36. 2018 Statistical Yearbook, *supra* note 34, at 28 (displaying asylum decision rates by immigration court, with two percent grant rates in Atlanta, GA, El Paso, TX and Harlingen, TX).



fear, and the expedited removal regulation—amount to indirect and direct expansions of expedited removal.

*A. Metering/Turnback Policy*

The Immigration and Nationality Act plainly provides any person “in the United States” with the right to seek asylum, even if they lack prior permission to enter the country and irrespective of their manner of entry or duration of physical presence on U.S. soil.<sup>37</sup> Since about 2015, an increasing number of people have sought asylum along the U.S.–Mexico border, especially from three Central American countries—El Salvador, Honduras, and Guatemala—resulting from push factors that include rampant gang violence and domestic violence as well as widespread poverty and climate change. Individuals from far-flung countries, too, have made dangerous journeys across multiple countries to seek asylum along the southern border.

Under a practice known as “metering” or the “turnback policy,” the number of people permitted to request asylum at official ports of entry is severely limited on a daily basis. Since roughly 2016, U.S. border officials have collaborated with Mexican officials to require that migrants wishing to seek asylum first secure an appointment with Grupos Beta, an office within the Mexican government’s immigration agency, at which point they receive a number.<sup>38</sup> Waiting follows, often for weeks, for their number to approach the port of entry to become valid.<sup>39</sup> To enforce the turnback policy, U.S. border officials stop people at the international line between Mexico and the U.S. in front of the port of entry station (before they are present, in the words of the statute, “in the United States”).<sup>40</sup> According to advocates, U.S. officials have used a range of threats, force, coercion and other tactics to prohibit individuals who lack valid numbers from physically entering

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37. 8 U.S.C. § 1158(a)(1) (2018).

38. B. SHAW DRAKE, ELEANOR ACER & OLGA BYRNE, HUMAN RIGHTS FIRST, CROSSING THE LINE: U.S. BORDER AGENTS ILLEGALLY REJECT ASYLUM SEEKERS 8–10 (2017), <https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-linereport.pdf> [<https://perma.cc/AA2H-EKB2>].

39. Caitlin Dickerson & Miriam Jordan, ‘No Asylum Here’: Some Say U.S. Border Agents Rejected Them, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/2017/05/03/us/asylum-border-customs.html> [<https://perma.cc/E4RD-F45B>]; Joshua Partlow, U.S. Border Officials Are Illegally Turning Away Asylum Seekers, Critics Say, WASH. POST (Jan. 16, 2017), [https://www.washingtonpost.com/world/the\\_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450\\_story.html](https://www.washingtonpost.com/world/the_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450_story.html) [<https://perma.cc/PGY8-EDPY>].

40. § 1158(a)(1).

the port-of-entry premises owned by the U.S. government.<sup>41</sup> Metering has created a visible human rights crisis in various border cities in Mexico, particularly Tijuana, where the risk of violence is high and available protections from Mexican authorities minimal. Instances of murder, kidnapping, and other atrocities have emerged.<sup>42</sup>

U.S. officials have both denied the existence, and praised the implementation, of metering. Metering does not exist in any statute, regulation, or agency-wide written policy. In July 2017, the nonprofit organization *Al Otro Lado* together with a half dozen individuals subjected to metering filed a lawsuit challenging the policy, alleging statutory, Administrative Procedure Act (“APA”), and constitutional violations.<sup>43</sup> The first two years of the litigation focused to a considerable degree on the question of whether an official metering policy even existed, or whether it amounted to “uncoordinated and unauthorized actions by a handful of individual officers,” as the government claimed in its filings.<sup>44</sup> But shortly after DOJ attorneys alleged the nonexistence of a turnback policy, top agency officials and the President informally sanctioned—and even celebrated—the metering system in public statements supporting the practice of strictly regulating the numbers of migrants permitted to request asylum at ports of entry on a daily basis.<sup>45</sup> A DHS Office of Inspector General

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41. See DRAKE ET AL., *supra* note 38, at 11–12.

42. See generally Josiah Heyman & Jeremy Slack, *Blockading Asylum Seekers at Ports of Entry at the US-Mexico Border Puts Them at Increased Risk of Exploitation, Violence, and Death*, CTR. FOR MIGRATION STUD. (June 25, 2018), [http://cmsny.org/publications/heyman-slack-asylum-poe/#\\_ednref11.pdf](http://cmsny.org/publications/heyman-slack-asylum-poe/#_ednref11.pdf) [<https://perma.cc/3YY2-PW2Y>] (assessing consequences of metering); see also DRAKE ET AL., *supra* note 38, at 18–20 (describing the U.S. government’s legal violations in treatment of individuals seeking asylum).

43. See Complaint, *Al Otro Lado, Inc. v. Kelly*, 2017 WL 10592130, at \*43–48 (C.D. Cal. July 12, 2017); see also HILLEL R. SMITH, CONG. RES. SERV., THE DEPARTMENT OF HOMELAND SECURITY’S REPORTED “METERING” POLICY: LEGAL ISSUES (2019), <https://fas.org/sgp/crs/homsec/LSB10295.pdf> [<https://perma.cc/3YY2-PW2Y>] (discussing constitutional and statutory arguments and *Al Otro Lado* litigation).

44. Defendants’ Notice of Motion and Motion to Dismiss Under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) at 17, *Al Otro Lado, Inc. v. Duke*, No. 2:17-cv-5111 (C.D. Cal. Oct. 12, 2017); *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1318–21 (S.D. Cal. 2018) (granting government’s first motion to dismiss, contending that the allegations failed to show final agency action as required under the APA).

45. First Amended Complaint for Declaratory and Injunctive Relief, *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284 (S.D. Cal. 2018) (No. 3:17-cv-02366) [hereinafter *Al Otro Lado* First Amended Complaint]. The Complaint described the comments of then-DHS Secretary Kirstjen Nielsen stating that “we are ‘metering,’ which means that if we don’t have the resources to let them in on a particular day, then they are going to have to come back.” *Id.* at \*34 (citing *Secretary Nielsen Talks Immigration, Relationship with Trump*, FOX NEWS (May 15, 2018), <https://video.foxnews.com/v/5785340898001/?#sp=showclips> [<https://perma.cc/GG3U-T6ET>]). This sentiment was also expressed by President Trump in several tweets. See, e.g., Donald J.

report also found evidence of metering,<sup>46</sup> as did discovery in the *Al Otro Lado* litigation.<sup>47</sup> The primary rationale set forth by high-level agency officials for the turnback policy was a lack of capacity at ports of entry, a rationale that the *Al Otro Lado* plaintiffs argued was pretextual and factually unsupported.<sup>48</sup>

The turnback policy represents the most physically tangible example of the executive branch barricading the immigration courts. Metering physically prevents individuals from stepping foot into the ports of entry that enable them to eventually access the immigration courts. But the turnback policy is arguably the least procedurally robust development discussed in this Essay. The absence of statutory, regulatory or even subregulatory written authority for metering, coupled with the fact that the courts have had to expend significant time determining whether metering even exists as a policy—much less assess its legality—represents a shift in how the executive branch has typically exploited its ability to bypass the immigration courts. In effect, the metering policy reflects a deeply substantive revision of the asylum laws through its novel reading of the asylum statute as empowering state officials to prevent people from requesting asylum so long as they have not yet entered a port of entry. But metering is also accompanied by stark procedural flimsiness, resulting in decreased accountability, a minimal record of agency deliberation, and perceptions of illegitimacy.

In an order issued on July 29, 2019, the district court found sufficient evidence of the turnback policy to meet the APA requirement of final agency action, among other rulings that permitted the litigation to proceed past the motion to dismiss stage.<sup>49</sup> As the legal challenge to metering proceeds, the practice continues.

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Trump (@realDonaldTrump), TWITTER (June 30, 2018, 12:44 PM), <https://twitter.com/realdonaldtrump/status/1013146187510243328?lang=en> [<https://perma.cc/T8N3-F6U8>] (“When people come into our country illegally, we must IMMEDIATELY escort them back without going through years of legal maneuvering.”).

46. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., SPECIAL REVIEW: INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION UNDER ZERO TOLERANCE POLICY 4–7 (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> [<https://perma.cc/3YZX-6G3H>].

47. See *Al Otro Lado* First Amended Complaint, *supra* note 45, at \*28–32 (describing “[e]vidence of a Turnback Policy”).

48. *Id.* at \*39.

49. Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss the Second Amended Complaint at 53–54, *Al Otro Lado, Inc. v. McAlenen*, 394 F. Supp. 3d 1168 (S.D. Cal. 2019).

*B. Indirectly Expanding Expedited Removal Through Substantive Asylum Eligibility*

The Trump Administration has attempted to rewrite the eligibility criteria for asylum through the enactment of two “asylum bans,” both of which seek to restrict asylum for tremendous swaths of the current asylum-seeking population. Rewriting the substantive rules governing asylum eligibility is a second form of barricading. While more restrictive asylum eligibility standards have obvious implications for the actual adjudication of asylum applications, they also have the potential to directly and quite drastically impact the adjudication of CFIs.<sup>50</sup> Although the asylum bans were issued at different times and with distinct criteria, they share numerous similarities with respect to procedure, purpose, litigation challenges, and impact on preventing access to the immigration courts. But vastly different litigation outcomes followed. The first asylum ban never went into effect and has been invalidated by a federal district court.<sup>51</sup> The second asylum ban has been implemented nationally following the Supreme Court’s stay of a national injunction.<sup>52</sup>

Both asylum bans were issued as interim final rules, published in the Federal Register, and deemed persons categorically ineligible for asylum not based on the nature of the persecution suffered, but on their travel and entry patterns to the U.S. The first asylum ban, published on November 9, 2018, imposed a mandatory bar to asylum for any persons seeking to enter the U.S. outside a designated port of entry.<sup>53</sup> When

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50. As noted earlier, a positive credible fear assessment is the main avenue by which a person can prevent the entry of an expedited removal order. *See supra* note 25 and accompanying text.

51. *See infra* notes 64–68 and accompanying text.

52. *See infra* notes 75–79 and accompanying text. Attorneys General have also used their power to certify cases from the BIA to themselves for the issuance of precedential administrative decisions to rewrite asylum standards. *See* Matter of A-B-, 27 I&N Dec. 316, 320 (A.G. 2018) (restricting asylum eligibility for individuals fleeing persecution based on private criminal activity); Matter of L-E-A-, 27 I&N Dec. 581, 582 (A.G. 2019) (restricting asylum eligibility for individuals fleeing persecution based on membership in families). A federal district court enjoined the implementation of a policy memorandum that sought to instruct immigration officers to apply *A-B-* during the credible fear stage, even despite conflicting circuit court authority. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 140–41 (D.D.C. 2018). *A-B-* and *L-E-A-* are additional examples of the barricading of the immigration courts.

53. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,939 (Nov. 9, 2018) (barring asylum to anyone in violation of Presidential Proclamation); Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661, 57,663 (Nov. 15, 2018) (temporarily suspending entry to any non-U.S. citizen or nonlawful permanent resident seeking to enter outside ports of entry).

combined with the practice of metering, the first asylum ban amounted to a wholesale prohibition on the grant of asylum to individuals seeking entry along the southern border. The second asylum ban was issued eight months later, on July 16, 2019. The rule, also known as the third country asylum ban, barred from asylum any persons who traveled through Mexico or another third country and failed to apply for and receive a final decision on asylum there.<sup>54</sup> Like the first asylum ban, the second targeted the vast majority of asylum seekers, most of whom travel through countries that lack the infrastructure for processing domestic asylum claims.

While obviously a ban on the grant of asylum, the immediate aim of both asylum bans was to transform the expedited removal and credible fear process, thereby preventing individuals seeking asylum from reaching the immigration courts at all. The Federal Register clearly stated the Administration's plan to rely on the first asylum ban in order to mandate negative credible fear findings and boost the number of expedited removals.<sup>55</sup> The rule change amended existing regulations governing the credible-fear process to direct asylum officers to issue negative CFIs for persons subject to the bar.<sup>56</sup> As the Preamble explained, "the application of the rule's bar to eligibility for asylum in the credible-fear screening process . . . would reduce the number of cases referred to" immigration court proceedings.<sup>57</sup> The second asylum ban also cited similar concerns related to the backlog in the immigration courts, and sought to immediately impact credible fear assessments, thereby allowing officials to prevent people from presenting their asylum claims in immigration court.<sup>58</sup> It is worth acknowledging that neither asylum ban categorically bars persons from accessing the immigration courts to present claims for withholding of removal or under the Convention Against Torture.<sup>59</sup> However, in order

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54. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019).

55. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. at 55,936 ("[T]his rule ensures that asylum officers and immigration judges account for such aliens' ineligibility within the expedited-removal process, so that aliens subject to the bar will be processed swiftly.").

56. 8 C.F.R. § 208.30(e)(5)(ii) (2019).

57. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. at 55,947. The announcement also noted that "determining whether an alien is subject to a suspension of entry proclamation" would ordinarily be a straightforward analysis. *Id.* The announcement also cited increases in the number of credible fear requests made, and discussed with disapproval the rate at which asylum officers issued positive credible fear findings. *Id.* at 55,934.

58. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,830–31.

59. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures

to reach immigration court adjudication of a withholding or Convention Against Torture claim, the person must first pass a reasonable fear interview (“RFI”), which involves a higher evidentiary and testimonial threshold.<sup>60</sup>

Both asylum bans were issued without notice and comment and cited the foreign affairs and good cause exemptions to informal rulemaking under the APA.<sup>61</sup> As for good cause, both announcements argued that providing notice of the rule without immediate implementation would incentivize migrants to seek entry prior to the rule’s implementation and repeatedly made reference to a possible “surge” of migration and “influx of aliens.”<sup>62</sup> With respect to foreign affairs, both rules claimed that the rule would implicate the U.S.’s relationship with Mexico and other countries.<sup>63</sup>

The litigation challenges to the asylum bans resulted in similar trajectories but different outcomes, at least as of the writing of this Essay. The federal court litigation also reinforces the hit-or-miss, legally tenuous nature of government policy with respect to barricading immigration court access. Organizational plaintiffs East Bay Sanctuary Covenant, Al Otro Lado, and several other non-profits serving asylum seekers immediately challenged “Asylum Ban 1.0” in the Northern District of California. Federal district judge Jon Tigar issued both a temporary restraining order and preliminary injunction preventing the ban from going into effect in *East Bay Sanctuary Covenant v. Trump*,<sup>64</sup> citing the likelihood that plaintiffs would prevail on the statutory and APA claims.<sup>65</sup> Eight months later, federal district court judge Randolph Moss of the District of Columbia vacated the rule entirely in

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for Protection Claims, 83 Fed. Reg. at 55,938–39; Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,837.

60. See 8 C.F.R. § 208.31(c) (describing standard for reasonable fear interview); see also ASYLUM SEEKER ADVOCACY PROJECT, VINDICATING THE RIGHTS OF ASYLUM SEEKERS AT THE BORDER AND BEYOND 13–15 (2018), <https://asylumadvocacy.org/wp-content/uploads/2018/06/ASAP-Expedited-Removal-Guide.pdf> [<https://perma.cc/UFT7-27DU>] (describing differences between credible fear and reasonable fear standards).

61. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. at 55,950; Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,841.

62. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,841. Indeed, the second asylum ban referenced the good cause justifications cited in the first, and asserted that the “same concerns would apply to an even greater extent with this rule.” *Id.*

63. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. at 55,950–51; Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. at 33,841–42.

64. *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018).

65. *Id.* at 854–66.

*O.A. v. Trump*,<sup>66</sup> a consolidated lawsuit challenging the rule.<sup>67</sup> Judge Moss found the regulation inconsistent with the statutory scheme governing asylum.<sup>68</sup> Accordingly, the first asylum ban has not been implemented. Had it gone forward, the ban on asylum for all nonport of entry arrivals could have significantly reduced the number of people able to seek asylum in the immigration courts.

The second asylum ban, by contrast, is now being implemented nationally after the Supreme Court stayed a federal district court injunction of the ban.<sup>69</sup> The same plaintiffs in the Asylum Ban 1.0 lawsuit filed litigation in the Northern District of California against Asylum Ban 2.0, which initially resulted in a preliminary injunction.<sup>70</sup> Judge Tigar's preliminary injunction order found first that the asylum ban violated key provisions of the immigration statute and, in particular, conflicted with asylum statutes that already prohibited the grant of asylum to persons who could be removed to "safe third countries" or to whom an individualized assessment of firm resettlement in another country had been made.<sup>71</sup> Second, the court found the procedural challenge to the promulgation of the rule without notice and comment likely violated the APA, as it did not appear to fall within either the foreign affairs or good cause exemptions to notice and comment.<sup>72</sup> Third, the court concluded that the asylum ban was likely an arbitrary and capricious rule lacking reasoned explanation.<sup>73</sup> In related litigation pending in the District of Columbia, however, a federal district court declined to issue a temporary restraining order on that same day.<sup>74</sup>

But on September 11, 2019, the U.S. Supreme Court granted the government's request for a stay of the national injunction, thereby

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66. *O.A. v. Trump*, No. CV 18-2718, 2019 WL 3536334 (D.D.C. Aug. 2, 2019).

67. *See id.* at \*28.

68. *Id.* at \*2.

69. *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019).

70. *E. Bay Sanctuary Covenant v. Trump*, No. 18-CV-06810, 2019 WL 1048238 (N.D. Cal. Mar. 5, 2019).

71. *Id.* at \*2.

72. *Id.* at \*3.

73. *See id.* (anticipating that the Ninth Circuit would so hold based on the fixed stated of the record).

74. *See* Danielle Silva, *Federal Judge Issues Preliminary Injunction Blocking Trump Asylum Restrictions at Southern Border*, NBC NEWS (July 24, 2019), <https://www.nbcnews.com/news/us-news/federal-judge-declines-block-trump-asylum-restrictions-southern-border-n1033756> [<https://perma.cc/QDC4-MKKF>] (describing order by federal district court Judge Timothy J. Kelly declining to issue preliminary injunction against second asylum ban).

permitting the agency to fully implement the second asylum ban.<sup>75</sup> Between the original district court injunction and the Supreme Court stay, the Ninth Circuit and district court weighed in on the scope of the injunction. A 2–1 vote by a panel of the Ninth Circuit had upheld a version of the injunction that would have applied only in the Ninth Circuit but not nationally.<sup>76</sup> After the federal appeals court allowed the district court to further develop the record,<sup>77</sup> the lower court restored the nationwide scope of the injunction, emphasizing the potential harm to the organizational plaintiffs if the asylum ban were to be partially implemented as well as concerns regarding uniformity, administrability, and the text of the APA.<sup>78</sup> But two days after the district court’s restoration of the national injunction, the stay issued by the Supreme Court allowed the third country asylum ban to go fully into effect.

While it is tempting to view the asylum ban as simply that—a bar on asylum—the rule also constitutes a dramatic and impactful barricade of the immigration courts.<sup>79</sup> The stakes associated with pre-immigration court adjudications—CFIs and especially RFIs—are now higher, and the hurdles one must overcome in order to even reach the immigration courts are greater than ever. On November 19, 2019, the federal district court in the metering litigation placed a modest limitation on the asylum ban by enjoining application of the asylum ban to persons who had been subject to metering on or before July 16,

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75. *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019). Justice Sotomayor, joined by Justice Ginsburg, issued a dissent which emphasized the rule’s impact on “longstanding practices regarding refugees,” the district court’s findings with respect to the legality of the ban, the extraordinary nature of the relief requested by the Court, and the multiple stages of litigation pending in the lower courts. *Id.* at 4–5.

76. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019). The Ninth Circuit found that the district court had not sufficiently explained why preventing harm to plaintiffs required a national injunction. *Id.* at 1029. The Court also emphasized the downsides of entering an injunction of national scope, namely the lost opportunities for additional litigation, debate, and expression of viewpoints. *Id.* at 1030.

77. *Id.* at 1030–31.

78. Order Granting Motion to Restore Nationwide Scope of Injunction, *E. Bay Sanctuary Covenant v. Barr*, 391 F. Supp. 3d 974 (N.D. Cal. 2019).

79. Individuals subject to the ban remain eligible to seek withholding of removal or relief under the Convention Against Torture in immigration court. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829, 33,830 (July 16, 2019). To do so, however, they must demonstrate not that they have a *reasonable* fear of persecution, which requires a higher threshold than the credible fear process. *Id.* at 33,837. The asylum rule creates a bifurcated screening process to assess whether individuals found to lack a credible fear of persecution nonetheless have a reasonable fear, such that their cases can proceed to immigration court, where an opportunity to contest the application of the ban to the proceedings exists. *Id.* The ban also contains an exception for trafficking victims. *Id.* at 33,839.



2019—but one month later, the Ninth Circuit temporarily stayed that injunction upon the government’s emergency request.<sup>80</sup> As of publication of this Essay, the ban was being broadly implemented as the Ninth Circuit continues to consider the validity of the third country asylum ban as well as the metering litigation.<sup>81</sup>

The second asylum ban appears to have had a barricading effect on access to the immigration courts well before the Supreme Court’s stay of the national injunction. In *M.M.V. v. Barr*,<sup>82</sup> immigration advocates have alleged that since the mere announcement of “Asylum Ban 2.0” on July 16, 2019, the federal government has implemented a series of undisclosed and “ever-shifting directives, guidance and procedures” that drastically revised the credible fear process.<sup>83</sup> As noted earlier, the South Texas Family Residential Center in Dilley, Texas, has reportedly experienced a dramatic decline in positive credible fear determinations, from 97 percent prior to the second asylum ban to less than 10 percent as of the September 16, 2019, filing date for the litigation.<sup>84</sup> The *M.M.V.* complaint alleges the existence of ten different policies, given names by the plaintiffs such as “Proceed Before Training and Written Guidance Policy,” or “Declare a Negative Decision in the Middle of Screening Directive.”<sup>85</sup> The allegations collectively suggest severe departures from existing credible fear regulations and policies, prompted by the second asylum ban. But the *M.M.V.* complaint also suggests that barricading may be taking place irrespective of the legality of various policies, a development that would implicate longstanding rule of law concerns in expedited removal adjudication.

### *C. Restructuring Credible Fear Guidance and Bureaucracy*

The executive branch has also used informal administrative tools to indirectly expand expedited removal, such as subregulatory guidance and bureaucratic reorganization of agency employees. These less controversial tools appear to have avoided significant media

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80. See Order Granting Plaintiffs’ Motion for Provisional Class Certification and Granting Plaintiffs’ Motion for Preliminary Injunction, *Al Otro Lado v. McAleenan*, 17-cv-02366-BAS-KSC (S.D. Cal. Nov. 19, 2019); *Al Otro Lado v. Wolf*, 945 F.3d 1223, 1224 (9th Cir. 2019).

81. The Ninth Circuit heard oral arguments in *East Bay Sanctuary Covenant v. Barr* on December 2, 2019.

82. *M.M.V. v. Barr*, No. 1:19-cv-2773 (D.D.C. filed Sept. 16, 2019).

83. *M.M.V.* Complaint, *supra* note 26, at \*2.

84. *Id.*

85. *Id.* at \*31–37.

attention, public outcry, and substantial litigation challenges, but they could nonetheless result in a substantial barrier to accessing the immigration courts.

**Credible Fear Guidance.** Notwithstanding the recent allegations of ad hoc, undisclosed policy changes in credible fear guidance prompted by the second asylum ban, asylum officers have also received revised lesson plans regarding the credible fear process since the inception of the Administration.<sup>86</sup> Although the immigration statute provides minimal guidance on the adjudication of credible fear, prior agency directives encouraged the application of flexible and broad standards.<sup>87</sup> Unlike earlier directives, guidance materials under the Trump Administration require officers to make credibility determinations, instruct them to consider inconsistent statements made by individuals to border officers during CBP screenings that take place prior to CFIs, tighten standards related to identity documents, and remove language directing officers to make positive credible fear determinations where reasonable doubt exists.<sup>88</sup> Following the implementation of this guidance, positive credible fear findings decreased, as did the percentage of cases in which IJs reversed asylum officers' negative credible fear findings.<sup>89</sup>

Internal guidance aimed at facilitating negative credible fear findings has continued. On July 26, 2019, a half-page "message sent by the acting director" to all asylum officers instructed officers conducting CFIs in cases involving private violence to evaluate whether the person could safely relocate to other parts of their home country.<sup>90</sup> The guidance encourages asylum officers to issue more negative findings, noting that "USCIS faces an unprecedented number of aliens overwhelming our asylum system, many of whom are ineligible for asylum" and claiming that "there are areas that are generally very safe within each of the countries that currently make up the bulk of our credible fear process."<sup>91</sup>

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86. Marouf, *supra* note 11, at 738.

87. *Id.*

88. *Id.* at 738–39.

89. *Id.* at 739 (observing that from February 2017 to June 2018, positive CFIs decreased from 78 percent to 68 percent; IJ reversals of negative CFIs decreased from 30 percent to 15 percent).

90. Memorandum from Matthew Albence, Acting Director, to USCIS Asylum Officers (July 26, 2019), <https://www.uscis.gov/news/news-releases/asylum-and-internal-relocation-guidance> [<https://perma.cc/4S8H-Y7KV>] (stating that "[w]hen confronted with evidence of private violence, you must consider whether internal relocation is possible" and "elicit[] testimony for credible fear screenings").

91. *Id.*

The July 2019 internal relocation guidance not only represents a departure from past practice, it arguably misrepresents the legal significance of internal relocation in asylum law. Proving one's inability to safely relocate within their country is not a per se requirement for asylum. The establishment of past persecution creates a rebuttable presumption that the person has a well-founded fear of future persecution, thereby satisfying one eligibility prong for (without guaranteeing a grant of) asylum.<sup>92</sup> The presumption can be rebutted in one of two ways, one of which involves demonstrating that internal relocation is possible.<sup>93</sup> But even where internal relocation is possible, IJs must balance various factors to determine whether relocation is reasonable in order for internal relocation to prevent a grant of asylum.<sup>94</sup> The July 2019 guidance thus takes a potential, discretionary rebuttal issue in asylum adjudication and effectively suggests—without necessarily carrying the force of law—that it operates as a preliminary bar to accessing the asylum process.

**Bureaucratic Reorganization.** DHS's attempts to permit CBP officers to conduct credible fear screenings also amounts to an indirect expansion of expedited removal. Federal regulation specifically vests jurisdiction over CFIs in the USCIS asylum office.<sup>95</sup> But in the Spring of 2019, White House adviser Stephen Miller and others reportedly advocated reassigning border patrol officers to the CFI process.<sup>96</sup> By early July 2019, a pilot program in the El Paso, Texas region began, which trained and authorized thirty-five CBP officers to conduct CFIs.<sup>97</sup> Various critics have described CBP's agency culture as being singularly devoted to enforcement, characterized by lawlessness, minimal regard for the truth or human dignity, and promoting harmful racial and gender stereotypes.<sup>98</sup> By mid-September 2019, the CBP

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92. 8 C.F.R. § 1208.13(b)(1).

93. 8 C.F.R. § 1208.13 (b)(1)(i) (describing grounds for rebuttal of past persecution claims).

94. Matter of M-Z-M-R-, 26 I&N Dec. 28 (B.I.A. 2012).

95. 8 C.F.R. § 208.2(a) (vesting jurisdiction over credible fear interviews with Refugee, Asylum and International Operations); see also 8 U.S.C. § 1225(b)(1)(B)(i) (2018) (stating that "asylum officers shall conduct" credible fear interviews).

96. Eileen Sullivan & Michael D. Shear, *Trump Sees an Obstacle to Getting His Way on Immigration: His Own Officials*, N.Y. TIMES (Apr. 14, 2019), <https://www.nytimes.com/2019/04/14/us/politics/trump-immigration-stephen-miller.html> [<https://perma.cc/J7B6-LXB4>].

97. Mica Rosenberg & Kristine Cooke, *An Ever-Expanding Job for Border Agents: Sensitive Decisions on Migrants' Fates*, REUTERS (July 3, 2019), <https://www.reuters.com/article/us-usa-immigration-border/an-ever-expanding-job-for-border-agents-sensitive-decisions-on-migrants-fates-idUSKCN1TY2GT> [<https://perma.cc/KT7M-W3QQ>].

98. In July 2019, reports of a Facebook group for former and current CBP agents unearthed disturbing comments made by group members. See A.C. Thompson, *Inside the Secret Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, PROPUBLICA (July 1,

agency tasked seventy-five CBP officers with conducting CFIs, primarily in connection with asylum seekers designated for the Remain in Mexico policy.<sup>99</sup> Not surprisingly, reports of rampant errors, a culture of denial, and lower positive CFI assessments have emerged.<sup>100</sup> The agency has disclosed little information about the training or supervision of CBP officers assigned to CFIs, or the overall implementation of the program, as a complaint filed in recent litigation alleges.<sup>101</sup>

Like the internal relocation and other credible fear guidance documents, authorizing CBP officers to conduct CFIs is procedurally less sweeping and arguably less prone to judicial challenge. After all, administrative agencies typically have the discretion to assign their officers to the roles necessary for the implementation of statutory mandates, including the reorganization of administrative bureaucracy. Still, in light of concerns about CBP's agency culture as well as its own record of referring individuals to CFIs at the border, the reorganization constitutes another indirect expansion of expedited removal.

#### *D. Direct Expansion of Expedited Removal*

The direct expansion of expedited removal throughout the interior of the U.S. constitutes a fourth type of barricading and has the potential to transform immigration policing and adjudication in profound and lasting ways if permitted to go into effect. Within weeks of the 2017 presidential inauguration, the Trump Administration revealed its plan to expand its legal authority to use expedited removal

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2019), <https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes> [https://perma.cc/R39Q-H4NJ] (describing “indifference” and “wisecracks” such as “if he dies, he dies” in response to reports of death of sixteen-year-old migrant in CBP custody and the posting of derogatory comments about members of Congress visiting border patrol detention facilities); *see also* Manny Fernandez, Miriam Jordan, Zolan Kanno-Youngs & Caitlin Dickerson, ‘People Actively Hate Us’: Inside the Border Patrol’s Morale Crisis, N.Y. TIMES (Sept. 15, 2019), <https://www.nytimes.com/2019/09/15/us/border-patrol-culture.html> [https://perma.cc/953Q-GKXU] (describing institutional culture of CBP, including description of agency where “an attitude of contempt toward migrants . . . is now the rule, not the exception”).

99. Debbie Nathan, *An Asylum Officer Speaks Out Against Trump Administration’s “Supervillain” Attacks on Immigrants*, INTERCEPT (Sept. 13, 2019), <https://theintercept.com/2019/09/13/asylum-interview-immigration-trump> [https://perma.cc/4TT3-SGWP]; Molly O’Toole, *Border Patrol Agents, Rather than Asylum Officers, Interviewing Families for ‘Credible Fear,’* L.A. TIMES (Sept. 19, 2019), <https://www.latimes.com/politics/story/2019-09-19/border-patrol-interview-migrant-families-credible-fear> [https://perma.cc/K7RY-DXGT].

100. *Id.*

101. Complaint, *Am. Immigration Council v. U.S. Customs and Border Prot.*, No. 1:19-cv-02965, at \*4 (D.D.C. filed Oct. 7, 2019). Citing this “lack of publicly discussed information,” Plaintiffs filed a Freedom of Information Act request seeking records related to the program. *Id.*

through an executive order, which outlined various ways in which the executive intended to intensify immigration enforcement efforts.<sup>102</sup> The January 2017 executive orders prompted outcry amongst advocates and concerns about the due process implications of the plans, but they did not come to fruition until July 2019.

To understand the agency's ability to enact this dramatic shift in power, it is necessary to describe the statutory framework governing expedited removal. The statute on its face authorizes the executive branch to apply the truncated removal process anywhere in the U.S. and to any individual suspected of having entered the country without inspection or parole within the two years before apprehension. But the statute also specifies that the agency must act by rule in order to delineate the scope of its authority before taking action.<sup>103</sup> In the past, DHS has explicitly chosen not to exercise its full statutory authority.<sup>104</sup>

Nearly two-and-a-half years after the Administration's initial executive order, on July 23, 2019, it issued a direct, final rule via publication in the Federal Register that purported to exercise the maximum extent of its statutory authority.<sup>105</sup> The 2019 rule authorized immigration officers to use expedited removal against any person unable to show to the satisfaction of the officer that they were physically in the U.S. for a two-year continuous period prior to the encounter.<sup>106</sup> Not surprisingly, DHS cited to the efficiency gains associated with expedited removal, "as opposed to placing those aliens in more time-consuming removal proceedings,"<sup>107</sup> as well as the existing backlogs in the immigration courts.<sup>108</sup>

As expected, within weeks of the publication of the rule, litigation was filed in federal district court challenging its implementation.<sup>109</sup>

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102. Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017). Section 11(c) states: "Pursuant to section 235(b)(1)(A)(iii)(I) of the [Immigration and Nationality Act (INA) 8 U.S.C. § 1101 *et seq.*], the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II)." *Id.*

103. 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (2018).

104. *See, e.g.*, Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48879 (Aug. 11, 2004) ("In the interests of focusing enforcement resources upon unlawful entries that have a close spatial and temporal nexus to the border, this notice does not implement the full nationwide expedited removal authority available to DHS pursuant to section 235 of the Act, 8 U.S.C. 1225.").

105. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019).

106. *Id.*

107. *Id.* at 35,411.

108. *Id.* at 35,411–12.

109. Complaint for Declaratory and Injunctive Relief, Make the Road New York v. McAleenan, No. 19-cv-2369 (D.D.C. Aug. 6, 2019), 2019 WL 4738070.

Plaintiffs, three immigrants' rights organizations throughout the U.S., raised various claims under the INA and the APA, including an arbitrary and capricious claim.<sup>110</sup> On September 27, 2019, the federal district court granted a preliminary injunction preventing implementation of the expanded expedited removal rule.<sup>111</sup> Judge Ketanji Brown Jackson's order hinged on the plaintiffs' likelihood of success on the claims that DHS should have used notice-and-comment procedures to promulgate the rule and that the rule failed to reflect reasoned decision-making in violation of the requirement that agencies avoid arbitrary and capricious action. In particular, the order emphasized DHS's failure to acknowledge or respond to the evidence of rampant error in the expedited removal system as it existed prior to the rule. As the court put it, "At the very least, it would seem that *some* consideration of *how many* people might be erroneously swept up in the expanded expedited-removal dragnet, and/or *how often* such identification errors have occurred with respect to the agency's expedited-removal practices in the past, would be in order" if DHS attempts "to undertake a rational consideration of whether to ramp up the practice."<sup>112</sup> The court also criticized the agency for failing to sufficiently grapple with the "real-world consequences" of the policy.<sup>113</sup> It emphasized that the agency has an obligation, before "authoriz[ing] the swift ejection of someone who lives in the interior of the country and has been here for up to two years, . . . to do some research regarding such matters as how long a person must be here, on average, to be likely to have the kinds of substantial ties to the community that would make her expedited removal more, or less, consequential for all involved."<sup>114</sup> The agency's single-minded focus on the efficient disposition of cases, in other words, was not enough to pass the requirements of arbitrary and capricious review.<sup>115</sup>

The formal expansion of expedited removal reflects a more classic form of offensive immigration enforcement, where DHS seeks to remove people who otherwise do not wish to come to the attention of

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110. Plaintiffs raised two types of statutory claims: (1) while the existing statute reflects deep flaws, if "properly read" and in light of constitutional avoidance doctrine, the rule violates the INA; and (2) the right to counsel of one's own choosing as set forth in the immigration statute and the APA. *Id.* at \*34–35.

111. Memorandum Opinion, *Make the Road New York v. McAleenan*, No. 19-cv-2369, 2019 WL 4738070 (D.D.C. Sept. 29, 2019).

112. *Id.* at \*23.

113. *Id.*

114. *Id.* at \*39.

115. *Id.* at \*38.

authorities, and thereby might strike readers as occupying a conceptually different category from the other policy actions described in this Essay (which generally prevent asylum seekers from pursuing their cases in immigration court). Indeed, prior to the preliminary injunction, ICE had issued internal guidance to its employees signaling its plans to begin implementation of expanded expedited removal on or about September 1, 2019, and to focus its use on cases involving worksite enforcement actions or “raids” and in certain cases involving noncitizens with prior criminal convictions.<sup>116</sup> The agency’s planned use of expedited removal in the context of raids and noncitizens who interact with the criminal justice system points to its plans to reach a much broader population than that of persons seeking asylum in the U.S. However, important similarities across all four categories of government action exist. Even for persons already in the interior of the U.S., once apprehended, the scope of rights and potential relief is significantly more robust in immigration court than through the fast-track, closed-door, and error-prone adjudication that occurs with expedited removal. Moreover, the use of administrative tools with questionable statutory and procedural validity, and strong litigation responses, are common threads throughout the various forms of barricading. Although the expanded expedited removal rule has not been implemented, the future of the rule will turn on litigation developments that could include—like the asylum ban rule—further navigation in the higher courts.

### III. IMPLICATIONS AND CONCLUSION

This Essay has highlighted how the executive branch is engaged in a multipronged, if haphazard and legally tenuous, strategy of barricading the immigration courts. It concludes with several observations and implications.

First, the current barricading of the immigration courts affirms that a core part of immigration adjudication encompasses not only adjudication *in* the immigration courts, but decision-making in the shadows and peripheries of immigration court.<sup>117</sup> Increasingly, expedited removal occupies a central role in our understanding of

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116. Memorandum from Matthew Albence, Acting Director, to All ICE Employees (July 24, 2019), <https://www.aila.org/infonet/ice-memo-implementation-expedited-removal> [https://perma.cc/779P-JKH4].

117. See generally Koh, *Removal in Shadows*, *supra* note 12, at 182–87 (arguing for conventional understandings of immigration adjudication to include removals that involve little-to-no immigration judge involvement).

immigration adjudication and enforcement, even as it triggers an alternative scheme of rights, remedies, and procedures, and growing literature on removal procedures that bypass the immigration courts reflects this shift.<sup>118</sup> On October 18, 2019, the Supreme Court granted certiorari in *Department of Homeland Security v. Thuraissigiam*<sup>119</sup> and will examine the question of whether restrictions on habeas review of expedited removal orders—specifically of credible fear assessments—are constitutional under the Suspension Clause.<sup>120</sup> The barricading developments discussed here highlight the significance of the Court's analysis in *Thuraissigiam*. Indeed, the stakes during pre-immigration court adjudications include life, liberty, and other constitutionally recognized interests like family and community ties as well as administrative principles such as accuracy, statutory adherence, and fairness. These interests are arguably just as present during processes that take place prior to immigration court as they are once a person's case is being adjudicated by those courts and in subsequent judicial review of removal orders. Furthermore, understanding the multiple efforts taken to prevent individuals from having their deportation cases heard by the immigration courts is essential for assessing the impact of current executive immigration policy, contextualizing data, and focusing long-term reform efforts.

Relatedly, the indirect and direct expansions of expedited removal—whether through applications of rewritten asylum standards, credible fear practices, or use of expedited removal in the interior—suggests not only that higher numbers of people may receive expedited removal orders, but that the propensity for error in the issuance of such orders may increase.<sup>121</sup> Some might argue that effecting removal

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118. See generally DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 65–67 (2012) (identifying “deformalization” of removal procedures); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595 (2009) (exploring diversions from immigration system through expedited removal, voluntary departure, and criminal prosecutions of immigration offenses); Harris, *supra* note 27 (discussing impact of expedited removal and reinstatement on persons fleeing persecution abroad); Mary Holper, *The Unreasonable Seizures of Shadow Deportations*, 86 U. CIN. L. REV. 923 (2018) (analyzing Fourth Amendment violations in reinstatement and administrative removal contexts); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2014) (describing expedited removal, reinstatement and administrative removal as forms of “speed deportation”).

119. *Thuraissigiam v. Dep’t of Homeland Sec’y*, 917 F.3d 1097 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 427 (2019).

120. See *id.* at 1116–17 (finding that 8 U.S.C. 1252(e)(2) violates the Suspension Clause); see also *Castro v. Dep’t of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017) (holding that the Suspension Clause does not apply to 8 U.S.C. 1252(e)(2)).

121. See Hong & Manning, *supra* note 27, at 699–701 (analyzing risk of error during expedited



outside the immigration courts is a necessary response to the overtaxing of immigration court resources and that the risk of error justifies the need for administrative efficiency.<sup>122</sup> The increased error resulting from the barricading of the immigration courts may also prompt harder questions about acceptable rates of accuracy in the immigration system overall.<sup>123</sup> While addressing the normative benefits and drawbacks of pushing adjudication outside of the immigration courts is beyond the scope of this Essay, it is worth emphasizing that efficiency has never been the single, exclusive goal of the immigration system (or any other administrative system). Values like accuracy, predictability, uniformity, fairness, the rule of law, and legitimacy have long been central to administrative adjudication, and take on particular importance in evaluating the role of the executive branch in setting immigration policy.<sup>124</sup> As Shoba Sivaprasad Wadhia has written, the operation of the immigration system relies heavily on the exercise of prosecutorial discretion by the executive, the deployment of which shapes the fundamental nature of the system.<sup>125</sup>

Understanding the scope of the barricading of the immigration courts is necessary for assessing, as a descriptive matter, the nature of immigration adjudication in the current era as well as for developing

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removal as part of due process analysis).

122. See Koh, *Removal in Shadows*, *supra* note 12, at 200 (noting efficiency rationale for expedited removal).

123. Scholars have probed the question of error and mistake in other parts of the immigration system. See generally Amanda Frost, *Learning from our Mistakes: Using Immigration Enforcement Errors to Guide Reform*, 92 DENV. U.L. REV. 769 (2015) (querying whether accuracy in immigration enforcement has become a significant problem); David Hausman, *The Failure of Immigration Appeals*, 164 U. PENN. L. REV. 1177 (2016) (analyzing capacity of Board of Immigration Appeals to correct for disparities in immigration judge decision-making); Fatma E. Marouf, Michael Kagan & Rebecca D. Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337 (2014) (discussing rates of errors in federal appeals courts' issuance of stays of removal); Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAWAII L. REV. 139 (2010) (analyzing availability of remedies for individuals with wrongfully issued removal orders).

124. See, e.g., Kim, *supra* note 10, at 38–48 (discussing role of democratic accountability, individual interests and separation of powers concerns in agency adjudication); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 NYU L. REV. 1669, 1728–42 (2011) (discussing values of uniformity, predictability, notice, judicial review and efficiency in immigration adjudication); Ming Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 358–62 (2017) (discussing the role of legitimacy in evaluating executive immigration actions).

125. See generally SHOBA SIVAPRASAD WADHIA, *BANNED: IMMIGRATION ENFORCEMENT UNDER TRUMP* (2019) (discussing the role of discretion in multiple Trump Administration immigration policy changes); Wadhia, *supra* note 118 (arguing for greater exercises of prosecutorial discretion in decisions to place noncitizens into expedited removal, reinstatement and administrative removal).

agendas for future immigration practice, advocacy, and reform. The existence of a prior removal order—including an expedited removal order—can drastically restrict an individual’s eligibility for relief under the immigration laws and subject them to reinstatement of removal<sup>126</sup> or to criminal prosecution for illegal re-entry.<sup>127</sup> Assuming the normative undesirability of adjudicating high-stakes cases with resources and accountability mechanisms that fall far short of even the immigration courts, future policy agendas may question the practice of attaching collateral consequences to removal orders entered without in-court hearings. Additionally, a meaningful rethinking of the immigration laws might restructure the existing system of expedited removal and other truncated removal procedures and may also permit greater mechanisms for the correction of past mistakes in adjudication and policy.

Barricading-related litigation also presents a number of opportunities for future inquiry. From a separation of powers perspective, the executive branch’s outsized role in shaping immigration adjudication invites deeper exploration into the role of the judiciary in the immigration context,<sup>128</sup> including in ongoing debates over the propriety of nationwide injunctions.<sup>129</sup> The litigation also raises questions about the capaciousness of statutory claims arising out of the INA, a statute that has long been animating by multiple and, at times, conflicting principles including humanitarian concerns, family unity, national security, as well as the boundaries of due process and constitutional rights for immigrants.

From an advocacy perspective, the litigation highlights the critical role of on-the-ground advocates’ nimble responses to shifting government practices. The federal government’s initial disavowal of metering, for instance, has changed in large part due to unrelenting and impassioned efforts of advocates in border cities like Tijuana, Mexico, and their witness to the harms associated with metering. Creative advocacy that transcends geographic limitations—for instance,

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126. See Koh, *Removal in Shadows*, *supra* note 12, at 203–08 (discussing reinstatement for persons with prior expedited removal orders).

127. See 8 U.S.C. § 1326 (2018) (providing for the prosecution of individuals who reenter the country).

128. See generally Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C.L. REV. 77 (2018) (analyzing the federal courts’ increased willingness to review immigration claims, notwithstanding plenary power doctrine, through lens of separation of powers and delegation issues).

129. Compare Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018) (defending nationwide injunctions), with Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 113 HARV. L. REV. 417 (2017) (arguing against).

through technological innovation,<sup>130</sup> rapid responses in fundraising, and cross-border advocacy—will shape the fate of many immigration policies, including those described here.

Immigration enforcement has remained a high priority for the Trump Administration. The immigration courts have long been perceived as the central actor in the adjudication of removals by the federal government, and the executive branch has engaged in countless changes to the adjudication of cases by immigration judges. But the executive's direct and indirect efforts to barricade the immigration courts and the frontline decision-making that takes place outside the immigration courts raises equally compelling, if not more acute, concerns about due process, fairness, the rule of law, and agency legitimacy that will require deep course correction far into the future.

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130. See generally Manning & Stumpf, *supra* note 31 (describing the use of technology to provide high-stakes advocacy despite limitations in geography and the availability of lawyers in the immediate vicinity).