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HUMAN RIGHTS WATCH

HRW.org

September 23, 2019

Via Federal e-Rulemaking Portal

Acting Secretary Kevin K. McAleenan
Department of Homeland Security
Washington, DC 20229

RE: Request for Comment on Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (Jul. 23, 2019)
Docket No. DHS-2019-0036-0001

Dear Acting Secretary McAleenan,

Human Rights Watch writes in response to Docket No. DHS-2019-0036-0001, the Department of Homeland Security (DHS) request for comments on Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (Jul. 23, 2019) (hereinafter, the Rule). This immediately effective notice broadly expanded the scope of expedited removal to include individuals apprehended after residing in the United States for up to two years and/or in the interior of the United States. The new rule will likely result in serious harm to immigrants and their families.

The Universal Declaration of Human Rights provides that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration of Human Rights, adopted December 10, 1948, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). The United States committed to the central guarantees of the 1951 Refugee Convention by its accession to the Refugee Convention's 1967 Protocol. Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954; U.N. Protocol Relating to the Status of Refugees, 606 U.N.T.S. 268, entered into force October 4, 1967. The US government passed the Refugee Act of 1980 in order to bring the country's laws into compliance with the Refugee Convention and Protocol, by incorporating into US law the convention's definition of a "refugee" and the principle of nonrefoulement, which prohibits the return of refugees to countries where they would face persecution. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat 102 (1980).

The US, as a party to the Convention against Torture, is also obligated not to return someone to a country "where there are substantial grounds for believing that [they] would be in danger of being subjected to torture." Convention against Torture, art. 3(1).

Human Rights Watch has found that under expedited removal, as previously applied at the border, US immigration officials have failed to properly identify asylum seekers and have therefore violated its international human rights obligations. Human Rights Watch *"You Don't Have Rights Here": US Border Screening and Returns of Central Americans to Risk of Serious Harm"* (Oct. 2014).

A 2005 study commissioned by Congress similarly documented numerous "serious problems" in the expedited removal process "which put some asylum seekers at risk of improper return." U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal: Volume I: Findings & Recommendations* 4-5, 10 (2005) ("2005 USCIRF Study"). A 2016 follow-up study "revealed continuing and new concerns about [Customs and Border Protection ("CBP")] officers' interviewing practices and the reliability of the records they create, including . . . certain CBP officers' outright skepticism, if not hostility, toward asylum claims; and inadequate quality assurance procedures." U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 2 (2016) ("2016 USCIRF Study").

The broad expansion of expedited removal into the entire country will expose thousands more people living in the US to these same flawed procedures.

For the following reasons, Human Rights Watch requests that DHS immediately halt implementation of the expansion of expedited removal and take steps to ameliorate the well-documented problems in the expedited removal process as it existed prior to the Rule.

1. **DHS should not expand the scope of expedited removal because its officers regularly fail to identify asylum seekers and interfere with the right of individuals in expedited removal to pursue asylum claims.**

US Customs and Border Protection (CBP) officers are required to screen people in expedited removal for fear of return to their country and, if the noncitizen expresses fear, refer them for a credible or reasonable fear interview by asylum officers with the US Citizenship and Immigration Services (USCIS).

Despite this requirement, Human Rights Watch spoke with deportees who reported that they were not informed of the availability of protection or that they were not referred to an asylum officer for a credible fear interview after they told a Border Patrol agent they were afraid to return to their country. Human Rights Watch, *"You Don't Have Rights Here"* at 26.

All of the people we interviewed for this report expressed a fear of returning to Honduras, but fewer than half were referred by US Border Patrol for a credible or reasonable fear interview. *Id.* at 6.

Some would-be asylum seekers reported that Border Patrol officers harassed, threatened, and attempted to dissuade them from applying for asylum. One man told Human Rights Watch, "The officers don't pay attention to you. If you say you are afraid they say they 'can't do anything…All they said to me was that if I came back they would give me six months in prison." *Id.* at 27.

In another investigation, parents separated from their children told Human Rights Watch immigration officials induced them to waive their rights, including to seek asylum, telling them it was the only way, or the fastest way to be reunited with their children. Human Rights Watch, "Separated Families Report Trauma, Lies, Coercion" (July 26, 2018). *See also,* Human Rights Watch, *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells* (Feb. 2018) at 30 (several women told Human Rights Watch that immigration officials pressured them to accept return to their home countries).

Asylum seekers who were not referred for a credible fear interview told Human Rights Watch that interviews by CBP are brief and focused on explaining additional consequences of deportation, such as bars to return for set periods of time, rather than exploring their fear of return. Some asylum seekers told Human Rights Watch that when they tried to tell US officials about their fear of returning, they were denied further exploration of that claim, and were put in touch with consular officers from their country of origin. This practice runs counter to international protection standards, which recognize the problematic relationship asylum seekers may have with officials from their home countries. Human Rights Watch, *"You Don't Have Rights Here"* at 29.

Human Rights Watch has also received and analyzed governmental records, obtained under the Freedom of Information Act, that demonstrate asylum officers within the US Citizenship and Immigration Services (USCIS) have repeatedly provided internal reports on Customs and Border Protection's (CBP) problematic practices. Human Rights Watch, "US FOIA Suit on Border Guards' Rights Abuses" (March 26, 2018). Although these records were heavily redacted and Human Rights Watch filed suit to obtain production of more responsive documents, the documents it has obtained provide details about multiple cases of intimidation, verbal, and even physical abuse by CBP officers.

One email from an asylum officer indicated that an asylum seeker was intimidated by CBP into withdrawing his case: "What is especially disturbing about this is that … the record indicates that he has been subjected to harassment, intimidation, and physical mistreatment by CBP upon his

recent entry into the US, and [ ] this mistreatment. . . affected his decision to dissolve his case." *Ibid.*

Other organizations have similarly found CBP routinely fails to identify asylum seekers. *See e.g.*, Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border* 12 (2017) ("In 12% of the cases documented for this report, individuals expressing fear of violence upon return to their country of origin were not processed for credible fear screenings and instead, were placed into removal proceedings."); DHS Office of the Inspector General, *Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* (Sept. 27, 2018) (describing CBP practices amounting to failure to properly refer asylum seekers for CFIs in order to "regulat[e] the flow of asylum-seekers at ports of entry"); Amnesty International, *Facing Walls: USA and Mexico's Violations of the Rights of Asylum-Seekers* (2017) (describing CBP agents' coercion of and threats to asylum seekers, including making them recant their claims of fear on video, claiming that they cannot seek asylum without a ticket from officials in Mexico, and claiming that there is no more asylum for individuals from certain countries); American Immigration Council, *Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Migrants*, 1, 2, 5, 7-8 (Sept. 2017) (reporting that 55.7% of a survey of 600 deported Mexican migrants were not asked if they feared return to Mexico and describing numerous incidents of CBP interference with asylum claims); American Immigration Council, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, 9 (Aug. 2017) (reporting CBP's failure to act in response to complaints of misconduct, including complaints that agents ignored claims of fear or persecution); Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* (May 2017) (documenting CBP abuses towards asylum seekers, including ignoring asylum claims, stating that the United States no longer provides asylum, providing other false information, mocking and intimidating asylum seekers, imposing procedures to deter asylum seekers from pursuing their claims, and coercing asylum seekers into giving up their claims); 2016 USCIRF Study at 20-32 (documenting examples of failure to properly screen for fear of return in CBP primary inspection interviews); American Civil Liberties Union, *American Exile: Rapid Deportations That Bypass the Courtroom*, 4 (Dec. 2014) (reporting that 55% of 89 interviewed individuals who received summary removal orders, including expedited removal orders, were not asked about fear of persecution in language they could understand and 40% of those asked about fear were deported without a CFI despite expressing fear of return); 2005 USCIRF Study at 53-54 (finding that in 15% of observed cases, when a noncitizen expressed a fear of return to an immigration officer during the inspections process, the officer failed to refer the individual to an asylum officer for a credible fear interview).

US government data itself indicates that credible fear referrals by CBP for nationals of Honduras, Mexico, El Salvador, and Guatemala have been extremely low. An analysis of data obtained from

CBP by Human Rights Watch under the Freedom of Information Act found that between October 2010 and September 2012, only 1.9 percent of Hondurans were flagged for credible fear assessments by CBP. Similarly, only 0.1 percent of Mexicans, 0.8 percent of Guatemalans, and 5.5 percent of Salvadorans in expedited or reinstatement of removal were referred to a credible or reasonable fear interview by CBP. However, 21 percent of migrants from countries other than these, who underwent the same proceedings in the same years, were flagged for credible fear interviews by CBP. Human Rights Watch, *"You Don't Have Rights Here"* at 21-24.

Should DHS continue to implement the Rule, the well-documented failure of immigration officers to fulfill their basic obligations to asylum seekers facing expedited removal is likely to continue as well. The Rule itself suggests, now that DHS has expanded the scope of expedited removal, that tens of thousands more individuals each year could be forced through this flawed system that routinely deprives individuals of their right to have their claims examined in a credible fear interview with an asylum officer. *See* 84 Fed. Reg. at 35411.

In order to safeguard asylum seekers' right to seek protection from persecution and torture, DHS should halt implementation of the Rule.

2. **DHS should not expand the scope of expedited removal because its officers routinely record inaccurate or false information on expedited removal forms and coerce noncitizens into signing forms they do not understands.**

The content of the paperwork that DHS officers complete during expedited removal proceedings has a profound impact on the individuals subject to expedited removal—for many, it will result in their immediate deportation; for others, the content of forms filled out during initial interviews will impact assessments of their credibility in subsequent proceedings. Yet this paperwork is often replete with errors.

Human Rights Watch has spoken with deportees and detainees who reported they resisted signing forms offered by Border Patrol, or were coerced into signing something they did not understand. As noted above, Human Rights Watch has also received documents in which USCIS asylum officers have recorded complaints of DHS officers coercing asylum seekers to sign forms and including inaccurate information in such paperwork.

Mateo S., who had fled death threats from a gang, said he tried to not sign papers agreeing to his deportation:

> I was detained for six days in the cold rooms. They just asked me my name, where I came from, and they told me I was punished for five years and I had to sign the

> deportation. I didn't want to sign. When the moment of the interview came I said I wouldn't sign. The officer insulted me. They started waking me up every couple of hours and moving me from cell to cell. It was hard…. The officer filled out all the paperwork and told me to sign, I told him I wouldn't sign and I hoped the US government would admit me. He ripped up all the paper and threw it almost at my face. He told me I was deported anyway. He said he "had the law in his hand and he was going to sign for me." I told him he was violating my right to life and he said, "You don't have rights here." Human Rights Watch, *"You Don't Have Rights Here"* at 28.

The records also include instances recorded by asylum officers in which CBP officers are said to have refused to record an asylum seeker's fear: "I told them I was very fearful and please not to be deported, they started laughing"; as well as instances in which CBP officers allegedly fabricated the response to a question that it never asked: "Q: when border protection asked you if you were afraid to go back to El Salvador, you said no; why did you say no? A: I did not say no, those questions were not asked from me." Human Rights Watch, "US: FOIA Suit on Border Guards' Rights Abuses."

Edwin H., from Honduras, who was separated from his son in 2018, told Human Rights Watch, "An official gave me the results of my interview [an initial credible fear interview, the first stage in pursuing an asylum claim]. He pointed to a box and told me to mark it and sign the form. I said I wasn't going to sign it because I didn't know what I was signing. He got angry. 'You have to sign. You don't want to have your son back?' Under that pressure, I signed. I didn't understand it because it was all in English." Human Rights Watch examined the document he signed, in which he waived the right to see an immigration judge to explain the reasons why he feared returning to his home country. Human Rights Watch, "Separated Families Report Trauma, Lies, Coercion."

Others have made similar findings, including DHS officers' failure to provide people in expedited removal proceedings with the opportunity to review and respond to information in the paperwork, use of coercion to force people to sign forms they do not understand, and requiring individuals to sign paperwork despite interpretation failures that impact their ability to understand the proceedings. *See, e.g.*, Borderland Immigration Council, *Discretion to Deny* at 13 (noting that "[i]ndividuals are forced to sign legal documents in English without translation" and "that CBP affidavits are often inconsistent with asylum-seekers' own accounts"); 2016 USCIRF Study at 2, 20-22 (discussing "continuing and new concerns about CBP officers' interviewing practices and the reliability of the records they create"); American Civil Liberties Union, *American Exile* at 34-36 (describing noncitizens who were required to sign forms in languages they do not understand); 2005 USCRIF Study at 74 (explaining that statements recorded by CBP officers "are often inaccurate and are almost always unverifiable"); *id.* at 55 ("Study observations indicate that paper

files created by the inspector are not always reliable indicators" of whether a credible fear interview was merited.); *id.* at 53 (noting that expedited removal forms were routinely inaccurate); *United States v. Sanchez-Figuero*, No. 3:19-cr-00025-MMD-WGC, slip op. at 2, 9 (D. Nev. July 25, 2019) (dismissing unlawful reentry indictment where defendant, who had not slept for 36 hours at the time of apprehension, "was not informed of the charge against him and never received a meaningful opportunity to review the sworn statement"); *United States v. Raya-Vaca*, 771 F.3d 1195, 1205-06, 1210-11 (9th Cir. 2014) (holding that immigration officer's failure during expedited removal process to advise the defendant of the charge of removability and to permit him to review the sworn statement prepared by the officer violated his due process rights to notice and an opportunity to respond).

Forcing tens of thousands more individuals, many of whom will have lived in the United States for significant periods of time and developed substantial ties, through this flawed and fast-tracked system is not appropriate. To avoid subjecting more individuals with claims to relief—or who never should have been subject to expedited removal even under the Rule's broad scope—to a system replete with coercion, factual errors, and inadequate translation, DHS should halt implementation of the Rule.

3. There are well-documented failures in the credible fear process.

Furthermore, even those individuals who receive credible fear interviews after DHS inspection in expedited removal face significant barriers to fair adjudication of their claims. As multiple reports indicate, individuals who must establish a credible fear—rather than immediately being placed in immigration court proceedings to pursue their asylum claims—may not receive adequate consideration of their claims.

Instead, they face erroneous denials of credible fear, denials of access to counsel, and inadequacies in interpretation. *See, e.g.*, U.S. Dep't of Homeland Sec. Advisory Comm. on Family Residential Ctrs., *Report of the DHS Advisory Committee on Family Residential Centers* 96-100 (2016) (discussing inadequate or nonexistent interpretation services during credible fear interviews and immigration judge reviews of negative credible fear determinations); Borderland Immigration Council, *Discretion to Deny* at 13 (describing interpretation failures during CFIs); 2016 USCIRF Study at 28 (describing case of a detained Ethiopian asylum seeker who was denied an interpreter); American Civil Liberties Union, *American Exile* at 34 ("Most of the individuals interviewed . . . stated that they were given forms to sign in English, which most did not speak or read, and often were not interviewed by an immigration officer who fluently spoke their language or through an interpreter."); *Interior Immigration Enforcement Legislation: Hearing Before the H. Judiciary Subcomm. on Immigration & Border Sec.* 5 (Feb. 11, 2015) (statement of Eleanor Acer, Dir., Refugee Protection, Human Rights First) ("In some cases, interviews are sometimes rushed,

essential information is not identified due to lack of follow up questions, and/or other mistakes are made that block genuine asylum seekers from even applying for asylum and having a real chance to submit evidence and have their case fully considered").

Rather than placing additional strain on the CFI system, DHS should halt implementation of the Rule.

4. DHS officers have wrongfully removed numerous individuals through expedited removal.

As a result of the widespread flaws in the expedited removal process, numerous individuals have been wrongfully removed from the United States. This includes multiple reported instances of deportations of U.S. citizens. *See, e.g.*, *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1272-73 (M.D. Ga. 2012); *De la Paz v. Johnson*, No. 1:14-CV-016 (S.D. Tex. habeas petition filed Jan. 24, 2014); Ian James, *Wrongly Deported, American Citizen Sues INS for $8 Million*, L.A. Times (Sept. 3, 2000) (recounting expedited removal of U.S. citizen Sharon McKnight). Similarly, due to the rushed system of expedited removal, DHS fails to identify immigrants who should not be subject to the process because, for example, they have lived in the United States for many years or they have credible fear of persecution. *See, e.g.*, *American Exile* at 63 (describing erroneous expedited removal of Mexican citizen who had lived in the United States for 14 years); *id.* at 38 (recounting case of a Guatemalan citizen and mother of four U.S. citizen children who was removed under an expedited removal order even though she told the CBP officers that she was afraid to be deported to Guatemala, where her father had been murdered and her mother had been the target of extortion by gangs); *id.* at 39 (describing 22-year-old woman who fled domestic violence removed to El Salvador without being provided a credible fear interview); *United States v. Mejia-Avila*, No. 2:14-CR-0177-WFN-1, 2016 WL 1423845, at *1 (E.D. Wash. Apr. 5, 2016) (dismissing indictment where defendant was not subject to expedited removal because the record was "clear" that he had lived in the United States for more than two years).

These errors are likely to increase under the Rule. Proving two years of continuous physical presence, while detained and alone, will be unfeasible for many people detained under the Rule under the short timeframe provided for expedited removal proceedings. Long-time residents and citizens of the United States have been improperly deported, including to countries where those individuals face persecution or torture, and they will continue to face that risk of improper deportation. To prevent these foreseeable harms, DHS should halt implementation of the Rule.

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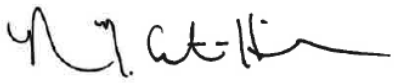
We request that DHS consider these recommendations, halt expansion of the scope of expedited removal, and act immediately to address the long-standing problems with implementation of the

pre-July 23, 2019 expedited removal system. Please do not hesitate to contact us if you have questions regarding our comments. Thank you for your consideration.

Sincerely,



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