

EXPEDITED REMOVAL OF VISA HOLDERS: CHALLENGING ADVERSE IMMIGRATION INSPECTION ACTIONS

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Line-level immigration officers have virtually unreviewable discretion to deny noncitizens the ability to enter the United States. This power extends not only to those who enter without inspection or arrive with counterfeit documents, but also to those who travel to the United States with the U.S. government's express permission—i.e., visa holders. These noncitizens can unwittingly be caught up in the expedited removal process, which affords only minimal procedural safeguards and heavily circumscribes judicial review of officers' actions. This Note argues that, despite these limitations, federal habeas courts should take advantage of their ability under the statute to inquire into whether an expedited removal order in fact was issued. In particular, courts should insist upon compliance with critical procedures required by the agency's own regulations, without which an expedited removal order may be said not to exist at all. Informed by fundamental principles of administrative law, such an insistence on procedural compliance could help correct some of the worst abuses of the system notwithstanding the lack of constitutional due process protections for arriving noncitizens.

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INTRODUCTION

A common refrain in U.S. immigration law is that a visa does not give a foreign national the right to enter the United States.¹ Instead, it gives them the privilege to travel to a U.S. port of entry and apply for admission there.² This may seem like an unimportant distinction in practice. Preparing a visa petition and securing the visa from a U.S. consulate often takes months or more.³ By contrast, presenting the visa at a port of entry and applying for admission might take only a few minutes, if that.⁴ The noncitizen simply presents their visa with all supporting documentation, answers a few quick questions, and moves on to the currency exchange or the taxi queue. The process is so routine and so painless for the vast majority of entrants that it can appear like a mere formality, a literal rubber stamp on a months-long journey to the United States.⁵ But if the approval of an application for admission can so easily go right, it can also very quickly go wrong. When it does, visa holders—who arrived at the port of entry with the U.S. government’s express permission—can find themselves caught in a byzantine enforcement system designed to facilitate their rapid expulsion from the United States with only minimal procedural protections.

¹ See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (“At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right.”).

² See *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1157 (D.C. Cir. 1999) (explaining that it is up to the immigration inspector to “independently examine the alien’s eligibility for admission”).

³ Processing times can vary widely depending on the type of visa requested and the agencies involved. In cases where processing delays become extreme, some applicants resort to mandamus litigation to force a decision on their request. See generally AM. IMMIGR. COUNCIL, *MANDAMUS AND APA DELAY CASES: AVOIDING DISMISSAL AND PROVING THE CASE 1* (2021), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/mandamus_actions_avoiding_dismissal.pdf (providing practice tips for filing mandamus petitions in immigration visa cases).

⁴ See *Inspection and Expedited Removal of Aliens*, 62 Fed. Reg. 10,312, 10,318 (Mar. 6, 1997) (noting that “the immigration officer literally has only a few seconds” to determine admissibility).

⁵ See LISA SEGHETTI, CONG. RSCH. SERV., R43356, *BORDER SECURITY: IMMIGRATION INSPECTIONS AT PORTS OF ENTRY 14* (2015) (noting that the overall admission rate for travelers at ports of entry was between 99.94% and 99.95% from FY2005–FY2013).

Few know this better than Shahab Dehghani. An Iranian national, Dehghani saw his plans to complete a bachelor's degree at Northeastern University evaporate when he was denied entry by Customs and Border Protection (CBP) at Boston's Logan International Airport in January 2020.⁶ Dehghani had previously completed a portion of his degree before returning to Iran for family reasons. After waiting nearly a year for a new student visa, he had reenrolled at Northeastern to complete his degree in economics.⁷ Upon arriving at Logan, however, Dehghani was accused by CBP agents of concealing his designs to remain in the United States indefinitely, an allegation of "immigrant intent" that would make him ineligible for a temporary student visa.⁸ CBP then moved Dehghani into a side room for secondary inspection, held him overnight in the airport, canceled his visa, issued him an expedited removal order, placed him on an outbound flight to Paris (minutes *after* a federal judge ordered a stay of his removal), and barred him from returning for at least five years.⁹

Dehghani was not alone in this experience. From late 2019 to early 2020, several students from Iran, Palestine, and China were denied admission at ports of entry by CBP officers.¹⁰ Each traveled to the United States on a valid visa issued by a U.S. consulate abroad, each had already been admitted to a course of study at a U.S. univer-

⁶ See Caitlin Dickerson & Caleb Hampton, *Iranian Student Turned Back at Airport, Sparking Protest*, N.Y. TIMES (Jan. 21, 2020), <https://www.nytimes.com/2020/01/21/us/iranian-students-deported.html>.

⁷ See *id.*

⁸ Elizabeth Redden, *Iranian Student Denied Entry to U.S.*, INSIDE HIGHER ED (Jan. 27, 2020), <https://www.insidehighered.com/admissions/article/2020/01/27/iranian-student-was-bound-northeastern-was-turned-away>.

⁹ *Id.* Another judge then dismissed his suit as moot, since a habeas claim cannot be brought by someone who is no longer in custody. See *Abadi v. U.S. Customs & Border Prot.*, No. 20-10114, 2020 U.S. Dist. LEXIS 11228, at *4 (D. Mass. Jan. 23, 2020). Asked to compel CBP to return him to the United States so his suit could proceed, the judge declared: "I don't think they're going to listen to me." See Adrienne Mahsa Varkiani, *Will CBP Get Away With Deporting an Iranian Student Against a Court Order?*, SLATE (Jan. 22, 2020), <https://slate.com/news-and-politics/2020/01/cbp-deports-iranian-student-in-defiance-of-a-court-order.html>.

¹⁰ See Anemona Hartocollis, *Palestinian Harvard Student Blocked from Coming to U.S. Is Allowed to Enter*, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/us/palestinian-harvard-student.html> (reporting on CBP's rejection of a Palestinian student based on his friends' social media posts); Caleb Hampton & Caitlin Dickerson, *'Demeaned and Humiliated': What Happened to These Iranians at U.S. Airports*, N.Y. TIMES (Jan. 25, 2020), <https://www.nytimes.com/2020/01/25/us/iran-students-deported-border.html> (detailing CBP's rejection of nine Iranian students); Nina Agrawal, *Nine Chinese Arizona State University Students Detained at LAX and Sent Back. ASU Demands Answers*, L.A. TIMES (Sept. 5, 2019), <https://www.latimes.com/california/story/2019-09-04/nine-chinese-arizona-state-university-students-detained-at-lax-and-sent-back-asu-demands-answers>.

sity, and each saw their plans upended by line-level officers at the inspection counter. Their experience is a reminder that, no matter how routinized the inspection process may appear, it cannot be taken for granted. Instead, it is a fundamental aspect of the U.S. immigration system, a final and critical encounter between the noncitizen and the U.S. sovereign, acting through an administrative officer without whose approval the noncitizen is not likely to gain admission. Yet despite the interests at stake in that encounter, and the obvious risks of administrative error or abuse, noncitizens in Dehghani's position—including students, business visitors, and a host of other prospective entrants—have few options for challenging these immensely important agency actions.

As a matter of both constitutional and positive law, judicial review of adverse immigration inspection actions can be all but impossible to obtain. In due process terms, noncitizens applying for admission are deemed to have no cognizable rights other than those which Congress expressly provides them.¹¹ The idea is that the political branches of the federal government have “plenary power” to determine the rules for admission of noncitizens, based in part on the government's responsibility to “give security against foreign aggression and encroachment,” including “vast hordes of . . . people crowding in upon us.”¹² Consequently, for a noncitizen seeking entry, due process is entirely a statutory matter, not a constitutional one.¹³ A noncitizen's rights under the Suspension Clause are not much greater. Although the Constitution requires that anyone held in government custody be allowed to challenge the legality of their detention,¹⁴ the Supreme Court has held that Congress can restrict the scope of habeas review in immigration cases.¹⁵

¹¹ See *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020) (“Congress is entitled to set the conditions for an alien's lawful entry into this country.”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (restricting the due process rights of noncitizens on the threshold of entry to what Congress has expressly provided); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (affirming that, when immigration officials act “within powers expressly conferred by congress,” those actions “are due process of law”).

¹² *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (upholding the exclusion of a Chinese national under the Chinese Exclusion Act).

¹³ See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”).

¹⁴ See *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (“The [Suspension] Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”).

¹⁵ See *Thuraissigiam*, 140 S. Ct. at 1977.

Nor does the Immigration and Nationality Act (INA)¹⁶ provide much comfort for noncitizens seeking to challenge adverse entry decisions. Under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, noncitizens who arrive with no documents or fraudulent documents are subject to an “expedited removal” regime, the aim of which is to ensure their removal “without further hearing or review.”¹⁷ Applicants seeking asylum are afforded some (relatively minimal) safeguards, and all individuals held in custody can theoretically petition for habeas. But the options are bleak for any foreign student who finds herself subject to expedited removal simply because an airport CBP officer deemed her to have immigrant intent. After IIRIRA, the INA limits the power of federal courts to hear challenges to expedited removal to three specific habeas inquiries: (1) whether the petitioner is a noncitizen; (2) whether she was ordered removed under the expedited removal statute; and (3) whether she can prove she already holds status as a lawful permanent resident, refugee, or asylee.¹⁸ With respect to the second question, Congress further provided that “the court’s inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner,” adding that “[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.”¹⁹

In this way, the prevailing understanding of the plenary power doctrine and the specific contours of the INA as amended by IIRIRA crowd out almost any space in which a noncitizen might assert a claim for better treatment. Asylum advocates have long decried this confluence, generating an appreciable amount of scholarship showing how expedited removal leaves asylum seekers at risk of removal without consideration of their fears of persecution in their home countries.²⁰

¹⁶ Passed in 1965, the INA is the primary statute governing immigration and naturalization law in the United States. While subsequent amendments to the INA have initiated major changes in the U.S. immigration system, none have proved as transformative as the passage of the INA itself. See Muzaffar Chishti, Faye Hipsman & Isabel Ball, *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POL’Y INST.: MIGRATION INFO. SOURCE (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states>.

¹⁷ 8 U.S.C. § 1225(b)(1)(A)(i). As its name suggests, the expedited removal system is expressly designed to provide for faster removals with fewer procedural protections than the “formal” removal process governed by 8 U.S.C. § 1229a, in which noncitizens have the right to a hearing before an immigration judge. See *infra* notes 90–93.

¹⁸ See 8 U.S.C. § 1252(e)(2).

¹⁹ *Id.* § 1252(e)(5).

²⁰ See, e.g., Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1 (2001) (discussing IIRIRA’s impacts on asylum seekers); Karen Musalo, Lauren Gibson, Stephen Knight & J. Edward Taylor, *The*

Yet “expedited removal remains an understudied area that is ripe for deeper research and review.”²¹ In particular, there is a lack of literature exploring how and why students, businesspeople, and others who travel to the United States with the federal government’s express permission (i.e., with a valid visa) can nonetheless be swept up in a summary deportation system designed to counteract unauthorized border crossings and travelers with counterfeit papers.²² Even less literature considers what visa holders can do about it. This Note helps to fill these gaps.²³

Visa holders represent only a small portion of removals each year,²⁴ but focusing on their experience helps to highlight the pervasiveness of the system’s flaws. In particular, this focus underscores the expansive authority of line-level officers, showing how their power to decide the fate of noncitizens on the threshold of entry is not confined to the asylum space but undergirds the legal immigration system in a much broader sense. Through expedited removal, line-level officers are empowered, with no more than the signoff of a second-line supervisor, to cancel the visa of an otherwise lawful entrant, force them onto an outbound flight, and bar them from returning for five years or more. By statutory design, this single officer can essentially veto the months-long assessment of a sister agency, and that veto is then virtu-

Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y (SPECIAL ISSUE) 1 (2001) [hereinafter *The Expedited Removal Study*] (discussing the impacts of expedited removal on asylum seekers, plus migrants with facially valid documents); Lindsay M. Harris, *Withholding Protection*, 50 COLUM. HUM. RTS. L. REV. 1 (2019) (analyzing how abuses of expedited removal can negatively affect asylum applications).

²¹ Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337, 356 (2018) [hereinafter Koh, *Shadow Removals*].

²² See *infra* note 90 and accompanying text.

²³ Of course, this Note is not the only piece to explore this topic. One early study of expedited removal, for instance, raised concerns that immigration officials in Portland, Oregon, were refusing entry to Asian businesspeople with valid visas at an alarmingly high rate compared to other airports. See *The Expedited Removal Study*, *supra* note 20, at 29; see also AM. CIV. LIBERTIES UNION, AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM 54–58 (2014) (recounting interviews with visa holders who were subjected to expedited removal).

²⁴ CBP made 53,000 inadmissibility determinations at U.S. airports in 2019, plus 157,000 at land crossings and 77,000 at seaports. MIKE GUO, OFF. OF IMMIGR. STAT., DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2019, at 6 (2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf. By contrast, CBP made 851,000 apprehensions near the southern border. *Id.* at 4. While it is not clear what percentage of each group was subjected to expedited removal, ninety-one percent of all removals were against Mexican or Central American nationals, suggesting that CBP conducted most expedited removals in the border region. See *id.* at 8. Inadmissibility determinations at airports were implicated in eleven percent of all removals, including both formal and expedited removal. *Id.*

ally immune from judicial review under the INA's jurisdictional bars. Far from being a point of concern only for asylum seekers or those who enter without authorization, expedited removal is a risk for scores of "legal"²⁵ migrants who might not otherwise assume it could be employed against them.

Many challenges to expedited removal have focused, unsuccessfully, on its constitutional dimensions. But the system may also be vulnerable on more mundane, administrative grounds. While federal courts are forbidden from asking whether a noncitizen "is actually inadmissible," they are expressly authorized to hear habeas suits challenging "whether [an expedited removal order] in fact was issued."²⁶ This Note argues that federal courts should explore this statutory grant more fully to protect noncitizens against arbitrary exercises of the expedited removal power. Specifically, it argues that key principles of administrative law—including agencies' common-law obligation to follow their own regulations—should inform courts' understanding of the legal force of expedited removal orders, in particular "whether such an order in fact was issued."²⁷ The driving principle is that, despite the law's present limitations on due process and habeas claims, such foundational concepts of good governance do not countenance the arbitrary use of state power. And while getting into court may be difficult for noncitizens in this position, invoking administrative standards against arbitrary agency action could be a promising way for visa holders and asylum seekers alike to check abuses of power by line-level immigration officers.

This Note proceeds as follows. Part I presents an overview of the rules and procedures governing visa issuance, the immigration inspections process, and the issuance of expedited removal orders. Part II analyzes the INA's restrictions on judicial review of adverse entry decisions, and surveys how the federal courts have interpreted the scope of their jurisdiction under those restrictions. Part III examines how administrative law principles can inform a court's review of the existence *vel non* of an expedited removal order.

²⁵ Political debates often suppose a firm distinction between "legal" and "illegal" attempts to enter the United States. But as this Note emphasizes, the distinction between a "legal" and "illegal" entry attempt is highly misleading, particularly in the case of migrants who hold facially valid visas. A "legal" migrant who has followed all applicable rules may nonetheless be changed into an "illegal" entry case by the judgment of a line-level officer during the inspection process. See *infra* note 110 and accompanying text.

²⁶ 8 U.S.C. § 1252(e)(5).

²⁷ *Id.*

I

LINE-LEVEL OFFICERS' POWER OVER IMMIGRATION ADMISSIONS

The immigration admissions system is a creature of the modern administrative state. Passports, visas, and inspection requirements all grow out of the state's determination to control the movement of people across its borders, and in doing so, to shape the nation, its culture, and its economy.²⁸ Operationalizing that determination has long required the use of front-line bureaucrats capable of admitting those who are authorized to enter while blocking those who are not.²⁹ Using student entrants as an illustrative example,³⁰ this Part examines the mechanics of visa issuance, admission, and inspection. As the discussion illustrates, the two-step process of entry—obtaining a visa and then applying for admission—concentrates a significant amount of virtually unreviewable decisionmaking power in line-level bureaucrats.

A. *Getting the Visa: Consular Processing*

Getting a visa into the hands of a foreign student involves considerable effort, both for the student and for the U.S. government. Foreign students most often enter on an F-1 visa, a temporary or “nonimmigrant” visa that does not allow them to take up permanent residence.³¹ Instead, students are required to show “nonimmigrant intent”—i.e., that they intend to depart after completing their degree and have a residence abroad which they have “no intention of abandoning.”³² To get a visa, students must first submit to extensive background checks. This includes the sharing of vital information between their prospective university and the Department of Homeland

²⁸ See IAN GOLDIN, GEOFFREY CAMERON & MEERA BALARAJAN, *EXCEPTIONAL PEOPLE: HOW MIGRATION SHAPED OUR WORLD AND WILL DEFINE OUR FUTURE* 4 (2011) (explaining how passports, border controls, and the like “are all features of the new era of highly managed migration”).

²⁹ See ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 135–36 (2020) (noting that the federal government had no immigration personnel when the Chinese Exclusion Act was passed in 1882, and had to rely on state-level bureaucrats to enforce the ban on Chinese entry).

³⁰ There are numerous other visa categories—e.g., for tourists and businesspeople—that require entrants to show nonimmigrant intent. Many of the dynamics that apply to students would also apply to these nonimmigrants.

³¹ See *Requirements for Immigrant and Nonimmigrant Visas*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/travel/international-visitors/visa-waiver-program/requirements-immigrant-and-nonimmigrant-visas> (last updated Jan. 3, 2018).

³² 8 U.S.C. § 1101(a)(15)(F)(i). This determination focuses on the student’s “present intent—not on contingencies of what might happen in the future, during a lengthy period of study in the United States.” Cable from the U.S. Dep’t of State on Evaluating Residence Abroad for F-1 Students (Sept. 28, 2005), https://www.nafsa.org/_file/_/amresource/DOScale_20050928.htm.

Security (DHS),³³ as well as an in-person interview at a U.S. consulate. There, the consular officer will establish the student's substantive eligibility for the F-1 (including nonimmigrant intent) and will ask the student about their study plans and post-degree intentions.³⁴

Applicants are then screened for admissibility by consular officials using an array of biometric and biographical databases, including systems maintained by the State Department, DHS, and the FBI.³⁵ The goal is to determine, first, whether the student meets the substantive criteria for the visa,³⁶ and second, whether they are subject to any of the INA's inadmissibility grounds, such as criminal convictions or association with terrorist organizations.³⁷ Notably, the decision whether to issue a visa is reserved to line-level consular officers, not to the Secretary of State.³⁸ The consular interview and screening process normally takes a few weeks, but when added to the tasks the student has already completed (including actually gaining admission to a U.S. school), the entire process takes several months to a year.³⁹ However, if all goes well, the student will receive a copy of the F-1 in their passport, and they are then authorized to travel to the United States.

B. Primary Inspection: Applying for Admission

The next step in gaining entry is "applying for admission" at a port of entry, typically a U.S. airport. Upon landing, the student must present the inspecting CBP officer with their passport, visa, and original signed forms from their university.⁴⁰ Formally, this presentation constitutes the student's application for admission.⁴¹ Through this face-to-face interaction, the noncitizen "must establish to the satisfac-

³³ See *Student and Exchange Visitor Program*, U.S. IMMIGR. & CUSTOMS ENFT, <https://www.ice.gov/sevis> (last updated Mar. 24, 2021).

³⁴ See *Students: Prepare for Your Visa Interview*, DEP'T OF HOMELAND SEC. (Aug. 8, 2018), <https://studyinthestates.dhs.gov/2018/08/students-prepare-your-visa-interview>.

³⁵ See RUTH ELLEN WASEM, CONG. RSCH. SERV., R41093, *VISA SECURITY POLICY: ROLES OF THE DEPARTMENTS OF STATE AND HOMELAND SECURITY* 6–8 (2011).

³⁶ See 9 FOREIGN AFFAIRS MANUAL § 402.5-5(E)(1)(a) (U.S. Dep't of State 2021), <https://fam.state.gov/FAM/09FAM/09FAM040205.html> (stating the substantive eligibility criteria).

³⁷ See 8 U.S.C. § 1182(a) (listing the main grounds of inadmissibility).

³⁸ See *id.* § 1104(a)(1). This is the basis for the doctrine of consular nonreviewability, the precise contours of which are beyond the scope of this Note.

³⁹ See, e.g., *Apply for a U.S. Visa*, UNIV. OF NOTRE DAME INT'L STUDENT & SCHOLAR AFFS., <https://issa.nd.edu/students/pre-arrival/apply-for-a-u-s-visa> (last visited Oct. 18, 2021) (advising students to "apply for your F-1 or J-1 visa well in advance of your program, as it can take several weeks, and sometimes longer, to obtain").

⁴⁰ See *Frequently Asked Questions*, DEP'T OF HOMELAND SEC., <https://studyinthestates.dhs.gov/tools-menu/frequently-asked-questions> (last visited Sept. 16, 2021).

⁴¹ See 8 U.S.C. § 1225(a)(1), (a)(3).

tion of the inspecting officer that the alien is not subject to removal . . . and is entitled . . . to enter the United States.”⁴² From CBP’s perspective, the goal of this primary inspection is twofold: to exclude unauthorized entrants, and to facilitate lawful travel.⁴³ Through primary inspection, the CBP officer seeks to verify the applicant’s identity by collecting biometric data and checking it against the information collected before the visa was issued.⁴⁴ For an applicant with an F-1 visa, the CBP officer will also seek to determine that the noncitizen is a bona fide student entrant by reviewing their documentation and asking brief questions about their visit.⁴⁵

On some level, the CBP officer’s work during primary inspection is a repeat of the task the consular officer completed in issuing the visa, just in a much shorter time frame. Both the consular officer and the CBP inspector, for example, are assigned primary responsibility for determining that a student does not have immigrant intent—and if the student has made it to the airport, CBP is undoubtedly aware of the consular officer’s answer.⁴⁶ The primary inspection process is also usually quick—the statute sets a goal for CBP to clear all incoming flights within forty-five minutes,⁴⁷ and each inspector “literally has only a few seconds” to interact with each arrival.⁴⁸ The end result is that more than ninety-nine percent of all applicants are admitted each year,⁴⁹ the overwhelming majority through primary inspection.⁵⁰

Of course, the primary inspection process begins well before the noncitizen lands at the airport. As soon as they purchase a plane ticket, and again when they check in for their flight, the noncitizen’s information is transmitted by the airline to CBP for advanced vetting.⁵¹ That data can generate a “no-board” recommendation, preventing the noncitizen from getting on the flight, or a notice to the

⁴² 8 C.F.R. § 235.1(f) (2020).

⁴³ See SEGHETTI, *supra* note 5, at 2.

⁴⁴ See BIPARTISAN POL’Y CTR., ENTRY-EXIT SYSTEM: PROGRESS, CHALLENGES, AND OUTLOOK 22 (2014).

⁴⁵ See *Here to Help: What to Expect at a Port of Entry with a U.S. Customs and Border Protection Officer*, DEP’T OF HOMELAND SEC. (Apr. 18, 2013), <https://studyinthestates.dhs.gov/2013/04/here-help-what-expect-port-entry-us-customs-and-border-protection-officer> (listing common questions CBP officers ask during primary inspection).

⁴⁶ See 8 U.S.C. § 1184(b) (stating that noncitizens must establish their eligibility for nonimmigrant status “to the satisfaction of the consular officer” and later to “the immigration officers”).

⁴⁷ See *id.* § 1752.

⁴⁸ Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,318 (Mar. 6, 1997).

⁴⁹ See SEGHETTI, *supra* note 5, at 14.

⁵⁰ *Id.* at 13 tbl.1.

⁵¹ See *id.* at 9–10.

CBP inspector to flag them for additional screening upon arrival, a process known as “secondary inspection.”⁵² Nevertheless, a warning from one of the prescreening databases is not required for CBP to send a noncitizen to secondary inspection; rather, the officer has discretion to deny admission to any noncitizen they feel has not met the stated requirements.⁵³

C. Secondary Inspection and Expedited Removal

Only a small percentage of entrants are moved into secondary inspection, but for those who are, the consequences can be severe. Ostensibly, secondary inspection is designed to “allow[] inspectors to conduct additional research in order to verify information without causing delays for other arriving passengers.”⁵⁴ For example, CBP states that secondary inspection may be used for a student who does not have all the necessary documentation, or when an officer needs to contact a school official to verify information.⁵⁵ Many times, secondary inspection serves that purpose, verifying missing or ambiguous information and constituting little more than a procedural detour on the path to entry.

However, secondary inspection has a reputation as a much more comprehensive and intrusive inquiry. During secondary inspection, officers may ask detailed questions about the noncitizen and their intentions in the United States, and are authorized to search through the applicant’s belongings, including phones and computers as well as the contacts, messages, and social media apps they contain.⁵⁶ Applicants routinely describe their treatment by CBP officers in secondary inspection as hostile and impermissibly biased. A Canadian man traveling to New Orleans reported being “grill[ed]” by CBP officers as they searched through a series of LGBT apps and websites on his phone and accused him of being a prostitute.⁵⁷ An Iranian doc-

⁵² See *id.* at 10.

⁵³ See 8 C.F.R. § 235.1(f) (2020) (requiring the noncitizen to demonstrate admissibility “to the satisfaction of the inspecting officer”).

⁵⁴ *What Is Secondary Inspection?*, DEP’T HOMELAND SEC., <https://studyinthestates.dhs.gov/students/what-is-secondary-inspection> (last visited July 25, 2021).

⁵⁵ See *id.*

⁵⁶ See *CBP Search Authority*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/travel/cbp-search-authority> (last modified Jan. 5, 2018) (acknowledging how “inconvenient and stressful the inspection process may be”); *Inspection of Electronic Devices*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/sites/default/files/documents/inspection-electronic-devices-tearsheet.pdf> (last visited Oct. 18, 2021) (noting that devices may be detained for further inspection and copied).

⁵⁷ See Kaveh Waddell, *How Long Can Border Agents Keep Your Email Password?*, ATLANTIC (Feb. 27, 2017), <https://www.theatlantic.com/technology/archive/2017/02/border-agents-personal-information/517962>.

toral student recounted being “treated . . . like a terrorist” during repeated rounds of questioning, while others remembered an officer shouting at them to “Tell us the fucking truth!” and asking if they “like[] blondes like other Arabs do.”⁵⁸ Even U.S. citizens report mistreatment.⁵⁹ One Muslim returnee—an NYPD officer—stated that CBP threatened to “lock him up” when he asked for a status update during his hours-long detention.⁶⁰ Likewise, a Black U.S. diplomat working for the consulate in Ciudad Juarez, who reported being sent to secondary inspection two out of every three times she crossed the border while her white colleagues experienced no issues, noted that “with me, the questioning was accusatory, always premised on the idea that I was lying somehow.”⁶¹

Line-level officers have near-complete control over these proceedings, not just over the conduct of the questioning and the length of the detention, but also—in the case of noncitizens, at least—over the ultimate question of admissibility. Under federal regulations, CBP officers must “create a record of the facts of the case and statements made by” the noncitizen during secondary inspection through the use of Form I-867.⁶² The aim is to ensure that asylum seekers who express a credible fear of persecution are not summarily deported, but the process also serves an important informational function for arrivals who are not seeking asylum. Because officers are required to read the record aloud to the noncitizen, repeating their statements back to them and stating the grounds for their removal, it provides the applicant an opportunity to know exactly what the officer has concluded and gives them a chance to dispute it.⁶³

Even so, the process of creating the record of the officer’s decision is lacking in safeguards and often riddled with errors. Applicants are not entitled to legal representation during inspection, even at their

⁵⁸ Caleb Hampton, *Treated Like a Terrorist: US Deports Growing Number of Iranian Students with Valid Visas from US Airports*, GUARDIAN (Jan. 14, 2020), <https://www.theguardian.com/us-news/2020/jan/14/they-treated-me-like-a-terrorist-the-vetted-iranians-blocked-from-the-us>.

⁵⁹ All prospective entrants at U.S. ports of entry, including U.S. citizens, are subject to primary inspection and secondary inspection, if CBP deems necessary. However, U.S. citizens ultimately cannot be denied entry. *See* *Nguyen v. INS*, 533 U.S. 53, 67 (2001) (indicating that U.S. citizens have “the absolute right to enter [U.S.] borders”).

⁶⁰ *See* Nicholas Kulish, *Police Officer, Combat Veteran, Muslim and J.F.K. Detainee*, N.Y. TIMES (May 15, 2017), <https://www.nytimes.com/2017/05/15/nyregion/muslim-police-officer-combat-vet-and-detained-without-explanation.html>.

⁶¹ Tianna Spears, *I Was a U.S. Diplomat. Customs and Border Protection Only Cared that I Was Black.*, POLITICO (Aug. 30, 2020, 7:00 AM), <https://www.politico.com/news/magazine/2020/08/30/black-us-diplomat-customs-border-protection-cbp-detained-harassed-325676>.

⁶² 8 C.F.R. § 235.3(b)(2) (2020).

⁶³ *See id.*

own expense.⁶⁴ Interviews are not recorded or videotaped.⁶⁵ Supervising officers may sit in on the proceedings, but do not have to, and while a supervisor's signature is required to make an expedited removal order final, the supervisor is not required to do anything more than review the record created by the subordinate officer.⁶⁶ If the applicant wishes to contact anyone on the outside—say, a school official—CBP officers have discretion to refuse the call.⁶⁷ Students who lack documentation or present contradictory information may be allowed temporary admission while the confusion is sorted out, but that too is at the officer's discretion.⁶⁸ To a significant degree, then, the proper functioning of the process depends upon the good faith of line-level officers. While these officers do not have an easy job,⁶⁹ the system, in practice, often fails to meet the standards set by the statute and regulations.

Critics of the secondary inspection process charge that it is permeated by administrative errors. Tianna Spears, the U.S. diplomat who was repeatedly sent into secondary inspection, catalogued the reasons given by CBP to justify her detention, noting that they made little sense⁷⁰ and were often internally incoherent.⁷¹ Similarly, a 2016 report by the U.S. Commission on International Religious Freedom detailed a number of procedural violations committed by CBP officers during secondary inspection, including failures to ask required questions, record applicant's answers, and obtain their review and signature of the record.⁷² The Commission emphasized that it had

⁶⁴ See *id.* § 292.5(b) (providing an exception where the applicant is under criminal investigation).

⁶⁵ See Harris, *supra* note 20, at 61–63 (advocating the use of body cameras during secondary inspection interviews).

⁶⁶ See 8 C.F.R. § 235.3(b)(7) (requiring supervisory review of expedited removal orders and the supporting record, not of the interview itself).

⁶⁷ The “Access to Counsel Act of 2021” (HR 1573) would clarify that individuals in secondary inspection have the right to call an attorney, family member, etc., on the outside to assist them, but the bill was only passed by the House and has not proceeded further. See generally H.R. 1573, 117th Cong. (2021) (as received by Senate, Apr. 22, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/1573>.

⁶⁸ See *Form I-515A Overview*, DEP'T OF HOMELAND SEC., <https://studyinthestates.dhs.gov/students/form-i-515a-overview> (last visited July 26, 2021).

⁶⁹ See Tim O'Shei, *You're Likely Part of the 99%. Border Agents Get One Chance to Be Sure.*, BUFFALO NEWS (Nov. 26, 2019), https://buffalonews.com/news/local/youre-likely-part-of-the-99-border-agents-get-one-chance-to-besure/article_9cef2a2b-1132-5d41-a45e-1f72330de01d.html.

⁷⁰ See Spears, *supra* note 61 (“We do not believe that you work at the Consulate.”).

⁷¹ See *id.* (“We don't have you in the system. Is this your first time crossing the border? Ten minutes later at secondary inspection with a different officer, I was asked the opposite — Why do you so frequently enter the U.S.?”).

⁷² U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 20 (2016), <https://>

identified these same problems eleven years earlier,⁷³ but that they still persisted.⁷⁴ Consequently, “although they resemble verbatim transcripts, the I-867 sworn statements were neither verbatim nor reliable, often indicating that information was conveyed when in fact it was not and sometimes including answers to questions that never were asked.”⁷⁵ The Commission stressed that the inaccuracy and unreliability of the record compiled by CBP is particularly concerning for asylum seekers,⁷⁶ but given that the I-867 is the only document required to be reviewed by a CBP supervisor prior to issuance of an expedited removal order, students and other visa holders would likely also suffer as a result of the same errors.

Moreover, once a CBP officer decides *not* to admit a noncitizen, they hold broad power to determine the circumstances of removal. First, CBP officers have discretion to allow a prospective entrant to withdraw their application for admission,⁷⁷ a voluntary measure which enables them to depart with less severe immigration consequences.⁷⁸ Second, if the officer does not grant (or offer) withdrawal, they have the responsibility for specifying the exact grounds of inadmissibility under the INA.⁷⁹ This is a consequential decision, because if the officer charges the applicant with being inadmissible either for lack of appropriate entry documents or by reason of fraud or misrepresentation, the noncitizen becomes subject to expedited removal.⁸⁰ By contrast, if they specify any other ground, or any *additional* grounds, the noncitizen falls under the formal removal regime of 8 U.S.C. § 1229a, where their case is reviewed by an immigration judge.⁸¹ This produces an anomaly whereby a student charged with misrepresenting their long-term intentions will be removed without further review, while a

www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf [hereinafter USCIRF REPORT].

⁷³ *Id.* at 7.

⁷⁴ *Id.* at 17.

⁷⁵ *Id.* at 19.

⁷⁶ *See id.* (emphasizing that “immigration judges often used these unreliable documents against asylum seekers when adjudicating their cases”).

⁷⁷ *See* 8 U.S.C. § 1225(a)(4).

⁷⁸ ALISON SISKIN, CONG. RSCH. SERV., R43892, ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS 11 (2015). If an officer grants a withdrawal request, they have discretion to cancel the noncitizen’s visa, such that they would be required to go through the consular process again before attempting to return. *See* 22 C.F.R. § 41.122(e)(3) (2020). This result is mild compared to a five-year bar on reentry. *See infra* note 84.

⁷⁹ *See* 8 U.S.C. § 1225(b)(1)(A)(i) (charging immigration officers with the responsibility of determining the grounds of inadmissibility for purposes of expedited removal).

⁸⁰ *Id.*

⁸¹ HILLEL R. SMITH, CONG. RSCH. SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 12 (2019).

student charged with both misrepresentation and drug trafficking will have a chance to present their case before an immigration judge and potentially gain admission.⁸² Upon removal, both students may have their visas cancelled,⁸³ and both will then be subject to a five-year bar on reentry,⁸⁴ but only one will have had a chance to argue the merits—and *that* as a direct consequence of the line-level officer’s charging decision.

Thus, while there may be other systems and actors involved in the inspections process, the line-level officer plays a large part in deciding whether an applicant gets to enter the country and under what conditions they will be made to leave. As emphasized by the D.C. Circuit, unless an applicant expresses a desire to apply for asylum, “all that stands between that individual and removal is a paper review by the officer’s supervisor.”⁸⁵ Immigration inspection is thus a “minimal process”⁸⁶ enabling swift and decisive agency action at the expense of individual interests. Given the potential for errors and abuse in that process,⁸⁷ including racial and religious discrimination,⁸⁸ one might hope for an opportunity for third-party review. But as the next Part shows, such opportunities are few and far between.

II

JURISDICTIONAL LIMITATIONS ON REVIEW OF INADMISSIBILITY DETERMINATIONS

To understand how an applicant might challenge the adverse actions of a CBP inspector, it is necessary to examine how the courts have responded to various jurisdictional limitations built into the INA. Section II.A presents an overview of these restrictions, including the jurisdictional bars specific to expedited removal as well as the restricted notion of habeas adopted by the INA. Section II.B analyzes the expansive view most courts have taken of the jurisdictional bars applicable to expedited removal and highlights the reticence of some courts to expand their jurisdictional views despite express concerns about racial or ethnic bias in immigration inspection decisions. Section II.C examines areas of tension within the courts’ jurisdictional dis-

⁸² *Id.*

⁸³ See 22 C.F.R. § 41.122(d) (2020) (empowering immigration inspectors to cancel a noncitizen’s visa by writing “REVOKED” across the face of it).

⁸⁴ 8 U.S.C. § 1182(a)(9)(A)(i).

⁸⁵ *Make the Road N.Y. v. Wolf*, 962 F.3d 612, 619 (D.C. Cir. 2020).

⁸⁶ *Jill E. Family, The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59, 76 (2016).

⁸⁷ See *supra* notes 70–75 and accompanying text.

⁸⁸ See *supra* notes 57–61 and accompanying text.

course, including the reviewability of expedited removal orders against specific types of petitioners and the legal consequence of procedural flaws in the production of an expedited removal order. These areas signal potential openings for noncitizens to challenge the legal force of expedited removal orders.⁸⁹

A. *Judicial Review of Expedited Removal Orders*

While there are several ways immigration officers can remove noncitizens from the country, two principal methods are relevant here: formal removal and expedited removal. Formal removal under § 1229a applies to noncitizens deemed inadmissible by reason of criminal convictions, terrorist associations, and a host of other grounds.⁹⁰ Formal removal requires an appearance before an immigration judge, and allows the noncitizen to appeal the removal determination to a U.S. circuit court, a process known as a “petition for review.”⁹¹ Deference is given to the immigration officer’s inadmissibility determination,⁹² but the circuit court has power to review any administrative action other than one to commence proceedings, adjudicate cases, or execute removal orders.⁹³

By contrast, noncitizens seeking review of expedited removal orders face a much more daunting series of jurisdictional bars.⁹⁴ For starters, § 1225(b)(1) mandates that expedited removal be executed “without further hearing or review,” except where the noncitizen expresses an intent to apply for asylum.⁹⁵ Section 1252(a)(2) then states that “no court shall have jurisdiction to review . . . any indi-

⁸⁹ In addition to the judicial options discussed below, noncitizens may also be able to challenge expedited removal orders through administrative channels, including motions to reopen, reconsider, or rescind. DHS has not expressly acknowledged that these motions are available in the expedited removal context, but anecdotes from immigration lawyers suggest they may be an option. See Letter from Efrain Solis Jr., Port Dir., Hidalgo, Texas Port of Entry, to Trina Realmuto, Esq., Nat’l Immigr. Project of the Nat’l Laws. Guild (Oct. 3, 2016), https://www.nationalimmigrationproject.org/PDFs/practitioners/our_lit/impact_litigation/2016_3October_CBP-Decision-Hidalgo-MTR.pdf (granting the motion based on agency discretion); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 199 n.96 (2017) (recounting the success of such motions).

⁹⁰ See 8 U.S.C. § 1229a(a)(2).

⁹¹ *Id.* § 1252(b)(2).

⁹² *Id.* § 1252(b)(4)(C).

⁹³ See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (noting that “[t]here are of course many other decisions or actions that may be part of the deportation process,” other than the three specific types of actions over which the courts lack jurisdiction).

⁹⁴ See Koh, *Shadow Removals*, *supra* note 21, at 346 (stressing that the procedural fairness of expedited removal “falls far short of what noncitizens receive in immigration court”).

⁹⁵ 8 U.S.C. § 1225(b)(1)(A)(i).

vidual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of” an expedited removal order,⁹⁶ while § 1252(e)(1) prohibits any court from entering “declaratory, injunctive, or other equitable relief in any action pertaining to” an expedited removal order.⁹⁷

As emphasized by the House Judiciary Committee shortly after their enactment as part of IIRIRA, these jurisdiction-stripping provisions were necessary to control the “arrival at U.S. airports of smuggled aliens who possess fraudulent or otherwise invalid travel documents” and to ensure that these arrivals “would not be eligible for a hearing before an immigration judge, or for any rights of appeal, because they clearly had no right to enter the U.S.”⁹⁸ The trouble with that rationale, however, is that the jurisdictional restrictions ensnare not only “smuggled” noncitizens who arrive with fraudulent or no documents, but also prospective entrants who arrive with facially valid visas but whose intentions are disbelieved by immigration inspectors.⁹⁹

Of course, there is an important caveat to the jurisdictional bars. Because noncitizens subject to expedited removal remain in the government’s custody until they are placed aboard an outbound flight or returned across the border, “[j]udicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings.”¹⁰⁰ This provision is in line with the Supreme Court’s view that a total denial of habeas jurisdiction in immigration cases would raise serious constitutional questions,¹⁰¹ as the Suspension Clause provides an affirmative right to citizens and noncitizens alike to challenge unlawful executive detention.¹⁰²

Nonetheless, the habeas review made available during expedited removal is heavily circumscribed. Specifically, the court’s jurisdiction is limited to inquiring into (1) “whether the petitioner is an alien,” (2) “whether the petitioner was ordered removed,” and (3) “whether the petitioner can prove by a preponderance of the evidence” that

⁹⁶ *Id.* § 1252(a)(2)(A).

⁹⁷ *Id.* § 1252(e)(1)(A).

⁹⁸ See H.R. REP. NO. 104-879, at 107 (1997).

⁹⁹ See *Khan v. Holder*, 608 F.3d 325, 329 (7th Cir. 2010) (emphasizing that CBP officers can create the very circumstances which render an otherwise lawful entrant subject to expedited removal).

¹⁰⁰ 8 U.S.C. § 1252(e)(2).

¹⁰¹ See *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (holding that some judicial review is required in removal cases).

¹⁰² See *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (affirming “the duty and authority of the Judiciary to call the jailer to account”).

they already hold permanent resident, refugee, or asylee status.¹⁰³ The statute further clarifies that “the court’s inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner,” such that “[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.”¹⁰⁴ In effect, these bars prevent the court from hearing any actions except those questioning the issuance of the order, its relationship to the applicant, or the applicant’s lawful status. If a court finds the noncitizen meets one of the enumerated exceptions, it can order a formal removal hearing before an immigration judge under § 1229a, though that is the only remedy the court can provide.¹⁰⁵

B. Federal Court Responses to the INA’s Jurisdictional Bars

Courts have interpreted these jurisdictional restrictions as a broad prohibition on consideration of the merits of a claim, but not, on that account, as an unconstitutional denial of habeas corpus. In *Castro v. United States Department of Homeland Security*, for example, the Third Circuit rejected the constitutional arguments of a group of Central American asylum seekers who had been apprehended shortly after crossing the border.¹⁰⁶ The petitioners had objected to the lack of judicial oversight for their credible fear determinations, claiming that their presence on U.S. soil entitled them, via habeas, to present their case before an impartial arbiter.¹⁰⁷ The court disagreed, holding that unlawful migrants who had not been properly admitted had no constitutional rights regarding entry, and thus no rights to vindicate in habeas.¹⁰⁸ Because the petitioners were challenging expedited removal orders, “they cannot invoke the Constitution, including the Suspension Clause, in an effort to force judicial review beyond what Congress has already granted them.”¹⁰⁹ The Supreme Court has expanded this understanding, holding that “neither the Suspension Clause nor the Due Process Clause of the Fifth Amendment requires any further review” of an asylum seeker’s adverse credible fear determination.¹¹⁰ The upshot is that the jurisdictional bars of § 1252(e) render the actions of line-level CBP officers all but immune from constitutional scrutiny.

¹⁰³ 8 U.S.C. § 1252(e)(2)(A)–(C).

¹⁰⁴ *Id.* § 1252(e)(5).

¹⁰⁵ *Id.* § 1252(e)(4).

¹⁰⁶ 835 F.3d 422, 425, 427 (3d Cir. 2016).

¹⁰⁷ *Id.* at 444–45.

¹⁰⁸ *Id.* at 445–46.

¹⁰⁹ *Id.*

¹¹⁰ *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020).

Courts have not been oblivious to the serious problems that can result from a strict observance of the INA's jurisdictional bars, but they have been largely unwilling to expand their view of their own jurisdiction on that account. Perhaps the most striking admission of this comes from *Khan v. Holder*, a Seventh Circuit case in which two Pakistani siblings arriving with valid B-1/B-2 visas challenged their exclusion by CBP officers at O'Hare International Airport.¹¹¹ As with the Iranian students discussed in the Introduction, the officers alleged that the Khans did not intend for their visit to be temporary, but rather sought to reside here permanently.¹¹² CBP thus deemed their lack of *immigrant* visas to mean they had no documents for purposes of 8 U.S.C. § 1182(a)(7) and were thus subject to expedited removal.¹¹³ Acknowledging the statute's jurisdictional bars, the Khans sought to argue that the court could nonetheless review the merits of their case on constitutional grounds. The court expressed some sympathy for that position:

The troubling reality of the expedited removal procedure is that a CBP officer can create the [inadmissibility] charge by deciding to convert the person's status from a non-immigrant with valid papers to an intending immigrant without the proper papers, and then that same officer, free from the risk of judicial oversight, can confirm his or her suspicions of the person's intentions and find the person guilty of that charge. The entire process—from the initial decision to convert the person's status to removal—can happen without any check on whether the person understood the proceedings, had an interpreter, or enjoyed any other safeguards.¹¹⁴

The court further emphasized that the inspection process “is fraught with risk of arbitrary, mistaken, or discriminatory behavior,” including the possibility that “a particular CBP officer [could] decide[] that enough visitors from Africa have already entered the United States.”¹¹⁵ Nevertheless, the court determined that to acknowledge those risks “is not . . . to say that courts are free to disregard jurisdictional limitations.”¹¹⁶ Rather, the court found itself bound by the restrictions written into § 1252(e), such that it could not inquire

¹¹¹ 608 F.3d 325, 326 (7th Cir. 2010). The B-1/B-2 visa allows noncitizens to enter for either temporary business purposes, tourism, or both. *Visitor Visa*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html> (last visited July 25, 2021).

¹¹² *Khan*, 608 F.3d at 326–27.

¹¹³ *Id.*

¹¹⁴ *Id.* at 329.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

whether expedited removal “was properly invoked” in the case before it.¹¹⁷

The Ninth Circuit reached a similar conclusion in *Li v. Eddy*.¹¹⁸ There, a Chinese national with a valid B-1 business visitor visa was detained by immigration officers and incarcerated in a local jail for eleven days without explanation.¹¹⁹ After filing for habeas, Li was provided a copy of the removal order, which indicated the inspector’s finding that she had procured her visa through fraud or misrepresentation.¹²⁰ Li had entered the country twice before on B-1 visas without issue, but where the form called for an explanation of the fraud determination, none was provided.¹²¹ The inspector simply concluded that Li was inadmissible and imposed on her a five-year bar to reentry.¹²² In habeas, Li asked the district court to review the legality of the expedited removal order—particularly the inspector’s determination of fraud—but the court dismissed her claim for want of jurisdiction.¹²³ The Ninth Circuit affirmed, holding that § 1252(e) “does not appear to permit the court to inquire into whether [expedited removal] was properly invoked, but only whether it was invoked at all.”¹²⁴ Simply put, if the immigration inspector says that the petitioner committed fraud, the court has no jurisdiction to question the legal sufficiency of that determination.

To the dissent in *Li*, the idea that an officer’s unsubstantiated (and likely erroneous)¹²⁵ determination of inadmissibility could be immune from judicial scrutiny went too far. Judge Hawkins emphasized that if the majority’s reading is correct, immigration officers could issue expedited removal orders “for any reason, including clearly improper grounds such as racial or ethnic bias.”¹²⁶ Instead, he suggested a narrower reading of the jurisdictional bars, stressing first that a court always has jurisdiction to determine its jurisdiction,¹²⁷ and second, that the statute’s allowance to ask “whether such an order in

¹¹⁷ *Id.* at 329–30.

¹¹⁸ 259 F.3d 1132 (9th Cir. 2001) (per curiam), *vacated as moot*, 324 F.3d 1109 (9th Cir. 2003).

¹¹⁹ *Id.* at 1136–37 (Hawkins, J., dissenting).

¹²⁰ *Id.* at 1137.

¹²¹ *Id.*

¹²² *Id.* at 1133 (majority opinion).

¹²³ *Id.*

¹²⁴ *Id.* at 1134.

¹²⁵ It appears the inspectors were confused by an L-1 visa (for intracompany transfers) which had been denied before approval of the B-1, and perhaps thought that Li was attempting to enter on the L-1 after it had been denied. *See id.* at 1137 (Hawkins, J., dissenting).

¹²⁶ *Id.* at 1138 (emphasis omitted).

¹²⁷ *Id.*

fact was issued” must extend beyond merely confirming the existence of the paper to include “at least superficial substantive review.”¹²⁸ Judge Hawkins argued that this reading would give clearer import to each word in the statute, authorizing federal courts to “determine at least superficial compliance” with the statute without inquiring into actual inadmissibility.¹²⁹ As he saw it, “[t]he only way that [the court] can determine whether Li was ‘ordered removed under [§ 1225]’ and ‘whether such an order in fact was issued’ is to determine whether INS has, to whatever extent, identified any conduct that offends § 1225.”¹³⁰ The inquiry would be one of jurisdictional fact for which it would be inappropriate to simply accept the government’s contention that such an order in fact was issued.¹³¹

Of course, Judge Hawkins’s view did not carry the day in *Li*, and has been at least implicitly rejected by other courts. In *Brumme v. INS*, the Fifth Circuit rejected the notion that federal habeas courts retain jurisdiction to determine whether the expedited removal statute applies at all.¹³² The petitioner had argued that the court’s authority to ask “whether the petitioner was ordered removed” extended to asking “whether [§ 1225(b)(1)] was applicable in the first place,”¹³³ but the court disagreed, finding her argument to be an “end run” around a clear statutory directive.¹³⁴ Another court has affirmed that “[t]he expedited removal statutes are express and unambiguous” and has derided “acrobatic attempts at interpretation”¹³⁵ that seek to confer more jurisdiction on the courts than the statute provides.

That said, the INA’s jurisdictional bars are not an absolute prohibition of judicial review. As noted above, the INA expressly authorizes federal habeas courts to ask whether the petitioner was ordered removed, a task which includes asking whether an expedited removal order in fact was issued and whether it relates to the petitioner.¹³⁶ As the next Section explains, some courts have found, within that narrow statutory grant, the ability to conduct the sort of “superficial substan-

¹²⁸ *Id.* at 1139.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1139–40 (citations omitted) (quoting 8 U.S.C. §§ 1252(e)(2)(B), (e)(5)).

¹³¹ *See* *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (holding that the determination of “jurisdictional fact[s],” which determine whether a law is actually operative, falls outside Congress’s conferral of conclusive fact-finding authority to an administrative agency and fall within the natural authority of Article III courts).

¹³² 275 F.3d 443, 448 (5th Cir. 2001).

¹³³ *Id.* at 447–48.

¹³⁴ *Id.* at 448.

¹³⁵ *Rodriguez v. U.S. Customs & Border Prot.*, No. 14–cv–2716, 2014 WL 4675182, at *2 (W.D. La. Sept. 18, 2014).

¹³⁶ *See supra* notes 103–04.

tive review” envisioned by the *Li* dissent.¹³⁷ In doing this, however, they must still abide by the statute’s admonition not to second-guess whether a noncitizen in expedited removal “is actually inadmissible.”¹³⁸

C. *Points of Dissension Regarding Expedited Removal Challenges*

Despite the broad reading of the INA’s jurisdictional restrictions adopted by most courts, some have been willing to engage in limited substantive review of expedited removal orders in particular factual scenarios. This includes a willingness to ask (1) whether expedited removal may be lawfully applied against the petitioner, and (2) whether, because of some critical procedural flaw in the issuance of the expedited removal order, the order itself does not lawfully exist. This Section argues that, while both approaches have advantages, the latter is likely the more fruitful approach for habeas petitioners, as it more clearly stays within the narrow jurisdictional grant of the statute—i.e., the courts’ ability to ask whether an expedited removal order in fact was issued—while simultaneously hinting at a broader understanding of that same jurisdictional grant.

Some courts have treated the question of whether expedited removal can be lawfully applied against a petitioner as a jurisdictional matter touching on their own jurisdiction to hear the case and the executive’s jurisdiction over the individual’s person. For instance, in *American-Arab Anti-Discrimination Committee v. Ashcroft*, the district court concluded that determining whether expedited removal was lawfully applied against the petitioners was part and parcel of the court’s “review of the question of whether an order of expedited removal has been entered against them and whether the order ‘relates’ to the individual.”¹³⁹ This inquiry would not ask whether the noncitizen was actually inadmissible, but instead would seek to “determin[e] whether the expedited removal procedure ‘relates to’ petitioners in the sense that it lawfully applies to them.”¹⁴⁰ Admitting otherwise would mean that CBP “would effectively . . . be allowed to judge the bounds of its own statutory authority.”¹⁴¹ In a similar move, the Ninth Circuit held in *Smith v. United States Customs & Border Protection* that federal courts had some “limited jurisdiction” to ask whether the expedited removal statute had been lawfully applied

¹³⁷ *Li v. Eddy*, 259 F.3d 1132, 1139 (9th Cir. 2001) (Hawkins, J., dissenting), *vacated as moot*, 324 F.3d 1109 (9th Cir. 2003).

¹³⁸ 8 U.S.C. § 1252(e)(5).

¹³⁹ 272 F. Supp. 2d 650, 663 (E.D. Mich. 2003) (quoting 8 U.S.C. § 1252(e)(5)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

against the petitioner, a Canadian who claimed he was not subject to certain documentary requirements for admission.¹⁴² Smith contended that his claim was “a version” of the second inquiry permitted by the INA—i.e., whether the petitioner was ordered removed under section 1225(b)(1)—and was thus subject to judicial review.¹⁴³

The logic of *Smith* and *Ashcroft* is undoubtedly appealing. If a CBP officer were to subject the holder of an H-1B specialty occupation visa to expedited removal on the grounds that they harbored immigrant intent, this would plainly violate the law, since the H-1B expressly allows noncitizens to enter on a temporary visa but with the goal of permanent residency.¹⁴⁴ H-1B holders thus cannot be subjected to expedited removal (at least not for that reason), and so one could readily conclude that the statute was not lawfully applied against the applicant. As the Supreme Court has stated, “detention under an invalid order of deportation is established where an alien is ordered deported for reasons not specified by Congress.”¹⁴⁵ Nevertheless, other courts have spurned the reasoning of *Smith* and *Ashcroft*, considering the review of the petitioners’ claims to be either a disfavored exercise of hypothetical jurisdiction or an ill-supported end run around a clear statutory prohibition.¹⁴⁶ Consequently, an approach which is more textually faithful to the statute’s explicit grants of jurisdiction, such as asking “whether such an order in fact was issued,”¹⁴⁷ may be more effective at checking unsanctioned exercises of administrative power.

The clearest example of this is *Dugdale v. United States Customs & Border Protection*.¹⁴⁸ There, the district court considered a pro se habeas petition from a Canadian resident who claimed he could not be subjected to expedited removal because no expedited removal order had been issued against him. The court noted the existence of an expedited removal order with his name on it,¹⁴⁹ but concluded that this fact alone did not end the court’s inquiry into whether he was in

¹⁴² 741 F.3d 1016, 1018 (9th Cir. 2014). The court proceeded to reject Smith’s claim, finding that he “was in fact removed” under the expedited removal statute. *Id.* at 1021.

¹⁴³ *Id.* at 1021.

¹⁴⁴ See 8 U.S.C. § 1184(b) (exempting H-1B entrants from the normal requirement to show nonimmigrant intent).

¹⁴⁵ *Bridges v. Wixon*, 326 U.S. 135, 149 (1945).

¹⁴⁶ See *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 432 (3d Cir. 2016) (declining to follow either *Smith* or *Ashcroft*).

¹⁴⁷ 8 U.S.C. § 1252(e)(5).

¹⁴⁸ 88 F. Supp. 3d 1 (D.D.C. 2015).

¹⁴⁹ *Id.* at 7 (“[A] determination of whether a removal order ‘in fact was issued’ fairly encompasses . . . Dugdale’s contention that his order was not lawfully issued because it lacked a supervisor’s signature . . .”).

fact ordered removed.¹⁵⁰ This was because the putative expedited removal order contained no supervisory signature.¹⁵¹ Stressing that “[c]ase law on this question is scarce,” the court pondered whether it can truly “be said that Dugdale’s claim relates to whether the order ‘in fact was issued.’”¹⁵² Like Judge Hawkins in *Li*,¹⁵³ the court concluded that the only way to determine whether the petitioner was ordered removed and whether an expedited removal order in fact was issued was to inquire into the basic merits of his claim. Thus, “a determination of whether a removal order ‘in fact was issued’ fairly encompasses a claim that the order was not lawfully issued due to some procedural defect,” in this case the lack of a supervisory signature.¹⁵⁴

Key to the court’s decision was the fact that DHS regulations state that an expedited removal order “must be reviewed and approved by the appropriate supervisor before the order is considered final.”¹⁵⁵ Although the regulations “do not explicitly require that a supervisor *sign* the order in order to approve it,” the form’s layout suggests that *some* denotation of supervisory approval is needed.¹⁵⁶ And while the statute assigns ultimate decisionmaking authority to line-level officers and makes no mention of supervisors, the court found that the lack of a signature on the putative order was enough to “raise[] a legitimate question as to whether a CBP supervisor in fact ‘reviewed and approved’ the order before it was served.”¹⁵⁷ Finding that “it remain[ed] unclear whether CBP complied with its own regulations in issuing [the] removal order,” the court ordered supplemental briefing to “determine what, if any, effect a lack of supervisor approval might have on the validity of the order and the relief available.”¹⁵⁸ The court’s request for further briefing was an acknowledgment that a review of the merits is not the norm in expedited removal cases. However, it emphasized that “given how few means aliens have to challenge expedited removal orders, . . . it [is] important that CBP follow the letter of the law in issuing them, even in cases where the

¹⁵⁰ *Id.* at 6.

¹⁵¹ *See id.* (finding that a claim asserting a procedural defect, such as the lack of a signature, fell within the court’s jurisdiction).

¹⁵² *Id.* (quoting 8 U.S.C. § 1252(e)(5)).

¹⁵³ *See supra* notes 125–31.

¹⁵⁴ *Dugdale*, 88 F. Supp. 3d at 6 (quoting 8 U.S.C. § 1252(e)(5)).

¹⁵⁵ 8 C.F.R. § 235.3(b)(7) (2017); *see Dugdale*, 88 F. Supp. 3d at 7 (citing the DHS regulation and contrasting it with the INA, which contains no such requirement).

¹⁵⁶ *See Dugdale*, 88 F. Supp. 3d at 7 (noting that the order includes a space to indicate supervisory approval).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* This briefing never occurred. CBP instead vacated its order, and Dugdale was allowed to enter on nonimmigrant status. *See Dugdale v. Lynch*, 672 F. App’x 35, 36 (D.C. Cir. 2016).

grounds for removal appear clear.”¹⁵⁹ Specifically, because “[s]upervisory approval is one of the few checks on erroneous or arbitrary expedited removals . . . [i]t should be taken seriously.”¹⁶⁰

Dugdale’s case is not entirely unique, but the question remains as to how broadly its principle can be applied. In *Awais v. Customs & Border Protection*, for example, the district court initially noted that as in *Dugdale*, the expedited removal order against the petitioner had not been signed by a CBP supervisor.¹⁶¹ However, CBP attempted to cure the error weeks later by issuing a second order that *was* properly signed.¹⁶² While the second order lacked an acknowledgement of receipt by the applicant himself (as the regulations also require), the latter fault was not sufficient to question the order’s validity.¹⁶³ Likewise, the *Castro* court suggested that *Dugdale* should be confined to cases where “[t]he procedural defect . . . alleged [is] at least *arguably* related to the question whether a removal order ‘in fact was issued.’”¹⁶⁴ Claims that have “nothing to do with the issuance of the actual removal orders” but instead cut to the “adequacy” of the procedures employed do not fall within the jurisdictional bounds of § 1252(e)(2)(B).¹⁶⁵ The D.C. District Court has similarly characterized *Dugdale* as a “narrow opening” that does not admit claims as to “whether the government may lawfully implement the removal orders it has issued,” but only “whether it issued those orders at all.”¹⁶⁶

These narrow interpretations of *Dugdale* are not necessarily wrong. But the central reasoning is hard to dispute. After all, what President could enforce an executive order they had failed to sign? However, as the next Part illustrates, the circumstances bearing on the legal existence of an expedited removal order should not be cabined merely to the fact of supervisory approval. Instead, this determination should be informed by basic tenets of administrative law, including the

¹⁵⁹ *Dugdale*, 88 F. Supp. 3d at 7–8.

¹⁶⁰ *Id.* at 8.

¹⁶¹ *Awais v. Customs & Border Prot.*, No. SA CV 18-0701-DOC (SKx), 2018 WL 8647754, at *2 (C.D. Cal. May 15, 2018).

¹⁶² Whether CBP should be allowed to cure its initial error through the issuance of a second expedited removal order seems questionable. See *infra* note 226 and accompanying text.

¹⁶³ See *Awais*, 2018 WL 8647754, at *6 (“[U]nlike the regulatory requirement of supervisory approval . . . the acknowledgment of receipt requirement contains no such language conditioning the finality of the removal order on acknowledgment of receipt.”). The court reasoned that the notice function of the acknowledgment requirement was satisfied by personal service of the order on the petitioner. *Id.* (noting that “the purpose of an acknowledgment of receipt requirement is to ensure notice” and that “Plaintiff received actual notice” via personal service of the expedited removal order).

¹⁶⁴ *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 433 (3d Cir. 2016).

¹⁶⁵ *Id.*

¹⁶⁶ *D.A.M. v. Barr*, 486 F. Supp. 3d 404, 419 (D.D.C. 2020).

prohibition on arbitrary and capricious agency action under the Administrative Procedure Act (APA) and the doctrine that an agency is obliged to follow its own regulations. Incorporating these principles into the assessment of expedited removal claims is important not just for checking the worst abuses of administrative authority, but also for establishing uniformity on what constitutes an expedited removal order. These considerations should push the courts toward a more considered, fact-specific approach to determining habeas jurisdiction under § 1252(e).

III

USING ADMINISTRATIVE LAW TO CHECK THE POWER OF LINE-LEVEL OFFICERS

As early as 1895, the Supreme Court affirmed “[t]he power of Congress to exclude aliens altogether from the United States . . . and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention.”¹⁶⁷ Nevertheless, with the growth of the administrative state, new questions arose regarding the ways in which statutory and common-law principles of administrative law could constrain the actions of immigration officers.¹⁶⁸ For example, courts have long recognized a strong presumption in favor of judicial review of administrative action,¹⁶⁹ and they have “consistently applied that interpretive guide to legislation regarding immigration, and particularly to questions concerning the preservation of federal-court jurisdiction.”¹⁷⁰ However, courts have also held that many immigration functions fall outside the scope of judicial review, raising the fact-intensive question of how the precepts of administrative law can apply in the immigration context.

Informed by core principles of administrative law, this Part argues that under their jurisdiction to determine whether an expedited removal order in fact was issued, the courts may examine a range of administrative actions that would render an order null as a matter of law. Section III.A examines the applicability of the APA’s “arbitrary and capricious” (A&C) standard to immigration actions and explores

¹⁶⁷ *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895).

¹⁶⁸ See Jeffrey D. Stein, *Delineating Discretion: How Judulang Limits Executive Immigration Policy-Making Authority and Opens Channels for Future Challenges*, 27 GEO. IMMIGR. L.J. 35, 39–45 (2012) (reviewing the history of early APA challenges to deportation proceedings).

¹⁶⁹ See *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986) (“We begin with the strong presumption that Congress intends judicial review of administrative action.”).

¹⁷⁰ *Kucana v. Holder*, 558 U.S. 233, 251 (2010).

how it can be used to check the power of line-level officers in the expedited removal context. Section III.B explores the common-law doctrine that agencies must abide by their own regulations and argues that as a basic principle of good governance, this doctrine should inform judges' review of expedited removal orders that fail to conform with the requirements of the law. Section III.C further explores how these principles might be applied in practice.

A. *The Arbitrary and Capricious Standard as a Constraint on Immigration Officers*

Congress enacted the APA in 1946 in order to increase the fairness and impartiality of administrative proceedings through "greater uniformity of procedure and standardization of administrative practice."¹⁷¹ A "fundamental" purpose of the APA was thus "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."¹⁷² As such, the APA establishes that a reviewing court is to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁷³ The APA's safeguards are meant to guide nearly all agency action, but Congress can exempt specific areas from the APA's reach.¹⁷⁴ However, even if Congress exempts a given regulatory area from the *procedures* required by the APA, the arbitrary and capricious standard of review may arguably still apply to agency conduct that is ancillary to the action exempted by Congress.¹⁷⁵

An example is *Judulang v. Holder*, where a unanimous Supreme Court applied A&C review to strike down a policy used to determine eligibility for waivers of removal.¹⁷⁶ The petitioner had been ordered removed through the formal removal process but could not challenge the merits of the order under the INA's jurisdictional bars. However, the Court maintained jurisdiction over the ancillary challenge to the denial of waiver eligibility. With little comment, the Court assessed the policy at issue through the standard APA lens of A&C review,

¹⁷¹ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950) (recounting the legislative history of the APA).

¹⁷² *Id.*; see also *id.* at 46 (holding that deportation proceedings are not exempt "from reforms in administrative procedure applicable generally to federal agencies").

¹⁷³ 5 U.S.C. § 706(2).

¹⁷⁴ See *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (emphasizing that Congress need not use any magic words when it intends to exempt a regulatory area from the APA).

¹⁷⁵ See, e.g., *Zhang v. Napolitano*, 604 F. Supp. 2d 77, 80 (D.D.C. 2009) (holding that a request to compel USCIS to adjudicate applications for asylum and withholding of removal fell outside the jurisdictional bars of § 1252(g) and was thus subject to APA review).

¹⁷⁶ 565 U.S. 42, 45 (2011).

making no special exceptions for the agency just because it worked in immigration—a move that surprised advocates.¹⁷⁷ Instead, it employed “quintessential administrative law cases”¹⁷⁸ and “applied an independent A&C evaluation of the merits . . . rather than just . . . a cursory check to ensure that the rule did not inexplicably depart from existing regulations.”¹⁷⁹ Lower courts have similarly affirmed that A&C review can apply within the “petition for review” process available in formal removal cases,¹⁸⁰ at least insofar as a petitioner uses the standard to challenge the *process* used by the agency rather than its final determination, which is immune from judicial review.¹⁸¹

As a consequence of courts’ reliance upon A&C review in these cases, its use to check administrative abuses within the formal removal process has been invigorated in recent years, even if petitioners cannot use it to contest the merits of removal. By contrast, within expedited removal, where procedural safeguards are designedly minimal,¹⁸² any role for A&C review remains elusive. Still, some scholars have read *Judulang* to provide a window for a more active judicial role in areas touching on expedited removal.¹⁸³ Jennifer Lee Koh has argued that under *Judulang*, A&C review can invalidate an agency’s reliance on an expedited removal order as grounds for reinstatement of removal at a later date, either by highlighting the disproportionate impact of CBP officers’ charging decisions or by exposing a disconnect between the policy and “the fitness of an individual to remain in the country.”¹⁸⁴ In Koh’s vision, “the particular inadequacy of the process surrounding the charging decisions made during expedited removal should weigh in favor” of finding DHS’s reliance on that order as a predicate for future action to be arbitrary and capricious,¹⁸⁵ in part because such reliance would not reflect reasoned decisionmaking by the agency.¹⁸⁶

¹⁷⁷ See Stein, *supra* note 168, at 37 (“Some heralded the decision as a proclamation that the Court would no longer tolerate unfairness in the immigration system.”).

¹⁷⁸ *Id.* at 56.

¹⁷⁹ *Id.* at 48.

¹⁸⁰ See 8 U.S.C. § 1252(b)(2), *supra* note 91 (describing the “petition for review” process).

¹⁸¹ See *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 25, 40 n.12 (D.D.C. 2018) (finding that the A&C standard could be used to challenge USCIS’s use of a “secret, alternate claims-processing system” to adjudicate green card applications).

¹⁸² See Koh, *Shadow Removals*, *supra* note 21, at 343 (“[T]he expedited removal process seems designed to produce error and arbitrariness, given its closed-door, speedy, and potentially coercive nature.”).

¹⁸³ See, e.g., *id.* at 344–45 (suggesting that as in *Judulang*, courts can draw on A&C review to mitigate abuses of expedited removal and reinstatement).

¹⁸⁴ *Id.* at 345.

¹⁸⁵ *Id.* at 391.

¹⁸⁶ *Id.* at 388.

Koh's approach does not seek to attack the expedited removal order itself—only its later use by the agency as a ground for additional action. But there is no doubt that restricting a habeas court to confirming the mere existence of a putative expedited removal order without conducting even superficial review of the process that produced it “empowers individual immigration officers’ charging decisions to disproportionately impact deportation outcomes.”¹⁸⁷ It thus could be argued that the existence *vel non* of an expedited removal order is a distinct legal question from the merits of any such order and a question of law to which the APA’s A&C standard could apply.¹⁸⁸ The Second Circuit has suggested as much in the permanent residency context, holding that despite a jurisdictional bar on reviewing discretionary grants of permanent residency, the APA could supply a metric for assessing whether such a grant was made at all, though “not whether the decision was correct or a proper exercise of discretion.”¹⁸⁹ Thus, there may be a narrow space in which the A&C standard could be used to challenge the existence of an agency action.

Such an approach *might* be enough to avoid the clear text of the INA’s jurisdictional bars. After all, Congress has not precluded the courts from inquiring into whether an expedited removal order in fact was issued, and “[j]udicial review is available under the APA . . . precisely so that agencies . . . do not become stagnant backwaters of caprice and lawlessness.”¹⁹⁰ Yet federal courts, traditionally averse to aggrandizing their own jurisdiction, could be wary of it, seeing it as an attempt to shoehorn the APA into a space where it does not belong. Then again, it is not inconceivable that a particularly egregious pattern of conduct on the part of immigration inspectors—extending beyond individual exclusion decisions to encompass, say, a full-blown agency *policy* of excluding noncitizens for racial or religious reasons—could warrant an appeal to the A&C standard as a transsubstantive baseline for acceptable bureaucratic behavior.

B. Common-Law Administrative Standards as a Constraint on Immigration Officers

A more straightforward and textually faithful approach might be to emphasize that an agency order resulting from the agency’s failure to follow its own regulations is not a valid order and may not be an

¹⁸⁷ *Id.* at 345.

¹⁸⁸ *See id.* at 388 (stating that reinstatement orders may be reviewed for questions of law, which would include the A&C inquiry determining whether a predicate expedited removal order existed).

¹⁸⁹ *Sharkey v. Quarantillo*, 541 F.3d 75, 85 (2d Cir. 2008).

¹⁹⁰ *Heckler v. Chaney*, 470 U.S. 821, 848 (1985) (Marshall, J., concurring).

order at all. Under the so-called *Accardi* doctrine, it is beyond dispute that agencies within the administrative state must follow their own regulations.¹⁹¹ So too is the role of the courts in ensuring compliance. As Justice Frankfurter put it, “[a]n executive agency must be rigorously held to the standards by which it professes its action to be judged.”¹⁹² Thus, “an agency’s failure to afford an individual procedural safeguards required under its own regulations may result in the invalidation of the ultimate administrative determination.”¹⁹³

In the expedited removal context, this judgment must be a fact-specific determination bearing on the underlying idea of what an expedited removal order is supposed to be: namely, the end result of a prescribed statutory and regulatory process for determining admissibility. Thus, the *Awais* court could find that an expedited removal order that was personally served on the applicant was still in fact issued,¹⁹⁴ despite not fulfilling the regulatory requirement that the applicant sign the order as acknowledgement of receipt, while the *Dugdale* court could find that the lack of any denotation of supervisory approval called the order’s very existence into doubt.¹⁹⁵ Notably, neither *Dugdale* nor *Awais* appealed to the APA in reviewing the actions of immigration inspectors; instead, their inquiries were grounded in a more fundamental assessment of what kind of agency action is legally sufficient to constitute an expedited removal order. The questions are how broadly this logic might apply to other factual scenarios beyond supervisory approval and what types of agency conduct might run so far afoul of common-law principles of administrative action that they render any putative order null and unenforceable.

A baseline principle here is that rules promulgated by an agency with the power to deport “are designed as safeguards against essentially unfair procedures.”¹⁹⁶ It thus follows that “one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.”¹⁹⁷ Because this issue is traditionally framed as a matter of due process, it would be susceptible to the long-running theory, most recently recog-

¹⁹¹ See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (“[W]e object to the Board’s alleged *failure to exercise* its own discretion, contrary to existing valid regulations.”).

¹⁹² *Vitarelli v. Seaton*, 359 U.S. 535, 546 (1959) (Frankfurter, J., concurring).

¹⁹³ *United States v. Morgan*, 193 F.3d 252, 266 (4th Cir. 1999).

¹⁹⁴ See *supra* notes 161–63 and accompanying text (discussing the *Awais* decision).

¹⁹⁵ See *supra* notes 148–60 and accompanying text (discussing the *Dugdale* decision).

¹⁹⁶ *Bridges v. Wixon*, 326 U.S. 135, 153 (1945) (invalidating a removal order that was based in part on consideration of hearsay evidence, which was prohibited by agency regulations).

¹⁹⁷ *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923).

nized in *Thuraissigiam*, that noncitizens on the threshold of entry have no due process rights other than what Congress has expressly given them.¹⁹⁸ But due process is only one side of the coin—the side that recognizes a personal injury and gives individuals the right to redress it. The other side of that coin is the rule of law, or what might be called good governance—the idea that regardless of any specific injury to an individual, government conduct must adhere to established standards of reasonableness by way of compliance with statutes and regulations.¹⁹⁹ The reason for this is simply to maintain the integrity of the government itself. As the Supreme Court has stated, “[n]othing can destroy a government more quickly than its failure to observe its own laws.”²⁰⁰

Hence, if “the Constitution gives the political department of the government plenary authority to decide which aliens to admit . . . and a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted,”²⁰¹ the courts might at least give effect to the idea that the executive must *follow* the established procedures and refrain from unbounded, arbitrary exercises of government power.²⁰² Were it otherwise, those procedures would be of no import whatsoever. It would be as though Congress were countenancing arbitrary action within the administrative state, licensing officers to implement whatever ad hoc immigration laws they saw fit at any given time,²⁰³ and telling agencies: “You make the rules, but you don’t need to follow them.”²⁰⁴ Very likely, that is something Congress cannot do.

¹⁹⁸ See *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (emphasizing that executive officers’ exercise of powers conferred on them by Congress over foreign nationals *is* due process (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892))).

¹⁹⁹ See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) (“The ‘rule of law’ . . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated . . .”).

²⁰⁰ *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

²⁰¹ *Thuraissigiam*, 140 S. Ct. at 1982 (internal citations and quotation marks omitted).

²⁰² See *Service v. Dulles*, 354 U.S. 363, 388 (1957) (holding that the firing of a foreign service officer was illegal under *Accardi*, because the Secretary failed to comply with the department’s own regulations).

²⁰³ There is also a judicial interest in the uniform application of federal law. If CBP officers can implement the law however they see fit, the immigration system would become a patchwork of rules for each port of entry. At least one Iranian student who experienced an unexpected visa cancellation reported being warned by a CBP translator not to fly through Boston again, since “[t]he rules are stricter here.” See Hampton, *supra* note 58.

²⁰⁴ See Koh, *Shadow Removals*, *supra* note 21, at 360–61 (characterizing expedited removal as a “‘legal black hole’ . . . in which governmental powers are high but where the law cannot reach”).

The common-law principle that agencies must follow their own rules can thus be said to serve a dual purpose—to prevent harm to individuals, but also to ensure that the government operates responsibly and predictably and avoids engaging in arbitrary behavior.²⁰⁵ The Supreme Court itself has recognized the importance of the principle that agencies follow the established rules in the immigration context, even when failure to do so does not expressly implicate due process. In *Pereira v. Sessions*, the Court considered whether a putative notice to appear (NTA) that failed to specify a time and date was, properly speaking, an NTA at all.²⁰⁶ An NTA is essentially a charging document that orders a noncitizen to appear in immigration court for removal proceedings; both IIRIRA and a related case-scheduling regulation require that an NTA specify the time and place of the appearance, though the regulation includes the caveat that such information be provided “where practicable.”²⁰⁷ For years, DHS understood that caveat to mean it could issue NTAs that listed the time and place as “to be determined.”²⁰⁸ But the Court soundly rejected that approach, holding that “[t]he plain text, the statutory context, and common sense all lead inescapably and unambiguously to [the] conclusion” that “[an NTA] that does not inform a noncitizen when and where to appear for removal proceedings is not [an NTA]” at all.²⁰⁹ Due process had nothing to do with it; the focus was simply on whether the agency had followed the letter of the law in issuing NTAs. Because it had not, the NTAs it had issued were legal nullities.²¹⁰

Violation of the agency’s common-law obligation to follow the rules can thus be grounds for finding that an agency order is not an order at all. As with *Dugdale*, the key question is how narrowly to read *Pereira*, but there is good reason for courts to play an active role in ensuring that agencies adhere to both the statute and their own regulations. Looking at recent allegations of officer misconduct, Section III.C argues that a broader array of factual scenarios than one

²⁰⁵ See *Leslie v. Att’y Gen. of the U.S.*, 611 F.3d 171, 180 (3d Cir. 2010) (stating that an agency’s failure to comply with its own regulations “will merit invalidation of the challenged agency action” whether or not it “has substantially prejudiced the complaining party”).

²⁰⁶ 138 S. Ct. 2105, 2110 (2018).

²⁰⁷ See *id.* at 2111.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 2110.

²¹⁰ The Supreme Court doubled down on this line of reasoning in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), another case involving the government’s failure to honor the ordinary meaning of the law’s requirements with respect to issuing NTAs. Justice Gorsuch wryly noted that “it turns out the federal government finds some of its forms frustrating too.” *Id.* at 1478.

might immediately suppose could offer grounds for questioning the legal existence of an expedited removal order.

C. *A Fact-Specific Administrative Law Approach to Expedited Removal Orders*

Federal habeas courts are permitted to ask whether an expedited removal order in fact was issued, but are given no statutory guidance as to what constitutes “issuance” of such an order. This Section argues that, in answering that existential question, courts ought to insist upon line-level officers’ procedural compliance with the agency’s own regulations as a means for assessing the legal existence of an expedited removal order. Just as an NTA which fails to specify a time and place for a court appearance is not, under *Pereira*, an NTA at all, an expedited removal order which fails to accord with critical procedural requirements spelled out in the agency’s regulations should not, in fact, constitute an expedited removal order. Even with this procedural focus, however, it is clear that not every violation would call an order’s legal existence into question. As the Third Circuit stated in *Castro*, violations that have “nothing to do with the issuance of the actual removal orders,” but instead cut to the “adequacy” of the procedures employed, would be unreviewable under the INA’s jurisdictional bars.²¹¹ For that reason, it is worthwhile to ask what specific violations would allow a court to find that no expedited removal order in fact was issued.

Challenging the legal existence of an expedited removal order would be an uphill battle for almost any applicant,²¹² but some procedural violations would almost certainly call the issuance of an expedited removal order into doubt. The most straightforward case would be the unlikely instance where the agency can produce no documentation whatsoever evidencing an expedited removal order against the applicant. Under the regulations, an expedited removal order itself is accomplished via Form I-860, which incorporates the record of secondary inspection contained in Form I-867 and advises the noncitizen of

²¹¹ *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 433 (3d Cir. 2016).

²¹² It bears emphasis that many noncitizens who might seek to challenge an expedited removal order are held in detention (either at the airport or at an off-site facility), and may not be allowed to contact an attorney or loved ones on the outside. CBP also has a perverse incentive to attempt to remove a noncitizen before any habeas proceeding begins, since “[w]ithout a body . . . there can be no grant of the writ.” See *Abadi v. U.S. Customs & Border Prot.*, No. 20-10114, slip op. at 5 (D. Mass. Jan. 23, 2020). Even so, some pro se applicants, like Timothy Dugdale, have managed to gain the courts’ attention. See *Dugdale v. U.S. Customs & Border Prot.*, 88 F. Supp. 3d 1, 4 n.1 (D.D.C. 2015) (describing Dugdale’s various pro se filings).

the charges against them.²¹³ Unless a Form I-860 can be produced in habeas proceedings, a court could rightly find that no expedited removal order in fact was issued. By the same token, a putative expedited removal order completed on the wrong form, on loose leaf, or by purely verbal communication would not count as an expedited removal order.²¹⁴

The same procedural logic would also apply to putative orders that lack evidence of supervisory concurrence. As noted in *Dugdale*, the regulations provide that an expedited removal order “must be reviewed and approved by the appropriate supervisor before [it] is considered final.”²¹⁵ Thus, failure to comply with this regulation could easily lead a court to find that no order in fact was issued. While this may sound like an unlikely event, there is reason to believe that an appreciable portion of expedited removal orders could lack supervisory approval. Although data is hard to come by, a 2000 government report found 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.”²¹⁶ That may be a small percentage, but were it still the case today, it would mean that thousands of noncitizens are being summarily deported “based on the un-reviewed assessment of a single secondary inspection officer working in a demonstrably flawed system.”²¹⁷

Similarly, there may be cases where the “supervisory” review is not actually conducted by a supervisor, but instead by another line-level officer.²¹⁸ This would violate the regulatory requirement that “supervisory review shall not be delegated below the level of the second line supervisor, or a person acting in that capacity.”²¹⁹ Were that the case, a court could find that the CBP officer failed to comply with the agency’s own regulations in obtaining supervisory approval; therefore, the resulting order would not be final and, legally speaking, would not exist. Granted, the regulation’s requirement of supervisory concurrence is arguably at odds with the statute’s concentration of decisionmaking power in the line-level officer, but it is by no means

²¹³ See 8 C.F.R. § 235.3(b)(2)(i) (2020).

²¹⁴ Some courts have rather carelessly suggested that any “piece of paper stamped ‘expedited removal order’” would suffice, but the regulations clearly establish that only a Form I-860 constitutes an expedited removal order. See, e.g., *M.S.P.C. v. U.S. Customs & Border Prot.*, 60 F. Supp. 3d 1156, 1163 (D.N.M. 2014).

²¹⁵ 8 C.F.R. § 235.3(b)(7).

²¹⁶ See Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 185 (2006).

²¹⁷ *Id.*

²¹⁸ See *id.* at 186.

²¹⁹ 8 C.F.R. § 235.3(b)(7).

unusual for a regulation to more tightly restrict agency action than the statute itself.²²⁰

Other scenarios could give rise to similar doubts about expedited removal orders. A common allegation among student visa holders subjected to expedited removal is that they were not told by CBP officers why they were being excluded.²²¹ Some students asserted that they had no chance to review the statements prepared by CBP or the substance of the expedited removal orders against them until they were out of CBP custody and handed the documents by flight attendants upon arrival at their destination.²²² Such conduct would constitute a serious breach of the regulations, as CBP officers are required not just to read the record of secondary inspection to applicants, but also to record their responses, have them read the statement, and direct them to sign and initial each page as well as any corrections they may make.²²³ Moreover, CBP officers are expressly required to advise noncitizens of the charges against them through Form I-860.²²⁴ That form is styled as a “*Notice and Order of Expedited Removal*,”²²⁵ indicating just how important apprising the applicant is to the integrity of the overall process. A habeas court could well find that, if the applicant never received the form and thus was not advised of the charges against them, the order itself was not truly issued. CBP might try to cure that error by serving the order on the applicant later, as it did with the petitioner in *Li*. But once the applicant appears in habeas, where the only remedy available to the court is to order a formal removal proceeding, it is not clear that CBP should be allowed a second bite at the procedural apple.²²⁶ Thus, it is arguable that such a failure to abide by the agency’s own regulations would cast into doubt the very existence of an expedited removal order.

Other failures to follow the agency’s own regulations could cause similar doubts, though it is questionable whether certain violations cut more toward the issuance of the order than the adequacy of the process. For example, several students stated that they refused to sign the record of their interview in secondary inspection because it contained

²²⁰ See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (holding that the Attorney General must observe regulations with the force and effect of law, even if they give him less leeway than the statute).

²²¹ See Hampton & Dickerson, *supra* note 10.

²²² See *id.*; Hampton, *supra* note 58 (“[O]thers were put on planes back to Iran without a copy of the paperwork. ‘I don’t know under which section of the law I was not allowed to enter the US,’ Shahkhajeh said.”).

²²³ See 8 C.F.R. § 235.3(b)(2)(i).

²²⁴ *Id.*

²²⁵ *Id.* (emphasis added).

²²⁶ See 8 U.S.C. § 1252(e)(4).

inaccuracies, omissions, and even outright fabrications.²²⁷ This, too, would be a breach of the regulations, which provide that “the examining immigration officer shall create a record of the facts of the case and statements made by the [applicant]” via a “sworn statement.”²²⁸ But it would not be entirely out of character for the agency. For years, advocates have documented instances where CBP officers fabricated or falsified the records of asylum interviews, attributing statements to noncitizens that were never made, omitting statements that were, and stating that critical questions were asked when, in fact, they were not.²²⁹ In one especially transparent example of fabrication, CBP officers swore on the applicant’s Form I-867—the official record of the secondary inspection interview—that when asked why they had left their home country, the applicant informed them that it was “[t]o look for work.”²³⁰ But the applicant was only three years old at the time, meaning that “[the] interview, so painstakingly transcribed, sworn, signed and counter-signed, almost certainly never happened in the format in which it was memorialized.”²³¹

Claims of fabrication or falsification may implicate whether the expedited removal order legally exists or, relatedly, whether it relates to the petitioner. Indeed, no reasonable observer could conclude that an expedited removal order stating that a three year old said they came to the United States to look for work truly relates to that individual. At best, it reflects a good faith mistake: The order actually relates to someone else, and no order in fact exists for the individual in question. Even this optimistic view would suggest that the process

²²⁷ See Hampton, *supra* note 58 (“Multiple students said CBP gave them records of their questioning that were partly inaccurate or fabricated”); Sarah Betancourt, *Lawyers Say at Least 10 Iranian Students Deported in Last Year*, COMMONWEALTH (Jan. 21, 2020), <https://commonwealthmagazine.org/immigration/lawyers-say-at-least-10-iranian-students-deported-in-last-year> (“Arandi said the statement was an inaccurate summary of the interrogation, which included questions about her political affiliation, so she refused to sign it.”).

²²⁸ 8 C.F.R. § 235.3(b)(2)(i).

²²⁹ See, e.g., USCIRF REPORT, *supra* note 72, at 20–21 (noting discrepancies between the conduct of secondary inspection interviews and the record produced); Human Rights Watch, Comment Letter on Designating Aliens for Expedited Removal (Sept. 23, 2019), https://www.hrw.org/sites/default/files/supporting_resources/hrw_usp_expedited_removal_comment.pdf (noting instances where CBP failed to record applicants’ fears of persecution and where CBP fabricated responses to questions that were never asked); Edna Yang & Paul Zoltan, Presentation at the University of Texas School of Law A Practical Guide to Immigration Removal Proceedings eConference: Asylum Advocacy in the Age of ‘The Donald’: Once More Unto the Breach, Dear Friends 1 n.4 (2018), <https://ailatexas.org/wp-content/uploads/2015/04/Friday-Family-Removal-11.20-Materials-2.pdf> (remarking that the asylum record is “often fabricated”).

²³⁰ Brief for Am. Immigr. Laws. Ass’n as Amici Curiae Supporting Respondents at 3, Matter of M-R-R- (B.I.A. 2015), <https://www.aila.org/infonet/brief-with-bia-artesia-case>.

²³¹ *Id.* at 5.

of supervisory review had suffered a critical flaw, as any record submitted to the supervisor would not have been an accurate reflection of the secondary inspection proceedings. And if the supervisor did not review and approve the true, factual transcript, any subsequent actions would necessarily conflict with the agency's own regulations. That could reasonably raise a question whether—as a matter of law—an expedited removal order in fact was issued, though a court may be wary of bootstrapping a fabrication claim to the supervisory review requirement.

Some noncitizens could also assert that CBP is attempting to remove them based on statutory grounds that do not support the use of expedited removal—i.e., grounds other than lack of documents or fraudulent documents. Some students, for example, claimed the CBP officers acknowledged they were being excluded for geopolitical reasons, rather than for possessing immigrant intent.²³² Others alleged that CBP devoted a substantial portion of their interviews to questions about religion, geopolitics, and terrorism.²³³ In Dehghani's case, a DHS official went so far as to inform the media that “Dehghani's family has links to the [Islamic Revolutionary Guard Corps]—of which Gen. Qassem Soleimani, who was recently killed in a controversial U.S. strike, was a member—and to terror group Hezbollah.”²³⁴ A government official also alleged that Dehghani was the administrator of a YouTube channel that had “published a call for reprisals against the United States” for Soleimani's assassination.²³⁵ Dehghani's attorneys fiercely contested those allegations,²³⁶ but regardless of their veracity, it appears that DHS admits that the reason underlying his removal was a concern over potential terrorist associations.

²³² See Hampton & Dickerson, *supra* note 10 (noting that a student who had worked for a plastics company with ties to the Iranian oil industry was told by an officer that “his boss didn't like that I had worked with that company”).

²³³ See *id.* (“He was asked what he thought about the Ukrainian jet that had been shot down three days earlier by two Iranian missiles.”); Philip Marcelo, *2 Iranian Students File Civil Rights Complaint After Removal from the U.S.*, TIME (Feb. 3, 2020), <https://time.com/5777118/iranian-students-civil-rights-complaint-removal> (noting Dehghani's allegation that he was “subjected to a ‘threatening and uncivil interrogation’ that focused on his religious and political beliefs”); Sarah Parvini, *‘I Have Lost Everything’: Iranian Students with Valid Visas Sent Home upon Arrival at U.S. Airports*, L.A. TIMES (Jan. 29, 2020, 1:58 PM), <https://www.latimes.com/world-nation/story/2020-01-29/iranian-student-visas> (reporting that CBP pulled a copy of a student's Quran from her luggage and asked her “what Iranian people think about the explosion in Saudi Arabia”).

²³⁴ See Adam Shaw, *Iranian Student Whose Deportation Spurred Dem Outcry Has Family Ties to IRGC, Hezbollah: DHS Official*, FOX NEWS (Jan. 24, 2020), <https://www.foxnews.com/politics/iranian-student-whose-deportation-spurred-dem-outcry-has-family-ties-to-irgc-hezbollah-dhs-official>.

²³⁵ See Dickerson & Hampton, *supra* note 6.

²³⁶ See *id.*

The problem for CBP—which officially told Dehghani that he was being excluded because he harbored immigrant intent—is that inadmissibility by reason of “[a]ssociation with terrorist organizations”²³⁷ is *not* one of the two statutory grounds on which CBP officers may exercise the expedited removal power.²³⁸ Instead, if terrorist association were truly the government’s concern, Dehghani should have been charged with inadmissibility under 8 U.S.C. § 1182(a)(3)(F) and subjected to the formal removal process, in which an immigration judge could review the merits of his removal.²³⁹ Thus, unless one takes a capacious view of the “misrepresentation” ground of inadmissibility, it appears clear that CBP officers failed to follow the agency’s own regulations—and the plain text of the statute—in subjecting Dehghani to expedited removal. While some courts have expressed skepticism as to whether an applicant can challenge whether expedited removal was lawfully applied against them,²⁴⁰ it is at least arguable that a court could question whether an expedited removal order in fact was issued when the CBP officers purporting to issue it plainly acted beyond the bounds of their statutory and regulatory authority.²⁴¹

Finally, there is a set of violations of agency regulations that, though extremely consequential and distressing, likely cannot fit into the question of whether an expedited removal order in fact was issued. Allegations of hostile and inappropriate treatment during secondary inspection, including claims of invidious discrimination on the basis of race, religion, and sexual orientation,²⁴² are not uncommon. Such claims, however, would most likely cut toward the adequacy of the process provided, rather than to the fact of the issuance of an order itself. As the dissent in *Li* and the majority in *Khan* both lamented, the law seems to give CBP officers a free hand to discriminate against applicants on any number of “clearly improper grounds.”²⁴³ Confronted with an applicant who credibly alleges impermissible bias but is subject to a facially valid order, a court would

²³⁷ 8 U.S.C. § 1182(a)(3)(F).

²³⁸ See *supra* notes 80–81 and accompanying text.

²³⁹ See 8 C.F.R. § 235.3(b)(3) (2020) (requiring that, if CBP charges the noncitizen with any inadmissibility grounds other than the two listed in § 1225(b)(1), the noncitizen “shall be detained and referred for a removal hearing before an immigration judge”).

²⁴⁰ See *supra* Section II.C.

²⁴¹ See *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (finding that courts are not precluded from reviewing agency action when it is clear that the agency acted “in excess of its delegated powers”).

²⁴² See *supra* notes 56–61 and accompanying text.

²⁴³ *Li v. Eddy*, 259 F.3d 1132, 1138 (9th Cir. 2001) (Hawkins, J., dissenting); see also *Khan v. Holder*, 608 F.3d 325, 329 (7th Cir. 2010).

likely find itself devoid of jurisdiction to inquire into the merits of the applicant's case, unable to question the legal existence of an order that bears all the procedural trappings required by the regulations.

That sad fact underscores the reality that, by statutory design, line-level officers hold virtually all the cards in these encounters. Hence, while the arguments above may each have some potential, many courts would likely be averse to entertaining them out of concern for transgressing the statute's clear purpose to effectuate expedited removals "without further hearing or review."²⁴⁴ However, that does not mean that applicants who are unwittingly caught up in the expedited removal system—and who manage to make it into federal habeas court—should not at least try to make them. Instances of CBP officers' failure to follow the statute and the agency's own regulations are well-documented, recurring, and oftentimes egregious. The more frequently such allegations are brought before the courts, the more their concern for good governance and the rule of law, if not due process, may grow in consideration.

CONCLUSION

Since the enactment of IIRIRA in 1996, the expedited removal system has generated a significant amount of scholarly controversy and real-world litigation. Much of this has rightly been focused on the plight of those who enter the United States without authorization, but it is worthwhile to consider more fully how, through the actions of line-level officers, the program can rope in even those who travel here with the U.S. government's express permission. This Note adds to the literature showing that expedited removal is not merely a side feature of the U.S. immigration system, but rather a major function of it, extending even into the "legal" immigration context to exclude those with valid visas. As asylum advocates have long argued, it is time for the courts to exercise their statutory authority to review expedited removal challenges in habeas proceedings more fully. Looking to the modest reasoning of *Dugdale*, courts should expand their willingness to entertain claims challenging expedited removal orders on the grounds authorized by the statute—i.e., whether an expedited removal order in fact was issued. A broad view of that inquiry, informed by key principles of administrative law, may help constrain some of the worst abuses of the expedited removal power.

²⁴⁴ 8 U.S.C. § 1225(b)(1)(A)(i).