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WAIVING DUE PROCESS (GOODBYE): STIPULATED ORDERS OF REMOVAL AND THE CRISIS IN IMMIGRATION ADJUDICATION*

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In recent years, the federal government has deported a surprising number of non-citizens through a little-known procedure called stipulated removal, in which a non-citizen agrees to the entry of a formal removal order while waiving the right to an in-person hearing before an Immigration Judge. The federal government has looked to stipulated orders of removal as a partial solution to the mismatch between its enforcement goals and the resources of the immigration court system—a mismatch that, many commentators agree, has reached a state of crisis. Stipulated removal arguably offers some benefits to both the non-citizen and the government, insofar as the non-citizen stands to receive a shorter time in immigration detention and faster removal, while the federal government benefits from efficiency gains and political rewards. This Article, the first academic piece to examine stipulated orders of removal, draws from extensive internal government documents and data obtained through the Freedom of Information Act to examine the stipulated order of removal program. It argues that stipulated orders of removal under current law and practice should not function as a partial

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solution to the crisis in immigration adjudication. The Article offers an in-depth examination of stipulated removal, which has largely affected unrepresented non-citizens in immigration detention centers who faced severe information deficits during the removal process. Relying on both the illegal re-entry context and the familiar Mathews v. Eldridge *procedural due process framework, this Article argues that the stipulated order of removal program, as implemented thus far, violates due process, and offers suggestions for reform.*

INTRODUCTION

Isaac Ramos had lived in the United States for nearly twenty years, was married to a lawful permanent resident, and was father to three United States citizen children when immigration authorities detained him and placed him in removal proceedings.[1] Two days after being transferred to the Eloy Detention Facility in Eloy, Arizona—550 miles away from Bakersfield, California (where he was apprehended)—Immigration and Customs Enforcement ("ICE") officers presented Mr. Ramos with a boilerplate form entitled "Stipulated Request for Removal Order and Waiver of Hearing."[2] The form contained a statement admitting to all the charges lodged against him by ICE, as well as stipulations giving up Mr. Ramos's right to a hearing before an Immigration Judge ("IJ"), his right to apply for relief from removal, and his right to appeal the removal order.[3]

ICE Officer Christina Olsen, whose only Spanish language instruction took place during her training to become an ICE agent, met individually with Mr. Ramos, a Spanish speaker, to explain the request for a stipulated removal order.[4] During her meeting with Mr.

1. United States v. Ramos, 623 F.3d 672, 675 (9th Cir. 2010).
2. *Id.* at 676–77.
3. *Id.* at 677.
4. *Id.* at 678.

Ramos, she asked Mr. Ramos a question in Spanish that she understood to mean, "Do you want to fight your case or sign?"[5] Several years later, when Officer Olsen was asked to repeat this same sentence to a Spanish language interpreter in federal district court, the interpreter indicated that the statement was "nonsensical in part" and incapable of translation.[6] On the basis of his conversation with Officer Olsen, Mr. Ramos signed the stipulated removal form.[7] Mr. Ramos never had a lawyer during the process.[8] Neither Officer Olsen nor any government representative ever reviewed Mr. Ramos's file to determine whether he might be eligible for immigration relief or for release from detention on bond.[9] Based purely on a review of the preprinted form, which stated that Mr. Ramos waived his rights voluntarily, knowingly, and intelligently, an IJ found Mr. Ramos' waiver of rights to be voluntary, knowing, and intelligent.[10] Within a day, the IJ ordered Mr. Ramos deported, and authorities physically removed him to Mexico.[11] By receiving an IJ-issued removal order, Mr. Ramos was barred from legally re-entering the United States for at least ten years.[12] A year and a half later, federal border agents apprehended Mr. Ramos after he attempted to return to the United States.[13] Because of the prior removal order, he was criminally prosecuted for illegal re-entry and sentenced to six and a half years in federal prison.[14]

Isaac Ramos is one of a growing number of non-citizens in immigration detention centers who have been deported through a process known as stipulated removal.[15] Over the past decade, the

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5. *Id.*

6. *Id.* As the Ninth Circuit opinion noted, the district court held an evidentiary hearing on Mr. Ramos's motion to dismiss the illegal re-entry charge, during which Officer Olsen testified. *Id.* at 677–78.

7. *Id.* at 681.

8. Immigrants in removal proceedings are entitled to counsel of their choosing but do not have the option of government-appointed counsel. *See* 8 U.S.C. § 1229a(b)(4)(A) (2006).

9. *Ramos*, 623 F.3d at 678.

10. *Id.* at 679.

11. *Id.*

12. *See* 8 U.S.C. § 1182(a)(9)(A) (2006) (rendering inadmissible an alien who has been previously ordered removed for periods of five, ten, or twenty years, depending on whether the alien had a second or subsequent removal order or has previously been convicted of an "aggravated felony," as well as on the timing of removal proceedings).

13. *Ramos*, 623 F.3d at 675.

14. Reply Brief for Appellee at 6, *Ramos*, 623 F.3d 672 (No. 09-50059), 2009 WL 6564884, at *4–5.

15. *See* 8 U.S.C. § 1229a(d) (2006); 8 C.F.R. § 1003.25(b) (2012) (detailing stipulated removal).

federal government has substantially expanded and experimented with stipulated removal. Before 2003, a handful of stipulated orders were recorded.[16] But by fiscal year 2008, approximately 30,000 removal orders—nearly one-fifth of all removal orders issued by IJs that year—were stipulated removal orders.[17] And although the practice across the country appears to have peaked in 2009, with some decline since then,[18] stipulated orders still constitute almost a third of all removal orders issued by IJs in certain parts of the country.[19] Non-citizens who sign requests for stipulated orders of removal agree to the entry of a formal order of removal against them while forgoing a hearing before an IJ, and they waive other rights associated with removal proceedings, such as the right to contest the grounds of removal and the right to appeal the removal order.[20]

Stipulated orders of removal arguably offer benefits to both sides. To non-citizens who do not wish to fight their removal cases, agreeing to a stipulated order of removal offers them a faster removal and therefore less time in detention. To the federal agencies tasked with immigration enforcement and adjudication,[21] stipulated removal provides significant efficiency benefits, political rewards, and potential enforcement clout. Stipulated removal orders move cases more quickly through the removal and detention process. Moreover, they are counted as formal removals, giving the government the power to impose civil and/or criminal penalties if previously deported persons re-enter the country in the future.[22]

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16. Data received from Executive Office for Immigration Review (EOIR) (on file with the *North Carolina Law Review*).

17. *See infra* notes 179–82 and accompanying text.

18. *See* LENNI B. BENSON & RUSSELL WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 129 (2012), *available at* http://www.acus.gov/wp-content/uploads/downloads/2012/06/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf (showing 36,533 stipulated removal orders entered in fiscal year 2009; 27,706 in 2010; and 14,846 in 2011).

19. *See id.* at 128 (showing that in fiscal year 2011, stipulated orders in Cleveland accounted for thirty-two percent of removal orders issued by IJs, and stipulated orders in Salt Lake City accounted for twenty-nine percent).

20. § 1003.25(b).

21. Several different federal agencies are charged with administering the immigration laws and participate in the stipulated removal program. *See generally infra* Part III (discussing implementation of stipulated removal). Where a specific agency is relevant, this Article will refer to the particular agency in question. At times, however, the Article refers generically to "federal immigration agencies" to discuss the actions of various agencies collectively.

22. *See, e.g.*, 8 U.S.C. § 1181(a)(9)(A) (2006) (imposing civil bars to re-entry for individuals ordered removed); 8 U.S.C. § 1326(a) (2006) (describing elements of crime of illegal re-entry following removal order).

For individuals like Isaac Ramos, who are charged with removal by ICE, the alternative to a stipulated order of removal involves appearing for an in-person hearing before an IJ, often during detention. IJs, who preside over immigration courts that fall under the direction of the Department of Justice, are responsible for adjudicating deportation cases and process over 400,000 matters each year.[23] Over the past decade, policymakers, judges, and scholars alike have identified a crisis in immigration adjudication, focusing on questions such as the wide disparities in individualized decision-making,[24] bias in the selection process for adjudicators,[25] an overall dearth of professionalism,[26] and severe resource constraints in the system.[27] The government's modern system of immigration detention, too, has become the focus of intense criticism.[28] At the same time, the level of federal government resources devoted to enforcement has expanded substantially, thereby enhancing the demand for the services of the immigration courts and immigration detention facilities.[29]

Do stipulated orders of removal offer a partial solution to the mismatch between the federal government's enforcement goals and

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23. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2011 STATISTICAL YEARBOOK B2 (2012) [hereinafter EOIR, FY 2011 YEARBOOK], http://www.justice.gov/eoir/statspub/fy11syb.pdf (showing receipt of 393,185 matters in fiscal year 2009; 392,888 matters in fiscal year 2010; and 430,574 in fiscal year 2011). EOIR defines "matters received" as "the total number of proceedings, bond redeterminations, and motions to reopen or reconsider received by the immigration courts during the reporting period." *Id.* at B1.

24. *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 303 (2007).

25. *See* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 374–75 (2006).

26. A number of federal appeals court judges have openly criticized the quality of IJ decision-making. *See, e.g.*, Guchshenkov v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004) (criticizing the IJ's analysis as "one more indication of systemic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum."); *see also* Michele Benedetto, *Crisis on the Immigration Bench*, 73 BROOK. L. REV. 467, 471 (2008) (arguing that crisis on immigration bench implicates judicial ethics).

27. APPLESEED & CHICAGO APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 1 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf.

28. DORA SCHRIRO, IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEP'T HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 4 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

29. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2010 YEARBOOK OF IMMIGRATION STATISTICS 94 (2011) [hereinafter DHS, 2010 YEARBOOK], http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf (showing five-fold increase in number of removals from fiscal year 1996 to 2010).

the resource constraints of the immigration courts and detention system? This Article argues that they do not, at least not under current procedures and practices. At a descriptive level, the Article draws from thousands of previously confidential government records and data that were obtained through the Freedom of Information Act ("FOIA") to provide a close view of the federal government's expansion of the stipulated removal program. It highlights several troubling features of the program, particularly for those who have been disproportionately affected by stipulated removal: individuals who did not have lawyers and were incarcerated in immigration detention facilities, the overwhelming majority of whom were of Latino descent. The Article then argues that the stipulated order of removal program, as implemented since statutory and regulatory changes in 1996 allowed its use on unrepresented non-citizens, violates procedural due process under the Fifth Amendment. While the Article critiques the government's use of stipulated removal to date, it does not advocate for stipulated removal's abolition. It instead advocates for small but meaningful administrative reforms to ameliorate the due process problems associated with the program, while recognizing that ICE's pro-enforcement culture and the absence of comprehensive immigration reform are also responsible for stipulated removal's deficiencies.

Stipulated removal constitutes part of a broader trend in the immigration enforcement context, in which efficiency takes priority over process. Since 1996, the civil immigration laws have set forth a variety of streamlined procedures, in addition to stipulated removal, which enable the government to deport non-citizens while avoiding adjudication before the immigration courts.[30] Increasingly, ICE directly issues removal orders that never come before IJs, and it has become common to hear of individuals physically removed after signing a piece of paper during an interview with an ICE officer. Indeed, in fiscal year 2010, almost two-thirds of all removal orders reported by DHS came directly from the Agency and were not issued

30. Other forms of removal employed in the civil immigration context include expedited removal, *see* 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (2006) (indicating that certain aliens arriving at ports of entry "shall" be ordered removed "without further hearing or review"); reinstatement of removal, *see* 8 U.S.C. § 1231(a)(5) (2006) and 8 C.F.R. § 241.8(a) (2012) (providing for removal, without right to immigration court hearing, for non-citizens apprehended in the United States after the receipt of a prior removal order); and administrative removal, *see* 8 U.S.C. § 1228(b) (2006) and 8 C.F.R. § 238.1 (2012) (applying to immigrants who are not lawful permanent residents and who have convictions that are aggravated felonies).

by IJs.[31] A related set of procedures are followed when the criminal courts act as immigration-related forums.[32] The criminal justice system has witnessed a rise in the use of various plea bargaining arrangements with non-citizens to ultimately achieve immigration enforcement goals in the form of both criminal sanctions and physical removals. Examples include the conditioning of removal orders as part of plea bargains in federal criminal prosecutions (for immigration and non-immigration offenses),[33] and the use of fast-

31. *See* DHS, 2010 YEARBOOK, *supra* note 29, at 94 (showing 387,242 removals); EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP'T OF JUSTICE, FY 2010 STATISTICAL YEARBOOK D2, Q1 (2011), http://www.justice.gov/eoir/statspub/fy10syb.pdf (suggesting that IJs entered 138,864 removal orders that were not grants of voluntary departure).

32. It is worth acknowledging that the expansion of stipulated removal, a civil immigration enforcement mechanism that amplifies the government's criminal enforcement power for immigration violations, has implications for the growing literature on the overlap between the criminal and immigration laws. *See generally* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009) (discussing and theorizing the criminal prosecution of immigration-related offenses); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639 (2004) (discussing criminalization of non-citizens after September 11th and through proposals to involve local law enforcement in immigration enforcement); Stephen Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE. L. REV. 469 (2007) (asserting that immigration law has adopted criminal law's punitive aspects while rejecting criminal law's procedural protections); Peter Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011) (arguing that Supreme Court has rejected, and may further reject, traditional characterization of deportation as purely civil in nature); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (exploring convergence of criminal and immigration laws, as well as implications of convergence for political theories of national membership). Indeed, stipulated removal constitutes yet another example of what Stephen Legomsky calls the "asymmetric incorporation" of criminal law into immigration law, in which the policies and practices of criminal law have seeped into immigration enforcement, even though immigration law has simultaneously failed to incorporate the procedural protections of criminal law. *See* Legomsky, *supra*, at 494–96 (describing other forms of "criminal-style plea-bargaining" in immigration law).

33. 8 U.S.C. § 1228(c)(5) (2006). Under a stipulated judicial order, a federal district court judge has the authority to enter a removal order as a condition of a plea agreement, probation, and/or supervised release. *Id.* The use of stipulated judicial orders of deportation has appeared most prominently in several high-profile workplace raids of immigrant workers. *See* Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Law*, 32 SEATTLE U. L. REV. 651, 669–704 (2008) (describing use of stipulated judicial orders of removal in conjunction with immigration raid on Postville, Iowa meatpacking plant). Stipulated judicial orders under § 1228(c)(5) raise several issues in common with stipulated orders of removal, including allegations of pressure and government agents' reliance on misinformation and lack of access to counsel in order to obtain concessions to final orders of removal. *See id.* at 687. A full discussion of stipulated *judicial* orders of removal, entered at the same time as criminal proceedings and under the authority of § 1228(c)(5), is outside the scope of this Article, which focuses primarily on stipulated removal orders entered during the civil immigration enforcement process pursuant to 8 U.S.C. § 1229a(d) (2006) and 8 C.F.R. § 1003.25(b) (2012). This

track pleas and group plea colloquies in illegal entry prosecutions in certain border states.[34] In general, this trend towards efficiency at the expense of process in both the civil and criminal contexts has remained relatively under-examined in the legal scholarship. The immigration literature generally centers on the quality of adjudication in cases pending before IJs.[35] Relatedly, the effect of immigration enforcement's increasing entanglement with criminal law on the criminal justice system itself has only recently gained the attention of scholars.[36] This Article focuses exclusively on stipulated orders of removal in immigration courts. In doing so, it supplies one missing piece of a generally under-theorized area of law dealing with how immigration law's various civil and criminal enforcement arms employ truncated procedures to accomplish enforcement goals, accompanied by a glaring lack of attention to procedural due process rights.[37]

Article uses the phrases "stipulated order of removal" and "stipulated removal" interchangeably to refer to the latter process only.

34. In certain states along the U.S./Mexico border, the aggressive criminal prosecution of all migrants crossing the border, under a program known as "Operation Streamline," has led to a proliferation in the use of group guilty plea hearings in order to control federal district court backlogs. Operation Streamline's effect on criminal proceedings shares similar themes as the use of stipulated orders of removal in the immigration context, in the sense that both are driven in part by a perceived shortage of detention space, overwhelmed court calendars, and the government's enforcement priorities, and both suffer from due process concerns. For a helpful description of Operation Streamline, see generally Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481 (2010). Given the dearth of literature on stipulated orders of removal, this Article does not set forth a full account of the parallel use of abbreviated procedures in both immigration and criminal law, although this area is ripe for further development. Ingrid V. Eagly has examined the practical effects of current immigration enforcement on the criminal justice system and suggested that a "criminal immigration enforcement" system that takes place in the criminal law setting but also incorporates the relaxed rights and procedures of immigration law has emerged. *See* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1349 (2010).

35. *See generally* Legomsky, *supra* note 25 (critiquing absence of decisional independence amongst immigration judges); Ramji-Nogales, Schoenholtz & Schrag, *supra* note 24 (identifying wide disparities amongst immigration judges adjudicating asylum applications); *see also* Stephen Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1638 (2010) (advocating creation of Article I immigration court to enhance quality of "formal system for adjudicating removal cases").

36. *See* Eagly, *supra* note 34, at 1283, 1284 (asserting that "[t]he consequences of . . . sustained focus on criminal immigration enforcement . . . have remained under-examined," and that the "existing scholarship . . . has not adequately explored how immigration operates in the criminal sphere—namely, how the rights, procedures, and systems traditionally associated with the criminal system have themselves been affected by interaction with the civil system of immigration").

37. Jill Family has initiated a scholarly conversation on "diversions" from the immigration court system and has persuasively argued that "[t]he problems facing the adjudication system do not justify intensifying executive power over immigration law

Despite the growth of stipulated removal during the late 2000s, its use has, until 2010, remained largely hidden from public scrutiny and almost entirely absent from scholarly discussions related to immigration.[38] Nonetheless, stipulated orders of removal are gaining judicial and public attention. In September 2010, the Executive Office for Immigration Review ("EOIR"), the federal agency comprised of the immigration courts and judges, issued an internal policy memorandum in which it encouraged the greater use of stipulated removal orders.[39] In the same month that the executive branch endorsed the stipulated removal program, the judicial branch questioned it. In *United States v. Ramos*,[40] the United States Court of Appeals for the Ninth Circuit found that the stipulated removal order entered against Isaac Ramos violated procedural due process and Agency regulations.[41] A year later, the nation's first comprehensive advocacy report detailing the government's implementation of stipulated orders of removal confirmed many of the concerns that immigration advocates had previously voiced over the program, such as the risk that individuals were agreeing to stipulated removal because they erroneously believed they had no other choice.[42]

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through the use of diversions." Jill Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L. J. 595, 598 (2009). Family identifies stipulated orders of removal as an example of such diversions and evaluates them against administrative law principles. *See id.* at 616–17.

38. *See id.*

39. Memorandum from Brian M. O'Leary, Chief Immigration Judge, to All Immigration Judges, Court Administrators, Attorney Advisors, Judicial Law Clerks and Immigration Court Staff (Sept. 15, 2010), http://www.justice.gov/eoir/efoia/ocij/oppm10/10-01.pdf. The memorandum was accompanied by stipulated removal forms and procedures, which had been developed collaboratively between EOIR and ICE.

40. 623 F.3d 672 (9th Cir. 2010).

41. 8 C.F.R. § 1003.25(b) (2012) (requiring that "the Immigration Judge must determine that the alien's waiver [of rights] is voluntary, knowing, and intelligent").

42. *See generally* JENNIFER LEE KOH, JAYASHRI SRIKANTIAH & KAREN TUMLIN, DEPORTATION WITHOUT DUE PROCESS (2011), *available* at http://www.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf (explaining program). Prior to the release of DEPORTATION WITHOUT DUE PROCESS, a number of advocates expressed concerns about the growing use of stipulated orders of removal, but none set forth details about the government's operation of the program. *See, e.g.*, *Crossing the Border: Immigrants in Detention and Victims of Trafficking Part I and II: Hearing Before the Subcomm. on Border, Maritime, and Global Counterterrorism of the H. Comm. on Homeland Sec.*, 110th Cong. 41 (2007) (prepared statement of Christina Fiflis, Member, Commission on Immigration, American Bar Association) (testifying, with respect to stipulated orders of removal, that "detainees who may in fact be eligible for immigration relief . . . perceive that they have no other choice but to sign the order"); *Policy Brief: Data Suggests Language Barriers Lead Immigrants to Waive Right to Hearing Before Deportation*, NAT'L IMMIGRANT JUST. CENTER, http://www.immigrantjustice.org/publications/policy-brief-stipulated-orders (last visited

This Article critiques the government's treatment of stipulated removal as a solution to current crises of immigration adjudication and detention and argues that the entry of stipulated removal orders on unrepresented immigrant detainees who never appear before an IJ constitutes a violation of procedural due process. Part I provides relevant background and context for stipulated removal by explaining the rights and protections that potentially apply to non-citizens and generally only become real in immigration court hearings before IJs, and it describes the factors that have contributed to the crisis in immigration adjudication. Part II highlights the legal framework surrounding stipulated removal and discusses stipulated removal's regulatory and statutory history. Part III provides a descriptive account of stipulated removal's implementation, drawing largely from internal government records and data. Part IV examines the due process concerns that are implicated by stipulated removal's implementation thus far, both through the lens of recent developments in illegal re-entry criminal prosecutions as well as through the standard procedural due process framework set forth by the Supreme Court in *Mathews v. Eldridge*.[43] Part V sets forth policy recommendations, with a focus on recommendations that may take place through the executive branch, without Congressional action.

I. THE CONTEXT: REMOVAL PROCEEDINGS BEFORE IMMIGRATION COURTS

This Part sets forth the context in which stipulated orders of removal have arisen: modern immigration adjudication. It first discusses how many non-citizens, particularly the majority who do not have legal representation, often lack substantive rights but do possess procedural rights under the federal immigration statutes, regulations, and the Due Process Clause of the Fifth Amendment. It also discusses the role of the immigration courts in enforcing those procedural rights. Moreover, although the immigration laws leave many non-citizens without defenses to removal, those same laws are sufficiently nuanced and complex that a substantial number of immigrants who face charges of removal may, upon further examination, have claims to release from detention, relief from removal, or to termination of the proceedings. This Part then proceeds to discuss the institutional

Oct. 28, 2012) (describing case of Colombian immigrant who signed stipulated order of removal but did not understand consequences, despite fact that she had valid claim for political asylum).

43. 424 U.S. 319 (1976).

challenges facing immigration adjudication, which are significant, if not overwhelming. At first blush, stipulated orders of removal may seem to offer a partial solution to the challenges plaguing the immigration courts and detention system. However, as demonstrated in later sections, stipulated removal in its current form is too flawed to serve as a remotely viable answer to the immigration adjudication crisis.

A. *The Standard Process: Non-Citizens' Rights and the Role of the Immigration Judge*

A well-established maxim of immigration law dictates that, because removal is a civil sanction and distinct from criminal punishment, the constitutional rights typically associated with criminal proceedings do not apply.[44] The civil administrative context in which removal proceedings take place confirm their technically noncriminal nature. Immigration courts are part of the EOIR, a sub-agency of the Department of Justice ("DOJ"). Immigration and Customs Enforcement, a sub-agency of the Department of Homeland Security ("DHS"), prosecutes removal cases.[45] Appeals of immigration court decisions go to the Board of Immigration Appeals ("BIA"),[46] and they only reach the federal judiciary through petitions for review to the federal courts of appeal,[47] whose jurisdiction over

44. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893). The courts' rigid treatment of deportation as a noncriminal sanction has been widely criticized, but nonetheless upheld since *Fong Yue Ting*. *See, e.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1894–95 (2000); Markowitz, *supra* note 32, at 1314–16, 1325; Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 295, 338, 346 (2008); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 313 (2000).

45. Congress created the Department of Homeland Security (DHS) in 2002 through the Homeland Security Act. Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135, 2142 (2002) (codified at 6 U.S.C. § 111(a) (2006)). Many of the immigration functions of the former Immigration and Naturalization Service, including immigration enforcement, were assumed by DHS following the Homeland Security Act. *See id.* § 441, 116 Stat. at 2192 (codified at 6 U.S.C. § 251 (2006)) (listing the functions transferred from the Commissioner of Immigration and Naturalization to the Under Secretary for Border and Transportation Security); *About ICE: Overview*, ICE.GOV, http://www.ice.gov/about/overview (last visited Oct. 1, 2012) (stating that ICE "promote[s] homeland security and public safety through the ... enforcement of federal laws governing border control, customs, trade, and immigration").

46. 8 C.F.R. § 1003.1(b) (2012).

47. 8 U.S.C. § 1252(a)(5) (2006).

immigration matters is generally limited to constitutional questions or questions of law.[48]

Procedural protections in removal proceedings are limited in comparison to criminal proceedings, but nonetheless remain relevant and retain their constitutional gravitas through procedural due process. In 1903, the Supreme Court held that procedural due process applies to deportation hearings,[49] a principle to which the Court has consistently adhered.[50] The Court has stated, for instance, that "the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent."[51] Indeed, procedural due process claims have become a focal point of many challenges to deficiencies in the removal process, operating as a substitute for constitutional claims that the courts do not recognize, in large part because of the doctrine that Congress has plenary, unreviewable power over the immigration laws.[52] For instance, the Fifth Amendment has operated as a stand-in for other constitutional criminal protections,[53] such as the right to counsel (including effective assistance of counsel) under the Sixth

48. Questions of fact or discretionary decisions are not appealable to the federal courts. *See id.* § 1252(a)(2) (2006) (denying discretionary relief and preserving judicial review of constitutional claims or questions of law); Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57, 57 (2010) (stating that appeals by non-citizens facing deportation are restricted to questions of law).

49. Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903).

50. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("[D]eportation . . . visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . . Meticulous care must be exercised lest the procedure by which [the alien] is deprived of that liberty not meet the essential standards of fairness.").

51. Zadvydas v. Davis, 533 U.S. 678, 679 (2001).

52. Hiroshi Motomura has influentially explained how, in immigration law, procedural due process claims operate as a surrogate for substantial constitutional claims that are ordinarily foreclosed by the plenary power doctrine. *See generally* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); *see also* Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST'L. L.Q. 925, 931 (1995) (describing "the applicability of procedural due process in deportation cases" as "[o]ne clear exception to the principle of plenary congressional power [that] emerged early on").

53. *See* Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491, 493 (2011) (arguing that courts should continue to rely on due process to "ensure that immigration proceedings are fair, just and sufficiently transparent" rather than seek to expand the application of the Sixth Amendment).

Amendment,[54] the right to protection against unreasonable searches and seizures under the Fourth Amendment,[55] and the constitutional right to discovery.[56]

Procedural due process has also animated a number of statutory rights that apply to immigration proceedings. In its current form, section 240 of the Immigration and Nationality Act ("INA") sets forth the requirements for immigration court proceedings, including protections that apply to all non-citizens facing removal.[57] For instance, immigrants have a statutory right to counsel (at no government expense), the right to examine the evidence presented by the government, the right to cross-examine witnesses, and the right to present evidence.[58] These rights only become a reality when the immigrant appears for a court hearing. Similarly, the right to appeal an IJ's decision is protected by statute, grounded in procedural due process, and requires adjudication before an IJ in order to be realized.[59]

Despite the harshness and blunt force with which the immigration laws generally operate,[60] removal proceedings can lead

54. *See* Matter of Lozada, 19 I. & N. Dec. 637, 638 (B.I.A. 1988) (allowing ineffective assistance of counsel claims in removal proceedings under Fifth Amendment). *But see* Matter of Compean, 24 I. & N. Dec. 710, 710 (A.G. 2009) (eliminating *Lozada* right to effective assistance of counsel under Fifth Amendment in immigration proceedings), *vacated by* Matter of Compean, 25 I. & N. Dec. 1, 2–3 (A.G. 2009) (restoring *Matter of Lozada* while directing Department of Justice to institute rulemaking procedures to evaluate *Lozada* framework).

55. Although the Supreme Court has held that the Fourth Amendment does not apply in the immigration context, it and other courts have suggested that "egregious" Fourth Amendment violations should lead to application of the exclusionary rule. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984). The Fifth Amendment also provides an avenue for the suppression of illegally obtained evidence in removal proceedings. *See* Matter of Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980); *see also* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1624–25 (2010) (questioning institutional competence of immigration courts to hear exclusionary rule claims).

56. *See* Dent v. Holder, 627 F.3d 365, 374 (9th Cir. 2010) (finding failure of government to provide copy of non-citizen's "A-file" violated Fifth Amendment due process).

57. *See generally* 8 U.S.C. § 1229a (2006) (describing the requirements for immigration removal proceedings).

58. *Id.* § 1229a(b)(4).

59. *Id.* § 1229a(c)(5).

60. Many have offered commentary on the draconian and confusing nature of the immigration laws, particularly the way in which drastic changes to the laws in 1996 left large swaths of individuals subject to removal without the option of discretionary relief. *See, e.g.*, BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY AND IMMIGRATION POLICY 5–7, 63–64 (2006); Kanstroom, *supra* note 44, at 1891–92; Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1956–57 (2000).

to surprising outcomes even where immigrants are not eligible for relief from removal. For instance, because ICE has the burden of proving by clear and convincing evidence that an immigrant is deportable,[61] the non-citizen can contest the factual allegations and legal grounds of removability charged by the Agency.[62] For lawful permanent residents charged with removal based on a prior criminal conviction, arguing that a conviction does not fall within the statutory ground articulated by the federal immigration laws may operate as a particularly critical defense strategy because the immigration statute may leave the non-citizen with no other options.[63] As part of proving removability, the government must prove that the individual is not a citizen of the United States. In some cases, the individual might be or have a claim to U.S. citizenship,[64] or be able to suppress evidence that he or she is a foreign national,[65] thereby leaving the government unable to prove alienage. If the charge of removability (including alienage) cannot be sustained, then the IJ may terminate the proceedings altogether. Similarly, a defective charging document could also enable the non-citizen to avoid deportation.[66]

Even if deemed removable, in some (but not all) cases, the non-citizen may apply for relief from removal. A pro se immigrant may not learn about the opportunity to apply for relief until she sees the judge, as federal regulations impose an affirmative obligation on the IJ to inform the immigrant of any apparent eligibility for relief from removal.[67] Indeed, an IJ's failure to inform the non-citizen of the right

61. § 1229a(c)(3)(A) (describing the burden of proof for deportable aliens).

62. The charges are listed on a document known as the Notice to Appear. *See id.* § 1229(a).

63. Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. (forthcoming 2013) (on file with the *North Carolina Law Review*) (explaining the emergence of the categorical approach as critical defense strategy in removal proceedings involving prior convictions).

64. For a compelling discussion of how and why the government has detained and deported substantial numbers of U.S. citizens, see Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 629 (2011).

65. Suppression motions are typically based on the theory that immigration agents violated the Fourth Amendment, Fifth Amendment, or federal regulations when obtaining evidence of alienage. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984). They are relatively rare and difficult to prevail on, in part due to the Supreme Court's ruling that the Fourth Amendment's exclusionary rule does not apply in immigration cases as a general rule, although it may apply where the constitutional violations are egregious or widespread. *Id.*

66. *See* 8 C.F.R. § 239.2(c) (2012).

67. *Id.* § 1240.11(a)(2).

to apply for relief can rise to the level of a due process violation.[68] Although immigration laws enacted in 1996 drastically narrowed the categories of individuals who are statutorily eligible for relief from removal, EOIR's reported statistics nonetheless suggest that meaningful numbers of individuals apply for relief, are granted relief, or have removal proceedings against them terminated. In fiscal year 2011, over a quarter of all immigration court cases resulted in either the positive grant of relief that allowed the non-citizen to remain in the United States or in termination of the proceedings altogether.[69] Once proceedings commence, in order to avoid physical removal (for instance, through the grant of relief or termination of the proceedings), the non-citizen must generally have her case adjudicated by the immigration court.[70]

Although many forms of relief from removal enable the non-citizen to remain in the United States, voluntary departure—in which either the IJ or ICE permits the non-citizen to leave the country in exchange for not having a formal order of removal entered against her—is also a common outcome that provides the non-citizen with important benefits over a removal order.[71] In fiscal year 2011, nineteen percent of all immigration court proceedings resulted in the

68. *See infra* discussion accompanying notes 305–13.

69. EOIR, FY 2011 YEARBOOK, *supra* note 23, at D2 (showing 11.6% of all cases resolved by termination, and 14.4% of all matters in a grant of relief not including voluntary departure by an immigration judge, in fiscal year 2011). Termination might also result if a non-citizen received discretionary relief in which Citizenship and Immigration Services (CIS), an immigration agency distinct from the immigration courts, had jurisdiction over the application. For instance, respondents in removal proceedings who receive U nonimmigrant status, a form of immigration relief for certain crime victims, may in turn seek to have removal proceedings terminated once CIS grants status. *See New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53,014, 53,022 (Sept. 17, 2007) (contemplating termination of proceedings, with consent of ICE, following grant of U visa by CIS). Note also that while 14.4% of all cases resulted in the positive grant of relief, 24% percent of all matters before the immigration courts involved an application for relief, meaning that in nearly a quarter of all cases the non-citizen attempted to obtain relief. EOIR, FY 2011 YEARBOOK, *supra* note 23, at N.

70. *See* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 329 (12th ed. 2010). After the commencement of immigration proceedings, only the IJ may terminate proceedings. *Id.*

71. Either an IJ or ICE must agree to a grant of voluntary departure, which is treated as a form of immigration relief. *See* 8 U.S.C. § 1229c (2006) (describing requirements for voluntary departure). Voluntary departure is therefore distinct from the concept of "self-deportation," which refers to efforts to make living conditions difficult enough for non-citizens that they choose to return to their countries of origin without necessarily communicating that choice to government officials. *See* Antonio Alarcón, *Do-It-Yourself Deportation*, N.Y. TIMES, Feb. 2, 2012, at A27 (describing then-presidential candidate Mitt Romney's description of self-deportation as creating policies so that immigrants "decide they can do better by going home because they can't find work here").

grant of voluntary departure.[72] Like stipulated removal, voluntary departure allows the government to obtain a speedier departure while avoiding the costs of the removal process (such as detention or obtaining travel documents). However, in sharp contrast to stipulated removal, a grant of voluntary departure avoids the legal consequences of a formal removal order such as bars to lawful re-admission in the future and the possibility of criminal prosecution for illegal re-entry. Like many other forms of relief, non-citizens faced with the prospect of deportation may not know, prior to seeing an IJ, whether they can seek voluntary departure or be familiar with its benefits.

Immigration detention during the pendency of one's removal proceedings, and even throughout the appeals process, is a harsh reality. In some cases, the option of release on bond may exist only if the non-citizen appears before an IJ.[73] Mandatory detention statutes require ICE to categorically detain many non-citizens with prior criminal convictions if those convictions fall within statutorily-enumerated categories.[74] When mandatory detention applies, the IJ generally lacks the discretion to order the release of the individual on bond unless the non-citizen can demonstrate that he or she does not fall within the mandatory detention statute.[75] Another statutory provision authorizes ICE to detain almost any non-citizen charged with any ground of removal, regardless of criminal history.[76] However, immigrants detained under non-mandatory detention provisions remain eligible to request bond hearings before an IJ, in which successfully showing that one is neither a flight risk nor a danger to the community may lead to release on bond (or on lower bond).[77] Bond redetermination hearings—in which an IJ considers an individual's request for release on bond or lower bond—account for a

72. EOIR, FY 2011 YEARBOOK, *supra* note 23, at Q1.

73. If ICE takes the position that a non-citizen falls within the criminal-based mandatory detention statute at 8 U.S.C. § 1226(c)(1), then the non-citizen might be able to seek release on bond through a "Joseph" hearing. *See* Matter of Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999).

74. *See* § 1226(c)(1); *see also* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 609–13 (2010) (discussing the legal framework governing mandatory detention in the immigration context).

75. *Joseph*, 22 I. & N. Dec. 799, 800; *see also* Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1850–51 (2011) (describing, and identifying procedural shortcomings in, "Joseph" hearings).

76. *See* § 1226(a).

77. *Id.*

substantial portion of the immigration courts' dockets, with judges receiving almost 77,000 bond matters in fiscal year 2011.[78]

Immigration court hearings thus offer minimal, but significant, protections to non-citizens facing deportation. But as the next Section illustrates, the current system of immigration adjudication also faces immense obstacles to processing the growing number of cases before it.

B. Modern Pressures Facing Immigration Courts

Many commentators acknowledge that the immigration court system is in a state of crisis and in dire need of reform.[79] A number of forces appear to have influenced the government's decision to rely on stipulated orders of removal to alleviate the pressures burdening the immigration courts.[80] This Section briefly sets forth these interconnected pressures, which include rapidly intensified immigration enforcement, resource constraints in the immigration courts, the perceived need for greater detention bed space, the fiscal costs of immigration enforcement, and the lack of access to counsel for non-citizen respondents.

Immigration enforcement reached an all-time high in 2011. In fiscal year 2011, the federal government ordered 396,906 individuals removed,[81] nearly double the number from 2001.[82] During the 2000s, the Bush Administration escalated immigration enforcement in the interior parts of the country. This expansion occurred through the use of workplace raids and greater collaboration with local law enforcement to carry out immigration objectives through the limited,

78. EOIR, FY 2011 YEARBOOK, *supra* note 23, at B7.

79. *See, e.g.*, AM. BAR ASS'N COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 2–4 (2010); APPLESEED & CHICAGO APPLESEED, *supra* note 27, at 1.

80. For instance, the former Commissioner of ICE in 2006 testified to Congress that the Agency would explore practices like stipulated removal in order to "short-circuit the removal process." *Fiscal Year 2007 Appropriations for the Secure Border Initiative, Immigration Customs and Enforcement, and Customs Border Protection: Hearing Before the Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 110th Cong. (2006) (statement of Julie Myers, Comm'r, Immigration and Customs Enforcement) (on file with the *North Carolina Law Review*).

81. Press Release, Immigration and Customs Enforcement, FY 2011: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities Including Threats to Public Safety and National Security (Oct. 19, 2011), http://www.ice.gov/news/releases/1110/111018washingtondc.htm.

82. DHS, 2010 YEARBOOK, *supra* note 29, at 94.

but controversial, use of 287(g) agreements.[83] Under the Obama Administration, immigration enforcement has continued, and arguably intensified, to include the national deployment of local-federal law enforcement collaborations, through programs such as Secure Communities, and overall removal numbers that surpassed those of the Bush Administration.[84] Indeed, political pressure to report higher deportation numbers appears to have guided the Obama Administration's immigration enforcement strategies, with internal Agency communications released in February 2010 showing that DHS had explicit quotas to achieve 400,000 deportations within the fiscal year.[85]

Stronger immigration enforcement and the drive to obtain higher removal numbers have placed pressure on the already-strained governmental institutions that carry out these objectives. The immigration courts are notoriously under-resourced and have not kept up with the rapidly expanding pace of immigration enforcement. The task of IJs has been compared to adjudicating death penalty cases in traffic court.[86] On average, four to six IJs share one judicial law clerk. The immigration courts regularly experience severe backlogs; in September 2011, nearly 300,000 cases were awaiting resolution before the immigration courts.[87] Despite rising caseloads, IJs must adjudicate high-stakes cases against demanding case

83. These 287(g) agreements enabled state and local law enforcement, pursuant to memoranda of understandings negotiated with the federal government, to be deputized with immigration enforcement powers. *See* 8 U.S.C. § 1357(g) (2006); *see also* Chacón, *supra* note 55, at 1582–86 (describing a range of local-state-federal law enforcement partnerships aimed at immigration enforcement); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1149–68 (2008) (describing expanded interior enforcement efforts in immigration).

84. *See* AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 1 (2011), *available at* http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

85. E-mail from James M. Chaparro, Dir., DRO Taskings, to Field Office Dirs. and Deputy Field Office Dirs. (Feb. 22, 2010) (stating that the Agency's projections "only give[] us a total of just over 310,000 overall removals—*well* under the Agency's goal of 400,000"), http://media.washingtonpost.com/wp-srv/politics/documents/ICEdocument032710.pdf?sid=ST2010032700037.

86. *See* Memorandum from Dana Leigh Marks, President, Nat'l Ass'n of Immigration Judges, Immigration Court Needs: Priority Short List of the NAIJ 2 (Oct. 2009), http://law.psu.edu/_file/NAIJ%20Priorities%20Short%20List%20-%20October%202009.pdf.

87. *Immigration Court Backlog Rises for Another Year*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Dec. 8, 2011), http://trac.syr.edu/whatsnew/email.111208.html (reporting all-time high backlog of 297,551 cases pending in September 2011).

completion calendars that place pressure on judges to finish cases as quickly as possible.[88]

The problem of backlogs in immigration court, coupled with the current system of immigration detention, means that non-citizens can regularly face prolonged periods of time in jail-like conditions while they wait to see an IJ who can adjudicate their case. Immigration detention has become a multi-million, if not multi-billion, dollar industry for the private corporations who administer the majority of the nation's immigration detention facilities.[89] The average length in detention for immigrants who appear for IJ hearings is forty-one days,[90] but detention can last for months and even years, depending on the case.[91]

Immigration enforcement and detention are not cheap, and costs for both have grown astronomically since the passage of the 1996 laws. In fiscal year 2012, ICE's enacted budget was $5.862 billion,[92] while Customs and Border Protection ("CBP"), which regulates the borders, had an enacted budget of $11.737 billion.[93] Together, the two agencies' budgets represented over $17.5 billion, more than thirty percent of DHS's total $59.7 billion budget.[94] Notably, an increase of $157.7 million was intended for ICE's Custody Operations to "support 33,400 detention beds" and the removal of "criminal aliens."[95] As a point of comparison, in 1998, the then-Immigration

88. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT, at executive summary (2006), http://www.gao.gov/assets/260/251155.pdf (stating that "EOIR evaluates the performance of the immigration courts based on the immigration courts' success in meeting case completion goals").

89. *See* Detention Watch Network, *The Influence of the Private Prison Industry on Immigration Detention* (2008), http://www.detentionwatchnetwork.org/privateprisons (discussing the difficulty of identifying precise percentage of profits resulting from ICE contracts generated for three corporations that collectively administer over 25,000 detention beds on behalf of ICE).

90. U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT SALARIES AND EXPENSES, FISCAL YEAR 2011 OVERVIEW CONGRESSIONAL JUSTIFICATION 49 (2011), *available at* http://www.ice.gov/doclib/foia/secure_communities/fy2011overviewcongressional justification.pdf.

91. *See* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 49 (2010) (discussing prolonged immigration detention).

92. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FISCAL YEAR 2013, at 25 (2012), http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf.

93. *Id.*

94. *Id.* at 3, 23.

95. U.S. DEP'T OF HOMELAND SEC., BUDGET IN BRIEF FISCAL YEAR 2012, at 10 (2012), http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf.

and Naturalization Service's budget was approximately $3.6 billion,[96] and in 1996 the federal government had 8,000 immigration detention beds.[97]

The lack of access to legal counsel for immigrants in removal proceedings, and particularly for those in detention, exacerbates the adjudication challenges noted above. Non-citizens in removal proceedings have no right to government-appointed counsel, and the majority of detained immigrants are pro se.[98] Not surprisingly, eighty-four percent of detained non-citizens are not represented.[99] Many immigration detention facilities exist in remote locations that make it nearly impossible for detained immigrants to obtain or even consult with counsel.[100] According to one study, eighty percent of all immigrant detainees are "severely" underserved by nonprofit legal organizations.[101] The Legal Orientation Program ("LOP"), an EOIR-funded initiative in which nonprofit attorneys host legal rights presentations, does not reach half the detained population.[102] Despite the severe absence of legal representation for detained immigrants, having a lawyer may be one of the most critical factors for prevailing in one's case. Indeed, studies have shown a strong correlation between having an attorney and success in the removal proceedings,[103] suggesting that a more robust right to counsel could

96. *See* Chacón, *supra* note 55, at 1571.

97. U.S. DEP'T OF JUSTICE, FY 2002 BUDGET SUMMARY 114 (2001), http://www.justice.gov/archive/jmd/2002summary/pdf/ins_breached_bond.pdf.

98. *See* Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 541–42 (2009) (indicating that fifty-eight percent of detained immigrants in removal proceedings did not have lawyers).

99. AM. BAR ASS'N COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM, PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 5–8 (2010), http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.

100. *See* NAT'L IMMIGRANT JUSTICE CTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT 3 (2010), www.immigrantjustice.org/policy-resources/isolatedindetention/intro.html.

101. *Id.* (defining "severely underserved" facilities as holding "more than 100 detainees for every full-time [non-governmental organization] attorney providing legal services").

102. *Id.* at 7 ("In 2009, just 51 percent of the detention population . . . had access to LOPs . . . .").

103. One study found that for non-detained immigrants, seventy-four percent who are represented have a successful outcome, in comparison to thirteen percent who are not represented. Of detained immigrants, thirteen percent have a successful outcome, in comparison to three percent who are not represented. *See* Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363–64 (2011)

increase the number of individuals who receive positive outcomes in their removal proceedings as well as move cases more efficiently through the system.

Furthermore, immigration courts lack a series of rules and norms designed to facilitate a regular practice of engaging in stipulations or settlements that, in other forums, might address judicial economy concerns.[104] Removal proceedings are a form of administrative litigation. In many other civil and criminal litigation systems, where the vast majority of cases do not go to trial, the parties are encouraged to agree upon issues that are not in dispute through a process that includes pretrial conference, requiring the parties to meet and confer, required disclosures, and other practices that have developed over time.[105] By contrast, the immigration courts do not foster a litigation culture in which the parties engage in arms-length negotiations that result in the entry into stipulations on a regular basis. Litigation practices that, in other courts, encourage pretrial stipulations do not frequently take place, such as prehearing conferences or exercising a duty of disclosure.[106]

Given that immigration court backlogs are preventing DHS from meeting its enforcement goals, it is not surprising that the federal government has looked to solutions that enable it to bypass the immigration courts. Nor should it be surprising, given the conditions described above, that many non-citizens decide not to fight their cases and instead choose to return home rather than face prolonged detention. In light of these pressures, one might think that stipulated orders of removal offer a suitable solution. However, as demonstrated below, the constitutional harms created by stipulated removal's implementation to date far outweigh its benefits.

(finding that "[t]he two most important variables affecting the ability to secure a successful outcome in a case (defined as relief or termination) are having representation and being free from detention" (footnote omitted)).

104. Thanks to Lenni Benson for bringing this point to my attention. For a more extensive discussion of the use of prehearing conferences and other case management tools in immigration court, see BENSON & WHEELER, *supra* note 18, at 67–74.

105. *See* FED. R. CIV. P. 16 (describing pretrial conferences); FED. R. CIV. P. 26 (describing required disclosures); FED. R. CRIM. P. 16 (describing required disclosures).

106. In the Ninth Circuit, ICE attorneys must provide a copy of the non-citizen's "A-File," or "Alien File," when requested, but this requirement only became mandatory in 2010 as a result of litigation. *See* Dent v. Holder, 627 F.3d 365, 374–75 (9th Cir. 2010).

II. A PARTIAL SOLUTION? UNDERSTANDING STIPULATED ORDERS OF REMOVAL

What are the precise legal effects of a stipulated removal order? Where does the legal authority for stipulated removal orders come from? This Part discusses the regulatory and statutory framework governing stipulated orders of removal, including their history and effect.

A. Statutory and Regulatory Authority: Waiving Rights in Removal Proceedings

The stipulated removal statute appears within section 240 of the Immigration and Nationality Act, which addresses immigration court removal proceedings generally.[107] The statute does nothing more than instruct the Attorney General to "provide by regulation for the entry by an immigration judge an order of removal stipulated to by the alien (or the alien's representative) and [ICE]," and states that a "stipulated order shall constitute a conclusive determination of the alien's removability from the United States."[108] The statute therefore delegates the bulk of the procedure to the administrative agency to develop consistent with the statute and Constitution.

As described in greater detail by the federal regulation, the entry of a stipulated removal order both explicitly and implicitly eliminates the procedures and protections associated with immigration court hearings. A brief regulation consisting of less than 300 words sets forth the Agency's vision of stipulated orders of removal and their legal effect. The regulation, at 8 C.F.R. § 1003.25(b), states as follows:

> An Immigration Judge may enter an order of deportation, exclusion or removal stipulated to by the alien (or the alien's representative) and [ICE]. The Immigration Judge may enter such an order without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and supporting documents, if any. If the alien is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent. The

107. Although beyond the scope of the Article, other provisions within section 240 of the INA lend weight to a colorable argument that the stipulated removal regulations are *ultra vires* of the immigration statute because they authorize the entry of removal orders on unrepresented immigrants without an immigration court hearing. *See* 8 U.S.C. 1229a(a)(3) (2006) (stating that a "proceeding under this section shall be the *sole* and *exclusive* procedure for determining whether an alien may be admitted . . . [or] removed from the United States" (emphasis added)).

108. 8 U.S.C. § 1229a(d) (2006).

> stipulated request and required waivers shall be signed on behalf of the government and by the alien and his or her attorney or representative, if any.... A stipulated order shall constitute a conclusive determination of the alien's deportability or removability from the United States.[109]

The regulation enumerates items that the written stipulation "shall" include, which highlight the main legal consequences of a stipulated removal order.[110] The non-citizen waives the right to any in-person hearing before an IJ, including the initial master calendar hearing or bond-related hearings.[111] The regulation sends mixed signals as to whether an IJ should, nonetheless, insist that an in-person hearing take place. On one hand, the written request signed by the non-citizen must state that the waiver of rights is "voluntary, knowing, and intelligent,"[112] and the judge "may enter" the removal order "without a hearing," suggesting that no hearing is necessary.[113] On the other hand, by stating that the IJ "must determine that the [unrepresented] alien's waiver is voluntary, knowing, and intelligent,"[114] the regulation contemplates that, for pro se immigrants, an IJ should conduct an independent inquiry that goes beyond relying on the written document.

The request for a stipulated removal order admits the factual allegations raised by DHS,[115] concedes the legal grounds of removability,[116] and waives any rights to discretionary relief from deportation.[117] ICE is therefore relieved of the burden of proving removability. Thus, even if the immigrant could contest removability, seek discretionary relief, or otherwise lawfully remain in the country, the act of signing a stipulated removal order waives the right to pursue each of these avenues. Although not stated explicitly in the regulation, a stipulated order also prevents the non-citizen from

109. 8 C.F.R. § 1003.25(b) (2012).

110. *See generally id.* (detailing consequences).

111. *Id.*

112. *Id.* § 1003.25(b)(6) (requiring "[a] statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly, and intelligently").

113. *Id.* § 1003.25(b).

114. *Id.*

115. *Id.* § 1003.25(b)(1) (requiring "[a]n admission that all factual allegations contained in the charging document are true and correct as written").

116. *Id.* § 1003.25(b)(2) (requiring "[a] concession of deportability or inadmissibility as charged").

117. *Id.* § 1003.25(b)(3) (requiring "[a] statement that the alien makes no application for relief under the Act").

seeking release from detention on bond, even if he is eligible for a bond hearing, because a bond hearing must take place before an IJ.

An IJ reviews the written record, including the non-citizen's stipulated request, and issues the removal order itself.[118] As a result, a stipulated removal order carries the legal consequences of a fully-litigated removal order. For instance, the immigration laws bar an individual who receives a formal order of removal from subsequently returning, even if a valid visa is available, for anywhere from five to twenty years.[119] The non-citizen also becomes vulnerable to criminal prosecution under federal illegal re-entry statutes. While all non-citizens who cross the border without permission from DHS may face criminal prosecution for misdemeanor illegal entry,[120] the sentence for illegal re-entry—which requires the existence of a prior removal order—can be astronomically more severe, with potential sentences reaching as high as twenty years, depending on the circumstances surrounding the prior removal order.[121]

Finally, a stipulated removal order waives the non-citizen's rights to appeal the removal order to the BIA.[122] Since the immigrant must exhaust administrative remedies prior to filing a petition for review in the courts of appeal,[123] the stipulated order also arguably eliminates the right to judicial review.[124]

B. Regulatory and Statutory History: Allowing Stipulated Removal for Pro Se Non-Citizens

The practice of allowing non-citizens to agree to their own removal orders appears to have begun in the early 1990s. In the beginning, no regulation or statute addressed the practice, and such removal orders generally took place only with non-citizens who had lawyers able to convey their client's desire for a faster removal in lieu

118. *Id.* § 1003.25(b)(7) (requiring "[a] statement that the alien will accept a written order for his or her deportation, exclusion or removal as a final disposition of the proceedings").

119. 8 U.S.C. § 1182(a)(9)(A) (2006).

120. *Id.* § 1325.

121. *See id.* § 1326(b)(2). For a discussion of the sentencing enhancement scheme that attaches to illegal re-entry cases, see generally, Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-Entry Cases Are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. REV. 719 (2010).

122. 8 C.F.R. § 1003.25(b)(8) (2012) (requiring "[a] waiver of appeal of the written order of deportation or removal").

123. 8 U.S.C. § 1252(d)(1) (2006).

124. The stipulated removal regulation contains no provision waiving the immigrant's right to file a motion to reopen or a motion to reconsider before the IJ or BIA. *See* 8 C.F.R. § 1003.25(b) (2012).

of an in-person hearing.[125] As explained below, in 1996, Congress enacted extensive changes to the immigration laws and to removal procedures in particular.[126] In the midst of the 1996 immigration legislation, Congress and the executive branch quickly and quietly—but radically—transformed stipulated orders of removal. Prior to the enactment of the statute and regulation, stipulated removal was available for the small percentage of represented non-citizens who, with the benefit of counsel, could determine that they were ineligible for immigration relief and thus could benefit from a more efficient removal.[127] By the time DHS issued the rule that has governed stipulated removal since passage of the 1996 immigration laws, stipulated removal had become a program that ICE could employ on vast numbers of non-citizens facing removal without access to counsel or even to accurate legal information.[128]

Prior to the enactment of the stipulated removal statute in 1996, the Agency proposed two versions of a regulation governing stipulated removal. Despite the allure of greater efficiency offered by stipulated removal, including problems of overcrowding in immigration detention facilities and backlogs in the immigration courts, [129] both versions explicitly limited its use to non-citizens with counsel.[130] Even when stipulated orders of removal were contemplated for represented non-citizens only, due process concerns influenced the Agency's internal deliberations. According to the Agency, "numerous commentators['] ... due process concerns" directly influenced the Agency's decision to limit stipulated orders to

125. *See* Exec. Office for Immigration Review, Stipulated Requests for Deportation or Exclusion Orders Telephonic, Video Teleconferenced Hearings, 59 Fed. Reg. 24,976, 24,976 (proposed May 13, 1994) (proposing regulations that would "codif[y] the litigation practice in some jurisdictions").

126. *See infra* notes 133–41 and accompanying text.

127. *See supra* note 125.

128. *See supra* Part I.B.

129. *See* Exec. Office for Immigration Review, Stipulated Requests for Deportation or Exclusion Orders, Telephonic, Video Electronic Media Hearings, 60 Fed. Reg. 26,351, 26,352 (May 17, 1995) (suggesting that wider use of stipulated removal "could alleviate overcrowded federal, state and local detention facilities and eliminate the need to calendar such uncontested cases on crowded Immigration Court dockets").

130. Stipulated Requests for Deportation or Exclusion Orders Telephonic, Video Teleconferenced Hearings, 59 Fed. Reg. at 24,976. The 1994 version of the regulation would have made the approval of a stipulated removal order mandatory for the IJ. *See id.* (noting that "this practice currently occurs at the discretion of the Immigration Judge, [but] the proposed rule would make it mandatory"). In 1995, EOIR issued a rule that, in response to comments on the 1994 rule, retained the requirement that non-citizens have counsel. Stipulated Requests for Deportation or Exclusion Orders, Telephonic, Video Electronic Media Hearings, 60 Fed. Reg. at 26,351.

represented immigrants and to give IJs discretion over whether to sign the orders, as opposed to making IJ approval of the orders mandatory.[131] To further safeguard the requirement that non-citizens understand the effect of the waivers, the Agency also specified that the IJ must determine that any waiver was effected "voluntarily, knowingly, and intelligently."[132]

In the mid-1990s, massive public concern over illegal immigration and foreign terrorism led to sweeping changes in the immigration laws.[133] The 1996 laws contained provisions aimed at "streamlin[ing] rules and procedures in the [INA] to make it easier to deny admission to inadmissible aliens and easier to remove deportable aliens from the United States,"[134] among other significant (and much-critiqued) changes to the statute.[135] For instance, the 1996 laws enacted "expedited removal" provisions that authorized border officials to summarily return individuals apprehended at the border without a hearing, unless they claimed asylum and could convince a border official that they had a "credible fear" of returning to their home country,[136] a practice that gave rise to sustained human rights-based criticisms.[137] Another change affected non-citizens who re-entered the United States after having been previously removed. The Illegal Immigration Reform and Immigrant Responsibility Act of

131. Stipulated Requests for Deportation or Exclusion Orders, Telephonic, Video Electronic Media Hearings, 60 Fed. Reg. at 26,351 (also stating that the final version of the rule was "modified to respond to the commentators' due process concern," and noting specifically that IJ discretion "is limited to cases in which the applicant or respondent is represented at the time of the stipulation").

132. *Id.* at 26,351–52.

133. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C).

134. H.R. Rep. No. 104-469, pt.1, at 157 (1996).

135. In addition to reconfiguring the procedures employed to deport non-citizens from the United States, IIRIRA and AEDPA also expanded the Agency's detention authority, expanded the grounds for removal, contracted avenues for discretionary relief, and eliminated several avenues for the federal courts to exercise judicial review over agency decisions. *See* Kanstroom, *supra* note 44, at 1981; Morawetz, *supra* note 60, at 1936–54.

136. Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213, 221–24 (1999) (describing expedited removal); Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L. J. 167, 175–93 (2006) (describing failure of agency officials to follow mandatory procedural safeguards associated with expedited removal); Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117, 134–41 (2001) (arguing that expedited removal provisions violate international human rights laws).

137. *See* Ramji, *supra* note 136, at 134–41.

1996 ("IIRIRA") enacted reinstatement of removal provisions that required the immediate removal of such individuals, again without a hearing or any opportunity to seek relief.[138]

By contrast to the public criticism over expedited removal and other proposed changes aimed at streamlining the deportation process,[139] the stipulated removal provision received far less, and indeed almost no, attention. The 1996 laws added the statutory provision authorizing stipulated removal.[140] However brief, the new statutory language authorizing stipulated removal radically changed the nature of the practice. By stating that the alien "or the alien's representative" could stipulate to a removal order, the statute opened the door to the possibility of unrepresented non-citizens receiving such orders.[141] The stipulated removal statute passed with no explicit legislative debate.

In January 1997, EOIR and the then-Immigration and Naturalization Service ("INS") proposed a new version of the stipulated removal regulation that completely eliminated the requirement that stipulated orders be limited to represented non-citizens.[142] The seventy-three-page Federal Register announcement also sought to implement "pervasive" changes to many aspects of the 1996 immigration laws enacted by Congress, including the procedures governing expedited removal, removal procedures, asylum claims, apprehension, and detention, which the Federal Register described as "[broad] and complex[]."[143] Despite the length of the overall proposed regulation, stipulated orders of removal received no explanatory discussion. The Federal Register simply contained the revised regulation, which seemed to bury the authorization for stipulated removal that is used on pro se immigrants.[144]

138. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 305, 110 Stat. at 3009-599 (codified as amended at 8 U.S.C. § 1231(a)(5) (2006)); 8 C.F.R. § 241.8(a) (2012).

139. *See* sources cited *supra* note 136.

140. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 304(a)(3), 110 Stat. at 3009-593 (codified as amended at 8 U.S.C. § 1229a(d) (2006)).

141. *Id.*

142. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444 (proposed Jan. 3, 1997).

143. *Id.* at 444 (noting that the "length of this rulemaking document alone ... demonstrates the breadth and complexity of these changes").

144. *Id.* at 459.

Just two months after the issuance of the post-IIRIRA stipulated removal regulations,[145] the Agency's interim regulations—which remain in force today—retained the provision permitting the entry of stipulated orders on unrepresented non-citizens. The regulations acknowledged the due process concerns raised during the notice-and-comment period,[146] but they did not change the regulation.[147] Instead, the agency pointed to the "requirement that the [IJ] determine if an unrepresented alien's waiver is voluntary, knowing, and intelligent," explaining that the requirement would "safeguard[] against an imprudent waiver of a formal adjudication on the part of an unrepresented alien."[148] The Agency went on to acknowledge the possibility of an IJ holding a hearing on a stipulated removal request, stating that "[i]f an [IJ] is confronted with a stipulated request raising due process concerns, he or she may examine that request in the context of a hearing."[149] However, as detailed in the next Section, ICE approached stipulated removal with the expectation that IJs should disregard the possibility of holding an in-person hearing as a safeguard on due process concerns.

III. STIPULATED REMOVAL IN PRACTICE

This Part provides the first descriptive account in legal scholarship of how the stipulated removal program has operated in recent years, with an emphasis on the period from 1996 to 2010, and draws largely from internal Agency records and data made available through Freedom of Information Act[150] requests and litigation.[151] Despite its existence in the statute and regulations for the past fifteen years, very little has been known about stipulated orders of removal.[152] Several factors have contributed to stipulated removal's

145. The agencies had been directed by Congress to publish implementing regulations by March 1, 1997, just five months after the enactment of IIRIRA and AEDPA on September 30, 1996. *Id.* As a result, the public was given only thirty days for comments, rather than the usual sixty days. *Id.*

146. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,322 (Mar. 6, 1997) (describing concern of commentator that proposed regulation failed to provide "adequate safeguard[s]" against potential for due process violations).

147. *See id.*

148. *Id.*

149. *Id.*

150. 5 U.S.C. § 552 (2006).

151. *See* Nat'l Lawyers Guild S.F. Chapter v. Dep't of Homeland Sec., No. C 08-5137 RS (N.D. Cal. filed Nov. 12, 2008).

152. Press Release, Jayashri Srikantiah and Karen Tumlin, Nat'l Immigration Law Ctr., Backgrounder: Stipulated Removal 1 (Nov. 12, 2008),

almost secretive status. First, the vast majority of stipulated removal orders take place in immigration detention facilities, which have been criticized for imposing systematic barriers on detainees' communication with the outside world through a regime that involves remote locations, frequent transfers of detainees, and hurdles to obtaining legal information and representation.[153] Second, even though complaints about the lack of transparency in immigration law are not new,[154] the Agency has released surprisingly little information about stipulated removal to the public.[155] Third, a combination of law and practice has made it difficult for those who have signed stipulated orders to later challenge them. Because stipulated removal disproportionately affects pro se immigrants who are often deported within days, immigration attorneys have limited exposure to individuals who agree to stipulated orders. The speed of the process means that individuals who might have claims to challenge stipulated orders have little time to hire an attorney to challenge the order. Once deported, the Agency's rule that immigrants could not file a motion to reopen a removal order once physically removed—known as the post-departure bar (which several courts of appeal have invalidated)—likely prevented recipients of stipulated removal orders who were outside of the United States from filing legal claims.[156] As a result, the federal courts and BIA have had limited opportunities to fully examine the implications of the Agency's use of stipulated orders of removal, while stipulated removal has remained far from the public eye.

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http://www.law.stanford.edu/sites/default/files/child-page/163220/doc/slspublic/Stipulated_removal_backgrounder.pdf ("Despite the rapid expansion of stipulated removal, little is known about when and how these orders are used by immigration officials.").

153. *See* Kalhan, *supra* note 91; NAT'L IMMIGRANT JUSTICE CTR., *supra* note 100, at 3.

154. *See* Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. (forthcoming 2012).

155. For instance, neither the DHS Statistical Yearbook nor the EOIR Statistical Yearbook contains any reporting on stipulated orders of removal. *See* DHS, FY 2010 YEARBOOK, *supra* note 29; EOIR, FY 2011 YEARBOOK, *supra* note 23.

156. 8 C.F.R. § 1003.2(d) (2012). A number of circuit courts of appeal have invalidated the post-departure bar as an invalid exercise of Agency discretion. *See* Contreras-Bocanegra v. Holder, 678 F.3d 811, 813 (10th Cir. 2012) (en banc); Prestol Espinal v. Att'y Gen. of U.S, 653 F.3d 213, 224 (3d Cir. 2011); Reyes-Torres v. Holder, 645 F.3d 1073, 1076 (9th Cir. 2011); Coyt v. Holder, 593 F.3d 902, 904 (9th Cir. 2010); William v. Gonzales, 499 F.3d 329, 330 (4th Cir. 2007), *appeal denied*, 359 F App'x. 370 (4th Cir. 2009); *see also* Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 140–43 (2010) (explaining post-departure bar).

Since approximately 2010, immigration advocates, the federal courts, and the immigration agencies have begun to shed light on how the executive branch has implemented stipulated orders of removal.[157] The program's relatively brief history, and the little existing information about it, suggests that stipulated removal has rapidly expanded throughout immigration detention centers for use primarily on unrepresented detainees. As the next Part discusses, most IJs signed stipulated removal orders without holding in-person hearings to independently verify that the immigrant understood the consequences of signing the order. Given the lack of access to counsel and the absence of procedural protections for detainees during the process, the program as implemented has a high potential for abuse and for implicating the procedural due process principles that apply to removal proceedings.

A. Expansion at National and Local Levels

A dramatic growth in the entry of stipulated orders took place in the mid-to-late 2000s. According to data from the EOIR, at least 160,000 stipulated removal orders were entered through May 2010, with a steady increase in numbers from 2004 to 2009 in particular.[158] The then-INS first aggressively encouraged the expansion of the stipulated removal program in the late 1990s, shortly after the regulatory revision that enabled their use on pro se immigrants.[159] One Regional Director of the Agency "mandat[ed]" the use of stipulated removal—along with administrative removal and reinstatement of removal—"as early as possible in the investigative or

157. *See supra* notes 37–42 and accompanying text.

158. DEPORTATION WITHOUT DUE PROCESS contained data on the number of stipulated removal orders entered through May 2010. *See* KOH, SRIKANTIAH & TUMLIN, *supra* note 42, at iii, 3. Since then, a report issued by the Administrative Conference of the United States reported on total numbers of stipulated removal orders entered in fiscal years 2010 and 2011. BENSON & WHEELER, *supra* note 18, at 129.

159. *See, e.g.*, Memorandum from Thomas C. Leupp, E. Reg'l Dir., EOIR, to E. Region Dist. Dirs. & Chief Patrol Agents (July 24, 1997) (EOIR-2008-5140(7)-0000451) (on file with author); Memorandum from Brian R. Perryman, Exec. Assoc. Comm'r, Headquarters Office of Field Operations, ICE, to Regional and District Dirs., Chief Patrol Agents, & Service Ctr. Dirs. (July 31, 1997) (ICE.08-1450(13).000258) (on file with author); Memorandum from Dwayne E. Peterson, ICE Acting Regional Dir., to Central Region Dist. Dirs. & Chief Patrol Agents (Aug. 28, 1997) (ICE.08-1450.00003) (on file with author); Memorandum from Mark K. Reed, ICE regional director, to Central Region District Dirs. & Chief Patrol Agents (June 4, 1998) (ICE.08-1450.000001) (on file with author). Stanford Law School has archived the memoranda and e-mails obtained through the FOIA lawsuit. *See Deportation Without Due Process*, STAN. L. CLINIC (Sept. 1, 2011), http://blogs.law.stanford.edu/stipulatedremoval/. All identifying numbers used herein refer to documents listed on the website.

arrest stages."[160] The Regional Director noted it was "imperative that all Districts and Sectors ensure the maximum possible use of these procedures," all of which were designed to bypass immigration court hearings. Another memorandum adopted a similar tenor, stating that a "notice to appear before an Immigration Judge should only be served after clearly determining that the alien is ineligible for alternative removal proceedings," including stipulated removal.[161] However, from 1997 to 2004, stipulated removal was rarely used. The factors preventing greater use of stipulated removal orders during the late 1990s and early 2000s are unclear. It may be that the 1996 laws introduced such massive changes to immigration law enforcement that stipulated orders were overshadowed by other enforcement priorities, especially the expansion of criminal grounds of removal,[162] litigation over the retroactive application of the 1996 laws,[163] and elimination of the right to habeas corpus review and other restrictions on judicial review of removal orders.[164]

In 2004, ICE again shifted its attention to stipulated orders of removal. Internal Agency memoranda directed officers to maximize the use of stipulated removal in connection with efforts to enhance efficiency in the removal process.[165] For instance, one internal

160. Memorandum from Mark K. Reed, *supra* note 159; *see also* Memorandum from Brian R. Perryman, *supra* note 159, at 258–59 (encouraging the use of alternatives to immigration court proceedings, including stipulated removal).

161. Memorandum from Dwayne E. Peterson, *supra* note 159, at 3–4; *see also* Memorandum from Thomas C. Leupp, *supra* note 159 ("strongly recommend[ing] ... implementing an aggressive program" to use stipulated removals for all non-citizens for whom reinstatement or administrative removal are inappropriate).

162. *See* Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 632–35 (2003) (discussing the expansion of criminal grounds of removal through immigration laws passed in 1996).

163. *See, e.g.*, Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 115–18 (1998) (explaining changes in 1996 immigration laws that gave rise to retroactive application of certain criminal grounds of removal).

164. *See, e.g.*, Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review in Removal Proceedings*, 29 CONN. L. REV. 1411, 1465–78 (1997) (discussing restrictions on judicial review enacted by 1996 immigration laws); Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 233 (1998) (describing as "perhaps the most important change" in the 1996 immigration laws the "attempt to eliminate or severely curtail judicial review of immigration decisions"); Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2509–16 (1998) (discussing jurisdictional issues raised by the elimination of habeas relief and restrictions on judicial review created by 1996 immigration laws).

165. *See, e.g.*, Memorandum from Anthony S. Tangeman, Office of Detention and Removal Dir., ICE, to Leonard Kovensky, Deputy Assistant Dir. of Field Operations Div. & Field Office Dirs., ICE (Jan. 12, 2004) (ICE.08-1450(1).000006) (on file with author)

memorandum circulated amongst top DHS officials noted that "[e]ach component [of the Agency] must ensure apprehended aliens are processed efficiently and placed in the appropriate and most expedient removal process," including stipulated removal.[166] In recognition of the fact that the immigration courts and enforcement agency are divided into a series of local courts and field offices,[167] the Agency encouraged its regional and local offices to create protocols for the implementation of stipulated removal.[168] In 2007, the Director of ICE's detention and removal office explicitly linked the use of stipulated removal to the Agency's need to efficiently manage its detention bed space and instructed all directors of local ICE field offices to "expand the use of stipulated orders of removal."[169] The Agency's renewed focus on stipulated removal in the mid-2000s appears to be connected to the Bush Administration's immigration enforcement strategy, which involved increasing the overall number of formal removals, greater use of immigration detention, and stronger immigration enforcement in the interior parts of the country.[170] For example, one internal memo to all field office directors of ICE emphasized ICE's "goal ... to improve removal operational efficiency by at least ten percent from the prior fiscal year, which would result in approximately 207,000 removals during

(requiring all Field Office Directors to coordinate with the Office of Chief Counsel and the local court to develop procedures for stipulated removal orders).

166. Memorandum from Asa Hutchinson, Under Sec'y for Border & Transp. Sec., DHS, to Robert C. Bonner, Comm'r, Customs and Border Protection and Michael J. Garcia, Assistant Sec'y, ICE (Oct. 18, 2004) (ICE.08-1450(3)-000157) [hereinafter Hutchinson Memo] (on file with author); *see also* Memorandum from Marey M. Forman, Director of Office of Investigations, ICE and Victor X. Cerda, Acting Director of Detention and Removal Operations, ICE to All Special Agents in Charge and All Field Office Dirs., ICE (Jan. 11, 2005) (ICE.08-1450(3)-000155) (on file with author) (referencing the Hutchinson Memo and reiterating the emphasis on the use of stipulated and other alternative removal forms).

167. *See Enforcement and Removal Operations*, ICE, http://www.ice.gov/contact/ero/ (last visited Sept. 22, 2012) (listing ICE field offices); *EOIR Immigration Court Listing*, U.S. DEP'T OF JUST., http://www.justice.gov/eoir/sibpages/ICadr.htm (last visited Sept. 22, 2012) (listing immigration courts).

168. *See* Memorandum from Anthony S. Tangeman, *supra* note 165.

169. Memorandum from John P. Torres, Dir., ICE, to Field Office Dirs., ICE (Aug. 1, 2007) (ICE-08-1450(4)-000031) (on file with author) (instructing that "each of you must ... [e]xpand the use of Stipulated Orders of Removal" and noting the "end [of] the practice of 'catch and release' along the southern border" in 2005 and anticipated increases to detention bed space in the upcoming fiscal year).

170. *See* Kalhan, *supra* note 83, at 1149–68; Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1832, 1850–52 (2011) (discussing the use of worksite raids under the second term of the Bush Administration and the effect of 287(g) program on subfederal law enforcement's role in immigration enforcement).

the 2007 fiscal year."[171] Immigration enforcement goals thus gave rise to a heightened need to efficiently manage the removal process while obtaining successively higher removal numbers each year.

Implementation of stipulated removal in the mid-2000s, when stipulated removal expanded, took place primarily through local ICE field offices and immigration courts developing their own protocols to incentivize the entry of such orders.[172] For at least some ICE field offices, the ability to report higher numbers of official removal orders, and the creation of stipulated removal quotas for individual offices, appears to have motivated the use of stipulated removal.[173] For instance, an ICE official in Atlanta, Georgia indicated in an internal e-mail that stipulated removal orders should be used even if voluntary departure is available because the latter "do[es] not count for statistics and[,] let's face it[,] I would prefer a bigger BANG for our tax dollars that we will invest during this operation."[174] Other incentives, such as monthly quotas[175] or better evaluations of local field offices by the Agency's headquarters,[176] contributed to its growth.

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171. Memorandum from John P. Torres, Dir., ICE, to Field Office Dirs. & Deputy Field Office Dirs., ICE (Feb. 22, 2007) (ICE.08-1450(1).000007) (on file with author).

172. *See* sources cited *supra* notes 157–61 and accompanying text.

173. *See* E-mail from Ronald E. LeFevre to redacted recipients (Aug. 1, 2006, 10:43) (ICE.08-1450(11).000456) (on file with author) (celebrating reaching the goal of 100 stipulated removal orders a month, and suggesting that the office reach 200 a month).

174. E-mail from redacted sender to Terry Bird (Apr. 13, 1999, 10:30) (ICE-08-1450(3)-000142) (on file with author) (responding to Bird's comment that for Mexican nationals without criminal convictions, "[i]f these aliens are not criminals and are just from Mexico then you may want to consider just giving them V.R. [voluntary return]").

175. *See* E-mail from Rene D. Mateo, Deputy Chief Counsel, ICE, to Theresa Scala and Stuart Siegel (Apr. 2, 2007, 13:50) (ICE-1450(9).000642) (on file with author) (asking for further clarification on the number of stipulated removal orders obtained by each recipient and noting that Mateo wants to "get [them] additional recognition"); E-mail from Ronald E. LeFevre, *supra* note 173; E-mail from redacted sender to redacted recipients (Jan. 17, 2007, 13:39) (ICE-08-1450(5)-000298) (on file with author) (stating that the Field Office Director "would like for us to offer Stipulated Removals for all those cases currently being offered VRs [voluntary returns]" and directing agents to "establish a weekly count" of Stipulated Removals); E-mail from redacted sender to Timothy S. Aitken and Nancy Alcantar (Jan. 17, 2008, 14:27) (ICE.08-1450(11).000597) (on file with author) (suggesting the creation of an "award specifically for stip cases"). The January 17, 2008 e-mail from the redacted sender to Aitken and Alcantar also suggested that "[t]he easiest way may be to set goals, something like 25% of NTAs should be stipped and maybe provide training," and noted that "[a]ll you need is one hard charging IEA to kick out a bunch of stips to show it can be done." *Id.*

176. *See* E-mail from F. Venegas, Deputy Field Office Dir., ICE, to E. Gastelo, Acting DCC, ELP-OCC (Aug. 6, 2008, 09:05) (ICE-08-1450(7).00002) (on file with author) (noting that field office director "rated on" ability to reduce "average length of aliens in our custody" and therefore encouraged use of stipulated removals).

In addition to ICE, EOIR has played a central role in the increase of stipulated removal orders. Immigration Judges' high caseloads and case completion goals have provided an incentive for them to sign stipulated removal orders without holding hearings. A case with a stipulated removal order can be "closed" far more quickly, with a single signature, than one in which the non-citizen has multiple hearings, files motions, and provides testimony.[177] Indeed, one court administrator stated that "it would be devastating" to stop doing stipulated removals, because the court "has only been able to get by on its detained docket and stay true to case completion goals because we do so many [stipulated removals,] which don't clog up the dockets."[178]

Stipulated removal orders in the mid-to-late 2000s have accounted for anywhere between ten and thirty percent of all removal orders issued by the federal government, depending on which agency is reporting the numbers. According to internal EOIR data, between 2007 and 2009, on average, approximately 30,000 stipulated orders of removal were entered each year[179]—statistics that are consistent with the limited public reporting of stipulated removals from ICE's Office of Chief Counsel.[180] However, many removal orders are not assigned to either ICE counsel or an IJ at all. These orders, which include

177. *See* E-mail from Maria Jauregui, Court Adm'r, S.F. Immigration Court, to Loreto S. Geisse, Judge, Exec. Office for Immigration Review (Oct. 23. 2007, 11:52) (EOIR-2008-5140(5)-000060) (on file with author) ("If you [IJs] are [participating in signing stips], please note that these cases will count as completions for the month, but as previously mentioned must be reviewed and signed off on the same day.").

178. *See* E-mail from Scott McDaniel, Exec. Office for Immigration Review, to Stephen Griswold and Scott Rosen, Exec. Office for Immigration Review (Apr. 25, 2008, 09:56) (EOIR-2008-5140(5)-000039) (noting also that a San Francisco court was able to meet "case completion goals" due to large number of stipulated removals in jurisdiction) (on file with author).

179. *See* KOH, SRIKANTIAH & TUMLIN, *supra* note 42, at 3.

180. In fiscal year 2008, ICE noted that just over 30,000—or almost thirty percent of all final removal orders obtained by ICE attorneys—were stipulated orders. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2008 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY 28 (2009), *available at* http://cdm16064.contentdm.oclc.org/cdm/singleitem/collection/p266901coll4/id/2170/rec/4 [hereinafter ICE FISCAL YEAR 2008 REPORT] ("In FY08, ICE attorneys obtained 91,374 final orders of removal; [*sic*] which included 30,707 stipulated orders of removal . . . ."). For fiscal year 2009, ICE disclosed obtaining nearly 30,000 stipulated removal orders. U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2011 OVERVIEW: CONGRESSIONAL JUSTIFICATION 18 (undated), www.ice.gov/doclib/foia/secure_communities/fy2011overviewcongressionaljustification.pdf (stating that "[a] total of 29,012 cases were completed through the stipulated removal process").

reinstatements, expedited removals, or administrative removals, are executed and issued by DHS through front-line immigration agents. As a result, the total number of removal orders reported by DHS (the parent agency) is significantly larger than the number of removal orders accounted for by ICE's Office of Chief Counsel, as well as the number of removal orders actually issued by an IJ. For instance, in fiscal year 2008, ICE reported its attorneys as having "obtained" 91,374 final orders of removal,[181] and EOIR reported 156,056 removal orders issued by IJs.[182] DHS, however, issued the far greater number of 359,795 removals.[183] Thus, for 2008, the most recent year in which data from multiple agency offices is available, stipulated removals constituted nearly *one-third* of all final removal orders obtained by ICE attorneys, nearly *one-fifth* of all removal orders issued by IJs, and almost *one-tenth* of all removals issued by DHS.[184] Despite the relatively high proportion of stipulated removal orders, EOIR has never publicly reported on—or even referenced—stipulated orders in its annual yearbook of statistics. Notwithstanding the variations in public reporting, this preliminary analysis shows that stipulated removals have comprised a substantial percentage of all removal orders entered each year, which is particularly high in comparison to the scant attention they have received.

B. The Face of Stipulated Removal: Pro Se Immigrant Detainees

Data produced by EOIR indicates that most immigrants who received stipulated orders were in immigration detention, did not have lawyers (ninety-six percent), faced noncriminal grounds of removal (eighty percent), and were from Mexico or Latin American countries (ninety-eight percent).[185] Thus, unrepresented immigrant

181. *See* ICE FISCAL YEAR 2008 REPORT, *supra* note 180, at 28.

182. EOIR reported 182,720 total removals for fiscal year 2008. EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2010 STATISTICAL YEARBOOK D2 (2011), http://www.justice.gov/eoir/statspub/fy10syb.pdf. However, EOIR also stated that the total number of removals includes voluntary departure, which numbered 26,684 in 2008. *Id.* at Q1, D2 ("Orders of voluntary departure are included as removals."). Because voluntary departure is technically a form of immigration relief, a more accurate number of removal orders issued by EOIR for FY 2008 should not account for voluntary departure, thus bringing the total number of removal orders issued by EOIR to 156,036.

183. DHS, 2010 YEARBOOK, *supra* note 29, at 94 (defining removals as orders that lead to "administrative or criminal consequences placed on subsequent reentry").

184. The ICE Office of Chief Counsel has not made stipulated removal order numbers available after fiscal year 2008.

185. *See* KOH, SRIKANTIAH & TUMLIN, *supra* note 42, at 1 (analyzing data received from the EOIR). That ninety-eight percent of stipulated removal recipients came from Mexico or Latin American countries reinforces the longstanding link between immigration

detainees from Spanish-speaking countries who have not been convicted of a removable offense are, overwhelmingly, the recipients of stipulated removal.

The specific selection criteria, as well as the frequency, timing, and extent of the use of stipulated removal orders appear to depend on the discretion of Agency officials at the local level. At the Eloy, Arizona detention facility, for instance, ICE agents have been instructed to use stipulated removal for immigrant detainees who are Mexican citizens, in the United States for less than ten years, and who are charged with unlawful entry to the United States.[186] In other jurisdictions, ICE has used stipulated removal for non-citizens charged with unlawful entry—but not, say, crime-based grounds of removal—without regard to their length of residence.[187] Neither the stipulated removal statute, regulations, nor any internal agency guidance bars its use for juveniles, the mentally ill, or lawful permanent residents.[188] Some internal government documents suggest that stipulated orders of removal may have been entered against juveniles, the mentally ill, and the physically disabled.[189]

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policy and race. *See* Keith Aoki & Kevin R. Johnson, *Latinos and the Law: Cases and Materials: The Need for Focus in Critical Analysis*, 12 HARV. LATINO L. REV. 73, 92 (2009) (linking modern immigration enforcement to ongoing conversations in "LatCrit," such as the concept of "discrimination by proxy").

186. *See* United States v. Ramos, 623 F.3d 672, 678 (9th Cir. 2010). The prohibition on using stipulated removal on non-citizens who have lived in the country for over ten years appears aimed at preventing its use on immigrants who are potentially eligible for one form of relief from removal known as "cancellation of removal." *See* 8 U.S.C. § 1229b(b) (2006) (requiring, *inter alia*, ten years' physical presence in the United States to apply for cancellation of removal for certain nonpermanent residents).

187. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SAN ANTONIO FIELD OFFICE, STIPULATED FINAL ORDER OF REMOVALS: STANDARD OPERATING PROCEDURES (2008) (ICE-08-1450(4)-000148) (on file with author) ("At this moment, we are only processing all EWI and overstays without convictions alleged in the NTA.") (on file with author); Memorandum from Brent L. Perkins, Court Adm'r, Exec. Office for Immigration Review, to All NTA-Issuing Posts, Dep't of Homeland Sec., San Diego (undated) (EOIR-2008-5140(6)-000582) ("There must be only one charge on the NTA and that is under section 212(a)(6)(A)(I) of the [INA], present without inspection or parole.").

188. *See* 8 U.S.C. § 1229a(d) (2006); 8 C.F.R. § 1003.25(b) (2012).

189. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, CHIEF COUNSEL OFFICES RESPONSES: STIPULATED REMOVAL PROCESS 2, 4, 9, 14–15 (Feb. 10, 2006) (ICE-08-1450(13).000222) (on file with author) (noting that an IJ in Houston/Huntsville area "agreed to expand to juvenile program" and referencing a note from the Baltimore Chief Counsel indicating the "use Stipulated Removal in the cases of aliens who have been found not criminally responsible and who are detained at a state mental institution"); E-mail from redacted sender to redacted recipients (Aug. 10, 2005, 07:01) (on file with author) (ICE.06-23467-000512) (referencing the use of stipulated removal in case involving "a paraplegic with bed sore problems").

C. *Roles of Institutional Players and De Facto Stipulated Removal "Procedure"*

The federal statute and regulations governing stipulated removal contain only minimal guidance as to the procedures to be employed by the Agency.[190] Three phases constitute the de facto process that has nonetheless developed in practice: (1) a "solicitation phase," in which ICE agents describe stipulated removal orders to immigrants and solicit their signatures on the stipulated removal requests;[191] (2) review and concurrence by ICE attorneys;[192] and (3) review and signature by IJs.[193] At no point does the process ensure that the immigrant, who is usually in detention, consults with an attorney or receives a neutral explanation of the process from a judge or other government official who does not have an interest in increasing the number of removal orders issued.[194]

1. Role of ICE Agents: Solicitation Phase

Typically, during the solicitation process, ICE officials approach immigrant detainees, either in groups or individually, to describe the stipulated removal process and solicit participation in the program.[195] ICE agents are not required to screen detainees' cases to determine, for instance, if they might be eligible to apply for release from detention on bond or apply for relief from removal.[196] Since most recipients of stipulated removal do not have lawyers or access to legal information, ICE agents are usually the immigrants' sole source of information about their options and the law. No legal authority directly regulates the conduct of ICE agents who approach immigrant detainees about stipulated orders of removal. The practical potential for language barriers and coercion to pervade the solicitation phase was articulated in one e-mail from an Agency official:

> The [stipulated removal] program is allowed by regulation, but it is implemented by personal relationships. The reality is that we are asking the [IJ and the ICE attorney] to rely on a non-

190. *See* 8 U.S.C. § 1229a(d) (2006); 8 C.F.R. § 1003.25(b) (2012).

191. *See infra* Part III.C.1.

192. *See infra* Part III.C.2.

193. *See infra* Part III.C.3.

194. *See infra* Parts III.C.1–3.

195. *See* United States v. Ramos, 623 F.3d 672, 678 (9th Cir. 2010) (describing use of group presentations for stipulated removal at Eloy, Arizona immigration detention facility).

196. Nothing in the federal regulation requires ICE agents to review cases for potential eligibility for release on bond or relief from removal. *See* 8 C.F.R. § 1003.25(b) (2012).

> attorney to accurately discharge the legal requirements and also to be honest—after all it would be really easy to trick an illiterate non-English speaker into signing a request for a stip order.[197]

In the absence of any guidance on how ICE officers should explain stipulated removal to detainees, informal explanations that reflect the interests of ICE have developed to fill the void. Internal government scripts that ICE agents have apparently used in at least some jurisdictions suggest that immigrants systematically have received inaccurate and misleading information about their rights.[198] ICE agents have used the threat of longer detention in order to convince detainees to waive their rights through a stipulated removal order. Agents have relied on scripts that emphasize, for instance, that it may take "a month" to see a judge for the first time, but that a stipulated removal order "eliminates/cuts the time in half," and that presenting one's entire case to the judge could take between "six months and three years"[199] This same script contains obvious misstatements about detainees' legal options and omissions regarding the civil and criminal consequences associated with signing a stipulated order of removal.[200] Thus, despite the fact that eligibility for immigration relief often involves a complex analysis of multiple legal and factual questions (including, but not at all limited to, whether they were the victim of a crime[201] or fear persecution in their home country[202]), the script states that the "only" way for detainees to "fix [their] papers" is through certain family relationships.[203] The script says nothing about the possibility of detainees being United States citizens. It then goes on to incorrectly list forms of immigration status that can be obtained through family relationships.[204] Although many non-citizens who are initially detained are eligible for bond, the script provides false information about their rights to seek bond and

197. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 187 (describing the stipulated removal program in Memphis, Tennessee).

198. *See, e.g.*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, STIPS PRESENTATION (SPANISH) (undated) (ICE-08-1450(6)-000066) (on file with author).

199. *Id.*

200. *Id.*

201. *See* 8 U.S.C. § 1101(a)(15)(U) (2006) (providing nonimmigrant status to certain victims of specified crimes).

202. *See id.* § 1158(h)(1)(B)(i).

203. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 198.

204. *See id.* (stating that brother and sisters of "residents" can qualify for relief). In fact, lawful permanent residents have no right to petition for their siblings' immigration status, although adult U.S. citizens can petition for their siblings. 8 U.S.C. § 1153(a)(4) (2006).

discourages them from even asking for bond. For instance, the script states that a person with "any charge related to drugs, any charge . . . related to hitting another person like assault or battery, [or] any charge that is a felony resulting in a sentence of 180 days or more," will be "automatically disqualified" from receiving bond, and that "it is most probable that you will be denied"[205]—even though the immigration laws contain no such bar on the ability to obtain bond under such circumstances. Furthermore, the script neglects to explain the alternative of voluntary departure, which would allow a non-citizen to leave the country, reduce their time in detention, and avoid the civil and criminal penalties that potentially accompany receiving a formal order of removal.[206]

Poor translation appears to have distorted ICE agents' conversations with non-citizens during the solicitation stage. The script discussed above, for instance, is written in broken Spanish, replete with confusing and condescending language that exacerbates the error in the script itself.[207] As highlighted in the Introduction, an ICE agent in Eloy, Arizona regularly asked, in "nonsensical" and "unintelligible" Spanish, a question she understood to mean, "do you want to fight your case or want to sign?"[208] Some IJs have seen the language problems inherent in relying on ICE protocols. As one judge stated, "Having seen [ICE officers' Spanish language] proficiency up close[,] I'm not sure their Spanish is sufficient to communicate to the degree necessary for a stipulated removal."[209] Against this context, at the end of the solicitation process, an immigrant detainee may sign a preprinted form that states that the waiver of rights was knowing, voluntary, and intelligent.[210]

Reports of immigration advocates around the country have confirmed that ICE agents who present stipulated orders of removal have left a number of detainees confused about their legal options and feeling pressured to accept stipulated orders of removal.[211] ICE

205. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 198.

206. *See supra* note 71 (discussing voluntary departure).

207. *See* KOH, SRIKANTIAH & TUMLIN, *supra* note 42, at 10 & n.43.

208. United States v. Ramos, 623 F.3d 672, 678 (9th Cir. 2010).

209. E-mail from Agnelis Reese to Larry Dean (Aug. 1, 2008, 03:21) (EOIR-2008-5140(4).000058) (on file with author).

210. *See* 8 C.F.R. § 1003.25(b)(6) (2012) (requiring that a request for stipulated removal order contain "[a] statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly, and intelligently").

211. *See, e.g.*, Paloma Esquivel, *Many Deportees Unwittingly Wave Rights, Report Says*, L.A. TIMES, Sept. 9, 2011, at AA1 (referring to a statement of Karen Tumlin, managing attorney at National Immigration Law Center, describing over a dozen interviews with

agents have reportedly told detainees who are actually eligible for relief that their only viable option is to accept a stipulated order, sometimes in a language that is unintelligible to them.[212] Certainly, agreeing to a stipulated removal order may represent the best option for some immigrants, particularly if they are not eligible for any immigration relief, including voluntary departure. However, the legal framework places few constraints on ICE agents' actions, despite the fact that detainees remain heavily reliant on those agents.

2. Role of ICE Attorneys: Representing the Government's Interests

Should the non-citizen sign the request for the stipulated removal order, the documentation must be reviewed and signed first by an ICE attorney, and then by an IJ, in order to become final.[213] Like the solicitation phase, the statute and regulations provide no guidance regarding this review process. ICE attorneys who sign stipulated removal requests on behalf of ICE appear to take the position that they have no obligation to review the non-citizen's records for eligibility for relief, nor do they review the requests for evidence that the non-citizen's waiver of rights was valid.[214] Claims to U.S. citizenship should receive heightened scrutiny under the immigration laws,[215] and the law is sufficiently complex that it is not always apparent whether an individual is a citizen.[216] However, the EOIR-endorsed stipulated removal forms issued in 2010 require no

immigrant detainees at Mira Loma Detention Center in Lancaster, California, who signed stipulated orders of removal and "had absolutely no idea what the legal consequences were").

212. *See* sources cited *supra* notes 195–207 and accompanying text.

213. *See* § 1003.25(b).

214. *See* E-mail from Paul Nishie to Patricia Spaletta, Erin Lopez, Cara Cutler, Jennifer Castro, Margaret Curry and Sherry Nohara (Aug. 23, 2007) (ICE.08-1450(9).001158) (on file with author) (stating that "OCC [Office of Chief Counsel] will not reject stips on the grounds that an alien may be eligible for relief"). EOIR's recent revision of the stipulated removal forms requires an ICE attorney to sign a statement indicating that the non-citizen has not already applied to the Agency for a few specified forms of relief, a level of review that does not involve identifying potential forms of relief for the non-citizen. *See* Memorandum from Brian M. O'Leary, *supra* note 39.

215. The stated policy of ICE is to "ensure claims to U.S. citizenship receive immediate and careful investigation and analysis." *See* Memorandum from John Morton, Assistant Sec'y of Immigration and Customs Enforcement, to Field Office Dirs., Special Agents in Charge, and Chief Counsels (Nov. 19, 2009), http://www.ice.gov/doclib/detention-reform/pdf/usc_guidance_nov_2009.pdf (noting that "[a]s a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a [U.S. citizen]").

216. *See* Stevens, *supra* note 64, at 684–713 (analyzing cases involving claims to citizenship that required courts to engage in close readings of state family laws, prior versions of federal immigration statutes, and factual records).

more from the ICE attorney than an attestation that the individual has not already filed a claim to U.S. citizenship, with no obligation to affirmatively review the file for a cognizable claim of citizenship.[217] Indeed, ICE attorneys typically have no direct contact with non-citizens during the stipulated order of removal process.[218] In at least one jurisdiction, ICE attorneys were encouraged to spend no more than seven or eight minutes on the review process.[219] It appears, based on initial evidence of the program, that ICE attorneys act primarily to rubber-stamp agents' requests for stipulated orders.

3. Role of Immigration Judges: Rubber Stamps or Dissenting Voices

In most cases, the bulk of the paperwork related to a stipulated order of removal appears to occur prior to the non-citizen's first court appearance, known as the "master calendar hearing."[220] Once the non-citizen and a DHS attorney sign the request, the stipulated order request then proceeds to an IJ for final review and issuance of the removal order.[221] In accordance with the regulation, the IJ must determine the validity of the non-citizen's waiver.[222] In the absence of a hearing, the IJ relies entirely on the boilerplate form signed by the detainee that states, pursuant to the regulation, that the waiver was voluntary, knowing, and intelligent.[223] IJs have responded to the rise in stipulated orders of removal in drastically different ways. Not surprisingly, stipulated removal is implemented in a disparate manner across the country. Some jurisdictions used stipulated orders of

217. *See* Memorandum from Brian M. O'Leary, *supra* note 39, at 8 (requiring an ICE attorney to sign a statement indicating that review of the alien registration file "do[es] not reflect" that non-citizen has filed a claim to U.S. citizenship, an application for legalization under sections 210 or 245A of the INA, or has an approved visa petition that is pending with the Agency).

218. A review of the documents produced by ICE and EOIR, together with the federal regulation at 8 C.F.R. § 1003.25(b), suggests that ICE attorneys conduct a paper review of the non-citizen's file only. *See also id.* (discussing the standard concurrence signed by ICE attorneys on stipulated removal request forms).

219. *See* E-mail from Jim Stolley, to Ronald LeFevre, Leonard Rosenberg, and Leslie Ungerman (Nov. 8, 2006, 08:51) (ICE.08-1450(11).000481) (on file with author) (stating that "fifteen minutes is way too long" a period of time for a DHS trial attorney to review a stipulated removal order for legal sufficiency and instructing recipient to "[c]ut that in half").

220. *See* BENSON & WHEELER, *supra* note 18, at 81.

221. *See* 8 C.F.R. § 1003.25(b) (2012); *see also* Memorandum from Brian M. O'Leary, *supra* note 39, at 8 (requiring ICE attorneys to submit a request form to the court for an order of removal).

222. § 1003.25(b).

223. *Id.*

removal in nearly fifty percent of all completed matters in 2009 and 2010, and others have used them less than one percent of the time, if at all.[224]

Some judges, concerned with the potential for abuse in the program, have generally refused to rubber-stamp stipulated orders without holding in-person hearings in order to confirm the validity of the immigrant's waiver.[225] For example, one IJ stated in an e-mail that he "has determined that the waiver is not knowing in almost all occasions," in large part because "in unrepresented cases . . . the alien is told that if he wants [to] get out of jail he should sign this paper."[226] Other IJs have echoed similar concerns, noting that non-citizens are told that ICE agents "just told them to sign"[227] or had identified cases where non-citizens were statutorily eligible for relief from removal.[228] The attitude held by these IJs appears to reflect a perception that IJs have a duty to conduct a requisite level of due diligence into the cases that form the basis for a removal order.[229]

Certain IJs' reluctance to sign stipulated orders in the absence of hearings has led ICE to generally view these IJs as barriers to the

224. *See* BENSON & WHEELER, *supra* note 18, at 128 (showing stipulated removals as approximately fifty percent of completed proceedings in fiscal years 2009 and 2010 in Salt Lake City, and less than one percent in locations including San Antonio, Boston, and Miami).

225. *See, e.g.*, E-mail from Christopher Shanahan, Field Office Dir., New York, ICE, to Marisa Flores (Feb. 28, 2008, 10:33) (ICE-08-1450(6).000134) (on file with author) (indicating that the chief IJ and court administration in New York City "stated clearly that they will not do Stipulated Removal Orders without having the detainee brought to court"); *see also* E-mail from James Grable to Donald Cassidy (Jan. 23, 2007, 09:48) (ICE.08-1450(9).273) (on file with author) (explaining that IJs in San Juan and Buffalo require court appearances for unrepresented aliens).

226. E-mail from Anne Greer to EOIR Officials (June 15, 2006, 14:40) (EOIR-2008-5140(8)-000084) (on file with author).

227. E-mail from James Vandello to Alan Vomacka (Jan. 26, 2007) (EOIR-2008-5140(4)-000218) (on file with author).

228. *See* E-mail from redacted sender to redacted recipient (Dec. 14, 2004) (ICE-08-1450(3).000294) (on file with author) (discussing cases where the IJ found the non-citizen eligible for relief from removal but had signed a request for stipulated removal order); E-mail from Magdalena Ramos to Vivian Reyes-Lopez, Crimilda Guilloty-Dorsey, Jorge Ramos (Feb. 13, 2007) (ICE.08-1450(10).000648) (on file with author) (noting than an IJ rejected stipulated removal orders because the "alien could possibly have a relief from removal").

229. In addition to the documentary evidence of certain IJs' misapprehensions about signing stipulated removal orders without holding a hearing, according to one scholar, an IJ "who insists on 'thoroughly questioning' people who sign these orders 'regularly encounters U.S. citizens.' " Jacqueline Stevens, *Lawless Courts*, THE NATION (Oct. 20, 2010), http://www.thenation.com/print/article/155497/lawless-courts (quoting Professor Rachel Rosenbloom, who also stated that "[t]here are many judges who don't question people, and it's very likely there's going to be US citizens among those people as well, and they're not being [identified]").

implementation of stipulated removals.[230] ICE officials have made abundantly clear that they view the absence of in-person hearings as a fundamental characteristic of the stipulated removal program and that to hold hearings would invalidate the very purpose of the practice.[231] The relationship between IJs' willingness to sign stipulated removal orders without holding a colloquy with the non-citizen and the "success"[232] of the stipulated removal program in particular jurisdictions has been a subject of regular discussion in inter- and intra-agency communications and meetings.[233] At one DHS-EOIR liaison meeting, for instance, the agenda listed ICE's concern that "some immigration judges are not accepting stipulated orders [and] others are requiring in-person interviews before accepting any such orders."[234] Another internal document, compiling the informal responses of DHS Chief Counsels for ICE offices across the country, contained notes indicating ICE's concern that IJs would not sign stipulated removal orders in certain jurisdictions without first holding in-person hearings.[235]

In other jurisdictions, ICE has successfully used stipulated orders, notwithstanding individual judges who insist on in-person hearings to test the validity of the waiver, by routing all requests to specific IJs who do sign them without holding hearings.[236] An internal ICE document purporting to reflect the practices of various jurisdictions reported that, in one Southern California detention facility, a number of IJs "won't do [stipulated removals]," but that the single IJ willing to sign them "is staying until 8:00 pm many evenings

230. *See, e.g.*, DEP'T OF HOMELAND SEC., AGENDA FOR DHS/EOIR LIAISON MEETING 2 (Oct. 4, 2007) (ICE.08-1450(13).000023) (on file with author).

231. *See, e.g.*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 189 (describing the "less successful" stipulated removal programs as those where "many" IJs hold hearings to determine whether the non-citizen's waiver is valid, a practice which the document refers to as "making the use of a stipulated order pointless").

232. *Id.*

233. *See* IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2011 OVERVIEW CONGRESSIONAL JUSTIFICATION 50, http://www.ice.gov/doclib/foia/secure_communities/fy2011overviewcongressionaljustification.pdf (noting the "inconsistent application or acceptance of stipulated removal process," and describing the creation of DHS-DOJ intra-agency working group "to resolve the issues which will allow all eligible detained aliens to request stipulated removal orders").

234. DEP'T OF HOMELAND SEC., *supra* note 230, at 2.

235. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 189 (noting that in Boston, Buffalo, Honolulu, Houston, Los Angeles, New Orleans, New York, Newark, Phoenix, San Antonio, San Juan and Seattle, at least one—and in some cases all—of the IJs will not sign stipulated removal orders without a hearing).

236. *Id.*

to complete" the orders.[237] The same document described the use of stipulated removal in the Northwest United States, which indicated that "[the ICE Office of Chief Counsel has] approximately 1,000 stips a year." According to the document, stipulated removals in the region are "centralized in that they are signed off on by the Seattle IJs" because the IJ in Portland "does not sign off on any of them eventhough [*sic*] the Portland attorneys may be reviewing and forwarding to EOIR."[238] An internal e-mail written at the start of stipulated removal's expansion unapologetically reported that ICE has "asked" that one IJ in Eloy, Arizona, "not be assigned any [stipulated removal orders], and EOIR, recognizing the reasonableness of excluding him, has cooperated."[239] Indeed, EOIR data suggests that roughly ten percent of the entire immigration bench has been responsible for the majority of stipulated removals entered through mid-2010.[240] And in just over a three year time period, a single IJ in Miami, Florida, signed almost 10,000 stipulated removal orders.[241]

At least in part as a response to disparity in IJs' treatment of stipulated orders, in September 2010, EOIR released an internal policy memo, in conjunction with ICE, that issued uniform forms for stipulated removal requests and implicitly discourages IJs from holding in-person hearings to confirm the validity of the waivers.[242] The internal memo assumes, without further explanation, that a non-citizen's signature on the forms is sufficient proof that the waiver of rights is knowing, voluntary, and intelligent, and nowhere discusses how—beyond a review of the boilerplate forms—the IJ should confirm the validity of the non-citizen's waiver.[243]

237. *Id.* at 230.

238. *Id.* at 246.

239. E-mail from Patricia Vroom to Bill Howard, Principal Legal Advisor, ICE (Jan. 4, 2004) (ICE.08-1450(13).000205) (on file with author).

240. *See* KOH, SRIKANTIAH & TUMLIN, *supra* note 42, at 14 ("In the past decade, according to EOIR's own data, over 100,000 of the almost 160,000 stipulated removal orders entered were signed by only 20 immigration judges across the country."); *see also* ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 21 (2010) (noting that 226 IJs sit on the immigration bench).

241. *See* KOH, SRIKANTIAH & TUMLIN, *supra* note 42, at 14 (9,642 orders were signed by IJ Rex Ford) (original data on file with author).

242. *See* Memorandum from Brian M. O'Leary, *supra* note 39, at 2.

243. *Id.*

IV. STIPULATED REMOVAL AND THE PROBLEM OF DUE PROCESS

This Part explores the due process implications of stipulated orders of removal. It first discusses the Supreme Court's holding that non-citizens who are criminally prosecuted for illegal re-entry may collaterally attack a prior removal order, as well as a recent illegal re-entry case from the Ninth Circuit that casts doubt on the validity of stipulated removal orders. It then places stipulated orders of removal under the familiar *Mathews v. Eldridge* procedural due process framework and concludes that the program in its current form—one involving waivers of rights that occur solely on paper and in the depths of immigration detention facilities with only the illusion of IJ review—runs afoul of due process.

A. Evaluating Stipulated Removal Through the Lens of Illegal Re-Entry

Despite the relatively significant numbers of stipulated orders entered in the mid- to late-2000s, the federal courts have had minimal opportunities to review the stipulated removal process.[244] However, criminal prosecutions for illegal re-entry have provided the courts with some opportunity to evaluate stipulated orders of removal. The leading case explaining the availability of judicial review over removal orders used as basis for illegal re-entry prosecutions is *United States v. Mendoza-Lopez*.[245] In *Mendoza-Lopez*, the Supreme Court held that a non-citizen facing a criminal charge of illegal re-entry has the Fifth Amendment due process right to collaterally attack the underlying deportation order where the civil immigration proceedings deprived the non-citizen of judicial review.[246] Congress later codified the right to collaterally attack a removal order in the illegal re-entry statute,[247] thereby giving rise to a body of case law in the criminal context that provides guidance on the immigration courts' adherence to due process principles.

Mendoza-Lopez also shed light on the obligations of IJs and the sufficiency of waivers obtained in immigration proceedings. The case

244. *See supra* text accompanying notes 140–44 (discussing lack of public and judicial scrutiny of stipulated removal).

245. 481 U.S. 828 (1987).

246. *Id.* at 829.

247. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(d)(4)(J), 110 Stat. 3009-546, 3009-618 (codified as amended at 8 U.S.C. § 1326(d) (2006)) (providing for collateral attack and requiring (1) exhaustion of administrative remedies, (2) that the underlying proceedings "improperly deprived" the non-citizen of judicial review, and (3) that "entry of the order was fundamentally unfair").

arose out of the criminal prosecutions of two immigrants, both of whom had received their initial deportation orders after group hearings before an IJ.[248] They claimed that the IJ had failed to advise them of their right to counsel as well as of their right to apply for relief from deportation.[249] Because the federal government had conceded that the removal proceedings were fundamentally unfair, the Court did not engage in a detailed analysis of the IJ's actions. However, the Court agreed that the "Immigration Judge permitted waivers of the right to appeal that were not the result of considered judgments by respondents, and failed to advise respondents properly of their eligibility to apply for" a form of immigration relief known as suspension of deportation.[250] The Court thus found that "the waivers of their rights to appeal were not considered or intelligent,"[251] thus suggesting that the validity of a rights waiver would come under question where the non-citizen was unaware of available alternatives and where the IJ failed to issue an adequate advisal to the non-citizen.

In *United States v. Ramos*,[252] a decision issued in September 2010, the Ninth Circuit found due process and regulatory violations with a stipulated removal order executed in Eloy, Arizona.[253] The Ninth Circuit is the only federal appeals court to have evaluated the constitutional validity of stipulated removal orders. The court identified three main due process and regulatory deficiencies in the stipulated removal order signed by Isaac Ramos, whose case is described in the Introduction to this Article. First, it found that Mr. Ramos had not validly waived his right to appeal the removal order.[254] Mr. Ramos had been presented with a written form that was translated into Spanish, listed the rights he was waiving, and stated that he voluntarily, knowingly, and intelligently waived his rights.[255] Nonetheless, the court emphasized the ICE agent's lack of Spanish language proficiency and the lack of any other evidence that he could understand the questions asked of him.[256] Moreover, the court stressed that without either counsel[257] or a hearing before an IJ, Mr.

248. *Mendoza-Lopez*, 481 U.S. at 830.
249. *Id.* at 831.
250. *Id.* at 840.
251. *Id.*
252. 623 F.3d 672 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 240 (2011).
253. *Id.* at 675.
254. *Id.* at 680.
255. *Id.* at 677.
256. *Id.* at 680–81.
257. *Id.* at 681.

Ramos's only source of legal information came from an "immigration enforcement agent or deportation officer."[258] Relying on case law upholding the requirement that IJs inform non-citizens of eligibility for relief and the consequences of a removal order, the *Ramos* court found that Mr. Ramos "failed to receive the benefit of procedural safeguards necessary to ensure a valid waiver of the right to appeal."[259]

Second, the *Ramos* court found that the right to counsel had been invalidly waived.[260] Noting that non-citizens in removal proceedings have no Sixth Amendment right to government-appointed counsel, the court drew attention to the obligation of the IJ to inquire into a non-citizen's desire for counsel and to assess whether a waiver of the right to counsel is voluntary and knowing.[261] The court also rejected the government's argument that because Mr. Ramos had waived the right to counsel in writing, the IJ had no further obligation to assess the validity of the waiver.[262] In response to the government's argument that the written nature of the waiver served as proof of its validity, the Court emphasized that "[t]he key question is whether the waiver is 'knowing and intelligent,' not whether it is verbal or written."[263]

Third, given the explicit regulatory requirement that the IJ "determine that the alien's waiver is voluntary, knowing, and intelligent,"[264] the *Ramos* court found that EOIR had failed to follow its own rules. Stating that "[s]hortcuts frequently turn out to be mistakes,"[265] the court emphasized that, by signing the stipulated removal order, the IJ had failed to conduct any "independent inquiry" and instead "depend[ed] solely on information provided by DHS."[266]

The *Ramos* decision has given rise to some changes in the government's practices related to stipulated removal, at least in the Ninth Circuit. Stipulated removal orders appear to have continued in

258. *Id.*
259. *Id.* at 682.
260. *Id.*
261. *Id.*
262. *Id.* at 682–83.
263. *Id.* at 682.
264. 8 C.F.R. § 1003.25(b) (2012).
265. *Ramos*, 623 F.3d at 683 (citing Cano-Merida v. INS, 311 F.3d 960, 965 (9th Cir. 2002)).
266. *Id.* at 683.

the Ninth Circuit since *Ramos*,[267] although shortly after the decision was issued, at least some IJs interpreted the opinion to mean that stipulated orders of removal should cease completely.[268] The decision also impacted federal prosecutors' offices. The U.S. Attorney's Office in San Diego appears to have refrained from seeking criminal prosecutions for illegal re-entry where the underlying removal order was a stipulated removal order,[269] and it has readily conceded the defectiveness of stipulated removal orders in subsequent litigation.[270]

Outside the Ninth Circuit, however, the effects of *Ramos* remain to be seen. A skeptic might point to *Ramos* as an example of the Ninth Circuit's reputation as a liberal court that makes it an outlier with respect to immigration and criminal law, among other matters. The following Section explains why *Ramos* has implications beyond the four corners of Isaac Ramos's case and correctly treats stipulated removal's current use as a failure under procedural due process standards.

B. Evaluating Stipulated Removal Through Mathews v. Eldridge

Under the Supreme Court's well-known holding in *Mathews v. Eldridge*, whether a particular procedural protection is necessary hinges on the balance among several factors, namely: (1) the private interests affected by the official action; (2) the risk of erroneous deprivation of those interests through the procedures used and the value of additional procedures; and (3) the government's interest,

267. *See* Telephone Interview with Erika Pinheiro, Det. Att'y, Esperanza Immigrants' Rights Project at Catholic Charities, Inc. (Aug. 20, 2012) (confirming that IJs continue to sign stipulated removal orders in Mira Loma Detention Facility in Lancaster, California, and that the regular practice is to not hold in-person hearings prior to signing the order).

268. Months after the decision, the government argued that the decision had been "read by immigration judges as requiring a complete halt to stipulated removals across the Ninth Circuit" and requested that the court of appeals amend the opinion. In response, the Court stated that such a reading was "incorrect," reiterated that the decision simply required that stipulated removal orders be obtained in a manner to ensure that waivers were intelligent, knowing, and voluntary, and instructed the United States to "reread the opinion." United States v. Ramos, No. 09-50059 (9th Cir. Dec. 30, 2010) (order denying motion to amend opinion).

269. *See* Sandra Dibble, *Questions Raised About Deportees Re-Entries*, U.T. SAN DIEGO, Aug. 20, 2011, http://www.utsandiego.com/news/2011/aug/20/questions-raised-about-deportees-repeated-re/ (quoting U.S. Attorney Lauren Duffy of San Diego region stating that individuals found with prior stipulated removal orders are generally not prosecuted for illegal re-entry).

270. *See* United States v. Rodriguez-Ocampo, 664 F.3d 1275, 1276 (9th Cir. 2011) (per curiam) (conceding constitutional defects in prior stipulated removal order); United States v. Penaloza-Mejia, No. CR-10-2116-EFS, 2011 WL 293877, at *1 (E.D. Wash. Jan. 27, 2011) ("The USAO does not dispute that the underlying deportation proceedings were defective.").

including the fiscal and administrative burdens that additional or new procedures would create.[271] In setting forth this framework, the Court emphasized that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances" but requires that "the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard' to insure that they are given a meaningful opportunity to present their case."[272] *Eldridge*, which involved the termination of social security benefits without a hearing, has been invoked frequently in the civil commitment context and in immigration proceedings.[273] Under the *Eldridge* civil due process framework, the use of stipulated orders of removal on unrepresented non-citizens facing removal fails.

1. Private Interests at Stake

The most obvious private interest implicated by the stipulated order of removal program is the non-citizen's ability to remain in the United States. Although the Court has repeatedly refused to characterize deportation as a form of criminal punishment, it has recognized the profound impact that deportation can have on a non-citizen, noting, for instance, that "deportation is a drastic measure and at times the equivalent of banishment or exile."[274] The liberty interests at stake with removal decisions apply with particular force to lawful permanent residents ("LPRs"). The strength of LPRs' liberty interests is underscored by their lawful presence and generally deep

271. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

272. *Id.* at 334, 349 (internal citation omitted).

273. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 34 (1982) (acknowledging the due process argument under *Eldridge* and remanding to court of appeals); Walters v. Reno, 145 F.3d 1032, 1042–43 (9th Cir. 1998) (finding violations of procedural due process under *Eldridge* where forms issued to aliens charged with document fraud failed to advise of rights and resulted in automatic deportation); Alice Clapman, *Hearing Difficult Voices: The Due Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 395 (2011) (applying *Eldridge* to the right for mentally disabled individuals in removal proceedings to counsel); César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 24 (2011) (arguing that the DHS policy of transferring detained LPRs constitutes violation of due process under *Eldridge*).

274. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); *see also Landon*, 459 U.S. at 34 (noting that an alien's interest in deportation proceedings "is, without question, a weighty one" because "[s]he stands to lose the right 'to stay and live and work in this land of freedom' " (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945))).

ties to the country. Indeed, LPRs have been described by one scholar as "Americans in waiting."[275]

In the cases of non-LPRs, particularly undocumented immigrants, the liberty interest in remaining in the country is arguably weaker but still cognizable. Many undocumented immigrants develop strong ties to the United States that are akin to those of lawful permanent residents.[276] An increasing number of undocumented immigrants live in the United States for long periods and have family, communal, and personal ties to the country such that deportation would strip them, in the Supreme Court's words, of "all that makes life worth living."[277] Efforts to pass the DREAM Act[278] in the mid- to late- 2000s and the Obama Administration's attempts to expand the exercise of prosecutorial discretion[279] (including the categorical extension of administrative discretion to youth who would have benefited under the DREAM Act)[280] in 2011 and 2012 also strengthen undocumented person's liberty claims, albeit indirectly. Such initiatives illustrate a growing (though not majority) consensus that large swaths of the undocumented population have claims to reside in the United States that are philosophically and (to some degree) politically persuasive, even if not fully accounted for by the current statutory framework.

In light of the strength of a non-citizen's liberty interest in remaining in the United States, the courts have consistently

275. *See, e.g.*, HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006).

276. For instance, one study found that thirty-seven percent of undocumented adults have U.S. citizen children. JEFFREY S. PASSEL & D'VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 8 (2009), http://www.pewhispanic.org/files/reports/107.pdf. Another study indicated that forty-five percent of undocumented immigrants live with a spouse or child(ren), compared to twenty-one percent of U.S. born adults, indicating the existence of strong family ties amongst the undocumented population. JEFFREY S. PASSEL & PAUL TAYLOR, UNAUTHORIZED IMMIGRANTS AND THEIR U.S.-BORN CHILDREN 4 (2010), http://www.pewhispanic.org/files/reports/125.pdf.

277. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

278. The DREAM Act would provide lawful status to undocumented immigrants who came to the United States as children and either attend college or enroll in the military. *See* Development, Relief, and Education for Alien Minors Act of 2010 (DREAM Act), S. 3992, 111th Cong. (2010).

279. *See generally* Wadhia, *supra* note 154 (discussing the exercise of prosecutorial discretion).

280. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Protection, Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Services, and John Morton, Dir., U.S. Immigration and Customs Enforcement 1 (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

recognized that procedural due process requires a fundamentally fair hearing or other procedure to effectuate removal.[281] These constitutionally grounded rights are reflected in the INA and in the federal immigration regulations,[282] and they apply equally to LPRs and non-LPRs alike.[283] Several key components of a fundamentally fair hearing include being properly advised of the right to appeal an IJ's decision, the right to obtain counsel at one's own expense, and the right to apply for relief from removal—deprivations of which have been construed by the courts as violations of procedural due process.[284]

A related liberty interest arguably implicated by the stipulated removal order framework is the right to pursue the procedures designed for non-citizens in removal proceedings, such as an immigration court hearing and any relevant applications for relief. Indeed, the courts have used flexible definitions of liberty.[285] Thus, the Fifth Circuit found a protected interest at stake where immigration officials, including IJs, engaged in an "accelerated processing" system that effectively denied all Haitian nationals the right to apply for asylum.[286] Although the court declined to squarely characterize the private interest in that case as either a liberty or property interest,[287] it emphasized that due process is violated when the government "creates a right to petition"[288]—for instance through the promulgation of regulations describing the process of applying for asylum[289]—"and then makes the exercise of that right utterly

281. *See* sources cited *supra* notes 57–59 and accompanying text.

282. 8 U.S.C. § 1229a(b)(4) (2006) (right to counsel); 8 U.S.C. § 1229a(c)(5) (2006) (requiring an IJ to affirmatively "inform the alien of the right to appeal" if ordered removed); 8 C.F.R. § 1003.3 (2012) (affected parties "shall be given notice of the opportunity for filing an appeal"); 8 C.F.R. § 1240.11(b) (2012) (IJs "shall" advise of the consequences of filing post-decision motions to reopen or reconsider).

283. *See* Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1273 n.6 (11th Cir. 2005) (per curiam) (right to effective representation); Augustin v. Sava, 735 F.2d 32, 36 (2d Cir. 1984) (right to adequate interpretation); Najaf-Ali v. Meese, 653 F. Supp. 833, 837 (N.D. Cal. 1987) (right to present witnesses and right to fair hearing).

284. *See* sources cited *supra* notes 57–59 and accompanying text.

285. *See* J. Bruce Bennett, *The Rights of Licensed Professionals to Notice and Hearing in Agency Enforcement Actions*, 7 TEX. TECH. ADMIN. L.J. 205, 209 (2006) ("[T]he U.S. Supreme Court has made clear that the meaning of liberty is broad indeed and includes a person's right to engage in any of the common occupations of life.").

286. *See* Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1029–32 (5th Cir. 1982) (describing the efforts of government to stem backlog in immigration court cases through a "Haitian program," resulting in zero grants of asylum out of 4,000 Haitians processed).

287. *Id.* at 1039.

288. *Id.*

289. *Id.* at 1040.

impossible."[290] One might similarly find a protected interest at stake that is sufficient enough to invoke the *Eldridge* framework in all immigration cases, insofar as the government has created, through statute and regulation, a series of procedures through which non-citizens facing removal may appear before the immigration courts and apply for relief for which they are eligible.[291]

A final relevant interest is the right to physical liberty. In the context of stipulated orders of removal, the vast majority of which are used on immigrant detainees, the interest in being free from detention weighs heavily on the due process analysis. A liberty interest in remaining free from incarceration applies in two ways to stipulated removal. First, non-citizens have an interest in avoiding civil immigration detention during the removal proceedings or pending physical removal. Indeed, in *Zadvydas v. Davis*,[292] the Supreme Court recognized that immigration detention implicates a liberty interest that "lies at the heart of the liberty that the [Due Process] Clause protects,"[293] notwithstanding the fact that the non-citizen had already been ordered removed. Several years later, the Court further recognized a liberty interest in the immigration detention context for aliens who had not yet been legally "admitted."[294] Second, non-citizens who waive their rights via stipulated orders of removal may also have a liberty interest in avoiding incarceration in a prison or jail pursuant to a criminal conviction under federal illegal re-entry statutes, particularly given their draconian sentencing schemes.[295]

2. Risk of Erroneous Deprivation of Private Interests

The second *Eldridge* factor involves the risk that private interests will be erroneously deprived under existing procedures and the probable value, if any, of additional procedures.[296] In the stipulated removal context, the primary error is that the government will deport individuals who otherwise have claims to alternative forms of relief, including voluntary departure, without informing them of the

290. *Id.* at 1039.

291. *But see infra* notes 317–21 and accompanying text (describing certain courts' treatment of the ability to apply for relief from removal as purely discretionary).

292. 533 U.S. 678 (2001).

293. *Id.* at 690.

294. Clark v. Martinez, 543 U.S. 371, 379 (2005).

295. *See generally* Keller, *supra* note 121 and accompanying text.

296. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

possibility of pursuing these other forms of relief.[297] Given the nature of deportation, the cost of error is especially high. The termination of a property interest like social security benefits, which were at stake in *Eldridge*, can eventually be corrected by restoring the benefits to the individual.[298] But the physical removal of a non-citizen often ends the individual's ability to correct the error altogether due to the obstacles to obtaining legal redress following physical removal.[299]

A component of the risk of erroneous deportations is the risk that immigrants agreeing to stipulated orders of removal will be subject to invalid waivers of their rights. Constitutionally protected interests can be waived in various contexts. Although the jurisprudence surrounding waivers of rights is far from coherent or uniform,[300] the standard inquiry involves determining whether an individual made a considered and intelligent decision.[301] IJs are required by regulation to find that a non-citizen's decision to opt for a stipulated removal order was "voluntary, knowing, and intelligent"[302]—the same standard that applies to waivers of rights across the civil and criminal legal systems.[303] Determining the existence of an invalid waiver typically requires a case-by-case

297. *See, e.g.*, United States v. Ortiz-Lopez, 385 F.3d 1202, 1204 (9th Cir. 2004) (per curiam) (holding that defendant's due process rights were violated because the IJ failed to inform him that he was eligible for voluntary departure instead of removal).

298. *Eldridge*, 424 U.S. at 325–26. Of course, the temporary interruption of benefits can invoke liberty interests. *See* Goldberg v. Kelley, 397 U.S. 254, 265–66 (1970) (acknowledging a liberty interest in uninterrupted receipt of benefits). I do not take the position that terminating benefits does not implicate liberty interests, but simply make the point that correcting the harms that accompany physical deportation is often far more difficult than restoring governmental benefits.

299. These difficulties include the challenge of litigating one's case from abroad, gaining physical re-entry after an erroneous deportation, and the continued operation of the post-departure bar in some circuits. *See* Rachel E. Rosenbloom, *Will Padilla Reach Across the Border?*, 45 NEW ENG. L. REV. 327, 338–44 (2011).

300. *See* Jason Mazzone, Comment, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003) (comparing the doctrine of criminal waiver, in which courts generally allow defendants to waive constitutional rights, with the doctrine of unconstitutional conditions, which views waivers of rights with greater skepticism).

301. *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972) (finding a civil judgment waiver subject to the same standard applicable to a waiver in a criminal proceeding: "that it be voluntary, knowing, and intelligently made"); Fuentes v. Shevin, 407 U.S. 67, 94 n.31 (1972) (finding that in both the civil and criminal arenas courts have a reasonable presumption against waiver); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (using reasonable presumption against waiver in criminal context); Gete v. I.N.S., 121 F.3d 1285, 1293 (9th Cir. 1997) (finding that principles governing waiver of constitutional rights apply equally to criminal and civil cases).

302. 8 C.F.R. § 1003.25(b) (2012).

303. *See supra* note 301.

analysis and a consideration of the nature of the right involved.[304] An invalid waiver has been found, in particular, where the IJ failed to adequately inform a non-citizen about his or her legal options, including the existence of the right to counsel, the right to appeal, the consequences of waiving such rights, and the availability of legal alternatives.[305] In light of the relevant legal standard, the risk of error in the stipulated removal process arises both from (1) risks resulting from the lack of in-person IJ review, and (2) risks resulting from non-citizens' interactions with ICE agents, which immigration courts rely on as a substitute for IJ review. The absence of counsel, language barriers, and the complexity of the immigration laws compound the information deficits that non-citizens face.

a. Absence of In-Person Review from Immigration Judge

Due process has been held to require that an IJ, before determining that the non-citizen has validly waived the right to counsel, first "inquire specifically as to whether petitioner wishes to continue without a lawyer" and second, "receive a knowing and voluntary affirmative response."[306] The courts have also recognized a connection between the right to counsel and the ability to make a considered and intelligent waiver of the right to appeal, given that one's ability to decide whether to pursue appeal depends in large part on the strength of one's legal claims.[307] Indeed, the Board of Immigration Appeals has recognized that, "in cases involving unrepresented aliens, more detailed explanations" of the right to appeal by IJs "are often needed."[308] In the stipulated removal context, the risk of a due process violation is particularly high. Ninety-six

304. *See, e.g.*, *Johnson*, 304 U.S. at 464 (noting, in a criminal case, that whether valid waiver exists "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused").

305. *See, e.g.*, *Gete*, 121 F.3d at 1292–93 (finding no knowing waiver of right to judicial review to challenge INS forfeiture of vehicles, where aliens were given the choice to seek either judicial remedy or administrative remedy, but were not told that choosing the less onerous administrative remedy would give up a right to judicial review).

306. Mendoza-Mazariegos v. Mukasey, 509 F.3d 1074, 1080 (9th Cir. 2007).

307. *See* Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) (finding no valid waiver of the right to appeal where a non-citizen was not provided with continuance necessary to obtain counsel and "was under the misapprehension that he had no choice but to waive his appeal").

308. *In re* Rodriguez-Diaz, 22 I. & N. Dec. 1320, 1323 (B.I.A. 2000). Even where the non-citizen was represented by counsel, the courts have found due process violations where neither the lawyer nor the IJ specifically advised the non-citizen about the consequences of waiving appeal. *See* Narine v. Holder, 559 F.3d 246, 249–50 (4th Cir. 2009).

percent of non-citizens who opted for stipulated orders of removal were not represented by counsel.[309] And because an IJ signed off on the removal order without holding an in-person hearing, they were not asked if they wished to retain counsel. They therefore had little to no access to accurate legal information needed in order to make considered and intelligent waivers.

The elimination of the non-citizen's opportunity to appear before the IJ makes it nearly impossible for IJs to fulfill their duties to the non-citizen, duties that are also aimed at preserving due process and maintaining the integrity of the proceedings. To determine whether a non-citizen's waiver of appeal was valid, courts have suggested that an IJ must generally engage in an individualized colloquy with the non-citizen to ensure that the non-citizen wishes to waive the right.[310] Courts have found violations of due process where an IJ failed to clarify the difference between waiving an appeal and agreeing that the judge's order was the "final one."[311] Similar violations have also been found where an IJ held a group deportation hearing and asked respondents to stand if they wished to waive appeal.[312]

IJs must also advise non-citizens of any apparent eligibility for relief,[313] which courts have held to include voluntary departure.[314] As the Second Circuit has explained, because "many aliens are uncounselled, our removal system relies on IJs to explain the law accurately to pro se aliens."[315] The Second Circuit went on to explain that "[o]therwise, such aliens would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal."[316] Under stipulated removal, the IJ never advises the non-citizen as to his or her apparent eligibility for relief from removal. To be sure, some circuits do not

309. *See* KOH, SRIKANTIAH & TUMLIN, *supra* note 42, at 1.

310. *See* United States v. Chavez-Huerto, 972 F.2d 1087, 1088–89 (9th Cir. 1992) (upholding waiver where one-on-one colloquy occurred between an IJ and a non-citizen); United States v. Zaleta-Sosa, 854 F.2d 48, 49, 51–52 (5th Cir. 1988) (same); United States v. Nicholas-Armenta, 763 F.2d 1089, 1091 (9th Cir. 1985) (upholding waiver in mass deportation hearing where judge conducted "particularized" inquiries).

311. *Rodriguez-Diaz*, 22 I. & N. Dec. at 1321–22; *see also* United States v. Fares, 978 F.2d 52, 57 (2d Cir. 1992) (finding IJ statement that "you're accepting orders of deportation . . . as final in your case with no appeal" insufficient to waive appellate rights).

312. United States v. Lopez-Vasquez, 1 F.3d 751, 754–55 (9th Cir. 1993) (per curiam).

313. 8 C.F.R. § 1240.11(a)(2) (2012).

314. *See, e.g.*, United States v. Ortiz-Lopez, 385 F.3d 1202, 1204 (9th Cir. 2004) (per curiam) (finding violation of due process when IJ failed to inform defendant of eligibility for voluntary departure instead of removal).

315. United States v. Copeland, 376 F.3d 61, 71 (2d Cir. 2004).

316. *Id.*

treat an IJ's failure to advise on eligibility for relief as a due process violation, relying largely upon the principle that a grant of relief from removal is purely discretionary and therefore not a right to which non-citizens are entitled.[317] However, as one scholar has persuasively argued, the refusal to treat inadequate or nonexistent advisals as constitutional errors lies in a fundamental misunderstanding about the nature of immigration relief.[318] As the Supreme Court emphasized in *INS v. St. Cyr*,[319] even if the right to ultimately receive relief from removal is a matter of administrative discretion, the correct application of rules governing eligibility does give rise to a cognizable right.[320] Moreover, the Ninth and the Second Circuits reject the other courts' view, holding that the duty to inform a non-citizen whether he or she appears to be eligible for relief, even discretionary forms of relief, is required by due process.[321] Given that the two circuits taking the strongest view of the IJ's duty to advise a non-citizen of potential eligibility for relief arguably have the most experience with, and the

317. The distinction between being advised of one's eligibility for relief versus being granted relief has arisen most frequently in the context of litigation related to § 212(c) relief, a form of immigration relief that existed prior to the 1996 laws. In 1996, Congress repealed the availability of § 212(c) relief and rendered any non-citizen with a conviction classified as an "aggravated felony" ineligible for cancellation of removal, the form of discretionary relief that replaced § 212(c). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-594, 3009-618 (codified as amended at 8 U.S.C. § 1229b(a)(3) (2006)); *see also* INS v. St. Cyr, 533 U.S. 289, 297 (2001) (discussing the repeal of § 212(c)). In 2001, after five years of litigation over the retroactive application of the repeal of § 212(c) relief, the Supreme Court ruled that § 212(c) relief would remain available for persons with pre-1996 convictions who would have been eligible for § 212(c) but for the 1996 laws. *St. Cyr*, 533 U.S. at 326. Following the *St. Cyr* ruling, non-citizens who had been deported based on the erroneous advice that their convictions made them ineligible for § 212(c), and then criminally prosecuted for illegal re-entry, sought to collaterally attack their original removal orders on the grounds that they should have been given the opportunity to apply for § 212(c) relief. For more detailed treatment, see Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After* St. Cyr, 19 GEO. IMMIGR. L.J. 455, 457–66 (2005). In some jurisdictions, the federal courts rejected their claims, taking the position that the grant of § 212(c) relief is a purely discretionary decision that does not give rise to a cognizable right. *See id.* at 466–74 (discussing circuit court opinions).

318. *See* Wible, *supra* note 317, at 485–86.

319. 533 U.S. 289 (2001).

320. *Id.* at 307 ("Traditionally, courts recognized a distinction between eligibility for discretionary relief on the one hand, and the favorable exercise of discretion, on the other hand.").

321. *See* United States v. Copeland, 376 F.3d 61, 72 (2d Cir. 2004); United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1049–50 (9th Cir. 2004); *see also* Wible, *supra* note 317, at 473–80 (discussing reasoning of Second and Ninth Circuits).

strongest expertise in, immigration matters,[322] their view should be treated as the majority one.

Worse yet, ICE has, by its own admission, engaged in and relied on blatant judge-shopping in order to achieve high numbers of stipulated orders of removal in some parts of the country. By identifying specific IJs who are willing to sign stipulated removal orders without holding in-person hearings to assess the validity of the non-citizen's waiver, and then routing all requests for stipulated orders to those specific judges,[323] the administrative agency has explicitly manipulated the judicial process in a way that violates the fundamental fairness of the proceedings under almost any standard. The egregiousness of ICE's procedural manipulation is even more pronounced given the legitimacy problems currently facing immigration courts. A well-known study has demonstrated that the single most influential factor affecting the success of an immigrant's case is the identity of the IJ to whom the case is assigned.[324] Concerns about the influence of political hires in the IJ selection process during the Bush Administration have also arguably undermined public confidence in immigration courts.[325] The practice also throws into question the quality of the paper-only review that IJs do conduct. Given that only twenty IJs signed over 100,000 of the 160,000 stipulated removals entered through mid-2010, it is likely that those judges' review of the files was brief and cursory.

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322. The Ninth and Second Circuit both hear a greater number of immigration petitions than any other circuit in the country, and immigration petitions constitute a higher percentage of the courts' overall docket in comparison to other circuits. *See* LAW, *supra* note 240, at 154 (showing Ninth Circuit as having fifty-four percent of nation's immigration appeals in 2005 and discussing the disproportionate volume of cases in Ninth and Second Circuits); Lenni B. Benson, *The Search for Fair Agency Process: The Immigration Opinions of Judge Michael Daly Hawkins 1994 to 2010*, 43 ARIZ. ST. L.J. 7, 10 (2011) (noting that immigration petitions represented twenty-seven percent of the Ninth Circuit's docket in 2009); John R.B. Palmer, *The Second Circuit's "New Asylum Seekers": Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 968–70 (2006) (noting that petitions for review from BIA then constituted thirty-six percent of the Second Circuit's docket).

323. *See supra* discussion accompanying notes 236–41.

324. *See* Ramji-Nogales, Schoenholtz & Schrag, *supra* note 24, at 363–64.

325. *See generally* U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATT'Y GEN. (2008) (J 37.2:P 75), http://www.justice.gov/oig/special/s0807/final.pdf (concluding, *inter alia*, that three individuals in the OAG inappropriately considered political and ideological affiliation in hiring IJs); Legomsky, *supra* note 25 (arguing that the Attorney General's threats to reassign or remove IJs if they ruled against the government in immigration proceedings played a substantial role in eliminating decisional independence).

By signing a stipulated removal order without an in-person hearing, the IJ thus relies on the non-citizen's interaction with front-line ICE agents instead of engaging in a substantive exchange with the non-citizen. An analysis of these interactions suggests, however, that the risk of error is unacceptably high.

b. Quality of ICE Agent Interaction with Non-Citizens Selected for Stipulated Removal.

Another factor that raises the risk of error is that non-citizens sign stipulations based solely on information they receive from ICE. As noted, informal scripts used by government agents to describe the stipulated order of removal process reveal blatant misinformation and misrepresentations about the immigration laws. Given the disparity between the interests of ICE agents and non-citizens, it seems likely that ICE agents do not generally provide immigrant detainees with comprehensive and accurate information about their legal options to fight removal. Even outside the stipulated removal setting, for instance with voluntary departure grants, ICE has been known to engage in a pattern and practice of coercing non-citizens into accepting physical removal.[326] In the stipulated removal context, the absence of any oversight, policy, or rule affecting ICE agents during the solicitation process makes the entire process particularly vulnerable to error.

The potential for error created by language barriers in the stipulated removal process is significant. Although the stipulated removal forms published by EOIR in 2010 contain a Spanish language translation, the governing immigration regulations contain no requirement that ICE officers who offer stipulated removal orders speak other languages fluently or even intelligibly. Unlike immigration court proceedings, in which statements made by and to a limited English proficient non-citizen must be interpreted through an official court interpreter,[327] ICE agents' communications with non-English speaking detainees are not subject to explicit regulation. In many cases, the quality of communication may depend on whatever

326. *See* Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 551, 567–68 (9th Cir. 1990) (affirming a permanent injunction entered after finding that then-INS and Border Patrol agents engaged in a practice and pattern of coercing Salvadoran nationals into accepting voluntary departure).

327. *See* 8 C.F.R. § 1003.22 (2012). The policy of providing only partial interpretation in immigration court, as opposed to interpretation of the entire proceeding, carries problems as well. *See* Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1027 (2007).

Spanish-language trainings are conducted by the Agency, if those trainings occur at all.[328] Nonetheless, these same officers' conversations are relied on by IJs to determine the validity of the waiver.

The complexity of the immigration laws compound the problems raised by the absence of counsel and IJ review. For those who face purely civil grounds of removal and therefore presumably do not have a disqualifying criminal conviction,[329] voluntary departure may present a superior alternative to opting for a stipulated order of removal. Indeed, district courts have found due process violations in illegal re-entry appeals where IJs signed stipulated removal forms while neglecting to advise the detainee of his eligibility for voluntary departure,[330] and appeals courts have held the same outside of the stipulated removal context.[331] However, as noted, ICE agents have thus far failed even to inform many immigrant detainees about the option of voluntary departure or the relatively harsher consequences of receiving a stipulated removal order in comparison to a grant of voluntary departure.[332]

One might also take the position that non-citizens facing removal for criminal convictions, particularly those with convictions classified as "aggravated felonies," should be specifically targeted for stipulated

328. ICE reportedly "eliminate[d] formal language training requirements for new ICE agents in 2003," and it is not clear whether the Agency has restored those requirements. *See* DEMOCRATIC STAFF OF THE HOMELAND SEC. COMM. FOR U.S. HOUSE OF REPRESENTATIVES, DECISION ELIMINATING SPANISH AND OTHER LANGUAGE TRAINING FOR ICE INVESTIGATORS WAS A MISTAKE 2 (2005), http://chsdemocrats.house.gov/SiteDocuments/20060912174546-40413.pdf.

329. *See* 8 U.S.C. § 1229c(a)(1) (2006) (permitting voluntary departure in lieu of, or prior to, completion of removal proceedings, if alien not deportable under INA § 237(a)(2)(A)(iii) (conviction for aggravated felony) or INA § 237(a)(4)(B) (terrorist activities)).

330. *See* United States v. Penaloza-Mejia, No. CR-10-2116-EFS, 2011 WL 293877, at *3 (E.D. Wash. Jan. 27, 2011); United States v. Soto-Castelo, 621 F. Supp. 2d 1062, 1071 (D. Nev. 2008), *aff'd*, 361 Fed. App'x 782 (9th Cir. 2010); United States v. Gomez-Hernandez, No. CR-08-6005-FVS, 2008 WL 2096876, at *5 (E.D. Wash. May 16, 2008).

331. *See, e.g.*, United States v. Melendez-Castro, 671 F.3d 950, 954 (9th Cir. 2012) (finding invalid waiver of appeal where an IJ told respondent, in a group deportation hearing, that he was eligible for voluntary departure, but then stated that the IJ would never grant voluntary departure to respondent); United States v. Ortiz-Lopez, 385 F.3d 1202, 1204 (9th Cir. 2004) (finding violation of due process rights where an IJ failed to inform defendant of eligibility for voluntary departure instead of removal); United States v. Rangel-Gonzales, 617 F.2d 529, 531 (9th Cir. 1980) (finding that failure to inform respondent of his right to contact Mexican consul prejudiced him because he could have applied for voluntary departure rather than deportation).

332. *See, e.g.*, *supra* text accompanying note 206 (describing a script used by ICE agents to explain stipulated removal, which failed to mention voluntary departure as a potential option).

removal.[333] Indeed, an aggravated felony conviction renders an individual ineligible for most forms of immigration relief, including voluntary departure.[334] What about those non-citizens who face removal for criminal convictions and might therefore be ineligible even for voluntary departure? Would it be better to instead concentrate the use of stipulated removal on non-citizens whose criminal convictions lead to an immigration penalty? The problem here also implicates the complexity of the immigration laws. Determining whether a particular conviction actually falls under one of the INA's many categories of removable crimes can involve a lengthy, complicated analysis that typically requires the intervention of a lawyer.[335] Given the actual sophistication required to decipher the impact of a particular criminal conviction on an individual's eligibility for relief, ICE agents' statements indicating that "any" conviction for "assault or battery" will render an immigrant ineligible for relief or release on bond is simply incorrect as a matter of law[336] and might constitute reversible error if conveyed by an IJ or immigration lawyer.[337]

The nature of the role of the DHS trial attorney—the only attorney who participates in the approval of a stipulated removal order—further enhances the potential risk of error. Because DHS

333. A draft report of the Administrative Conference of the United States on immigration adjudication has recommended concentrating the use of stipulated removal on non-citizens with prior convictions, including pro se detainees. *See* LENNI B. BENSON & RUSSELL R. WHEELER, INTERIM DRAFT: ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 49 (2012), http://www.acus.gov/wp-content/uploads/downloads/2012/01/ACUS-Immigration-Removal-Adjudication-Draft-Report-1_12_12.pdf. The authors of the report later modified the recommendation in response to comments highlighting the due process problems associated with stipulated removal. The final version of the report retained the recommendation to concentrate stipulated removal on non-citizens with serious criminal convictions but not on pro se detainees. *See* BENSON & WHEELER, *supra* note 18, at 81.

334. 8 U.S.C. § 1229c(b)(1)(C) (2006) (establishing as a prerequisite to voluntary departure an IJ's finding that the alien is not deportable under § 1227(a)(2)(A)(iii) as convicted of an aggravated felony).

335. *See* Koh, *supra* note 63, at 23–39.

336. In a number of cases, the BIA has held that simple assault and/or battery are not categorically crimes involving moral turpitude. *See, e.g.*, In re Sejas, 24 I. & N. Dec. 236, 238 (B.I.A. 2007) (assault and battery under Virginia law); In re Sanudo, 23 I. & N. Dec. 968, 973 (B.I.A. 2006) (domestic battery under California law). Many simple assault and battery statutes carry maximum sentences that are less than one year, placing them outside of the ambit of the aggravated felony category. *See* 8 U.S.C. § 1101(a)(43)(F) (2006).

337. *See, e.g.*, United States v. Penaloza-Mejia, No. CR-10-2116-EFS, 2011 WL 293877, at *5–6 (E.D. Wash. Jan. 27, 2011) (finding, under categorical and modified categorical analysis of prior conviction, that conviction did not constitute an "aggravated felony" for immigration law purposes and would not have disqualified from voluntary departure a non-citizen who agreed to stipulated removal).

attorneys are not required to screen non-citizens who are eligible for relief from removal or whose charges of removability do not meet the relevant burden of proof, their cursory review of the file contributes to the illusion of due process without providing an adequate safeguard. Indeed, given the caseloads of trial attorneys, who have been reported to have only twenty minutes to prepare an entire case before a final merits hearing,[338] it is unrealistic to believe that trial attorney review of requests for stipulated orders of removal offers substantive value. DHS attorneys also operate within a courtroom culture marked by a severe absence of stipulations and discussions with respondents, even those with counsel, to settle on an outcome that reflects an arms' length negotiation between both parties.[339] As a result, DHS attorneys would likely not question the practice of signing off on a "stipulation" in which they have never communicated directly with the respondent or with counsel. While DHS attorneys do not owe specific duties to the non-citizen, they are nonetheless responsible for upholding the Constitution and maintaining the integrity of the removal and enforcement process and should therefore refrain from concurring in the stipulated removal process, given its defects.[340]

One problem with assessing the risk of error inherent in the stipulated removal process, however, is that it is difficult to know with precision how many immigrants who are deported via stipulated removal might have ultimately either been eligible for, or received, relief. To be sure, the immigration laws have been rightly criticized as harsh. Many individuals, even those with longstanding ties to the United States or who otherwise make positive contributions to the country, are simply not eligible to fight the charge of deportation. For those who do not qualify for any immigration relief or who cannot contest removability, receiving a stipulated removal order may truly represent the best option. However, EOIR's own statistics suggest that a significant number—*forty-five percent*, or almost half—of non-citizens who pursue their cases before an IJ ultimately receive an outcome better than a formal removal order, meaning that they receive some form of relief from removal (including voluntary

338. *See* APPLESEED & CHICAGO APPLESEED, *supra* note 27, at 16 (discussing caseloads of DHS trial attorneys).

339. *See supra* discussion accompanying notes 104–06 (discussing the absence of a culture of stipulation in immigration courts).

340. *See* Reid v. U.S. Immigration and Naturalization Serv., 949 F.2d 287, 288 (9th Cir. 1991) ("Counsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation.").

departure) or termination of the case.[341] Admittedly, immigrants who opt for stipulated removal may arguably have weaker claims to relief or termination as a group, so that the numbers alone may not suggest an error rate of, say, forty-five percent. Nonetheless, the meaningful number of immigrants who ultimately receive alternatives to formal removal, in combination with the severe risk of error inherent in the procedures used during stipulated removal, together lend credence to the claim that the risk of error is constitutionally unacceptable.

3. Government Interests

The third *Eldridge* factor involves the interest of the government in the conservation of fiscal and administrative resources.[342] As discussed, the fiscal and administrative burdens facing immigration adjudication are formidable.[343] At first glance, stipulated orders of removal may seem to offer a compelling way to alleviate some of the burdens on IJs to meet case completion deadlines. They may also appear to provide a simple solution to a perceived lack of detention bed space, as well as further the interest of both the non-citizen and government in reducing the average length of time that immigrant detainees spend in federal custody prior to removal. According to one estimate, stipulated removal orders might have provided an estimated cost savings of $100 million in fiscal year 2010.[344]

However, a narrow focus on fiscal costs risks an incomplete due process analysis. The *Eldridge* Court recognized that the government's efficiency interests, while relevant, should not be given undue consideration, and emphasized that the "ultimate balance" should focus on "when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."[345] In the immigration context, the federal courts have weighed the limitations of due process against the practical realities of overburdened immigration courts before. One court has noted, for instance, that "we cannot allow a 'myopic insistence upon

341. *See* EOIR, FY 2011 YEARBOOK, *supra* note 23, at D2, Q1 (showing 11.6% of cases resulting in termination, 14.4% in a grant of relief other than voluntary departure, and 19% in voluntary departure). Because voluntary departure can be granted either by an IJ or by ICE, these numbers do not reflect the total numbers of non-citizens who were initially charged with removal but to whom the immigration agency ultimately decided to offer voluntary departure in lieu of continuing with removal proceedings.

342. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

343. *See supra* Part I.B.

344. *See* Letter from Am. Immigration Lawyers Ass'n to Charles K. Edwards, Acting Inspector Gen. 5 n.23 (Aug. 2011) (on file with author).

345. *Eldridge*, 424 U.S. at 348.

expeditiousness' to render the right to counsel 'an empty formality.' "[346] The government has a strong interest in the *accurate* and *lawful* adjudication of removal cases.[347] The government also has a broader investment in principles that have long animated the immigration laws, such as family unity, economic growth, and humanitarian concerns. Indeed, the cost of broken families and loss of faith in the integrity of the legal system are harder to quantify but potentially far more significant and worth avoiding.

However, ICE's standard efficiency-based argument in favor of stipulated orders of removal—that they offer an effective cost-saving measure by reducing case calendaring time or the cost of detention—obscures the true costs of stipulated removal. The argument focuses only on fiscal efficiencies that occur at the front end of the process, but it ignores the various ways in which constitutional errors are expensive. Failure to reform the stipulated removal process is likely to lead to further litigation across both the civil and criminal systems. Indeed, stipulated removal may constitute only the first step in a multi-stage chain of enforcement that could include the civil reinstatement of the prior stipulated removal order by ICE, as well as an illegal re-entry prosecution in the criminal system. But continuing to employ a flawed procedure at the front end of the enforcement chain is likely to exacerbate costs at the back end, through the cost of federal criminal appeals and their attendant consumption of resources for the judiciary and prosecutors' and public defenders' offices. From ICE's and EOIR's perspective, shifting costs from the immigration adjudication and enforcement system to the federal criminal justice system may not be problematic; however, an appropriate due process analysis should take into account the full range of costs created by the system.

Once the costs of the current stipulated removal procedure are exposed, it becomes clear that the alternatives are far less costly. Indeed, some alternatives to the implementation of stipulated orders of removal may continue to offer fiscal and administrative benefits to the government. These alternatives are discussed in the following Section.

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346. Biwot v. Gonzales, 403 F.3d 1094, 1099 (9th Cir. 2005) (quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964)); *see also* Mendoza-Mazariegos v. Mukasey, 509 F.3d 1074, 1084 (9th Cir. 2007) ("As frustrating as delays might be, an immigrant's right to counsel should not be sacrificed because of the shortcomings of the immigration system itself.").

347. For a discussion of the phenomenon of the government wrongfully deporting individuals whom it did not have legal authority to deport, see generally Rosenbloom, *supra* note 156.

V. POLICY RECOMMENDATIONS

Despite the problems with the current implementation of stipulated removal, if reformed, the program could constitute a tool that addresses some of the problems in immigration adjudication while properly balancing due process concerns. If stipulated removal remains available to those non-citizens for whom it presents the best option or who genuinely wish to return to their country, then it can fulfill its original vision of offering meaningful benefits to both sides. Stipulated removal could be implemented in a manner that accounts for some of the due process concerns raised in this Article, without requiring intervention from Congress.[348] This Part discusses those potential solutions. Ultimately, many of the problems associated with stipulated removal can be traced back to the immigration adjudication crisis itself, such as the categorical absence of a right to counsel, the use of detention in removal proceedings, and the operation of the immigration courts. Others have proposed comprehensive solutions to the challenges of immigration adjudication, such as by fundamentally restructuring the immigration court system.[349] This Part takes a more focused (and admittedly limited) approach, and explores how the government might approach stipulated removal in the absence of either legislative or other large-scale reform.

348. The Obama Administration has looked to solutions that do not require legislative action, and scholars have begun to probe the implications of the executive role in setting immigration policy. The most prominent of the Administration's actions has been the extension of Deferred Action for Childhood Arrivals, in which DHS announced that it would extend temporary safety from removal along with work authorization to certain youths who had come to the United States as children and meet other eligibility requirements. *See generally* JANET NAPOLITANO, DEP'T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (advising DHS on enforcement of immigration laws against "certain young people who were brought to this country as children and know only this country as home"). For a discussion of the history, modern use of, and possibilities associated with the President's exercise of immigration powers, see generally Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

349. *See* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 35, at 1686–87 (proposing creation of Article III immigration court); Ramji-Nogales, Schoenholtz & Schrag *supra* note 24, at 386 (proposing creation of Article I immigration court).

A. *Opportunity for Immigration Court Hearing or Attorney Consultation Before Issuance of Stipulated Removal Order*

One of the fundamental problems with the stipulated order of removal process is the unrepresented non-citizen's disproportionate reliance on the statements of an ICE agent who offers the stipulated order itself, in combination with the boilerplate form prepared by the Agency. To account for the misinformation and pressure likely to develop in this setting, ICE and EOIR should limit the use of stipulated orders of removal on pro se immigrant detainees to those who either (a) appear in person for an IJ hearing after the non-citizen has agreed to the removal order but before the judge signs, or (b) have had a meaningful opportunity to consult with an attorney who does not owe any duties to the government. These reforms, which are best suited for regulatory amendment, would seek to displace some of the power that frontline ICE agents currently have over the non-citizen.

Requiring an immigration court hearing after the non-citizen signs the stipulated order request but before the judge signs the final order of removal would mirror the procedures currently used in criminal court to ascertain the validity of a criminal defendant's guilty plea.[350] Through the use of a brief, in-person colloquy, akin to those required by Rule 11 of the Federal Rules of Criminal Procedure, IJs could engage in an independent determination of whether the non-citizen's waiver of rights was "knowing, voluntary, and intelligent" as required by the federal regulation.[351] At the hearing, the IJ could ask the non-citizen whether they understood what they were signing when they agreed to the stipulated removal order and whether they experienced pressure or coercion with the ICE agent who offered the order to them. The IJ should affirmatively explain to the non-citizen the rights that she is waiving. The IJ would also have an opportunity to fulfill his or her duties to the non-citizen, such as advising the non-citizen of any apparent eligibility for relief. In contrast to the practice in some jurisdictions, all requests for stipulated orders of removal—like any other matter—should be randomly assigned to all IJs within a particular court, not routed only to those judges who are willing to sign the orders.

As an alternative to requiring in-person hearings before IJs, EOIR could require that unrepresented non-citizens submit proof that they individually consulted with an attorney who advised them of

350. *See* FED. R. CRIM. P. 11(b).
351. 8 C.F.R. § 1003.25(b) (2012).

their eligibility for immigration relief and the consequences of signing a stipulated removal order before judges sign off on stipulated removal orders. While the attorneys need not commit to full representation of the non-citizen in the removal matter, attorneys affiliated with a Legal Orientation Program (LOP) could submit a short declaration attesting that they discussed the non-citizen's legal options with the detainee and, if relevant, that the detainee attended a group presentation prepared by the LOP provider. ICE and EOIR might also recruit pro bono lawyers from the immigration bar to assist with the individual consultation process. Important limitations on this proposal exist, given the relative unavailability of LOPs. Nonetheless, where LOPs exist, stipulated orders of removal might be structured in collaboration with LOP providers.

Two primary objections to this proposal may arise, from opposite ends of the ideological spectrum. The first objection might focus on cost and come from the government or those who believe that maximizing efficiency and minimizing costs toward the objective of deporting non-citizens who have violated the immigration laws should generally outweigh concern for due process rights. To be sure, requiring either an immigration court hearing or an individual consultation with a lawyer would involve some additional cost, principally in the form of additional immigration court time or detention, or government resources required for individual attorney consultations. However, costs alone fail to serve as a sufficient justification for failure to comply with constitutional requirements.[352] As noted earlier, the costs associated with a dysfunctional stipulated removal system may well outweigh the immediate costs associated with providing hearings and/or counsel.[353]

A second objection could come from the perspective of those who possess a philosophical commitment to fairness in removal proceedings but view the promise of additional procedures with cynicism. Do more hearings or attorney consultations offer a true solution, particularly given the complexity of the immigration laws, shortcomings of immigration adjudication and complaints about the quality of the immigration bar? Or will it simply replace one pro forma procedure with another? Indeed, one might point to the criminal justice system—where constitutional rights attach with full force—and argue persuasively that despite the existence of Rule 11

352. *See* discussion *supra* Part IV.B.3.

353. *See* discussion *supra* Part IV.B.3 (discussing costs of stipulated removal as currently implemented).

and its state law counterparts, criminal defendants routinely plead guilty to crimes that they did not commit, without fully understanding the implications of a guilty plea.[354] Indeed, criminal law scholars have powerfully documented the disconnect between the rights guaranteed by constitutional criminal procedure and the practical reality of the criminal justice system.[355] Another argument would be that creating more rights grounded primarily in procedure will have the unintended consequence of preventing the enactment of greater substantive rights.[356]

However, requiring more process, rather than less, is nonetheless a step that would constitute a meaningful improvement to the current process. The idea of limiting the use of stipulated removal orders to non-citizens who are represented by counsel, and encouraging IJs to assess the validity of the waiver, has been discussed by others, such as the independent government agency the Administrative Conference of the United States.[357] Other advantages might attach for non-citizens. Colloquies between IJs and non-citizens would be recorded, thereby allowing for appellate review and discussion of the merits of the process, instead of allowing stipulated removal to remain shrouded in relative secrecy and conducted in the back halls of immigration detention facilities. IJs who have embraced stipulated removal orders in their current form may well approach such hearings with indignation; however, appellate review would remain available as a response to potential resistance from IJs to holding hearings.

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354. One might look no further than the poor quality of Rule 11 colloquies in federal immigration enforcement prosecutions for evidence of the potential for deficiencies and shortcuts. *See generally* Lydgate, *supra* note 34 (describing the implementation of "Operation Streamline" in four border cities and discussing its legal and policy implications); *see also* Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 276–77 (2006) (questioning the value of plea colloquy in ensuring voluntariness of guilty plea due to judge's limited access to information).

355. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 536–37 (2001).

356. *See* Benson, *supra* note 164, at 1487.

357. *See* ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2012-3, IMMIGRATION REMOVAL ADJUDICATION 7–8 (2012), http://www.acus.gov/wp-content/uploads/downloads/2012/06/Final-Recommendation-2012-3-Immigration-Removal-Adjudication.pdf (encouraging EOIR to engage in pilot tests in which random samples of respondents, having been counseled by independent attorneys, appear for in-person hearings in order to evaluate validity of waivers); *see also About*, ADMIN. CONF. OF THE U.S., http://www.acus.gov/about/ (last visited Oct. 3, 2012) (describing the Administrative Conference of the United States ("ACUS") as "an independent federal agency dedicated to improving the administrative process through consensus-driven applied research, providing nonpartisan expert advice and recommendations for improvement of federal agency procedures").

B. *Regulate ICE Agents' Interactions with Detainees During Solicitation Phase*

The stipulated removal statute and regulations are completely silent with respect to how ICE agents conduct the "solicitation phase" of the stipulated removal process, thereby creating a procedural void which ICE agents have filled with their own scripts, procedures, and practices. As illustrated by the Spanish-language scripts that have organically developed in ICE offices without meaningful oversight, the current procedures appear to be woefully inadequate from a due process perspective.[358] In other removal contexts, federal regulations prescribe small but important limitations on ICE officer behavior. For instance, the regulations governing administrative removal—a form of removal in which ICE officers directly process removal orders for non-LPRs with aggravated felony convictions)—contain limited, but available, procedural safeguards. Those regulations require that the administrative removal process be handled by two different officers—an issuing officer (who brings the charges) and a deciding officer (who evaluates the evidence of removability against the non-citizen).[359] Under the administrative removal regulation, the officers must provide the non-citizen with notice of the charges against her[360] and sufficient time to rebut the written charges[361] and, under some circumstances, must refer the case to an IJ if the evidence against the non-citizen is insufficient.[362] The stipulated removal regulation, by contrast, contains no such limitations on ICE agent behavior.

DHS should promulgate regulations that specifically require ICE officers to provide non-citizens selected for stipulated orders of removal with formal notice of the charges against them and an opportunity to examine the charges. The regulations should also provide guidance to facilitate ICE officers' compliance with this Article's recommendation to limit stipulated orders of removal to situations where a non-citizen appears for an immigration court hearing or consults individually with an attorney. For instance, the regulations might impose a waiting period between the time the non-citizen agrees to the stipulated removal order and the time an IJ actually signs it to ensure that the non-citizen has an opportunity to consult with an attorney.

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358. *See* sources cited *supra* notes 197–210 and accompanying text.

359. 8 C.F.R. § 238.1(a) (2012) (defining "deciding service officer" and "issuing service officer" and stating that the two officers must be different people).

360. *Id.* § 238.1(b)(2)(i).

361. *Id.* § 238.1(c).

362. *See id.* § 238.1(d)(iii).

In addition to formal regulations, DHS could issue subregulatory guidance and training to ICE officers to safeguard the procedural integrity of stipulated removal orders. The guidance could set forth guidelines aimed at reducing the likelihood that ICE officers will pressure detainees into signing stipulated orders of removal. For instance, to prevent ICE officers from blatantly misstating the law or legal options available to detainees, DHS could develop guidelines that reflect the substantive legal information that ICE officers must convey, or require any scripts used by ICE officers to be approved at the supervisory level. To be sure, the value of scripts or internal requirements is limited, and the risk that ICE officers will fail to follow internal protocol exists. Indeed, in the expedited removal context, Customs and Border Patrol officers have failed miserably in terms of compliance with mandatory questions or required advisals for asylum-seekers at the border—even when those officers knew they were being evaluated by outside observers.[363] Despite this reality, more robust internal rules may set the stage for greater oversight of the program, as well as for litigation-based challenges to the implementation of stipulated removal.

C. *Presumption of Constitutional Invalidity for Prior Stipulated Removal Orders*

Stipulated removal's structural deficiencies should also give rise to a presumption that stipulated removal orders entered to date against unrepresented immigrants, under the practices described in this Article, are constitutionally invalid. A presumption of constitutional invalidity would primarily affect three federal entities: United States Attorneys' offices prosecuting immigration violations, immigration adjudicators (primarily IJs and the BIA), and the federal judiciary.

First, federal criminal prosecutors should, like the United States Attorney's Office in the Southern District of California, refrain from seeking illegal re-entry prosecutions where the underlying removal order was a stipulated order.[364] Non-citizens who re-enter after having previously received a stipulated removal order would still remain criminally liable for misdemeanor illegal entry but would avoid the harsh sentencing scheme that accompanies illegal *re*-entry. Federal

363. *See* Pistone & Hoeffner, *supra* note 136, at 178 ("Despite their mandatory nature, every study of the expedited removal process and the mandatory questions shows that secondary inspectors repeatedly fail to ask, or fail to record the answer to, one or more of the questions.").

364. *See supra* text accompanying notes 269–70.

prosecutors should also refrain from seeking sentencing enhancements in illegal entry cases where the enhancement is based on the existence of a stipulated removal order.[365] These exercises of criminal prosecutorial discretion would ameliorate some of the sting that stipulated removal orders have thus far inflicted.

Second, the administrative Agency adjudicators—namely, IJs and the BIA—should apply the presumption of constitutional invalidity in civil immigration cases involving stipulated orders of removal. The presumption would appear most frequently in motions to reopen before either trial- or appellate-level Agency adjudicators, in which an immigrant might allege that her waiver of rights was invalid and seek to assert relief to which she is eligible. Under current law, an immigrant who claims that a written waiver was obtained invalidly generally has the burden of proving otherwise.[366] Such a presumption would shift the burden of proof to the Agency to show, for instance, that the waiver of rights was knowing, voluntary, and intelligent.

Third, the federal judiciary should apply a presumption of constitutional invalidity to stipulated orders of removal in both immigration and criminal appeals. This recommendation would most significantly affect collateral attacks in illegal re-entry prosecutions. In immigration matters, federal appeals courts hearing petitions for review may have the opportunity to apply the presumption as well, such as in appeals of motions to reopen before the Agency where a stipulated removal order was entered.[367] The presumption might also

365. United States v. Rodriguez-Ocampo, 664 F.3d 1275, 1276, 1278 (9th Cir. 2011) (finding that sentencing enhancement where "the defendant previously was deported, or unlawfully remained in the United States, after . . . a conviction for a felony that is . . . a crime of violence" cannot apply where prior order was a stipulated removal order).

366. *See* Richardson v. United States, 558 F.3d 216, 219–23 (3d Cir. 2009) (discussing and approving "the presumption that, when there is a written waiver, the waiver is valid, thereby implicitly placing the burden on the alien of proving any claim that the waiver was invalid").

367. *Avila-Santoyo v. Holder* serves as an example of a case in which a court of appeals could have applied a presumption of unconstitutionality to stipulated orders of removal. Mr. Avila-Santoyo had appealed the BIA's denial of a motion to reopen a stipulated removal order, despite the fact that he had resided in the U.S. since the age of two, was statutorily eligible for cancellation of removal, and was a juvenile when he signed the stipulated order. The argument that systemic flaws in the stipulated removal process made deprivations of due process highly likely was made available to the court, *see* Brief for Nat'l Immigration Law Ctr. as Amicus Curiae Supporting Respondent, Avila-Santoyo v. Holder, No. 11-14941, 2012 WL 3530679, at *10–22 (11th Cir. Aug. 16, 2012) (unfiled brief) (on file with the *North Carolina Law Review*); however, the Eleventh Circuit rejected the appeal on other grounds without addressing the constitutionality of the underlying stipulated removal order or accepting the brief for filing. *Avila-Santoyo*, 2012

apply to cases in which the federal courts' ability to assert jurisdiction over a petition for review depends on whether the non-citizen exhausted his or her administrative remedies but failed to do so based upon the reasonable perception that the stipulated removal order waived their right to appeal to the BIA.[368]

D. *Greater Use of Alternatives to Detention (ATDs) and Voluntary Departure In Lieu of Stipulated Removal Orders*

The government's logic regarding the need for stipulated orders of removal—that the need to alleviate the pressure of limited detention bed space and overcrowded court calendars make them necessary—is shortsighted. It overlooks the fact that the perceived lack of immigration detention space and, to a lesser degree, backlogged courts are themselves creations of the Agency. More extensive use of Alternatives to Detention ("ATDs"), in which ICE physically releases detainees upon the condition of participation in community-based monitoring programs, could ameliorate the lack of detention bed space.[369] While ICE has voiced a strong interest in making greater use of ATDs, particularly since President Obama took office,[370] it has generally focused its efforts on more punitive forms of ATDs, such as ankle monitoring bracelets.[371] However, viable options, involving releasing immigrants while requiring them to report to community organizations, churches, or other partnering entities, have been attempted and should be explored in further

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WL 3530679, at *1, *3 (No. 11-14941) (per curiam). The author of this Article assisted in preparing the amicus brief for filing.

368. *See, e.g.*, Cordova-Soto v. Holder, 659 F.3d 1029, 1032 (10th Cir. 2011) (holding that the court lacked jurisdiction to review stipulated removal order where alien failed to appeal within thirty-day deadline for filing petition for review under 8 U.S.C. § 1252(b)(1)). The author of this Article worked on an amicus brief to the BIA seeking administrative reopening of the respondent's stipulated removal order. *See* Brief of Amicus Curiae National Immigration Law Center in Support of Respondent at 14, Cordova-Soto, No. A091 045 891 (B.I.A. Sept. 4, 2012).

369. *See* DETENTION WATCH NETWORK & STANFORD LAW SCHOOL IMMIGRANTS' RIGHTS CLINIC, POLICY BRIEF: COMMUNITY-BASED ALTERNATIVES TO IMMIGRATION DETENTION 1–2 (2010), http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/DWN%20ATD%20Report%20FINAL_08-25-2010.pdf. For a critique of ATD programs, see generally RUTGERS SCHOOL OF LAW-NEWARK IMMIGRANT RIGHTS CLINIC, FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION (2012), http://www.law.newark.rutgers.edu/files/FreedbutnotFree.pdf.

370. *See* SCHRIRO, *supra* note 28, at 20–21.

371. *See* DET. WATCH NETWORK & STANFORD LAW SCH. IMMIGRANTS' RIGHTS CLINIC, *supra* note 369, at 7 ("ICE's current programs rely heavily on onerous restrictions including telephonic reporting, curfews, and Global Positioning System (GPS)-enabled electronic monitoring via ankle devices.").

detail.[372] The use of ATDs would also further non-citizens' interest in avoiding prolonged physical detention pending removal.

Similarly, ICE has the discretion to offer voluntary departure to most non-citizens, aside from those facing removal for aggravated felony convictions or terrorist activities, in lieu of or before the completion of removal proceedings.[373] ICE should screen cases to determine whether it should offer voluntary departure to all detainees who might have been previously offered stipulated orders of removal, instead of vice versa. To be sure, the voluntary departure process itself carries the potential for abuse and coercion.[374] However, instead of opting for stipulated removal and its many defects, ICE should reconsider its use of voluntary departure, which has decreased drastically in the past decade in favor of formal removals.[375]

E. Enhance Agency Transparency

Finally, ICE and EOIR should disclose more information to the public regarding the use of stipulated orders of removal. For instance, both agencies should include statistics on the number of stipulated orders of removal entered in regular publications such as the EOIR Yearbook and DHS reports on enforcement actions. At the local level, EOIR and ICE offices could release to the immigration bar, especially nonprofit providers, information regarding their plans to use stipulated removal, so know-your-rights materials and other education campaigns could incorporate information on stipulated orders of removal for specific immigrant communities.

CONCLUSION

While the government has looked to stipulated orders of removal as a partial solution to the immigration adjudication crisis, the implementation of the stipulated removal over the past decades shows that the due process costs exacted by the program have outweighed any efficiency benefits associated with it. As implemented, stipulated removal violates procedural due process as well as the Agency's own regulations. Some of these deficiencies can be cured through administrative corrections. However, the problems presented by stipulated removal can also be traced to ICE's culture,

372. *See id.* at 8–12.

373. 8 U.S.C. § 1229c(a)(1) (2006).

374. *See* Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 551, 567–68 (9th Cir. 1990).

375. *See* DHS, 2010 YEARBOOK, *supra* note 29, at 94 (showing steady decrease in use of voluntary departure).

which suffers from a deep-seated pro-enforcement orientation. This culture in turn facilitates the problematic practices that are reflected in stipulated removal, such as blatant judge-shopping or misstatements about the law.

Ultimately, the pressures facing immigration adjudication today—all-time highs in immigration court backlogs, all-time highs in detention, twelve million individuals subject to potential detention and removal, and woeful resource constraints across the immigration courts—find their origins in deeper troubles in the immigration laws that congressional intervention could remedy. Comprehensive statutory reform, including paths to legalization for those who live in the country without authorization, an expansion of statutory eligibility for discretionary relief, and relaxation of rules related to mandatory detention, could more meaningfully alleviate the forces giving rise to procedures like stipulated orders of removal. Whether Congress will act, however, remains unclear. Unless or until legislative interventions take place, the agencies participating in stipulated removal should refrain from exacerbating the problems in an already broken system.