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Legal Sidebar

The Department of Homeland Security's Authority to Expand Expedited Removal

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An alien apprehended by immigration authorities when attempting to unlawfully enter the United States is generally subject to an expedited removal process if an official of the Department of Homeland Security (DHS) determines that the alien lacks proper entry documents or has attempted to enter through fraud or misrepresentation. Under this process, the alien is generally not afforded a hearing or any further review of the administrative determination that the alien should be removed from the United States. (Additional procedures govern review of claims for asylum and related humanitarian protections raised by aliens who are subject to expedited removal.) Since the enactment of the expedited removal statute in 1996, that process has been used primarily with respect to aliens who either have arrived at designated ports of entry or were apprehended near the border shortly after entering the United States. Federal law authorizes the Secretary of DHS to apply expedited removal to designated classes of aliens found in *any part* of the United States who have not been admitted or paroled following inspection by immigration authorities at ports of entry if those aliens cannot establish that they have been physically present in the United States for a continuous period of two years at the time they are found to be inadmissible.

On January 20, 2025, President Trump issued Executive Order 14159, Protecting the American People Against Invasion. Section 9 directs the Secretary of DHS to, among other things, "take all appropriate action" based on her authority to designate additional classes of aliens for expedited removal and to apply "in her sole and unreviewable discretion" the expedited removal procedures to those aliens. On the same day, DHS announced it was expanding the scope of expedited removal "to the fullest extent authorized by Congress." This expansion includes aliens who are encountered anywhere in the United States and who have been continuously present for less than two years if they have not been admitted or paroled and lack proper entry documents or have tried to procure admission through fraud or misrepresentation. The agency's action has since been subject to legal challenges seeking to stop its implementation.

As discussed in this Legal Sidebar, DHS's authority to expand expedited removal has prompted 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.

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The Expedited Removal Framework

Typically, when DHS seeks to remove an alien found in the interior of the United States, it initiates removal proceedings under 8 U.S.C. § 1229a, which are conducted by an immigration judge within the Department of Justice's Executive Office for Immigration Review (EOIR). During these removal proceedings, the alien has a number of procedural protections, including the right to counsel at his or her 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 EOIR's 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 removal proceedings are pending and may release the alien on bond or on his or her own recognizance subject to specified conditions. (Detention is mandatory if the alien is removable on certain criminal or terrorist-related grounds, except in limited circumstances.)

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created a separate expedited removal process for certain arriving aliens who have not been admitted into the United States—a process that significantly differs from the removal proceedings governed by 8 U.S.C. § 1229a. Specifically, the process, found at 8 U.S.C. § 1225(b)(1), provides that an alien "arriving in the United States" will be removed *without a hearing or further review* if the alien 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 removal proceedings.) Section 1225(b)(1) also authorizes—but does not require—DHS to apply this process to designated classes of aliens who are inadmissible on the same grounds who have "not been admitted or paroled into the United States" and have been physically present in the United States for less than two years "immediately prior to the date of the determination of inadmissibility." The statute provides that "[s]uch designation shall be in the sole and unreviewable discretion" of the DHS Secretary and that the designation "may be modified at any time."

Expedited removal has far fewer procedural protections than provided during removal proceedings. The alien has no right to counsel and no right to a hearing in immigration court or appeal of an adverse ruling to the BIA. Judicial review of an expedited removal order is also limited in scope. Further, federal statute 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 authorize parole at this stage only in specified circumstances.

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 with an asylum officer, the alien shows a credible fear of persecution or torture, the alien will be processed for removal proceedings, during which the alien may pursue asylum and related protections. (The alien may seek administrative review of an asylum officer's negative credible fear finding before an immigration judge.) Administrative review also occurs if a person placed in expedited removal claims that he or she is a U.S. citizen or lawful permanent resident or has been granted refugee or asylee status. In these circumstances, DHS may not proceed with removal until the alien's claim receives consideration.

Past Implementation of Expedited Removal Authority

Following passage of IIRIRA in 1996, the former Immigration and Naturalization Service (INS) initially implemented expedited removal only for arriving aliens seeking entry at U.S. ports of entry. In 2002, the INS exercised its discretionary authority to expand expedited removal to aliens who entered the United States by sea without being admitted or paroled and had 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 had not been admitted or paroled.

In 2019, during the first Trump Administration, DHS announced that it would "exercise the full remaining scope of its statutory authority" under 8 U.S.C. § 1225(b)(1) to expand the classes of aliens subject to expedited removal. The expansion covered aliens physically present in any part of the United States who had not been admitted or paroled, were determined to be inadmissible due to a lack of valid entry documents or efforts to procure entry through fraud or misrepresentation, and had failed to show continuous physical presence in the United States for two years at the time they were found to be inadmissible.

In *Make the Road New York v. Wolf*, several advocacy groups, on behalf of individuals affected by the DHS rule, filed a lawsuit in the U.S. District Court for the District of Columbia (D.C. District Court) challenging the agency's expansion of expedited removal. In 2019, a district court judge granted the plaintiffs' motion for a preliminary injunction pending the outcome of the litigation. The court ruled that the plaintiffs were likely to succeed on the merits of their claim that DHS's action violated the Administrative Procedure Act because the agency 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' argument that the expansion violated the Fifth Amendment's Due Process Clause because it deprived individuals residing in the United States for lengthier periods of time an opportunity to contest their removal at a hearing.

In 2020, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) reversed the district court's injunction. The court held that DHS's designation of additional classes of aliens for purposes of expedited removal was not subject to judicial review because, under 8 U.S.C. § 1225(b)(1), "[s]uch designation shall be in the sole and unreviewable discretion" of the DHS Secretary. The court explained that, under the Administrative Procedure Act, there is no judicial review when the "agency action is committed to agency discretion by law." Moreover, the court observed, Section 1225(b)(1) "provides no discernible standards by which a court could evaluate the Secretary's judgment." With regard to DHS's failure to comply with notice and comment procedures, the court determined that Section 1225(b)(1) rendered that process inapplicable to the expansion of expedited removal because it gave the Secretary "sole" discretion to make a designation "entirely independent of the views of others." Like the district court, the D.C. Circuit did not consider whether the expansion of expedited removal violated the constitutional rights of aliens within the United States.

Although the D.C. Circuit's ruling enabled DHS to expand expedited removal as announced, DHS under the Biden Administration rescinded its 2019 expansion, citing the agency's operational constraints and need to prioritize limited enforcement resources at the southwest border. The rescission did not affect DHS's earlier implementation of expedited removal, including DHS's ability to employ expedited removal with respect to aliens encountered at or near the border.

2025 Expansion and Legal Challenges

On January 21, 2025, DHS announced the rescission of its 2022 notice that had rescinded the 2019 expansion of expedited removal. The 2025 notice also announced an expansion of expedited removal "to the fullest extent authorized by Congress" to cover the following additional designated classes of aliens who have not been admitted or paroled and who lack valid entry documents or sought to enter through fraud or misrepresentation:

- 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
- 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 fourteen days but for less than two years.

DHS claimed that the expansion enables it "to address more effectively and efficiently the large volume of aliens who are present in the United States unlawfully ... and ensure the prompt removal from the United States of those not entitled to enter, remain, or be provided relief or protection from removal." The agency's action, which went into effect immediately, did not affect any previous expedited removal designations issued before 2019.

On January 23, 2025, then-acting Secretary of DHS Benjamine Huffman directed agency officials to consider expedited removal for "any alien DHS is aware of who is amenable to expedited removal but to whom expedited removal has not been applied," including those placed in removal proceedings or granted parole, and to consider whether to terminate any ongoing removal proceedings or active parole status for such aliens. A February 18, 2025, directive by DHS's Immigration and Customs Enforcement similarly instructed immigration officers to consider expedited removal for aliens previously released into the United States, including those who have been paroled into the country and may be inadmissible under one of the two statutory grounds specified in Section 1225(b)(1).

DHS's expansion of expedited removal has prompted legal challenges, three of which are subject to ongoing litigation in the D.C. District Court (and two before the same district court judge). For example, in *Make the Road New York v. Noem*, an advocacy organization argued, among other things, that the expansion violates due process by allowing immigration officials "to summarily remove noncitizens who have already entered the United States with no advance notice, no opportunity to meaningfully contest removal, and no hearing before a neutral adjudicator." On August 29, 2025, a D.C. District Court judge granted the plaintiffs' motion to stay DHS's expansion of expedited removal on the basis that it likely violates the Due Process Clause. The court explained that all persons within the United States, including unlawful entrants, have the right to due process. The court determined that, unlike previous expedited removal expansions, the 2025 designation covers aliens "who have long since crossed the threshold and effected entry into the country." The court rejected the government's claim that Fifth Amendment due process protections attach only when a person is lawfully admitted or lawfully present in the country. The court held that the covered aliens were entitled to "a meaningful opportunity to contest the predicate bases for expedited removal." In the court's view, the current expedited removal procedures are constitutionally inadequate as applied to the covered aliens because the procedures lack safeguards to mitigate the risk that such aliens could be unlawfully removed.

In *Coalition for Humane Immigrant Rights v. Noem*, several organizations challenged and filed a motion to stay DHS's policy of applying its expedited removal authority to aliens who were paroled into the United States, including those who are in removal proceedings and seeking asylum. The same district court judge presiding over the *Make the Road New York* case granted the plaintiffs' motion here, ruling that DHS exceeded its authority because the designation provision of Section 1225(b)(1) applies to aliens present in the United States who have "not been admitted or paroled into the United States" and rejecting the government's claim that aliens whose parole status has expired are not "paroled" under the statute. The court also held that aliens paroled into the United States are not subject to expedited removal under the separate provision applicable to aliens "arriving in the United States" because paroled aliens are no longer in the process of "arriving." On September 12, 2025, the D.C. Circuit denied the government's motion to stay the district court's order pending consideration of its appeal.

In *Immigrant Advocates Response Collaborative v. DOJ*, another case in the D.C. District Court, various plaintiffs argued, among other things, that DHS's policy of terminating removal proceedings to place aliens in expedited removal violates regulations that limit when the agency may move to terminate removal proceedings. The plaintiffs also claim that DHS is unlawfully subjecting to expedited removal aliens who have been present in the United States for over two years who were served with notices to appear commencing their removal proceedings within two years of their arrival. The plaintiffs argue that Section 1225(b)(1) covers aliens present in the United States only if they have been in the country less than two years prior to inadmissibility determinations and that a notice to appear is not an inadmissibility determination. To date, the case remains pending before the district court.

Constitutional Considerations

One of the key legal questions left open by the D.C. Circuit's decision upholding the first Trump Administration's expansion of expedited removal, and raised in the recent litigation concerning the agency's 2025 expansion, is whether due process considerations limit expedited removal in the interior of the United States. While the Supreme Court has long held that aliens seeking entry have no constitutional rights regarding their applications for admission, the Court has also recognized that aliens who have entered the United States, even unlawfully, are "persons" under the Fifth Amendment's Due Process Clause. Procedural 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.

In 1998, the D.C. District Court rejected a constitutional challenge to the expedited removal process, which at the time applied only to aliens arriving at ports of entry. The plaintiffs, who filed their lawsuit shortly after IIRIRA was enacted, argued that expedited removal violated arriving aliens' right to due process because the streamlined procedures and lack of access to family, legal counsel, and interpreters heightened the risk that they could be erroneously removed and deprived of liberty and property. In rejecting this claim, the court explained that, under "long-standing precedent," aliens arriving in the United States and seeking initial admission have no constitutional rights regarding their applications for admission and are entitled only to the procedures granted by Congress. The D.C. Circuit affirmed that decision on appeal in 2000. This case, however, did not consider the expansion of expedited removal to cover aliens who developed more significant connections to the United States than those initially arriving at the border. In *Make the Road New York v. Noem*, the D.C. District Court judge distinguished this earlier litigation and held that aliens who have been present in the country for up to two years have a stronger liberty interest than aliens initially arriving at the border, and that applying the expedited removal procedures to them violates their Fifth Amendment right to due process.

In reaching this conclusion, the district court relied on what it described as "more than a century of precedent holding that those who have entered the United States have a liberty interest in remaining—no matter how they entered." For example, the court cited *Shaughnessy v. United States* ex rel. *Mezei*, where the Supreme Court in 1953 held that, while an alien detained at the threshold of entry was entitled only to whatever process was afforded by Congress, 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 district court also cited *Zadvydas v. Davis*, where the Supreme Court in 2001 similarly stated that due process protections extend to aliens within the United States "whether their presence here is lawful, unlawful, temporary, or permanent."

The Supreme Court has sometimes suggested that the extent of due process for aliens within the United States "may vary depending upon status and circumstance." For example, in *Landon v. Plasencia*, the Supreme Court in 1982 stated 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." The Court further explained that it is only "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, that his constitutional status changes accordingly." In *United States v. Verdugo-Urquidez*, the Court in 1990 acknowledged that its own jurisprudence established that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." More recently, in *DHS v. Thuraissigiam*, the Supreme Court, in determining that Section 1252(e)(2)'s limitation on the judicial review an alien may seek in expedited removal proceedings does not violate the Due Process Clause, remarked that "aliens who have established connections in this country have due process rights in deportation proceedings." 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."

In *Make the Road New York v. Noem*, the district court determined that applying the streamlined expedited removal procedures to aliens farther in the interior of the United States is not constitutionally permissible and distinguished *Thuraissigiam* as a case involving an alien who had "remained at the threshold of initial admission." Thus, DHS's recent implementation of its expedited removal authority to the fullest extent authorized by Section 1225(b)(1) has prompted a judicial reassessment of the scope of Congress's immigration power with respect to aliens physically present in the United States who were never lawfully admitted, and whether due process affords them certain rights in their removal proceedings.

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