BROKEN RECORDS: EVIDENTIARY FAILURES IN EXPEDITED REMOVAL AND CREDIBLE FEAR REVIEWS

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ABSTRACT

Expedited removal, a process allowing for the swift deportation of noncitizens without a full hearing, has become a central mechanism in U.S. immigration enforcement. Although the process was designed to expedite removals, it is riddled with evidentiary and procedural deficiencies that undermine asylum seekers' rights. This Note examines how systemic flaws in record development during initial "credible fear" screenings—such as officer misconduct, language barriers, and trauma—skew credible fear determinations, leading to erroneous deportations. It further critiques the limited reviewability of negative credible fear findings, highlighting inconsistencies among immigration judges regarding the admission of new evidence, credibility assessments, and access to counsel. Additionally, it argues that the "entry fiction" doctrine, which purports to justify the lack of due process protections in expedited removal, is fundamentally incompatible with U.S. asylum law, due process, and non-refoulement obligations. To address these deficiencies, this Note proposes key reforms to credible fear review: (1) requiring immigration judges to allow new evidence and testimony; (2) utilizing a framework adopted by the Seventh Circuit in Jimenez Ferreira v. Lynch *for assessing credibility; and (3) guaranteeing a right to counsel during review proceedings. These changes are necessary to align expedited removal with U.S. asylum law, safeguard due process, and prevent the wrongful deportation of bona fide asylum seekers.*

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INTRODUCTION

Created in 1996 with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),[1] the process of expedited removal allows summary deportation of certain noncitizens to be effectuated by low-level immigration officers[2] who essentially act as both prosecutor and judge.[3] Notably, the majority of deportations are effectuated through processes outside the immigration court,[4] including expedited removal. On January 21, 2025, the Trump administration expanded the use of expedited removal for the second time in history, authorizing its application to reach noncitizens anywhere in the country who cannot prove they have been in the United States continuously for two years.[5] This expansion puts noncitizens at greater risk of being placed in rapid deportations without due process.

Immediate deportation at this stage may be circumvented only upon expressing an intention to apply for asylum or a fear of persecution.[6] As prescribed by regulation, immigration officers are required to ask noncitizens "fear questions" with the intention to help ascertain whether noncitizens have a fear of returning back to their country.[7] Articulating fear triggers referral to an asylum officer for a credible fear interview during which the noncitizen must demonstrate that they have a credible fear of persecution.[8] If the asylum officer determines that the noncitizen does have a credible fear, the noncitizen will have the opportunity to fully pursue their claim for asylum.[9] If the asylum officer determines that the noncitizen does not have a credible fear of persecution—a negative credible fear determination—the noncitizen is immediately removed unless they request a review of the negative determination by an immigration judge ("credible fear review").[10] Upon the completion of review where the immigration judge either affirms or vacates the negative credible fear finding, the determination becomes final with no option for appeal.[11] A negative fear determination following the review will result in immediate removal.[12]

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1. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).
2. *See* 8 C.F.R. § 235.3(b)(2) (2025) (explaining the process for determination of inadmissibility and the role of the examining immigration judge).
3. Eunice Lee, *Regulating the Border*, 79 MD. L. REV. 374, 392 (2020).
4. Jocelyn B. Cazares Willingham, *Process [Ill]Defined: Immigration Judge Reviews of Negative Fear Determinations*, 55 COLUM. HUM. RTS. L. REV. 103, 168 n.353 (2024).
5. *Expedited Removal Explainer*, AM. IMMIGR. COUNCIL (Feb. 20, 2025), https://www.americanimmigrationcouncil.org/fact-sheet/expedited-removal [https://perma.cc/64FB-8HDH].
6. 8 C.F.R. § 235.3(b)(4) (2025).
7. 8 C.F.R. § 235.3(b)(2) (2025).
8. 8 C.F.R. § 208.30(b) (2025).
9. 8 C.F.R. § 208.30(f) (2025).
10. 8 C.F.R. § 208.30(g) (2025).
11. 8 C.F.R. § 1208.30(g)(2)(iv)(A) (2025).
12. 8 C.F.R. § 1208.30(g)(2)(iv)(A) (2025).

Although these "safeguards" are intended to protect bona fide asylum seekers in expedited removal, they have proven to be inadequate and to have lingering effects on the credible fear process. Specifically, immigration and asylum officers can make errors in developing the record of facts as to noncitizens' fear, and these errors then form an inaccurate basis for the immigration judge's determination in credible fear review.[13] Systematic defects in expedited removal, such as trauma, language barriers, lack of knowledge of the credible fear process, bias, and officer abuse, also hinder the record-development process during initial credible fear screenings. These documented shortcomings affect the legitimacy of the fear-screening process and skew credible fear review.[14] It is no surprise then that immigration judges tend to affirm the negative credible fear determinations of asylum officers, with a 77% affirmance rate in Fiscal Year 2023.[15]

The process of expedited removal is so fundamentally flawed that it violates U.S. obligations to refugees and U.S. asylum law. The United States is bound by "non-refoulement"—an international principle that prohibits the return of a refugee to territories where their "life or freedom would be threatened on account of [their] race, religion, nationality, [or] membership of a particular social group or political opinion."[16] Additionally, the asylum statute provides that a noncitizen, regardless of status, is generally eligible for asylum if they are physically present in the United States or at a lawful port of entry and can show that they meet the definition of a refugee.[17] Thus, contrary to international obligations and U.S. asylum law, expedited removal results in the summary deportation of asylum seekers back to countries where they may face significant harm, torture, or death before they are even provided the opportunity to present their claims for relief.

Despite campaign promises to restore asylum laws and protect refugees, the former Biden administration's recent efforts have further pushed the United States away from upholding its own asylum laws.[18] On June 3, 2024, President Biden signed a Proclamation, "Securing the Border," that

13. 8 C.F.R. § 1208.30(g)(2)(ii) (2025).

14. *See infra* Sections II–III (discussing the documented inadequacies of the credible fear determination process and how they negatively affect credible fear review).

15. DEP'T OF JUST., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS, CREDIBLE FEAR REVIEW AND REASONABLE FEAR REVIEW DECISIONS (2023) [hereinafter CREDIBLE FEAR REVIEW AND REASONABLE FEAR REVIEW DECISIONS], https://www.justice.gov/eoir/page/file/1104856/download [https://perma.cc/T537-DQ93].

16. U.N. Convention Relating to the Status of Refugees, art. 33(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

17. 8 U.S.C. § 1158(b)(1)(A).

18. Joe Biden Speech Transcript August 6: National Association of Latino Elected Officials Conference at 17:03, REV (Aug. 6, 2020), https://www.rev.com/blog/transcripts/joe-biden-speech-transcript-august-6-national-association-of-latino-elected-officials-conference [https://perma.cc/GXU6-GALN] ("We're going to restore our moral standing in the world and our historic role as a safe haven for refugees and asylum seekers, and those fleeing violence and persecution.").

temporarily suspended and limited the entry of noncitizens at the southern border with narrow exceptions.[19] Effective June 5, 2024, this decision was in response to high levels of migration throughout the Western Hemisphere, including at the southwest land border.[20] The limitation on entry was to be discontinued if the seven-day average of daily illegal border crossings fell below 1,500 and remained this way for two weeks.[21] Following the Proclamation, the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ") issued an Interim Final Rule that also went into effect on June 5, 2024, limiting asylum eligibility and promoting enhanced consequences at the border during "emergency border circumstances."[22] President Biden subsequently amended the Proclamation, requiring that the suspension and limitation on entry only be lifted after there have been "28 consecutive calendar days in which the 7-consecutive-calendar-day average of encounters is less than 1,500."[23] In short, the Biden administration manipulated policy to ensure the heightened restrictions would be permanent for the foreseeable future,[24] as apprehensions during the Biden administration never fell below this level.[25] Consistent with the amended Proclamation, the DHS and DOJ issued a Final Rule that became effective October 1, 2024.[26]

19. Proclamation No. 10773, 89 Fed. Reg. 48487, 48491–92 (June 3, 2024) [hereinafter Securing the Border Proclamation]; *Securing the Border: Presidential Proclamation and Rule*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigrationlaws [https://perma.cc/4KFR-CPMD] ("[T]he Proclamation and rule do not apply to lawful permanent residents, other noncitizens with a valid visa or other lawful permission to enter the United States, unaccompanied children, and victims of a severe form of human trafficking.").

20. Securing the Border Proclamation, *supra* note 19, at 48487, 48491.

21. *Id.* at 48491.

22. Securing the Border Interim Final Rule, 89 Fed. Reg. 48710, 48715, 48737–39 (June 7, 2024) [hereinafter Interim Final Rule] (stating that the limitation applies when there has been a "7-consecutive-calendar-day average of 2,500 encounters or more").

23. *A Proclamation on Amending Proclamation 10773*, THE WHITE HOUSE (Sep. 30, 2024), https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2024/09/30/a-proclamation-on-amending-proclamation-10773 [https://perma.cc/VAS5-VLQK].

24. Heidi Altman, *How the Biden Administration's Expanded Asylum Ban Puts Lives at Risk and Contradicts American Values*, NAT'L IMMIGR. L. CTR., (Sep. 30, 2024), https://www.nilc.org/resources/how-the-biden-administrations-expanded-asylum-ban-puts-lives-at-risk-and-contradicts-american-values [https://perma.cc/2A4U-E2LZ].

25. For a chart containing data on the total Southwest border apprehensions during the Biden administration, see *Nationwide Encounters*, U.S. CUSTOMS AND BORDER PROTECTION, https://www.cbp.gov/newsroom/stats/nationwide-encounters [https://perma.cc/NCB4-W4XW]. By taking the total apprehensions each month and dividing by the number of days in the month, the data shows that the average daily encounters were greater than the threshold to keep the suspension in effect. *Id.*; *see also* AUDREY SINGER, CONGR. RSCH. SERV., IN12457, THE BIDEN ADMINISTRATION'S REVISED PROCLAMATION AND FINAL RULE, "SECURING THE BORDER" 2–3 (Nov. 6, 2024), https://www.congress.gov/crs_external_products/IN/PDF/IN12457/IN12457.2.pdf [https://web.archive.org/web/20250330072612/https://www.congress.gov/crs-product/IN12457] (stating that, using CBP data, CRS calculated that in the period from January 2021 through September 2024, the average daily encounters were greater than 1,500 encounters).

26. Securing the Border Final Rule, 89 Fed. Reg. 81156, 81156 (Oct. 7, 2024) [hereinafter Final Rule].

In effect, the Final Rule changes the landscape of expedited removal—a process that already lacks procedural protections—in favor of expediency. Immigration officers will no longer ask noncitizens fear questions; instead, noncitizens are required to affirmatively manifest a fear of return.[27] Additionally, per the Final Rule's restriction on asylum eligibility, asylum seekers will receive a negative credible fear determination unless they demonstrate by a preponderance of the evidence that "exceptionally compelling circumstances exist."[28] Thus, instead of allowing all noncitizens the opportunity to apply for asylum, only those who meet the stricter threshold will have the ability to apply. Because the heightened standard makes it more likely that noncitizens will receive a negative fear determination, more noncitizens will request review instead of moving forward with their claims. Rather than pushing expedited removal toward a system that protects bona fide asylum seekers, the process has now moved further away from upholding U.S. asylum law and international obligations.

As a purported justification for limiting procedural protections, expedited removal relies on the "entry fiction." Since 1886, the Supreme Court has reiterated that noncitizens' physical presence on U.S. territory is sufficient to grant them constitutional protections.[29] In 2001, the Court in *Zadvydas v. Davis* explicitly stated that "once a [noncitizen] enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent."[30] However, this bright-line territory distinction for purposes of constitutional protections has one carveout: the entry fiction doctrine. Under this exception, a noncitizen's arrival at a port of entry that is geographically within the United States does not qualify as effecting an entry on U.S. territory.[31] Thus, a noncitizen "at a port of entry 'is treated as if stopped at the border' " for due process purposes.[32] In practice, "a person effects an entry if they cross

27. *Id.* at 81168.

28. *Id.*

29. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent"); Mathews v. Diaz, 426 U.S. 67, 77–78 (1976) ("The Fifth Amendment . . . protects [noncitizens] from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.").

30. *Zadvydas*, 533 U.S. at 693.

31. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) ("A [noncitizen] on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as a [noncitizen] denied entry is concerned.").

32. Brief of Amici Curiae Immigration Scholars in Support of Respondent at 7, Department of Homeland Security v. Thuraissigiam, 591 U.S. 300 (2020).

into the territory of the United States *either* via inspection and admission by an immigration official *or* by intentionally evading inspection while remaining free from restraint."[33] This doctrine allows Congress to afford very limited procedural protections to noncitizens subject to expedited removal, given that noncitizens subject to the process are those who have not yet been inspected and admitted at a port of entry. But the entry fiction as applied to asylum seekers is incompatible with U.S. asylum law and non-refoulement as it restricts asylum seekers' due process protections—protections that are necessary for asylum seekers to present their claims for relief in accordance with statutory language and international obligations.

Considering the grave deficiencies of expedited removal, both as created under the IIRIRA and under the changes made during the Biden administration, this Note analyzes how the summary removal process is so flawed that it contradicts U.S. asylum law. Specifically, this Note seeks to explore how the inadequate record-development process hinders credible fear review, often resulting in the immediate deportation of asylum seekers without a fair opportunity to apply for asylum. Part I provides an overview of expedited removal and calls attention to how seeking asylum is incompatible with the process. Part II discusses the deficiencies that are apparent in the initial fear-screening process conducted by immigration and asylum officers. Part III analyzes how those deficiencies negatively affect credible fear review and how the review process itself is inadequate to offset the record-making deficiencies. This Note does so by analyzing the applicable regulations and how they contribute to significant inconsistencies among immigration judges—inconsistencies that can be the determining factor as to whether an asylum seeker is erroneously deported. As a foundation for reforming the process of expedited removal, Part IV argues that asylum seekers deserve due process protections while subjected to the process. Finally, Part V proposes reforms to the credible fear review process to move it closer to its intended use as a safety net to protect bona fide asylum seekers. These reforms include: (1) requiring immigration judges to allow new evidence and testimony; (2) utilizing a framework adopted by the Seventh Circuit in *Jimenez Ferreira v. Lynch* for assessing credibility; and (3) requiring a right to representation for noncitizens during the review process. In turn, these reforms will allow asylum seekers to have a fair opportunity to fully present their claims in accordance with U.S. asylum law.

33. Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 571–72 (2021) (citing Z-, 20 I. & N. Dec. 707, 707–08 (B.I.A. 1993)) (emphasis in original).

I. EXPEDITED REMOVAL

The obligations of non-refoulement and U.S. asylum law underpin the expedited-removal process.[34] Regardless of political agenda, the United States is bound by the principle of non-refoulement. Established in Article 33 of the 1951 Convention (the "Convention"),[35] non-refoulement "constitutes the cornerstone of international refugee protection."[36] The Convention provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion."[37] Though not a party to the original Convention,[38] the United States acceded the UN Protocol Relating to the Status of Refugees (the "1967 Protocol") on November 1, 1968.[39] The 1967 Protocol incorporated Articles 2 to 34 of the Convention,[40] thereby including the prohibition on refoulement, and expanded the definition of a refugee.[41]

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34. Willingham, *supra* note 4, at 125; *see also* COMMENTS OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES ON THE PROPOSED RULE FROM THE U.S. DEPARTMENT OF JUSTICE (EXECUTIVE OFFICE FOR IMMIGRATION REVIEW) AND THE U.S. DEPARTMENT OF HOMELAND SECURITY (U.S. CITIZENSHIP AND IMMIGRATION SERVICES): "PROCEDURES FOR CREDIBLE FEAR SCREENING AND CONSIDERATION OF ASYLUM, WITHHOLDING OF REMOVAL, AND CAT PROTECTION CLAIMS BY ASYLUM OFFICERS," U.N. OFFICE OF THE HIGH COMM'R OF REFUGEES 15 (Oct. 19, 2021), https://www.refworld.org/legal/natlegcomments/unhcr/2021/en/124208 [https://perma.cc/3ZP5-XHZV] ("Given that the credible fear screening determines access to the U.S. asylum procedure, the standards applied therein must guard against the risk that refugees are returned to places where they face persecution (direct refoulement) or onward removal to an unsafe country (indirect refoulement), which would violate the core principle of non-refoulement that is enshrined in Article 33(1) of the 1951 Convention.").

35. 1951 Convention, *supra* note 16, at art. 33(1).

36. ADVISORY OPINION ON THE EXTRATERRITORIAL APPLICATION OF NON-REFOULEMENT OBLIGATIONS UNDER THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL, U.N. HIGH COMM'R OF REFUGEES ADVISORY OPINION 2, 5 (Jan. 26, 2007) https://www.unhcr.org/sites/default/files/legacy-pdf/4d9486929.pdf [https://web.archive.org/web/20240411034307/https://www.unhcr.org/sites/default/files/legacy-pdf/4d9486929.pdf]; *see also* CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES, U.N. HIGH COMM'R OF REFUGEES 2 https://www.unhcr.org/sites/default/files/legacy-pdf/3b66c2aa10.pdf [https://web.archive.org/web/20250830051010/https://www.unhcr.org/media/1951-refugee-convention-and-1967-protocol-relating-status-refugees] ("Grounded in Article 14 of the Universal Declaration of human rights 1948, which recognizes the right of persons to seek asylum from persecution in other countries, the United Nations Convention relating the Status of Refugees, adopted in 1951, is the centrepiece of international refugee protection today.").

37. 1951 Convention, *supra* note 16, at art. 33(1). Under the Convention, the benefit of non-refoulement does not extend to a refugee who poses a danger to the security or the community of the country in which they are living. *Id.* at art. 33(2).

38. For a chart depicting which countries are a part of the 1951 Convention and the 1967 Protocol, see STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, U.N. HIGH COMM'R OF REFUGEES (Apr. 17, 2015) [hereinafter STATES TO THE 1951 CONVENTION AND 1967 PROTOCOL], https://www.unhcr.org/us/sites/en-us/files/legacy-pdf/3b73b0d63.pdf [https://web.archive.org/web/20231013174858/https://www.unhcr.org/us/sites/en-us/files/legacy-pdf/3b73b0d63.pdf]. The United States is only a party to the 1967 Protocol. *Id.* at 1.

39. *Id.* at 4.

40. Protocol Relating to the Status of Refugees, art. 1(1), Oct. 4, 1967 [hereinafter 1967 Protocol].

41. *Id.* at art. 1(2).

Despite its adoption of the 1967 Protocol, the United States did not enact domestic legislation with a conforming definition for "refugee" or a mandatory non-refoulement provision until the enactment of the Refugee Act of 1980 (the "Refugee Act").[42] The United States adopted the Convention's definition of "refugee," which reads, in relevant part, as follows:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[43]

Additionally, the Refugee Act amended the Immigration and Nationality Act ("INA")[44] to align the INA with the 1967 Protocol's non-refoulement obligations. Specifically, the Refugee Act amended § 243(h) of the INA, which provides that "[t]he Attorney General *shall not* deport or return any [noncitizen]" who is subject to persecution.[45] The declared purpose of the Refugee Act is "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted."[46] Additionally, the non-refoulment obligation is extended by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") to prohibit the return ("refouler") of "a person to another State where there are substantial grounds for believing that [they] would be in danger of being subjected to torture."[47]

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42. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C) (1980) [hereinafter Refugee Act] (amending the Immigration and Nationality Act and the Migration and Refugee Assistance Act of 1962). The Act was the first statutory basis for asylum and removed the geographical and ideological limits on the definition of "refugee" that were introduced by 1965 Amendments to the INA. *Refugee Timeline*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/about-us/our-history/stories-from-the-archives/refugee-timeline#:~:text=1952, [https://perma.cc/3HZ4-CCBQ].

43. Refugee Act, *supra* note 42, at 102.

44. The INA is the law governing U.S. immigration policy.

45. Refugee Act, *supra* note 42, at 107.

46. *Id.* at 102.

47. G.A. Res. 39/46 pt. 1, art. 3, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

The United States ratified CAT in 1994[48] and implemented it through domestic law.[49] Thus, international and domestic laws bind the United States to the principle of non-refoulement.

However, the Refugee Act's primary goal was the refugee process; the asylum process was viewed as a "separate and considerably less significant subject."[50] Accordingly, the Refugee Act added three short paragraphs regarding asylum to the INA.[51] These additions included eligibility requirements stating that "[a]ny [noncitizen] who is physically present in the United States or who arrives in the United States . . . , *irrespective of such [noncitizen's] status*, may apply for asylum."[52] Although the amendment of § 243(h) and statutory provisions on asylum attempted to uphold U.S. obligations of non-refoulement, these changes have a negligible effect in practice. Specifically, barriers to asylum that are inherent to the process of expedited removal contradict the principle of non-refoulement and U.S. asylum law when considering the rights of asylum seekers.

Prior to 1996, all refugees seeking asylum generally held the right to an evidentiary hearing on their asylum claim.[53] Thus, a judicial procedure followed adverse admission decisions, and the decision made by an immigration judge was "subject to review by the Board of Immigration Appeals and the Federal District Courts."[54] However, the passage of the IIRIRA in 1996 and the subsequent creation of the process of expedited removal rid those seeking, but not yet granted, admission[55] to the United

48. *See Status of Ratification Interactive Dashboard*, U.N. OFFICE OF THE HIGH COMM'R OF REFUGEES, https://indicators.ohchr.org [https://perma.cc/M4WH-VPCB] (indicating that the United States is a party to CAT).

49. MICHAEL JOHN GARCIA, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS, CRS REPORT FOR CONGRESS 3–6 (2006) https://tracreports.org/tracfed/tracker/dynadata/2005_12/RL32276_03112004.pdf [https://perma.cc/RSZ4-CGCX]. CAT is subject to "reservations," "understandings," and "declarations," including that the declaration was not self-executing, thus requiring it to be implemented through domestic legislation. *Id.* Thus, the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA") created a policy that required "the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing that the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681 (1998).

50. CONG. RSCH. SERV., IMMIGRATION: U.S. ASYLUM POLICY 9 (Feb. 19, 2019), https://crsreports.congress.gov/product/pdf/R/R45539/2.

51. INA § 208(b)(1), 8 U.S.C. § 1158(b)(1)(A).

52. INA § 208(b)(1), 8 U.S.C. § 1158(b)(1)(A) (emphasis added).

53. Lee, *supra* note 3, at 391–92 ("Individuals apprehended at ports of entry, including border ports, had fewer procedural protections than individuals already in the United States but, nevertheless, would receive an exclusion hearing before an immigration judge . . . to present and receive evidence, give testimony, secure witnesses, and appeal an adverse decision.").

54. James E. Crowe III, *Running Afoul of the Principle of Non-Refoulement: Expedited Removal Under the Illegal Immigration Reform and Immigrant Responsibility Act*, 18 ST. LOUIS U. PUB. L. REV. 291, 294 (1999).

55. Traditionally, noncitizens were either classified as "deportable" or "excludable." David M.

States of their right to an evidentiary hearing. Arriving noncitizens (termed "applicants for admission"[56]) lacking valid entry documents at a port of entry or who are apprehended within one hundred miles of the U.S. border within fourteen days of entry are subject to expedited removal.[57] The Trump administration expanded the use of expedited removal from 2020 to 2022 and again from 2025 to the present.[58] These expansions authorize immigration officers to utilize the process to its fullest extent—noncitizens *anywhere in the United States* who have been in the country for up to two years could be summarily deported.[59] This process allows the same government official who determines admissibility to summarily order the noncitizen removed back to their country, "without further hearing or review."[60] Once the noncitizen is deported, the removal order carries a five-year ban in most circumstances.[61]

Under the new IIRIRA scheme, low-level immigration officials act as both prosecutors and judges with respect to noncitizens seeking admission.[62] Immigration officials are given unfettered and unchecked power as the expedited removal process strictly limits judicial review,[63] and noncitizens are unable to appeal the removal order to the Board of Immigration Appeals.[64] Because the process developed as a reaction to a large influx of illegal immigration, the primary rhetoric around the use of expedited removal follows from wanting to remove individuals who do not have a basis under U.S. law to be in the country.[65] Yet, the process does not adequately take into account the special circumstances of asylum seekers. Seeking asylum *is* a legal reason to be in the United States, "*irrespective of such*

Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of* 1996, 83 CORN. L. REV. 820, 823 (1998). Noncitizens who had entered were "deportable" and granted due process protections whereas those who sought entry were "excludable" and denied due process protections. *Id.* The IIRIRA eliminated these classifications and replaced "excludable" with "inadmissible." *Id.* at 824. "Inadmissib[ility]" turns on whether the noncitizen has been inspected and admitted. *Id.*

56. A noncitizen present in the United States who has not yet been admitted or who arrives in the United States "shall be deemed . . . an applicant for admission." 8 U.S.C. § 1225(a)(1).

57. Lexie M. Ford, *A Reasonable Possibility of Refoulement: The Inadequacies of Procedures to Protect Vulnerable Noncitizens from Return to Persecution, Torture, or Death*, 9 TEX. A&M L. REV. 209, 219 (2021).

58. *Expedited Removal Explainer*, *supra* note 5.

59. *Id.*

60. 8 U.S.C. § 1225(b)(1)(A)(i).

61. *Expedited Removal Explainer*, *supra* note 5.

62. Lee, *supra* note 3, at 392.

63. 8 U.S.C. § 1252 (a)(2).

64. 8 C.F.R. § 235.3 (b)(2)(ii) (2025).

65. Willingham, *supra* note 4, at 116; *see* Erin M. O'Callaghan, *Expedited Removal and Discrimination in the Asylum Process: The Use of Humanitarian Aid as a Political Tool*, 43 WM. & MARY L. REV. 1747, 1774 (2002) ("Congress implemented the IIRIRA as a result of negative public opinion about illegal immigration and asylum . . . and an effort by Congress to prevent illegal immigration from Mexico and other Central and Latin American Countries.").

[noncitizen's] status"—in fact, arriving in the United States is the only way a refugee can seek asylum in the country.[66] Also, asylum seekers "may have their documents destroyed as a result of . . . persecution" or they may have "falsified their documents to prevent . . . their own country from discovering their intent to leave,"[67] thus subjecting them to a process that precludes access to protection.

Recognizing that asylum seekers flee their country to escape serious danger and are often unable to obtain documentation required to enter the United States,[68] Congress carved out procedural protections for asylum seekers subject to expedited removal, with the intention to allow legitimate asylum seekers to "receive a full adjudication of the asylum claim—the same as any other [noncitizen]" in the United States.[69] However, as this Note will demonstrate, these protections are inadequate, frequently misapplied or ignored altogether, and seemingly nonexistent.

II. DEFICIENCIES IN THE INITIAL FEAR-SCREENING PROCESS

When noncitizens enter without entry documents at a port of entry, they undergo a "secondary inspection" where an immigration officer will determine admissibility.[70] If the noncitizen "indicates an intention to apply for asylum . . . or a fear of persecution," they may avoid immediate removal.[71] The immigration "officer shall refer the [noncitizen]" to an asylum officer for a credible fear interview.[72] However, there are a series of barriers asylum seekers face to correctly articulating this fear, both in secondary inspections and in credible fear interviews, including trauma, language barriers, lack of knowledge regarding the articulation requirement, bias, and hostile officers.[73] As a result, the credible fear determination

66. INA § 208(b)(1), 8 U.S.C. § 1158(b)(1)(A) (emphasis added).

67. O'Callaghan, *supra* note 65, at 1747 n.6.

68. Brief for Amici Curiae Immigration and Human Rights Organizations in Support of Respondent at 9, Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103 (2020) (no. 191-161).

69. *Id.* at 10, 13.

70. CONG. RSCH. SERV., EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 14 (last updated Oct. 8, 2019) https://crsreports.congress.gov/product/pdf/R/R45314.

71. 8 U.S.C. § 1225 (b)(1)(A)(i).

72. 8 U.S.C. § 1225 (b)(1)(A)(ii).

73. Willingham, *supra* note 4, at 122. Studies by the U.S. Commission on International Religious Freedom ("USCIRF") found that, in some cases, immigration officers improperly encouraged asylum seekers to withdraw their applications for admission and, when arriving noncitizens expressed a fear of return to the officer, they were not referred for a credible fear interview. MARK HETFIELD ET AL., REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME I: FINDINGS AND RECOMMENDATIONS, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM (USCIRF) 50–55 (Feb. 8, 2005), https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf [https://perma.cc/89WA-UWCJ]. Another example includes "a Guatemalan asylum seeker in ICE custody who had previously been deported told USCIRF that on her first apprehension by BP, she 'was not given the opportunity to talk;' instead, she said that when she tried to explain why she had fled to the United States, the agent forced her to sign papers instead." ELIZABETH CASSIDY & TIFFANY LYNCH, BARRIERS TO PROTECTION, U.S.

process often fails to adequately identify bona fide asylum seekers and is susceptible to abuse given the power vested in immigration officers.[74]

A. SECONDARY INSPECTION

In apparent recognition of how the expedited removal process contradicts humanitarian protection,[75] regulatory obligations require immigration officers to make a record of the facts and statements made by the noncitizen using Form I-867AB ("Record of Sworn Statement") during the secondary inspection.[76] Immigration officers must provide the noncitizen with the information on Form I-867A, part of which advises the noncitizen that they should inform the inspector, "privately and confidentially"—if they have any fear or concern of returning home, since there are protections available under U.S. law for those facing persecution.[77] Additionally, the examining officer must record the noncitizen's answers to the "fear questions" contained on form I-867B,[78] which are as follows:

(1) Why did you leave your home country or country of last residence?

(2) Do you have any fear or concern about being returned to your home country or being removed from the United States?

(3) Would you be harmed if you are returned to your home country or country of last residence?

(4) Do you have any questions or is there anything else you would like to add?[79]

In glaring disregard for these regulatory obligations, studies by the United States Commission on International Religious Freedom ("USCIRF") found that compliance with statutory and regulatory procedures "varied significantly"; the outcomes of refugees seeking asylum depend "not only on the strength of the claim, but also on which officials consider the claim."[80] The findings indicated that inspectors observed using Form I-867A failed to convey the relevant portion informing applicants that they may ask for

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COMM'N ON INT'L RELIGIOUS FREEDOM 22 https://www.uscirf.gov/sites/default/files/Barriers To Protection.pdf [https://perma.cc/G79Q-7H3A].

74. Katherine Shattuck, Comment, *Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 WASH. L. REV. 459, 459 (2018).

75. Willingham, *supra* note 4, at 122.

76. 8 C.F.R. § 235.3(b)(2) (2025).

77. HETFIELD ET AL., *supra* note 73, at 21.

78. 8 C.F.R. § 235.3(b)(2) (2025).

79. ELIMINATION OF FEAR SCREENING REFERRAL SAFEGUARDS IN EXPEDITED REMOVAL, HUMAN RIGHTS FIRST 1 (Jan. 2024) [hereinafter ELIMINATION OF FEAR SCREENING], https://humanrightsfirst.org/wp-content/uploads/2024/02/2024.HRF_.Fact_Sheet.Shout-formatted.pdf [https://perma.cc/CV7J-URCQ].

80. HETFIELD ET AL., *supra* note 73, at 4.

protection if they have a fear of persecution approximately *half* of the time.[81] Also, in about 14% of cases, immigration officers failed to ask both questions on Form I-867B that specifically mention fear; in 5% of cases, neither question was asked.[82] Similarly, in 2014, the American Civil Liberties Union ("ACLU") found that 55% of 89 individuals interviewed for its report were never asked if they had a fear of persecution; others who were asked and indicated a fear were nevertheless removed without a referral for a credible fear interview.[83] Significantly alarming is that although the expedited removal statute states an unqualified requirement that immigration officers "*shall* refer" a noncitizen if they indicate an intention to apply for asylum, this referral is not guaranteed.[84]

Additional safeguards that are not strictly followed include the requirement that the officer review noncitizens' sworn statements on Form I-867B by reading it back to them, inquire whether the noncitizen understood what was read back to them, and correct any inaccuracies identified by the noncitizen, before asking them to sign the statement to confirm its accuracy.[85] Studies illustrate, for example, that asylum seekers are often "not allowed to review and correct the form before signing, as required."[86] This is especially concerning considering that the forms sometimes include "plainly inaccurate information or responses to questions that were never asked."[87] Asylum officers even report that many forms have identical answers and others with "clearly erroneous ones."[88] Also, in violation of their statutory duty, immigration officers have made "*de facto* assessments of the legitimacy of expressed fears"[89] by improperly coercing asylum seekers to withdraw their claims and sign a form falsely stating the asylum

81. *Id.* at 51, 54 (noting that noncitizens who did receive this information were seven times more likely to be referred for a credible fear determination than those who were not).

82. Brief for Amici Curiae Immigration and Human Rights Organizations in Support of Respondent, *supra* note 68, at 15 ("[N]oncitizens asked even a single fear question were twice as likely to be referred, and those asked both questions were four times as likely to be referred."); *see* Allen Keller, *et al.*, *Evaluation of Credible Fear Referral in Expedited Removal at Ports of Entry in the United States*, *in* U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume II: Expert Reports* 1, 15–18 (2005). These findings are consistent with current USCIRF research, which revealed "continuing and new concerns" regarding protections for asylum seekers in expedited removal. CASSIDY & LYNCH, *supra* note 73, at 17.

83. Eleanor Acer & Olga Byrne, *How the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources*, 5 J. ON MIGRATION & HUM. SEC. 356, 361 (2017).

84. 8 U.S.C. § 1225 (b)(1)(A)(ii) (emphasis added).

85. HETFIELD ET AL., *supra* note 73, at 75 (noting lapses in compliance with these procedures).

86. CASSIDY & LYNCH, *supra* note 73, at 19.

87. Brief for Amici Curiae Immigration and Human Rights Organizations in Support of Respondent, *supra* note 68, at 16.

88. CASSIDY & LYNCH, *supra* note 73, at 21.

89. Keller et al., *supra* note 82, at 29.

seeker had no fear of return.[90] These inadequacies have lingering effects when it comes to final determinations[91] and protecting against erroneous deportations to countries where noncitizens may face persecution.[92]

Under the Final Rule issued by the DHS and DOJ, Form I-867AB is no longer used. Instead, it has been replaced with a "manifestation" requirement—or "shout test"[93]—that has resulted in severe consequences for asylum seekers and violations of U.S. obligations to refugees. For example, noncitizens have reported that they were unable to express their fears because immigration officers "forbade them from speaking, reprimanded them, intimidated them, threatened them with prolonged detention, or told them there was no asylum anymore."[94] Completely eliminating the use of the sworn statement makes it even more likely that records will be incorrect and asylum seekers' fears will not be accurately recorded.

B. CREDIBLE FEAR INTERVIEW

The inadequacies in the initial fear-screening stage extend to the credible fear interview. This is of particular concern since the interview stage is a "make-or-break step" that determines whether a noncitizen who fears persecution is allowed to apply for asylum in the United States.[95] If a noncitizen articulates fear and is properly referred to an asylum officer, then the legitimacy of the claim is evaluated by determining whether the fear meets the "significant possibility" standard; that is, there is a "significant possibility" that the noncitizen *could* establish an asylum claim.[96] Courts

90. Brief for Amici Curiae Immigration and Human Rights Organizations in Support of Respondent, *supra* note 68, at 17.

91. CASSIDY & LYNCH, *supra* note 73, at 19 n.22 ("[T]he records created by CBP during initial interviews or by USCIS asylum officers during credible fear interviews are often used by ICE trial attorneys to impeach asylum seekers' credibility and/or cited by immigration judges in denying relief.").

92. CASSIDY & LYNCH, *supra* note 73, at 19.

93. NAT'L IMMIGRANT JUST. CTR., SIX-WEEK REPORT: IMPLEMENTATION OF THE BIDEN ADMINISTRATION'S JUNE 2024 "SECURING THE BORDER" ASYLUM BAN 2 (July 2024) [hereinafter SIX-WEEK REPORT], https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2024-07/Six-Week-Report-Biden-2024-Asylum-Ban_FINAL.pdf [https://perma.cc/NV2Z-L47G].

94. YAEL SCHACHER, "DON'T TELL ME ABOUT YOUR FEAR": ELIMINATION OF LONGSTANDING SAFEGUARD LEADS TO SYSTEMATIC VIOLATIONS OF REFUGEE LAW 8, REFUGEES INT'L (Aug. 12, 2024) https://humanrightsfirst.org/wp-content/uploads/2024/08/IFR-report_formatted.pdf [https://perma.cc/QY3W-JQA3] (recounting several instances where noncitizens reported not being able to speak).

95. Eileen Sullivan, *Lawyers Say Helping Asylum Seekers in Border Custody Is Nearly Impossible*, N.Y. TIMES (July 22, 2023), https://www.nytimes.com/2023/07/22/us/politics/biden-asylum-policies-border.html [https://perma.cc/458Z-U87W].

96. 8 U.S.C. § 1225 (b)(1)(B)(V). When making the determination, the asylum officer "tak[es] into account the credibility of the statements made by the [noncitizen] in support of [their] claim and such other facts as are known to the officer." *Id.* The "significant possibility" standard does not require the noncitizen to show that they are "more likely than not" going to succeed on their asylum claim. AMY GRENIER & GREG CHEN, AM. IMMIGR. LAWS. ASS'N, POLICY BRIEF: THE ASYLUM CREDIBLE FEAR

have stated that this threshold only requires showing "a fraction of [a] ten percent" possibility of persecution.[97] Congress intended the legal standard for credible fear interviews to be lower than what is required for the ultimate grant of asylum since the interview occurs at the preliminary stage.[98] Importantly, the use of a lower standard signals Congress's recognition of the inherent procedural difficulties that are likely to occur in a rapid proceeding with limited review.[99] Yet, credible fear is still a "complicated, amorphous standard" that acts as a "gatekeeping mechanism[]" against asylum seekers with meritorious claims."[100] The meaning of credible fear is not readily apparent, and asylum seekers' "likely unfamiliarity" with the term poses challenges in successfully navigating the credible fear process.[101] The ambiguity has also provided leeway for asylum officers to misapply the standard and force asylum seekers to prove credible fear beyond a significant possibility.[102] In turn, some cases that meet the legal standard for credible fear do not pass the interview stage.[103]

Further, asylum officers are supposed to conduct interviews in a "nonadversarial manner" to "elicit all relevant and useful information."[104] However, asylum seekers are often reluctant to share important information because the asylum officer "appear[s] disinterested, unbelieving, hurried, or aggressive."[105] This conduct by asylum officers, coupled with the trauma

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STANDARD 2 (Nov. 27, 2023), https://www.aila.org/aila-files/84232834-EC30-4264-8726-6388F5A060EC/23112244b.pdf?1701188581 [https://web.archive.org/web/20250208004839/https://www.aila.org/aila-files/84232834-EC30-4264-8726-6388F5A060EC/23112244b.pdf?1701188581].

97. Grace v. Whitaker, 344 F. Supp. 3d 96, 127 (D.D.C. 2018); *see* INS v. Cardoza-Fonseca, 480 U.S. 421, 439–40 (1987) (explaining that a ten percent chance of persecution can establish a " 'well-founded fear' of the event happening").

98. *See* 142 CONG. REC. S11491–02 (daily ed. Sep. 27, 1996) (statement of Sen. Orrin Hatch) ("The conference report struck a compromise by rejecting the higher standard of credibility included in the House bill. The standard adopted . . . is intended to be a low screening standard for admission into the usual full asylum process.") https://www.govinfo.gov/content/pkg/CREC-1996-09-27/html/CREC-1996-09-27-pt1-PgS11491-2.htm [https://perma.cc/VC2R-9P77].

99. GRENIER & CHEN, *supra* note 96, at 2.

100. Willingham, *supra* note 4, at 124.

101. Kif Augustine-Adams & D. Carolina Núñez, *Sites of (Mis)Translation: The Credible Fear Process in United States Immigration Detention*, 35 GEO. IMMIGR. L.J. 399, 405–09 (2021); *see* KATHRYN SHEPHERD & ROYCE BERNSTEIN MURRAY, AM. IMMIGR. COUNCIL, THE PERILS OF EXPEDITED REMOVAL: HOW FAST-TRACK DEPORTATIONS JEOPARDIZE ASYLUM SEEKERS 19 (May 2017), [hereinafter THE PERILS OF EXPEDITED REMOVAL], https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations_jeopardize_detained_asylum_seekers.pdf [https://perma.cc/NS9N-GG6W] (describing a case in which an asylum seeker failed to communicate a history of physical and sexual abuse because she did not "realize its relevance to her asylum claim" and ultimately received a negative credible fear determination).

102. Willingham, *supra* note 4, at 131 (describing "systematic deficiencies" in credible fear interviews at the Houston Asylum Office that led to "severe violations of due process and statutory obligations"); Shattuck, *supra* note 74, at 482–83 (describing how asylum officers have "misappl[ied] the [credible-fear] standard" in a family detention center in Artesia, New Mexico) (alterations in original).

103. Shattuck, *supra* note 74, at 482.

104. 8 C.F.R. § 208.30(d) (2025).

105. Ford, *supra* note 57, at 228.

asylum seekers carry, makes for an unreasonable environment to allow asylum seekers to comfortably and safely express their fears.[106] As members of Congress have stated, "Many [asylum seekers] are so traumatized by the kinds of persecution and torture that they have undergone [that] they are psychologically unprepared to [participate in any legal process]."[107] Asylum officers have also directly prevented asylum seekers from expressing their fear, even when asylum seekers were willing to recount what happened. For example, officers have failed to ensure that asylum seekers can understand their interpreters or have forced them to undergo interviews in a language they do not speak or understand,[108] thus ignoring the regulatory requirement to provide an interpreter.[109] There have also been instances of asylum officers limiting what could be said during the interview to questions that were explicitly asked, repeatedly interrupting the asylum seeker when attempting to share information about severe persecution, or wrongly accusing them of lying.[110]

These inadequacies are exacerbated by the noncitizen's nonexistent right to counsel in credible fear interviews.[111] While other classes of noncitizens within expedited removal permit *representation* during an interview,[112] noncitizens in credible fear interviews are only allowed to consult someone *before the interview*.[113] The consulted person *may* be present at the interview and permitted to offer a statement at the end of the interview, at the discretion of the asylum officer.[114] Thus, a noncitizen has

106. THE PERILS OF EXPEDITED REMOVAL, *supra* note 101, at 9–10 (May 2017) (recounting various instances where asylum seekers could not accurately express their fears due to intense trauma); REBECCA GENDELMAN, PRETENSE OF PROTECTION, HUM. RIGHTS FIRST 18–19 (Aug. 2022), https://humanrightsfirst.org/wp-content/uploads/2023/01/PretenseofProtection-21.pdf [https://perma.cc/ME6H-C6D9] (describing instances where asylum seekers were too afraid or ashamed to share information with asylum officers).

107. Philip G. Schrag, Andrew I. Schoenholtz, Jaya Ramji-Nogales & James P. Dombach, *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 671 (2010).

108. GENDELMAN, *supra* note 106, at 2.

109. 8 C.F.R. § 208.30(d), (d)(5).

110. GENDELMAN, *supra* note 106, at 17–18.

111. CHARLES H. KUCK, LEGAL ASSISTANCE FOR ASYLUM SEEKERS IN EXPEDITED REMOVAL: A SURVEY OF ALTERNATIVE PRACTICES 238 (Dec. 2004) ("Expedited Removal has had the effect of significantly restricting [a noncitizen's] right to counsel. . . . [Expedited removal] authorize[s] secondary inspectors and their supervisors to make removal decisions previously made only by Immigration Judges, and before [a noncitizen] is permitted to contact legal counsel.") https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/legalAssist.pdf [https://perma.cc/54KT-REZZ].

112. Willingham, *supra* note 4, at 126 n.136 ("For noncitizens in an RFI, they are permitted representation at the interview who can then introduce relevant evidence and make a closing statement at the discretion of the asylum officer, whereas noncitizens in a CFI are permitted consultants instead of representatives.") (citing 8 C.F.R. §§ 1208(c), 208.30(d)(4)).

113. 8 U.S.C. § 1225 (b)(1)(B)(iv). The consultation "shall be at no expense to the Government and shall not unreasonably delay the process." *Id.*

114. 8 C.F.R. § 208.30(d)(4) ("The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and on the length of the statement.").

no unqualified right to legal representation before or during the interview.[115] Under the Final Rule, the right to consult is further compromised since the time frame noncitizens have to consult with counsel before their credible fear interview is reduced to as little as four hours,[116] even when that window falls outside of the legal service providers' business hours.[117] This makes it almost impossible for noncitizens to speak with counsel prior to their interview.

Despite intending to be a low-threshold screener to allow asylum seekers to ultimately present their claims in a regular proceeding, the Final Rule has created even more barriers that hinder noncitizens' right to seek asylum. The Final Rule implemented restrictions on asylum that manifest themselves at the credible fear interview stage.[118] If a noncitizen is referred for a credible fear interview, they will receive a negative credible fear determination regarding their asylum claim unless they can show that the restriction does not apply[119] or that they meet a narrow exception.[120] Similar efforts made during the Trump administration were found unlawful by federal courts for violating U.S. asylum law. In *East Bay Sanctuary Covenant v. Barr*,[121] the court recognized that the asylum restrictions implemented were "attempting an unlawful end run around asylum protections enacted by Congress" and that "decades of U.S. asylum law prevent [the] administration from attempting to deny wholesale, asylum protections through [the] arbitrary and hasty regulation."[122] The Final Rule justifies the limitation on asylum by screening noncitizens subject to the restriction—those who cannot demonstrate that "exceptionally compelling

115. HETFIELD ET AL., *supra* note 73, at 29 (depicting the asylum application process in expedited removal proceedings and indicating that, during credible fear interviews, a noncitizen has no right to legal representation but may have a consultant present).

116. The four-hour consultation period begins when the noncitizen is provided the opportunity to consult, "i.e., when the noncitizen is provided access to a phone." Memorandum from Patrick J. Lechleitner, Deputy Dir. of U.S. Immigr. and Customs Enf't, to Daniel A. Bible, Exec. Assoc. Dir. of U.S. Immigr. and Customs Enf't 4 (June 4, 2024), https://www.aila.org/aila-files/388D788F-87D6-4933-8921-E9A7AB1F6670/24060504.pdf?1717612621 [https://perma.cc/XT5J-ZAY4].

117. SIX-WEEK REPORT, *supra* note 93, at 4.

118. Interim Final Rule, *supra* note 22, at 48718.

119. The limitation does not apply to noncitizen U.S. nationals, lawful permanent residents, victims of a severe form of trafficking, noncitizens with valid visas or lawful permission to enter, or noncitizens arriving at a port of entry for a prescheduled appointment using the CBP One application. SINGER, *supra* note 25, at 2.

120. Final Rule, *supra* note 26, at 81168 (listing exceptions, including if the "noncitizen demonstrates that they or a member of their family as described in 8 CFR 208.30(c) with whom they are traveling: (1) faced an acute medical emergency; (2) faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder; or (3) satisfied the definition of 'victim of a severe form of trafficking in persons' provided in 8 CFR 214.201.").

121. E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922 (N.D. Cal. 2019).

122. Press Release, ACLU, Federal Court Blocks New Trump Asylum Restrictions (July 24, 2019), https://www.aclu.org/press-releases/federal-court-blocks-new-trump-asylum-restrictions [https://perma.cc/W5H2-BZAU].

circumstances" exist[123]—for the lesser forms of relief of statutory withholding of removal[124] and CAT.[125] But rather than having to prove their fear based on the "significant possibility" standard traditionally used, noncitizens will be forced to prove a higher standard of "reasonable probability."[126] The "reasonable probability" standard is defined to mean "substantially more than a 'reasonable possibility' but somewhat less than more likely than not."[127] Similar to the likely increase in requests for review due to the restriction on asylum, the higher "reasonable probability" standard will make it more difficult for noncitizens to get a positive fear determination for withholding of removal and CAT, ultimately resulting in more requests for review. The restriction on asylum and higher screening standards extend beyond what is authorized by U.S. asylum laws and elevates the risk of refoulement by suppressing applicants from applying for asylum.[128] Importantly, "the availability of alternative forms of immigration relief, which are subject to a higher bar and different collateral consequences, are not interchangeable substitutes."[129] Thus, as with the Trump administration's asylum restrictions, the Final Rule circumvents the United States' statutory obligation to asylum seekers by creating frivolous limits on asylum eligibility. What results then is that more people are likely to be returned to countries where they face torture or death without the possibility of seeking asylum. Considering these grave consequences, it is even more imperative to drastically change the system of expedited removal to ensure that noncitizens have the opportunity to apply for asylum.

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123. Final Rule, *supra* note 26, at 81168.

124. *Compare Asylum Manual: Withholding of Removal*, IMMIGR. EQUAL. https://immigrationequality.org/asylum/asylum-manual/immigration-basics-withholding-of-removal [https://perma.cc/DMH3-L6GG] ("The individual [who is successful under a withholding of removal claim] can seek work authorization; however, they will not be able to adjust their status to become a legal permanent resident, nor can they become a citizen."), *with Asylum Manual: Asylee Status*, IMMIGR. EQUAL. https://immigrationequality.org/asylum/asylum-manual/asylee-status [https://perma.cc/J2B7-JU4L] ("When asylum is granted, it means that the asylee will have the opportunity to live and work legally in the United States and will eventually have the opportunity to apply for lawful permanent residence and citizenship.").

125. *Compare Asylum Manual: Relief Under CAT*, IMMIGR. EQUAL., https://immigrationequality.org/asylum/asylum-manual/immigration-basics-relief-under-cat [https://perma.cc/3H99-SLHX] ("An individual who is successful under a CAT claim cannot be removed from the United States to the country from which they fled persecution, but they can be removed to a third country if one is available. An individual granted CAT cannot adjust their status to a legal permanent reside, but can obtain work authorization."), *with Asylum Manual: Asylee Status*, *supra* note 124 ("When asylum is granted, it means that the asylee will have the opportunity to live and work legally in the United States and will eventually have the opportunity to apply for lawful permanent residence and citizenship.").

126. Final Rule, *supra* note 26, at 81168.

127. *Id.*

128. Geoffrey Louden & Christina Asencio, *Basics of Asylum*, HUM. RTS. FIRST (Nov. 29, 2023) https://humanrightsfirst.org/library/basics-of-asylum [https://perma.cc/45LH-PWQK].

129. E. Bay Sanctuary Covenant v. Barr, No. 19-cv-04073 (N.D. Cal. July 25, 2019) (order granting preliminary injunction).

III. HOW DEFICIENCIES OF THE RECORD HINDER CREDIBLE FEAR REVIEW

If the asylum officer finds credible fear, then the expedited removal order will be revoked, and the noncitizen can apply for protection in regular removal proceedings,[130] which are known as "240 proceeding[s]."[131] However, if the asylum officer finds that the noncitizen has not shown credible fear, then "the officer shall order the [noncitizen] removed . . . without further hearing or review," unless a request for an immigration judge to review the finding is made.[132] Credible fear review was created through an amendment as lawmakers argued that "any system that denied asylum seekers with negative credible fear findings 'a chance to be heard before a judge' would inevitably send some persecuted persons 'back summarily to the hands of [their] abusers.' "[133]

The asylum officer must inquire whether the noncitizen wishes to have an immigration judge review the negative credible fear finding.[134] Prior to the Final Rule, a refusal or failure by the noncitizen to make such a request, absent explicit denial of the review, "shall be considered a request for review."[135] Upon a request, the asylum officer is required to refer the noncitizen to an immigration judge.[136] Now, while the Final Rule is in effect, a refusal or failure to make a request will result in deportation.[137] Review by an immigration judge is an asylum seeker's opportunity "to be heard and questioned by the immigration judge";[138] however, the review is often limited in scope, and the noncitizen has no per se right to submit evidence or be represented during the review.[139] The proceeding is intended to be a review of the asylum officer's decision,[140] utilizing the asylum officer's record of determination and all materials relied upon to form the basis of

130. *Expedited Removal Explainer*, *supra* note 5.

131. FREQUENTLY ASKED QUESTIONS: ASYLUM SEEKERS AND THE EXPEDITED REMOVAL PROCESS, HUMAN RIGHTS FIRST (Nov. 2015), https://humanrightsfirst.org/wp-content/uploads/2015/11/FAQ-asylum-seekers-and-the-expedited-removal-process.pdf [https://perma.cc/ZH7K-48E4]. Regular 240 proceedings involve a hearing before an immigration judge, and the noncitizen has the opportunity to make a claim to remain in the United States. *Id.*

132. 8 U.S.C. § 1225(b)(1)(B)(iii)(I), (III).

133. Shattuck, *supra* note 74, at 493 (alternations in original).

134. 8 C.F.R. § 208.30(g)(1).

135. *Id.*

136. 8 C.F.R. § 208.30(g)(1)(i). To begin the referral process, the asylum officer serves the noncitizen with a Form I-863, Notice of Referral to Immigration Judge, for review of the credible fear determination. *Id.*

137. Final Rule, *supra* note 26, at 81229.

138. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

139. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL § 7.4(d)(4)(C), (E) [hereinafter IMMIGRATION COURT PRACTICE MANUAL] ("Evidence *may* be introduced at the discretion of the immigration judge." (emphasis added)).

140. *Id.* § 7.4(d)(4)(E).

their negative fear determination.[141] Credible fear reviews are to be conducted within twenty-four hours when possible, or within seven days at the latest.[142] The review requires the immigration judge to determine whether the noncitizen's fear rises to the level of "significant possibility" under the credible fear standard, and the asylum officer's determination is reviewed de novo.[143] While the Final Rule's asylum limitation is in place, the credible fear review process will also encompass whether the noncitizen would be able to demonstrate by a preponderance of the evidence that the limitation does not apply or that the noncitizen meets an exception.[144] Based on the record and any statements made by the noncitizen, the immigration judge decides whether to affirm or vacate the negative fear determination. If the determination is vacated, the noncitizen may be placed in regular removal proceedings.[145] If a noncitizen is not as lucky and the determination is affirmed, they will be subject to immediate removal.[146] Importantly, the immigration judge's determination is final and not subject to any other administrative or judicial review.[147]

In practice, the reviewability of negative credible fear determinations does not fulfill its intended purpose of providing a safeguard for asylum seekers with bona fide claims.[148] Immigration judges overwhelmingly affirm negative credible fear determinations: between Fiscal Year 2018 and Fiscal Year 2021, 73.3% of asylum officer's decisions were affirmed,[149] 68.6% were affirmed in the first three quarters of Fiscal Year 2022,[150] and 77% were affirmed in Fiscal Year 2023.[151] Of note is how the inadequate record-making process in the secondary inspections and credible fear interviews detrimentally affects the outcomes of credible fear review. Immigration judges are relying on incomplete or erroneous facts about noncitizens' fears in making their determinations, heightening the risk of erroneously returning noncitizens to places where they fear persecution and denying them the ability to apply for asylum. This is especially prevalent given two major inconsistencies among immigration judges: (1) allowing the introduction of

141. *Id.* § 7.4(d)(4)(D).
142. 8 C.F.R. § 1003.42(e).
143. *Id.* § 1003.42(d).
144. Final Rule, *supra* note 26, at 81,193.
145. 8 C.F.R. § 1208.30(g)(1)(i), (2)(iv)(A).
146. *Id.* § 1208.30(g)(2)(iv)(A).
147. *Id.*
148. Shattuck, *supra* note 74, at 493–95 (discussing that Congress intended for asylum seekers to have a judicial review safeguard to prevent sending them "back summarily to the hands of [their] abusers") (alteration in original) (citing 142 CONG. REC. S4461 (daily ed. May 1, 1996) (statement of Sen. Leahy)).
149. GENDELMAN, *supra* note 106, at 5.
150. Willingham, *supra* note 4, at 111.
151. CREDIBLE FEAR REVIEW AND REASONABLE FEAR REVIEW DECISIONS, *supra* note 15.

new evidence not previously mentioned in the initial fear-screening process; and (2) allowing counsel to be present and participate in the review process. Effectively then, credible fear review often serves as a "rubber stamp" for the asylum officer's determination depending on the immigration judge presiding over the review.[152] These variations create a "lottery system where the 'lucky winners' are afforded a fair process and opportunity, and the rest are left feeling like they are contestants in a system rigged to ensure their removal."[153]

A. ALLOWANCE OF NEW EVIDENCE

The initial fear-screening process is readily susceptible to, and arguably promotes, an ineffective system to correctly and adequately document noncitizens' claim of fear. Credible fear interviews are typically conducted in detention, and recounting fear in this setting is inherently intimidating and re-traumatizing.[154] As a result, noncitizens are often reluctant to share certain information in these initial screenings, or they are unable—although willing––to explain their fear of return due to hostile asylum officers.[155] Coupled with the record-making deficiencies described in Section II, the discretionary nature of allowing new evidence during credible fear review bars potential bona fide asylum seekers from pursuing their claims since the record does not accurately reflect their fear.

Despite being the last, and only, opportunity for a noncitizen to be heard and questioned by an immigration judge, the right to be heard and present evidence is the "[w]ild [w]est," fluctuating among immigration judges.[156] For example, some judges allow noncitizens to give testimony, while others do not allow them to speak at all.[157] Additionally, admittance of documentary evidence varies, with some judges allowing evidence to be submitted and others restricting evidence to that which has already been provided to the asylum officer.[158] These differing approaches point to a critical failure of credible fear review as a safeguard against erroneous and unlawful removals of asylum seekers with potentially meritorious claims. Considering the documented record-making issues that occur in secondary inspections and

152. Lauren Schusterman, *A Suspended Death Sentence: Habeas Review of Expedited Removal Decisions*, 118 MICH. L. REV. 655, 662 (2020).

153. Willingham, *supra* note 4, at 140.

154. GENDELMAN, *supra* note 106, at 18.

155. *Id.* at 16–19 (recounting various stories of noncitizens who did not have a fair opportunity to present their full claims of fear, ultimately resulting in negative credible fear findings, due to the nature of initial fear screenings, including hostile officers).

156. Willingham, *supra* note 4, at 158.

157. *Id.*; GENDELMAN, *supra* note 106, at 17 (noting that a Haitian asylum seeker was wrongly found not to have credible fear when an immigration judge affirmed the negative fear determination and did not allow the asylum seeker to speak at the review).

158. Willingham, *supra* note 4, at 158.

credible fear interviews, "any indication of instances of immigration judges refusing to allow testimony and evidence during . . . [r]eview point to serious procedural flaws."[159] By prohibiting testimony and evidence, judges are limited to the record formed during the initial fear-screening phases, posing challenges when noncitizens want to add new information *not documented* because they either didn't mention it previously or the officers failed to correctly record the fear. The ability to deny the introduction of testimony or new evidence inhibits the ability to pinpoint any errors that may have occurred during the initial credible fear determination. It is particularly concerning that the denial is at the discretion of the immigration judge given that the consequence is returning a noncitizen back to a place where they may face torture or death.[160] Although it might make sense to limit the introduction of new evidence on appeal in a process where attorneys can participate at the trial level, restricting new evidence in credible fear review does not follow this logic. The initial fear-screening process is unsuitable for attorney participation, and there is no statutory or regulatory right to representation during the credible fear interview.[161] Therefore, it does not make sense that noncitizens should be limited to the evidence elicited during a process that did not involve an attorney, especially because of the difficulties noncitizens face during the initial fear-screening phase.

Even if additional evidence is considered, immigration judges have interpreted additional information not explicitly mentioned during the initial fear-screening process as impugning the noncitizen's credibility.[162] Notably, immigration judges denying asylum on the basis of credibility have cited the noncitizen's statements recorded on Form I-867AB and the asylum officer's interview notes on Form I-870 when information was mentioned in the review not originally in the record.[163] This is despite the fact that Form I-870 includes the following statement: "The following notes are not a verbatim transcript of this interview. . . . There may be areas of the individual's claim that were not explored or documented for purposes of this threshold screening."[164] However, this statement does not appear on Form I-867.[165] In one instance, a Haitian asylum seeker threatened at gunpoint for his sexual orientation was deemed not credible by the immigration judge because it was

159. *Id.* at 159.

160. *Id.*

161. *See supra* notes 112, 115–18 and accompanying text (discussing how expedited removal restricts attorney participation and the right to representation in the initial fear-screening process).

162. GENDELMAN, *supra* note 106, at 5; *see* 8 C.F.R. § 1003.42(d)(1) ("The immigration judge shall make a de novo determination as to whether there is a significant possibility, taking into account the *credibility* of the statements made by the [noncitizen] in support of the [noncitizen's] claim.") (emphasis added).

163. HETFIELD ET AL., *supra* note 73, at 57–58.

164. CASSIDY & LYNCH, *supra* note 73, 19 n.22.

165. *Id.*

not disclosed during his credible fear interview that he was gay after being instructed to answer only the questions asked.[166] Another asylum seeker said in her credible fear interview that she had seven brothers and sisters; in her credible fear review she said she had six when she only had three but was too nervous to remember accurately.[167] Despite their best efforts, asylum seekers' traumatic experiences often inhibit them from remembering events correctly or contribute to their reluctance to share out of shame or fear of retaliation.

B. ALLOWANCE OF COUNSEL

The role of counsel in credible fear review is another area of uncertainty among immigration judges, and it poses issues for noncitizens when trying to articulate fear or present evidence. Regulations governing the credible fear review process make clear that a noncitizen may consult with counsel "prior to the review."[168] The Immigration Court Practice Manual reaffirms this and further states: "In the *discretion* of the immigration judge, persons consulted may be present during the credible fear review. However, the noncitizen *is not represented at the credible fear review*."[169] Similar to admitting testimony or new evidence, immigration judges differ significantly when interpreting the role of counsel in credible fear review: some judges let counsel participate as far as proffering testimony and explaining how clients meet the respective standards, while others deny counsel participation completely.[170]

Like the difficulties asylum seekers face in articulating their fear in the initial fear-screening process, asylum seekers in credible fear review face a series of obstacles when it comes to articulating their fear, including trauma, language barriers, and the need to navigate an immensely complicated area of law. For instance, noncitizens who either did not have an attorney or who *did* have an attorney who was willing to help but was ultimately barred from participating in the review "rarely [had] anyone to monitor the quality of and access to interpretation."[171] Also, even if noncitizens *are* able to introduce new evidence or testimony, forcing them to articulate a nexus between their claims and asylum eligibility *pro se* is "unreasonable and fundamentally

166. GENDELMAN, *supra* note 106, at 5.

167. SHEPHERD & MURRAY, THE PERILS OF EXPEDITED REMOVAL, *supra* note 101, at 9.

168. 8 C.F.R. § 1003.42(c).

169. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 139, § 7.4(d)(2)(4)(C) (emphasis added).

170. Willingham, *supra* note 4, at 159–60.

171. *Id.* at 162; *see* GENDELMAN, *supra* note 106, at 5 ("[A]n Ivorian asylum seeker kidnapped and tortured for his family's political activism . . . was . . . forced to proceed with interpretation in a non-primary language at his credible fear review after the judge said he would 'never leave' detention otherwise.").

unfair."[172] Ultimately, it calls for concern that the utility of representation during credible fear review significantly depends on the immigration judge's view of a representative's role in the process given the obstacles that are prevalent for asylum seekers during this last line of defense.[173]

IV. ASYLUM SEEKERS DESERVE DUE PROCESS PROTECTIONS IN EXPEDITED REMOVAL

The Supreme Court has "long held"—and recently reaffirmed in 2025—that the Fifth Amendment entitles noncitizens to a fair hearing of their claims.[174] The Fifth Amendment guarantees that "no person shall . . . be deprived of life, liberty, or property, without due process of law."[175] Evidently, when an erroneous deportation order results in persecution, torture, or death, as is the case for legitimate asylum seekers,[176] a noncitizen's "interest in life and liberty is implicated directly."[177] In *Wong Wing v. United States*, the Court "concluded that all *persons* within the territory of the United States are entitled to the protection guaranteed by [the Fifth A]mendment."[178] The language "all persons" has repeatedly been interpreted as including all noncitizens, regardless of status, within the borders.[179] Seven years later, the Court in *Yamataya v. Fisher* held that a person "who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here" is entitled to the "opportunity to be heard upon the questions involving [their] right to be and remain in the United States."[180] These two cases reiterate a territory-based view that courts have used to determine who is

172. Willingham, *supra* note 4, at 175 (citing Quintero v. Garland, 998 F.3d 612, 632 (4th Cir. 2021)).

173. *Id.* at 160.

174. A.A.R.P. v. Trump, 145 S. Ct. 1364, 1367 (2025); *see also* Wong Wing v. United States, 163 U.S. 228, 238 (1896); Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings."); Yick Wo v. Hopkins, 118 U.S 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.").

175. U.S. CONST. amend. V.

176. *See* Nina Sreshta et al., *Who Seeks Asylum in the United States and Why? Some Preliminary Answers from a Boston-Based Study*, HARV. MED. SCH. CTR. FOR BIOETHICS (Apr. 1, 2021), https://bioethics.hms.harvard.edu/journal/displacement-crisis [https://perma.cc/BFZ4-JPCY] (recounting several instances where asylum seekers fled their country after witnessing family members getting killed and being personally subjected to significant harm or death threats).

177. John R. Mills et al., *Death is Different and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 363 (2009).

178. *Wong Wing*, 163 U.S. at 238 (emphasis added).

179. Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[O]nce [a noncitizen] enters the country . . . the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); Mathews v. Diaz, 426 U.S. 67, 77 (1976); *cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (holding that "[noncitizens] are [not] entitled to Fifth Amendment rights outside the sovereign territory of the United States.").

180. Yamataya v. Fisher, 189 U.S. 86, 101 (1903).

considered "persons"—and is thus entitled to due process protections—and who is not.[181] Put simply, due process protections reach all "persons" *within the territory* of the United States, "whether their presence here is lawful, unlawful, temporary, or permanent"—and conversely, it does not reach foreign citizens *outside* U.S. territory.[182] This approach to ensuring due process that does not distinguish between " 'persons' [*within the geographical borders* of the United States] is rooted in more than a century of jurisprudence and dictated by textual command in the Constitution."[183]

As the physical border has grown to be a contested issue in immigration law, and with the enactment of the IIRIRA in 1996, a new distinction between physical entry and formal legal admission has surfaced for the purposes of determining constitutional guarantees.[184] Animated by Congress's plenary power,[185] the territorial question became a "legal, not literal, one."[186] As a result, a noncitizen who has not been admitted is treated as "an applicant for admission," even if they are physically within the border,[187] and "cannot be said to have 'effected an entry.' "[188] This is true "even if Immigration and Customs Enforcement ('ICE') officials transport them deep into the interior and lock them away in detention centers, even for years."[189] This legal fiction, dubbed "entry fiction," was originally created by the Court in *Shaughnessy v. United States ex rel. Mezei* and underlies the justifications for affording extremely limited procedural protections to those in expedited removal.[190] The Court in *Mezei* held that, whereas noncitizens "who have once passed through our gates, even illegally," are entitled to certain constitutional protections, a noncitizen "on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as a [noncitizen] denied entry is

181. *See* Diana G. Li, Note, *Due Process in Removal Proceedings After* Thuraissigiam, 74 STAN. L. REV. 793, 805 (2022).

182. *Zadvydas*, 533 U.S. at 693 (emphasis added).

183. Brief for Amici Curiae Immigration and Human Rights Organizations in Support of Respondent, *supra* note 68, at 7.

184. Li, *supra* note 181, at 808–09.

185. Plenary power is rooted in Article 1, Section 8 of the U.S. Constitution. *See* Hillel R. Smith, *Supreme Court Rules that There Is No Constitutional Right to Having an Alien Spouse Admitted to the United States*, CONG. RSCH. SERV., https://www.congress.gov/crs-product/LSB11245 (Nov. 5, 2024) ("The Supreme Court has long recognized that Congress has 'plenary' power over immigration and has interpreted this power to apply with most force to the admission and exclusion of [noncitizens] who seek to enter the United States.").

186. Brandon Hallett Thomas, *Separation of Powers and* Thuraissigiam*: The Entry Fiction as Judicial Aggrandizement*, 136 HARV. L. REV. 226, 237 (2023).

187. 8 U.S.C. § 1225(a)(1).

188. Thomas, *supra* note 186, at 246.

189. Lee, *supra* note 33, at 571–72 (citing Z-, 20 I. & N. Dec. 707, 707–08 (B.I.A. 1993)) (emphasis in original).

190. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953).

concerned.' "[191] Thus, noncitizens seeking admission into the United States "may *physically* be allowed within its borders . . . but they are *legally* considered to be detained at the border and hence enjoy limited protections under the Constitution."[192]

One scholar has noted that entry "is perhaps the most heavily criticized immigration law fiction."[193] Specifically, it has been described as "scandalous, shocking, morally outrageous, deplorable, an embarrassment and an anomaly in constitutional government."[194] Regardless, the entry fiction is still widely used as a determinate of procedural due process.[195] Despite the entry fiction's continued prevalence, this Note argues that asylum seekers stand on a different footing than other noncitizens—seeking asylum does not warrant being conflated with standing on the threshold of initial entry. Rather, U.S. asylum law and congressional intent encourage the application of the due process clause to extend to asylum seekers no matter their manner of entry or status.

A. THE INCOMPATIBILITY OF ENTRY FICTION WITH U.S. GOALS OF PROTECTING REFUGEES

The right of a noncitizen to apply for asylum is codified at 8 U.S.C. § 1158(a)(1), which states:

> Any [noncitizen] who is *physically present* in the United States or who *arrives in* the United States (whether or not at a designated port of entry of arrival and including a [noncitizen] who is brought to the United States after having been interdicted in international or United States waters), irrespective of such [noncitizen's] status, may apply for asylum . . . .[196]

Of importance is that the language of the statute specifies that those who are "physically present" or who "arrive[] in" the United States may apply for asylum; nowhere in the statute does it carve out a requirement for being *legally* present. A June 2025 Ninth Circuit decision, *Al Otro Lado v. Executive Office for Immigration Review*, reaffirmed this when deciding that

191. *Mezei*, 345 U.S. at 212 (first citing United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); and then citing Ekiu v. United States, 142 U.S. 651, 660 (1892)).

192. Zainab A. Cheema, *A Constitutional Case for Extending the Due Process Clause to Asylum Seekers: Revisiting the Entry Fiction After Boumediene*, 87 FORDHAM L. REV. 289, 306 (2018).

193. Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 90–92, 90 n.209, 91 n.217, 92 n.218 (1989) (describing criticisms from multiple scholars including Laurence Tribe, Charles Reich, Henry Hart, Jr., Peter Schuck, Louis Henkin, and others).

194. *Id.* at 92–93.

195. *Id.* at 91–92.

196. 8 U.S.C. § 1158(a)(1) (emphasis added).

a "metering"[197] policy was unlawful.[198] The Government argued that noncitizens "at the border" are not eligible to apply for asylum because they are not covered by the phrase "arrives in the United States."[199] But "[s]tatutory language 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' "[200] To "arrive" means to "reach a destination,"[201] and for an asylum seeker coming to the United States, "the relevant destination is the U.S. border."[202] It follows then that noncitizens who present themselves at the border have reached their destination.[203] The court's construction of the statute's language also aligns with the overall context of the immigration system because it "avoids creating a 'perverse incentive to enter at an unlawful rather than a lawful location.' "[204] If the Government's reading of the statute were adopted, then an asylum seeker who knows they will be turned away at a port of entry would be "better off" circumventing official avenues for entering the country—Congress would not have created that incentive.[205] Thus, the court concluded that § 1158(a)(1) applies to a noncitizen who is *either* "physically present in the United States *or* who arrives in the United States."[206]

Further, the court emphasized that the phrase " 'arrives in the United States' encompasses those who encounter officials at the border, *whichever side of the border they are standing on*."[207] This extraterritorial reach of the asylum statute, specifically in the context of expedited removal, goes beyond the traditional territory-based distinction and asserts that protections are afforded to asylum seekers before they reach U.S. territory.[208] A prior

197. In 2016, Customs and Border Protection adopted a policy of "metering" asylum seekers at ports of entry along the border between Mexico and the United States. Under the policy, whenever border officials deemed a port of entry to be at capacity, they turned away all people lacking valid travel documents; many of those people intended to seek asylum, but they were not allowed to apply. Al Otro Lado v. Exec. Off. for Immigr. Rev., 138 F.4th 1102, 1109 (9th Cir. 2025).

198. *Id.* at 1109.

199. *Id.* at 1114 ("The Government's position is that one only 'arrives in the United States' upon stepping across the border.").

200. *Id.* (citing Sturgeon v. Frost, 577 U.S. 424, 438 (2016)).

201. *Id.* at 1115 (citing *Arrive*, Merriam-Webster's Collegiate Dictionary (10th ed. 1996)).

202. *Id.*

203. *Id.*

204. *Id.* (citing Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 140 (2020)).

205. *Id.* at 1115–16.

206. *Id.* at 1114 (alteration in original) ("We therefore must endeavor to give the phrase 'arrives in the United States' a meaning that is not completely subsumed within the phrase 'physically present in the United States.' ").

207. *Id.* at 1115 (emphasis added).

208. *See id.* at 1119–20; Al Otro Lado v. Exec. Off. for Immigr. Rev., 120 F.4th 606, 639 (9th Cir. 2024), *superseded by* Al Otro Lado v. Exec. Off. for Immigr. Rev., 138 F.4th 1102 (2025) (noting that the extraterritorial reach is appropriate because § 1158 addresses conduct that "almost always originates outside the United States" and that § 1158 does not extend worldwide).

version of § 1158 lends support to this interpretation, stating, "The Attorney General shall establish a procedure for a [noncitizen] physically present in the United States or at a land border or port of entry, irrespective of such [noncitizen's] status, to apply for asylum . . . ."[209] Because a noncitizen stopped at a border is " 'at a land border' whether or not they have stepped across," the court's interpretation in *Al Otro Lado* does not unreasonably expand the right to apply for asylum—it mirrors the scope of the previous "at a land border" category.[210] Indeed, a different meaning prescribed to the statute would "reflect a radical contraction of the right to apply for asylum."[211]

The history of U.S. asylum law and the statutory language undoubtedly allow, and ultimately require, that noncitizens be eligible to apply for asylum regardless of status or manner of entry. Section 1158(a)(1) even goes as far as to extend to noncitizens at a port of entry even if they have not physically stepped over the border. Evidently, the statutory language makes it clear that "entry fiction does not interfere with a noncitizen's right to apply for asylum."[212] Although noncitizens subject to expedited removal may not be legally present, having not been admitted, this does not change the fact that they are *physically* present or have *arrived*, and thus they are entitled to apply for asylum. Yet expedited removal's innate deficiencies and the lack of due process safeguards—which the government justifies using the entry fiction—create a process restricting access to asylum. As it stands, seeking asylum is no longer about ensuring that those with bona fide claims are protected, but rather about determining who can *access* the system. To uphold the statute, asylum seekers subject to expedited removal require at least some due process protections.

At the time of the creation of expedited removal, Congress specifically carved out an exception for noncitizens seeking asylum: "[T]he officer shall order the [noncitizen] removed from the United States without further hearing or review *unless* the [noncitizen] indicates either an intention to apply for asylum . . . or a fear of persecution."[213] Under the statutory language, refugees are afforded further review of their claims and placed in "[l]imited proceedings."[214] This act of Congress signifies how expedited removal was viewed in light of its application to refugees; members of Congress viewed expedited removal as "an abandonment of our historical

209. 8 U.S.C. § 1158(a) (1980), *amended by* Pub. L. 104–208, § 604(a), 110 Stat. 3009–690 (1996).
210. *Al Otro Lado*, 138 F.4th at 1115–16.
211. *Id.* at 1117.
212. *Id.* at 1116.
213. 8 U.S.C. § 1225(b)(1)(A)(i) (emphasis added).
214. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 139, § 7.4(b)(1)(B).

commitment to refugees."[215] A few years after its implementation, Senator Patrick Leahy and others proposed the bipartisan Refugee Protection Act of 1999 "to [] reduce the likelihood that a bona fide refugee will be returned to persecution . . . because of expedited removal procedures or lack of due process in the United States asylum system."[216] Senator Leahy has since introduced the Refugee Protection Act seven times, with its most recent and expansive version being in 2022.[217] The proposed Refugee Protection Act of 1999 stated the following findings by Congress:

The very foundation of the Republic was laid by people who came to America to escape persecution . . . .

Protecting people from persecution is a cherished goal and a guiding principle of the American people.

The United States has a history of generosity to persons fleeing persecution that has served as an inspiring example to other nations developing refugee policy . . . .

Conversely, when the United States has restricted protection for refugees, other nations have followed that lead.

Current law fails to ensure that those who arrive in the United States fleeing persecution have a fair and adequate opportunity to present claims for protection.[218]

The proposed Act underscores the humanitarian and legal duty of the United States to provide due process protections for asylum seekers in a summary removal process such as expedited removal.[219] Ensuring that deportation processes allow noncitizens fleeing persecution to "have a *fair and adequate opportunity* to present claims for protection"[220] requires at least some due process.[221] As previously noted, however, this original intent

215. HUMAN RIGHTS FIRST, COMMENT LETTER ON DEPARTMENT OF HOMELAND SECURITY & EXECUTIVE OFFICER FOR IMMIGRATION REVIEW, "PROCEDURES FOR CREDIBLE FEAR SCREENING AND CONSIDERATION OF ASYLUM, WITHHOLDING OF REMOVAL, AND CAT PROTECTION CLAIMS BY ASYLUM OFFICERS," 87 FR 18078, 26 (May 31, 2022), https://humanrightsfirst.org/wp content/uploads/2022/09/HumanRightsFirstCommentonAsylumProcessIFR.5.31.2022-1.pdf [https://perma.cc/ABF6-SNLL] [hereinafter COMMENT ON CREDIBLE FEAR SCREENING PROCEDURES].

216. Refugee Protection Act of 1999, S. 1940, 106th Cong., § 2(b) (1999).

217. Yael Schacher, *Refugee Protection Act of 2022: Asylum and Refugee Protection Fit for the Twenty-First Century*, REFUGEES INTERNATIONAL (Dec. 22, 2022), https://www.refugeesinternational.org/refugee-protection-act-of-2022-asylum-and-refugee-protection-fit-for-the-twenty-first-century [https://perma.cc/S77W-765W] ("The 2022 version of the bill goes even further, offering a much-needed affirmative vision of asylum in the United States and at its southern border, and expanded protections for persecuted and forcibly displaced people.").

218. Refugee Protection Act of 1999 § 2(a) (emphasis added).

219. Senator Leahy stated that when expedited removal is used, it should "include due process protections." 146 CONG. REC. S8752–53 (Senate Sep. 19, 2000).

220. Refugee Protection Act of 1999 § 2(a) (emphasis added).

221. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (stating that

of Congress has lost its way under the true operation of expedited removal as current law still fails refugees.[222] To condone these defects, expedited removal relies on the entry fiction to support not extending due process protections to asylum seekers subject to the process. But, as Senator Leahy explained in the Congressional record in 2000, "people who flee their countries to escape serious danger should be able to have asylum hearings in the United States without having to navigate the procedural roadblocks established by expedited removal."[223] Thus, to better align with congressional intent and to ensure fundamental fairness in the asylum process, expedited removal should have due process protections—rather than the entry fiction—woven into credible fear determinations. It is only then that asylum seekers will get the protections they are entitled to, and U.S. obligations and the intent of Congress will be brought to fruition.

V. PROPOSALS FOR REFORM IN CREDIBLE FEAR REVIEW

To uphold U.S. asylum law and to ensure due process is provided to asylum seekers, changes to the credible fear review process are required. By enabling the system of expedited removal to restrict noncitizens' access to asylum, the United States is not abiding by its own asylum law and risks running afoul of the principle of non-refoulement. The safeguards in expedited removal meant to be in place to protect bona fide asylum seekers have been inadequate since its inception, and as discussed above, asylum seekers are entitled to due process protections in expedited removal notwithstanding the entry fiction.

Although this Note focuses on reforms in the credible fear review process, it would be an oversight not to also address potential reforms during the initial fear-screening process. To ensure that the regulatory and statutory obligations of officers are followed, greater oversight should be implemented, such as video recording in secondary inspections to correctly document noncitizens' initial expression of fear,[224] and allowance of representation during credible fear interviews to aid officers in properly recording claims of fear and eliciting information.[225] However, the government has prioritized speed over fairness, particularly during the initial credible fear determination process. Since credible fear review is a

traditional standards of fairness are encompassed in due process of law).

222. *See supra* Section II for a discussion of how expedited removal fails asylum seekers in credible fear determinations.

223. 146 CONG. REC. S8752–53 (Senate Sep. 19, 2000) (statement by Sen. Patrick Leahy).

224. *See* CASSIDY & LYNCH, *supra* note 73, at 19–20 (outlining recommendations, including videotaping, to Customs and Border Patrol to address interviewing and recordkeeping flaws).

225. *See* Stephen Manning & Kari Hong, *Getting It Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673, 693–703 (2018) (outlining how the access to counsel supports a more efficient and accurate fear-screening process).

seemingly less contested issue in expedited removal given that there were no major changes introduced in the Final Rule, modifications to this process may fare well. Thus, this Note proposes reforms to the credible fear review process through amending applicable regulations and the Immigration Court Practice Manual: (1) noncitizens must be allowed to introduce new evidence and testimony; (2) if a noncitizen presents new evidence or testimony, judges should balance various factors when determining noncitizens' credibility; and (3) noncitizens must have a right to be represented during credible fear review at no expense of the government.

A. NONCITIZENS MUST BE ALLOWED TO INTRODUCE NEW EVIDENCE AND PROVIDE TESTIMONY IN CREDIBLE FEAR REVIEW

Given the significant room for error when recording asylum seekers' fear fully and accurately, and the reliance on these records in credible fear review, immigration judges should be required to allow asylum seekers to introduce evidence that was not presented during secondary inspections or credible fear review. This should be effectuated through amending the applicable regulation, 8 C.F.R. § 1003.42(c), and the Immigration Court Practice Manual § 7.4(d)(4)(E).

The current regulations and language in the Immigration Court Practice Manual offer support for this amendment. Allowing new evidence and testimony during credible fear review is not precluded by the regulations—some immigration judges expressly allow or even solicit it.[226] Specifically, the applicable regulation, 8 C.F.R. § 1003.42(c), states, "The [i]mmigration [j]udge *may* receive into evidence any oral or written statement which is material and relevant to any issue in the review,"[227] and the Immigration Court Practice Manual § 7.4(d)(4)(E) states, "[e]vidence *may* be introduced at the discretion of the immigration judge."[228] Further, the de novo determination seemingly encourages a more thorough examination of all of the evidence.[229] Similarly, the purpose of credible fear review to be a review of the asylum officer's determination does not prohibit an immigration judge to explore further evidence in making their determination.[230] In fact, the statutory and regulatory language noting that credible fear review is an asylum seeker's "opportunity to be heard and questioned" pushes for allowing new evidence to be admitted.[231] The language does not suggest that allowing the introduction of new evidence would in any way contravene

226. Willingham, *supra* note 4, at 161.
227. 8 C.F.R. § 1003.42(c) (2022) (emphasis added).
228. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 139, § 7.4(d)(4)(E) (emphasis added).
229. Willingham, *supra* note 4, at 161.
230. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 139, § 7.4(d)(4)(E).
231. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); Willingham, *supra* note 4, at 161.

credible fear review. Rather, requiring immigration judges to accept new evidence, instead of being discretionary, would simply create a uniform standard in credible fear review—asylum seekers' last line of defense—before being summarily deported.

Although introducing new evidence may marginally prolong the review process, this does not outweigh protecting asylum seekers from being erroneously deported and upholding U.S. asylum law. Additionally, reports of asylum seekers have proven that introducing new evidence can uncover critical errors during initial fear screenings, such as translation errors or factual errors made by the asylum officer.[232] For example, two asylum seekers did not mention that they were LGBT in their credible fear interviews and had their negative fear determination vacated when they shared this information in credible fear review because of their claims based on their identity.[233] Another asylum seeker who failed to disclose critical information during her credible fear interview regarding her asylum claim because she was afraid it would worsen her condition had her negative fear determination reversed after she was able to submit written testimony.[234] Contextualized in the purpose of credible fear review as a procedural safeguard for asylum seekers and the positive impact introducing new evidence can have given the flawed fear-screening records, immigration judges must be required to allow new evidence and testimony during credible fear review.

B. BALANCING FACTORS TO DETERMINE NONCITIZENS' CREDIBILITY

During credible fear review, immigration judges are to take "into account the *credibility* of the statements made by the [noncitizen] in support of the [noncitizen's] claim."[235] Immigration judges are provided great discretion when it comes to evaluating asylum seekers' records and statements. Despite amending this by requiring immigration judges to allow new evidence or testimony to be admitted during credible fear review, the lack of guidance and great discretion when it comes to determining credibility still serve as barriers for asylum seekers to fully present their claims. Determining how credibility is assessed in asylum cases has primarily focused on regular removal proceedings outside the purview of expedited removal. However, this proposed reform draws attention to credibility determinations made during credible fear reviews and examines how factors analyzed by courts in the context of regular proceedings can lend support to how immigration judges in credible fear review proceedings determine credibility.

232. Willingham, *supra* note 4, at 160.
233. *Id.* at 160–61.
234. THE PERILS OF EXPEDITED REMOVAL, *supra* note 101, at 21.
235. 8 C.F.R. § 1003.42(d) (2022) (emphasis added).

Different circuits have utilized a variety of approaches to determine credibility in regular proceedings.[236] This proposal focuses on factors adopted by the Seventh Circuit in *Jimenez Ferreira v. Lynch*. Even though there were possible discrepancies between credible fear interview notes and the asylum seeker's testimony regarding the precise time of day that an act of violence occurred, the court found that the asylum seeker had consistently maintained her claim of fear and that the discrepancy was trivial.[237] In making this determination, the court was concerned with how much weight was placed on the credible fear interview, especially since it was not a verbatim transcript.[238] Considering the quality of asylum interviews and the notes from the interview, the Seventh Circuit adopted several nonexclusive factors in making the determination: (1) whether the record of the interview is a summary and not a verbatim transcript; (2) whether the asylum officer conducting the interview asked follow-up questions relating to the asylum claim; (3) whether the notes indicate that the asylum seeker had difficulty understanding the questions asked; and (4) whether the asylum seeker was reluctant to reveal information to the asylum officer because of past negative experiences with the government in their home country.[239] The benefit of immigration judges utilizing these factors during credible fear review would prevent potential bona fide asylum seekers from being summarily deported due to obstacles beyond their control. Rather than arbitrarily holding inconsistencies against the asylum seeker—potentially sending them back to a country where they could be severely harmed or killed—immigration judges should determine whether it would be *fair* to affirm the finding on this basis.

In addition to the *Lynch* factors, judges should also consider the materiality of and reason for the inconsistency. Although not explicitly mentioned in the expedited removal statute or credible fear review regulation, the asylum statute under 8 U.S.C. § 1158 details how credibility is to be determined in a regular proceeding, stating:

> Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on . . . the consistency between the applicant's . . . written and oral statements . . . and any inaccuracies or falsehoods in such statements, *without regard to whether*

236. For example, the Eleventh Circuit gives full discretion to immigration judges to determine whether notes from credible fear interviews are sufficient and reliable, whereas the Seventh Circuit utilizes a specific, cogent reason standard. Alana Mosley, *Re-Victimization and the Asylum Process:* Jimenez Ferreira v. Lynch*: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility*, 36(2) LAW & INEQ. 315, 325 (2018).

237. Jimenez Ferreira v. Lynch, 831 F.3d 803, 811 (7th Cir. 2016).

238. *Id.* at 809.

239. *Id.*

> *an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor*.[240]

This language suggests that immigration judges as triers of fact in credible fear review may also base credibility determinations on immaterial inconsistencies. With the great discretion held by immigration judges, immaterial inconsistencies that do not go to the heart of the asylum seeker's claim should not be factored into credibility determinations. Even if there is a material inconsistency, whether due to conflicting information or previous omissions, the immigration judge should inquire into *why* certain information was not discussed during the secondary inspection or credible fear interview. This would allow immigration judges to identify whether asylum seekers experienced hostilities or traumas that may have prohibited them from expressing their fear to officers. Weighing the *Lynch* factors with the materiality of the inconsistency and the reason for the inconsistency will better aid immigration judges in credible fear review when making credibility determinations, rather than relying on a deficient process that sets up asylum seekers to be summarily removed back to a place where they fear persecution.

C. NONCITIZENS MUST HAVE A RIGHT TO REPRESENTATION DURING CREDIBLE FEAR REVIEW

While allowing new evidence and testimony would correct the lingering effects of erroneous records created during the initial fear-screening process, asylum seekers may still face barriers to correctly articulating how this evidence supports their claim of fear absent representation. As allowing counsel is another important area of inconsistency among immigration judges during credible fear review, the applicable regulation, 8 C.F.R. § 1003.42(c), and the Immigration Court Practice Manual § 7.4(d)(4)(C) should be amended to provide noncitizens a right to representation at no expense of the government.

Regulatory and statutory considerations weigh in favor of this. Similar to allowing new evidence, 8 C.F.R. § 1003.42(c) does not preclude representation during credible fear review. Indeed, the regulation lacks language explicating the denial of representation during the review and states, "The [noncitizen] may consult with a person or persons of the [noncitizen's] choosing prior to the review."[241] In fact, some judges *do* allow noncitizens to be represented during the review,[242] further lending support. Also, credible fear review's systematic similarities to a regular proceeding

240. 8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added).
241. 8 C.F.R. § 1003.42(c) (2022).
242. *See supra* note 170 and accompanying text (indicating that some immigration judges do allow counsel during review).

support noncitizens' right to representation. Under 8 U.S.C. § 1362, a noncitizen "[i]n *any removal proceedings before an immigration judge* . . . shall have the privilege of being represented (at no expense to the Government) by such counsel."[243] As credible fear review occurs in front of an immigration judge and may result in immediate removal, it naturally follows that the right to representation should extend to noncitizens in this proceeding. Finally, denying counsel during a process that already favors expediency over fairness would deprive asylum seekers of the due process rights they are entitled to by ridding them of a fair opportunity to present their claims for relief.[244]

Additionally, the practical considerations favor allowing noncitizens the right to representation during credible fear review. Although it may seem inefficient on its face, empirical data suggests that "attorney participation in the expedited removal proceedings has no meaningful impact on the pace of adjudication."[245] Importantly, the role of counsel is necessary to help asylum seekers navigate the series of obstacles that stem from the innate nature of expedited removal, such as trauma, language barriers, and the lack of knowledge of the process as a whole. The unparalleled benefit of counsel during credible fear review has led to various asylum seekers being able to fully adjudicate their claim. For example, despite many challenges one asylum seeker faced during the credible fear process, an immigration judge vacated her negative credible fear determination after her attorney submitted a detailed declaration explaining the issues that prevented her from fully articulating her claim during her credible fear interview.[246] Thus, by granting the right to representation for asylum seekers in credible fear review, attorneys' roles would not be "purely ornamental";[247] instead, they would ensure a more efficient and accurate process.

VI. CONCLUSION

As it stands, expedited removal undermines the United States' commitment to its own asylum laws and its international obligations to refugees. Prioritizing expediency over fairness, expedited removal is rife with procedural inadequacies that systematically deprive asylum seekers of their right to fully and fairly present their claims. The deficiencies in the

243. 8 U.S.C. § 1362 (emphasis added).

244. *See supra* Section IV (discussing why the due process clause should extend to asylum seekers in expedited removal).

245. Manning & Hong, *supra* note 225, at 702 (indicating that, at a detention center where counsel is available to every person, the expedited removal process takes about two to four weeks); *cf.* POLICY BRIEF: THE ASYLUM CREDIBLE FEAR STANDARD, *supra* note 96, at 1 (indicating that the time from referral for a credible fear interview to determination is thirteen days).

246. THE PERILS OF EXPEDITED REMOVAL, *supra* note 101, at 19.

247. Willingham, *supra* note 4, at 170.

record-development process and cursory nature of credible fear review exacerbate the risk of erroneous summary deportation. These structural flaws are further amplified by regulatory changes under the Biden administration that impose heightened evidentiary burdens and procedural barriers that push the expedited removal process further away from safeguarding bona fide asylum claims.

Further, the entry fiction doctrine as a justification for the limited procedural protections in expedited removal is ill-suited for application to asylum seekers. The doctrine arbitrarily strips asylum seekers of their due process protections necessary to ensure they have an opportunity to apply for asylum as prescribed by U.S. law. This approach is not only incompatible with the language of the U.S. asylum statute but also with congressional intent.

To remedy these injustices, several reforms are warranted. Allowing new evidence and testimony, implementing a framework for evaluating credibility, and a right to representation would restore the credible fear review process to its intended role as a safety net for bona fide asylum seekers. Ensuring fairness and procedural safeguards in expedited removal is not only consistent with U.S. asylum law but is also essential to upholding the country's moral and legal obligations to those seeking refuge from persecution.