

## Extreme Expedition

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- Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, \_\_ **Wash. U. L. Rev.** \_\_ (forthcoming), available at [SSRN](#).
- Jennifer Lee Koh, [Removal in the Shadows of Immigration Court](#), 90 **S. Cal. L. Rev.** 181 (2017).

Regardless of your views over the nationwide protests over family separations and refugee incarceration, these times are an urgent call to understand what is happening in our nation's immigration system. Just as [Padilla v. Kentucky](#)'s holding on the duty to advise regarding the immigration consequences of a guilty plea underscored the need for criminal defense attorneys to understand immigration law, these times are a call to us as educators. Our students, family, friends, and the media turn to us to understand the policies and process behind the human dramas.

Contemporary aggressively streamlined immigration process is a mystery to most of us. As criminal justice scholars, many of whom have practiced in the field, we expect a certain semblance of process, even if we critique that process as less than we would hope. We expect a certain baseline of rights. [Jennifer Lee Koh](#)'s body of recent work is powerful and timely because it guides us through the realities of present immigration process, which defies expectations.

Koh's articles are a fascinating and macabre education on removal proceedings in the "shadows of immigration court," as she terms it. She powerfully illuminates how the vast majority of people removed from the United States never make it into an immigration court. Her work dispels the conventional assumption that removals proceed by formal order following adjudication by an immigration judge. She gives us a primer on the five main ways people are removed with extreme expedition today.

The first and biggest basis is expedited removal at the border. This occurs when Customs and Border Protection officers who apprehend persons within 100 miles of the border or ports of entry issue removal orders subject to minimal process or review. This power vested in border control agents arose as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which provides that inspecting officers "shall order the alien removed from the United States without further hearing or review" when they apprehend noncitizens without valid entry documents or presenting false entry documents. These removal orders have a similar legal effect as an order issued by an immigration judge. In fiscal year 2015, more than half of the 235,413 total removals appear to have occurred via expedited removals.

The second basis is reinstatement of a removal order for persons who re-enter the United States following removal. The law largely forecloses review of reinstatement, except for extremely narrower avenues. One such narrow defense against automatic renewal is claiming "a reasonable fear of persecution or torture" in one's home country.

A third basis is administrative removal of persons who are not lawful permanent residents who commit aggravated felonies. This process enables immigration officers to use abbreviated administrative procedures in lieu of immigration court proceedings.

The fourth basis is stipulated removal orders wherein a noncitizen accepts a removal order and agrees to waive the right to an immigration court hearing. At the height of their popularity in the 2000s, stipulated removals tended to occur against persons in immigration detention without attorneys to advise them, and without adequate checks that the persons waiving their rights had any understanding of what was happening.

The fifth basis is an *in absentia* removal order, which may be entered for persons who miss a court date.

Koh writes about the pathological consequences of the gross mismatch in resources between heavy funding of immigration enforcement, and under-enforcement of the immigration court system. A result is the intense pressure to divert the majority of people processed for removals into the shadow system. Because of the normalization of expedited removals and other shortcuts, improving formal adjudication processes would miss the majority of people who never get that process.

In her most recent and very timely article, Koh focuses in on the interaction between expedited removals and the power to reinstate removal orders. She argues that this creates “legal black holes” whereby a person forever is subject to immediate deportation based on a brief encounter near a border. She shows how agency policies fueled the evolution toward the current norm of expedited removal at the border. She collects findings indicating how some border agents refuse to recognize asylum claims or follow other protocols during expedited removal proceedings. Finally, she argues that routine reinstatements with limited review constitutes arbitrary and capricious action in violation of administrative law principles that the Court in [\*Judulang v. Holder\*](#) indicated applied to immigration agency policies.

Koh is well-situated to know the evolving trends in shadow proceedings because she continues to represent immigration clients as a clinician. Her overview of the abbreviated approaches that sidestep an already notoriously underprotective process is important reading to understand the fast muddy slide into our present mire.

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