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Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers

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Michele R. Pistone and John J. Hoeffner Esq.

Abstract

Immigration inspectors are authorized to deport persons who arrive at U.S. ports without valid travel documents. This process, which usually occurs within 48 hours and does not allow for judicial review, is called expedited removal. This article begins by summarizing the findings of the few studies allowed access to the process. The authors extrapolate from the studies to demonstrate that thousands of genuine asylum seekers have erroneously been deported via expedited removal. The greatest cause of erroneous deportation is a failure by the agency responsible for the process, Customs and Border Protection (CBP), to follow its own rules. The heart of the article is a simple inquiry: given the stakes involved, why doesn't CBP follow its own rules? One report found CBP's failure "simply inexplicable." Drawing on the work of Jerry Mashaw, among others, the article attempts to "explain the inexplicable." It demonstrates that a mix of bureaucratic and personal realities, including CBP's dominant enforcement culture, combine to promote noncompliance with many of the rules intended to protect asylees. This showing has important implications for those who would repair the system. CBP's enforcement culture is likely to defeat any attempt to ensure compliance with the rules simply by reiterating them. A method is needed for moderating the culture, so that deporting the wrong person becomes as unacceptable in the future as admitting the wrong person is right now. The article closes with numerous suggestions to help achieve the required change, as well as a few recommendations for specific rule changes.

ARTICLE

RULES ARE MADE TO BE BROKEN: HOW THE PROCESS OF EXPEDITED REMOVAL FAILS ASYLUM SEEKERS

MICHELE R. PISTONE AND JOHN J. HOFFNER*

Expedited removal, whereby a person arriving in the United States can be removed within forty-eight hours and barred from returning for up to five years without any judicial oversight or review,¹ is one of the greatest powers any agency of the United States government possesses. This power was originally granted to the Immigration and Naturalization Service (INS) in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).² Since the expedited removal provisions of IIRIRA became effective in April 1997, the INS and its successor agency, Customs and Border Protection (CBP) – a division of the Department of Homeland Security (DHS)³ – have removed more than 500,000 persons from the United States via the expedited removal process.⁴ This Article examines and explains the impact of the expedited removal process on genuine asylum seekers and explores possibilities for improving the system.

In addition to the potentially enormous consequences for individuals subject to expedited removal – genuine asylum seekers who are wrongly removed, for example, are by definition at risk of suffering persecution, torture or death – what makes the expedited removal authority perhaps

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1. INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A) (2005).
2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 100 Stat. 3009 (codified in numerous sections of 8 U.S.C.).
3. DHS was established by the Homeland Security Act of 2002. Pursuant to that Act, the INS was abolished on March 1, 2003, and its functions were absorbed by DHS, and distributed among its various sub-parts, such as CBP.
4. *See* U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 149 (2004) (noting 421,976 expedited removals from 1997 to 2003).

uniquely weighty is not simply the lack of judicial oversight, but the near absence of oversight of any kind. This combination of circumstances does not exist with other substantial powers. The criminal justice authority, an analogous power in terms of its focus on individuals and its impact on them, is circumscribed by appellate review, the right to trial by jury and the right to counsel, as well as by the accessibility of the process to the press and public. Expedited removal, however, typically takes place out of public view, with only CBP inspectors – acting as judge, jury and oftentimes prosecutor – present.

The importance of the expedited removal process to the individuals affected and the unreviewable finality of CBP's decisions make it imperative that CBP err as little as possible. Yet, to ensure removal and due to economic and security-based concerns, CBP also expects to make and *implement* most of its deportation decisions under expedited removal within forty-eight hours of an applicant's arrival.⁵ There is considerable tension between high speed and high accuracy and fairness, and no one could reasonably expect perfection from any system that is subjected to these dueling demands. Some errors, in other words, may be necessary evils.

The history of the development of expedited removal makes clear that the inherent conflict between speedy decision-making and accurate and fair decision-making was well understood at the procedure's inception.⁶ The formidable task that befell those charged with creating the administrative rules to implement the mostly vague directive of Congress was to make expedited removal approximate, *as much as possible*, the much lengthier and more considered review formerly available as a matter of course in formal hearings before immigration judges. At those hearings, the goals of accuracy and fairness in decision-making were advanced by, among other things, affording applicants for admission the right to present witnesses and evidence in support of their defense to removal, the right to cross-examine any government witnesses, and the right to be represented by counsel (at no expense to the government). In addition, the deportation decisions of immigration judges were subject to review by the Board of Immigration Appeals and the federal courts.⁷

Under expedited removal, these rights had to be approximated rather than duplicated because duplication would destroy the summary nature of the

5. U.S. GEN. ACCOUNTING OFFICE, PUBL'N. NO. GAO/GGD-98-81, *ILLEGAL ALIENS: CHANGES IN THE PROCESS OF DENYING ALIENS ENTRY INTO THE UNITED STATES* 44 (1998) [hereinafter *CHANGES IN THE PROCESS*] (estimating that 95% of aliens who received removal orders were removed within 48 hours of their arrival).

6. See generally PHILIP A. SCHRAG, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* 193-224 (2000) [hereinafter *A WELL-FOUNDED FEAR*] (detailing the perspectives of numerous parties formally or informally involved in shaping IIRIRA and the administrative response to it, and the parties' attempts to anticipate and rebut opposing arguments that would sacrifice unduly accuracy, for example, for the sake of speed).

7. 8 U.S.C. § 1105a (repealed 1996).

process. Full rights could not be afforded without ignoring both congressional legislative intent as well as substantial congressional sentiment, which would have preferred “expedited exclusion to be done at the airport within an hour after the person arrive[d].”⁸ After much negotiation both inside and outside the INS,⁹ exactly such a form of approximate justice emerged in the compromise set of final regulations promulgated by the agency in December 2000.¹⁰

To the extent that this set of regulations applied to potential asylum seekers, it provided the following safeguards against immigration inspectors erroneously deporting persons with genuine claims of asylum through the expedited removal process. First, in place of a broad right to develop evidence and present witnesses, applicants were to be allowed to offer their own statements and whatever documentary evidence they happened to be carrying with them. Second, rather than relying on judges, lawyers or others (such as previously admitted immigrants) to provide – inside or outside of the courtroom – a statement of the law,¹¹ immigration inspectors would be required to read aloud a short statement to the newly-arrived applicant; the statement purposely avoided the word “asylum,” but did generally note the existence of protections available to persons who feared being returned to their home country. Third, in place of giving the applicant or his or her lawyer time to develop the record, as well as the benefit of clarifying questions that were frequently posed by judges in deportation proceedings, immigration inspectors would be required to ask and record the answers to three specific questions designed to elicit evidence of a possible claim of asylum. Fourth, in place of a verified record established by court reporters or audiotaping, upon the completion of an interview, immigration inspectors would have the applicant read and sign the inspector’s record of the meeting. Finally, instead of a right to appeal adverse decisions to the Board of Immigration Appeals and the federal courts, including the United States Supreme Court, the regulations provided for a single review by a second-line supervisor.

In almost every particular, the promise of these carefully drawn and negotiated compromise safeguards has been broken through a failure to apply them adequately and with consistency. As a result of the failure to apply established regulations, more genuine asylum seekers have been erroneously deported to their homelands than was required by the balance struck in

8. A WELL-FOUNDED FEAR, *supra* note 6, at 204 (quoting an unnamed INS official).

9. *See id.* at 193-213.

10. Asylum Procedures, 65 Fed. Reg. 76,121 (Dec. 6, 2001).

11. “Throughout his or her time in the secondary inspection area, the alien is not permitted to meet with, or contact, counsel (or anyone else other than Customs and Border Patrol personnel).” U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, 1 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: FINDINGS AND RECOMMENDATIONS 21 (2005) [hereinafter USCIRF REPORT, vol. 1]. The USCIRF report was published in two volumes; the title of the second volume differs slightly from the first volume’s title. *See* U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, 2 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL: EXPERT REPORTS (2005) [hereinafter USCIRF REPORT, vol. 2].

IIRIRA between speedy and accurate decision-making. Indeed, a recent two-volume report by the bipartisan United States Commission of International Religious Freedom (USCIRF) indicates that the deficiencies of the expedited removal program continue to date.¹² In documenting “serious problems” in the program,¹³ the USCIRF report confirms a smaller study conducted in 2000 by the General Accounting Office (GAO). The GAO’s 2000 report is graciously titled *Opportunities Exist to Improve the Expedited Removal Process*.¹⁴

It is cause for great concern that, five years later, many of the same “opportunities” are still available. The persistence of problems in the expedited removal program represents, first of all, a continuing violation of the United States’ obligations under an international treaty to which it is a signatory – the Protocol Relating to the Status of Refugees.¹⁵ Moreover, mistakes made during expedited removal inspections potentially subject deported individuals to persecution – including imprisonment, torture and death – and actually will result in such persecution in at least some cases. In addition, even if they escape persecution, persons erroneously deported via expedited removal are still likely to be subjected to a five-year bar on returning to the United States.¹⁶ Depending on one’s individual circumstances, this too could be a considerable hardship.

Some commentators have looked at these lamentable consequences and suggested that the elimination of the expedited removal process is the only appropriate solution. As early as 1999, for example, 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 for the Administration.”¹⁷ Many other persons and groups have

12. USCIRF is an independent federal agency charged with monitoring religious freedom worldwide. It was established by the International Religious Freedom Act of 1998. Section 605 of that Act authorized USCIRF’s recent study on the implementation of expedited removal, and granted USCIRF “virtually unrestricted access to Expedited Removal proceedings.” USCIRF REPORT, vol. 1, *supra* note 11, at 3.

13. *Id.* at 10.

14. U.S. GEN. ACCOUNTING OFFICE, PUBL’N. NO. GAO/GGD-00-176, OPPORTUNITIES EXIST TO IMPROVE THE EXPEDITED REMOVAL PROCESS (Sept. 2000) [hereinafter OPPORTUNITIES EXIST]. As was the USCIRF report, the 2000 GAO report also was authorized by the International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2812. OPPORTUNITIES EXIST studies issues related to “expedited removal and those who claimed a fear of persecution or torture in their home country.” OPPORTUNITIES EXIST, *supra* at 4. In particular, the report addresses “INS’ management controls over (1) the expedited removal process and (2) the credible fear determination process, including those determinations relating to aliens’ decisions to recant their claims of a fear of persecution or torture.” *Id.*

15. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 [hereinafter Refugee Protocol]. The Refugee Protocol holds that, by ratifying it, signatories are bound by Articles 2-34 of the 1951 Convention Relating to the Status of Refugees. *Id.* at art. I(1).

16. INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (2005).

17. ADVISORY COMM. ON RELIGIOUS FREEDOM ABROAD, FINAL REPORT TO THE SECRETARY OF STATE AND TO THE PRESIDENT 45 (1999).

issued similar calls.¹⁸

The rationale behind these calls for repeal is not entirely without basis, for to some extent speed will always be at war with accuracy. But the mere fact that a process is imperfect does not mean that it is appropriate to discard it – as engineers say, the standard of measurement for assessing adequacy is not perfection; rather, the standard is the alternative. In this case, in these times, many thoughtful students of expedited removal have seen no other alternative that addresses as well as expedited removal the security concerns that were presented in stark relief on September 11, 2001.

Yet, while many of the harms caused by expedited removal may be regarded and accepted as necessary evils, one cannot rest comfortably with those conclusions without quantifying the extent of the harms. Few things in life are appropriate *no matter what*; accordingly, in assessing the wisdom of expedited removal it matters, or should matter, whether genuine asylum seekers are erroneously deported only occasionally, or by the hundreds, or by the thousands. Indeed, if the latter figure is correct, even the most ardent supporters of expedited removal might reconsider their position.

Before any group so acts, however, they may appropriately ask whether it is possible to create an expedited removal system less prone to error. Many of the “necessary” evils of the expedited removal process may not be so necessary after all, and may be avoided in ways short of repealing the authority. If this is true, those persons most sensitive to security and other concerns that provided the rationales for expedited removal may become the staunchest supporters of expedited removal’s reform.

After briefly outlining the expedited removal process in Part I, the remainder of this Article will explore both of these issues – first, the estimated number of erroneously deported asylum seekers, and then, whether and how this number could be reduced. As for the first issue, limiting ourselves to the data found in the two most extensive studies of expedited removal, and then only to errors that stem from a failure to follow already established regulations, Parts II and III will demonstrate the likelihood that tens of thousands of persons have been wrongly deported via expedited removal and that many thousands have been wrongly denied asylum. In other words, though based on conservative premises, our estimate is that more genuine refugees have mistakenly been deported pursuant to the expedited removal authority than even the most vocal opponents feared.

The implications of this showing are enormous. They certainly place a

18. THE LAWYERS COMM. FOR HUMAN RIGHTS, *IS THIS AMERICA? THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN AMERICA*, app. 4 (2000) [hereinafter *IS THIS AMERICA?*] (listing over fifty groups who called for the general repeal of expedited removal, including Amnesty International USA, the American Civil Liberties Union, the American Immigration Law Foundation, Human Rights Watch, and the National Council of La Raza); American Immigration Lawyers Association, *America’s Borders: From Our Consulates to Our Ports of Entry Balancing Our Security and Economic Needs*, AILA’S IMMIGRATION THIS WEEK (May 26, 2005) (suggesting repeal would enhance U.S. security); see also Anthony Lewis, *A Bad Time for Civil Liberties*, 5 ANN. SURV. INT’L & COMP. L. 1 (1999).

high burden upon all responsible officials, but especially upon continued proponents of expedited removal, to work to ensure that harms resulting from the process are reduced as soon and as much as possible. How might this be accomplished?

In addressing this question, Part IV argues that improvement must begin with a change in the culture of the responsible agency. Part IV lists a number of ways to try to achieve this end, and makes some other suggestions as well. We think the reforms we suggest will reduce the likelihood of mistakes in the future. We also think that, as currently practiced, the expedited removal process is troubled enough that substantial reforms have become an absolute necessity. If such reforms fail, or worse, are never even attempted, and the present failed system continues, the entire premise of expedited removal – that it can achieve widely acceptable levels of accuracy and fairness – will have been undermined. Remaining supporters of expedited removal will be forced to argue that, although the mistaken expulsion of thousands of legitimate asylum seekers has been shown by experience to be an expected element of the expedited removal regime, the unexpectedly disappointing status quo is but a necessary evil outweighed by other concerns. Should this course of events come to pass, one need not imagine that it is only against a standard of perfection that expedited removal will be deemed by most observers to have fallen short.

I. OVERVIEW OF THE EXPEDITED REMOVAL PROCESS

CBP inspects persons seeking admission to the United States at border crossings, airports and seaports. There are two phases in the inspections process: a primary and a secondary interview. At the primary interview, CBP officers inspect a traveler's identity and travel documents, such as passports, visas, or permanent residency cards. Non-citizens are questioned about their travel purposes and intentions, including the "applicant's intended length of stay and whether the applicant intends to remain permanently."¹⁹ Most persons pass quickly through this stage and are allowed to leave the port of entry and enter the country. Approximately 300 million applicants for admission are processed annually via the primary inspection process.²⁰

When the primary inspector believes that an individual is ineligible for admission, the inspector sends the person to a secondary inspection area. Most of the seven to ten million persons sent to secondary inspection each year are processed without an extensive interview and are allowed to enter the country after additional document screening and security checks through

19. INA § 235(a)(5), 8 U.S.C. § 1225(a)(5) (2005).

20. USCIRF REPORT, vol. 1, *supra* note 11, at 32 (reporting 332 million primary inspections in 2001, and 265 million in 2003); OPPORTUNITIES EXIST, *supra* note 14, at 20 (noting 28.3 million primary inspections per month from April 1, 1997, to September 30, 1999).

various databases.²¹ Approximately ten percent, however, are subject to a more probing interview by a secondary inspector in a secondary inspection interview.²² If no secondary inspector is immediately available, applicants may be restrained with handcuffs and sometimes with shackles until the interview begins.²³

The secondary interview typically lasts about an hour.²⁴ During the interview, the inspector can review any documents an individual is carrying, but passengers arriving by sea or air are not allowed to retrieve documents from checked luggage.²⁵ Moreover, applicants cannot seek the help of a lawyer or assistance from friends or family during the interview. As a result, the process places a premium on the ability of an applicant to verbalize his or her story, a requirement that is especially problematic when, as is sometimes the case, the interview is conducted in a language that the applicant does not adequately understand.²⁶ At the end of the interview, the inspector may either allow the individual to enter the country, deny admission, or send him or her to a “credible fear” interview, the last alternative being reserved for possible asylum applicants.²⁷

Regarding the denial of admission, expedited removal laws expressly authorize secondary inspectors to deny admission to persons who arrive at an airport, seaport or land border without proper travel documents²⁸ or who carry documents that CBP officials suspect have been procured

21. USCIRF REPORT, vol. 2, *supra* note 11, at 6 (reporting that “the number of aliens sent to Secondary Inspection per year approximate 10 million, and 90 percent of these individuals are ultimately allowed to enter the U.S. after being processed through an initial triage”); OPPORTUNITIES EXIST, *supra* note 14, at 20 (noting that from April 1, 1997 to September 30, 1999, a monthly average of 601,000 individuals were sent to secondary inspection).

22. See OPPORTUNITIES EXIST, *supra* note 14, at 18-19; USCIRF REPORT, vol. 2, *supra* note 11, at 6.

23. See Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 61-62 (2001) [hereinafter Pistone & Schrag] (noting “the nearly universal use of oppressive restraints”); IS THIS AMERICA?, *supra* note 18, at 26 (stating that the vast majority of persons in the expedited removal process was restrained); Rachel L. Swarns, *U.N. Report Cites Harassment of Immigrants Who Sought Asylum at American Airports*, N.Y. TIMES, Aug. 13, 2004, at A11 (stating that “asylum seekers were routinely handcuffed and restrained with belly chains and leg restraints”). But see USCIRF REPORT, vol. 2, *supra* note 11, at 27 (noting that recent CBP guidelines have now made shackling extremely rare even at JFK International Airport, the place where it was most often practiced).

24. USCIRF REPORT, vol. 2, *supra* note 11, at 6.

25. See Pistone & Schrag, *supra* note 23, at 39 n.217.

26. USCIRF REPORT, vol. 2, *supra* note 11, at 31 (noting that “on more than one occasion aliens were refused interpreters . . . even when they requested them”); Swarns, *supra* note 23, at A11 (citing U.N. report stating that certified translators often were not provided for asylum seekers who did not speak English). See also Pistone & Schrag, *supra* note 23, at 55 (noting “reluctance of INS inspectors to call upon interpreters during secondary inspections”).

27. In limited cases, the inspections officer can also allow the individual to withdraw his or her application for admission, thereby achieving the same result of removal while avoiding an official record of denial of admission. Withdrawal might be preferable to an individual who does not want an order of removal on his record because the order of removal can result in a five-year bar on returning to the United States. INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A)(i) (2005).

28. See INA § 212(a)(7), 8 U.S.C. § 1182(a)(7) (2005).

through fraud.²⁹ Such persons may be deported “without further hearing or review,”³⁰ subject only to a supervisor’s approval of the order.³¹ IIRIRA further forbids courts from reviewing expedited removal decisions.³²

Unfortunately, the nature of their claims makes genuine asylum seekers – who by definition are fleeing persecution based on race, religion, nationality, political opinion or membership in a particular social group – disproportionately likely to find themselves in a secondary inspection interview. The government that normally grants travel documents is the government from which they are fleeing. For such individuals, to seek travel documents, or to show authentic identifying documents to government officials, could be dangerous; accordingly, asylum seekers often do not carry any documents that would properly identify them. In addition, asylum seekers fleeing *imminent* harm may not have had time to obtain the usual documents. As a result, asylum seekers often come to the United States without valid travel documents, and hence such potential asylees become ensnared in the secondary inspection process.

For asylum seekers without proper travel documents, the secondary inspection interview is the most critical stage of the expedited removal process. At this stage they must indicate either a fear of persecution or the intent to apply for asylum. Failure to do so subjects them to expedited removal. On the other hand, individuals who request asylum or give secondary inspectors information about their fear of return are required to be removed from the secondary inspection area and sent to detention centers.³³ There, asylum seekers are interviewed once again – this time by an asylum officer.³⁴ At this interview, asylum applicants must prove that they have a “credible fear of persecution.”³⁵ Those applicants who are able to meet this

29. See INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (2005).

30. INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A)(i) (2005); 8 C.F.R. § 235.3(b)(5) (2005).

31. 8 C.F.R. § 235.4(b)(7) (2005). Specifically, the applicable regulation states:

[A]ny removal order entered by a [secondary inspector] must be reviewed and approved by the appropriate supervisor before the order is considered final. Such supervisory review shall not be delegated below the level of a second line supervisor, or a person acting in that capacity. The supervisory review shall include a review of the sworn statement and any answers and statements made by the alien regarding a fear of removal or return.

Id.

32. See INA § 235(b)(1)(C), 8 U.S.C. § 1225(b)(1)(C) (2005); 8 C.F.R. § 235.3(b)(5) (2005).

33. The detention centers may be owned and managed by DHS (or, more specifically, by Immigration and Customs Enforcement (“ICE”), another component of DHS). ICE also may rent bed space in prisons run by other authorities. For a discussion of these prisons under ICE’s predecessor agency, the INS, see Michele R. Pistone, *Justice Delayed Is Justice Denied*, 12 HARV. HUM. RTS. J. 197, 204 (1999).

34. INA § 235(b)(1)(B), 8 U.S.C. § 1225(b)(1)(B) (2005). An asylum officer is specially trained in asylum and refugee law and in the human rights conditions in foreign countries. 8 C.F.R. § 208.1(b) (2005).

35. INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii) (2005). The term “credible fear of persecution” is statutorily defined to mean “that there is a significant possibility, taking into account

burden of proof are eligible to apply to an immigration judge for asylum protection.³⁶ Those who do not establish a credible fear to the satisfaction of the asylum officer are entitled to an extremely limited review by an immigration judge.³⁷ An immigration judge's affirmation of the asylum officer's negative credible fear determination will, in most cases, subject the applicant to deportation within forty-eight hours, the same fate that awaits persons who receive deportation orders by secondary inspectors.

II. SOURCES OF ERROR IN THE EXPEDITED REMOVAL PROCESS

Part II will demonstrate that, in practice, the extensive protections formerly offered in deportation proceedings have, in many applications of the expedited removal process, been replaced by precisely . . . nothing. Even in the abbreviated fashion envisioned by DHS regulations, the law is not explained, the facts are not explored, verification is inadequate and supervisory review is effectively absent. As a result, a randomness and arbitrariness has been introduced into the expedited removal process that is wholly at odds with the expectations of its sponsors.

Part II(A) examines secondary inspectors' failure to follow regulations designed to identify genuine asylum seekers; Part II(B) discusses similar failures by local supervisors, as well as by higher-level managers.

A. *The Record Established by Secondary Inspectors is Incomplete and Unreliable*

Numerous flaws pervade the secondary inspection process. First, secondary inspectors fail to provide applicants for admission with crucial information about the proceedings against them and the possible availability of protection. Second, inspectors fail to ask mandatory questions designed to elicit information about possible claims of asylum. Third, contrary to requirements, individuals who express credible fear during a secondary inspection interview sometimes are not referred to an asylum officer, but rather are expeditiously removed. Fourth, in a large majority of the cases, interview subjects sign the sworn statement portion of the I-867B form used in expedited removal cases without reviewing it. Fifth, in a disturbing finding by the only group allowed to widely observe secondary inspection interviews, the forms completed by officers more than occasionally contained assertions never communicated by the applicant. Sixth, in other cases, the

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." INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (2005).

36. The asylum seeker is issued a Form I-862, Notice to Appear, for full consideration of the claim for protection at removal proceedings pursuant to section 240 of the INA. 8 C.F.R. § 208.30(f) (2005); see also INA § 240, 8 U.S.C. § 1229a (2005).

37. See Pistone & Schrag, *supra* note 23, at 41-42 (detailing limitations of the review process).

completed forms lacked important information communicated by the applicant. Finally, several studies have documented instances of inspectors refusing to provide interpretive assistance.

1. *Inspectors Fail to Communicate Required Information*

CBP training materials state that secondary inspectors must use the I-867A & B forms “in every case in which an alien is determined to be subject to Expedited Removal.”³⁸ The following paragraphs of the I-867A must be read to persons subject to expedited removal:

You do not appear to be admissible or to have the required legal papers authorizing your admission to the United States. This may result in your being denied admission and immediately returned to your home country without a hearing. If a decision is made to refuse your admission into the United States, you may be immediately removed from this country, and if so, barred from reentry for a period of 5 years or longer.

This may be your only opportunity to present information to me and the Immigration and Naturalization Service [sic] to make a decision. It is very important that you tell me the truth. If you lie or give misinformation, you may be subject to criminal or civil penalties, or barred from receiving immigration benefits or relief now or in the future.

U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.³⁹

Nothing is more crucial in preventing the deportation of genuine asylum seekers via expedited removal than ensuring that the I-867A information is communicated; hence, the controlling regulation requires that the information be read out-loud by the secondary inspector or a translator.⁴⁰ The need to do this is particularly acute in the case of the paragraph that informs individuals that “U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their

38. USCIRF REPORT, vol. 2, *supra* note 11, at 13.

39. *See id.* at 252 (copy of I-867A); *see also id.* at 13 (noting obligatory paragraphs).

40. 8 C.F.R. § 235.3(b)(i) (2005) (stating “[t]he examining immigration officer shall read (or have read) to the alien all information contained on Form I-867A”); *see* USCIRF REPORT, vol. 2, *supra* note 11, at 15 (noting that CBP’s manual also expressly requires that the I-867A be read aloud).

home country.” Many victims of persecution are from countries that tightly control information about the ability of victims of persecution to seek refuge in other countries. Thus, for this or other reasons, many applicants for admission are unaware of their right to ask for protection from return and must affirmatively be told about this right by the inspections officer.⁴¹

The same paragraph also contains important information stating that expressions of fear about returning home will be treated confidentially. Especially given the prevalence of post-traumatic stress disorder (PTSD) among true victims of persecution,⁴² as well as the fear that inspectors may relay claims of persecution back to the home government (and thereby possibly endanger the applicant, if returned, or his or her family), many applicants may need to receive the assurance of confidentiality before they will communicate with their interrogators.

The other paragraphs of the I-867A form are also important and failure to read them reduces the accuracy of the secondary inspection process as well.⁴³ Unfortunately, if an inspector fails to read the form aloud, or any part of it, nothing is likely to be done because the omission will likely never be revealed; the file reviewed by supervisors does not require any assurance that the I-867A was read. It is perhaps unsurprising, then, that the form often is not read at all.

The recent report by USCIRF notes both the extent of the failure to read the I-867A aloud and the consequences of this omission. For example, with respect to the failure to read the paragraph informing the applicant of the availability of protection to people who face persecution, the report states:

DHS regulations require immigration inspectors to follow a standard script informing each alien that (s)he may ask for protection if (s)he has

41. See Pistone & Schrag, *supra* note 23, at 25-26 (noting that eventual asylum seekers can even live in the United States for years without learning of the availability of asylum protection).

42. See, e.g., Mark Van Ommeren et al., *Culture, Trauma, and Psychotrauma Programmes*, 350 THE LANCET 595 (1997) (noting “increased rates of post-traumatic stress disorder . . . among Turkish, Palestinian, and Bhutanese survivors of torture”); Pistone & Schrag, *supra* note 23 at 49 n.272 (collecting studies showing elevated levels of PTSD among refugees). Victims of PTSD may be reluctant to discuss the source of their trauma, especially absent the establishment of a “trusting relationship” with an interrogator. See Derrick Silove et al., *Anxiety, Depression and PTSD in Asylum-Seekers: Associations with Pre-Migration Trauma and Post-Migration Stressors*, 170 BRIT. J. PSYCHIATRY 351, 351 (1997) (noting requirement of “trusting relationships”). A promise of confidentiality can be a start toward establishing that relationship, and thus a start toward communicating the information that may qualify one for asylum.

43. For example, confusion about the expedited removal process is widespread even among people who have been through it. USCIRF REPORT, vol. 2, *supra* note 11, at 25. Thus, the paragraph noting that “[t]his may be your only opportunity to present information” may provide new information to applicants, which might be important in motivating them to talk of possible persecution, especially combined with the remaining paragraph’s notification of apparent inadmissibility and warning of a five-year bar. Cf. *Balasubramaniam v. INS*, 143 F.3d 157, 162-63 (3d Cir. 1998) (noting that “an arriving alien who has suffered abuse during interrogation sessions by government officials in his home country may be reluctant to reveal such information during the first meeting with government officials in this country”).

a fear of returning home. In approximately half of inspections observed, inspectors failed to inform the alien of the information in that part of the script. Aliens who did receive this information were seven times more likely to be referred for a credible fear determination than those who were not.⁴⁴

The magnitude of these numbers is stunning, especially when one realizes that the officers knew that they were being observed by USCIRF staff and, as the USCIRF report notes, “It certainly seems likely that compliance with required policies could be greater and inappropriate behaviors would be fewer when observers were monitoring their interviews.”⁴⁵ In all events, the demonstrated widespread disregard of the requirement that the I-867A be read aloud obviously represents a substantial failure.

2. *Inspectors Order Expedited Removal Based on Incomplete Statements*

Inspection officers are also required to ask three questions found on the I-867B and record the answers. Those three questions, which are meant to elicit information relevant to whether a credible fear referral is warranted (and are therefore known as “fear” questions)⁴⁶ are:

- Why did you leave your home country or country of last residence?
- Do you have any fear or concern about being returned to your home country or being removed from the United States?
- Would you be harmed if you are returned to your home country or country of last residence?⁴⁷

Despite their mandatory nature, every study of the expedited removal process and the mandatory questions shows that secondary inspectors repeatedly fail to ask, or fail to record the answer to, one or more of the questions.⁴⁸ The latest study, by USCIRF, found that between 5% and 15% of I-867B’s

44. USCIRF REPORT, vol. 1, *supra* note 11, at 6.

45. USCIRF REPORT, vol. 2, *supra* note 11, at 30. The report continues by noting that “[t]hus, the rates of problems observed in this study likely underestimate the actual rate of problem behaviors and failures to adhere to established policies.” *Id.* The phenomenon by which observers, by their mere presence, affect examined behaviors is known as the Hawthorne effect.

46. *Id.* at 13.

47. *Id.* The I-867B also contains a fourth mandatory question: “Do you have any questions or is there anything else you would like to add?” *Id.* at 253. This catch-all question may sometimes be considered a “fear” question, *see* USCIRF Report, vol. 1, *supra* note 11, at 55 (referring to the “four fear questions”), but its intended scope is broader – to make sure the applicant understands the process as much as to elicit further information. Perhaps the USCIRF report focuses on the first three questions for this reason. *See, e.g.*, USCIRF Report, vol. 2, *supra* note 11, at 13-16.

48. *See* USCIRF REPORT, vol. 2, *supra* note 11, at 14-16; OPPORTUNITIES EXIST, *supra* note 14, at 39-40; CHANGES IN THE PROCESS, *supra* note 5, at 43.

are incomplete in this manner.⁴⁹ A comparison with the 2000 GAO study suggests compliance with this requirement has declined considerably in recent years.⁵⁰ It is unclear whether the decline is due to a decrease in inspector diligence, a lessening of supervisory vigilance, or both. In any event, the trend is unmistakable, and is an unquestionably negative development.⁵¹ Indeed, as discussed below in Part II(A)(5), the compliance failure in this particular respect is greater than the numbers above indicate: the USCIRF study found, through its direct observation of interviews, that the CBP's file record indicating the percentage of times that fear questions had been asked substantially overstated the actual level of compliance during the interviews.⁵²

3. *Inspectors Issue Removal Orders to Individuals who Express Fear During Secondary Inspections*

DHS regulations state the following:

If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer *shall not proceed further* with removal of the alien until the alien has been referred for [a credible fear] interview by an asylum officer in accordance with 8 CFR 208.30.⁵³

Both the GAO and USCIRF studies found evidence that this regulation has not always been obeyed. Thus, in a random sample of 365 case files reviewed by the GAO, seven case files indicated that an individual was ordered removed despite having expressed a fear of return.⁵⁴ USCIRF's study shows an even higher level of disregard for the regulation. In that study, "[o]ne in six aliens who expressed a fear of return during the Secondary Inspection interview were placed in Expedited Removal or allowed to withdraw their application for admission."⁵⁵ Withdrawal is at the discretion of immigration officers; however, the request for withdrawal of an application for admission must be made "strictly voluntar[ily]" by the applicant and "not be coerced in

49. USCIRF REPORT, vol. 2, *supra* note 11, at 14-16 (indicating, at Table 2.1, that a file review showed approximately a 95% compliance rate for each question, meaning that a minimum of 5% and a maximum of 15% of all I-867B's failed to contain an answer to at least one fear question).

50. OPPORTUNITIES EXIST, *supra* note 14, at 39-40.

51. One related bright spot is that while the 1998 and 2000 GAO studies revealed incorrect forms being used by inspectors and accepted by supervisors in some instances, *see* OPPORTUNITIES EXIST, *supra* note 14, at 44; CHANGES IN THE PROCESS, *supra* note 5, at 43, the USCIRF study recorded no such instances.

52. USCIRF REPORT, Vol. 2, *supra* note 11, at 15-16; *see* USCIRF REPORT, vol. 1, *supra* note 11, at 54.

53. 8 C.F.R. § 235.3(b)(4) (2005) (emphasis added).

54. OPPORTUNITIES EXIST, *supra* note 14, at 40.

55. USCIRF REPORT, vol. 2, *supra* note 11, at 29.

any way.”⁵⁶ Distressingly, USCIRF’s researchers witnessed several persons withdraw after expressing fear, with the withdrawals seemingly as a result of improper encouragement by inspectors.⁵⁷

The issuance of expedited removal orders to individuals who express fear during secondary inspections is problematic because it violates the treaty obligation of *non-refoulement*, which prohibits the return of a refugee “from one state to another, especially to one where his or her life would be threatened.”⁵⁸ Because secondary inspectors are not qualified to assess “fear” in the asylum context, as will be discussed in Part II(B)(5), they must not do so. Rather, they should simply record the applicants’ expressions of fear and pass the cases on to asylum officers. As will be shown in Part II(B)(5), confusion among supervisors and upper-level managers appears to cause at least some of the confusion on the inspector level. Inspectors, therefore, may not deserve criticism for doing the wrong thing. Nonetheless, when inspectors evaluate and judge levels and types of fear, the wrong thing *is* being done.

4. *Inspectors Allow Sworn Statements to be Signed Without Being Verified*

Given the high stakes involved in removing individuals from the United States without a judicial hearing and barring them from returning to the country for up to five years, the regulations seek to ensure that all information about an applicant for admission that is recorded on the I-867B sworn statement is accurate and verified. To achieve this goal, the regulations have incorporated three safeguards into the inspection process.

First, inspectors are required to “have the alien read (or have read to him or her)” the statement as it is recorded on the form.⁵⁹ The regulations also contemplate the possibility that corrections will be made to the statement, thereby eliminating any errors, misstatements or misunderstandings between an applicant’s stated answers and the written record. Finally, the regulations also require the applicant to “sign and initial each page of the statement and each correction.”⁶⁰ This last requirement is an effort to have the applicant

56. USCIRF REPORT, vol. 1, *supra* note 11, at 5-6 (quoting CBP training materials) (internal quotation marks omitted); *see also* 8 C.F.R. § 235.4 (2005) (stating that “[t]he alien’s decision to withdraw his or her application for admission must be made voluntarily, but nothing in this section shall be construed as to give an alien the right to withdraw his or her application for admission.”).

57. USCIRF REPORT, vol. 1, *supra* note 11, at 5-6, 50-51; USCIRF REPORT, vol. 2, *supra* note 11, at 23-24; *See Swarns, supra* note 23, at A11 (noting report by the U.N. High Commissioner for Refugees describing “instances in which inspectors encouraged asylum seekers not to pursue asylum”).

58. BLACK’S LAW DICTIONARY 1080 (8th ed. 2004); *see* Refugee Protocol, *supra* note 15, 19 U.S.T. 6224, 606 U.N.T.S. 267 (constituting U.S. treaty obligation). The Refugee Act of 1980 incorporated the United States’ treaty obligation of *non-refoulement* into U.S. law. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

59. 8 C.F.R. § 235.3(b)(2)(i) (2005).

60. *Id.*

confirm the truth of the statement,⁶¹ much as a deponent in litigation is called upon to certify the truth of a deposition transcript after it is read to or by him.⁶²

In practice, however, there is a major difference between signing an I-867 and signing a deposition transcript. The deposition transcript will almost always be in a language the deponent understands; the deposition, after all, purports to be his or her own words. The same is not true of the I-867. That form is written in English, which a substantial majority of persons caught in the expedited removal process do not speak. In fact, in the cases observed by the USCIRF researchers, it was possible to conduct interviews in English less than 20% of the time.⁶³

The language difference does not present an insurmountable obstacle to fulfilling the purpose of the signature requirement. It simply means that the I-867 will have to be translated before it is signed. However, in practice, the I-867 often is signed without being translated.

Thus, the USCIRF study found that, while there was 100% compliance with the signature requirement,⁶⁴ 72% of the signers neither read their statement nor had it read to them.⁶⁵ This large majority signed the form in front of them – as people often do – without knowing or checking its contents. Contrary to the intent of the signature requirement, therefore, the presence of a signature does little to ensure the reliability of the sworn statement.

One might regard this as the failure of the signers, not the inspectors, given that typically the burden is on a signatory to make sure that he or she understands a document before signing it.⁶⁶ In this case, however, the burden is on the inspectors to be “absolutely certain . . . that the alien has understood the proceedings against him or her.”⁶⁷ Moreover, in the majority of cases, it is impossible for signatories to read the document on his or her own initiative. Inspectors provide interpreters only when “necessary”⁶⁸ and, in the USCIRF study, interpretation was provided 81% of the time.⁶⁹ However, the statements were read back to the applicants only 17.7 % of the time,⁷⁰ meaning

61. USCIRF REPORT, vol. 2, *supra* note 11, at 18.

62. FED. R. CIV. P. 30(e), (f)(1).

63. USCIRF REPORT, vol. 2, *supra* note 11, at 10 tbl. 1.4.

64. *Id.* at 18. The 100% performance represents an improvement over prior measures of compliance with the signature requirement. *See OPPORTUNITIES EXIST*, *supra* note 14, at 41 tbl. 2.5 (noting compliance percentages as low as 95%); *CHANGES IN THE PROCESS*, *supra* note 5, at 44 (noting compliance percentages as low as 97%).

65. USCIRF REPORT, vol. 2, *supra* note 11, at 19 tbl. 2.11.

66. E. ALLAN FARNSWORTH, *CONTRACTS* § 4.26, at 295 (1982) (stating that “the law presumes that a person knows the contents of a document that he executes and understands at least the literal meaning of its terms,” (internal quotation marks omitted)).

67. CBP Inspector’s Field Manual § 17.15(a).

68. 8 C.F.R. § 235.3(b)(2)(i) (2005) (“[I]nterpretative assistance shall be used if necessary to communicate with the alien.”).

69. USCIRF REPORT, vol. 2, *supra* note 11, at 10 tbl. 1.4.

70. *Id.* at 19 tbl. 2.11.

that more than 63% of the time the signatories could not know what was in the document, and that this fact necessarily was known to the inspectors who had procured interpreters or themselves had to speak to applicants in a language other than English.

In the vast majority of cases, then, the signature establishes nothing more than that an applicant for admission sat in front of an inspector as the latter wrote up a sworn statement. The consequences of this general failure to treat the signature requirement as anything more than a technical exercise are substantial. First, an undetected misinterpretation or misunderstanding could result in a secondary inspector ordering removal of an applicant who has a viable asylum claim. Second, the same misunderstanding could cause a supervisor to approve a removal order he might otherwise reject. Third, because the I-867B will become part of the official record of the case sent on to credible fear interviews with asylum officers and will then be reviewed and often given substantial weight by immigration judges and government attorneys as they deliberate the merits of asylum claims, undetected misunderstandings could come back to haunt even persons who successfully avoid expedited removal.⁷¹ Finally, the signature requirement and the requirement that inspectors be “absolutely certain . . . that the alien has understood the proceedings” have a secondary purpose of protecting the dignitary interests of applicants. As one scholar has written in a study of social security disability insurance, “claimant control over the processing of a claim . . . is important to the development of an adjudicatory process that maintains or fosters dignity and self-respect.”⁷² Allowing an applicant a chance to review his or her statement and to make changes to it before signing certainly could give the applicant the sense of control that can foster dignity.

5. *Inspectors Falsely Attribute Statements to Applicants*

USCIRF’s recent congressionally-mandated study of the expedited removal process is “the first systematic evaluation of the Expedited Removal process utilizing direct observation of Secondary Inspection interviews with arriving aliens.”⁷³ The results of USCIRF’s study suggest that previous studies based mainly or exclusively on archival data⁷⁴ are very likely to have

71. *Id.* at 67-70 (“Our findings reveal that the Expedited Removal record created during the Expedited Removal process is in many cases used by immigration judges and DHS trial attorneys to impeach aliens’ credibility and undermine their claim”).

72. JERRY L. MASHAW, BUREAUCRATIC JUSTICE 133 (1983).

73. USCIRF REPORT, vol. 2, *supra* note 11, at 28.

74. *See, e.g.*, OPPORTUNITIES EXIST, *supra* note 14, at 32-33; CHANGES IN THE PROCESS, *supra* note 5, at 4; CENTER FOR HUMAN RIGHTS AND INTERNATIONAL JUSTICE, THE EXPEDITED REMOVAL STUDY: REPORT ON THE FIRST THREE YEARS OF IMPLEMENTATION OF EXPEDITED REMOVAL 1-2 (May 2000) [hereinafter EXPEDITED REMOVAL STUDY]. For years, except for the mandated GAO reports, which relied mainly on a review of paper files, the INS resisted almost all outside review of the expedited removal process. Indeed, for several years, it declined not only repeated requests to conduct “on-site observations of the process” but also, until 2000, “denied access to statistical data on expedited

substantially underestimated the rate of noncompliance with applicable regulations.

Thus, the USCIRF report states that “[s]tudy researchers found that the file often indicated that all four fear questions were asked of the alien, even when they were not.”⁷⁵ The discrepancies were substantial. For example, the USCIRF researchers observed thirty-seven cases in which the first “fear” question was not asked. However, in thirty-two of those cases, the applicant’s file nonetheless “incorrectly noted that the question had been asked and answered.”⁷⁶ This suggests that actual noncompliance with the requirement to ask the first mandatory question on the I-867B was almost *seven* times the rate indicated by the record files.

6. *Inspectors Fail to Include Important Information Conveyed by Applicants*

In some cases, inspectors fail to note significant information offered by the applicant on the I-867B.⁷⁷ The most egregious example of this occurs – with distressing frequency, according to USCIRF – when an individual expresses fear at secondary inspection but the officer fails to record the fear and orders expedited removal.⁷⁸

The failure to record important information can create a problem even for an individual who passes secondary inspection and moves to a credible fear interview before an asylum officer and an asylum hearing before an immigration judge. Immigration judges often deny an asylum claim on the ground “that the applicant was not credible because the alien’s testimony in court reflected additional detail not found in the original document from the port of entry.”⁷⁹ Because the I-867B is “less than reliable” in constituting a comprehensive record of the applicant’s statement, this ground may be factually wrong. Accordingly, secondary inspectors’ failure to include significant facts on the I-867B may “lead to the incorrect removal of asylum seekers to countries where they may face persecution,”⁸⁰ even when an inspector decides against ordering expedited removal.

removal.” *Id.* at 2. The one exception that was made to the veil of secrecy placed over the expedited removal process might well be regarded as the exception that proves the rule: the United Nations High Commissioner for Refugees was granted access to “more than 100 interviews with asylum seekers at airports,” but only “on the condition that [its] report not be released to the public.” Swarns, *supra* note 23, at A11 (discussing leaked report).

75. USCIRF REPORT, vol. 1, *supra* note 11, at 55. For an explanation of the fourth “fear” question, see *supra*, note 47.

76. USCIRF REPORT, vol. 2, *supra* note 11, at 15.

77. *Id.* at 16.

78. *Id.* at 20.

79. USCIRF REPORT, vol. 1, *supra* note 11, at 57.

80. *Id.* Although widespread, the practice of relying on the record created at secondary inspections has its detractors. *Id.* at 75 (stating that the sworn statement on the I-867B is not reliable, and therefore recommending that the form include a disclaimer noting that it is not a transcript and is “not intended to go into detail” (internal quotation marks omitted)); see also *Aravinthan Balasubramaniam v. INS*, 143 F.3d 157, 162-63 (3d Cir. 1998) (rejecting the reliance of the Board of

7. *Inspectors Fail to Provide Adequate Interpretive Assistance*

DHS regulations require that interpretive assistance be used, if necessary, at secondary inspection.⁸¹ The authors of the USCIRF report were surprised to find that, “despite the presence of researchers observing Secondary Inspection interviews, our observers . . . noted that on more than one occasion aliens were refused interpreters . . . even when they requested them.”⁸² In this respect, the USCIRF report confirms findings by several other studies.⁸³

Such refusals, even if only occasional, obviously are troubling. Not only do the refusals elevate the risk that an inspector will miss an applicant’s statement of fear and issue a removal order, but they also could eventually hurt applicants who survive secondary inspection. A record compiled by an inspector struggling to get by without an interpreter, or including statements by an applicant struggling to communicate in an unfamiliar language, is clearly susceptible to being tainted by affirmative misstatements and crucial omissions. As noted above in Part II(A)(6), such problems can cause immigration judges to find credibility issues where none truly exist, and could thus ultimately result in the erroneous return of genuine asylum seekers to countries where they may be persecuted.

Moreover, much more than occasionally, inspectors provide inadequate interpretive assistance. In Los Angeles, for example, interpretation is provided by airline personnel nearly 25% of the time⁸⁴ and, as CBP itself recognizes, such interpretation can be problematic.⁸⁵ The potential problems include deliberate inaccuracy, as the national or quasi-national nature of many airlines can foster a bias among airline personnel against a person alleging persecution by the airline employee’s state; unintentional incompetence, as an untrained interpreter may inappropriately summarize statements or attempt to resolve ambiguities on his or her own; and incompleteness, as an applicant may be reluctant to speak openly in front of a known state employee. An interpreter inadequate for any of these reasons can create the same difficulties as a complete failure to provide any interpreter at all.

B. *Supervisory Review of the Expedited Removal Process Is Ineffective*

Supervisory review of expedited removal orders also suffers from serious shortcomings. This review must be performed by an official at or above “the

Immigration Appeals on the record of a secondary inspections interview because, *inter alia*, it “may not be reliable”).

81. 8 C.F.R. § 235.3(b)(2)(i) (2005).

82. USCIRF REPORT, vol. 2, *supra* note 11, at 31.

83. See, e.g., AMERICAN BAR ASSOCIATION, AMERICAN JUSTICE THROUGH IMMIGRANTS’ EYES 10-11 (2004) (detailing instances of interpretive services being denied); Swarns, *supra* note 23, at A11 (citing confidential U.N. report stating that certified translators often were not provided for asylum seekers who did not speak English). See also EXPEDITED REMOVAL STUDY, *supra* note 74, at 72 (noting instance of inspectors refusing to believe applicants’ inability to speak English).

84. USCIRF REPORT, vol. 2, *supra* note 11, at 11 tbl. 1.6.

85. CBP Inspector’s Field Manual § 17.15(b)(3).

level of second line supervisor, or a person acting in that capacity.”⁸⁶ It is conducted primarily through a review of the I-867B. In theory, no expedited removal orders can be carried out unless approved by a supervisor. Unfortunately, in practice, this requirement and other regulations are sometimes ignored. Moreover, other actions are taken as well – including actions by upper-level managers – that make supervisory review of expedited removal orders ineffective.

1. *Supervisors Accept Incomplete Sworn Statements*

It has already been noted in Part II(A)(2) that secondary inspectors sometimes do not ask or do not record answers to the mandatory questions listed on the I-867B. The secondary inspectors’ supervisors compound the error during their own review, by either failing to notice the omissions or simply ignoring the inspectors’ errors.

This deficiency has persisted throughout the lifetime of the expedited removal program. The continued and increased existence of the problem, despite being specifically identified as an issue in government studies published in 1998, 2000, and 2005,⁸⁷ suggests a certain over-optimism among those proponents of expedited removal who thought that supervisory review would adequately approximate review by the Board of Immigration Appeals and the federal courts.

Indeed, this suggestion only becomes stronger as one becomes more familiar with the particulars of the I-867B. The space provided for answering, or at least to begin to answer, the mandatory questions of the I-867B is on the face of the form.⁸⁸ It seems impossible that one would overlook this space unless one has not looked at all. This suggests that the supervisors’ failure to address the omissions is not only a problem in itself, but also a sign of larger problems – most of all, it suggests a general unsuitability of supervisors acting as “courts” of last resort.

2. *In Some Cases, No Record Documents that Any Review Was Conducted*

The GAO has reported that supervisors at some of the busiest airports in the United States completely failed to review expedited removal orders in up to three percent of the cases.⁸⁹ In such cases, the failure to review an expedited removal order effectively constitutes a decision to deport the applicant based on the un-reviewed assessment of a single secondary inspection officer working in a demonstrably flawed system.

86. 8 C.F.R. § 235.3(b)(7) (2005).

87. USCIRF REPORT, vol. 2, *supra* note 11, at 14-16; OPPORTUNITIES EXIST, *supra* note 14, at 39-40, 46; CHANGES IN THE PROCESS, *supra* note 5, at 43.

88. See USCIRF REPORT, vol. 2, *supra* note 11, at 253 (copy of the I-867B).

89. OPPORTUNITIES EXIST, *supra* note 14, at 40-41.

3. *Supervisory Reviews Are Sometimes Conducted by Unauthorized Officials*

As previously noted, a second line supervisor must perform supervisory review.⁹⁰ However, this requirement is sometimes violated when the supervisory review is conducted by “someone other than the second line supervisor [signing] the order of removal.”⁹¹ Presumably, the intent of this rule is to ensure that the review of a secondary inspector’s removal order is conducted by someone who understands the importance (and finality) of the review, and is adequately trained to perform it. Too often, it seems, these assumptions do not reflect reality, but that unfortunate fact only underscores the seriousness of the failure to comply with the second line inspector rule. After all, as flawed as second line supervisor review seems to be, there is absolutely no reason to believe that an individual not empowered by the regulation to undertake the responsibility of review will perform even as well as a second line supervisor.

4. *Supervisors Rely on Inadequate Telephonic Review of Records*

CBP policies allow expedited removal orders to be approved by telephone if an appropriate supervisor is not present.⁹² In practice, supervisory review in many airports is conducted by telephone at least occasionally and perhaps in the vast majority of cases. For example, eighty of the ninety-four case files at JFK International Airport in New York reviewed by the GAO included evidence of telephonic supervisory review.⁹³

There are at least two problems with telephonic supervisory review. First, telephonic review inevitably lessens the overall quality of the review process. Second, telephonic review makes it impossible to conduct with confidence any systematic study of the review process.

The first problem results from the reality that a telephone conversation about a written record is not the same as compliance with the regulatory requirement that a supervisor review “the sworn statement and any answers and statements made by the alien”⁹⁴ unless these parts of the record are read verbatim over the telephone. It is, of course, theoretically possible to read the statement and answers verbatim over the telephone, but it is quite certain that it is not done very often. The supervisory review is by a “high level supervisor”⁹⁵ who has many other responsibilities; after all, out of every 10,000 persons who arrive at ports of entry, in only one or two cases, on

90. 8 C.F.R. § 235.3(b)(7) (2005).

91. OPPORTUNITIES EXIST, *supra* note 14, at 44.

92. *Id.* at 41; CBP Inspector’s Field Manual § 17.15(b)(3).

93. OPPORTUNITIES EXIST, *supra* note 14, at 41.

94. 8 C.F.R. § 235.3(b)(7) (2005).

95. David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT’L L. 673, 682 (2000).

average, will the supervisor be called upon to exercise his or her responsibility to review and approve orders for expedited removal.⁹⁶ Under these circumstances, when an inspector calls for approval of an expedited removal order, it is unlikely that the supervisor is leisurely waiting by the telephone, ready and willing to listen to a possibly lengthy verbatim reading of an applicant's statement. Rather, if the supervisor is available at all, the press of other demands likely encourages a less structured conversation, in which secondary inspectors, perhaps prompted by supervisors at certain points (e.g., "was there fear?," "did he sign it?," etc.), briefly and contemporaneously summarize their interviews.

Such summaries often could omit or mischaracterize important facts that a verbatim reading of the record would reveal. An abbreviated conversation, for example, easily could overlook a failure to answer one or more of the fear questions. Do abbreviated conversations of the sort posited here actually happen? Surely the demonstrated frequency with which fear questions actually do go unanswered, and the impossibility of overlooking the failure to answer if one actually conducted a verbatim reading, constitutes powerful circumstantial evidence that the answer is "yes." Moreover, for a proponent of telephonic review to argue that the answer is "no" would, if successful, be to win the battle but to lose the war over the appropriateness of the current system – it would mean that high level supervisors are approving deportations despite being expressly and routinely made aware that forms are incomplete in crucial respects.

More likely, we think, than that cynical view, is that abbreviated, i.e. non-verbatim, telephonic reviews are, above all, good faith responses to substantial time pressures. In addition, supervisors and secondary inspectors can find common ground in the fact that non-verbatim telephonic review has the additional bureaucratic appeal of lessening accountability on both ends of the line. When non-verbatim telephonic supervision is utilized, there is no written record of what is communicated to the supervisor. One cannot tell whether a supervisor made a mistake in evaluating the facts, or if the secondary inspector omitted or mischaracterized facts. Unfortunately, as the lack of accountability dawns on employees, the incentive to work carefully is lessened. Indeed, in the past and perhaps still, the lack of accountability was

96. Approximately 300 million people will arrive at U.S. ports in a given year. Approximately 3.3% of this group, or ten million people, will be directed to secondary inspections. Ten percent of this ten million, i.e., one million, will go through a long interview and truly be at risk of being immediately deported. In 2003, 43,336 of the latter group actually were ordered deported via expedited removal (almost double this number were given permission to withdraw). In other words, 4.3% of persons truly at risk of receiving expedited removal orders actually received them; .43% of persons diverted for any length to secondary inspections actually were deported via expedited removal; and .013% of persons – or 1.3 persons out of every 10,000 – who arrived hoping to enter the country were given expedited removal orders. See USCIRF REPORT, vol. 1, *supra* note 11, at 32 (statistical information); USCIRF REPORT, vol. 2, *supra* note 11, at 6 (noting 90% of persons sent to secondary inspection pass through quickly).

reinforced by the failure of supervisors to keep any record establishing that a review took place, despite training guidance recommending that approving officials keep a log of telephonic concurrence to ensure that all cases are properly approved.⁹⁷

In sum, telephonic review thus not only fails as a means of conducting an effective review, it succeeds far too well in masking the particular source of any errors that may be made. Absent any changes in procedure, this baleful combination has the unfortunate consequence of making systematic review by others, including even higher-ranking CBP officials, both necessary and impossible.

5. *High-Level Managers and Supervisors Have Inexcusably Confused the Standard to be Applied When Applicants Express Fear in the Secondary Inspections Interview*

CBP claims that certain expressions of fear in an expedited removal hearing should *not* result in a referral for a credible fear determination. CBP's claim finds expression in section 17.15(b) of the CBP Inspectors' Field Manual, which authorizes inspectors to deport, via expedited removal, even persons who have expressed fear in response to the I-867B's fear questions when the fear "would clearly not qualify that individual for asylum."⁹⁸ This instruction is vulnerable on numerous grounds.

The first objection to allowing inspectors to evaluate the adequacy of an applicant's fear assertion is that it flatly contradicts the DHS regulation it is intended to facilitate. As noted previously, that regulation states:

If an alien subject to the expedited removal provisions indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the inspecting officer *shall not proceed further* with removal of the alien until the alien has been referred for [a credible fear] interview by an asylum officer in accordance with 8 CFR 208.30.⁹⁹

The statute this regulation is meant to implement states that, upon an expression of fear, "the officer *shall refer* the alien for an interview by an asylum officer. . . ."¹⁰⁰ As far as the action required upon an expression of fear is concerned, the regulation thus differs from the statute it is implementing only in that the regulation's command "not [to] proceed further" makes explicit what is obviously implicit in the statute.

A strict constructionist might hold that CBP's interpretations of the statute

97. OPPORTUNITIES EXIST, *supra* note 14, at 41.

98. CBP Inspector's Field Manual § 17.15 (2003); *see* USCIRF REPORT, vol. 1, *supra* note 11, at 6, 53-54; USCIRF REPORT, vol. 2, *supra* note 11, at 20.

99. 8 C.F.R. § 235.3(b)(4) (2005) (emphasis added).

100. INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii) (2005) (emphasis added).

and regulation are self-refuting. To claim, as CBP does, that the “shall” in the statute means “may” and that the unqualified direction in the regulation that an inspector “shall not proceed further” actually allows an inspector to proceed further might be characterized as a step through the looking glass into an Alice in Wonderland world where words “mean just what [we] choose [them] to mean – neither more nor less.”¹⁰¹ Our view is more flexible, though not infinitely so. Perhaps there is room to proceed further but, at the very least, one’s call for flexibility must make sense in the larger statutory scheme.

Accordingly, to consider another example, calls to flexibly interpret the express statutory command that inadmissible persons without proper travel documents “shall [be] removed . . . without further hearing or review,”¹⁰² might appropriately be viewed with at least initial skepticism. When engaging in statutory interpretation, one must always keep in mind the possibility that Congress actually meant exactly what it said. Certainly the government’s position has always been that – except for certain expressly articulated exceptions – Congress meant exactly what it said when it framed the core expedited removal power to deport “without further hearing or review.”

The same might be said of the proscription against “proceed[ing] further” once a fear is articulated. Indeed, just as the power to deport “without further hearing or review” is at the core of expedited removal’s effectiveness, at the core of the asylum protection that provides the main exception to expedited removal’s jurisdiction over travelers without papers is the ability to halt the process with an expression of fear. Thus, one might conclude that the rule and its exception each might be interpreted in the same way, as absolute in their respective spheres.

With its claim that secondary inspectors can “proceed further” in some cases, CBP has rejected this parallel interpretation. Whether such a position is sensible depends upon practical questions of implementation and the compatibility of the position with the overall regulatory scheme. Considered in the light of these concerns, the CBP policy is objectionable in the extreme.

Ironically, another section of the CBP Inspector’s Field Manual best explains the most fundamental practical objection:

The alien may convey fear of violence or harm, a need for protection, an indication of harm to, or disappearance of, relatives or associates, or dangerous conditions in his or her country. Even disputes of a personal nature sometimes may relate to asylum, such as domestic violence, sexual or child abuse, child custody problems, coercive marriage or family planning practices, or forced female genital mutilation. All officers should recognize that sometimes unusual cases have been found eligible for asylum that may not have initially appeared to relate

101. LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE*, in *THE ANNOTATED ALICE* 129, 213 (2000) (quoting Humpty Dumpty).

102. 8 U.S.C. § 1225(b)(1)(A)(i) (2005).

to the five grounds contained in the definition of refugee, such as AIDS victims who face government persecution, land or money disputes with wealthy persons or persons in power, whistle blowers, witnesses to crime and even organized crime connections. Do not make judgment decisions concerning any fear of persecution, torture, or return. If in doubt, refer to an asylum officer for a determination. Any alien who by any means indicates a fear of persecution or return may not be removed from the United States until the alien has been interviewed by an asylum officer.¹⁰³

To paraphrase, asylum determinations require the special training of asylum officers. Because inspection officers do not have that training, they must recognize their limitations and refrain from making any judgments when fear is mentioned, except the judgment to refer the matter to an asylum officer.

This recognition of the limitations of inspectors has long been understood as demanding a low fear threshold at secondary inspections. Thus, when the I-867B was being developed, an early draft included a fear question asking, “what is the nature of [your] fear or concern [about being sent home]?” The proposed question was eliminated from the form after it was noted that “inspectors lacked training that would enable them to distinguish between qualifying and non-qualifying types of fears.”¹⁰⁴ Indeed, at the time, INS officials not only acknowledged inspectors’ present lack of training in asylum law, they also expressed that “inspectors would not be trained in the nuances of asylum law” in the future.¹⁰⁵

Time has proven this belief entirely well founded. Reports by the USCIRF and others confirm that secondary inspectors are still not trained in asylum law and thus remain unable to distinguish between qualifying and non-qualifying fears.¹⁰⁶ Under these circumstances, the only policy that sufficiently safeguards against the erroneous deportation of genuine asylum seekers is the one implied by the Field Manual quotation noted above: a sort of “beep test” in which, in the words of former INS General Counsel David Martin, once “the interviewee mentions fear of return, the beep sounds (figuratively) and the case is identified for referral to an asylum officer.”¹⁰⁷

The problem is that this understanding – which is the only understanding that can adequately protect genuine asylum seekers – has never been fully

103. CBP Inspector’s Field Manual § 17.15(d) (2001).

104. A WELL-FOUNDED FEAR, *supra* note 6, at 217. For what it is worth, one of the authors of this Article (Pistone) was intimately involved with many of the events described in Professor Schrag’s *A Well-Founded Fear*, and can often confirm his account based on first-hand knowledge. The path of the I-867B’s development is one such event. *See id.* at 105-10.

105. A WELL-FOUNDED FEAR, *supra* note 6, at 216.

106. USCIRF REPORT, vol. 1, *supra* note 11, at 74; *see Swarns, supra* note 23, at 11 (noting report by the United Nations High Commissioner for Refugees that found inspectors “often lacked an understanding of asylum law”).

107. Martin, *supra* note 95, at 681-82. Professor Martin was INS General Counsel from 1995 to 1998, the time period in which expedited removal was passed into law and implemented.

accepted within the immigration services; indeed, it has been actively resisted. Section 17.5(b) of the Manual, which authorizes an inspector to ignore an individual's assertion of fear when it "clearly would not qualify that individual . . . for asylum," constitutes the formal expression of the resistance. That section provides the legal grounding for a pattern of training and supervision that, from the start, has confused secondary inspection officers and caused an inconsistent and erroneous application of the fear standard.

Thus, the 2000 GAO study that found file evidence of erroneous deportation of individuals who asserted a fear also revealed evidence that inspection officers' training left them uncertain as to whether or not they were required to "refer any alien claiming a fear of returning to his/her country to an asylum officer."¹⁰⁸ Although at the time an INS official conceded that additional training and clarification of the fear standard might be needed,¹⁰⁹ based on the USCIRF study, five years later that confusion clearly persists.

For example, in twelve sample cases directly observed by the USCIRF staff, individuals who expressed fear – and who, therefore, "under DHS regulations . . . should have been referred for a credible fear interview"¹¹⁰ – were not so referred.¹¹¹ In five of these cases, there was no basis whatsoever for concluding that the expressed fear was non-qualifying. In two other cases, USCIRF deemed the fear "ambiguous," making them precisely the kinds of cases that demand what the inspectors concededly lack – the ability to make nuanced legal judgments. Finally, while one case was not characterized by USCIRF, the report suggests that the claims of fear in four other cases were more suspect; in three of these four cases, the expressed fear related to economic hardship. However, experienced asylum practitioners often find that ostensibly "economic" cases may in fact offer grounds for asylum. A potential client may start by talking about economic hardship, for instance, and only later reveal membership in a persecuted ethnic group suffering from economic hardship rooted in the persecution of him or his group.¹¹²

In none of the twelve observed cases, accordingly, can the fear expressed

108. OPPORTUNITIES EXIST, *supra* note 14, at 43.

109. *Id.* at 40.

110. USCIRF REPORT, vol. 1, *supra* note 11, at 54.

111. USCIRF REPORT, vol. 2, *supra* note 11, at 21-23. Incidentally, "among the countries to which the 12 aliens who expressed fear were returned, five of them (of nine) are noted to have extrajudicial killings and human rights abuses in recent reports . . . , and two of the countries have significant limitations on religious expression . . ." *Id.* at 21.

112. Indeed, in recognition of this fact, the Credible Fear Manual of the U.S. Citizenship and Immigration Services, the component of DHS responsible for "service" functions such as the naturalization process, as well as evaluating asylum claims through its corps of asylum officers and immigration judges, *see* USCIRF REPORT, vol. 1, *supra* note 11, at 28, instructs those officers that "[t]he statement by an applicant that 'I left my country because I can't work' is insufficient to judge the merits of a case and should lead to further inquiry." USCIRF REPORT, vol. 2, *supra* note 11, at 29 n.29. *See* Lukwago v. Ashcroft, 329 F.3d 157, 168 (3d Cir. 2003) ("defin[ing] persecution as including . . . 'economic restrictions so severe that they constitute a real threat to life or freedom'" (quoting *Lin v. INS*, 238 F.3d 239, 244 (3d Cir. 2001))).

clearly be classified as non-qualifying. The best that can be said on behalf of the Field Manual standard allowing inspectors some discretion, is that its application yields secondary inspection results that are often, but not necessarily always, wrong. (Actually, the results *are* always wrong because an appropriate policy would require a credible fear referral upon any invocation of fear. Our point is that, even on its own terms, the Field Manual policy produces demonstrably erroneous decisions.) This entirely predictable result – predictable because inspectors so obviously lack the training (as well as the time) to distinguish properly among types of fear – illustrates the reason why a more demanding fear showing was rejected by the regulations of the parent agency in the first place, i.e., because it would necessarily introduce a disconcerting element of randomness into a process that does, after all, potentially involve life-or-death decisions.¹¹³

In addition to endangering genuine asylum seekers, the Field Manual's amended fear policy produces other entirely predictable harms as well. In Part II(A)(1), we discussed the paragraphs of the I-867A that must be read to all persons subject to expedited removal; the final mandatory paragraph bears re-reading:

U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.¹¹⁴

The incompatibility of this paragraph with the fear position articulated in §17.15(b) of the Field Manual is jarring. As the I-867A indicates, CBP's approved policy is for a secondary inspector to promise an individual that "[i]f you fear or have a concern about being removed," "another officer [will speak to you] about your fear or concern" and that "[t]hat officer will determine if you should remain in the United States." In the twelve cases noted above (and in potentially thousands of unobserved cases) the following scenario occurred: an individual admitted a fear and was then ordered removed immediately by the very inspector who just promised the chance to talk "privately and confidentially" to another officer who would make the removal decision.

113. Indeed, given the similarity of the stakes, the introduction of this element of randomness into the asylum process should be no more acceptable as a policy matter than were the standardless death penalty determinations invalidated by the Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 239 (1972) and *Gregg v. Georgia*, 428 U.S. 153, 199 (1976).

114. See USCIRF REPORT, vol. 2, *supra* note 11, at 13, Box 2.1.

Given this scenario, the collateral consequences of the Field Manual's fear policy – to the reputation of the United States, to the coherence of the regulatory scheme, to the perceived fairness of the secondary inspection process, to the integrity of the process, to inspectors' own sense of integrity, to the willingness of inspectors to read a "mandatory" paragraph that they know is sometimes a lie, and to the development of an institutional culture that values truth-telling – are evidently serious and universally unwelcome. It is apparent that the managers responsible for development of the Field Manual did not think through all the collateral implications of the policy granting additional discretion, nor did they adequately appreciate the inability of secondary inspectors to make the distinctions the new policy required, or appropriately weigh the risks the policy creates for genuine asylum seekers. And, most fundamentally, they ignored the plain meaning of the regulation that their Field Manual ended up flouting, even though a plain meaning reading would yield a result both more consistent with the remainder of the regulatory scheme and more workable in practice, given the capabilities of secondary inspectors.¹¹⁵

III. THE CONSEQUENCES OF CBP'S RULE-BREAKING ARE SIGNIFICANT

In Part III, we quantify the human toll of CBP's failure to follow the rules governing the treatment of possible asylum seekers in expedited removal. Our calculation is extremely conservative, and almost certainly underestimates the total number of genuine asylum seekers wrongly deported since the implementation of expedited removal. For example, we do not include in our calculation deportations via expedited removal of genuine asylum seekers caused by: (1) the inappropriate exertion of pressure on asylum seekers to withdraw their applications for admission;¹¹⁶ (2) the failure to use interpreters or the use of inadequate or inappropriate interpreters;¹¹⁷ (3) the conditions at secondary inspection, which are not conducive to full disclosure (e.g., the handcuffing and shackling of asylum seekers);¹¹⁸ (4) the reliance by judges on inaccurate or incomplete sworn statements as the basis for making adverse credibility findings and denying asylum protection;¹¹⁹ (5) the "push back" of asylum seekers at primary inspection;¹²⁰ (6) the failure of appropriate or sometimes any supervisors to review expedited removal orders and

115. A grant of discretion might be justified in extremely narrow circumstances, e.g., if an interviewee responded to the question, "Do you have any fear about being returned to your home country . . .?" by stating, "Yes, because I have a fear of flying." To this point, however, CBP has shown no ability or inclination to so confine the grant.

116. See *supra* notes 56-57 and accompanying text.

117. See *supra* Part II(A)(7).

118. Pistone & Schrag, *supra* note 23, at 61-63; see also *supra* note 23 and accompanying text.

119. USCIRF REPORT, vol. 1, *supra* note 11, at 44; USCIRF REPORT, vol. 2, *supra* note 11, at 67-70.

120. USCIRF REPORT, vol. 1, *supra* note 11, at 54-55; USCIRF REPORT, vol. 2, *supra* note 11, at 24. Such incidents can occur at a land crossing – although not at an airport, for example – as in the

I-867s;¹²¹ and (7) mistakes made because of inadequate telephonic review of I-867 forms by supervisors.¹²² Nor do we adjust any figures to account for the operation of the Hawthorne effect – “where observers, by their mere presence, influence the behavior under investigation” – even though it is a virtual certainty that that effect has caused an underestimation of many of the rules violations witnessed during the USCIRF study,¹²³ just as it is a virtual certainty that every one of the seven problems noted above have caused genuine asylum seekers to be returned erroneously to homelands where they may be persecuted.

Rather, we limit ourselves to the following three acts of noncompliance: (1) failure to read the mandatory paragraphs of the I-867A;¹²⁴ (2) failure to refer individuals who indicated a fear of return to credible fear interviews;¹²⁵ and (3) failure to ask and/or record the answers to the mandatory fear questions of the I-867B.¹²⁶ In calculating the number of persons wrongly deported via expedited removal in a typical year, we have averaged figures for the last four years to arrive at an annual total of approximately 71,000 applicants for admission placed into the expedited removal process, with approximately 10,000 of those applicants referred by inspectors to credible fear interviews.¹²⁷ We have averaged figures over a multi-year period because the figures tend to vary considerably from year-to-year; we have selected the particular four-year period of 2000-2003 because that is the time period selected by the USCIRF to serve as a comparative basis for some of its own data collection efforts.¹²⁸ It is also the most recent four-year set of data available.

A. *The Consequences of Failing to Read Mandatory Information from the I-867A*

As explained in detail in Part II(A)(1), secondary inspectors are required to read mandatory scripted language to each of the 71,000 applicants for admission who are put into the expedited removal process in an average year. However, the USCIRF found that “in approximately half of inspections observed, inspectors failed to inform” the applicants for admission of the mandatory scripted information.¹²⁹ According to the USCIRF report, those

former location a primary inspector can informally deny entry and then simply tell an asylum seeker to leave.

121. See *supra* Parts II(B)(2) & (3).

122. See *supra* Part II(B)(4).

123. USCIRF REPORT, vol. 2, *supra* note 11, at 30-31.

124. See *supra* Part II(A)(1).

125. See *supra* Part II(A)(3).

126. See *supra* Part II(A)(2).

127. U.S. DEPARTMENT OF HOMELAND SECURITY, 2003 YEARBOOK OF IMMIGRATION STATISTICS 149 (2004).

128. See USCIRF REPORT, vol. 2, *supra* note 11, at 12.

129. USCIRF REPORT, vol. 1, *supra* note 11, at 6.

who “did receive this information were seven times more likely to be referred for a credible fear determination than those who were not.”¹³⁰

The impact of this failure is shocking. It means that, annually, approximately 35,500 applicants for admission are not read the required script. If people who are read the script are seven times more likely to be referred to credible fear interviews, then approximately 8750 out of our annual average of 10,000 people referred for credible fear interviews come from the half that received the mandatory information, while only 1250 come from the group that does not receive this information. The difference of 7500 constitutes the number of individuals each year who are not referred to credible fear interviews because of this failure alone.

B. The Consequences of Failing to Refer Individuals Who Mention Fear to Credible Fear Interviews

As discussed in Part II(A)(3), many individuals have been subjected to expedited removal because of the failure of secondary inspectors to refer all individuals who mention a fear of return to credible fear interviews. Specifically, according to the USCIRF study, 15.2% of individuals who mention fear are not so referred.¹³¹ In an average year, that means that approximately 1751 individuals who express a fear of return and hence should be referred to credible fear interviews are instead deported immediately via expedited removal.¹³²

C. The Consequences of Failing to Ask and/or Record Answers to the Fear Questions

As Part II(A)(2) details, the mandatory fear questions are designed to elicit information relevant to whether applicants for admission should be sent to credible fear interviews or expeditiously removed. The USCIRF report found that the questions effectively achieve the intended result. Specifically, the USCIRF report found that “the likelihood of referral for a Credible Fear interview was roughly doubled for each [of the two explicit] fear question[s] asked” (i.e., the likelihood was 4 times greater for individuals who were asked both fear questions compared to those who were asked neither question.)¹³³

In particular, 18% of the applicants who were asked both explicit fear questions were referred for credible fear interviews, while the comparative

130. USCIRF REPORT, vol. 1, *supra* note 11, at 6.

131. USCIRF REPORT, vol. 1, *supra* note 11, at 54; USCIRF REPORT, vol. 2, *supra* note 11, at 20.

132. The 15.2% figure indicates that of every 8,480 persons who are appropriately referred, 1,520 persons are not. Adjusting these numbers for our annual approximate base of 10,000 appropriate referrals yields a total of 1,751 additional persons who are improperly deported through the expedited removal process each year.

133. USCIRF REPORT, vol. 2, *supra* note 11, at 17-18.

figure for those who were asked only one of the questions was 8.6%, and the percentage for those asked neither question was only 5.3%.¹³⁴ Additionally, 5% of the time, neither question was asked, while only one question was asked an additional 9% of the time.¹³⁵ An extrapolation from these figures, and our average annual base of 71,000 applicants placed into the expedited removal process, leaves us with an expected shortfall of approximately 1052 persons per year who should have been referred to a credible fear interview, but were not because of this failure.¹³⁶

In conclusion, based on the USCIRF report's findings, the total number of applicants for admission who are not referred to credible fear interviews because of these three failures amounts to more than 10,300 persons each year – a figure that exceeds the total number of individuals actually referred by inspectors for credible fear interviews in an average year. Given the very small percentage of credible fear referrals that result in a negative credible fear determination, the likely effect is that approximately 10,000 persons per year are erroneously subject to a five-year bar on returning to the United States¹³⁷ and thousands are erroneously deported to face persecution.¹³⁸ The latter figure suggests that, over the entire course of expedited removal's almost nine-year history and based only on our partial accounting of the damage, approximately 20,000 genuine asylum seekers have been refused entry by the United States because those in charge of the process have broken the rules meant to protect persons fleeing persecution abroad.

IV. RECOMMENDATIONS

Given the serious nature of the harm caused, reform of the expedited removal process is urgently needed. In approaching this task, we agree with Professor Jerry Mashaw, who wrote in his analysis of the administration of the social security disability program that “[c]riticism and the reformist instinct must be harnessed to an appreciation of reality.”¹³⁹ In formulating our suggested reforms, we must appreciate the overwhelming reality that the culture in which expedited removal occurs is an enforcement culture,

134. USCIRF REPORT, vol. 2, *supra* note 11, at 17 tbl. 2.8.

135. USCIRF REPORT, vol. 1, *supra* note 11, at 54.

136. Out of an expected 6390 people (9% of 71,000) asked only one question, the difference between a referral rate of 18% and a referral rate of 8.6% is 601 (1105 minus 549). Similarly, out of an approximate 3,550 people (5% of 71,000) asked neither question, the difference between a referral rate of 18% and a referral rate of 5.3% is 451 (639 minus 188). Adding together the two sums yields a result of 1052 individuals.

137. In recent years, only about 1% of persons referred to credible fear hearings are given a negative credible fear determination, USCIRF REPORT, vol. 2, *supra* note 11, at 173 tbl. 1.0, and subsequently removed pursuant to the expedited removal power. Accordingly, very few persons who are referred to a credible fear hearing end up being subjected to the five-year ban.

138. Twenty-five percent of asylum seekers with counsel are granted asylum. *Id.* at 241. With the assistance of paid counsel, pro bono attorneys, human rights organizations, and law school clinical programs, almost 80% of all asylum applicants are represented by counsel at their hearings. *Id.* at 241 n.39; *see also id.* at 241-48 (noting several types of legal assistance available to asylees).

139. MASHAW, *supra* note 72, at 20.

meaning that CBP (as well as its parent department, DHS) focuses on enforcing the rules restricting illegal immigration, as opposed to maximizing legal immigration or providing services to immigrants and potential immigrants. By its nature, especially after the events of September 11, 2001, this culture will resist initiatives that are perceived as failing to serve the enforcement mission.¹⁴⁰

A realistic plan for reform, accordingly, must do more than recommend the issuance of certain diktats from above. Plenty of diktats already exist, and every study conducted of the expedited removal system has found that those diktats are often ignored on the ground. Simply designing a better mousetrap, in other words, is not enough.

Three years ago, Professor Lenni Benson introduced into the administrative law literature a striking metaphor to clarify this concept. She characterized the various diktats from above – “the statutory provisions, regulations, and implementing forms and instructions” – as a map and only a map. She argued that “[t]he map is not the territory,”¹⁴¹ but rather, the territory is the reality that the map symbolically represents, as the bureaucratic implementation is the reality that the diktats theoretically describe. Reform that focuses exclusively on making a better map, with no regard for the territory, carries with it a great and quite predictable risk of failure. A better map won’t help you if, on the ground, “you can’t get to there from here.”¹⁴²

Our aim is to offer recommendations that will allow the expedited removal process to arrive, in fact, at a place where thousands of genuine asylum seekers will no longer unnecessarily be put at risk of deportation. In order to

140. See Andrew I. Schoenholtz, *Refugee Protection in the United States Post-September 11*, 36 COLUM. HUM. RTS. L. REV. 323, 329-32 (2005) (discussing enhanced “enforcement focus” after September 11, 2001); Angelo A. Paparelli & John C. Valdez, *September 11 Ushers in a New Era in Immigration Law and Practice, Part II*, 7 BENDER’S IMMIGR. BULL. 427, 427 (Apr. 15, 2002) (noting that the INS’s planned reorganization in 2002 contained “ominous signs that the INS’s major focus will be more on enforcement and less on service”). Paparelli and Valdez rightly characterize the post-September 11 movement toward greater enforcement as “ominous” because, even before that day, “the agency ha[d] become completely enforcement-minded.” Mirta Ojito, *Change in Laws Sets Off Big Wave of Deportations*, N.Y. TIMES, Dec. 15, 1998, at A1; see Daniel W. Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 GEO. IMMIGR. L.J. 109, 119-20 (1996) (quoting former officials and others to the effect that enforcement and service clash, “the enforcement mentality almost always wins”); Demetrios Papademetriou et al., *Reorganizing the Immigration Function: Toward a New Framework for Accountability*, 75 INTERPRETER RELEASES 501, 504 (1998) (noting that “enforcement goals always seem to take precedence over service goals”). Indeed, in the aftermath of 9-11, some evidence suggests that under the DHS even service activities have taken on the characteristics of an enforcement program. See Louie Gilot, *Immigration changes; Citizenship office will put legacy of old INS on ICE*, EL PASO TIMES, Mar. 20, 2004, at 1A (noting claim that “enforcement is getting in the way of service”); Ernesto Londoño, *Immigration changes in works*, DALLAS MORNING NEWS, Mar. 30, 2004, at 1B (noting “[e]nhanced background checks introduced after 9-11 are leading to more arrests of felons who apply for immigration benefits”); Vicki Kemper & Ricardo Alonso-Zaldivar, *U.S. Tries to Speed Flow of Immigration Paperwork*, L.A. TIMES, June 18, 2004, at A18 (noting post-9-11 requirement of “full security checks” has slowed processing).

141. Lenni Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 211 (2002).

142. *Id.* at 218.

accomplish this goal, we have focused first on the territory, with several recommendations we think will have the effect of changing the ground environment in a way that will ultimately make CBP more receptive to following diktats from above. After this, we offer some changes of the map-making variety. The latter changes are important, but the former are really the *sine qua non* of effective reform.

Our hope is that people on all sides of the debate will embrace our recommendations because the need for effective reform has never been so obvious or necessary as it is now. The need is more obvious than ever due to the disclosures of the USCIRF report, which demonstrate, to a disturbing degree, both the unreliability of the file records upon which prior studies have primarily been based, and the great likelihood that the file records underestimate to a significant extent the scale of CBP's noncompliance with established requirements. And the need for effective reform is now more necessary than ever due to recent and perhaps future expansions of the expedited removal power. When it began, expedited removal was limited to persons who had just arrived at ports of entry, such as airports. Expansions in 2002 and 2004 extended expedited removal to "undocumented non-Cubans who entered the United States by sea within the prior two years" and to "undocumented aliens apprehended within 14 days after entry and within 100 miles of the border, in the Tucson and Laredo Border Patrol sectors," respectively.¹⁴³ Subsequent DHS initiatives further extended the latter policy "across the entire southwest border" in 2005, and to the entire U.S.-Canadian border and to all U.S. coastal areas in 2006.¹⁴⁴ With the extensions, officers inexperienced in expedited removal, working in offices similarly inexperienced, are beginning to exercise the awesome and unappealable power of deporting arriving persons and banning them from returning for five years or more. In sum, there is no better time than the present to get it right, and we are now better prepared to do so because we have a better picture of what can and has gone wrong.

A. *Reforming the Culture*

Contrary to general belief, bureaucratic culture is easy to change. The difficulty lies in making the change an improvement. A top-down, heavy-handed approach is likely to be counter-productive. In reality, inspectors at

143. USCIRF REPORT, vol. 1, *supra* note 11, at 2.

144. Press Release, U.S. Dep't of Homeland Security, DHS Expands Expedited Removal Authority Along Southwest Border (Sept. 14, 2005), *available at* <http://www.dhs.gov/dhspublic/display?content=4816>; Press Release, DHS Streamlines Removal Process Along Entire U.S. Border, U.S. Department of Homeland Security (Jan. 30, 2006). In between the 2005 and 2006 DHS initiatives, a legislative proposal to expand expedited removal to "all border patrol sectors on the southern border of the United States" was passed in the U.S. House of Representatives. *See* Border Patrol, Antiterrorism, and Illegal Immigrant Control Act of 2005, H.R. 4427, § 407 (passed Dec. 16, 2005).

the border – and their managers – have a complicated job balancing the “quite different, almost opposite, organizational objectives” of enforcement and service.¹⁴⁵ Anyone seeking to alter that balance has to be aware of the delicacy of the task. The potential for orders from above to be misinterpreted at ground level is significant. When the Social Security Administration (SSA), for example, desired to make social security disability awards more definite for certain claimants by classifying particular medical conditions as per se disabling, it simultaneously and quite unintentionally sent the undesired message that other conditions were “presumptively nondisabling.”¹⁴⁶

Immigration officials are aware of this problem. Indeed, at least one may have learned from the SSA example noted above, when a strikingly similar issue came up during discussions about the rules to govern expedited removal. As recalled in Professor Philip Schrag’s insightful memoir/study of IIRIRA’s origins, passage and aftermath:

Some advocates echoed the call that Pistone and I had made for a “problem list” of countries from which people would be assumed to be escaping. A senior INS official dismissed this suggestion, saying that if there were such a list, the inspectors would immediately deport anyone who was not from a country on the list. I suggested that they could be trained to use better judgment than that, but the official said that I was “bucking human nature.”¹⁴⁷

All things considered, the INS official may have been right. The flip side of a generally commendable caution about the unintended effects of managerial communications, however, is that it may lead to the conclusion that certain deeply rooted, habitual and serious problems simply cannot be effectively addressed. In this mindset, any proposed cure may be thought likely to be worse than the disease.

In many contexts, the choice between a caution that may let acknowledged problems fester, and action that may create new problems, can be a difficult one. We appreciate the difficulty, but think there may be a way to sidestep it in this case. An extension of Professor Benson’s metaphor may illuminate our approach.

Our concern is to change things on the ground, not simply on the map. Because of CBP’s strong enforcement culture, for asylum seekers that

145. *Immigration Issues: Making Needed Policy and Management Decisions on Immigration Issues: Hearing Before the Subcomm. On Information, Justice, Transportation, and Agriculture of the H. Comm. on Gov’t Operations*, 103rd Congress 1 (1993) (statement of Henry R. Wray, Director, Administration of Justice Issues, General Accounting Office).

146. MASHAW, *supra* note 72, at 66. Similarly, when SSA undertook additional review of one state agency whose award rate for disability claims placed it among the more generous states, the agency lurched within six months to a position as one of the least generous states, as examiners became convinced that they were “required to interpret all policies in the most stringent fashion.” *Id.* at 159-60.

147. A WELL-FOUNDED FEAR, *supra* note 6, at 200.

ground is far drier and more inhospitable than it should be. A flood of directives from above might change this, but as with all flooding, consequences are unpredictable. CBP officials, appropriately, are cautious about taking any actions that might wash away their enforcement culture or leave it buried underwater. On the other hand, the enforcement culture is strong enough – dry enough, let’s say – that a light sprinkling of directives is likely to have no more permanent or substantial effect than a brief summer shower on a hot desert floor. But what if we followed the lead of people who live in dry climates? They typically construct irrigation systems that control and direct the flow of water, allowing it to be absorbed into and transform the soil day-by-day, drop-by-drop. We advocate a structural approach that will have a similar effect, slowly changing the situation on the ground through a steady application of forces that, over time, can counter the dominant enforcement culture, without running the risk of uncontrolled and sudden change.

1. *Regularize and Expand the Use of External Studies*

We have lobbied against, thought and written extensively about, and closely followed the literature on expedited removal for nearly a decade. We have carefully read GAO studies, ABA reports, and other writings on the subject. Still, in many ways, the USCIRF report came as a revelation. From the 2000 GAO study, we knew inspectors sometimes failed to record answers to the mandatory questions of the I-867B, but we did not know that inspectors sometimes made up answers to questions that were never asked. We now know that they do. From the 2000 GAO study, we knew supervisors sometimes overlooked mentions of fear in approving expedited removal orders, but we did not know that inspectors sometimes failed to include mentions of fear in the I-867B sworn statement before recommending expedited removal. Again, we now know that they do. And the revelations do not end there; unfortunately, we could go on and on. Neither the alarming frequency with which I-867A information is not conveyed, for example, nor the overwhelming frequency with which the sworn statement is not read back to applicants before being signed, were known before the USCIRF report was published.

Information is power, it is rightly said, and there is no question that revelations of the sort uncovered by the USCIRF study give power to those who would want to modify CBP’s enforcement culture as it affects potential asylum seekers. Such revelations attract the attention of Congress and the press, provide impetus for scholarly articles such as this, and furnish solid grounds for demanding future studies of the process. All of these means may be utilized to attract allies and disarm opponents of reform. In this sense, to the extent that they uncover excesses of an enforcement culture, external studies can act as a type of counterforce to the dominant enforcement culture that allows rules protective of asylum seekers to be broken so often and with

such apparent impunity.

But we underestimate the reach of that counterforce if we limit it to motivating *outside* forces to take action and exert pressure on CBP. Although bureaucracies may lean very strongly in one direction or the other, no large organization is an absolute monolith; indeed, during the development of the regulations governing expedited removal, more than one INS official suggested differences between their own positions and that of the inspectors.¹⁴⁸ External studies that reveal problems in a program can be helpful in moderating the dominant culture by providing new information to powerful, relatively sympathetic officials, by strengthening the apparent merits of their position in internal debates, and by giving the sympathetic officials a reason not to easily capitulate to the hardliners in their agency in the interests of maintaining internal peace. Such capitulation loses a lot of its charm when the result is not peace but merely a change in the place of battle (e.g., to a seat in a committee room before a hostile Senator).

Thus, external studies – whether by USCIRF, the GAO, non-governmental organizations or independent scholars – can prove valuable by strengthening the hands and increasing the resolve of moderate forces within the agency, as well as by motivating elements of the larger political culture to action. The influence of any particular study, naturally, will depend upon the robustness of its findings. Another determinant of influence will be the recentness of the findings. Both factors are, to some degree, within the control of the agency under review. CBP, and the INS before it, rebuffed numerous attempts to study expedited removal. Moreover, even congressionally mandated studies, such as the ones of expedited removal by the GAO and USCIRF, are dependent in numerous ways upon the cooperation of the agency being studied. CBP, for example, affected the robustness and scope of the USCIRF study by, among other things, limiting sample size and prohibiting interviews of front-line CBP officers.¹⁴⁹ By virtue of its efforts along these lines, for a long time CBP was able to keep expedited removal “opaque not only to the outside world, but even within the [DHS].”¹⁵⁰

The lesson for the future is that, if controlling the excesses of the CBP’s enforcement culture depends on making the process transparent enough so that the excesses can be known, the larger political culture must rouse itself at least enough to demand such transparency. We know from history that CPB is unlikely to reveal its inner workings on its own initiative. However, the larger political culture – that is, Congress and anyone who might influence Congress – even if generally sympathetic to CBP’s enforcement mission, may not regard its own interests as identical to CBP’s in this case. And indeed, the two are not similarly situated in several important respects. The

148. A WELL-FOUNDED FEAR, *supra* note 6, at 204.

149. USCIRF REPORT, vol. 2, *supra* note 11, at 31-33.

150. USCIRF REPORT, vol. 1, *supra* note 11, at 76.

larger political culture is more desirous of studies that provide information because (1) it is more starved for that information, and (2) the cost of gathering the information is minimal for the larger political culture but substantial for the CBP, in terms of logistical planning and executive time, among other costs.

How much information should the larger political culture demand? Given the disappointing findings of the USCIRF study and CBP's apparent inability to fix problems identified in past studies, despite the passage of a number of years, we think the trend should be toward more information and not less. Congress should authorize a regular schedule of studies with the idea of continuing them until substantial improvement is shown. A mix of studies is appropriate – some of broad scope in subject matter and geographic focus and others more narrowly focused. Because of the demonstrated unreliability of the information contained in the files, most studies should utilize direct observation to a substantial extent.

As studies accumulate, they may collectively help to produce a change in CBP's enforcement culture, at least if the studies' results indicate a continuation of the serious problems previously uncovered. Of course, bureaucracies are well versed in ways to ignore studies that they do not like. To prevent this from happening, Congress should require CBP to respond formally to at least some of the studies.¹⁵¹ In addition, regularizing the schedule of studies also will make it harder for CBP to ignore the studies' results.

2. *Employ Testers to Assess Compliance*

Another technique that may be used to change CBP's culture is to regularly employ testers, i.e., actors who would go through the expedited removal process to test whether CBP inspectors are following the rules. Congress should require CBP to employ testers and to report the results annually. The testers would pose as regular travelers arriving at the primary inspections area with a group of passengers from an international air flight. They would present fraudulent documents and at the proper time indicate that they fear return to their home countries. The testers would be trained on the proper expedited removal procedures and have practice identifying common mistakes made by inspectors.

The use of testers could improve the expedited removal process in several ways. First, as the knowledge that testers are being used spreads, it may

151. Requiring a formal response may be particularly useful in averting extreme cases of bureaucratic denial, of which a recent statement by the chief of the Border Patrol, David V. Aguilar, might stand as a paradigmatic example. Against the clear contrary showing by USCIRF, Mr. Aguilar asserted that if cases of immigration officers subjecting persons arriving in the United States to expedited removal without asking the mandatory fear questions "exist at all, I am very confident that they are very small and very isolated. . . . The training of our agents is very involved, and there are safeguards in place within the process to ensure that nobody falls through the cracks." Rachel L. Swarns, *Rights Groups Criticize Speedy Deportations*, N.Y. TIMES, Feb. 20, 2006, at A9.

increase inspector diligence. This would be especially likely if individual inspectors who do not comply with the rules are held accountable for such non-compliance. Moreover, the testers' experiences could cumulatively reveal trends in non-compliance, such as whether inspectors are less likely to follow the rules during certain shifts, during peak periods, during slow periods, at certain ports of entry or when travelers are arriving from certain countries. Finally, as noted previously, one of the great advantages CBP has in maintaining the support of the larger political culture is that it gets to deport its mistakes. Testers, however, will not disappear; indeed, they may re-appear as they do in other contexts, such as in investigations of housing discrimination, to provide powerful anecdotal evidence of the excesses of CBP's enforcement culture. In various ways, therefore, testers can directly and indirectly help bring about a change in that enforcement culture.

3. *Videotape Secondary Inspection Interviews*

The institution of a policy of routinely videotaping secondary inspection interviews from the beginning of the I-867AB process until after the applicant signs the sworn statement would provide yet another means of providing a counterbalance to the dominant enforcement culture. In particular, the availability of videotape could make studies of the expedited removal process both more comprehensive and less intrusive to the ordinary workings of the office. This would have numerous positive effects.

First, as a practical matter, it would allow for more studies to be conducted, since the viewing of videotapes would be less disruptive to ports than having to accommodate observers. As noted earlier in Part V(A)(1), maintaining a regular schedule of studies is important because it makes it more difficult for officials to ignore the results. Second, the larger sample sizes made practical by the availability of videotapes would add to the robustness of studies' findings and, therefore, make the studies a more effective counterweight to the dominant enforcement culture. Not only would the results be more definitive because a larger sample size tends to increase statistical significance, but the ability to check and re-check the videotapes would increase the reliability of the findings by decreasing the risk that otherwise undetectable measurement quirks of individual observers could skew study results. In addition, the availability of videotaping would enhance reliability by eliminating measurement distortions caused by the Hawthorne effect; if the videotaping is universal, the events being viewed are occurring exactly as they ordinarily do.

Videotaping would also provide several other advantages. As with the use of testers, the mere fact that inspectors know that they are being taped would add an additional element of self-policing into the process.¹⁵² Further, a

152. USCIRF REPORT, vol. 2, *supra* note 11, at 33.

sample of the videotapes could be reviewed periodically as supervisory and training tools to ensure that inspectors know how to follow, and are following, CBP rules and policies. Finally, the taped record of an interview could protect an inspector from specious allegations of misconduct or allow an applicant a means of proving a meritorious claim.

The recommendation for universal videotaping is a realistic one. In fact, CBP is already videotaping secondary inspections at the Houston and Atlanta ports of entry.¹⁵³ CBP, accordingly, should expand its videotaping program to all ports of entry, as well as to any other location in which expedited removal interviews take place.

4. *The Senior Asylum Officer Must Be an Asylum Advocate*

Our last recommendation in this subsection must begin with a word of praise for the Department of Homeland Security. DHS Secretary Michael Chertoff recently announced the creation of a Senior Asylum Officer position, to be located within a new Directorate of Policy. The Senior Asylum Officer position, which was filled in February 2006 with the appointment of Igor V. Timofeyey, will be responsible for Department-wide coordination of policies, regulations and practices that impact asylum seekers.¹⁵⁴ The appointment of Mr. Timofeyey is a promising decision. Whether the promise will be fulfilled, however, is another matter entirely.

The key determinant of success or failure in this regard resides in the particulars of how the Senior Asylum Officer position is conceived. If it is regarded primarily as the position responsible for justifying current policies and practices to parties interested in and concerned with asylum, the position will be a great disappointment. In its coordination function, it may bring some consistency to currently divergent practices across DHS and, all else being equal, that is a good thing, but little else in the way of achievement is likely.

On the other hand, the position could achieve a great deal if, in its conception, it is regarded as a means to correct the systematic skew of CBP and DHS toward enforcement concerns when those concerns intersect with the interests of asylum seekers. Such a conception of the office would indicate a great deal of administrative sophistication in the upper levels of DHS. It would suggest a recognition of the truth that "tasks that are not part of the core mission . . . need special protection,"¹⁵⁵ and represent a determi-

153. *Id.*

154. Press Release, Homeland Security Secretary Michael Chertoff Announces Six-Point Agenda for Department of Homeland Security (July 13, 2005), available at <http://www.dhs.gov/dhspublic/display?content=4598> (last visited Jan. 30, 2006); Press Release, DHS Names Senior Advisor for Refugee and Asylum Policy (Feb. 7, 2006) available at <http://www.dhs.gov/dhspublic/display?content=5392>.

155. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 371 (1989).

nation to provide such protection.

There is precedent for conceiving an office in this manner. The Internal Revenue Service (IRS), for example, has a National Taxpayer Advocate, a high-level position charged with protecting taxpayer rights and recommending legislation to remedy problems that unnecessarily burden taxpayers.¹⁵⁶ As the name implies, the Taxpayer Advocate is meant to balance a systematic skew in the IRS in favor of the tax payee.

In addition to ensuring consistent legal interpretations and monitoring emerging developments, a Senior Asylum Officer position so conceived could undertake a number of initiatives to protect genuine asylum seekers from an overly enthusiastic enforcement culture and to help change the environment in which asylum decisions take place. For example, the Senior Asylum Officer could play a role in formulating, selecting and approving studies of the expedited removal process, as well as serve as a high-level liaison between researchers and DHS officials. He also could play a role in developing quality assurance procedures. Until now, “quality assurance” in the CBP was something of a misnomer, as it relied “entirely on ‘self-reporting’ by immigration inspectors.”¹⁵⁷ Hopefully, the Senior Asylum Officer’s different perspective will cause him to demand more from a quality assurance program than the finding that all the inspectors are above average (which is all that may be discovered when relying entirely on self-reporting).

Furthermore, the Senior Asylum Officer could advocate for the development and release of better statistical information, as immigration statistics are notoriously confusing and incomplete.¹⁵⁸ In addition, he could review training programs and manuals to ensure that they effectively convey, and fairly and accurately reflect, the law. The Senior Asylum Officer could also ensure that responsible agencies within DHS respond to the findings and recommendations of any studies that are conducted. Finally, his office could be publicized as an alternative point of contact for persons who have witnessed incidents of mistreatment of asylum seekers. In all these roles, the Senior Asylum Officer could act as a counterforce to the dominant enforcement culture at DHS and CBP.

B. *Changing the Rules*

In addition to the above-referenced means of effectuating structural change, various specific rule changes would also decrease the risk that genuine asylum seekers would be returned to face possible persecution in their homeland. We offer some practical examples below. None of our examples, we concede, are likely to have a substantial effect in the absence of

156. CHARLES O. ROSSOTTI, *MANY UNHAPPY RETURNS: ONE MAN’S QUEST TO TURN AROUND THE MOST UNPOPULAR ORGANIZATION IN AMERICA* 138-39, 275 (2005) (describing the purpose and performance of the National Taxpayer Advocate).

157. USCIRF REPORT, vol. 1, *supra* note 11, at 74.

158. *Id.* at 73.

a change in the overall cultural landscape of CBP. However, we do not think implementation of our suggestions should be postponed pending movement on the cultural front. First, the new rules we propose may have a marginally positive effect even if implemented immediately in the current dominant enforcement culture. Second, pre-cultural change implementation would provide additional important measures of CBP's compliance or noncompliance when reviewed by future researchers.

1. *Require Inspectors to Confirm in Writing that Required Information Was Read to Applicants*

As explained in Part II(A)(1), the requirement that inspectors read to all applicants for admission the information on the I-867A is vital to ensuring that asylum seekers understand the importance and finality of the secondary inspection interview. Yet, the statement often is not read. Under current practices, absent observation of the interviews by third parties, such failures go undetected.

The USCIRF report recognized the importance of this problem, but was content to rely on additional training, combined with the use of videotape and testers, as a solution.¹⁵⁹ The USCIRF suggestions are good ones, but we recommend that this specific problem also be addressed more directly. In particular, to increase the likelihood that inspectors read the required statement, they should be required to confirm in writing that the statement was indeed read to the applicant for admission. Form I-870, which is used by asylum officers during credible fear interviews, provides a good model for this proposed requirement.¹⁶⁰ Question 1.28 on Form I-870 contains a box that the asylum officer must check to confirm that he or she read a required paragraph to the applicant; in substance, the required paragraph of the I-870 is similar to the mandatory paragraphs of the I-867A. The I-867 could easily be amended to provide a similar assurance that the inspector read each mandatory paragraph aloud to the applicant for admission.

Amending the I-867 in this manner would promote diligence among inspectors and add to the effectiveness of supervisory review. As it now stands, busy inspectors have little incentive to comply fully with the mandatory reading requirement, and supervisors have no way of checking inspectors who fail to do so. Given the importance of the I-867 information, remedying these deficiencies in some way seems long overdue.

2. *Telephonic Supervisory Reviews Should Be Banned*

While USCIRF did not make any recommendations as to the conduct of the supervisory review process, CBP should also revise its policy that allows

159. USCIRF REPORT, vol. 1, *supra* note 11, at 74.

160. See USCIRF REPORT, vol. 2, *supra* note 11, at 254 (copy of Form I-870).

supervisors to review I-867 sworn statements over the telephone. As noted in Part II(B)(4), telephonic review lessens the overall accuracy and accountability of the review process. Given the important check that supervisory review is designed to play in preventing the removal of individuals who express a fear of return, it is vital that supervisors have as much information about the secondary interview as is available, and that the information is presented fully, accurately and adequately.

The very nature of a telephonic review suggests that important information will not be presented fully or adequately. For busy supervisors, it is likely tedious to listen to the sworn statement aloud, difficult to pick up on subtle nuances of the statement, and infuriatingly time-consuming to try to go back and forth in the statement to see how different parts of it relate to each other. There is a strong temptation to shortcut the process, particularly in the harried environment of secondary inspection. Requiring review of the record in written form reduces these temptations and, in all events, enhances accountability when the temptation proves too much to resist; the contents of the written record can later be reviewed while the content of a telephone conversation cannot.

Requiring review of the written record is a practical reform. In addition to enhancing the effectiveness of the review process, it would also be more efficient. Most importantly, it would save time, largely eliminating the time wasted in coordinating schedules to arrange a phone call. Secondary inspectors' time also would be saved because they would ordinarily be removed from the review process entirely. Similarly, as most people can read faster than they can talk, supervisors would save time, too – assuming, that is, that the telephonic review constituted a full review of the record. If it did not, of course, that lessens the efficiency argument, but heightens the argument that a telephonic review tends to be an inadequate review.

Despite the relative efficiency of a written review, in the past there has been a tendency to rely on telephonic review, particularly in those ports of entry in which supervisors are not stationed near the inspectors. If physical distance were ever a justification for the practice of telephonic review, it is no longer so. The transcript and answers to questions on most sworn statements are electronically processed. Inspectors could be required to send the transcript through a computer network to the supervisor, who would be able to access it wherever he or she is physically stationed.¹⁶¹

Moreover, even if the electronic transfer of files is not feasible in certain ports of entry, fax machines could be used. Indeed, equipping ports of entry with fax machines would itself be cost efficient, as the cost

161. The only complications that might arise from this approach are the supervisor's ability to check that the sworn statement was signed, and to note corrections that might have been made to the form by the applicant. Neither complication seems insurmountable. The inspector could otherwise confirm that the form was signed, and corrections by the applicant could be noted through the use of the "track changes" function common to most word-processing programs.

of a fax machine is minimal compared to the expense of having two people do the job of one – and do it more slowly – over and over and over again.¹⁶²

3. *Any Statement of Fear Should Result in a Credible Fear Referral*

As discussed in Parts II(A)(3) and (B)(5), individuals who express a fear of return have nonetheless been expeditiously removed despite a clear regulatory directive prohibiting inspecting officers from proceeding any further with removal in such cases. The USCIRF report recognizes this problem and recommends that CBP “[r]econcile conflicting guidance to require that any expression of fear . . . must result” in referral of the case to an asylum officer.¹⁶³ We agree with this recommendation, except to the extent that it is modified by USCIRF’s additional recommendation that a new procedural step be recognized between the secondary inspection interview and a referral to a credible fear interview when the inspector has doubts about the adequacy of the applicant’s expression of fear. We think it is fair to describe USCIRF’s position as recognizing a different procedural track for what we shall call “fear, but” cases, where fear of return has been expressed, but for some reason the inspector does not think the fear is enough to warrant a credible fear interview. The new procedural middle step would involve “contact with an asylum officer to speak to the alien via a telephonic interpretation service to determine whether or not the alien needs to be referred [for a credible fear interview].”¹⁶⁴

While the USCIRF’s call to clarify the fear standard is a welcome one, recognition of the “fear, but” standard, with its attendant telephonic asylum interview, is problematic. The idea is concededly premised on the incompetence of inspectors to distinguish between “fear” cases that require a credible fear interview with an asylum officer and “fear” cases that do not require such an interview. The problem of this incompetence was originally and wisely resolved by requiring credible fear referrals in all such cases. We believe that USCIRF’s proposal is less a solution to this problem of inspector-level incompetence than an addition to it.

USCIRF assumes that asylum officers would be competent to decide properly the “fear, but” cases identified by inspectors in the less welcoming environment of secondary inspection. Careful consideration reveals this assumption to be erroneous. In its proposed middle-step interview, USCIRF clearly expects asylum officers to delve into the nature of the fear expressed by the applicant – not merely confirm the utterance of a fear of return. But

162. In fact, the future cost might be truly minimal; the CBP Inspector’s Field Manual suggests that inspectors’ workplaces already are equipped with fax machines. *See* CBP Inspector’s Field Manual § 17.15(b)(3).

163. USCIRF REPORT, vol. 1, *supra* note 11, at 74.

164. *Id.*

exploring the nature of an applicant's fear is exactly what an asylum officer does in a *credible fear interview*; by its very nature, therefore, this middle-step interview is essentially a quasi-credible fear interview. There are already regulations, however, detailing the conditions thought necessary to an accurate determination of the nature of an applicant's fear.

Thus, the statute that created the expedited removal system expressly mandates that the inspecting officer "refer the alien for an interview by an asylum officer under subparagraph (B)" when a fear of persecution or an intention to apply for asylum is indicated.¹⁶⁵ The subparagraph (B) interview must be conducted pursuant to several specific rules designed to create conditions that will encourage full disclosure by the applicant for admission, including the right to reschedule the interview because of illness, fatigue or other impediments;¹⁶⁶ the right "to consult a person . . . of the alien's choosing prior to the interview";¹⁶⁷ the right to present evidence;¹⁶⁸ and the right to have present at the interview a representative who, in the asylum officer's discretion, may be permitted to "present a statement at the end of the interview."¹⁶⁹ None of these rights would be available in the proposed telephonic interview with an asylum officer, and all of them are otherwise mandated because they were thought necessary to accurately determine whether the nature of the applicant's fear satisfied the "credible fear" standard.

The interview contemplated by USCIRF, accordingly, is essentially an unreliable, second-class, credible fear interview. As to the system-wide impact that this second-class interview might have in practice, three possibilities emerge. First, if it rarely is used, the minor gain in efficiency that might be achieved would hardly seem worth the muddling of what otherwise would be an extremely clear standard. Second, if the second-class interview is used frequently and often leads to an inspector-authorized deportation, enforcement-minded inspectors untrained in asylum law will have a powerful incentive to advance the enforcement objective by shifting the forum for investigating the nature of an applicant's fear from the official credible fear interview, with all its accompanying rights, to a makeshift forum of dubious accuracy with no specified rights. Finally, if the second-class interview is used frequently and often leads to an official credible fear interview, rather than to an inspector-authorized deportation, the system will become less efficient by requiring, in many cases, asylum officers to conduct two interviews instead of one.

In sum, maintaining a low and certain threshold for the fear standard is itself an important safeguard for ensuring that genuine asylum seekers are not erroneously returned to their homelands. Speculating that the combined

165. 8 U.S.C. § 1225(b)(1)(A)(ii) (2005).

166. 8 C.F.R. § 208.30(d)(1) (2005).

167. 8 C.F.R. § 208.30(d)(4) (2005).

168. *Id.*

169. *Id.*

efforts of an inadequately trained inspector and an asylum officer handicapped by unfavorable conditions will somehow discern the truth seems an unwise and unacceptable gamble. Accordingly, the only appropriate understanding of the fear standard – that any mention of fear requires a referral to a credible fear interview – should be reasserted, without qualification or modification.

4. *Require Re-interviewing by Supervisors in Certain Circumstances*

Finally, as a means of urging diligence in completing the sworn statement, CBP should consider requiring *immediate* supervisors to re-interview applicants for admission when the record of the secondary inspection interview is facially incomplete, such as when the fear questions have not all been asked and answered. Beyond signaling upper management's interest in the issue, instituting this rule would create the right incentives to ensure diligence throughout the CBP hierarchy. Second-line supervisors would want their operation to run efficiently, without unnecessary duplication; immediate supervisors would want to please their supervisors and to spend their time supervising rather than doing the job of a front-line inspector; and inspectors would prefer not to have to deal with an angry boss (or bosses). Once the immediate supervisor re-interviewed the applicant, the completed file would be returned to a second-line supervisor for another review (or, if appropriate, sent to an asylum officer for a credible fear interview). In some cases, staffing considerations might make this recommendation impractical; perhaps this is why the recommendation has not been made before. But CBP can hardly contend that our proposed rule is overly strict, as the immigration service is notorious for returning paperwork for even minor omissions.¹⁷⁰

V. CONCLUSION

Under the best of circumstances – meaning when every required safeguard is fully implemented and all pertinent information is accurately recorded by an inspector and carefully reviewed by a supervisor, all pursuant to appropriate written direction from above – the expedited removal process established by IIRIRA would still call upon immigration inspectors to deny entry more quickly, more often, and with less information and training than the old system of experienced judges whose mistakes, in all events, were subject to multiple layers of review by even more experienced judges. Given this, only the most naïve persons, and probably not even they, would deny that, even implemented under ideal circumstances, the expedited removal system is more prone to error than the concededly less-than-perfect system that preceded it.

170. See A WELL-FOUNDED FEAR, *supra* note 6, at 195; Suzanne Lee, *Technology Helps Immigrants Deal with the INS*, ASIAN WEEK., Nov. 8-15, 2001, available at http://www.asianweek.com/2001_11_09/news_ins.html.

Hence, far too often – to note a partial list of shortcomings – the reality of expedited removal is one in which *mandatory* information does not get disseminated, *mandatory* questions do not get asked, *mandatory* credible fear referrals are not made, and *mandatory* supervisory reviews are but a mockery of the judicial hearings they were intended to replace. As a result of the failure to perform these mandatory requirements, thousands of genuine asylum seekers have been erroneously returned to their homelands to face possible imprisonment, torture, or other manners of persecution.

Faced with these facts, no one can take refuge in the hope that the promise of expedited removal can be salvaged without substantial reform. Various blueprints for successful reform might be drawn, but no plan can possibly succeed without taking CBP's enforcement bias into consideration. A successful plan must understand and counterbalance that bias.

This demands, most of all, that the process be made more transparent to, and open to the influence of, persons outside CBP, DHS and the entire federal government. The means used to provide this necessary transparency can and should be varied, and should include: regularly scheduled studies by various organizations and individuals; improved record-keeping, especially the exact record provided by videotaping; the recruitment and use of testers, who can provide a unique and valuable perspective on a process that has largely been hidden from view; and greater influence over and oversight of the process by persons, such as the Senior Asylum Officer, who are not part of the enforcement culture. When more transparency is attained by these means, but not before, it will again become possible to hope that the expedited removal process will work as planned.

We are under no illusions that our recommendations, if implemented, will make expedited removal a perfect system. Fast food and instant coffee aren't perfect, either. And there is no denying that the system demands a lot from inspectors who traditionally merely *processed* applications for admission rather than *judged* them, as they do now. Given all this, eternal vigilance in the form of constant oversight may be the price of mediocrity only. Regrettably, however, it is a sad but true commentary on where we stand now that attaining mediocrity would be a tremendous improvement, indeed – one that might best be measured by nothing less than the saving of many vulnerable lives.