



# Immigration Adjudication: The Missing “Rule of Law”

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## Executive Summary

The United States spends more than \$19 billion each year on border and immigration enforcement.<sup>1</sup> The Obama administration removed more people in eight years than the last four administrations combined.<sup>2</sup> Yet, to the Trump administration, enforcement is not yet robust enough. Among other measures, the administration favors more expedited and summary removals. More than 80 percent<sup>3</sup> of all removal orders are already issued outside the court process: When the Department of Homeland Security (DHS) uses summary removal processes, both access to counsel and an immigration judge can be nearly impossible. Advocates and policy analysts are equally concerned that a backlog of over 545,000 immigration court cases creates delay that harm people seeking asylum and other humanitarian protection. Recent use of priority or “rocket” dockets in immigration court and lack of appointed counsel also interfere with the fair adjudication of claims. Thus the administrative removal system is criticized both for being inefficient and moving too slowly, on the one hand, and for moving too quickly without adequate procedural safeguards, on the other. Both critiques have merit. The challenge is to design, implement, and most critically, maintain an appropriately balanced adjudication system.

While it is clear that US removal procedures need reform, process alone will not be able to address some of the systematic flaws within the system. Ultimately, the DHS will need to refine and prioritize the cases that are placed into the system and the government needs new tools, widely used in other adjudication systems, that can reduce backlogs, incentivize cooperation, and facilitate resolution. Congress should similarly reexamine the barriers to status and avenues for regularization or preservation of status. The paucity of equitable forms or relief and the lack of statutes of limitation place stress on the immigration court system. The lack

1 In fiscal year (FY) 2016, the budget for CBP and ICE was \$19.3 billion. See analysis by the American Immigration Council (2017a) about the costs of immigration enforcement. The budget for the immigration court has grown only 30 percent in comparison with a 70 percent increase in the budget of the DHS enforcement.

2 Taken from Obama removal data and comparison to past administrations (Arthur 2017).

3 The DHS does not routinely publish full statistical data that allows a comparison of the forms of removal. In a recent report by the Congressional Research Service, the analyst concluded that 44 percent were expedited removals as described below, and an additional 39 percent were reinstatement of removals — 83 percent of all orders of removal were outside the full immigration court system (Congressional Research Service 2015).

of appointed counsel has a dramatic impact on case outcomes. Without counsel, the rule of law is barely a constraint on government authority. Conversely, a system of appointed counsel could lead to efficiencies and to a culture of negotiation and settlement within the immigration court system.

DHS has increasingly used every tool in its arsenal to expeditiously remove people from the United States and most of these tools bypass judicial hearings. In these “ministerial” or expedited forms of removal, there is no courtroom, there is no administrative judge, and there are rarely any opportunities for legal counsel to participate. Moreover, there is rarely an opportunity for federal judicial review. In these settings, the rule of law is entirely within the hands of Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP) officers who serve as both prosecutor and judge. There is little record keeping and almost no avenue for administrative or judicial review. This paper will argue that the rule of law is missing in the US removal adjudication system, and will propose ways in which it can be restored.

## **Assembly Line Adjudication — the Need for Priorities and Process Protections**

For many years, the DHS has increased removal enforcement and Congress has similarly increased the funding for detention as a part of the removal process. In 1990, Congress revised the statutes to create an integrated immigration removal system that would both adjudicate the claims of those seeking initial admission or apprehended at entry and those who are found in the interior and subject to a ground of deportation. Over time, the adjudications before the immigration courts, a division within the Department of Justice, grew to over 200,000 new cases a year (EOIR 2017).<sup>4</sup> Frustrated with delays and intent on stiffer enforcement at the border with Mexico, the federal agencies expanded their reliance on forms of ministerial or expedited removal.<sup>5</sup> Today at least 80 percent of all removal orders are prepared and executed largely without the involvement of an immigration judge. In these cases, only a claim of persecution or torture can prevent a rapid deportation executed solely by DHS personnel. In many of these cases, the unrepresented individual is unable to persuade an immigration judge that a fuller hearing is required.

The growing reliance on expedited procedures has raised concerns about the adequacy and accuracy of the agency determinations. In a detailed report published in the summer of 2016, the US Commission on International Religious Freedom (USCIRF) reported that Customs

4 The Executive Office for Immigration Review (EOIR) publishes a statistical yearbook annually providing data on cases types, dispositions and completions. The data here is from FY 2016.

5 Congress first created the expedited removal statute in 1996 but has expanded its use to people found within 14 days and within 100 miles of the international land borders and to those apprehended who admit arriving by sea within the past two year. Under INA § 235; 8 U.S.C. § 1225, the DHS is only to use the procedure if a person is inadmissible for specific grounds, lack of documents, or making a misrepresentation or using fraud to secure a visa. However, the lack of records and administration review precludes knowing if the border officials constrain themselves to these contexts. The new administration is exploring expanding the use of expedited removal to the entire interior provided the individual arrived within the last two years.

and Border Protection (CBP) officers were not well trained or adequately supervised in their use of the expedited process. In addition, the need for protection determinations caused a shift in resources from the immigration court and the US Citizenship and Immigration Services (USCIS) Asylum Office that led to tremendous backlogs in the regular adjudications (Cassidy and Lynch 2016). Although some legal challenges to the fairness and accuracy of expedited removal have been attempted, most have failed because Congress curtails access to independent judicial review. In April of 2017, the Supreme Court denied review of a decision that refused to entertain jurisdiction to review the sufficiency of the expedited removal process for mothers and young children seeking asylum. In that decision, the Third Circuit Court of Appeals found that Congress may constitutionally preclude judicial review, including suspending the writ of habeas corpus.<sup>6</sup> In short, the rule of law is missing in immigration removal adjudication.

Even for those who are in regular removal proceedings, the quality and fairness of the procedures and the independence of the immigration court is a significant concern. Immigration judges (IJs) are civil service employees that serve at the pleasure of the attorney general. The immigration court is not an independent agency. It has coordinated its work with the enforcement units within DHS and has adapted its court-docketing procedures and relocated judges based on the enforcement priorities of the new administration. The National Association of Immigration Judges (NAIJ), the American Bar Association (ABA), and others have long called for greater financial and managerial independence as well as greater protections for the independence of the adjudicators making these important decisions (ABA Commission on Immigration 2010). As Dana Marks, the President of the NAIJ, has phrased it, “We are conducting death penalty cases in a traffic court setting” (Dooling 2016).<sup>7</sup>

Moreover, while immigration courts determine whether the government has established that a person is removable, it may also be the only place where an individual can seek protection from deportation. These are two distinct roles. While the forms of protections are limited, Congress has given immigration judges the power to make decisions in cases seeking asylum or protection against torture. For a small class of people, the IJ may be the only adjudicator with jurisdiction to determine if a noncitizen will be able to remain based on length of residence, extreme hardship to family, and/or surviving forms of domestic violence. In reality, Congress has narrowed these forms of relief so dramatically that less than 35 to 39 percent of the people in removal proceedings file any formal application for relief (EOIR 2017, figure 13).<sup>8</sup>

At first blush, the fact that so few people file applications for relief may imply that there is little need for the court, but in fact, DHS makes a great number of prosecutorial discretion determinations during the court process. It often decides to place individuals in removal proceedings. Yet, DHS also often agrees to close, or for the court, to terminate cases: In fiscal year (FY) 2015, 34 percent of the cases without a grant of relief or a final order of

6 See *Castro v. United States Dep’t of Homeland Sec.*, 835 F3d 422 (3d Cir. 2016), cert. denied, \_\_ U.S. \_\_, (April 17, 2017).

7 See also Marks (2012).

8 In FY 2015, the rate was 35 percent and grew to 39 percent in FY 2016 (ibid.).

removal were closed or terminated. This number grew to 38 percent in 2016 (EOIR 2017).<sup>9</sup> At times, the case is terminated because it was improvidently begun, but in the vast majority of cases the government determines the case should not move forward to a removal order. The government may close the case because the removal hearing might have motivated the individual to apply for an immigration benefit or relief. There is little need for the immigration court involvement if the individual is going to qualify for an immigration benefit from USCIS.<sup>10</sup> While administrative closure or termination is appropriate in these cases, some cases should never have been initiated or should have been closed as soon as a possibility of status was identified.

Some of the delays in the regular removal system occur because persons in proceedings are given continuances to try to secure counsel. But the immigration court lacks robust motion, conferencing, and settlement traditions. While the procedural rules contemplate motions and written pleadings, the tradition in the system is to do everything in front of the judge. Thus, attorney time and court time is filed with routine submission of documents, oral motions, and more requests for continuances that could be better managed. Moreover, many of the applications for relief cannot be adjudicated by the immigration court. The system created by Congress and DHS is replete with hard-to-fathom and rigid jurisdictional limits that cause cases to be broken into pieces and divided among a variety of benefits agencies. Immigration courts cannot expedite the security check, petition adjudication, or document review process because these functions are handled by a separate agency. And some of the rules require hours of court time to make factual findings that could be resolved by stipulation between the parties if the DHS would afford greater autonomy to its attorneys. The removal system lacks needed flexibility to allow for appropriate adjudication.

But regardless of the court process, one of the biggest factors in Immigration Court congestion is the assembly line or automatic initiation of removal proceedings by DHS. Most federal agencies cannot prosecute every violation nor pursue every enforcement action. Immigration “prosecutions” are a form of civil administrative adjudications. The entire system is predicated on the characterization that the sanctions for immigration enforcement are primarily civil sanctions assessed by administrative judges. The structure of the Immigration and Nationality Act (INA) gives the DHS border inspector insufficient flexibility and authority to avoid the removal process. But even within the interior of the country, it appears that the DHS is using the initiation of removal proceedings as a rough way to sort out who deserves some form of discretion. In general, because the charging documents are prepared and filed without formal consideration and evaluation by the prosecuting attorneys, it is not until the litigation has commenced that a DHS attorney examines the case. A well-defended individual will use the court process to explore

9 These numbers are based on comparing tabs B and C in EOIR (2017). Likely the numbers are higher than past years because many of the cases involved unaccompanied children who were eligible for relief or could not be safely repatriated. See discussion of outcomes in juvenile cases below.

10 A clear example of this is the large number of unaccompanied children’s cases. The benefits and applications that protect children are all made before a component of the USCIS. For most of the cases, the immigration court serves little purpose other than to move the case to another continuance. Of course, it is because the children are in removal that so many attorneys have stepped forward to volunteer to assist them, or that the children’s relatives have found the funds to hire the counsel who are essential to the application process. None of the work is simple and certainly the applications cannot be made by children unassisted by counsel.

the equities in the client’s life with the ICE attorney and to try to negotiate a closure or termination, or to narrow issues to allow the immigration judge to adjudicate the underlying eligibility for a form of statutory relief. Unfortunately, because there is no right to appointed counsel for indigent individuals, and because there is no formal mechanism or culture of prioritizing cases once within the system, the results are uneven. The rule of law exists, in large part, between the lines.

And finding justice between the lines is especially a problem for those behind bars. Each year DHS detains nearly 400,000 people a year. For those who must complete a removal hearing in detention, fewer than 20 percent secure any legal representation (Eagly and Schafer 2015).<sup>11</sup> The strategies that aid a closure may not exist in the context of a detained case. Congress mandates detention in a large number of cases as a means of efficiently completing the removal process. The calculus of who qualifies for relief and what type of hearings may be required is distorted by the stark reality of detention. Most detention centers are in remote locations and there are few defense attorneys nearby. The court itself has increasingly relied on video teleconferencing to conduct the hearings in these facilities. Video technology frequently separates the ICE attorney from the person in removal proceedings, and the opportunities for negotiation or requests for discretion may be even harder to initiate in these settings. The court does not publish annual statistics on its use of teleconferencing but a recent academic study reported that by 2012 one-third of all detained hearings used video technology (Eagly 2015, 953).<sup>12</sup>

### **There is No Other Forum for Adjudication — the Immigration Court is the Cauldron**

The large number of terminations and closures by the DHS suggests that our government should be making a careful selection of cases *before* the allegations are filed in the court. The lack of other forums for adjudications — for procedures to regularize status and for a method of investigating the context and equities in a case — makes the immigration court the default forum. The closure of cases may be the government’s only tool to consider the equities, given the rigidity of immigration law and its paucity of substantive options and pathways to status.

People are frequently surprised to learn that there is no general power within the immigration system for a judge to consider all of the factors and make a recommendation against removal. Immigration court is not a court of equity. The immigration judge has only the powers of grace afforded by Congress, and our statutes have increasingly limited relief and narrowed the relevant criteria for eligibility. For many years, Congress has restricted access to permanent resident status or waivers of deportation. There is often no application to file because the law precludes IJ discretion.

And in the outside-the-court ministerial removals, there is almost no opportunity to apply for a waiver or any form of discretionary relief. Individuals facing reinstatement of a prior removal order or expedited removal have a limited chance to seek protection from persecution or torture, but little else is available. Because there are so few ways to stop

11 Eagly and Schafer (2015) found that 14 percent of people in detention were represented by counsel.

12 According to Eagly (2015), “97.7% of removal proceedings in 2012 received pure in-person adjudication.”



removal, persons in proceedings try to find a way to fit into the narrow protection grounds like asylum. Nevertheless, when individuals seek immigration review, the initial DHS finding of lack of fear is reversed in a significant percentage of cases (EOIR 2017).<sup>13</sup>

In recent years, one of the largest subset of cases are those of unaccompanied minor children arriving from the Northern Triangle states of Central America where a crumbling civil society and systemic violence against youth have pushed children to seek safety in the United States. These youth frequently choose the United States as a destination because many have US resident relatives who may or may not have status. DHS maintains that all children identified at or near the border must be placed in removal proceedings and for three years its enforcement priorities included these recent arrivals, whose cases were placed onto priority dockets. Similarly, at the request of the DHS, the immigration courts also prioritized the cases of adults with small children who also arrived from the region seeking asylum. In 2017, the court announced that it would no longer prioritize the cases of non-detained children. Nevertheless thousands of children's cases remain pending in immigration court. Children with counsel secure status or receive administrative closure at relatively high rates. Using the court cauldron to sort and process juvenile cases is unnecessary. Moreover, this setting is poorly suited to consider children's claims. The attempt to rely solely on docket management tools in these cases rather than to examine the entire system — from initiation of removal to benefits adjudication — epitomizes the system's lack of flexibility. A careful look at the process used in children's cases would identify larger systemic problems. For example, when a child wants to seek a special immigrant juvenile petition, the immigration court is powerless to adjudicate every aspect of the petition. Instead, it must continue the case while the child, if represented, goes first to state juvenile or family court and then to the benefits division of USCIS and finally back to the court to seek closure of the case. None of these steps are simple. All require advocacy and lengthy adjudication procedures. These procedures congest already overcrowded dockets.

The current removal systems were largely designed in 1990 and relief and judicial review were substantially restricted in 1996. In the past 20 years, the immigration enforcement budgets and the numbers of people affected by the system have grown exponentially. All legal systems are dynamic. Over time, they bend, twist, clog, and even break. People desiring a more restrictive immigration policy, as well as those seeking more paths to regularization of status, agree that the US removal adjudication system has reached a breaking point. Factors such as the high dependence on physical detention, the immense volume of cases, the growing numbers of children in the system, the lack of transparency, and the near impossibility of substantive review in more than 80 percent of the cases call into the question the effectiveness, fairness, and accuracy of the US removal adjudication system.

13 From the 2016 EOIR Statistical Yearbook, credible fear review reflects a reversal of the agency determination in a significant number of cases. In FY 2015, the IJ reversed the credible fear denial 1,344 times out of 6,629 (20 percent) and in FY 2016, the percentage rose to 27 percent in 2,086 out of 7,469 cases. The reversal is lower in the reinstatement cases or defense to administrative removal under INA § 238. In FY 2015, there were 449 reversals out of 2,587 (20 percent). In FY 2016, there were 567 reversals out of 2,522 (22 percent). These rates of reversal argue strongly for more process, greater transparency, and oversight rather than leaving these decisions solely to DHS determinations.

## The Essentials for Adjudication

There is no perfect adjudication system. These systems should protect values like accuracy and fairness, and operate efficiently. However, ultimately, the demands placed on a system and the people acting within it can frustrate the goals of its designers or negate individual protections (ABA Commission on Immigration 2010; Benson and Wheeler 2012). Unfortunately, the US system is so far from perfect and so driven by the goals of efficiency and deterrence that it fails to incorporate the essential qualities of fairness. Moreover, the adjudication system does not operate in a vacuum. If US immigration policies allowed people to regularize their status, had a mechanism for correcting errors of judgment, or contained fines or punishments for breaking immigration rules that were proportionate to the interests at stake, it is very likely that it would not be under the current strain. People are subject to removal because the system blocks their path to status or makes them vulnerable to expulsion even after lengthy residence. Too many people are also in removal because the United States has no effective mechanism for processing refugee flows at our border (Musalo and Lee 2017).

Substantive rights and procedural structures are not separate. If we have a rigid system that excludes and punishes all who infringe on even minor rules, people will, by necessity, use the adjudication process as a substitute for substantive protection. Delay is a partial win. And just as frequently, if the individual lacks a remedy, he or she is more likely to do everything possible to avoid detection and to remain outside the law.

Furthermore, all of the basic assumptions about “the rule of law” or “due process” or basic constitutional rights, do not fully operate in the sphere of immigration law. In the immigration context, Congress has the power to define both the rules as to who will be admitted and the level of procedural protections necessary to evaluate claims. In a handful of cases, the Supreme Court has found that some noncitizens by virtue of their formal status or their connections to the United States and, most commonly, by virtue of their physical presence within US territory are entitled to due process of law.<sup>14</sup> But “due process” alone without a corresponding robust limit on government power to deport may be insufficient. The process may always seem unfair and stacked in favor of the government if Congress does not provide any formal mechanism for individual clemency or adequate paths to regularization of status.

Phrased another way, the current immigration system and the case law creates very real borders — not the territorial borders — but legal fictions that put immigrants outside the mainstream body of fundamental protections. Immigrants are remarkably vulnerable to a government official who oversteps, to a judge who acts in an arbitrary fashion, to the asymmetry of the power between the government attorney and the unrepresented detained individual. The US immigration system runs roughshod over hundreds of thousands of people each year and it creates uncertainty and fear for noncitizens and their families.

14 See, e.g., *Landon v. Plasencia*, 459 U.S. 21 (1982), in which returning lawful permanent resident, although at the border, was entitled to a measure of procedural fairness and remanding for application of *Mathews v. Eldridge* procedural due process balancing; and *Demore v. Hyung Joon Kim*, 538 US 510 (2003), which acknowledges due process rights of people inside the United States, but finding detention may be permitted. Note that the Supreme Court is revisiting the ability to detain without bond review in *Rodriguez v. Robbins*, 804 F.3d 160 (9th Cir. 2015), cert. granted, 136 S.Ct. 2489, renamed *Jennings v. Rodriguez*, decision pending as of March 2017.

## The Hallmarks of a Just System

The legal philosopher John Rawls (1971) in his book, *A Theory of Justice*, created a thought experiment. He asked us to consider what type of governmental system and respect for human rights we would design if we didn't know what status or role we would play in the new system. If operating behind a "veil of ignorance" would we create a system with a balance of rights and protections to limit governmental power? To be fair, Rawls expressly designed his experiment assuming that the participants were all citizens creating a nation-state. But others, such as the philosopher Joseph Carens (2013), have carefully explained that the process of design without regard to our individual privilege or status is also a tool that allows us to ethically examine the choices we make about borders and immigration controls. As some have put it, the lottery of birthplace does not fully justify the rule of law drawing distinctions amongst individuals. A system that values protections for individual liberty and protections for substantive rights to remain with family should be more extensive for those with long tenure in a country regardless of the manner of entry. International law already mandates both procedural and substantive protections for individuals who face a threat of violence in their country of origin. Constitutional values have routinely slowed administrative process and added robust notice and hearing procedures tempering mere efficiency or speed in adjudication. Scholars have long noted that a system with redundancy and appeals offers a better adjudication process, builds trust in outcomes, and can help to ensure accuracy. Records of proceedings, transparency and review protect against undue bias in adjudication and can identify patterns of selective, perhaps discriminatory, prosecution.

The US removal system does not adequately reflect these essential values. More than 80 percent of all removals take place without a hearing before a judge. Without records of proceedings, opportunities for appeal or adjudication before an independent decision maker, the US system is vulnerable to error, bias, and corruption. Given the importance of the issues involved, such as asylum claims or the right to retain permanent residence, the US system does not afford sufficient time and resources for careful development of evidence and evaluation of complex legal analysis. If the United States values efficiency, it is difficult to understand why so many cases are referred for removal proceedings and then closed as a matter of prosecutorial discretion. At first blush, it may appear that the lengthy backlog and months to completion of removal cases may argue for less process, but the lack of counsel in proceedings and the culture within the court's system may be among the largest contributors to delay.

## Truncated Process and Lack of Substantive Protection Lead to Systemic Problems

For many of those subject to it, the US removal adjudication system does not adequately balance efficiency, accuracy, and fairness. Placed behind the theoretical veil of ignorance and unaware if he or she would be a noncitizen in removal, few people would design the truncated procedures used in so many of the cases. Most people would be dissatisfied with the removal and detention system if they knew it would impact them or their close family members. Most would argue for greater process, a right to counsel, options for discretion, or clemency and protection from arbitrary or dangerous *refoulement*.



Traditionally, legal scholars have said that to build a fair adjudication system, the government must ensure that the administrative process balances efficiency with the goals of accuracy and fairness. Usually these commentators also assume that the system will be transparent and provide records of the proceedings. Evidentiary rules, the right to counsel, and the right to appeal are all hallmarks of protections built into adjudication to ensure accuracy and fairness. In expedited removal cases, people receive a removal order moments after arrival that forever impedes their ability to regularize their status. Persons who use the visa waiver program to enter and overstay a visa are not entitled to a hearing despite years of residence. People who are apprehended in the interior or who have held lawful status but are now charged with being removable do have a right to an administrative hearing, but Congress has foreclosed the opportunity — in most cases — for individual equitable assessments. For some, DHS has the ability to use a conviction to eliminate substantive relief before the court and to narrow the scope and nature of any appeals or judicial review. For others, there is no remedy, and despite years of living in the United States, even those brought as children, Congress has left them without a remedy before a court. The only shaky and unreliable remedy is to try to seek prosecutorial discretion in the hope that the government will not initiate removal proceedings or execute a removal.

It is a worthy endeavor to try to identify the characteristics of a removal system that would protect the essential values of adjudication.<sup>15</sup> However, no mere process scheme can adequately protect individual rights if it truncates or curtails the scope and presentation of claims. While on paper, our expedited removal system might seem to protect some values of accuracy and additional process for those who fear harm, in reality, the balance is skewed solely toward government efficiency. The United States has lost sight of the core values that protect an adjudication model (and those subject to it) from arbitrary determinations and that promote the rule of law. While in the main Congress has crafted the US immigration system, the manner in which the executive branch wields its enforcement tools is equally, if not more, powerful in constructing a system that honors the rule of law. In many areas of administrative law, the federal courts act as a tempering and moderating force, but in the immigration field, Congress has severely limited the power of the judiciary to impose limits on the enforcement choices or to fail to exercise discretion. Most of the power in the system is allocated to the government’s power to remove and little is afforded to the adjudicators to make case-by-case assessments. The number of dead ends, automatic grounds for deportation, and barriers to status far outnumber the discretionary exceptions. Only where Congress has chosen to protect a small number of victims of crime or domestic violence, or where international treaty is enshrined in our domestic law, does the system prioritize an individualized assessment of harm over the authority of the government to deport. This imbalance, the very generous allocation of power solely to enforcement, creates the harsh reality of our immigration system.

## Recommendations

Suggested here are some standards and characteristics of a removal system that would go further to promote fair outcomes and still preserve the government’s enforcement

<sup>15</sup> Other scholars have written important pieces that evaluate these values. See, e.g., Legomsky (2010), which suggests an independent Article I court, and Family (2011). Family (2011) and other works by the author explore many aspects of the adjudication and process issues in the immigration courts.

obligations and need for efficient resolution of claims. Some of the ideas are culled from the excellent and voluminous recommendations and studies that have been prepared by the ABA, USCIRF, the Administrative Conference of the United States (ACUS), and others (ABA Commission on Immigration 2010; Cassidy and Lynch 2016; Benson and Wheeler 2012). Other recommendations are based on my over 30 years of experience in this field and the opportunities to observe and reflect upon the operation of the removal systems. The lived territory of immigration adjudication is a very different place than a pure blueprint found in statutes and regulations would suggest.<sup>16</sup>

### ***1. The DHS Should Establish Clear Enforcement Priorities and Cases Should Be Investigated and Evaluated Before Commencing a Removal Case***

As mentioned above, many of the cases in the immigration courts or within the ministerial removal systems are initiated by enforcement officers without review and prioritization by the trained attorneys representing the government. Typically the mandatory cases are those arriving at the border. Almost all other cases should require an individual assessment by an attorney. ICE attorneys should not only review the charges presented by the enforcement officers but they should spend additional time on fact investigation. DHS should be given the resources to conduct fact investigation and to review the entire file of an individual. If the person appears to have extensive history and familial ties to the United States, the DHS should consider how the commencement of removal might disrupt a community business or harm the US family members. In some cases, if DHS offers freedom from incarceration and a period of a stay of removal, that option might be sufficient to create a settlement and a negotiated departure.

In a recent case pending before the US Supreme Court, the federal criminal prosecutor did not intend the deportation of a man, Jae Lee, who had lived in the United States for 34 years.<sup>17</sup> Integrating removal decisions with sentencing requests by federal prosecutors is already a possibility in some cases but is not widely used.<sup>18</sup> ICE does not have to put this man into removal after he has served his criminal sentence. ICE attorneys tend to begin removal cases and decide during the hearing whether or not removal is appropriate. In cases where ICE believes the individual has been convicted of an aggravated felony the agency has usually taken the position the case must move forward. While a man like Jae, who held lawful permanent resident status, is entitled to a removal hearing and to defend against the grounds of removal, ultimately Congress has eliminated almost every form of relief. Congress cannot criminally prosecute a noncitizen without the same due process protections afforded a citizen, but because US law treats deportation as a civil sanction, someone like Jae can lose everything he values. Courts have repeatedly pointed out the

16 See Benson (2007) for a fuller elaboration of this concept.

17 *Lee v. United States*, 825 F.3d. 311 (6th Cir. 2016), cert. granted, 137 S. Ct. 614 (2016). The Sixth Circuit Court of Appeals had ruled that Jae Lee could not set aside his plea agreement because it was not reasonable to assume that a person would risk trial with a longer period of incarceration where there was strong evidence of guilt rather than take a plea that shortened his sentence.

18 INA § 238 authorizes a federal sentencing judge in a case involving an aggravated felony to also issue an order of removal. There is little published data about the frequency of the US attorney general's implementation of this process.

harshness of deportation but have said it is up to Congress to afford more opportunities to remain in the United States. Until that day, and as immigration courts have no general equitable authority, it is incumbent on the ICE attorney to consider the whole person and to make careful determinations about whether deportation should be sought.

This appeared to be the approach used in the final years of the Obama administration. After years of robust deportations, Secretary Johnson issued a memorandum directing ICE prioritize individuals with serious criminal convictions that posed a risk to national security or public safety and to prosecute recent border entrants (Johnson 2014). The new administration has rescinded these directives and replaced it with a general policy of broad enforcement. DHS Secretary John Kelly preserves a focus on national security and public safety, but expands the priorities to all who have violated immigration rules (Kelly 2017). The impact of the changed priorities remains to be seen. In the Obama administration, the vast majority of people in removal were charged with immigration regulatory violations. Fewer than five percent of the people in removal last year were charged with being removable based on a criminal conviction unrelated to a violation of immigration status. Many people who come to the attention of DHS due to criminal arrests are ultimately treated only as status or entry violators. While many have committed misdemeanors in illegally entering the country, the lack of a significant number of cases involving criminal conduct other than immigration violations indicates that ICE is not adequately evaluating the importance of a case and the real risks to public safety.

To use a model of selective referral to removal proceedings, DHS would need a culture change. It could model itself on other important federal agencies that protect US health and welfare. The Department of Labor is unable to bring every wage and hour violation. The Environmental Protection Agency cannot pursue civil sanctions for every polluter. The Department of the Treasury cannot sanction every taxpayer and seize assets in every case. These agencies investigate, prioritize, and negotiate. If DHS were armed with more tools than simply not bringing an enforcement action or closing a file without action, it would incentivize cooperation by the affected individuals. Further, the opportunity to investigate and interview would allow the ICE trial attorney to rely on the skills and adjudication techniques of the people within other branches of DHS to make security and risk assessments, such as whether the individual contributes to society’s well-being or might be prone to an offense that threatens public safety. At the present time, until an application for relief is initiated by the individual, there is little for the DHS officer or ICE attorney to do but focus on removal, detention determinations, and execution of the removal orders. In asylum cases, the ICE attorney plays an important role in testing the veracity of the evidence and the testimony of the applicant. But not every case needs to be resolved solely through contested litigation. There are many other mechanisms such as written submissions of evidence, in-person depositions, or conferences with the parties that might more quickly and effectively narrow issues and allow a case to be resolved.

With an estimated 11 million undocumented people in the country and many living under existing final orders of removal, we need to give the DHS attorneys bargaining tools such as temporary work authorization, temporary status, conditional residency, and even a grant of permanent resident status for cases that might meet the legal immigration criteria, if not for technical reasons such as an entry without inspection, which make them unable to complete the adjustment of status or immigrant visa process.

Given that a significant number of cases pending in the removal system resulted in and are likely to continue to result in case closure without a removal order, DHS should not waste the resources of DOJ courts or its appellate bodies. Instead, ICE should become part of the US registration and regularization force for cases deemed a low enforcement priority. ICE should be able to exercise discretion prior to the removal adjudication.

## ***2. Fair Adjudication for New Arrivals Requires Adequate Resources and Greater Accountability***

Prior to 1996, if a person arrived at a US port of entry such as an airport and the CBP (formerly Immigration and Naturalization Service [INS]) inspector thought he or she had the wrong documents or false documents, he or she could put you into inadmissibility proceedings before an immigration judge. The individual might be detained, but most were given a temporary parole into the United States and then required to return for a further interview or for the hearing on their eligibility to enter. In 1996, Congress gave CBP officers the choice to use expedited removal when a person lacked documents. For many years, the agency did not choose to use this tool to refuse admission along the Mexican border. People would simply be refused entry. But DHS began to adopt a removal with consequences strategy. They expanded the use of expedited removal, which bars an individual for five years and subjects them to heightened criminal penalties if they chose to illegally reenter the country. The agency can and should return to its past practice of affording persons in this situation “regular removal proceedings.”

It is hard to say whether Congress has always intended these outcomes. Immigration law is complex and few have mastered all of the procedures or substantive rules. Over time, as Congress added more enforcement tools to expedite and to improve the efficiency of the removal system, it perhaps did not fully foresee the way in which the delegated authority would operate. When expedited removal was first created in 1996, it was rarely used and applied only to people arriving at airports who had destroyed their documents on flights. Over time, CBP began to use expedited removal as a tool against people who had been apprehended multiple times trying to cross the border illegally. But in 2000 and again in 2002, the Bush administration used the statutory authority to expand expedited removal to within the interior for those who within the previous two years had entered illegally by sea, and to those apprehended within 100 miles of the international land border who could not prove presence of more than 14 days or entry with proper inspection. Now the Trump administration is considering whether to expand expedited removal into the interior of the United States for all who cannot prove presence of more than two years and who cannot prove proper inspection. Expedited removal now accounts for more than 44 percent of removal orders (American Immigration Council 2017b).<sup>19</sup> This process affords no judge, no hearing, no chance to defend, and no chance to delay. The only exception is for those who can establish a possible claim for protection due to a “credible fear” of persecution.

It is difficult to evaluate the accuracy and fairness of expedited removal proceedings. First, it is even difficult to measure the use of the tool. The DHS formerly released the data about

<sup>19</sup> According to American Immigration Council (2017b): “In FY 2013, approximately 193,000 persons were deported from the United States through expedited removal. That represents 44 percent of all 438,000 removals from the United States in 2013.”

the form and quantity of various removals. But the agency no longer reports expedited removals, reinstatement of removals, and administrative removals separately from other forms of removal. Second, these forms of removal require little more than a DHS form and a supervisor’s signature. People subjected to the process may not understand that they have been subjected to a formal order of removal as opposed to being pushed back into Mexico or told simply to return to the country of origin. People subjected to reinstatement of removal may not fully understand that they can request a hearing to raise a fear of persecution, but that they have no ability to present details or circumstances of their lives or to demonstrate the harm removal might create for them or their families. Because this process includes no judges or transcripts in a central adjudicatory body, there is no public account of the removal orders and almost no review of the accuracy or fairness of the procedures used to establish the necessary predicate facts that subject the person to these truncated procedures.

When considered solely as an efficient tool for rapid decision-making at the US port of entry, expedited removal may seem like a good balance of efficiency over accuracy. Some people might be refused improperly but the alternative might be people who would use hearings and delay in the system to overwhelm the adjudications and to force the government to allow their physical presence within the United States. That rationale was part of the design when the system was limited to people who present themselves at a port of entry. However, the DHS expanded expedited removal and used it against people apprehended beyond the ports of entry. Further, the use of expedited removal does not operate in isolation from other provisions of the law. Handing an apprehended person a piece of paper labelled “removal” may be an insufficient warning of the severe consequences for subsequent reentry. Reentry after an order of expedited removal can trigger criminal prosecution as a felony or the almost insurmountable lifetime bar to future legal admission. In theory, the statute contains a powerful tool to deter people from violating the rules and entering illegally after an order of removal, but in reality, the people who are subjected to these rules have received little information about the law, and virtually no warnings about the consequences of violating the law, or advice about alternatives. Once someone enters illegally and remains for more than a year, she is trapped inside the United States. If she ever came forward to leave to try to correct her status, she would subject herself to the permanent bar.

The cumulative effect of these procedures has been to create a vulnerable and trapped class of residents. There are likely millions of people who could be removed quickly and who have few ways to correct or regularize their status. ICE does not formally report the number of outstanding final orders but estimates are that an estimated 900,000 people have a final order but the government has not chosen to or been able to remove them (Vaughan 2016). Some people appear at supervised release interviews living under a final but unexecuted order of removal. Under existing procedures, ICE need not provide an opportunity for a new hearing even if the person has resided in the United States for most of his or her life. Discretion given can be discretion withdrawn. The law’s finality means that an individual may not be able to argue that a change in the interpretation of the immigration consequences of a conviction should now prevent her removal. Congress’s desire to create absolute categories of removable people and the elimination of many of the discretionary forms of relief have combined to create a rigid system where the person’s lack of ties to any other nation, the citizenship of her children, and her long-term residence in the United States are irrelevant to the removal adjudication process.



Perhaps Congress has not given the border officers sufficient alternatives. If a person seeking protection appears at the US-Mexico border and has no visa to seek admission, the system forces CBP to place her into some form of removal. There are many reasons Congress and the agencies have chosen the path of detention and expedited removal. The primary argument is that the use of these tools will deter unlawful entrants. The evidence is mixed. The United States has never experienced the massive movements of people comparable to the millions seeking protection as they flee Iraq, Afghanistan, and Syria, or the millions displaced or threatened within Africa or Asia.

And, the current expedited removal status is actually not well suited when the United States receives large numbers of people with strong claims for protection. CBP takes the position that if someone arrives at a port of entry or a border crossing, and has no documents that authorize admission to the United States, it has no authority to allow them to seek asylum or similar protection. Instead, CBP maintains that people in this system or those apprehended within 100 miles of the border, must be placed in expedited removal and detained. In a recent memorandum, the Trump administration seemed to be considering whether to refuse even those who have a credible fear and to arrange for the use of video conferencing hearings from Mexico (Kelly 2017).<sup>20</sup>

The statutes and regulations have created a system where, once a statement of fear is made and recorded in a short “Q and A,” CBP holds the individual for a credible fear assessment made by an asylum officer from the USCIS that processes refugee and asylum claims. In some instances that means a face-to-face interview with an asylum officer and in others, it may mean a video teleconference. There is no right to counsel in the process but in some situations, CBP will allow an attorney to sit with the applicant and take notes. If the asylum officer finds the person has met the initial threshold, he or she will continue to be detained while a removal hearing to seek protection is scheduled. But if the assessment is a denial of the credible fear, then the applicant may seek a review of that determination by an immigration judge. There is no appeal from this decision, and only if the immigration judge finds a credible fear, will the individual proceed to a full hearing.

At the time of its design, this system seemed like an appropriate way to weed out weak claims with little likelihood of success on the merits. Congress created the expedited removal system to provide the federal government with tools to adapt to large numbers of arrivals, but for nearly 15 years DHS has expanded its use of expedited removal as a basic tool of enforcement. Expedited removal is used both for the asylum seeker and the entrant refused admission at a border or between official ports of entry. During many of those years, the DHS would allow people to be released pending the asylum adjudication; some were released with ankle monitors, some posted bond, and some on their own recognizance. But as the numbers of people seeking protection escalated in the summer of 2014 due to the growing violence and collapse of civil society protections within the Northern Triangle of Central America, the system could not keep up with the volume of people seeking protection.

At first, the US government responded both with an acknowledgement that the movement was a humanitarian crisis and by attempting to deter more asylum seekers. Initially, CBP

<sup>20</sup> See generally, INA § 235(b)(2); 8 U.S.C. § 1225(b).

released adults traveling with small children, but continued removal proceedings against them as inadmissible aliens. But as the numbers grew, the DHS began to build more detention facilities (Gilman 2016).

**Table 1. US Border Patrol Southwest Family Unit and Unaccompanied Alien Children Apprehensions FY 2013 to FY 2016**

	FY 13	FY 14	FY 15	FY 16
Unaccompanied children	38,759	68,541	39,970	59,692
Family units	14,855	68,445	39,838	77,674
Individuals	360,783	342,385	251,525	271,504
<b>Totals</b>	<b>414,397</b>	<b>479,371</b>	<b>331,333</b>	<b>408,870</b>

Source: CBP (2016a).

**Table 2. US Border Patrol Southwest Unaccompanied Child Arrivals FY 2010 to FY 2017**

Southwest border apprehensions								
Country	2010	2011	2012	2013	2014	2015	2016	2017
El Salvador	1,910	1,394	3,314	5,990	16,404	9,389	17,512	1,776
Guatemala	1,517	1,565	3,835	8,068	17,057	13,589	18,913	2,308
Honduras	1,017	974	2,997	6,747	18,244	5,409	10,468	1,367
Mexico	13,724	11,768	13,974	17,240	15,634	11,012	11,926	1,205
<b>Total</b>	<b>18,168</b>	<b>15,701</b>	<b>24,120</b>	<b>38,045</b>	<b>67,339</b>	<b>39,399</b>	<b>58,819</b>	<b>6,656</b>

Source: CBP (2016b).<sup>21</sup>

The Obama administration sought to deter children and women with small children from making the dangerous trip and insisted that all adults traveling with children would be detained pending the expedited removal process. This led to a legal challenge to the adequacy and fairness of the expedited removal process.

The United States is not alone in struggling to adapt asylum adjudication procedures to large numbers of people.<sup>22</sup> However, the combination of expedited removal, mandatory detention, obstacles to legal representation, and evidentiary restrictions abridges human rights. The fact that Congress also precluded extensive judicial inquiry into the process

21 Totals added by author and last accessed in December 2016. The page contents have changed with the new administration.

22 While asylum applicants at the border have dramatically increased since 2014, the totals are much smaller than the movements of millions of people fleeing Iraq, Syria, Afghanistan, South Sudan, Eritrea, the Central African Republic, or many other refugee source nations. The UNHCR (2016) estimates that more than 65 million people are forcibly displaced person. The United States needs to recommit to the protections enshrined in humanitarian treatise such as the Refugee Convention and not allow numbers alone to cause us to abandon these commitments.

and that at least one Circuit Court of Appeals agrees with those limits, creates a zone of adjudication without any of the key protections or process of an adjudication system. Efficiency seems to be the paramount, singular goal.

In a comprehensive evaluation published in the summer of 2016, USCIRF reported that the expedited removal system remains flawed and expressed concerns about both the operation of the system and the increasing use of detention and video technology to conduct interviews by asylum officers (Cassidy and Lynch 2016).<sup>23</sup> Authorized by Congress, in part, to observe and evaluate the expedited removal process, USCIRF has proposed ways to increase transparency and ensure greater procedural protections. However, many of its recommendations have not been adopted. There is no other external regular assessment or review mechanism for this process. In short, expedited removal operates outside the rule of law.

While courts have been reluctant to find that newcomers are entitled to a constitutional minimum of procedural protections, some new entrants are different in quality and nature than others. Some have family here. Some have no safe place to return to or are particularly vulnerable, such as young children. The obscurity of the expedited removal process hides its substantial problems. All removal procedures should generate an administrative record. Yet, at present, expedited removal paperwork is very limited and completely controlled by the CBP inspectors. Others have suggested that all interviews be recorded. Even if the United States valued speedy adjudication over additional process, it should allow a process for administrative review, submission of additional evidence, and review of the determination. If an individual was not seeking admission based on a claim for protection, this later review might be initiated while the applicant is abroad. At the current time, there is only an opaque process insulated from assessment and review.

Furthermore, if the United States chooses to use an expedited process, it should adequately staff adjudication teams to interview, investigate, and determine who might need temporary admission and who might deserve permanent protection. Congress should also give CBP and the Asylum Corps more options to respond to the protection needs of people at the border. For example, the United States could expand its use of temporary admission via parole. The United States could also expedite its adjudication process to help bona fide refugees present and complete their claims for protection.

If speed becomes important for security concerns or due to emergency situations, our system should have the flexibility to deploy more resources quickly and to use tools like priority dockets to move urgent cases first. At the current time, the underfunded courts are mostly disrupted when they try to move judges to needed areas and to move categories of cases to the front of the line. The repeated impact is to delay the adjudication of many other cases and to waste time and court resources in deciding which cases to prioritize. If the DHS attorneys are more engaged in the case-by-case decisions and if they are given greater options for outcomes, the system will both be more flexible and be better able to address emergent needs.

23 The USCIRF is the only entity that has been given access to carefully study the operations of the expedited removal system. The report by Cassidy and Lynch (2016) calls upon Congress and the DHS to regularly investigate operations and to improve internal oversight.

It is possible that generous adjudications and temporary admissions at our borders might encourage too many people to seek admission. But the current system screens out with a blunt removal and a bar for five years. The person who succeeds in entering illegally then becomes both a criminal and is barred potentially for life. In short, the pendulum has swung too far in one direction.

### ***3. The System Must See the Whole Person Not Merely Examine the Mode of Entry***

For many, the legal process authorized is completely controlled by the original means of entry and has little or nothing to do with current ties to the United States. If a child is brought to the United States with her parents under the visa waiver program, he or she is bound by the waiver of her parents. Even half a lifetime later, that child can be removed without any hearing. People previously ordered removed, after a few minutes of paperwork at an airport, could be subjected to reinstatement of removal even after 20 years of residence and the US citizenship of her children. Long-term residents, with or without permission, almost never acquire any equitable authority to limit the power of the US government to remove them, especially if they are convicted of any criminal conduct.

A traditional hallmark of due process is to assess the property or liberty interest at risk and to ask if the government has a right to interfere with the individual’s interest. While the Supreme Court has recognized since 1903 that even aliens are entitled to due process in deportation proceedings when the person is residing in the territory, it has unfortunately refused to use substantive due process to cut off the right of the federal government to deport. No matter the length of residence, no matter the hardship upon removal, courts have repeatedly concluded that the due process clause is insufficient to provide a shield from removal. Instead we have relied on procedural surrogates to provide long-term residents with procedural protections such as hearings or burden shifting.

Congress has been unwilling to allow noncitizens to apply for waivers of deportation or regularization of status when they are convicted of certain crimes or in punishment for illegal entry after removal. While there are a few exceptions for victims of crime or domestic violence or for those who can demonstrate a probability of severe harm or torture, in the main, far too many long term-residents lack a remedy in immigration court.

The system needs to provide more options. The empirical data indicates that the vast majority of people residing without status in the United States live in mixed households.<sup>24</sup> Some family members are citizens, while some are permanent residents. Moreover, the United States has two statutory provisions that establish significant barriers to status through the legal immigration system. Since 1996, the United States has punished people who overstayed a grant of status by more than one year with a 10-year bar if they depart. If the system removed this single provision, hundreds if not thousands of people could seek status through family and employer petitions as they did prior to 1996. It should also provide tools for DHS officials to grant permanent residence to people residing within the United States who cannot obtain status due to technical violations or an original failure

<sup>24</sup> According to Warren and Kerwin (2017), there are 5.3 million US households with undocumented residents, and they are home to 5.7 million US-born children.

to enter with a valid visa. DHS has a limited “parole in place” program, which allows the spouses and parents of US military on active duty to regularize status. If these individuals had to depart the United States and travel abroad to apply for a visa, their departure would trigger a permanent or 10-year bar to reentry. Some view discretion as “rewriting the immigration laws.” If so, Congress could always authorize parole more broadly or create more exceptions and interior waivers of the draconian departure bars.

#### *4. A Statute of Limitations is Essential*

One of the oldest constraints on civil law is the legislature’s ability to limit litigation by forcing the parties to litigate before the claims go stale. Statutes of limitation are, in part, intended to preserve the accuracy of evidence and the ability of adjudicators to serve a truth-seeking function — time dims memories. The statutes also serve the interest of finality and certainty. If an old debt has never been pursued, for example, the debtor is free to deploy the assets elsewhere. If a title was transferred with a stain or lien, as the years go by, the new owner can be certain he or she possesses a clear title and the value of the asset is preserved or enhanced.

In the US immigration system, this concept has been almost completely lost. In the early years of immigration law, the power to deport was limited to those who committed fraud at entry or committed an offense within the first few years after entry. There are still vestiges of the concept in some portions of the INA. A single offense may render a noncitizen deportable if committed within five years of entry but not afterward unless a second offense follows. But as the list of deportable offenses grew, few came with any temporal limit.

The US immigration system should afford a sense of finality and security to persons who have built strong equitable ties and lived in the United States for many years. If long-term residents commit a crime, the criminal justice system has the tools to punish them. However, to deport a person after years of residence makes a mockery of the claim that removal is not punishment but a civil sanction.

#### *5. A Path to Regularization*

The vast majority of people in removal proceedings entered without a visa or overstayed a period of temporary admission. For some, the commencement of a removal proceeding might unlock a door to status through cancellation due to “exceptional and extremely unusual” hardship to a US citizen or permanent resident relative. Yet, cancellation for someone who has not held lawful permanent resident status is limited to 4,000 cases a year and for people who have resided in the United States for a minimum of 10 years.<sup>25</sup> These numbers are usually used within the first 30 days of each year.

25 INA § 240A(b); 8 U.S.C. § 1229b provides for cancellation of removal for a person who can meet the strict criteria but the relief is only available in removal proceedings and is capped at 4,000 per year. There are other forms of cancellation for the lawful permanent resident who has seven years of physical presence and for victims of domestic violence. See generally INA § 240A(a) and (c); 8 U.S.C. § 1229b(a) and (c). But these opportunities for relief also are restricted by bars to eligibility for some forms of criminal behavior, even if the person is able to demonstrate rehabilitation.



Rather than placing people into the adversarial cauldron of a removal proceeding, DHS should have options for interviews and assessment. The agency could give individuals a deadline to apply for status and then pursue the usual background checks and evaluation of character and relationships as it already does in many cases. If the individual has committed serious crimes that have not been prosecuted or is a risk to national security, DHS can make a determination of whether the person should be removed. But the presumption should be that long-term residents would be vetted and integrated, not deported. Congress could make this option a reality. The political conversation is a complex one but a path to status offers a huge incentive and vehicle for tax compliance, transparency, reporting, military service, family stability, and economic growth. The power to grant status may be the single best incentive for participating in the court process. Conversely, the more difficult it is to qualify for status, the less effective it will be in promoting court adjudications.

### *6. A Right to Counsel*

Processing times for non-detained cases can take years, given the massively backlogged court dockets. In cities like Los Angeles or New York, it is not uncommon for adjudication to require more than three years. However, more people are represented and ultimately successful in securing a remedy or relief from removal in these cities. The complexity of the adjudication process and the underlying law makes counsel a necessity. In a survey of IJs by ACUS, more than 80 percent reported that competent counsel improved the court’s operations (Benson and Wheeler 2012).<sup>26</sup>

The New York Immigrant Family Unity Project has been providing universal representation to all indigent New Yorkers in regional detention for nearly four years. Before the project began, fewer than 3 percent of the individuals secured any relief from removal. At present, approximately 30 percent of the individuals in removal proceedings either defeat the government’s charges or win discretionary relief.<sup>27</sup> There are too many variables to predict similar results in every locality, especially where the substantive law can vary by federal circuit rulings. In New York City, a high percentage of the cases involve people who have applied for asylum affirmatively and are seeking review of their application, or were placed into removal due to a determination during a benefits application that their case presented a problem. The length of residence of the people, the existence of some waivers based on family relationships, the skills of the attorneys presenting asylum claims — these variables likely explain the differential in outcomes.

But the evidence that counsel makes a difference is dramatic. Transactional Records Access Clearinghouse (TRAC) data center at Syracuse University has a standing Freedom of Information Act (FOIA) request for the data and outcomes in juvenile cases. It appears that when a juvenile has an attorney in immigration court, he or she is 17 more times likely to secure a termination of the proceeding. These terminations are largely issued because the juvenile was granted a benefit such as special immigrant juvenile status or another visa or was able to secure asylum affirmatively at the USCIS office. Phrased another way, in

<sup>26</sup> See also Shannon (2014) and Thomas and Benson (2016), which discusses the importance of counsel.

<sup>27</sup> Testimony of Jennifer Friedman of Bronx Defenders to the New York City Council, on behalf of the New York Immigrant Family Unity Project, dated March 22, 2017, on file with author. This project is funded by the City of New York and does not receive federal funding.

the cases completed in FY 2015, a child was ordered removed in 34 percent of the cases without counsel and only 5 percent of the cases with representation.

Unfortunately Congress has not authorized paid counsel for children and recent litigation seeking government-appointed counsel was dismissed. A panel of the Ninth Circuit Court of Appeals ruled that Congress required cases to begin with the immigration courts, to exhaust the administrative appeals process, and only then to avail themselves of the courts of appeal.<sup>28</sup> The litigation seeking a class action declaring children were entitled to the appointment of counsel had begun in the federal district court. So Congress, perhaps in an effort to preserve judicial efficiency, has instead, created a situation where thousands of children will have to hire counsel or hope for pro bono assistance or simply preserve the issue of a need for counsel in the individual immigration hearings. The result is particularly perverse because most remedies available for these juveniles are found in fora outside the court in applications for relief made before other bodies such as the asylum office or family courts. But children in removal proceedings have no knowledge of those external procedures and the immigration judges are powerless to grant relief directly.

**Table 3. FY 2015: Outcomes in Juvenile Cases in All Immigration Courts\***

<b>FY 2015</b>	<b>Removal order</b>	<b>Prosecutorial discretion</b>	<b>Other closure</b>	<b>Relief</b>	<b>Termination</b>
Total of all juvenile cases: 31,075 (pending as of Mar. 2017: 13,973)	6,695	269	4,364	90	5,148
17,102 completed	39% of the completed cases	15.7%	25.5%	.5%	30%
Unrepresented	5,905	21	367	2	284
9,819	34% of the completed cases	.01%	2.1%	.01%	1.6%
Represented	791	248	3,997	88	4,864
21,256	4.6%	1.45%	23.3%	.5%	28%
	More than 8 times greater risk of removal order for unrepresented.		10 times greater likelihood of success than unrepresented	44 times	17 times

\*Fifty-five percent of the juvenile cases initiated in FY 2015 were completed during the year. Not all removal orders are executed. Juveniles may receive an administrative closure or after an order of removal or deferred departure. Political asylum is the most common form of relief granted in these cases. Termination usually occurs with ICE consent based on relief pending at USCIS. Source: TRAC (2017), using the data from 2015.

28 *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016). A petition for *en banc* review is pending as of March 2017.

Legal counsel increases rates of relief from removal. In addition, there is strong evidence that providing counsel would save time and money for the federal government (Montgomery 2014).<sup>29</sup> Counsel would not be able to secure relief for every person but they can advise the individual about his options and in many cases this may result in fewer nights in detention and shortened proceedings. As mentioned, if the ICE trial counsel adopted a culture of negotiation, it is likely that the delays inherent in the system now would be reduced. At present, more than one-half of all the continuances granted by IJs are issued to allow the individual time to try to secure counsel (Benson and Wheeler 2012).

### ***7. Reconsider the Growing Criminalization of Immigration Violations***

Despite the fact that the majority of removal orders are issued in an expedited or purely ministerial fashion, the long-term consequences for the individuals who are subject to these orders can be quite extreme. People who reenter the United States after an order of removal are subject to criminal prosecution for a felony. Immigration violations are primarily civil law violations. Yet, in the past 10 years, the federal government has chosen to use criminal sanctions against those who illegally reenter. In fact, it is the single largest category of criminal prosecution in the entire federal system and the fastest growing category of any crime. In FY 2016, the US federal courts entertained prosecutions for illegal entry (a misdemeanor) and criminal reentry (a potential felony) in nearly 69,000 cases (US District Courts 2016).<sup>30</sup> The next closest category of federal prosecutions was for drug crimes, with fewer than 20,000 cases.

A truncated, summary removal order issued by a CBP inspector one day can result in a later felony conviction if the individual tries to reenter the United States the next day. Further, these criminal prosecutions can carry significant sentences. The federal public defenders have developed an entire body of law collaterally attacking the legitimacy of the initial expedited removal to help diminish or eliminate the criminal sanction that can follow from that order. The defenders have sought to show that the expedited removal process violates basic tenets of procedural due process as the system can be prone to errors of fact and of application of law. A panel of the Ninth Circuit recently ruled that although the system of expedited removal may be swift, it does not violate the due process rights of recent unlawful entrants because Congress may largely define the scope of process and the Constitution, while guaranteeing due process of law to all “people” may not attach to recent entrants.<sup>31</sup>

### ***8. End Detention as Part of the Pre-trial Removal Process***

The growth of civil detention in immigration cases is exponential and expensive. The funds used to detain and control nearly 500,000 people annually could be better spent

<sup>29</sup> Montgomery (2014) concludes that counsel reduces delays and detention and would be cost effective and might produce savings.

<sup>30</sup> One analysis of the data states that as of the end of FY 2016, 52 percent of all criminal cases in the federal district court are related to immigration (TRAC 2016).

<sup>31</sup> See *United States v Peralta-Sanchez*, 847 F3d 1124 (9th Cir. 2017), on collaterally attacking an order of removal in a subsequent criminal prosecution. Petition for *en banc* review pending.

in providing resources to the adjudicators. There is no true justification for wholesale detention of noncitizens. Congress has traditionally justified detention as necessary to ensure attendance at removal hearings or to protect public safety. For those people who are in detention related to a conviction in the criminal justice system, the DHS could prioritize completing the removal process.<sup>32</sup> If DHS relied more heavily on proven and promising alternative to detention programs, some of the worst aspects of the removal system would be eliminated.

## Conclusion — A Dark Territory

Immigration law operates in the darkness beyond the reach of due process protections, accuracy, fairness, and transparency. Record numbers of immigrants live in the United States, but far too often they reside in a legal territory which the light does not reach. This essay has highlighted some of the characteristics of the US removal system. It outlines this system's lack of substantive protections and its overreliance on hidden and expedited processes. It argues that this system needs to be redesigned to reflect the rule of law. The system needs to be exposed to the light of day.

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32 The government's Institutional Hearing Program, which places immigration judges in state and federal prisons, is designed to complete removal hearings before the individual completes his or her period of incarceration. In FY 2016, the immigration court completed 51,849 of these cases, accounting for 28 percent of all detained cases (EOIR 2017, table 11).

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