Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

The Department of Homeland Security's Nationwide Expansion of Expedited Removal

Updated June 30, 2020

Non-U.S. nationals (aliens) apprehended by immigration authorities when attempting to unlawfully enter the United States are generally subject to a streamlined, expedited removal process, in which there is no hearing or further review of an administrative determination that the alien should be removed. Since the enactment of the expedited removal statute in 1996, expedited removal has been used primarily with respect to aliens who have either arrived at a designated port of entry or were apprehended near the border shortly after surreptitiously entering the United States. The Immigration and Nationality Act (INA), however, authorizes the Secretary of the Department of Homeland Security (DHS) to apply expedited removal more broadly to aliens in *any part* of the United States who have not been admitted or paroled by immigration authorities, if those aliens have been physically present in the country for less than two years and either did not obtain valid entry documents or procured their admission through fraud or misrepresentation. In 2019, DHS issued notice that it was expanding the use of expedited removal to the full extent permitted under the INA. The expansion prompts significant questions concerning the relationship between the federal government's broad power over the entry and removal of aliens and the due process rights of aliens located within the United States. Recently, a federal appellate court upheld the expansion against a legal challenge seeking to stop its implementation.

The Expedited Removal Framework

Typically, when DHS seeks to remove an alien found in the interior of the United States, it institutes removal proceedings under INA § 240, conducted by an immigration judge (IJ) within the Department of Justice's Executive Office for Immigration Review. During these "formal" removal proceedings, the alien has a number of procedural protections, including the right to counsel at his own expense, the right to apply for any available relief from removal (such as asylum), the right to present testimony and evidence on the alien's own behalf, and the right to appeal an adverse decision to the Board of Immigration Appeals (BIA). Additionally, the alien may, as authorized by statute, seek judicial review of a final order of removal. Generally, DHS may (but is not required to) detain an alien while formal removal proceedings are pending, and may release the alien on bond or his or her own recognizance (however, detention is mandatory if the alien is removable on certain criminal or terrorist-related grounds, except in limited circumstances).

Congressional Research Service
https://crsreports.congress.gov
LSB10336

The INA sets forth a separate removal process for certain arriving aliens who have not been admitted into the United States—a process that significantly differs from the formal removal proceedings governed by INA § 240. Specifically, INA § 235(b)(1) provides that an alien arriving at the U.S. border or a port of entry will be removed from the United States *without a hearing or further review* if he or she lacks valid entry documents or has attempted to procure admission by fraud or misrepresentation. (Aliens found inadmissible on most other grounds—e.g., because of certain criminal activity—are not subject to expedited removal and will instead be placed in formal removal proceedings.) INA § 235(b)(1) also authorizes—but does not require—DHS to apply this process to aliens inadmissible on the same grounds who have not been admitted or paroled into the United States by immigration authorities, and who have been physically present in the United States for less than two years. "Such designation shall be in the sole and unreviewable discretion" of the DHS Secretary, and the designation "may be modified at any time."

Expedited removal has far fewer procedural protections than formal removal proceedings. The alien has no right to counsel, no right to a hearing, and no right to appeal an adverse ruling to the BIA. Judicial review of an expedited removal order also is limited in scope. Further, the INA provides that an alien "shall be detained" pending expedited removal proceedings. Although DHS has discretion to parole an alien undergoing expedited removal, thereby allowing the alien to physically enter and remain in the United States pending a determination as to whether he or she should be admitted, DHS regulations only authorize parole at this stage for a medical emergency or law enforcement reasons.

Despite these restrictions, further administrative review occurs if an alien in expedited removal indicates an intent to seek asylum or otherwise claims a fear of persecution or torture if removed. If, following an interview, the alien demonstrates a credible fear of persecution or torture, he or she will be placed in formal removal proceedings under INA § 240 in lieu of expedited removal, and may pursue an application for asylum and related protections in those proceedings (if the alien fails to show a credible fear of persecution or torture, he or she may still seek administrative review of the asylum officer's determination before an IJ). Administrative review also occurs if a person placed in expedited removal claims that he or she is a U.S. citizen, a lawful permanent resident (LPR), or has been granted refugee or asylee status. In these circumstances, DHS may not proceed with removal until the alien's claim receives consideration.

Expedited removal initially was implemented only with respect to arriving aliens seeking entry at a U.S. port of entry. In 2002, the former Immigration and Naturalization Service (INS) exercised its discretionary authority to expand expedited removal to aliens who entered the United States by sea without being admitted or paroled, and who have been in the country less than two years. Then, in 2004, DHS (the successor agency to INS) extended expedited removal to designated aliens apprehended within 100 miles of the U.S. border within 14 days of entering the country, who have not been admitted or paroled.

DHS's Expansion of Expedited Removal

In January 2017, President Trump issued an executive order directing DHS to apply expedited removal within the broader limitations of the statute. On July 23, 2019, DHS issued a *Federal Register* Notice to implement this directive. The notice immediately expanded the scope of aliens subject to expedited removal within the full extent permitted by INA § 235(b)(1). Specifically, DHS designated the following two new classes of aliens as subject to expedited removal:

1. Aliens who did not arrive by sea, who are encountered anywhere in the United States more than 100 air miles from a U.S. international land border, and who have been continuously present in the United States for less than two years; and
2. Aliens who did not arrive by sea, who are encountered within 100 air miles from a U.S. international land border, and who have been continuously present in the United States for at least 14 days but for less than two years.

Taken together with prior expansions of expedited removal, the streamlined removal process is now potentially applicable to aliens physically present in *any part* of the United States who (1) are inadmissible because they lack valid entry documents or have procured their entry through fraud or misrepresentation, (2) have not been admitted or paroled, and (3) have been in the country less than two years.

Under DHS regulations, an alien screened for expedited removal has the burden of proving that he was admitted or paroled into the United States, and that he has the required continuous physical presence in the United States to avoid expedited removal. But, as noted, an alien placed in expedited removal may potentially pursue asylum or request administrative review of a claim that he or she is a U.S. citizen, LPR, asylee, or refugee. DHS has also maintained that it has discretion to place the alien in formal removal proceedings, or to allow the alien to voluntarily return to his or her country in lieu of expedited removal.

DHS indicated that the expansion of expedited removal would take effect immediately. The agency argued that the expansion does not have to go through the notice-and-comment procedures that generally apply to agency rulemaking "because public notice and comment and the delay attendant thereon would be impracticable, unnecessary, and contrary to the public interest." Nevertheless, DHS sought comments to ensure that the agency can be "more effective in combating and deterring illegal entry, while at the same time providing for appropriate procedural safeguards for the individuals designated." Shortly after the expansion was announced, plaintiffs brought suit challenging its lawfulness.

Legal Challenge to the Expedited Removal Expansion

In *Make the Road New York v. Wolf*, several advocacy groups, on behalf of individuals affected by the new DHS rule, filed a lawsuit in the U.S. District Court for the District of Columbia, challenging the agency's expansion of expedited removal. The plaintiffs alleged that DHS violated the Administrative Procedure Act (APA) because the agency failed to comply with notice-and-comment procedures before announcing the expansion, and the agency did not offer a "reasoned explanation" for its decision. The plaintiffs also argued that the expansion violated the Fifth Amendment's Due Process Clause because it deprives individuals who have lived in the United States for lengthier periods of time an opportunity to contest their removal at a hearing. In September 2019, the federal district court granted the plaintiffs' motion for a preliminary injunction pending the outcome of the litigation. The court determined that it had jurisdiction to review the plaintiffs' challenge under INA § 242(e)(3), which exclusively authorizes the D.C. federal district court to review whether a regulation or written policy to implement expedited removal is unconstitutional or in violation of law. The court also ruled that the plaintiffs were likely to succeed on the merits of their APA claims because, in expanding expedited removal, DHS failed to comply with notice-and-comment procedures and to consider the "potential negative impacts" of expanding expedited removal into the interior of the United States. The court did not address the plaintiffs' constitutional challenge to the expedited removal expansion.

The government appealed to the U.S. Court of Appeals for the D.C. Circuit. On June 23, 2020, the D.C. Circuit reversed the district court's injunction. As an initial matter, the D.C. Circuit agreed with the lower court that it could review the plaintiffs' challenge to the expedited removal expansion under INA § 242(e)(3). But the court held that the plaintiffs failed to show a likelihood of success on the merits of their APA claims. Starting with the plaintiffs' substantive claim that DHS failed to offer a "reasoned explanation" for the expedited removal expansion, the court recognized that, under the APA, there is no cause of action when the "agency action is committed to agency discretion by law." The court determined that the plaintiffs' challenge to DHS's designation of additional classes of aliens subject to expedited removal fell within this "restrictive mold" because, under INA § 235(b)(1), "[s]uch designation shall be in the sole and unreviewable discretion" of the DHS Secretary. Moreover, the court observed, § 235(b)(1) "provides no discernible standards by which a court could evaluate the Secretary's judgment." Thus, the statute "confines the judgment to the Secretary's hands and, in so doing, inescapably seeks to withdraw

the decision from APA review." Turning to the plaintiffs' procedural claim that DHS failed to comply with the notice-and-comment procedures when it announced the expansion, the court determined that § 235(b)(1) rendered that process inapplicable because it gave the Secretary "sole" discretion to make a designation "entirely independent of the views of others," and to modify that designation "at any time."

The D.C. Circuit thus held that the plaintiffs had no cause of action under the APA to challenge DHS's decision to expand expedited removal "so long as it falls within statutory and constitutional bounds," and remanded the case for further proceedings. Like the district court, the D.C. Circuit did not consider whether the expansion of expedited removal violated other federal statutes or the constitutional rights of aliens within the United States, leaving those questions for the lower court to resolve on remand. For now, though, given the D.C. Circuit's ruling, DHS may proceed with the expansion of expedited removal into the interior of the United States pending the outcome of the litigation.

Constitutional Considerations

Perhaps the key legal question left open by the D.C. Circuit's decision is whether due process considerations limit the use of expedited removal in the interior of the United States. The Supreme Court has long held that aliens seeking entry into the United States have no constitutional rights regarding their applications for *admission*. But the Court has recognized that aliens who have *physically entered* the United States, even unlawfully, are "persons" under the Fifth Amendment's Due Process Clause. Due process protections generally include a right to a hearing and a meaningful opportunity to be heard before deprivation of a liberty interest—features arguably lacking in the expedited removal context, where aliens generally have no right to a hearing or further review of an administrative determination of removability.

To date, reviewing courts have generally upheld the expedited removal process as employed along the border (though in a few cases, some courts have held that certain aliens did not meet the criteria for expedited removal, or that DHS officials failed to comply with expedited removal procedures). For example, shortly after the expedited removal statute was enacted, a group of advocacy organizations and aliens who had been removed filed a lawsuit arguing that the expedited removal process—at the time applied *only* to aliens arriving at designated ports of entry—offered insufficient procedural protections. The D.C. federal district court disagreed, citing Congress's broad legislative authority over the admission of aliens and "long-standing precedent" that aliens seeking to enter the United States have no constitutional due process protections concerning their applications for admission, and the D.C. Circuit affirmed that decision on appeal in 2000. These earlier cases, however, did not consider the expansion of expedited removal into the *interior* of the United States or its application to persons who had developed more significant contacts to the country than aliens initially arriving at the border. The plaintiffs in *Make the Road New York* contend that even if expedited removal applied to arriving aliens is permissible, its expansion to aliens who have been physically present in the United States for up to two years is not.

In assessing whether expedited removal may be employed with respect to aliens unlawfully present in the United States, a key consideration may be whether the procedural protections to which an alien is constitutionally entitled in removal proceedings turn upon the alien having been *admitted* into the United States. In the early decades of the 20th century, the Supreme Court issued several decisions recognizing that an alien admitted into the country was entitled to notice and a fair hearing before being removed. But the Court suggested it was less clear whether those protections were owed to aliens who entered unlawfully, particularly when the unlawful entrants had not developed significant ties to the United States. More recently in its 1982 decision in *Landon v. Plasencia,* the Court opined that "an alien seeking initial admission to the United States requests a privilege, and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." It is only once "an alien gains admission to our country and begins to develop the ties that go with permanent residence," the Court continued, "that his constitutional status changes accordingly."

Yet in other cases the Court has seemed to indicate that an alien's *physical presence* in the United States is sufficient for due process considerations to attach to removal decisions. In the 1953 case of *Shaughnessy v. United States* ex rel. *Mezei*, for example, the Court held that an alien detained for exclusion at the threshold of entry was entitled only to whatever process was afforded by Congress. But the Court went on to declare that once an alien has "passed through our gates, even illegally," he could "be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." The Court has described the Due Process Clause as extending protection to aliens within the United States "whether their presence here is lawful, unlawful, temporary, or permanent."

In *DHS v. Thuraissigiam*, decided on June 25, 2020, the Court stated that "aliens who have established connections in this country have due process rights in deportation proceedings." But the Court did not go further to assess the nature of "established connections," beyond determining that an alien apprehended by immigration authorities 25 yards from the U.S.-Mexico border could be "treated for due process purposes as if stopped at the border." Citing *Mezei*, the Court reasoned that the alien remained "on the threshold" of entry and was entitled only to those procedures provided by Congress. To conclude otherwise, the Court declared, would "undermine the sovereign prerogative of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location." In a few published decisions, lower courts have similarly emphasized aliens' status as "recent surreptitious entrants" in treating them like applicants for initial admission who lack due process rights in relation to admission beyond that authorized by Congress. But these cases concerned aliens whose presence in the country was significantly less than the two-year window set forth in the new expedited removal expansion. DHS's expansion throughout the United States may require courts to reassess the scope and limitations of Congress's broad immigration power with respect to aliens who, though physically present in the country, were never lawfully admitted, and whether due process affords them certain rights in the course of removal proceedings.

Author Information

Hillel R. Smith
Legislative Attorney

Disclaimer