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Katherine Shattuck

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PREVENTING ERRONEOUS EXPEDITED REMOVALS: IMMIGRATION JUDGE REVIEW AND REQUESTS FOR RECONSIDERATION OF NEGATIVE CREDIBLE FEAR DETERMINATIONS

Katherine Shattuck*

Abstract: The Central American refugee crisis has renewed criticism of expedited removal, which allows immigration officials to remove without a hearing certain noncitizens who seek to enter or have entered the United States. Asylum seekers who arrive at the border or ports of entry without entry documents undergo a screening process to determine whether they have a “credible fear of persecution.” An individual who receives a positive credible fear determination is entitled to a full hearing before an immigration judge. In contrast, an individual who receives a negative credible fear determination is typically subjected to expedited removal. Scholars and human rights advocates have long argued that the credible fear determination process fails to adequately identify bona fide asylum seekers, and that the power vested in individual immigration officers is susceptible to abuse.

This Comment examines two little-discussed administrative mechanisms that can prevent the erroneous expedited removal of asylum seekers: review of a negative credible fear determination by an immigration judge (IJ); and requests for reconsideration (RFRs), whereby a person who receives a negative credible fear determination may petition the Asylum Office for a positive fear finding or a re-interview. The Comment describes the mechanics of, and current practices surrounding, IJ review and RFRs. Data from the Executive Office for Immigration Review (EOIR) and U.S. Citizenship and Immigration Services (USCIS) suggest that IJ review and RFRs dramatically improve the accuracy of credible fear determinations, particularly in cases involving detained families. But the immigration agencies have failed to consistently implement either process, undermining their potential to prevent the removal of people who may face persecution in their home countries.

This Comment concludes by proposing reforms to fortify IJ review and RFRs. EOIR should allow counsel to advocate on behalf of clients during IJ review and should permit asylum seekers to introduce before the IJ information not disclosed during the credible fear interview. Moreover, USCIS should direct the Asylum Office to grant an asylum seeker’s RFR upon a showing that an official erred during the credible fear interview or that a second interview will yield new information about the asylum seeker’s claim.

INTRODUCTION

In late 2015, Martiza¹ fled El Salvador to seek asylum in the United States.² She wanted to escape her abusive husband, who began beating

* J.D. Candidate, University of Washington School of Law, Class of 2018. Special thanks to Professor Angélica Cházaro and Chris Strawn for their invaluable guidance and comments on earlier drafts and to the exceptional team at *Washington Law Review*. Any errors are my own.

her while she was pregnant with their second child and often swore he would kill her.³ She also feared members of the MS-13 gang.⁴ When Martiza reached the United States-Mexico border, she was detained and taken to the Karnes County Residential Center, an immigration detention facility in Texas that holds nearly 600 women and children.⁵ There an asylum officer interviewed Martiza to determine if she was eligible to apply for asylum.⁶

The interview produced only part of Martiza's story. A year and a half before Martiza fled El Salvador, the Board of Immigration Appeals held in a landmark decision that survivors of gender-based violence may qualify for asylum.⁷ But the asylum officer never asked Martiza if she suffered domestic violence in El Salvador; and Martiza, who assumed that MS-13's extortion and death threats were more important to her asylum claim, said nothing about her husband's abuse.⁸ At the end of the interview, the asylum officer concluded that Martiza lacked a credible fear of persecution, and was ineligible to apply for asylum.⁹ Martiza appealed that finding to an immigration judge (IJ).¹⁰ The IJ affirmed her negative credible fear determination.¹¹ Martiza was then ordered to be

1. "Martiza" is a pseudonym. See Letter from Am. Immigration Council et al. to Directors of U.S. Citizenship and Immigration Servs. and Immigration and Customs Enf't Concerning Due Process Violations at Det. Facilities 4 (Dec. 24, 2015), <http://www.aila.org/advo-media/aila-correspondence/2015/letter-uscis-ice-due-process> [<https://perma.cc/72U5-C8SF>] [hereinafter Letter on Due Process Violations].

2. *Id.*

3. *Id.*

4. *Id.* at 4–5.

5. *Id.* at 4; DHS ADVISORY COMM. ON FAMILY RESIDENTIAL CTRS., REPORT OF THE DHS ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 3 (2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf> [<https://perma.cc/T6N3-LPLP>] [hereinafter DHS ADVISORY COMM. REPORT]. The "residential center" in Karnes is managed by the GEO Group, a private prison corporation. See *Karnes County Residential Center*, GEO GRP., INC., <https://www.geogroup.com/FacilityDetail/FacilityID/58> [<https://perma.cc/T78R-YQ42>].

6. Letter on Due Process Violations, *supra* note 1, at 4–5; see also 8 U.S.C. § 1225(b)(1)(B)(ii) (2012) (explaining that an individual who is found to have "a credible fear of persecution" may proceed to seek asylum).

7. *In re A-R-C-G- et al.*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014) (holding that "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group for purposes of an asylum or withholding of removal claim).

8. Letter on Due Process Violations, *supra* note 1, at 4–5.

9. *Id.* at 5. Courts continue to grapple with whether, and under what circumstances, extortion provides a basis for a viable asylum claim. See, e.g., *Oliva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015) (recognizing that "extortion itself can constitute persecution").

10. Letter on Due Process Violations, *supra* note 1, at 4–5.

11. *Id.*

removed to El Salvador without a hearing, according to a law that authorizes the fast-track removal of noncitizens without valid entry documents.¹²

Racing against the clock, a team of volunteer lawyers submitted a request for reconsideration (RFR) to the Houston Asylum Office on Martiza's behalf.¹³ In the RFR, they noted that the asylum officer had failed to elicit during the credible fear interview information about the domestic violence Martiza suffered in El Salvador.¹⁴ Martiza's attorneys requested that the Asylum Office grant Martiza a second interview so that she could fully explain her fear of returning home.¹⁵ The next day, the Asylum Office denied the RFR.¹⁶ Martiza was put on a plane and flown back to El Salvador to face the man she thought would kill her.¹⁷

Martiza is one of a growing number of noncitizens who have been denied humanitarian protection in the United States and summarily returned to violent homelands they said they feared.¹⁸ Historically, noncitizens who entered the United States and requested asylum were allowed to present their claims for protection before an immigration court.¹⁹ But the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) upended that process.²⁰ IIRIRA

12. 8 U.S.C. § 1225(b)(1)(A) (2012).

13. Letter on Due Process Violations, *supra* note 1, at 4–5. The eight regional asylum offices in the United States form part of the Refugee, Asylum, and International Operations Directorate, a division of U.S. Citizenship and Immigration Services. See *Refugee, Asylum, and International Operations Directorate*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/directorates-and-program-offices/refugee-asylum-and-international-operations-directorate> [<https://perma.cc/Z7CC-N26V>].

14. Letter on Due Process Violations, *supra* note 1, at 4–5

15. *Id.*

16. *Id.*

17. *Id.*

18. See, e.g., Sarah Stillman, *No Refuge*, NEW YORKER, Jan. 15, 2017, at 32, 34 (describing the Global Migration Project's database of cases in which noncitizens removed from the United States suffered death, torture, kidnapping, sexual assault, and other harms in their home countries); Sibylla Brodzinsky & Ed Pilkington, *US Government Deporting Central American Migrants to Their Deaths*, GUARDIAN (Oct. 12, 2015), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> [<https://perma.cc/2AJW-598N>] (referencing study that identified eighty-three noncitizens who were deported to their deaths in El Salvador, Guatemala, and Honduras); *Trauma in Family Immigration Detention*, HUM. RTS. WATCH (May 15, 2015), <https://www.hrw.org/news/2015/05/15/us-trauma-family-immigration-detention-0> [<https://perma.cc/93ZD-5GJL>] (recounting stories of two female asylum seekers who were removed from the United States and severely abused in their home countries).

19. See *infra* section I.B.

20. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

introduced forms of summary deportation, including expedited removal and reinstatement of removal, that allow immigration officers to return certain noncitizens to their home countries without a hearing before an IJ.²¹ These days, most people who are removed from the United States never appear in a courtroom.²²

Asylum seekers are supposed to be spared immediate summary removal.²³ Noncitizens who arrive at a United States border or port of entry and say they fear returning home are referred to asylum officers for interviews to determine whether their fear of persecution is sufficiently “credible” to support an asylum claim.²⁴ If an officer determines that a noncitizen has “a significant possibility” of “establish[ing] eligibility for asylum,” the noncitizen is placed into regular removal proceedings and allowed to present a claim for relief before an IJ.²⁵ In contrast, a noncitizen who receives a negative credible fear determination is subject to removal “without further hearing or review.”²⁶

The past decade has seen sharp increases in recently arrived noncitizens who express fear of persecution. In fiscal year 2009, United States Citizenship and Immigration Services (USCIS) made 5,369

21. See 8 U.S.C. § 1225(b)(1)(A) (2012) (outlining expedited removal); *id.* § 1231(a)(5) (outlining reinstatement of removal).

22. Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 183 (2017) (“[T]he vast majority of cases in which the government issues removal orders against noncitizens never reach the immigration courts.”). Of the 340,056 noncitizens deported in fiscal year 2016, 141,518 people were subjected to expedited removal and 143,003 people were subjected to reinstatement of removal. BRYAN BAKER, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2016, at 8 (2017), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf [<https://perma.cc/HU4N-VAYY>].

23. 8 U.S.C. § 1225(b)(1)(B)(ii).

24. *Id.*

25. *Id.* (a noncitizen determined to have “a credible fear of persecution” must “be detained for further consideration of the application for asylum”); 8 U.S.C. § 1229 (outlining initiation of removal proceedings); 8 C.F.R. § 208.30(f) (2017) (a noncitizen determined to have “a credible fear of persecution or torture” will receive “full consideration of the asylum and withholding of removal claim”). Regular removal proceedings, also known as “section 240 removal proceedings” for the section of the Immigration and Nationality Act that corresponds to 8 U.S.C. § 1229, take place in immigration court and afford noncitizens greater procedural protections.

26. 8 U.S.C. § 1225(b)(1)(B)(iii)(I). This process differs for noncitizens who seek humanitarian protection in the United States after having been removed. These noncitizens face the threat of reinstatement of removal and undergo “reasonable fear” interviews with asylum officers. 8 C.F.R. §§ 208.31(b), 1208.31(b). If a person is determined to have a “reasonable fear of persecution or torture,” that person may apply for withholding of removal or relief under the Convention Against Torture before an IJ. See 8 C.F.R. §§ 208.31(e), 1208.31(e). Noncitizens previously removed are statutorily barred from seeking asylum. 8 U.S.C. § 1231(a)(5). This Comment focuses on expedited removal and credible fear interviews; however, many of its insights are relevant to the reinstatement context, as well.

credible fear determinations.²⁷ By fiscal year 2016, that figure had soared to 92,990 determinations.²⁸ The leap largely reflected rising migration from Central America: since 2008, the United Nations has recorded a fivefold increase in the number of asylum seekers who have fled El Salvador, Guatemala, and Honduras for the United States.²⁹ USCIS statistics show that the majority of credible fear interviews result in positive credible fear determinations.³⁰ But each year asylum officers issue thousands of negative credible fear determinations to putative asylum seekers.³¹ In fiscal year 2016 alone, 9,697 individuals received negative credible fear determinations.³² Put otherwise, there were 4,334 more credible fear *denials* in 2016 than there were *determinations* in 2009.³³

As Martiza's case suggests, the credible fear process is fraught with potential for error. Language barriers, official oversight, and trauma or disability may prevent an asylum seeker from disclosing in an initial interview why that person fled to the United States.³⁴ Legal scholars and human rights observers have long argued that the credible fear process fails to adequately identify bona fide asylum seekers, and that the power vested in individual immigration officials is susceptible to abuse.³⁵ The

27. *Asylum Abuse: Is it Overwhelming Our Borders? Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 5 (2013) (statement of Rep. Zoe Lofgren) [hereinafter *Asylum Hearing*].

28. U.S. CITIZENSHIP & IMMIGRATION SERVS., CREDIBLE FEAR AND REASONABLE FEAR STATISTICS AND NATIONALITY REPORT (2016), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearReasonableFearStatisticsNationalityReport.pdf [<https://perma.cc/N2PF-WYE3>] [hereinafter CREDIBLE FEAR STATISTICS 2016].

29. António Guterres, *Foreword* to U.N. HIGH COMM'R FOR REFUGEES, WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO (2015), <http://www.unhcr.org/publications/operations/5630f24c6/women-run.html> [<https://perma.cc/GUY3-C8WV>] [hereinafter WOMEN ON THE RUN].

30. Positive credible fear determinations were granted in 73,081 of 92,990 cases in fiscal year 2016. CREDIBLE FEAR STATISTICS 2016, *supra* note 28.

31. *See id.*

32. *Id.*

33. *Id.*; *Asylum Hearing*, *supra* note 27, at 5.

34. *See, e.g.*, KATHRYN SHEPHERD & ROYCE BERNSTEIN MURRAY, THE PERILS OF EXPEDITED REMOVAL: HOW FAST-TRACK DEPORTATIONS JEOPARDIZE ASYLUM SEEKERS 1–3 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations_jeopardize_detained_asylum_seekers.pdf [<https://perma.cc/HDV2-UHXT>] (summarizing report on the “serious obstacles” many noncitizens face to accessing the asylum process).

35. *See, e.g.*, *Asylum Hearing*, *supra* note 27, at 166 (statement of Leslie E. Vélez, Senior Protection Officer, United Nations High Commissioner for Refugees) (stating that the “significant possibility” standard for establishing credible fear under United States law is so onerous as to be inconsistent with international standards); 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.

Obama and Trump administrations' attempts to use expedited removal to deter migration from Central America have renewed such concerns.³⁶ So has the Trump administration's pledge to expand Department of Homeland Security's (DHS's) authority to subject noncitizens to expedited removal.³⁷

This Comment discusses two administrative mechanisms embedded in the credible fear process that may prevent the erroneous expedited removal of bona fide asylum seekers: (1) IJ review of negative credible fear determinations,³⁸ and (2) RFRs, whereby a person whose negative credible fear determination has been affirmed by an IJ may petition the Asylum Office for a positive credible fear determination or a re-interview.³⁹ Focusing on cases involving detained families,⁴⁰ this Comment argues that IJ review and RFRs are crucial, if imperfect, safety valves in the expedited removal regime. In fiscal years 2014 through 2016, IJs vacated 1,157 negative credible fear determinations in cases involving detained families.⁴¹ During the same period, RFRs prompted the Asylum Office to reverse over 200 negative credible fear determinations in cases involving detained families.⁴² These figures underscore both the deficiencies of the credible fear process and the bona fide nature of the vast majority of the claims for protection asserted by Central American families. Yet the government has failed to issue updated guidance on IJ review and RFRs, and agency officials inconsistently administer both processes. As a result, IJ review and

167, 193–94 (2006) (describing pervasive “rule-breaking” by government officials during screenings of undocumented persons at ports of entry); 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, 137 (2001) (“The ‘expedited removal’ process violates the rights of refugees and abrogates the duties of the United States to refugees in numerous ways.”); SHEPHERD & BERNSTEIN MURRAY, *supra* note 34, at 3 (“The credible fear interview process is potentially rife with procedural errors.”).

36. *See infra* section I.A.

37. *See infra* section I.A.

38. 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2012); 8 C.F.R. § 1208.30(g)(2) (2017).

39. *See* 8 C.F.R. § 1208.30(g)(2)(iv)(A); Memorandum from Michael A. Benson, Exec. Assoc. Comm’r for Field Operations, Immigration & Naturalization Servs., to Reg’l Dirs., Dist. Dirs. & Asylum Office Dirs. regarding Expedited Removal: Additional Policy Guidance (Dec. 30, 1997) [hereinafter *Expedited Removal Policy Guidance*].

40. There are currently three operational family detention centers in the United States. The Karnes County Residential Center, located in Karnes City, Texas, has the capacity to hold approximately 595 women and children. The South Texas Family Residential Center, located in Dilley, Texas, has a 2,400-bed capacity. The Berks Family Residential Center holds approximately 100 people. DHS ADVISORY COMM. REPORT, *supra* note 5, at 3.

41. *See infra* Part III.

42. *See infra* Part III.

RFRs do not reliably forestall the expedited removal of noncitizens with potentially viable claims for relief.

Three areas of scholarship inform this Comment. First, IJ review and RFRs illustrate what Inés Valdez, Mat Coleman, and Amna Akbar have described as the “paralegal” nature of immigration enforcement: the everyday practices surrounding RFRs, and, to a lesser extent, IJ review, are shaped less by codified rules than by negotiations between frontline immigration officials and nongovernmental actors who represent asylum seekers.⁴³ Second, the Comment sheds light on the complicated and often arbitrary “shadow proceedings” outside immigration courts that lead to the majority of removal orders against noncitizens.⁴⁴ Finally, the Comment draws upon, and seeks to contribute to, research on the intersection of family detention, asylum law, and pro bono efforts to protect the rights of detained families.⁴⁵

The first three parts of this Comment describe the mechanics and significance of RFRs: what they are, how they function in practice, and why they matter. Part I examines the recent increase in migration to the United States from Central America, situates IJ review and RFRs in

43. Inés Valdez, Mat Coleman, & Amna Akbar, *Missing in Action: Practice, Paralegality, and the Nature of Immigration Enforcement*, 21 CITIZENSHIP STUDS. 547, 549–53 (2017); see also HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 121 (2014) (“In theory, immigration law starts with Congress, but in practice it is made in the field.”).

44. Koh, *supra* note 22, at 193 (arguing that “the standard narrative about immigration adjudication is incomplete” because it overlooks “types of removal that take place in the shadows of immigration court”); see also DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA 52 (2012) (“[A] bewildering array of new fast-track mechanisms with such names as ‘expedited removal’ render much of the late twentieth- and early twenty-first century story of deportation one of *deformalization* in which rights guaranteed since the late nineteenth century have been eliminated.” (emphasis in original)); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 6–14 (2014) (discussing expedited removal, reinstatement of removal, and administrative removal).

45. See, e.g., Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. (forthcoming 2018) (manuscript at 101, 102) (on file with author) (presenting “the first empirical analysis of asylum adjudication in family detention”); Karen Musalo & Eunice Lee, *Seeking a Rational Approach to a Regional Refugee Crisis: Lessons from the Summer 2014 “Surge” of Central American Women and Children at the U.S.-Mexico Border*, 5 J. MIGRATION & HUM. SEC. 137, 140 (recommending that the United States government end family detention and “recognize the humanitarian crisis occurring in the Northern Triangle countries and the legitimate need of individuals from these countries for refugee protection”); Margaret H. Taylor & Kit Johnson, “Vast Hordes . . . Crowding in Upon Us”: *The Executive Branch’s Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 185, 186 (arguing that the detention of asylum-seeking families from Central America is “the modern iteration of *Chae Chan Ping*”); Stephen W. Manning, *The Artesia Report*, INNOVATION L. LAB, <https://innovationlawlab.org/the-artesia-report/the-artesia-report/> [https://perma.cc/W6QP-B9AK] (describing pro bono response to detention and deportation policies in the family detention center in Artesia, New Mexico in 2014).

statutory and regulatory context, and identifies sources of error in the credible fear determination process. Part II explores the evolution of, and current practices surrounding, IJ review and RFRs. It demonstrates that IJ review was intended to prevent the wrongful expedited removal of asylum seekers with meritorious claims, and shows how the Executive Office for Immigration Review's (EOIR's) guidance on the regulations governing IJ review has undermined that promise. Additionally, Part II examines the official guidance on RFRs. Part III discusses government data on negative credible fear determinations vacated through IJ review or RFRs, focusing on the family detention context. The data suggest that both methods of review play vital roles in preventing the expedited removal of individuals with potentially viable claims for protection.

Part IV proposes reforms to fortify IJ review and RFRs. EOIR should allow counsel to advocate on behalf of clients during IJ review and should permit asylum seekers to introduce before the IJ information not disclosed during the credible fear interview. Moreover, USCIS should direct the Asylum Office to grant an asylum seeker's RFR upon a showing that an official erred during the credible fear interview or that a second interview will yield new information about the asylum seeker's claim. This Comment concludes by contending that IJ review and RFRs will consistently prevent erroneous expedited removals only when asylum seekers have greater access to counsel.

I. LEGAL AND HUMANITARIAN BACKGROUND TO THE CREDIBLE FEAR DETERMINATION PROCESS

Credible fear determinations occur at the intersection of two statutory schemes: expedited removal, which subjects undocumented persons who seek to enter the United States to removal without a hearing; and asylum, a form of protection available to individuals who fear persecution on account of their race, religion, nationality, political opinion, or membership in a particular social group. This Part begins by describing recent migration to the United States from Central America, which has rekindled criticisms of expedited removal as applied to asylum seekers. It then provides overviews of expedited removal and asylum, focusing on the credible fear determination process. This Part concludes by discussing the potential for error in credible fear interviews.

A. *The Central American Refugee Crisis Has Brought Renewed Attention to Expedited Removal*

Since the summer of 2014, tens of thousands of families and unaccompanied children have requested humanitarian protection at the United States-Mexico border.⁴⁶ Most families have migrated from the Northern Triangle of Central America, which includes Guatemala, El Salvador, and Honduras.⁴⁷ They flee extortion and recruitment by criminal gangs, pervasive gender-related violence, and some of the highest homicide rates in the world.⁴⁸ In fiscal year 2014, 68,445 family units presented or were apprehended at the United States's southern border.⁴⁹ The flow of asylum seekers slowed slightly in 2015, but the refugee crisis continues.⁵⁰ Over 153,000 family units arrived at ports of entry in the southwestern border region in fiscal years 2016 and 2017.⁵¹

46. JONATHAN T. HISKY ET AL., AM. IMMIGRATION COUNCIL, UNDERSTANDING THE CENTRAL AMERICAN REFUGEE CRISIS: WHY THEY ARE FLEEING AND HOW UNITED STATES POLICIES ARE FAILING TO DETER THEM 1 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/understanding_the_centralamericanrefugeecrisis.pdf [<https://perma.cc/S2GL-JNWS>] [hereinafter UNDERSTANDING THE CENTRAL AMERICAN REFUGEE CRISIS].

47. *Id.* Growing numbers of noncitizens from Haiti and countries in Africa and Asia have presented at the United States-Mexico border, as well. See, e.g., Alexandra Zavis, *The Desperate Trek: The Sharp Rise in Non-Latin American Migrants Trying to Cross into the U.S. from Mexico*, L.A. TIMES (Dec. 22, 2016), <http://www.latimes.com/projects/la-fg-immigration-trek-america-tijuana/> [<https://perma.cc/4CYC-BVU5>] (noting that in 2016 “some 15,000 migrants from outside Latin America passed through” the Mexican state of Baja California en route to the United States).

48. UNDERSTANDING THE CENTRAL AMERICAN REFUGEE CRISIS, *supra* note 46, at 3; see also Kirk Semple, *Fleeing Gangs, Central American Families Surge Toward U.S.*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/13/world/467esource/fleeing-gangs-central-american-families-surge-toward-us.html> [<https://perma.cc/CA98-B4ZT>]; AM. BAR ASS'N, FAMILY IMMIGRATION DETENTION: WHY THE PAST CANNOT BE PROLOGUE 14 (2015), <https://www.americanbar.org/content/dam/aba/administrative/Immigration/FamilyDetentionReport2015.authcheckdam.pdf> [<https://perma.cc/SPDQ-H7P8>] (“Homicide rates in the Northern Triangle are among the highest in the world, with Guatemala, El Salvador, and Honduras consistently reporting three of the five highest national murder rates.”); *Central America: Femicides and Gender-Based Violence*, CTR. FOR GENDER & REFUGEE STUDIES, <https://cgrs.uchastings.edu/our-work/central-america-femicides-and-gender-based-violence> [<https://perma.cc/RZ35-PAP8>] (noting that Guatemala, Honduras, and El Salvador have some of the world's highest rates of violence against women and girls).

49. *Total Family Unit Apprehensions by Month, FY 2013–2017*, U.S. BORDER PATROL (Dec. 2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Total%20Monthly%20Family%20Units%20by%20Sector%2C%20FY13-FY17.pdf> [<https://perma.cc/QZ59-WJBF>] [hereinafter *Total Family Unit Apprehensions*].

50. Musalo & Lee, *supra* note 45, at 139 (suggesting that the “temporary drop” in arriving asylum seekers in early 2015 “likely reflects [the United States's] interdiction policies [in Mexico] rather than any ‘deterrent’ effect of harsh policies at or within [the United States's] own borders”).

51. *Total Family Unit Apprehensions*, *supra* note 49.

Most families appear to merit humanitarian relief.⁵² According to the United Nations High Commissioner for Refugees, persons “fleeing epidemic levels of violence, including gender-based violence, in El Salvador, Guatemala, and Honduras . . . present a clear need for international protection.”⁵³

Nonetheless, in mid-2014, the Obama administration undertook “an aggressive deterrence strategy” to dissuade asylum seekers from fleeing the Northern Triangle for the United States.⁵⁴ Federal officials launched a media campaign in Central America that emphasized the dangers of the journey through Mexico and suggested that persons escaping violence would “not get papers” in the United States.⁵⁵ The federal government also aided operations in Mexico to apprehend Central American asylum seekers en route to the United States.⁵⁶ Meanwhile, DHS escalated detention policies, contracting with private prison corporations to open two family detention centers in the border region.⁵⁷ Asylum-seeking families who in prior years would have been released before their hearings were detained on prohibitively high bonds, sometimes for months.⁵⁸ As Secretary of Homeland Security Jeh

52. LARA DOMÍNGUEZ, ADRIENNE LEE & ELIZABETH LEISERSON, U.S. DETENTION AND REMOVAL OF ASYLUM SEEKERS: AN INTERNATIONAL HUMAN RIGHTS LAW ANALYSIS 1 (2016), https://law.yale.edu/system/files/area/center/schell/human_rights_first_-_immigration_detention_-_final_-_20160620_for_publication.pdf [<https://perma.cc/98DE-LBZY>].

53. WOMEN ON THE RUN, *supra* note 29, at 2.

54. David Nakamura, *Obama Calls for “Aggressive Deterrence Strategy” for Border Crossers*, WASH. POST (June 30, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/06/30/obama-calls-for-aggressive-deterrence-strategy-for-border-crossers/> [<https://perma.cc/4MCA-UCWN>].

55. Valerie Hamilton, *How the US Is Trying to Deter Migrants from Central America—with Music*, PUB. RADIO INT’L (July 17, 2014), <https://www.pri.org/stories/2014-07-17/how-marimba-beat-helping-us-border-patrol-deter-migrants-coming-border> [<https://perma.cc/NYF8-9T9U>]; UNDERSTANDING THE CENTRAL AMERICAN REFUGEE CRISIS, *supra* note 46, at 1.

56. See ADAM ISACSON, MAUREEN MEYER & HANNAH SMITH, INCREASED ENFORCEMENT AT MEXICO’S SOUTHERN BORDER: AN UPDATE ON SECURITY, MIGRATION, AND U.S. ASSISTANCE 15–18 (2015), https://www.wola.org/files/WOLA_Increased_Enforcement_at_Mexico’s_Southern_Border_Nov2015.pdf [<https://perma.cc/Q3F7-2H7J>].

57. See Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html?hp&action=click&pgtype=Homepage&module=second-column-region®ion=top-news&WT.nav=top-news&_r=0 [<https://perma.cc/8TMQ-V76D>].

58. See, e.g., *A One-Week Snapshot: Human Rights First at Dilley Family Detention Facility Post-Flores Ruling*, HUM. RTS. FIRST (Aug. 6, 2015), <https://www.humanrightsfirst.org/re-source/one-week-snapshot-human-rights-first-dilley-family-detention-facility-post-flores-ruling> [<https://perma.cc/92YX-769G>] (documenting forty cases in the Dilley family detention center in which “ICE officers set initial bonds at \$7,000 to \$9,500,” which the typical “indigent asylum-seeking famil[y] cannot pay”); DHS ADVISORY COMM. REPORT, *supra* note 5, at 15–16 n.65

Johnson explained, such measures were calculated to send a clear message to Central Americans seeking protection in the United States: “we will send you back.”⁵⁹

The Obama administration’s deterrence strategy also relied on expedited removal.⁶⁰ Created by IIRIRA, expedited removal allows individual immigration officers to order the removal, without administrative or judicial review, of a person found inadmissible at a port of entry or within 100 miles of a United States border.⁶¹ Before 2014, the government declined to place families apprehended at or near the border into expedited removal proceedings.⁶² Parents with children were typically assigned to regular removal proceedings, which entail a hearing before an IJ, and given a notice to appear in immigration court at a later date.⁶³ As migration continued to rise, however, DHS changed course. It began to place family units into expedited removal proceedings, partly to deter other families from seeking asylum in the United States.⁶⁴ The strategy was of a piece with DHS’s widespread reliance on expedited removal during the Obama years. In total, over 141,000 noncitizens were subjected to expedited removal in fiscal year 2016, accounting for 41.6% of all removals from the United States.⁶⁵

Detention and expedited removal quickly became central to the Trump administration’s approach to border enforcement, as well. Among Donald Trump’s first actions as President was an executive order on “border security” in which he reiterated his administration’s commitment to enforcing expedited removal.⁶⁶ In February 2017,

(collecting reports on disproportionately high bonds in family detention centers); Manning, *supra* note 45, at Part XI (stating that “[a] preliminary review” of the data gathered by a pro bono project at the family detention center in Artesia, New Mexico, showed “that the mean bond amount set by the Headquarters immigration judges was \$17,000” during the first several weeks of the facility’s existence).

59. *Review of the President’s Emergency Supplemental Request for Unaccompanied Children and Related Matters: Hearing Before the S. Comm. On Appropriations*, 113th Cong. 14 (2014) (prepared statement of Hon. Jeh Johnson, Sec’y of Dep’t of Homeland Sec.) [hereinafter *Surge Hearing*].

60. Taylor & Johnson, *supra* note 45, 193–201 (describing Obama administration’s use of expedited removal against Central American asylum seekers).

61. 8 U.S.C. § 1225(b)(1)(A) (2012); *see infra* section II.C.

62. DHS ADVISORY COMM. REPORT, *supra* note 5, at 3.

63. *Id.*

64. *Id.*

65. BAKER, *supra* note 22, at 8.

66. Exec. Order 13,767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793, 8796 (Jan. 30, 2017) (directing the Secretary of the Department of Homeland Security to “take appropriate action to apply, in his sole and unreviewable discretion, the provisions of

Secretary of Homeland Security John Kelly issued a memorandum directing DHS to expand immigration detention, escalate its use of expedited removal, and “enhance” credible fear determinations.⁶⁷ A few months later, the Trump administration terminated the Central American Minors refugee program, an Obama-era initiative that allowed parents with lawful status in the United States to petition for refugee status on behalf of children in the Northern Triangle.⁶⁸ Advocates fear that such measures will jeopardize the claims for protection of bona fide asylum seekers from Central America and nations around the world.⁶⁹

B. “Credible Fear of Persecution” Is the Linchpin of an Asylum Claim

Asylum is a form of humanitarian protection granted to a noncitizen who is present in the United States and qualifies as a “refugee” under United States law.⁷⁰ The Immigration and Nationality Act (INA) defines

section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II)”.

67. Memorandum from John Kelly, Sec’y of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., et al. (Feb. 20, 2017), at 6–7, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [<https://perma.cc/HG2D-3DKL>] (claiming that “[t]he surge of illegal immigration at the southern border has overwhelmed federal agencies and resources and has created a significant national security vulnerability to the United States”). An internal DHS memo from July 2017 indicates that the Trump administration is considering proposals that would allow DHS to place into expedited removal proceedings noncitizens apprehended in the interior of the country who cannot prove that they have been present in the United States for at least ninety days. See Abigail Hauslohner & David Nakamura, *In Memo, Trump Administration Weighs Expanding the Expedited Deportation Powers of DHS*, WASH. POST (July 14, 2017), https://www.washingtonpost.com/world/national-security/in-memo-trump-administration-weighs-expanding-the-expedited-deportation-powers-of-dhs/2017/07/14/ce5f16b4-68ba-11e7-9928-22d00a47778f_story.html [<https://perma.cc/73SJ-HAVC>].

68. *U.S. Program for Central American Child Refugees to End Thursday*, REUTERS (Nov. 8, 2017), <https://www.reuters.com/article/us-usa-immigration-minors/u-s-program-for-central-america-n-child-refugees-to-end-thursday-idUSKBN1D905C> [<https://perma.cc/5KG5-7QK7>].

69. See, e.g., HARVARD LAW SCH. IMMIGRATION & REFUGEE CLINICAL PROGRAM, THE IMPACT OF PRESIDENT TRUMP’S EXECUTIVE ORDERS ON ASYLUM SEEKERS 1 (2017), <https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.pdf> [<https://perma.cc/CY5S-PSBL>] (arguing that President Trump’s executive orders of January 2017 “represent a dramatic restriction of access to asylum and other immigration protections in the United States”); HUMAN RIGHTS FIRST, ASYLUM UNDER THREAT: IMPACT OF PRESIDENT TRUMP’S IMMIGRATION EXECUTIVE ORDERS AND THE DEPARTMENT OF HOMELAND SECURITY’S MEMORANDA ON ASYLUM SEEKERS 1 (2017), <http://www.humanrightsfirst.org/sites/default/files/hrf-asylum-under-threat.pdf> [<https://perma.cc/FU5V-H7WF>] (stating that the measures outlined in the executive orders “would multiply the many challenges already faced by refugees attempting to navigate the U.S. asylum process”).

70. 8 U.S.C. § 1158(b)(1) (2012).

a “refugee” as any person who is outside that person’s country of nationality and is “unable or unwilling to return to” that country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁷¹ Additionally, the INA codifies the United States’s nonrefoulement obligations under international law.⁷² In accord with the United Nations 1967 Protocol Relating to the Status of Refugees, the United States must refrain from removing a noncitizen to a country if the noncitizen’s “life or freedom would be threatened in that country because of the” noncitizen’s “race, religion, nationality, membership in a particular social group, or political opinion.”⁷³

The asylum application process takes either an affirmative or a defensive posture.⁷⁴ Affirmative applicants apply for asylum after having entered the United States on a valid non-immigrant visa or without inspection.⁷⁵ They thus identify themselves to DHS through their applications to USCIS, a division of DHS.⁷⁶ In contrast, defensive applicants apply for asylum as a defense to removal, typically after being apprehended by DHS.⁷⁷ Defensive claims are filed with EOIR, the division of the Department of Justice that houses the immigration courts.⁷⁸ Persons who present at a port of entry without valid entry documents and are found to have a “credible fear of persecution” are placed into regular removal proceedings under section 240 of the INA, where they may assert defensive claims for protection.⁷⁹

The credible fear screening process effectively begins before an asylum seeker is referred to the Asylum Office for a credible fear interview. When individuals without entry documents arrive at the border or an airport, they undergo “secondary inspection[s]” by Customs

71. *Id.* § 1101(a)(42)(A).

72. *See* U.N. HIGH COMM’N FOR REFUGEES, 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 30 (1967), <http://www.unhcr.org/3b66c2aa10.html> [<https://perma.cc/2NRK-DZAF>] (barring any country from “expel[ling] or return[ing] . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened”).

73. 8 U.S.C. § 1231(b)(3)(A) (codifying the nonrefoulement standard).

74. T. ALEXANDER ALENIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 796–97 (8th ed. 2016).

75. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *STAN. L. REV.* 295, 305 (2007).

76. *Id.*

77. *Id.* at 305–06.

78. *Id.* at 306.

79. *See* 8 U.S.C. § 1225(b)(1)(B)(ii) (2012); *id.* § 1229a(a)(1).

and Border Protection (CBP), a division of DHS.⁸⁰ During secondary inspections, CBP officers are required to read a brief statement that describes the protections available to foreign nationals who have suffered torture or persecution in their home countries.⁸¹ Additionally, officers must ask undocumented arrivals questions designed to shed light on their eligibility for asylum, and must record and read back the statements made in reply.⁸² If at any point an individual expresses intent to seek asylum or fear of returning home, the officer must detain and refer the individual for a credible fear interview with an asylum officer.⁸³

Credible fear interviews are intended to ferret out fraudulent and clearly nonviable asylum claims. The INA defines “credible fear of persecution” to mean “that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.”⁸⁴ As USCIS’s Asylum Division Officer Training Course instructs, “the credible fear ‘significant possibility’ standard of proof can be best understood as requiring that the applicant ‘demonstrate a substantial and realistic possibility of succeeding,’ but not requiring the applicant to show that he or she is more likely than not going to succeed when before an immigration judge.”⁸⁵ In making this determination, the asylum officer must consider

80. Pistone & Hoeffner, *supra* note 35, at 173; *see also* Michele R. Pistone & Phillip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 37 (2001).

81. Pistone & Hoeffner, *supra* note 35, at 169.

82. *Id.*; *see also* 8 C.F.R. § 235.3(b)(4) (2017). Specifically, officers must ask: (1) “Why did you leave your home country or country of last residence?” (2) “Do you have any fear or concern about being returned to your home country or being removed from the United States?” (3) “Would you be harmed if you are returned to your home country or country of last residence?” ALLEN KELLER ET AL., STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 13 (2005), https://www.uscirf.gov/sites/default/files/472esources/stories/pdf/asylum_seekers/evalCredibleFear.pdf [<https://perma.cc/N52E-XKYA>].

83. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 235.3(b)(4) (stating that if an applicant “indicates an intention to apply for asylum, or expresses a fear of persecution or torture,” the “examining immigration officer shall record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern”).

84. 8 U.S.C. § 1225(b)(1)(B)(v); *see also* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,317 (Mar. 6, 1997) (stating that federal immigration officials would be trained to “ensure that the [credible fear] standard is implemented in a way which will encourage flexibility and a broad application of the statutory standard”).

85. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM DIVISION OFFICER TRAINING COURSE, CREDIBLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS 16 (2017) https://drive.google.com/file/d/0B_6gbFPjVDoxY0FCczROOFZ4SVk/edit [<https://perma.cc/56Z3-REVH>] [hereinafter 2017 LESSON PLAN ON CREDIBLE FEAR].

whether the asylum seeker's case "presents novel or unique issues that merit consideration in a full hearing before an immigration judge," as well as the "credibility" of the asylum seeker.⁸⁶ Credibility may be informed by the consistency of the asylum seeker's statements during the credible fear interview with those made to the inspecting CBP officer, the level of detail contained in the asylum seeker's statements, and the asylum seeker's "demeanor, candor, and responsiveness."⁸⁷

DHS has adopted a number of regulations intended to ensure that bona fide asylum seekers are spared expedited removal.⁸⁸ The asylum officer must "conduct the [credible fear] interview in a nonadversarial manner, separate and apart from the general public."⁸⁹ If the asylum officer determines that an individual "is unable to participate effectively in the interview because of illness, fatigue, or other impediments, the officer may reschedule the interview."⁹⁰ Additionally, the asylum officer must ensure that the asylum seeker "has an understanding of the credible fear determination process" before proceeding with the interview.⁹¹ Interpretation services must be provided if the asylum seeker is "unable to proceed effectively in English" and the officer "is unable to proceed competently in a language chosen by the alien."⁹² At the end of the interview, the asylum officer must create "a summary of the material facts as stated by the applicant," and is required to "review the summary with the alien and provide the alien with an opportunity to correct any errors therein."⁹³ A negative credible fear determination is not final until approved by a supervisory officer.⁹⁴ Finally, as discussed in more detail below, an asylum seeker who has received a negative credible fear determination may ask an IJ to review that determination before being removed.⁹⁵

In theory, these measures ensure that persons with meritorious claims are allowed to present their cases in immigration courts; in practice, their uneven execution makes noncitizens vulnerable to erroneous removals.⁹⁶

86. 8 C.F.R. § 208.30(e)(2)–(4).

87. 2017 LESSON PLAN ON CREDIBLE FEAR, *supra* note 85, at 18–23.

88. *See* Pistone & Hoeffner, *supra* note 35, at 169.

89. 8 C.F.R. § 208.30(d).

90. *Id.* § 208.30(d)(1).

91. *Id.* § 208.30(d)(2).

92. *Id.* § 208.30(d)(5).

93. *Id.* § 208.30(d)(6); *see also* 8 U.S.C. § 1225(b)(1)(B)(iii)(II) (2012).

94. 8 C.F.R. § 208.30(e)(7).

95. *See infra* section II.A.

96. *See infra* section I.D.

The next section examines expedited removal, the fast track to deportation that asylum seekers face when the credible fear interview's procedural safeguards fail.

C. *Expedited Removal Allows Immigration Officers to Order Individuals Removed from the United States, Typically Without Administrative or Judicial Review*

Expedited removal is a summary and ostensibly efficient process; it deputizes individual immigration officers near borders and ports of entry to issue removal orders against individuals found ineligible to enter the United States. This section examines the purposes of expedited removal, the types of noncitizens who are subjected to expedited removal, and the limitations on judicial review of expedited removal orders.

1. *Individuals Who Lack Valid Entry Documents May Face Expedited Removal*

IIRIRA, which implemented expedited removal, took effect on April 1, 1997.⁹⁷ Before that date, undocumented persons apprehended inside the United States were deemed "deportable," and were placed in "deportation" proceedings.⁹⁸ In contrast, individuals who arrived at a United States port of entry without valid entry documents were deemed "excludable," and were placed in exclusion proceedings.⁹⁹ Persons alleged to be excludable were entitled to an individualized hearing in an immigration court.¹⁰⁰ They enjoyed the right to retain counsel and could testify, present witnesses, and cross-examine witnesses before the IJ.¹⁰¹ Asylum seekers in exclusion proceedings were not required to establish

97. For a discussion of the major changes in immigration law that IIRIRA introduced, as well as the political climate in which it was adopted, see U.S. Representative Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349 (2005).

98. See *Landon v. Plasencia*, 459 U.S. 21, 25 (1982).

99. See *id.* ("The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission.").

100. Bo Cooper, *Procedures for Expedited Removal and Asylum Screening Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1501, 1502 (1997).

101. See 8 U.S.C. §§ 1225(b), 1226(a) (1994); Cooper, *supra* note 100, at 1502 (noting that proceedings before an immigration court resemble "the classic common law adversarial model").

a “credible fear of persecution” in a screening interview before being afforded a full hearing in immigration court.¹⁰²

IIRIRA dramatically changed the procedures that govern the inspection and removal of persons arriving at a United States port of entry. Animating the Act were concerns among lawmakers and immigration officials that the immigration system was crippled by administrative backlogs and rife with abuses, including frivolous asylum claims.¹⁰³ IIRIRA was intended to promote efficiency, shore up the southern border, and assuage national security concerns.¹⁰⁴ As a 1996 House Judiciary Committee report explained, “[O]ur immigration laws should enable the prompt admission of those who are entitled to be admitted, the prompt exclusion or removal of those who are not so entitled, and the clear distinction between these categories.”¹⁰⁵

To that end, IIRIRA authorizes individual immigration officials to remove two categories of “inadmissible aliens” without a hearing: noncitizens who attempt to obtain admission to the United States by means of fraud or material misrepresentation,¹⁰⁶ and noncitizens who lack valid entry documents.¹⁰⁷ Persons may be expeditiously removed if they present at a United States port of entry, such as an airport or a border patrol station, and fall into one of these two categories.¹⁰⁸ Additionally, expedited removal applies to individuals who are present in the United States without having been admitted or paroled, are apprehended within 100 miles of an international border, and cannot prove that they have been physically present in the United States for the preceding fourteen days.¹⁰⁹ In contrast to regular removal

102. *An Overview of Asylum Policy: Hearing Before the Subcomm. of the S. Comm. on the Judiciary*, 107th Cong. 14 (2001) (statement of Karen Musalo, Hastings College of the Law).

103. *See Cooper*, *supra* note 100, at 1501.

104. *See Lofgren*, *supra* note 97, at 351–52 (describing the national media’s focus on immigration fraud after the 1993 World Trade Center bombing).

105. H.R. REP. NO. 104-469, pt. 1, at 111 (1996).

106. *See* 8 U.S.C. § 1182(a)(6)(C) (2012) (deeming inadmissible “[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States”).

107. *See id.* § 1182(a)(7) (deeming inadmissible “any immigrant at the time of application for admission who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document . . . and a valid unexpired passport”).

108. *Id.* § 1225(b)(1)(A)(iii)(I)–(II). The statute grants the Attorney General the authority to expand by regulation the scope of expedited removal to individuals apprehended inside the United States without having been admitted or paroled who cannot establish that they have been continuously present for two or more years.

109. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,878 (Aug. 11, 2004) (extending expedited removal provisions to persons apprehended within 100 miles of the

proceedings under section 240 of the INA, expedited removal proceedings are severely abbreviated. If an immigration officer determines that a person satisfies the criteria for expedited removal, and that person does not express intent to apply for asylum or fear of persecution, then “the officer shall order the alien removed from the United States without further hearing or review.”¹¹⁰

Given its summary nature, expedited removal places enormous authority in the hands of frontline immigration officers. As immigration advocates pointed out after IIRIRA was adopted, the expedited removal invests in “relatively untrained” officials “a power previously given only to highly trained immigration judges: to return people to the land from which they came.”¹¹¹ Indeed, in expedited removal proceedings CBP officers “serve as both prosecutor and judge—often investigating, charging, and making a decision all within the course of one day.”¹¹² Even as it devolved the authority to remove noncitizens, IIRIRA heightened the costs of removal for noncitizens. A person subjected to expedited removal is barred from reentering the United States—even as a visitor—for a period of five years.¹¹³ And a person previously ordered expeditiously removed who seeks to enter the United States in violation of the five-year bar is ineligible for most forms of relief under the INA, including asylum.¹¹⁴ Expedited removal thus has serious long-term consequences for people who may face persecution in their home countries and seek to return to the United States in the future.¹¹⁵

southern border); Press Release, Dep’t of Homeland Sec., Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border (Jan. 30, 2006), <https://www.hsdh.org/?view&did=476965> [<https://perma.cc/SK59-UPHK>] (announcing expansion of expedited removal to apply to individuals apprehended within 100 miles of the northern border).

110. 8 U.S.C. § 1225(b)(1)(A)(i).

111. PHILLIP G. SCHRAG, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* 196 (2000); *see also* Ramji, *supra* note 35, at 135 (“[P]otentially life-threatening decisions are made by immigration officers, whose untrained judgments are ineligible for review by any court or judicial body.”).

112. AM. IMMIGRATION COUNCIL, *REMOVAL WITHOUT RECOURSE: THE GROWTH OF SUMMARY DEPORTATIONS FROM THE UNITED STATES* 1 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research_h/removal_without_recourse.pdf [<https://perma.cc/3LCS-62KP>].

113. 8 U.S.C. § 1182(a)(9)(A)(i).

114. *Id.*

115. *See, e.g.*, Stillman, *supra* note 18, at 37–38 (describing the experience of Elena, a Honduran citizen who was subjected to expedited removal after receiving a negative credible fear determination, was tortured in Honduras after being removed, and was barred from applying for asylum because of the prior expedited removal order).

The humanitarian criticisms of expedited removal came swiftly, and two decades later show no signs of abating.¹¹⁶ Some observers and human rights advocates have contended that expedited removal puts the United States in violation of its statutory and international law obligations; they insist that the system needs dramatic reform, if not wholesale repeal.¹¹⁷ But today, it seems safe to say, expedited removal is here to stay: Republican and Democratic administrations alike have made expedited removal a centerpiece of their border enforcement policies, and Congress has never seriously considered repealing the regime.¹¹⁸ If the Trump administration's 2017 executive actions are any indication, expedited removal will become even more entrenched in the coming years.¹¹⁹

Inherent to expedited removal is a “conflict between speedy decision-making and fair and accurate decision-making.”¹²⁰ This tension is especially evident in the limits IIRIRA imposes on judicial review of expedited removal orders.

2. *A Noncitizen Ordered Expeditiously Removed Typically Lacks Recourse to Administrative or Judicial Review*

Expedited removal orders are effectively immune from administrative and judicial review. IIRIRA bars the “administrative appeal” of an expedited removal order, except where a person claims to have been admitted for permanent residence, to already possess refuge or asylee

116. See, e.g., Pistone & Hoeffner, *supra* note 35, at 170–71 (describing early calls for elimination of expedited removal); Manning, *supra* note 45 (reprising similar criticisms of expedited removal in the context of present-day Central American migration).

117. See Pistone & Hoeffner, *supra* note 35, at 170 (“As early as 1999 . . . the Advisory Committee on Religious Freedom Abroad, which reported to the Secretary of State and to the President of the United States, called for the ‘[r]epeal of expedited removal,’ noting that repeal ‘should be a high priority.’”). Over fifty organizations, including Amnesty International, the American Civil Liberties Union, and Human Rights Watch, joined the Lawyers Committee’s call for repeal. *Id.* at 171 n.18 (discussing THE LAWYERS COMM. FOR HUMAN RIGHTS, IS THIS AMERICA? THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN AMERICA, app. 4 (2000) (calling for repeal of expedited removal)).

118. See, e.g., Hauslohner & Nakamura, *supra* note 67 (noting that the Obama administration maintained the Bush administration’s expedited removal guidelines).

119. *Id.* (describing the Trump administration’s proposal to apply expedited removal to noncitizens apprehended anywhere in the United States who cannot prove they have been present for at least ninety days); see also Exec. Order 13,767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793, 8796 (Jan. 30, 2017).

120. Pistone & Hoeffner, *supra* note 35, at 168 (stating that “the inherent conflict between speedy decision-making and accurate and fair decision-making was well understood” when IIRIRA was adopted).

status, or to be a United States citizen.¹²¹ Similarly, federal courts lack jurisdiction to review the merits of an expedited removal order,¹²² “any other cause or claim arising from or relating to the implementation or operation” of an expedited removal order,¹²³ or “a decision by the Attorney General to invoke the provisions” that activate expedited removal.¹²⁴ Accordingly, no court may issue relief in an action pertaining to an expedited removal order.¹²⁵

Moreover, IIRIRA largely strips Article III courts of jurisdiction of habeas corpus proceedings that arise from expedited removal orders. Federal courts may only exercise habeas review of an expedited removal order to determine three distinct inquiries: whether the petitioner is a noncitizen; whether the petitioner was ordered expeditiously removed; and whether the petitioner possesses status as a lawful permanent resident, refugee, or asylee.¹²⁶ A court that adjudicates an expedited removal-related habeas claim thus may consider whether an order was issued against the petitioner; however, it lacks jurisdiction to ask if the petitioner is actually inadmissible or merits a form of immigration relief.¹²⁷

Systemic challenges to expedited removal have floundered. Shortly after IIRIRA took effect, the American Immigration Lawyers Association timely filed an action challenging the regime’s legality and constitutionality.¹²⁸ On appeal, the D.C. Circuit found that the Association and other immigrant rights organizations lacked third-party standing to raise statutory or constitutional claims on behalf of persons

121. 8 U.S.C. § 1225(b)(1)(C) (2012).

122. *Id.* § 1252(a)(2)(A)(i).

123. *Id.*

124. *Id.* § 1252(a)(2)(A)(ii).

125. *Id.* § 1252(e)(1)(A). Nor may a court certify a class in a suit challenging expedited removal. *See id.* § 1252(e)(1)(B).

126. *Id.* § 1252(e)(2).

127. *See, e.g.,* *Pena v. Lynch*, 815 F.3d 452, 455 (9th Cir. 2015) (court lacked jurisdiction to consider petition for review of expedited removal where petitioner did not raise any claim listed in the statutory exceptions to the bar against judicial review); *Brumme v. INS*, 275 F.3d 443 (5th Cir. 2001) (under IIRIRA, judicial review of an expedited removal order following a person’s attempted entry into United States is limited to whether an order has in fact been issued and whether petitioner is the same person subject to the order); *see also* H.R. REP. NO. 104-828, at 220 (1996) (Conf. Rep.) (“The habeas corpus proceeding shall not address whether the alien is actually admissible or entitled to any relief from removal.”).

128. *See Am. Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000).

subjected to expedited removal.¹²⁹ Because IIRIRA requires that challenges to its provisions be filed within sixty days of implementation, the court's decision to dismiss the Association's suit cemented the statutory framework that governs expedited removal.¹³⁰

In subsequent years, advocates attempted to use habeas petitions as vehicles to challenge the constitutionality of expedited removal, particularly as it applies to asylum seekers.¹³¹ Most recently, in *Castro v. Department of Homeland Security*,¹³² twenty-eight Central American families who faced expedited removal filed habeas petitions in federal district court.¹³³ The plaintiffs, women and children who claimed to have fled persecution in their home countries, received negative credible fear determinations when they arrived in the United States.¹³⁴ Citing deficiencies in their credible fear interviews, the plaintiffs argued that DHS had violated their Fifth Amendment procedural due process rights.¹³⁵ Additionally, the plaintiffs maintained that IIRIRA's jurisdiction-stripping provisions violate the Suspension Clause of the United States Constitution.¹³⁶ The Third Circuit affirmed the district court's decision to dismiss the plaintiffs' action.¹³⁷ It held that the court lacked subject matter jurisdiction of the plaintiffs' claims, and that the protections of the Suspension Clause do not extend to noncitizens in expedited removal proceedings.¹³⁸ The fate of *Castro* and other habeas

129. *Id.* at 1363–64. According to the court, “It would be inconsistent with the ‘properly limited role of the courts’ for us to use [the sixty-day deadline] provision as the basis for expanding jurisdiction through the back door of third party standing.” *Id.* at 1364.

130. 8 U.S.C. § 1252(e)(3)(A)–(B); see H.R. REP. NO. 104-828, at 220 (“This limited provision for judicial review does not extend to determinations of credible fear and removability in the case of individual aliens, which are not reviewable.”).

131. See, e.g., *García de Rincon v. Dep’t of Homeland Sec.*, 539 F.3d 1133, 1140–42 (9th Cir. 2008) (court lacked jurisdiction over habeas petition collaterally attacking expedited removal order); *M.S.P.C. v. U.S. Customs & Border Prot.*, 60 F. Supp. 3d 1156, 1165–66 (D.N.M. 2014) (IIRIRA's restrictions on habeas review did not violate Suspension Clause rights of petitioner, an asylum seeker who received a negative credible fear determination and was ordered expeditiously removed); *Diaz Rodriguez v. U.S. Customs & Border Prot.*, No. 14-CV-2716, 2014 WL 4675182, at *3–4 (W.D. La. Sept. 18, 2014) (court lacked jurisdiction over habeas petition challenging expedited removal order, even though petitioner alleged procedural and substantive deficiencies in his credible fear interview).

132. 163 F. Supp. 3d 157 (E.D. Pa. 2016), *aff’d*, 835 F.3d 422 (3d Cir. 2016), *cert. denied*, ___ U.S. ___, 137 S. Ct. 1581 (2017).

133. *Id.* at 158.

134. *Castro*, 835 F.3d at 428.

135. *Id.*

136. *Id.* at 429.

137. *Id.* at 425.

138. *Id.*

challenges suggest that the statutory bases of the expedited removal regime are impervious to judicial review, even when asylum seekers claim that expedited removal would threaten their lives or liberty.¹³⁹

D. The Credible Fear Determination Process is Fraught with Potential for Error

The asylum-seeking families at the center of *Castro* all claimed to have escaped gang-related or sexual violence in the Northern Triangle.¹⁴⁰ Laura Flores-Pichinte fled with her young daughter after her partner raped her and physically abused her and her daughter.¹⁴¹ Maria Martinez Nolasco escaped after a gang leader sexually assaulted her and threatened to kidnap her son in retaliation for her decision to reject his advances.¹⁴² Lesly Griscelda Cruz Matamoros sought asylum with her twelve-year-old daughter after gang members made sexual threats against her daughter.¹⁴³ Once in the United States, they and other families with similar claims were deemed not to have credible fears of persecution.¹⁴⁴ In challenging their expedited removal orders, the *Castro* families asserted that their credible fear interviews were infected by official noncompliance and procedural errors.¹⁴⁵ For example, the families alleged that the asylum officers who conducted the interviews failed to provide written explanations of their negative credible fear determinations; rather, the officers “simply checked a box on a form stating that the applicant did not meet a particular legal requirement, without any explanation,” impeding the families’ ability to challenge the officers’ conclusions.¹⁴⁶ They also argued that asylum officers applied a heightened standard for gauging credible fear, instead of the “significant possibility” threshold mandated by statute.¹⁴⁷

139. *But see* Gerald L. Neuman, *The Habeas Corpus Suspension Clause after Boumediene v. Bush*, 110 COLUM. L. REV. 537, 577 (2010) (arguing that the statutory preclusion of judicial review “of issues of law arising in expedited removal from the interior [of the United States] . . . violates the Suspension Clause” (emphasis omitted)).

140. Petition for Writ of Certiorari at 11–12, *Castro v. Dep’t of Homeland Sec.*, ___ U.S. ___, 137 S. Ct. 1581 (2017) (No. 16-812).

141. *Id.* at 12.

142. *Id.*

143. *Id.*

144. *Id.* at 12–13.

145. *Id.* at 13.

146. *Id.*

147. *Id.*

The *Castro* plaintiffs' habeas claims alleged deficiencies in the credible fear determination process that human rights advocates and other observers have documented since expedited removal's inception. This section examines those deficiencies. It then discusses recent USCIS guidance on credible fear interviews, which appears to elevate the burden an asylum seeker must satisfy to avoid expedited removal.

1. *A Credible Fear Determination May Be Affected by Official Noncompliance, Inadequate Interpretation, and the Absence of Representation*

As recent reports by the American Immigration Council, the U.S. Commission on International Religious Freedom, and other organizations demonstrate, the credible fear determination process produces uneven and often arbitrary results.¹⁴⁸ Two sets of factors elevate the risk of error. First, frontline immigration officers fail to comply consistently with safeguards designed to ensure that bona fide asylum seekers are spared expedited removal.¹⁴⁹ Second, circumstances beyond asylum seekers' control, including the absence of counsel and the effects of trauma, disability, or untreated medical needs, may compromise credible fear determinations.¹⁵⁰

In some cases, CBP officers' noncompliance with the requirements of secondary inspections heightens the risk that asylum seekers will fail their credible fear interviews.¹⁵¹ During the credible fear interview, the asylum officer must take into account the consistency of the asylum seeker's statements with those made to CBP during secondary inspection.¹⁵² A 2016 report by the U.S. Commission on International Religious Freedom, a governmental entity tasked with studying the impact of expedited removal on asylum seekers, documented numerous

148. See AM. CIVIL LIBERTIES UNION, *AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM* (2014), https://www.aclu.org/sites/default/files/assets/120214-expeditedremoval_0.pdf [<https://perma.cc/VH4F-VNUW>] [hereinafter *AMERICAN EXILE*]; ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL* (2016), <http://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf> [<https://perma.cc/C8PJ-VMCE>] [hereinafter *USCIRF 2016 REPORT*]; HUMAN RIGHTS FIRST, *HOW TO PROTECT REFUGEES AND PREVENT ABUSE AT THE BORDER: BLUEPRINT FOR U.S. GOVERNMENT POLICY* (2014), <http://www.humanrightsfirst.org/sites/default/files/Asylum-on-the-Border-final.pdf> [<https://perma.cc/5A5U-YG5P>] [hereinafter *HOW TO PROTECT REFUGEES*]; SHEPHERD & BERNSTEIN MURRAY, *supra* note 34.

149. USCIRF 2016 REPORT, *supra* note 148, at 20–23.

150. SHEPHERD & BERNSTEIN MURRAY, *supra* note 34, at 8–22.

151. See *AMERICAN EXILE*, *supra* note 148, at 41.

152. See 2017 LESSON PLAN ON CREDIBLE FEAR, *supra* note 85, at 18–23.

cases in which CBP officers failed to record accurately asylum seekers' answers to questions about their fears of persecution.¹⁵³ In three of the five credible fear interviews the Commission observed, "asylum seekers' I-867 forms indicated 'no' answers to the fear questions in his or her [border patrol] interview, but the asylum seeker said that s/he had articulated a fear or was not asked."¹⁵⁴ Moreover, asylum seekers reported that CBP officers "inquired into their fear claims in detail, and/or dismissed assertions of fear," failed to read asylum seekers' statements back to them, and "pressured" asylum seekers to sign their statements.¹⁵⁵ One officer even told the Commission "he only reads back the contents if the interviewee requests it because it takes too long."¹⁵⁶ Such noncompliance not only makes it more likely that an asylum seeker will be removed without a credible fear interview, but also increases the odds of an adverse credibility finding during the interview itself.¹⁵⁷

Furthermore, the thoroughness and quality of credible fear interviews vary dramatically between asylum officers and detention centers. The family detention center in Artesia, New Mexico, which opened in June 2014, provides an illustrative example. Between September 2013 and June 2014, approximately 77% of asylum seekers who underwent credible fear interviews nationwide received positive determinations.¹⁵⁸ In contrast, just 37.8% of the families detained in Artesia received positive credible fear determinations in June and the first part of July 2014.¹⁵⁹ Pro bono attorneys and other visitors to Artesia reported that officials unevenly applied the substantive and procedural safeguards intended to protect asylum seekers with potentially viable claims.¹⁶⁰ As one Human Rights First attorney explained, "I met with families, including victims of domestic violence, who had cases that met the legal standard for asylum, yet did not pass a credible fear screening."¹⁶¹

153. USCIRF 2016 REPORT, *supra* note 148, at 21 (noting that CBP officers often recorded identical, "clearly erroneous" answers during secondary inspection).

154. *Id.*

155. *Id.*; AMERICAN EXILE, *supra* note 148, at 39.

156. USCIRF 2016 REPORT, *supra* note 148, at 20 n.25.

157. See AMERICAN EXILE, *supra* note 148, at 41.

158. U.S. CITIZENSHIP & IMMIGRATION SERVS., CREDIBLE FEAR WORKLOAD REPORT SUMMARY: FY 2014, https://www.uscis.gov/sites/default/files/USCIS/Outreach/Credible_Fear_and_Reasonable_Fear_FY14_Q3.pdf [<https://perma.cc/7XNU-8GZD>].

159. Complaint at 31, *M.S.P.C. v. Johnson*, No. 1:14-cv-01437 (D.D.C. Aug. 22, 2014).

160. See Manning, *supra* note 45, Part III.

161. *Lawsuit Challenges Credible Fear Process for Immigrant Families Held in Artesia Detention Facility*, HUM. RTS. FIRST (Aug. 22, 2014), <https://www.humanrightsfirst.org/press->

Asylum officers “misappl[ie]d the [credible fear] standard,” neglected to “prob[e] the asylum seeker for enough detail,” and “conduct[ed] interviews with the asylum seeker’s minor children in the room.”¹⁶² Similar problems have plagued credible fear interviews of women and children held in the family detention center in Dilley, Texas.¹⁶³ According to Shalyn Fluharty, managing attorney of the Dilley Pro Bono Project, the strength and nature of an asylum seeker’s claim bear less on the outcome of a credible fear interview than “the asylum officer [the applicant] happen[s] to draw and the Asylum Office supervisor.”¹⁶⁴

Additionally, immigration officials may fail to furnish adequate interpretation services during the credible fear interview, contrary to the regulations.¹⁶⁵ Interpretation is typically provided through telephone or video.¹⁶⁶ The flaws of remote interpretation are well documented: technological glitches impede communication and lead to erroneous interpretation; telephonic interpreters are less likely to gain the trust of the non-English-speaking party; and interpreters cannot see when a speaker is confused or scared.¹⁶⁷ Speakers of “rare” or indigenous languages face especially high barriers to effective communication with asylum officers.¹⁶⁸ A DHS Advisory Committee recently concluded that indigenous asylum seekers’ cases “are probably not receiving fair processing” because DHS “systematically fails to provide appropriate

release/lawsuit-challenges-credible-fear-process-immigrant-families-held-artesia-detention [https://perma.cc/BC2].

162. *Id.*

163. SHEPHERD & BERNSTEIN MURRAY, *supra* note 34.

164. Telephone Interview with Shalyn Fluharty, Managing Attorney, Dilley Pro Bono Project (Jan. 8, 2018).

165. *See* 8 C.F.R. § 208.30(d)(5) (2017); DHS ADVISORY COMM. REPORT, *supra* note 5, at 96.

166. *See* DHS ADVISORY COMM. REPORT, *supra* note 5, at 95–97.

167. *Id.* at 97; Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 941 (2015).

168. Eagly, Shafer & Whalley, *supra* note 45, at 140. In Eagly, Shafer, and Whalley’s study on family detention, “[f]amily detainees were . . . more likely to speak indigenous languages than the rest of the detained population. In [their] family detention sample, 635 detainees (4% of the total) spoke an indigenous Mexican, Central, or South American language.” *Id.* at 142. In 2013, the Asylum Office began dispensing with credible fear determinations for rare language speakers for whom interpretation could not be found within forty-eight hours, opting to serve such individuals with a notice to appear in immigration court for section 240 removal proceedings. *Id.* at 141 n.193. DHS has failed to implement that policy consistently, at least in the Dilley family detention center. Telephone Interview with Shalyn Fluharty, *supra* note 164. Since late 2017, the Houston Asylum Office has conducted numerous credible fear interviews of rare language speakers without adequate interpretation. In one case, the Asylum Office attempted to interview an indigenous language speaker no less than thirteen times before issuing a notice to appear. *Id.*

language access” for such individuals.¹⁶⁹ In one illustrative case, a Guatemalan woman detained in Texas was interviewed in Spanish, rather than her native indigenous language.¹⁷⁰ “Her credible fear interview notes demonstrated that the asylum officer understood a particular event took place on ten occasions; but the woman maintains she was referring to ten perpetrators. Before she could secure legal counsel, she was removed.”¹⁷¹ In other cases involving speakers of indigenous or rare languages, credible fear interviews have quite literally “resemble[d] a game of telephone”: the asylum seeker communicates telephonically with a speaker of the rare language, who then communicates telephonically with a Spanish interpreter, who in turn conveys telephonically the information to the asylum officer.¹⁷²

Compounding these problems, asylum seekers rarely enjoy the benefit of legal counsel before or during credible fear screenings.¹⁷³ Like all noncitizens in removal proceedings, asylum seekers have no right to publicly funded legal counsel at any stage in the asylum application process.¹⁷⁴ Asylum seekers are subjected to mandatory detention between secondary inspection and the credible fear interview, severely impeding their ability to access representation.¹⁷⁵ Barriers to representation are acute in the family detention context. As Professor Ingrid Eagly, Steven Shafer, and Jana Whalley show in their forthcoming study on family detention, “[a]ll five family detention centers used from 2001 to 2016 were located in small or rural cities, with populations of only a few thousand” and limited social and legal

169. DHS ADVISORY COMM. REPORT, *supra* note 5, at 99, 79.

170. Brief of Refugee and Human Rights Organizations and Scholars as Amici Curiae in Support of Petitioners at 15, *Castro v. Dep’t of Homeland Sec.*, __ U.S. __, 137 S. Ct. 1581 (2017) (No. 16-812).

171. *Id.*

172. DHS ADVISORY COMM. REPORT, *supra* note 5, at 98. The barriers to fair processing faced by speakers of rare languages are so high that the DHS Advisory Committee recommended that such persons “should not be detained, but should rather be released with a Notice to Appear, on their own recognizance or with the support of a case management support program.” *Id.* at 80.

173. *See* Eagly, Shafer & Whalley, *supra* note 45, at 131–36. Eagly, Shafer, and Whalley found that just 23% of asylum seekers in family detention centers had legal representation during IJ review of their negative credible or reasonable fear determinations. *Id.* at 134. Presumably, even fewer asylum seekers, in both family and non-family detention, have legal counsel during the credible fear interview itself. *See also* HOW TO PROTECT REFUGEES, *supra* note 148, at 8.

174. 8 U.S.C. § 1229a(b)(4)(A) (2012); *see also* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 3 (2015) (“[I]mmigrants have a right to counsel in immigration court, but not at the expense of the government.”).

175. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (asylum seekers “shall be detained pending a final determination of credible fear of persecution and, if not found to have such a fear, until removed”); 8 C.F.R. § 235.3(c) (2017).

services.¹⁷⁶ Valiant pro bono efforts, such as the Artesia Project, the CARA Pro Bono Project, and ALDEA, have expanded asylum-seeking families' access to legal advice in detention.¹⁷⁷ But ICE and private prison personnel have repeatedly encumbered legal representatives' ability to consult with detained asylum seekers.¹⁷⁸ And even in detention centers with pro bono services, some asylum seekers enter their credible fear interviews without having met with an attorney or attended legal presentations on the asylum process.¹⁷⁹

Absence of legal counsel matters; asylum seekers who do not understand the purpose or nature of a credible fear interview, or expedited removal generally, cannot be assumed to be aware of the information an asylum officer would find helpful to assessing their claims.¹⁸⁰ CBP is required to give asylum seekers a form that explains the credible fear process.¹⁸¹ This document is sure to be unintelligible to an asylum seeker who does not read or write. And in some ports of entry, the form may not be available in languages other than English or Spanish.¹⁸² Unsurprisingly, according to the U.S. Commission on

176. Eagly, Shafer & Whalley, *supra* note 45, at 129.

177. *See id.* at 132–33; Manning, *supra* note 45 (describing the Artesia Project). The Dilley Pro Bono Project, formerly the CARA Family Detention Pro Bono Project, serves protection-seeking mothers and children detained in Dilley, Texas. The project began as a collaboration between the Catholic Legal Immigration Network, the American Immigration Council, the Refugee and Immigrant Center for Education and Legal Services, and the American Immigration Lawyers Association. *See Who*, CARA PRO BONO PROJECT, <http://caraprobono.org/partners/> [<https://perma.cc/NHQ4-UAR6>]. ALDEA, a pro bono project based in Reading, Pennsylvania, serves families detained in the Berks County Residential Center. *See About Us*, ALDEA—THE PEOPLE'S JUST. CTR., <https://aldeapjc.org> [<https://perma.cc/AJV4-MQWG>].

178. Eagly, Shafer & Whalley, *supra* note 45, at 130–31; Complaint, Dilley Pro Bono Project v. U.S. Immigration & Customs Enf't, No. 1-17-cv-01055 (D.D.C. Jun. 1, 2017) (challenging ICE's revocation of pro bono project legal assistant's access to Dilley detention center); Letter from CARA Pro Bono Project to Megan Mack & John Roth, Dep't of Homeland Sec. (Sept. 30, 2015), <http://www.aila.org/advo-media/press-releases/2015/coercion-intimidation-detained-mothers-children/complaint-regarding-residential-center-in-dilley> [<https://perma.cc/TTY5-26DJ>] (submitting a "Complaint Regarding Coercion and Violations of the Right to Counsel at the South Texas Family Residential Center in Dilley, Texas").

179. *See HOW TO PROTECT REFUGEES*, *supra* note 148, at 8 ("Even [in detention centers] where [legal orientation] presentations exist, asylum seekers are generally not provided with legal presentations until *after* they have passed their credible fear interviews, and their cases are pending before the immigration courts." (emphasis in original)).

180. *Asylum Hearing*, *supra* note 27, at 134 (statement of Mary Meg McCarthy, Executive Director, Heartland Alliance's National Immigrant Justice Center) ("When individuals do not fully understand the legal process or their rights, the CFI [credible fear interview] process is more likely to erroneously exclude bona fide asylum seekers rather than permit entry to fraudulent applicants.").

181. USIRF 2016 REPORT, *supra* note 148, at 50.

182. *Id.* (describing case in which French-speaking asylum seeker received credible fear information in English).

International Religious Freedom, “[o]ne overriding impression from [the Commission’s] interviews of detained asylum seekers is their insufficient understanding of what is happening to them in the Expedited Removal process, and the fear, stress and uncertainty that this causes.”¹⁸³

Such fear, stress, and uncertainty may be aggravated by the credible fear interview itself. Asylum law is notoriously complex. Although asylum officers are instructed to avoid legalese during interviews, asylum seekers are not always asked to explain their fears in lay terms. As one complaint, filed in 2014 on behalf of Central American mothers and children detained in Artesia, documented, “mothers have been asked, and are expected to be able to accurately answer, questions such as, ‘Have you ever been harmed or threatened in El Salvador because you belong to a group that is seen as different or special by society in your home country?’ or ‘Are you a member of a particular social group?’”¹⁸⁴ One plaintiff, who had fled persecution by a criminal gang, “thought that she was being asked whether she belonged to a group of criminals or delinquents.”¹⁸⁵ She received a negative credible fear determination.¹⁸⁶ This mother’s experience is not atypical among asylum seekers who lack the benefit of counsel before the credible fear interview.¹⁸⁷

Whether or not they retain counsel, asylum seekers often confront an additional barrier: the effects of trauma. Asylum seekers suffer from post-traumatic stress disorder, depression, anxiety, and other psychological conditions at rates significantly higher than the general population.¹⁸⁸ These conditions may undermine an asylum seeker’s

183. *Id.*

184. Complaint at 27, *M.S.P.C. v. Johnson*, No. 1:14-cv-01437 (D.D.C. Aug. 22, 2014). The Artesia detention center closed in December 2014, and plaintiffs voluntarily dismissed their complaint on Jan. 30, 2015.

185. *Id.*

186. *Id.*

187. *See id.* at 27–28 (describing cases where asylum seekers received negative credible fear determinations after being asked to explain their fears of persecution in legal terms); Wil S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html?mcubz=0&_r=0 [<https://perma.cc/6SEZ-U7H2>] (documenting case where IJ affirmed negative credible fear determination after the asylum seeker told him she did not belong to a particular “social group”).

188. U.N. HIGH COMM’R FOR REFUGEES, REFUGEE RESETTLEMENT: AN INTERNATIONAL HANDBOOK TO GUIDE RECEPTION AND INTEGRATION 233 (2002), <http://www.unhcr.org/3d98623a4.html> [<https://perma.cc/723C-MBH2>] (citing clinical studies that found rates of PTSD in refugees ranged between 39% and 100%, compared to 1% for the general population); Letter from CARA Pro Bono Project to Megan Mack & John Roth, Dep’t of Homeland Sec. 2 (Mar. 28, 2016), <http://www.aila.org/advo-media/press-releases/2016/cara-crcl-complaint-concerns-regarding->

claim in multiple ways.¹⁸⁹ First, people who have suffered severe physical or psychological abuse or persecution may struggle to recount their history in linear fashion, lessening their “credibility” in the view of an asylum officer trained to evaluate a claim on the basis of the interviewee’s consistency.¹⁹⁰ Moreover, asylum seekers may fear disclosing why they fled to the United States.¹⁹¹ Women escaping gender-related violence, for example, often hesitate to tell male officials about the abuse they have suffered.¹⁹² Such trauma may be exacerbated by the “inhumane conditions” that asylum seekers experience in CBP “holding cells” along the southern border, while awaiting transfer to detention centers.¹⁹³ According to one recent report, untreated medical problems, including “physical manifestations of psychological trauma . . . regularly inhibit detained mothers and children from fully describing in their credible fear interviews their past experiences and fears of future persecution.”¹⁹⁴

detention [<https://perma.cc/H5NH-GMQ4>] [hereinafter CARA Project Complaint to DHS] (complaint with respect to “Ongoing Concerns regarding the Detention and Fast-Track Removal of Children and Mothers Experiencing Symptoms of Trauma”) (“[M]any detained families suffer from Post-traumatic Stress Disorder (PTSD), anxiety, depression, or other emotional or cognitive disorders.”).

189. See SHEPHERD & BERNSTEIN MURRAY, *supra* note 34, at 9.

190. See, e.g., Derrick Silove, Zachary Steel & Charles Watters, *Policies of Deterrence and the Mental Health of Asylum Seekers*, 284 JAMA 604, 605 (2000) (“Asylum seekers with symptoms of posttraumatic stress disorder (PTSD) or depression may experience psychological dissociation under pressure and in such an altered state of awareness may fail to give appropriate answers.”); JULIAN GOJER & ADAM ELLIS, POST-TRAUMATIC STRESS DISORDER AND THE REFUGEE DETERMINATION PROCESS IN CANADA: STARTING THE DISCOURSE 10 (2014), <http://www.unhcr.org/53356b349.pdf> [<https://perma.cc/Z3PQ-F56V>] (“Recent studies have demonstrated that mental health, including PTSD, can have an adverse effect on asylum seeker testimony and their ability to develop and produce ‘credible’ legal/medical evidence.” (citation omitted)).

191. SHEPHERD & BERNSTEIN MURRAY, *supra* note 34, at 4. Shalyn Fluharty emphasizes the role of trauma in negative credible fear determinations in the Dilley family detention center. Asylum seekers who fail their credible fear interviews tend to “avoid [discussing] the most traumatic incidents of harm” during their interviews, “which often are the incidents most important to their case[s].” Telephone Interview with Shalyn Fluharty, *supra* note 164.

192. See SHEPHERD & BERNSTEIN MURRAY, *supra* note 34, at 4; Letter on Due Process Violations, *supra* note 1, at 2.

193. HUMAN RIGHTS WATCH, IN THE FREEZER: ABUSIVE CONDITIONS FOR WOMEN AND CHILDREN IN U.S. IMMIGRATION HOLDING CELLS 7 (2018), https://www.hrw.org/sites/default/files/report_pdf/uscrd0218_web.pdf [<https://perma.cc/9CG5-X3X9>] (noting that “[u]ndocumented families taken into custody by US immigration agents at or near the US-Mexico border are generally placed in holding cells for several hours to several days, and sometimes a week or more”). The holding cells are often referred to as “*hieleras* (‘freezers,’” because they are “uncomfortably cold.” *Id.* at 1–2. A 2015 “mental health assessment” found that “[t]ime in CBP holding cells” was “the most difficult and traumatic period of detention for women and children.” *Id.* at 3 (quotation marks omitted).

194. SHEPHERD & BERNSTEIN MURRAY, *supra* note 34, at 13.

In sum, the protections built into the credible fear process do not always function as they should. Official noncompliance during secondary inspections increases the risk of adverse credibility findings during the credible fear interview. Inadequate interpretation, lack of legal counsel, and the effects of trauma may also foil an asylum seeker's credible fear determination.

2. *Recent USCIS Guidance on Credible Fear Interviews Appears to Heighten the "Significant Possibility" Standard*

By design, the credible fear interview is not a full-blown asylum hearing. As the Department of Justice explained when expedited removal took effect, "[t]he credible fear standard sets a low threshold of proof of potential entitlement to asylum; many [noncitizens] who have passed the credible fear standard will not ultimately be granted asylum."¹⁹⁵ In recent years, however, asylum experts have argued that new USCIS guidance has effectively elevated the threshold of proof required to support a positive credible fear finding.¹⁹⁶ Those criticisms have centered on revisions to the Asylum Office's credible fear lesson plans, which train asylum officers to conduct credible fear interviews.¹⁹⁷

In February 2014, citing an uptick in credible fear referrals, USCIS issued a revised lesson plan on credible fear determinations.¹⁹⁸ The revisions included a new, three-part test that asylum officers must use

195. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997).

196. See, e.g., TAHIRIH JUSTICE CTR., SUMMARY OF FEBRUARY 13, 2017 ASYLUM DIVISION LESSON PLAN IMPLEMENTING EXECUTIVE ORDERS: POSSIBLE IMPACTS ON SURVIVORS OF DOMESTIC AND SEXUAL VIOLENCE 3 (2017), <https://www.tahirih.org/wp-content/uploads/2017/03/Tahirih-Summary-of-CFI-RFI-Changes-3.6.17.pdf> [<https://perma.cc/8KX7-LZZV>] (describing the 2017 lesson plan as "bring[ing] . . . initial screening interviews closer to becoming final adjudications"); Memorandum from Bill Ong Hing to John Lafferty, Chief of USCIS Asylum Div. 2 (Apr. 21, 2014), <http://static.squarespace.com/static/50b1609de4b054abacd5ab6c/t/53558353e4b02071f74ee3c4/1398113107754/Response%20to%20USCIS%20Credible%20Fear%20Memo,%20Bill%20Hing,%2004.21.2014.pdf> [<https://perma.cc/34F9-Q6WQ>] [hereinafter Bill Ong Hing Memorandum] ("The new credible fear standards are misleading[] and inappropriate."); HUMAN RIGHTS WATCH, "YOU DON'T HAVE RIGHTS HERE": U.S. BORDER SCREENING AND RETURNS OF CENTRAL AMERICANS TO RISK OF SERIOUS HARM (2014), <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk> [<https://perma.cc/ZM8Q-ZSZA>] (documenting fall in positive credible fear determinations after new credible fear guidance was issued in February 2014).

197. See TAHIRIH JUSTICE CTR., *supra* note 196, at 1.

198. Memorandum from John Lafferty, Chief, USCIS Asylum Div., to Asylum Office Dirs. et al. regarding Release of Updated Asylum Division Officer Training Course Lesson Plan, Credible Fear of Persecution and Torture Determinations (Feb. 28, 2014), <http://www.aila.org/infonet/uscis-asylum-revised-credible-fear-lesson-plan> [<https://perma.cc/DL2J-LS24>].

when determining whether a person has a credible fear of persecution: only where the asylum seeker's testimony is "credible, persuasive, and . . . specific" can the asylum officer find the "significant possibility" standard satisfied.¹⁹⁹ Moreover, departing from previous guidance, the 2014 lesson plan stated that the "significant possibility" standard for gauging credible fear does not encompass claims determined to have a "minimal or mere possibility, of success."²⁰⁰ At the same time, the revised lesson plan included a new, highly detailed section on asylum case law.²⁰¹ As Professor Bill Ong Hing noted, the lesson plan's attempted "overview of asylum law" not only failed clarify "important variations in the law from federal circuit to federal circuit," but also erroneously suggested that the standard of proof for a positive credible fear determination is equivalent to that required for a grant of asylum.²⁰²

In February 2017, in response to President Trump's January 2017 executive order on border security, USCIS issued yet another updated lesson plan on credible fear determinations.²⁰³ Strikingly, the 2017 lesson plan deleted preexisting instructions to asylum officers to find in favor of an asylum seeker "[w]hen there is reasonable doubt regarding the outcome of a credible fear determination."²⁰⁴ Additionally, the new lesson plan removed language that emphasized the preliminary nature of the credible fear interview.²⁰⁵ Finally, the lesson plan directs asylum officers to give more weight to "inconsistencies between the applicant's initial statement" to CBP during secondary inspection, stating that "[s]uch inconsistencies may provide support for a negative credibility finding . . ."²⁰⁶ As explained above, the transcripts from border

199. U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM DIVISION OFFICER TRAINING COURSE: CREDIBLE FEAR 13–14 (2014), <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf> [<https://perma.cc/S4UF-S5Z8>].

200. *Id.* at 14.

201. *Id.* at 22–33.

202. Bill Ong Hing Memorandum, *supra* note 196, at 7–8.

203. Memorandum from John Lafferty, Chief, USCIS Asylum Div., to All Asylum Office Personnel on Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plans (Feb. 13, 2017), https://drive.google.com/file/d/0B_6gbFPjVDoxY0FCczROOFZ4SVk/edit [<https://perma.cc/69VT-368R>]; Tal Kopan, *Trump Admin Quietly Made Asylum More Difficult in the U.S.*, CNN (Mar. 8, 2017), <http://www.cnn.com/2017/03/08/politics/trump-immigration-crackdown-asylum/index.html> [<https://perma.cc/K43L-JWH4>].

204. TAHIRIH JUSTICE CTR., *supra* note 196, at 3 (quoting U.S. CITIZENSHIP & IMMIGRATION SERVS., ASYLUM DIV. OFFICER TRAINING COURSE: CREDIBLE FEAR 16 (Feb. 28, 2014), <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf> [<https://perma.cc/C4M8-UFGK>]).

205. *Id.*

206. 2017 LESSON PLAN ON CREDIBLE FEAR, *supra* note 85, at 21.

interviews have been shown to be rife with inaccuracies, a factor the lesson plan neglects to mention.²⁰⁷ The cumulative effect of these changes, some observers argue, is a heightened credible fear standard. Asylum experts have criticized the 2017 changes as “bring[ing] credible fear screenings closer to full adjudications,”²⁰⁸ sending a message to asylum officers to “be stricter,”²⁰⁹ and increasing the risk of erroneous negative credible fear findings.²¹⁰

Since releasing the 2017 lesson plan on credible fear determinations, the Trump administration has expressly called for elevating the standard of proof in credible fear interviews.²¹¹ Under an administration that construes “asylum reform” as “expand[ing] the use of expedited removal” and “return[ing] asylum seekers to safe third countries,”²¹² procedural safeguards in the credible fear determination process acquire even greater importance. The next Part describes two such safeguards: IJ review of negative credible fear determinations, and RFRs, whereby an asylum seeker may receive a revised credible fear determination or a second credible fear interview.

II. IJ REVIEW AND RFRS: PROTECTIONS AGAINST ERRONEOUS EXPEDITED REMOVAL

The credible fear interview process should be reformed to better protect asylum seekers. More than twenty years after IIRIRA, however, the system by which the government screens entering noncitizens is deeply entrenched. And the current administration’s hostility to immigrants and refugees renders meaningful reform of the credible fear interview process a far-off goal.

Absent comprehensive reform, asylum seekers and their advocates can invoke two administrative mechanisms to challenge negative

207. See *infra* text accompanying notes 151–57.

208. Reena Arya, *USCIS Revises Protection Screening Lesson Plans*, CATHOLIC LEGAL IMMIGR. NETWORK, INC., <https://cliniclegal.org/resources/uscis-revises-protection-screening-lesson-plans> [<https://perma.cc/6G59-XXJA>].

209. Kopan, *supra* note 203 (quoting former USCIS director León Rodríguez).

210. TAHIRIH JUSTICE CTR., *supra* note 196, at 4–5; Letter from Eleanor Acer, Senior Director of Refugee Protection, Human Rights First, to Lori Scialabba, Acting Director of U.S. Citizenship and Immigration Servs. & John Lafferty, Asylum Div. (Mar. 10, 2017), <http://www.humanrightsfirst.org/sites/default/files/credible-fear-lesson-plan-letter.pdf> [<https://perma.cc/MRG8-N95N>].

211. Attorney General Jeff Sessions, Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> [<https://perma.cc/YH6U-TUSU>].

212. *Id.*

credible fear determinations. The first permits an IJ to review a negative credible fear determination in a truncated hearing. The second allows an asylum seeker whose negative credible fear determination has been affirmed by an IJ to submit an RFR to the asylum office. Each year hundreds of negative credible fear determinations are reversed through IJ review and RFRs.²¹³ Some asylum seekers who have received positive credible fear findings through these mechanisms have “textbook” asylum cases.²¹⁴ Others have claims that are less certain to succeed at the merits phase.²¹⁵

This Part examines the mechanics of IJ review and RFRs. It begins by summarizing IJ review. It then explores the legislative and administrative history of IJ review, the record on which IJ review is based, and the role of counsel during IJ review. Next, this Part discusses RFRs. It takes a close look at two aspects of the RFR process: the burden of proof an asylum seeker must satisfy and stays of removal pending consideration of RFRs.

A. An Asylum Seeker Who Receives a Negative Credible Fear Determination May Seek Review by an Immigration Judge

IIRIRA and its implementing regulations provide that an asylum seeker who has received a negative credible fear determination may request that an IJ “prompt[ly]” review that determination pending the asylum seeker’s removal.²¹⁶ If the IJ finds that the asylum seeker has a credible fear of persecution or torture, the IJ must vacate the asylum

213. See *infra* Part III.

214. See Redacted Immigration Judge Complaint (Aug. 19, 2014), in Manning, *supra* note 45, Part XI (noting that in the summer of 2014, volunteer lawyers affiliated with the American Immigration Lawyers Association observed “several cases [in the Artesia detention center] where an individual had been denied [credible fear] by both the asylum office and IJ, only to meet with [an] attorney and find out there was a textbook asylum case”); Dara Lind, *9 Reasons Why Detaining Immigrant Families Is Turning into a “Shitshow,”* VOX (Aug. 14, 2014), <https://www.vox.com/2014/8/6/5971003/artesia-immigrants-detention-due-process-families-lawyers-asylum-court-border> [<https://perma.cc/5P5F-CRDA>] (detailing case of a lesbian woman from El Salvador who received a negative credible fear determination, despite having what immigration attorney Laura Lichter called “a textbook asylum claim,” and was granted a positive credible determination after a successful RFR).

215. AM. IMMIGRATION LAWYERS ASS’N, DUE PROCESS DENIED: CENTRAL AMERICANS SEEKING ASYLUM AND LEGAL PROTECTIONS IN THE UNITED STATES 23 (2016), www.aila.org/File/DownloadEmbeddedFile/68331 [<https://perma.cc/6ZFG-ZMLF>] (“Northern Triangle asylum seekers remain at a distinct disadvantage in seeking protection from persecution because of the gaps and inconsistencies in the interpretation of gang-related and gender-based asylum claims.”).

216. 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2012); 8 C.F.R. §§ 208.30(g)(2)(i), 1003.42, 1208.30(g)(2)(i) (2017).

officer's order and place the asylum seeker into section 240 removal proceedings.²¹⁷ If the IJ concurs with the asylum officer's negative credible fear finding, the asylum seeker is referred back to DHS and processed for removal.²¹⁸ An IJ's findings on review are not subject to appeal.²¹⁹

On its face, IJ review is a straightforward procedure. When an asylum seeker is found not to have a credible fear of persecution, the asylum officer must ask whether the asylum seeker wishes to have an IJ review the negative decision.²²⁰ An asylum seeker who answers affirmatively will be detained and served with a notice of referral to an IJ; an asylum seeker who refuses to either request or decline the review will be considered to have requested it.²²¹ IJ review must be conducted "as expeditiously as possible," ideally within twenty-four hours of, and no later than seven days after, a negative credible fear determination.²²² The review itself must "include an opportunity for the alien to be heard and questioned by the immigration judge," either in person or through telephone or video connection.²²³ The IJ is provided the written record of the asylum officer's credible fear determination, and, during the proceeding, "may receive into evidence any oral or written statement which is material and relevant to any issue in the review."²²⁴ The question of whether the asylum seeker has demonstrated a "significant possibility" of prevailing on a claim of persecution is reviewed *de novo*.²²⁵ Notably, asylum applicants must remain detained pending IJ review.²²⁶

In sum, IJ review is neither a second credible fear interview nor a merits hearing. Rather, it provides an administrative buffer—a second, ostensibly neutral appraisal of an asylum seeker's fear of returning home—before expedited removal. In assessing the scope and nature of IJ

217. 8 C.F.R. § 1208.30(g)(2)(iv)(B).

218. *Id.* § 1208.30(g)(2)(iv)(A).

219. *Id.*

220. *Id.* § 208.30(g)(1).

221. *Id.* § 208.30(g)(1)(i).

222. 8 U.S.C. 1225(b)(1)(B)(iii)(III) (2012).

223. *Id.*

224. 8 C.F.R. § 1003.42(c).

225. *Id.* § 1003.42(d).

226. 8 U.S.C. 1225(b)(1)(B)(iii)(IV); 8 C.F.R. § 1003.42(g) ("An Immigration Judge shall have no authority to review an alien's custody status in the course of a review of an adverse credible fear determination made by the Service.").

review, it is instructive to examine its legislative and administrative history.

1. *IJ Review Was Intended to Provide a Safety Net for Asylum Seekers with Bona Fide Claims*

IJ review evolved as a compromise measure in a Congress divided between conservatives who wanted to tighten the credible fear screening process and lawmakers keen on preserving protections for asylum seekers. As IIRIRA took shape, refugee advocates urged members of Congress to carve out procedural safeguards for asylum seekers who faced the threat of expedited removal.²²⁷ Midway through the drafting process, Senator Patrick Leahy introduced an amendment that, among other protections, allowed asylum seekers who lost their credible fear determinations to appeal to an IJ before being removed.²²⁸

The Leahy amendment responded to advocates' fears that the new requirement that asylum seekers demonstrate a "significant possibility" of prevailing on their claims, coupled with the fast pace of expedited removal, would put individuals with meritorious cases at risk of removal.²²⁹ In debating the amendment, Senator Leahy and other lawmakers argued that any system that denied asylum seekers with negative credible fear findings "a chance to be heard before a judge" would inevitably send some persecuted persons "back summarily to the hands of [their] abusers."²³⁰ Ultimately, the legislation that became IIRIRA included a vague provision granting asylum seekers the right to request IJ review after receiving a negative credible fear determination.²³¹ It also directed the DOJ to promulgate regulations governing IJ review.²³²

The variant of IJ review enshrined in the final regulations was less robust than some proponents of the Leahy amendment had proposed.

227. SCHRAG, *supra* note 111, at 197–99.

228. *Id.* at 158, 197.

229. *Id.* at 151, 157.

230. 142 CONG. REC. S4461 (daily ed. May 1, 1996) (statement of Sen. Leahy) (discussing importance of administrative review in the context of the case of Fauziya Kasinga, an asylee who fled Togo after being threatened with female genital cutting and whose claim was initially adjudged not credible); *id.* at S4465 (statement of Sen. DeWine) (discussing ultimately successful asylum case of an Indian national who would likely have been summarily excluded under expedited removal).

231. 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2012).

232. *Id.* ("The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge.").

Three aspects of the regulations deserve emphasis. First, during the notice and comment period, immigration attorneys and scholars urged the Immigration and Naturalization Service (INS) to adopt a presumption in favor of IJ review following a negative credible fear determination.²³³ As one commentary argued, “[r]eview should be denied only if the alien affirmatively expresses a desire to abandon the claim for asylum and accepts removal to the home country.”²³⁴ But the INS expressly rejected that approach;²³⁵ the regulations provide that IJ review occurs only if an asylum seeker requests it.²³⁶ Second, advocates encouraged the INS to “favor in-person questioning by the IJ whenever possible,” contending that telephonic or video hearings would compound cultural and linguistic barriers.²³⁷ The regulations ultimately included no such directive in favor of in-person review, however; they allow the IJ to determine whether the hearing will be in person, or by telephone or video.²³⁸ Finally, advocates expressed concern that while the interim regulations allowed asylum seekers to “consult” with persons of their choosing prior to the review, they failed to clarify whether counsel could present issues to the IJ during the review itself.²³⁹ The final regulations remain ambiguous as to the role of counsel during IJ review.²⁴⁰

A survey of the legislative and administrative history of IJ review yields two conclusions. First, IJ review was undoubtedly intended to provide a safety net to asylum seekers who, deprived of the safeguards that predated IIRIRA, received negative credible fear determinations despite having potentially meritorious claims.²⁴¹ Expedited removal writ large prioritizes speed; IJ review was designed to promote accuracy.²⁴² Second, the version of IJ review that emerged in the DOJ’s implementing regulations was far less vigorous than it could have

233. Michele R. Pistone & Philip G. Schrag, *The 1996 Immigration Act: Asylum and Expedited Removal—What the INS Should Do*, 73 INTERPRETER RELEASES 1565, 1578 (1996).

234. *Id.*

235. See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,320 (Mar. 6, 1997) (stating that “the language of [the legislation] clearly provides that the alien has the obligation to request review of a negative credible fear determination”).

236. SCHRAG, *supra* note 111, at 202.

237. Pistone & Schrag, *supra* note 233, at 1578.

238. 8 C.F.R. § 1003.42(c) (2017).

239. SCHRAG, *supra* note 111, at 208.

240. *Id.*

241. Pistone & Schrag, *supra* note 233, at 1578.

242. SCHRAG, *supra* note 111, at 202.

been.²⁴³ Shortly after IIRIRA took effect, one advocate painted a disheartening picture of the potentially toothless nature of IJ review: “[s]ome asylum seekers will be in a star-chamber proceeding where they have no counsel present, no record to examine, and a judge and interpreter which are faceless voices on the telephone.”²⁴⁴ That vision, it turns out, is sometimes not far from the truth.²⁴⁵

2. *IJ Review Is Inconsistently Executed*

For a process with so significant a function, IJ review has been the subject of surprisingly little agency guidance.²⁴⁶ As a result, the scope of IJ review differs between immigration courts and IJs.²⁴⁷ Two aspects of IJ review are especially variable: the evidence an IJ may consider, and the role of counsel before the immigration court.

An IJ has substantial discretion over the nature of the record when conducting a review of a negative credible fear determination. The asylum officer’s “written record of determination” from the credible fear interview forms the basis of IJ review.²⁴⁸ That record consists of both the asylum officer’s interview notes and “a summary of material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer’s analysis of why, in light of such facts, the [applicant] has not established a credible fear of persecution.”²⁴⁹ Additionally, under the regulations governing IJ review, an IJ “may receive into evidence any oral or written statement which is material and relevant to any issue in the review.”²⁵⁰ Practitioners report that IJs take inconsistent approaches to the submission and consideration of evidence

243. *Id.*

244. *Id.* at 316 n.36 (quoting Letter from Martin A. Wenick, Hebrew Immigrant Aid Soc., to Richard A. Sloane, Immigration & Nat’lity Serv. (Jul. 7, 1997)).

245. *See, e.g.*, CARA Project Complaint to DHS, *supra* note 188, at 9–10 (describing case where IJ affirmed the negative credible fear determination of an asylum seeker from El Salvador who was unrepresented during IJ review, struggled to recount the rapes she had suffered, and was later diagnosed with posttraumatic stress disorder).

246. *See* Katharine Ruhl & Christopher Strawn, *Assessing Protection at the Border: Pointers on Credible Fear and Reasonable Fear Interviews*, in 2015 AILA IMMIGRATION PRACTICE POINTERS 741, 748 (2015), <http://www.aila.org/File/Related/14072246a.pdf> [<https://perma.cc/H25L-AK2H>] (“Because appellate review is limited, there is scant guidance on the scope and nature of [IJ] reviews.”).

247. *Id.*

248. 8 C.F.R. § 1003.42(a) (2017).

249. 8 U.S.C. § 1225(b)(1)(B)(iii)(II) (2012); *see also* 8 C.F.R. § 208.30(g)(2)(ii).

250. 8 C.F.R. § 1003.42(c).

that did not feature in the credible fear interview.²⁵¹ Some IJs allow asylum seekers to discuss facts not addressed during the credible fear interview; others, however, “see their role on review as strictly appellate in nature, and will only consider that which was submitted to the [asylum officer] or referenced in the [asylum officer] referral.”²⁵²

The role of counsel during IJ review is another area of uncertainty. The regulations make clear that an asylum seeker may consult with counsel “prior to” the credible fear review, but are silent as to whether an attorney may advocate on behalf of an asylum seeker during the review itself.²⁵³ Just a few days before IIRIRA took effect, Chief Immigration Judge Michael Creppy issued a memorandum to the immigration courts that put forth a narrow reading of the role of counsel.²⁵⁴ Although an asylum seeker may choose to consult with an attorney before IJ review, he wrote, “there is no right to *representation* prior to or *during* the review, either in the statute or the regulation.”²⁵⁵ The memorandum went on to expressly limit an attorney’s ability to advocate during IJ review. “[N]othing in the statute, regulations or this [memorandum],” Creppy stated, “entitles an attorney to make an opening statement, call and question witnesses, cross examine, object to written evidence, or make a closing argument.”²⁵⁶ That circumscribed view of the role of counsel prevails today: the Immigration Court Practice Manual’s section on credible fear reviews echoes the 1997 memorandum almost verbatim, granting IJs unfettered discretion to allow or deny representation during the review.²⁵⁷

251. Ruhl & Strawn, *supra* note 246, at 748; *see also* SHEPHERD & BERNSTEIN MURRAY, *supra* note 34, at 23.

252. Ruhl & Strawn, *supra* note 246, at 748 (“The best practice would be to consult with local practitioners to learn your particular IJ’s approach.”); Telephone Interview Carol Anne Donohoe, Attorney, ALDEA (Feb. 25, 2018) (noting that one IJ who appears remotely at the Berks family detention center refuses to consider any information outside “the four corners” of the credible fear interview).

253. 8 C.F.R. § 1003.42(c).

254. *See INS Reports on the First Three Months of Implementation of Expedited Removal*, 74 INTERPRETER RELEASES 1101, 1103 (1997).

255. Memorandum from Office of the Chief Immigration Judge to All Assistant Chief Immigration Judges et al. (Mar. 25, 1997), at 10, <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/07/97-3.pdf> [<https://perma.cc/C7S8-H6UM>] (emphasis in original).

256. *Id.* at n.10; *see also INS Reports on the First Three Months of Implementation of Expedited Removal*, *supra* note 254, at 1103 (noting that “Sen. [Edward] Kennedy urged the INS to amend the regulations to specifically allow representation of asylum seekers” during IJ review).

257. U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL 125 (2017), <https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf> [<https://perma.cc/C7S8-H6UM>].

Practitioners who have advocated for a broader role for counsel during IJ review have encountered considerable resistance. Pro bono attorneys in family detention centers report that some IJs have refused to allow them to participate in credible fear reviews, even if they have entered an appearance with the immigration court.²⁵⁸ One administrative complaint, filed from Artesia in August 2014, documents a credible fear review in which the IJ informed the attorney that she had “no role” in the proceeding and refused to answer the attorney’s purely procedural questions.²⁵⁹ In the family detention center in Dilley, Texas, “[t]he detainee’s attorney is generally not permitted to speak during the IJ Review or present a theory of the case, case law, or arguments,” but rather “is limited to submitting a declaration and supporting documents . . . that may corroborate the applicant’s testimony.”²⁶⁰ Moreover, pro bono attorneys in family detention centers are typically not notified of IJ review hearings until the day before the hearing, leaving “only a few hours to prepare numerous families for a hearing that could result in their deportation.”²⁶¹ In some cases, attorneys are not notified at all.²⁶² “Consequently, some noncitizens are unable to consult with counsel or other individuals until *after* the IJ has upheld a negative credible fear determination.”²⁶³

EOIR has balked at carving out a greater role for counsel during IJ reviews of negative credible fear determinations. The American Immigration Lawyers Association has pointed out that the regulations do not preclude representation during IJ review and has asked EOIR to consider amending the Immigration Court Practice Manual to require IJs to allow counsel to assume a participatory role.²⁶⁴ To date, EOIR has

258. See Redacted Immigration Judge Complaint (Aug. 19, 2014), in Manning, *supra* note 45, Part XI (describing case where IJ confirmed receipt of an attorney’s notice of appearance in immigration court, only to prohibit attorney from participating in the negative credible fear review of attorney’s client); SHEPHERD & BERNSTEIN MURRAY, *supra* note 34, at 23.

259. Redacted Immigration Judge Complaint (Aug. 19, 2014), in Manning, *supra* note 45, Part XI.

260. SHEPHERD & BERNSTEIN MURRAY, *supra* note 34, at 23; see CARA Project Complaint to DHS, *supra* note 188, at 5–13 (documenting multiple cases in Dilley detention center where IJs refused to allow counsel to participate in IJ reviews of negative credible fear determinations).

261. SHEPHERD & BERNSTEIN MURRAY, *supra* note 34, at 23.

262. *Id.*

263. Brief for Refugee and Human Rights Organizations and Scholars as Amici Curiae Supporting Petitioners at 18, *Castro v. Dep’t of Homeland Security*, __ U.S. __, 137 S. Ct. 1581 (2017) (No. 16-812) (emphasis in original).

264. Meeting Agenda and Minutes, Am. Immigration Lawyers Ass’n & Office of the Chief Admin. Hearing Officer (Oct. 22, 2015), at 7, <https://web.archive.org/web/20170429161921/https://>

declined: it insists that IJs comply with the regulations as long as they allow asylum seekers to “consult” with persons of their choosing before the credible fear review.²⁶⁵

The case of Melina,²⁶⁶ a detained asylum seeker from Guatemala, illustrates IJ review in its most perfunctory form.²⁶⁷ When Melina was fourteen, she was kidnapped and raped by a well-known drug-trafficker.²⁶⁸ A few years later, after again encountering her attacker, she fled Guatemala with her one-year-old son.²⁶⁹ An asylum officer concluded that Melina did not have a credible fear of persecution, and she was ordered removed.²⁷⁰ With the help of an attorney, Melina requested IJ review.²⁷¹ Citing the Immigration Court Practice Manual, the IJ barred Melina’s attorney from participating in the review and did allow Melina to explain why she had struggled to tell her story during the credible fear interview.²⁷² The IJ affirmed Melina’s negative credible fear determination.²⁷³

Melina and her counsel then requested that the Houston Asylum Office reconsider her negative credible fear determination.²⁷⁴ They included in her RFR a psychological evaluation that diagnosed Melina with posttraumatic stress disorder and emphasized the barriers she faced to fully recounting her history of persecution.²⁷⁵ The Asylum Office granted Melina’s RFR.²⁷⁶ After a second credible fear interview, Melina and her son were found to have credible fears of persecution, placed into section 240 removal proceedings, and released from detention.²⁷⁷ The next section sketches the procedures and uncertainties involved in the RFRs that Melina and hundreds of other asylum seekers have submitted to USCIS in recent years.

www.justice.gov/sites/default/files/pages/attachments/2016/03/30/eoir_aila_fall_2015_minutes.pdf
[<https://perma.cc/A44F-XJZ7>].

265. *Id.*

266. Melina is a pseudonym. *See* CARA Project Complaint to DHS, *supra* note 188, at 4 n.11, 10.

267. *Id.* at 10.

268. *Id.*

269. *Id.*

270. *Id.* at 11.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* at 10–11.

276. *Id.* at 11.

277. *Id.*

B. An Asylum Seeker May Request Reconsideration of a Negative Credible Fear Determination Before Removal

In December 1997, the Executive Associate Commissioner for Field Operations of the INS²⁷⁸ issued a memorandum (1997 memorandum) to immigration officials tasked with enforcing expedited removal.²⁷⁹ At the time, expedited removal was just eight months old. The memorandum, which clarified “policy questions, procedural and logistical problems, and qualify assurance concerns,” included a paragraph on the “re-interview of individuals” prior to removal from the United States.²⁸⁰ “[A]t its discretion,” the memorandum stated, the government may “offer a second credible fear interview to any alien even if the alien has not established a credible fear before an asylum officer or after immigration judge review.”²⁸¹ The memorandum provided a standard for adjudicating requests for a second credible fear interview.²⁸² It also directed officials to refrain from removing individuals with outstanding requests for a re-interviews.²⁸³

Two decades later, the 1997 memorandum remains the only publicly available agency guidance on RFRs. Although the memorandum still informs advocacy on behalf of asylum seekers, its directives often seem at odds with the government’s on-the-ground practices in RFR adjudications. This section discusses the current state of the RFR process. It begins by examining the regulatory framework surrounding RFRs. It then sheds light on two aspects of RFRs that have prompted confusion and frustration among immigration attorneys. First, it asks whether the burden of proof an asylum seeker must satisfy for USCIS to grant an RFR has evolved since the 1997 guidance was issued. Second, it examines whether DHS must stay an asylum seeker’s expedited removal pending the adjudication of an RFR.²⁸⁴

278. In March 2003, the functions of the INS were distributed to three divisions within the newly created Department of Homeland Security: United States Citizenship and Immigration Services (USCIS), United States Immigration and Customs Enforcement (ICE), and United States Customs and Border Protection (CBP). See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

279. See *Expedited Removal Policy Guidance*, *supra* note 39, at 1.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. See *infra* sections II.B.2–3.

1. *The RFR Process Is Largely Uncodified*

RFRs are tethered to a single regulation: 8 C.F.R. section 1208.30(g)(2)(iv)(A), which provides that USCIS “may reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge.”²⁸⁵ Alongside the 1997 memorandum, this regulation supplies the official basis of a process by which asylum seekers who have received negative credible fear determinations may try to avoid expedited removal and enter section 240 removal proceedings. After a negative credible fear finding, an asylum seeker may submit an RFR to the regional Asylum Office that conducted the asylum seeker’s initial interview.²⁸⁶ If the RFR is approved, the asylum seeker is granted a second interview, or, in some cases, a positive credible fear determination.²⁸⁷ If the RFR is denied, the asylum seeker is processed for expedited removal.²⁸⁸

Like IJ review of negative credible fear determinations, the RFR process remains largely uncodified.²⁸⁹ The regulation makes no mention of a standard that should inform USCIS’s decision to grant or deny an RFR, the materials on which the asylum officer may base that decision, and the degree of deference, if any, to be afforded the IJ’s affirmance of the initial negative credible fear determination.²⁹⁰ Because an asylum seeker cannot appeal an adverse RFR, there is little agency guidance on the criteria that control RFR adjudication.²⁹¹ As a result, in at least some

285. 8 C.F.R. § 1208.30(g)(2)(iv)(A) (2017).

286. Dree K. Collopy, *Crisis at the Border, Part II: Demonstrating a Credible Fear of Persecution or Torture*, 16-04 IMMIGR. BRIEFINGS 1 (2016); Ruhl & Strawn, *supra* note 246, at 748.

287. 8 C.F.R. § 1208.30(g)(2)(iv)(A).

288. The regulations do not expressly state that an individual whose RFR has been denied is processed for expedited removal; however, hasty removal appears to be implied by the regulations. *Cf. id.* (stating that when an IJ affirms a negative credible fear determination, “the case shall be returned to the Service for removal of the alien”). Anecdotal evidence suggests that persons whose RFRs are denied are often hastily removed. *See, e.g.,* Ernie Collette, #Dilley Dispatches: From Hope to Heartbreak in Forty-Eight Hours, LAW MARGINS (Dec. 14, 2016), <http://lawatthemargins.com/dilleydispatches-hope-heartbreak-forty-eight-hours/> [<https://perma.cc/L6ZN-K8EN>] (describing case where USCIS denied an RFR and ICE removed the asylum seeker within a matter of hours); Letter on Due Process Violations, *supra* note 1, at 5 (describing case where USCIS denied an RFR and ICE removed the asylum seeker less than twenty-four hours later).

289. *See* 8 C.F.R. § 1208.30(g)(2)(iv)(A) (lacking guidance on the standard of review during, and the procedures involved in, RFRs).

290. *Id.*

291. *See* Ruhl & Strawn, *supra* note 246, at 748.

detention centers, the procedures that govern RFRs are variable, personnel-contingent, and susceptible to arbitrary application.²⁹²

2. *An Asylum Seeker Bears the Burden of Proof in an RFR*

The 1997 memorandum directs the Asylum Office to grant an RFR where the asylum seeker has “made a reasonable claim” that “compelling new information concerning the case” will come to light during reconsideration.²⁹³ USCIS has issued no public guidance that modifies that standard. Yet practitioners who represent detained families report that USCIS often denies RFRs filed on behalf of asylum seekers whose fears of persecution were not fully disclosed or probed during the credible fear interview.²⁹⁴

For example, in late 2015, USCIS abruptly adopted what appeared to be a heightened standard for adjudicating the RFRs of women and children detained in the two family detention centers in Texas.²⁹⁵ According to pro bono lawyers, the Houston Asylum Office began granting RFRs only where asylum seekers could demonstrate that “egregious circumstances” informed their negative fear determination.²⁹⁶ Data collected by the CARA Pro Bono Project showed a precipitous drop in RFR grants at the Dilley detention center; in the weeks after October 23, 2015, the denial rate “jumped from 23% to 66%.”²⁹⁷ At the same time, advocates observed, the Asylum Office accelerated RFR adjudications. “Whereas USCIS previously took a week or more,” attorneys noted in December 2015, “the Houston Asylum Office now issues a decision on a request for reconsideration within twenty-four to forty-eight hours, and sometimes on the same day that the request was submitted.”²⁹⁸

The increase in RFR denials coincided with litigation that challenged the prolonged detention of asylum-seeking families.²⁹⁹ In July 2015, a

292. Telephone Interview with Carol Anne Donohoe, Attorney, ALDEA (Feb. 25, 2018) (commenting on cases out of the Berks County Residential Center); Telephone Interview with Shalyn Fluharty, *supra* note 164 (commenting on cases out of the South Texas Family Residential Center); Letter on Due Process Violations, *supra* note 1, at 2–5.

293. *Expedited Removal Policy Guidance*, *supra* note 39, at 1.

294. Telephone Interview with Shalyn Fluharty, *supra* note 164.

295. See Letter on Due Process Violations, *supra* note 1, at 3.

296. *Id.*

297. *Id.* at 3–4.

298. *Id.* at 4.

299. *Id.* at 1.

federal district court judge ruled in *Flores v. Johnson*³⁰⁰ that DHS’s “no-release” policy—under which asylum-seeking families were detained for the duration of their cases—violated the *Flores* settlement of 1997.³⁰¹ That settlement requires the government to release children from immigration custody “without unnecessary delay.”³⁰² While the government’s appeal of the district court ruling was pending, DHS was under pressure to rapidly process families that included children.³⁰³ Heightening the RFR threshold may have helped DHS reduce the average detention-times of family units and profess compliance with the *Flores* settlement.³⁰⁴

Advocates raised the apparent policy shift with federal agency heads, to no avail. In December 2015, a coalition of immigrant rights organizations—the American Immigration Lawyers Association, Human Rights First, the Catholic Legal Immigration Network, and the American Immigration Council—published an open letter to the directors of USCIS and Immigration and Customs Enforcement (ICE).³⁰⁵ Among other concerns, the letter documented numerous cases in which apparently meritorious RFRs had been denied, “le[ading] to the removal of families with viable claims for protection.”³⁰⁶

Around the same time, the two dozen Central American families who would bring habeas challenges in *Castro v. Department of Homeland Security*³⁰⁷ were fighting to remain in the United States to seek asylum.³⁰⁸ After IJs affirmed their negative credible fear determinations, many of the *Castro* families submitted RFRs to the Asylum Office.³⁰⁹ In

300. 212 F. Supp. 3d 864 (C.D. Cal. 2015).

301. *Id.* at 886–87.

302. *See* Stipulated Settlement Agreement, *Flores v. Reno*, No. CV-85-4544-RJK(Px) (C.D. Cal. 1997).

303. *See* *Flores v. Lynch*, 212 F. Supp. 3d 907, 916–17 (C.D. Cal. 2015) (ordering DHS to release detained immigrant children and their parents “without unnecessary delay”); Letter on Due Process Violations, *supra* note 1, at 4.

304. Letter on Due Process Violations, *supra* note 1, at 4.

305. *Id.* at 2–5.

306. *Id.* at 2.

307. 163 F. Supp. 3d 157 (E.D. Pa. 2016), *aff’d*, 835 F.3d 422 (3d Cir. 2016), *cert. denied*, ___ U.S. ___, 137 S. Ct. 1581 (2017).

308. *See* *Castro*, 835 F.3d at 427 (noting that petitioners sought “refuge” in the United States “over a period of several months in late 2015”).

309. Telephone Interview with Carol Anne Donohoe, *supra* note 292; *see also* Bryan Johnson, *DHS’ Massive Fraud on Family Detention*, AMOACHI & JOHNSON (June 14, 2016), <https://amjlaw.com/2016/06/14/dhs-massive-fraud-on-family-detention/> [<https://perma.cc/B4VS-7GUB>] (displaying government data that shows denial of several RFRs filed by *Castro* families).

some cases, single families filed multiple RFRs.³¹⁰ Attorneys vigorously argued that the families satisfied the credible fear threshold.³¹¹ They also alleged that asylum officers had committed serious procedural and substantive errors during the families' credible fear interviews.³¹² But in case after case, the families' RFRs—uniformly meritorious, according to their advocates—were denied.³¹³

Whether or not USCIS has officially sanctioned a harder line on RFRs, practitioners in family detention centers have had little success when invoking the “compelling new information” standard outlined in the 1997 memorandum.³¹⁴ According to Fluharty, the Houston Asylum Office tends to grant RFRs only where the applicant can show that the credible fear interview was undermined by gross procedural deficiencies or official error.³¹⁵ In contrast, the Asylum Office often denies RFRs where asylum seekers seek to disclose information not discussed during credible fear interviews, even when that information would support cognizable asylum claims.³¹⁶ Attorneys in Dilley and Karnes hypothesize that the Houston Asylum Office has adopted a de-facto presumption against the credibility of persons who submit such RFRs.³¹⁷ They also surmise that when adjudicating RFRs, the Asylum Office applies Fifth Circuit asylum precedent, which is hostile to claims that might succeed in other circuits.³¹⁸ Similarly, the Newark Asylum Office, which adjudicates RFRs out of the Berks family detention center, has suggested in recent years that it gives more weight to RFRs that are based on egregious official errors than those that involve new information.³¹⁹ But, one attorney notes, RFR adjudications are opaque and unpredictable, even when representatives make a strong case that an official made a mistake.³²⁰

310. Telephone Interview with Carol Anne Donohoe, *supra* note 292.

311. *Id.*

312. See Petition for Writ of Certiorari at 13, *Castro v. Dep't of Homeland Sec.*, ___ U.S. ___, 137 S. Ct. 1581 (2017) (No. 16-812).

313. Telephone Interview with Carol Anne Donohoe, *supra* note 292; Johnson, *supra* note 309 (displaying government data that shows denial of several RFRs filed by *Castro* families).

314. Telephone Interview with Shalyn Fluharty, *supra* note 164.

315. *Id.* (“We’ve found the compelling new information [standard] to not be particularly persuasive unless . . . the asylum officer screwed up” or the interview suffered from “some sort of procedural flaw that was not the fault of the applicant.”).

316. *Id.*

317. *Id.*

318. *Id.*

319. Telephone Interview with Carol Anne Donohoe, *supra* note 292.

320. *Id.* (describing RFR adjudications as “a crapshoot”).

In any event, detained families who submit RFRs bear onerous and inconsistent burdens of proof. Pro bono attorneys in Dilley and Karnes often include in RFRs psychological evaluations that corroborate applicants' claims and explain what went wrong in the credible fear interview.³²¹ But in many cases, such evidence seems not to carry enough weight with USCIS to overcome the apparent presumption against the credibility of an asylum seeker who produces new or additional information at the RFR phase.³²² Just as the outcome of a credible fear interview may hinge on the asylum officer an applicant happens to draw, the outcome of an RFR is largely contingent on the Asylum Office supervisor who reviews the request—no matter how compelling an applicant's claim for relief.³²³

3. *In Theory, RFRs Should Stay Expedited Removal Orders*

According to publicly available DHS guidance, ICE must stay an expedited removal order if an asylum seeker has a pending RFR.³²⁴ The 1997 memorandum expressly instructs immigration officials to refrain from executing an expedited removal order in a case where an RFR has yet to be decided: officers “should cooperate by continuing to detain [a noncitizen who has submitted a request for reconsideration] until the second adjudication, and potentially also a second review by the immigration judge is completed.”³²⁵ In recent years, DHS communications have reiterated that policy. An internal ICE policy document from 2014, unearthed through Freedom of Information Act requests, directed officials at the Artesia family detention center to stay the removal of asylum seekers who submitted RFRs until the Asylum Office adjudicated the requests.³²⁶ Likewise, a 2015 DHS training manual for supervisors at the Houston Asylum Office suggested that ICE

321. Telephone Interview with Shalyn Fluharty, *supra* note 164; see CARA Project Complaint to DHS, *supra* note 188, at 5–13 (documenting multiple cases in which RFRs included professional psychological evaluations).

322. CARA Project Complaint to DHS, *supra* note 188, at 5–13.

323. *Id.*

324. *Expedited Removal Policy Guidance*, *supra* note 39, at 1.

325. *Id.*

326. See AM. IMMIGRATION COUNCIL, ARTESIA FOIA HIGHLIGHTS 2 (2016) https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/artesia_highlights.pdf [<https://perma.cc/AA2N-2YAF>] (citing Artesia ICE Office of Chief Counsel Procedures of Oct. 31, 2014) (instructing ICE Deputy Chief Counsel to remind ICE officers that DHS “has agreed to place a ‘Z’ hold [staying removal] on residents [with pending RFRs] until the [Artesia Family Residential Center Asylum Pre-Screening Officer] provides notice of his/her decision to accept or deny the motion for reconsideration”).

was supposed to verify that the persons it removed from the Karnes family detention center did not have pending RFRs.³²⁷

On-the-ground practices have not always faithfully reflected that guidance, however. Since 2014, advocates have documented several cases in which DHS removed families who were awaiting re-interviews or had pending RFRs.³²⁸ DHS itself has acknowledged as much: in December 2015, ICE Chief Counsel at the Dilley family detention center informed pro bono attorneys that ICE would no longer honor its “gentlemen’s agreement” to stay the removal of families with outstanding RFRs.³²⁹ That abrupt departure underscores the slippery and uncertain nature of RFRs generally; the “gentlemen’s agreements” that shape RFR protocols are malleable, untethered to precise regulatory commands, and revocable at ICE’s discretion.

In sum, RFRs are by no means a cure-all for the ills of flawed credible fear determinations and IJ reviews. Advocates for detained families have attempted to shape consistent, formal reconsideration protocols.³³⁰ But DHS officials have at times disregarded mutually agreed-upon rules,³³¹ and have apparently adopted a heightened standard for granting RFRs.³³² As a result, the RFR process is circumscribed and personnel-specific.³³³ Such a hole-riddled safety net will inevitably fail to catch asylum seekers who during the credible fear interview do not disclose details pertinent to their claims—whether because of disability, language barriers, or other factors.³³⁴

III. DESPITE THEIR FLAWS, IJ REVIEW AND RFRS HELP PREVENT THE ERRONEOUS REMOVAL OF ASYLUM SEEKERS

On June 24, 2014, DHS opened an immigration detention center in the town of Artesia, New Mexico.³³⁵ Improvised and isolated, the detention center consisted of corrugated steel trailers on a federal law

327. DEP’T OF HOMELAND SEC., SOPS FOR ZHN TEAM TDY TO KARNES 19 (2015), https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies_and_Manuals/Credible_Fear_Guidance.pdf [<https://perma.cc/V6XL-GN3C>].

328. Letter on Due Process Violations, *supra* note 1, at 10.

329. *Id.*

330. *See id.* at 2–12; CARA Project Complaint to DHS, *supra* note 188, at 4–15.

331. *See* Letter on Due Process Violations, *supra* note 1, at 2–12.

332. Telephone Interview with Shalyn Fluharty, *supra* note 164.

333. *See supra* section II.B.

334. *See* Letter on Due Process Violations, *supra* note 1, at 2–12.

335. DHS ADVISORY COMM. REPORT, *supra* note 5, at 150.

enforcement training campus.³³⁶ There the Obama administration moved DHS's expedited removal machinery into high gear.³³⁷ "We have already added resources to expedite the removal, without a hearing before an immigration judge, of adults who come from [El Salvador, Guatemala, and Honduras] without children," DHS Secretary Jeh Johnson told a Senate committee in July 2014.³³⁸ "Artesia is one of several facilities that DHS will use to increase our capacity to hold and expedite the removal of the increasing number of adults with children illegally crossing the southwest border."³³⁹

The detention center soon became a 700-bed "deportation center" for hundreds of Central American women and children.³⁴⁰ Positive credible fear rates in Artesia were grossly disproportionate to the national average.³⁴¹ In the nine months before June 2014, approximately 77% of asylum seekers passed their credible fear interviews.³⁴² In contrast, just 37.8% of the families detained in Artesia were deemed to have a credible fear of persecution during the first seven weeks of the facility's existence.³⁴³ During that period, DHS removed more than 200 women and children to Central America.³⁴⁴

As the weeks passed, volunteer lawyers mobilized in Artesia.³⁴⁵ Between late July and December 2014, teams averaging fourteen lawyers per day provided pro bono assistance to detained families.³⁴⁶ They consulted with mothers before their credible fear interviews, helped families obtain release on bond, and provided representation in

336. Taylor & Johnson, *supra* note 45, at 192–93. El Paso, the closest major city, is more than 200 miles away from Artesia.

337. *Surge Hearing*, *supra* note 59, at 14.

338. *Id.*

339. *Id.* at 15.

340. Manning, *supra* note 45, at Part III; *see also* Cindy Carcamo, *U.S. Sends First Planeload of Moms, Children Back to Honduras*, L.A. TIMES (July 14, 2014), <http://www.latimes.com/world/mexico-americas/la-fg-honduras-deportees-20140714-story.html#page=1> [<https://perma.cc/89UW-Z422>].

341. Manning, *supra* note 45, at Part III.

342. *Credible Fear Workload Report Summary: FY 2014*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/USCIS/Outreach/Credible_Fear_and_Reasonable_Fear_FY_14_Q3.pdf [<https://perma.cc/WSR5-LPWD>].

343. Complaint at 31, *M.S.P.C. v. Johnson*, No. 1:14-cv-01437 (D.D.C. Aug. 22, 2014).

344. Hylton, *supra* note 187.

345. Manning, *supra* note 45, at Part V.

346. *Id.* at Part IX.

immigration court.³⁴⁷ Within one month, the removal rate in Artesia had fallen by 80%, and within two months, by 97%.³⁴⁸

Central to the lawyers' efforts were their successful challenges to families' negative credible fear determinations. With help from remote legal teams, lawyers in Artesia helped mothers request that IJs review their negative credible fear determinations, and represented them during those reviews.³⁴⁹ They also submitted RFRs to USCIS, requesting that the Asylum Office reverse negative credible fear determinations or grant asylum seekers new interviews.³⁵⁰ Between July and October 2014, volunteer attorneys submitted at least twenty-four RFRs to USCIS on behalf of families detained in Artesia.³⁵¹ Twenty of those requests resulted in positive credible fear determinations.³⁵²

This Part examines government data on negative credible fear determinations vacated through IJ review and RFRs, focusing on family detention cases. The data, obtained through Freedom of Information Act requests, reflect outcomes in family detention centers from 2014 to 2016 in Artesia, New Mexico (now closed); Dilley, Texas; Karnes City, Texas; and Berks, Pennsylvania.³⁵³ The data suggest that despite their shortcomings, IJ review and RFRs have prevented the erroneous removal of hundreds of asylum-seeking families.

347. *Id.*

348. *Id.*

349. *Id.*; Victor Nieblas Pradis, *Artesia: A Day in the Tour of Duty, Part I*, THINK IMMIGR. (Oct. 27, 2014), <http://thinkimmigration.org/blog/2014/10/27/artesia-a-day-in-the-tour-of-duty-part-1> [<https://perma.cc/74MW-AXQ6>].

350. *Id.*; see also Letter from Stephen W. Manning, AILA-Coordinated Pro Bono Project Artesia, to the Houston Asylum Office, Request for Review of a Negative Credible Fear Determination (July 2014), https://innovationlawlab.org/wp-content/uploads/2015/01/Asylum-Office-Motion-Reconsider_Redacted.pdf [<https://perma.cc/T6PR-7QNZ>] (sample RFR).

351. See USCIS Asylum Div., *Artesia, Karnes, National Stats*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_Artesia_and_Karnes_Updates_Through_October_2014.pdf [<https://perma.cc/XXU8-2WXV>].

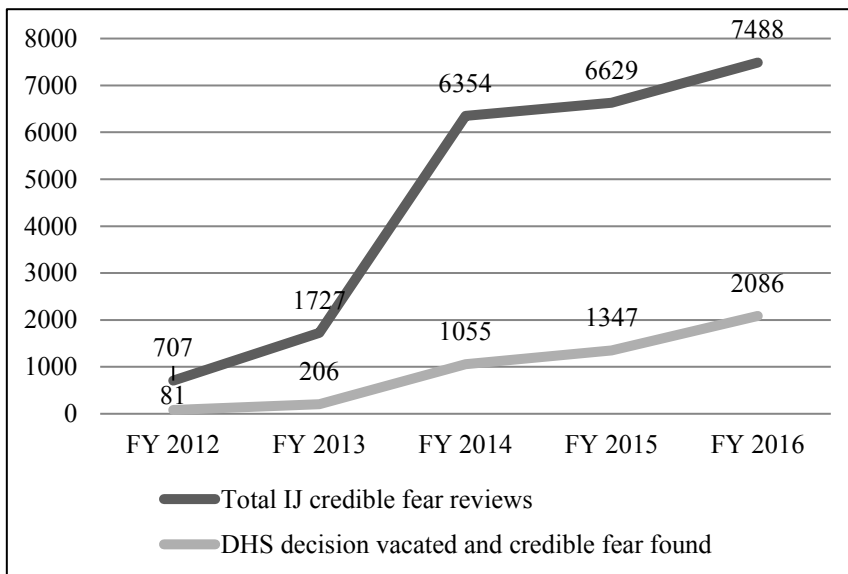
352. *Id.*

353. This section relies on raw data obtained from EOIR through a Freedom of Information Act request that the law firm Amoachi & Johnson, PLLC, submitted in 2016. Both the FOIA request and the data are available on the firm's website. See EOIR Response Letter and Original Data on Family Detention Immigration Judge Credible Fear Reviews, AMOACHI & JOHNSON, <https://amjolaw.com/category/vault/page/3/> [<https://perma.cc/36XY-K6EQ>] [hereinafter EOIR Data]. This section also incorporates and cites data from the original study on family detention discussed by Eagly, Shafer & Whalley, *supra* note 45.

A. *IJ Review Can Be a Meaningful Corrective to Erroneous Credible Fear Determinations*

In recent years, IJs have reversed thousands of negative credible fear determinations in cases involving families and individuals. Year on year, IJs have both conducted increasing numbers of negative credible fear reviews and reversed DHS's negative fear findings at progressively higher rates.³⁵⁴ In fiscal year 2012, IJs conducted a total of 707 credible fear reviews, vacating just eighty-one negative credible fear determinations (11.5%).³⁵⁵ Less than five years later, the frequency of IJ review had increased a hundred-fold, and the reversal rate had nearly tripled: in fiscal year 2016, IJs conducted a total of 7,488 credible fear reviews, vacating 2,086 negative credible fear determinations (27.9%).³⁵⁶ Figure 1 shows these trends.

Figure 1:
Nationwide Total of IJ Reviews and Reversals, FY 2012–2016³⁵⁷



354. See OFFICE OF PLANNING ANALYSIS AND STATISTICS, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2016 STATISTICS YEARBOOK (2017), <https://www.justice.gov/eoir/page/file/fysb16/download> [<https://perma.cc/6YJJ-3JNQ>].

355. *Id.*

356. *Id.*

357. *Id.*

As Eagly, Shafer, and Whalley show, IJs reverse negative credible fear findings more frequently in the family detention context than in cases not involving families.³⁵⁸ Between 2007 and 2016, their study found, IJs vacated 47% of the negative credible fear findings in five family detention centers.³⁵⁹ In contrast, between 2001 and 2016, approximately 16% of negative credible fear findings in non-family detained cases were vacated on IJ review.³⁶⁰ Significantly, “family and non-family detainees both obtained lawyers at an identical rate (23%) during such proceedings.”³⁶¹

Several factors may explain why IJs reverse negative credible fear determinations at higher rates in cases involving detained families. First, the credible fear screening process may be particularly ill-suited to evaluating the claims of the women and children who make up the vast majority of detained families. For example, female asylum seekers may be reluctant to disclose to male officials the details of the gender-based violence they have suffered, especially if accompanied by their children.³⁶² Moreover, DHS may have applied a more exacting credible fear standard to asylum-seeking families, especially after 2014, in an effort to deter other Central Americans from seeking protection in the United States.³⁶³ Finally, many of the women and children fleeing Central America have suffered gang-related harms, which do not map neatly onto recognized grounds of relief.³⁶⁴ Before IJ review, detained families may have consulted with pro bono attorneys who screened them for additional bases of asylum eligibility or helped identify a nexus

358. Eagly, Shafer & Whalley, *supra* note 45, at 148.

359. *Id.*

360. *Id.*

361. *Id.*

362. See SHEPHERD & BERNSTEIN MURRAY, *supra* note 34, at 4.

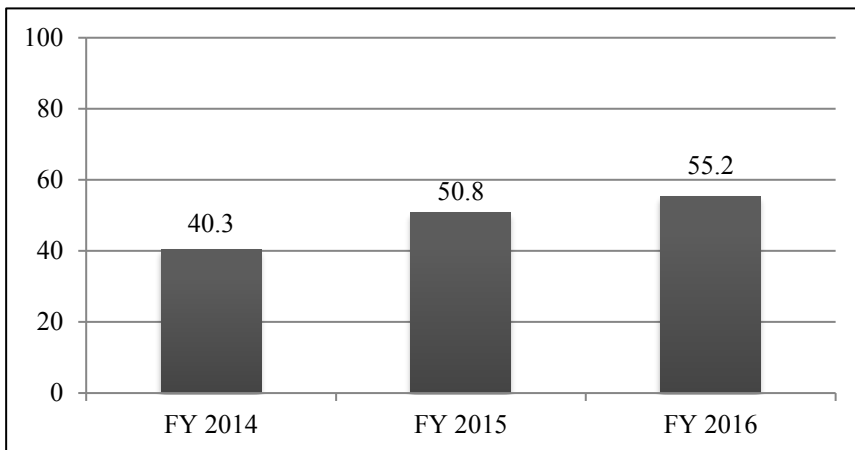
363. See Manning, *supra* note 45, at Part III (“Four days before Artesia opened, Vice President Joe Biden determined that ‘none of these children or women bringing children will be eligible under the existing law in the United States.’” (quoting Press Release, White House, Remarks to the Press with Q & A by Vice President Joe Biden in Guatemala (June 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/06/20/remarks-press-qa-vice-president-joe-biden-guatemala> [<https://perma.cc/7GV3-KYCK>])).

364. See, e.g., Elizabeth Keyes, *Unconventional Refugees*, 67 AM. U. L. REV. 89, 140 (2017) (“[T]hose fleeing gang violence *generally* are excluded from the definition of a refugee, unless they can prove that violence is intended to punish them for one of the protected characteristics (a nexus problem).” (emphasis in original)).

between the harms they fled and a protected characteristic, such as a particular social group.³⁶⁵

Regardless, since 2014 IJs have conducted credible fear reviews and vacated negative fear findings in family detention cases at increasing rates.³⁶⁶ In fiscal year 2014, 768 asylum seekers in family detention requested IJ review of credible fear determinations.³⁶⁷ Total IJ reviews dipped in 2014, but rose to 1,098 reviews in fiscal year 2016.³⁶⁸ Reversal rates rose, as well.³⁶⁹ As shown in Figure 2, IJs reversed 40.4% of negative credible fear findings in family detention cases in fiscal year 2014, 50.8% in fiscal year 2015, and 55.2% in fiscal year 2016.³⁷⁰ In other words, in fiscal years 2015 and 2016, it was more likely than not that where an IJ reviewed a negative credible fear determination in a case involving a detained family, the IJ found that the Asylum Office had erred.³⁷¹

Figure 2:
Percentage of Negative Credible Fear Determinations Vacated on IJ Review in Family Detention Centers, FY 2014–2016³⁷²



365. *See id.* at 141 (noting that Central American asylum seekers “often win” asylum claims based on gang violence, if they have the benefit of legal counsel (emphasis deleted)).

366. Eagly, Shafer & Whalley, *supra* note 45, at 148–49.

367. EOIR Data, *supra* note 353.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

The aggregate figures disguise sharp differences in both the number IJ reviews and reversal rates across the four family detention centers in operation between 2014 and 2016. As Table 1 shows, asylum seekers detained in Artesia in 2014 and in Dilley in 2015 and 2016 were more likely to benefit from IJ review than families detained in Berks or Karnes.³⁷³ In fiscal year 2016, for example, IJs vacated negative credible fear determinations in approximately 68.3% of cases reviewed in Dilley; negative fear findings were reversed in approximately 37% of cases reviewed in Karnes.³⁷⁴ Such disparities may stem from divergent approaches to IJ review among the various immigration courts—which typically sit remotely, and conduct hearings by video feed—that presided over the cases of detained families.³⁷⁵ Inconsistent judicial behavior is also certain to play a role.³⁷⁶ Indeed, the EOIR data show striking variations in the rates at which individual IJs reversed negative credible fear determinations. In fiscal year 2016, for instance, one IJ who conducted credible fear reviews at Dilley affirmed 146 negative determinations and reversed seventy-two (33% reversal rate).³⁷⁷ Another affirmed fourteen negative determinations and reversed 240 (94.5% reversal rate).³⁷⁸

IJ review thus appears to replicate the decisional disparities that plague the merits phase of asylum adjudications. In *Refugee Roulette*, Professors Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag exhaustively studied the outcomes of thousands of defensive and affirmative asylum claims.³⁷⁹ Their data laid bare a system of

373. *Id.*

374. *Id.*

375. Inconsistent defensive and affirmative asylum adjudication has long been the subject of academic attention. *See, e.g.*, Ramji-Nogales, Schoenholtz & Schrag, *supra* note 75, at 302 (“[I]n the world of asylum adjudication, there is remarkable variation in decision making from one official to the next, from one office to the next, from one region to the next, from one Court of Appeals to the next, and from one year to the next, even during periods when there has been no intervening change in the law.”).

376. *Id.* at 342–49 (noting that an IJ’s gender and INS or DHS work experience heavily influence the rate at which an IJ grants asylum). Although the Ramji-Nogales, Schoenholtz, and Schrag study concerned grant-rates at the merits phase of an asylum adjudication, its insights about the impact of an IJ’s gender and work experience are transferable to IJ review.

377. EOIR Data, *supra* note 353.

378. *Id.*

379. Ramji-Nogales, Schoenholtz & Schrag, *supra* note 75, at 295–96; *see also* ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, *LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY* (2014) (examining statistical disparities in affirmative asylum adjudications).

adjudication that is neither consistent nor fair: “[w]hen an asylum seeker stands before an official or court who will decide whether she will be deported or may remain in the United States, the result may be determined as much or more by who that official is, or where the court is located, as it is by the facts and law of the case.”³⁸⁰ That insight applies with equal force to both the credible fear interview and IJ review of negative fear findings. Although IJs have reversed negative credible fear determinations at remarkably high rates, particularly in family detention cases, IJ review has produced uneven, judge-dependent outcomes.

Table 1:
Results of IJ Review in Family Detention Cases, FY 2014–2016³⁸¹

	Artesia	Berks	Dilley	Karnes
FY 2014				
Total IJ credible fear reviews	293	18	---	457
Total negative credible fear findings vacated	149	2	---	159
<i>Percentage of decisions vacated</i>	<i>50.9%</i>	<i>11%</i>	---	<i>34.8%</i>
FY 2015				
Total IJ credible fear reviews	52	14	314	94
Total negative credible fear findings vacated	32	0	190	19
<i>Percentage of decisions vacated</i>	<i>61.5%</i>	<i>0%</i>	<i>60.5%</i>	<i>20.2%</i>
FY 2016				
Total IJ credible fear reviews	---	11	631	456
Total negative credible fear findings vacated	---	6	431	169
<i>Percentage of decisions vacated</i>	---	<i>54.5%</i>	<i>68.3%</i>	<i>37%</i>

Nonetheless, IJ review has emerged as an increasingly meaningful form of protection against erroneous removal, particularly in the family detention context.³⁸² Between 2014 and 2016, IJs reversed the negative

380. Ramji-Nogales, Schoenholtz & Schrag, *supra* note 75, at 302.

381. *Id.*

382. See Eagly, Shafer & Whalley, *supra* note 45, at 147–50.

credible fear findings of no fewer than 1,157 detained families.³⁸³ These figures are especially noteworthy in light of the constrained role that attorneys often play during IJ review.³⁸⁴ The high rates at which IJs have vacated DHS's credible fear findings in family detention cases discredit the narrative—spun first by the Obama administration and now by the Trump White House—that the families who are fleeing the Northern Triangle have no rightful claim to humanitarian protection. To the contrary, the majority of those families, whether or not they receive positive fear findings after an initial interview, have credible fears of persecution.³⁸⁵

B. RFRs Can Remedy Erroneous Credible Fear Determinations

Official data on RFRs are hard to come by: USCIS does not include RFRs in its annual credible fear statistics.³⁸⁶ What little data are available, however, suggest that RFRs have protected numerous asylum seekers with potentially meritorious claims.³⁸⁷ Between February 9, 2015, and March 31, 2016, asylum seekers detained in four family detention centers submitted at least 400 RFRs to the asylum office.³⁸⁸ Just over half of these requests resulted in positive credible determinations after reconsideration.³⁸⁹ Even as the Dilley detention center saw the greatest number of IJ reversals of negative credible fear determinations, it was also the site of the most successful RFRs, closely followed by the Karnes detention center.³⁹⁰ Those figures likely speak to both the error-prone nature of the credible fear interviews conducted there and the presence of vigorous pro bono projects at the detention centers.

383. EOIR Data, *supra* note 353.

384. *See supra* section II.A.2.

385. DHS ADVISORY COMM. REPORT, *supra* note 5, at 6 (noting that “nearly 90% of individuals in family facilities from . . . countries [in the Northern Triangle] pass their credible or reasonable fear interviews”).

386. *See Credible Fear Statistics 2016*, *supra* note 28.

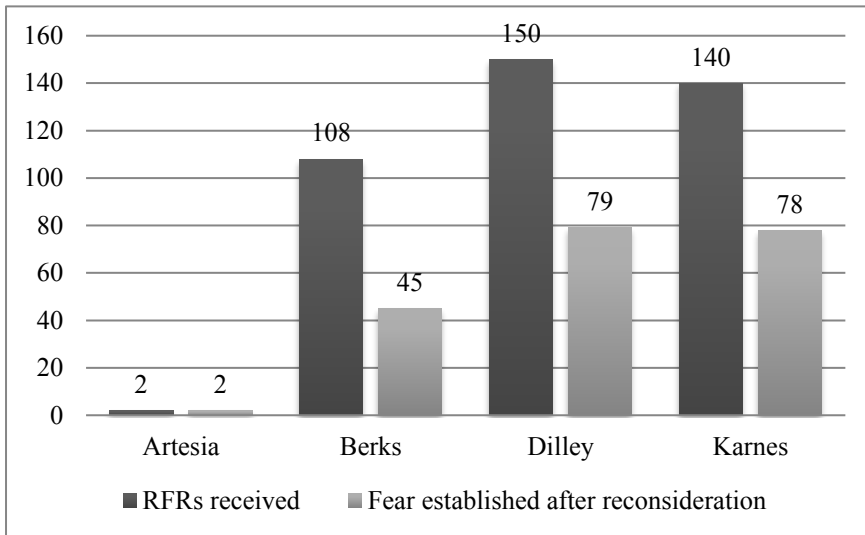
387. *See Credible Fear—Requests for Reconsideration*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (Apr. 13, 2016), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_RFR_CredibleFear033116.pdf [<https://perma.cc/RV8L-NRCY>].

388. *Id.*

389. *Id.*

390. *Id.*

Figure 3:
Requests for Reconsideration in Family Detention Cases,
February 9, 2015 through March 31, 2016³⁹¹



IV. PROPOSED REFORMS TO IJ REVIEW AND RFRS: UPHOLDING NONREFOULEMENT

IJ review and RFRs are far from toothless.³⁹² But the immigration agencies have failed to consistently administer either process, undermining their potential to prevent the wrongful removal of people who are lawfully entitled to air their claims for relief.³⁹³ Current political realities weigh against abolishing expedited removal or reforming the credible fear determination process; reforming IJ review and anchoring RFRs in administrative rules present similar, but less formidable, challenges. The proposals that follow reflect three propositions. First, IJ review and RFRs protect asylum seekers' due process rights without exacting a prohibitively high administrative burden on the government. Second, IJ review and RFRs support the United States' obligations under domestic and international law to refrain from removing asylum seekers

391. *Id.*

392. *See supra* Part III.

393. *See supra* Part II.

to countries where they may suffer persecution or torture.³⁹⁴ And finally, IJ review and RFRs will become meaningful correctives to the flaws of the credible fear determination process only if asylum seekers have greater access to counsel.

A. *EOIR Should Require IJs to Admit New Evidence and Allow Counsel to Advocate During Credible Fear Reviews*

EOIR should undertake at least two reforms to enhance the accuracy and efficiency of IJ review. To begin, EOIR should require IJs to allow asylum seekers to introduce evidence that was not presented during the credible fear interview. This change would promote consistency among IJs, and, in theory, would reduce IJ rubberstamping of negative credible fear determinations. Moreover, opening the record would obey the call of the regulations that govern IJ review: those require that the judge make a *de novo* determination as to a noncitizen's credible fear.³⁹⁵ In principle, *de novo* hearings rely on a clean, unbounded record, rather than a rehash of a prior—allegedly flawed—adjudication.³⁹⁶

Additionally, EOIR should amend the Immigration Court Practice Manual to require that IJs allow counsel to advocate on behalf of clients during credible fear reviews.³⁹⁷ Practical and statutory considerations weigh in favor of this reform. An attorney may distill an asylum seeker's experience into legal arguments the asylum seeker is unlikely to articulate, increasing both the efficiency and accuracy of IJ review, particularly with respect to novel claims.³⁹⁸ Moreover, the current limitations on attorney advocacy contravene the legislative purpose underlying IJ review: the more restricted the attorney's role, the less

394. 8 U.S.C. § 1231(b)(3) (2012); UNITED NATIONS HIGH COMM'N FOR REFUGEES, 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 30 (1967), <http://www.unhcr.org/3b66c2aa10.html> [https://perma.cc/J72G-P5QF].

395. 8 C.F.R. § 1003.42(d) (2017).

396. Schoenholtz, Schrag, and Ramji-Nogales make a similar point in describing the nature of section 240 removal proceedings after an asylum seeker's affirmative application has been denied. SCHOENHOLTZ, SCHRAG & RAMJI-NOGALES, *supra* note 379, at 14.

397. *See supra* text accompanying notes 253–57.

398. *See* M. Margaret McKeown & Allegra McLeod, *The Counsel Conundrum: Effective Representation in Immigration Proceedings*, in REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 286, 290 (Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, eds., 2009) (“Just outcomes are more likely . . . when effective counsel is present, because the facts necessary to a fair determination of the case will be developed, presented, and tested in light of the relevant law. In contrast, without an attorney or with an ineffective attorney, individuals testifying are frequently unaware of how to impart even the most fundamental information relating to the case to be decided.”).

robust the review, and the weaker the procedure's potential to correct erroneous credible fear determinations.

Furthermore, an IJ who sidelines a representative during IJ review arguably violates noncitizens' right to counsel under federal law and due process principles under the Fifth Amendment.³⁹⁹ The INA grants noncitizens in "removal proceedings" the right to counsel at no expense to the government.⁴⁰⁰ To this author's knowledge, no court has considered whether IJ reviews are "removal proceedings" within the meaning of the INA.⁴⁰¹ But federal regulations provide a broad right to counsel in all immigration matters in which a person undergoes "an examination," a criterion IJ review surely satisfies.⁴⁰² Under the regulations, "the person involved" in such proceedings has "the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections . . . and to submit briefs."⁴⁰³ Notably, the regulations expressly disclaim a right to counsel during secondary inspections;⁴⁰⁴ but they say nothing about credible fear determinations, implying that the right attaches at all phases of the asylum process.⁴⁰⁵ Finally, an asylum seeker whose retained counsel is denied the opportunity to speak or advocate during IJ review may well be deprived of the "fundamental fairness" guaranteed by the Fifth Amendment's due process clause.⁴⁰⁶

Absent reform, IJ review will continue to replicate many of the same problems that frustrate the initial credible fear determination. It is cursory rather than searching, may be limited to a record just as narrow as that involved in the initial interview, and is highly contingent on the IJ before whom an applicant happens to appear. IJ review in its current form is incapable of ensuring that the United States will not remove

399. U.S. CONST. amend. V; 8 U.S.C. § 1229a(b)(4)(B).

400. See 8 U.S.C. § 1229a(b)(4)(B) (stating that a noncitizen enjoys a right to counsel during removal proceedings).

401. *Id.*

402. 8 C.F.R. §§ 292.5(b), 1292.5(b) (2017).

403. *Id.*

404. *Id.* But see Greg Boos & Robert Pauw, *Reasserting the Right to Representation in Immigration Matters Arising at Ports of Entry*, 9 BENDER'S IMMIGR. BULL. 385 (2004) (suggesting that noncitizens have a right under the Constitution and federal law to representation during secondary inspection).

405. See 8 C.F.R. §§ 292.5(b), 1292.5(b).

406. See Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. SOC. JUST. 169, 177 (2010) (discussing how considerations of "fundamental fairness" might provide a basis for expanding access to counsel in immigration proceedings).

individuals to face persecution, torture, or death in their home countries. That so many RFRs have been successful in recent years makes this clear.

B. DHS Should Adopt a Consistent Standard for Adjudicating RFRs

Three reforms may help RFRs prevent wrongful expedited removals. First, DHS should direct its officials to refrain from removing asylum seekers with pending RFRs. Such removals fly in the face of the United States' nonrefoulement obligations. Second, USCIS should adopt a clear standard for adjudicating RFRs that comports with its mandate to accurately assess asylum seekers' fears of persecution. USCIS would improve the status quo if it renewed its commitment to the "compelling new information" standard outlined in the 1997 memorandum.⁴⁰⁷ Better yet, USCIS should direct the Asylum Office to grant RFRs where applicants show either that official error tainted the first interview or that they wish to disclose *any* additional information about their claims. That approach is consistent with the credible fear regulations' preference that persons with borderline claims be placed into removal proceedings rather than face expedited removal.⁴⁰⁸ Finally, USCIS should codify RFR procedures in regulations or publicly available agency guidance. That would incentivize officials to follow uniform rules—and help advocates hold officials to account when they do not.

C. Limitations of the Proposed Reforms

Asylum seekers who lack access to counsel are unlikely to benefit from the reforms proposed here. Courts often draw attention to the "labyrinth"-like nature of removal proceedings and the profound difficulties *pro se* noncitizens encounter in immigration court.⁴⁰⁹ Asylum seekers who are represented at the merits phase prevail at substantially higher rates than those who lack attorneys.⁴¹⁰ In fiscal year 2016, for

407. See *Expedited Removal Policy Guidance*, *supra* note 39, at 1.

408. See 8 C.F.R. § 208.30(d)–(e).

409. See, e.g., *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1334 (9th Cir. 2000) ("Deprivation of the statutory right to counsel deprives an alien asylum-seeker of the one hope she has to thread a labyrinth almost as impenetrable as the Internal Revenue Code.").

410. Ramji-Nogales, Schoenholtz & Schrag, *supra* note 75, at 340 (stating that in their study, "[r]epresented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel"); Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 *GEO. IMMIGR. L.J.* 739, 745 (2002) (noting that "statistics show that represented [asylum] applicants obtain relief at significantly higher rates than unrepresented ones").

example, just 10% of pro se applicants were granted asylum; in contrast, 52% of represented asylum seekers won the right to remain the United States.⁴¹¹ These disparities were even more pronounced in asylum cases involving women and children.⁴¹²

Asylum seekers who undergo credible fear interviews and IJ review without counsel suffer disadvantages that resemble those unrepresented applicants face at the merits phase: they are unfamiliar with proper procedures, have trouble synthesizing facts with complicated legal standards, and face heightened risks of intimidation or miscommunication.⁴¹³ Legal orientation programs may ameliorate these problems, but cannot guide all vulnerable asylum seekers through the credible fear determination process. As long as expedited removal remains on the books, noncitizens should be appointed counsel once they express fear of returning home.⁴¹⁴ At least, noncitizens who receive negative credible fear determinations should be appointed counsel before IJ review.

Moreover, barring dramatic changes in DHS policy, the proposed reforms will play out in the harsh confines of immigration detention.⁴¹⁵ The harms of immigration detention, including its adverse impact on

411. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CONTINUED RISE IN ASYLUM DENIAL RATES: IMPACT OF REPRESENTATION AND NATIONALITY (2017), <http://trac.syr.edu/immigration/reports/448/> [<https://perma.cc/F7AX-JP8T>].

412. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, REPRESENTATION IS KEY IN IMMIGRATION PROCEEDINGS INVOLVING WOMEN WITH CHILDREN (2015), <http://trac.syr.edu/immigration/reports/377/> [<https://perma.cc/8UT3-XPTT>].

413. See Sabrineh Ardanan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, 48 U. MICH. J.L. REFORM 1001, 1002 (2015) (“Along with trauma, language barriers and cross-cultural differences can affect asylum seekers’ abilities to recount their past experiences, as can a lack of understanding of the legal framework for asylum claims.”).

414. See *id.* at 1026 (arguing in favor of “a universal right to counsel for asylum seekers”); Nimrod Pitsker, Comment, *Due Process for All: Applying Eldridge to Require Appointed Counsel for Asylum Seekers*, 95 CALIF. L. REV. 169, 171 (2007) (arguing that under the *Mathews v. Eldridge* due process analysis, “the Constitution requires appointed counsel for asylum seekers”).

415. See Aria Bendix, *ICE Shuts Down Program for Asylum-Seekers*, ATLANTIC (June 9, 2017), <https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887/> [<https://perma.cc/ND5Z-RJRV>] (reporting Trump administration’s decision to terminate a program that allowed asylum-seeking families to enroll in case management in lieu of detention); Chris Hayes & Brian Montopoli, *Trump Administration Plans Expanded Immigrant Detention, Documents Say*, NBC NEWS (Mar. 3, 2017), <https://www.nbcnews.com/politics/politics-news/trump-administration-plans-expanded-immigrant-detention-documents-say-n729021> [<https://perma.cc/HL8X-QUZR>] (reporting that the Trump administration “is planning to radically expand . . . the detention of immigrant families seeking asylum in the United States”).

children and families, are serious and well documented.⁴¹⁶ Detention centers tend to be located in remote, rural areas.⁴¹⁷ Asylum seekers in detention face steep barriers to accessing counsel.⁴¹⁸ They experience trauma and depression at alarming rates.⁴¹⁹ Medical care is often inadequate.⁴²⁰ Telephone calls to family and attorneys are limited.⁴²¹ Guards may be abusive.⁴²² Children often yearn to escape.⁴²³ IJ review

416. See, e.g., César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 203 CALIF. L. REV. 1449, 1452 (2015) (“Evidence shows that migrants suffer unthinkable harms while imprisoned.”); WENDY CERVANTES, FIRST FOCUS CTR. FOR THE CHILDREN OF IMMIGRANTS, FAMILY DETENTION: THE HARMFUL IMPACT ON CHILDREN 1 (2015), <https://firstfocus.org/wp-content/uploads/2015/07/Family-Detention.pdf> [<https://perma.cc/HPN6-MN9B>] (citing research that shows that “even a short amount of time in detention is harmful to children”); Letter from Am. Immigration Law. Ass’n et al. to Megan Mack, Dep’t of Homeland Sec., *The Psychological Impact of Family Detention on Mothers and Children Seeking Asylum 2–4* (June 20, 2015), <http://www.aila.org/advo-media/press-releases/2015/impact-family-detention-mental-health/complaint-crcl> [<https://perma.cc/7SZ3-48ZT>] [hereinafter AILA Letter on Psychological Impact of Family Detention] (compiling studies on harms of detention); OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES 6 (2017) (internal DHS report describing “disregard for detainees’ basic rights” in various immigration detention centers).

417. See DHS ADVISORY COMM. REPORT *supra* note 5, at 40 (noting that existing family detention centers “are over an hour’s drive one-way from major, metropolitan areas”).

418. *Id.*

419. AILA Letter on Psychological Impact of Family Detention, *supra* note 416, at 2.

420. See, e.g., AM. CIVIL LIBERTIES UNION ET AL., FATAL NEGLIGENCE: HOW ICE IGNORES DEATHS IN DETENTION 3 (2016), https://www.aclu.org/sites/default/files/field_document/fatal_neglect_aclu_dwnnjjc.pdf [<https://perma.cc/W9FK-9S52>] (noting that “poor medical care contributes to the death of immigrants in federal immigration custody with alarming frequency”); Letter from Am. Immigration Council et al. to Megan Mack & John Roth, Dep’t of Homeland Sec., *ICE’s Failure to Provide Adequate Medical Care to Mothers and Children in Family Detention Facilities 1* (July 30, 2015), <http://www.aila.org/advo-media/press-releases/2015/deplorable-medical-treatment-at-fam-detention-ctrs/public-version-of-complaint-to-crcl> [<https://perma.cc/99EC-GZC7>] (summarizing “complaint filed on behalf of several mothers and their children who received substandard medical care while detained at the family detention facilities in Dilley and Karnes City, Texas, and Leesport, Pennsylvania”).

421. See Julia Harumi & Carl Takei, *Forget About Calling a Lawyer or Anyone at All if You’re in an Immigration Detention Facility*, AM. C.L. UNION (June 15, 2016), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/forget-about-calling-lawyer-or-anyone-all-if> [<https://perma.cc/RQ2P-M4WF>].

422. See Renée Feltz, *Immigration Facility Guard Given Jail Time for Sexual Assault of Detainee*, GUARDIAN (Apr. 23, 2016), <https://www.theguardian.com/us-news/2016/apr/23/immigration-detention-center-guard-sexual-assault-prison> [<https://perma.cc/BTW4-P9G2>] (describing conviction of guard for sexual assault of a nineteen-year-old mother detained in the Berks family detention facility); Esther Yu His Lee, *Chances Are High That if You’re Abused in Immigration Detention, No One Will Care*, THINKPROGRESS (Apr. 12, 2017), <https://thinkprogress.org/dhs-33000-complaints-abuse-civic-cf154614c006/> [<https://perma.cc/X2H9-GW9G>] (noting that DHS “opened investigations into a total of 247 of 33,126 complaints lodged against its component agencies between January 2010 and July 2016”).

and RFRs can prolong the time an asylum seeker remains detained—in some cases by a matter of days, and in others, weeks or months.⁴²⁴ IJ review and RFRs thus have a double-edged quality: even as these procedures allow asylum seekers to challenge the government's order that they return home, they keep asylum seekers behind bars, exacting a price in liberty and dignity.

CONCLUSION

The Refugee Act of 1980 enshrines the United States's commitment to refrain from removing any person to a country where that person may suffer persecution. Expedited removal has eroded that commitment. In recent years, a growing number of noncitizens have been involuntarily returned to homelands they said they feared, only to encounter death, torture, or other harms. Asylum seekers who are ensnared in expedited removal have little in the way of a safety net. But two procedures—IJ review of negative credible fear determinations and RFRs—have in hundreds of cases prevented the erroneous removal of people with potentially meritorious claims.

IJ review is a crucial stopgap in the expedited removal regime. Formulated by lawmakers who feared that expedited removal would jeopardize asylum seekers' claims for protection, IJ review was intended to be a force for accuracy in a statutory scheme that privileges speed. IJ review has helped compensate for the excesses of expedited removal, particularly in the family detention context. But it is inconsistently executed, highly dependent on the sympathies of individual judges, and largely uncodified. EOIR can begin to correct for these deficiencies by amending the Immigration Court Practice Manual to provide a greater role for counsel during IJ review.

The credible fear regulations allow an asylum seeker to request reconsideration after a negative credible fear determination. Unfortunately, the RFR process remains opaque. The government has

423. See Valeria Fernández, *These Asylum-Seekers Are Being Forced to Raise Their Kids in Immigration "Jails,"* PUB. RADIO INT'L (July 7, 2016), <https://www.pri.org/stories/2016-07-07/these-asylum-seekers-are-being-forced-raise-their-kids-immigration-jails> [<https://perma.cc/64A3-FQ88>].

424. In Eagly, Shafer, and Whalley's study, *supra* note 45, on average, detained families waited "three to four days" for IJ review of negative credible and reasonable fear determinations. But IJ review may induce "other delays," including "any delays in release following the judge's reversal." *Id.* at 150. RFRs typically entail longer delays. In some cases, families who submitted RFRs were detained for weeks or months after the credible fear review hearing. See CARA Project Complaint to DHS, *supra* note 188, at 5, 9–10 (describing cases where families were detained for weeks or months while RFRs were pending).

failed to adhere to the policy guidance it set out shortly after expedited removal took effect. It has also neglected to communicate any changes in official policy that would explain why it has denied apparently meritorious RFRs in recent years. As a result, the procedures surrounding RFRs are shaped less by top-down rules than everyday negotiations between frontline asylum officers, DHS personnel, and advocates on behalf of asylum seekers. USCIS should direct all asylum offices to grant RFRs where applicants show either that official error tainted the first interview or that they wish to disclose additional information about their claims. That standard is congruent with DHS's obligation to accurately assess asylum seekers' fears of persecution.

A single-interview credible fear determination process does not and cannot prevent the erroneous removal of asylum seekers with potentially viable claims. As long as bona fide asylum seekers are sent home, the United States will violate its obligations under the Refugee Convention and offend the principle of nonrefoulement set forth in the INA. Consistent, transparent policies on RFRs and IJ review cannot on their own guarantee that the United States will refrain from returning asylum seekers to countries where they may experience persecution—but they can help.