Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

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

Updated April 6, 2022

Non-U.S. nationals (*aliens*, as the term is used in federal statute) 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, during the Trump Administration, DHS issued notice that it was expanding the use of expedited removal to the full extent permitted under the INA. A federal appellate court upheld the expansion against a legal challenge seeking to stop its implementation. However, in March 2022, during the Biden Administration, DHS Secretary Alejandro Mayorkas rescinded the expansion. As a result, expedited removal remains limited in its application to aliens apprehended at or near the border. Nonetheless, DHS retains the authority to expand the use of expedited removal, and that authority may continue to prompt 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.

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

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

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).

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, the alien may pursue an application for asylum and related protections (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 2019 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 became potentially applicable to aliens physically present in *any part* of the United States who (1) were inadmissible because they lacked valid entry documents or procured their entry through fraud or misrepresentation, (2) had not been admitted or paroled, and (3) had been in the country less than two years.

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 deprived 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, then–federal district court judge Ketanji Brown Jackson 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 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.

In 2020, the U.S. Court of Appeals for the D.C. Circuit reversed the district court's injunction. The court held that the plaintiffs failed to show a likelihood of success on the merits of their claim that DHS failed to offer a "reasoned explanation" for the expedited removal expansion. The court recognized that, under the APA, there is no judicial review 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." Turning to plaintiffs' claim that DHS failed to comply with notice-and-comment procedures, the court determined that § 235(b)(1) rendered that process inapplicable to the expansion of expedited removal because the statute gave the Secretary "sole" discretion to make a designation "entirely independent of the views of others."

The D.C. Circuit thus rejected plaintiffs' APA claims against the expansion of expedited removal. 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. The D.C. Circuit's ruling thus enabled DHS to proceed with its expansion of expedited removal into the interior of the United States pending further litigation.

Rescission of Expedited Removal Expansion

In February 2021, President Biden, by executive order, directed the Secretary of Homeland Security to consider whether to modify, revoke, or rescind the 2019 expanded designation of expedited removal. In March 2022, DHS Secretary Alejandro Mayorkas formally rescinded the expedited removal expansion,

citing DHS's operational constraints and its need to prioritize limited enforcement resources given the high number of alien apprehensions at the Southwest border. According to Secretary Mayorkas, "expedited removal is best focused as a border enforcement tool on recent entrants encountered in close proximity to the border or its functional equivalent (e.g., air and land ports of entry), rather than on individuals apprehended throughout the United States without geographical limitation, who may have developed significant ties to the community." The rescission of the 2019 expedited removal expansion did not rescind or modify any earlier implementation of expedited removal. Therefore, DHS retains the ability to employ expedited removal with respect to aliens encountered at or near the border.

Constitutional Considerations

Although DHS rescinded its 2019 expansion of expedited removal, the agency could invoke its authority under INA § 235(b)(1) to designate additional classes of aliens subject to expedited removal in the future. The Supreme Court has recognized that a federal agency may adopt new policies that depart from its prior policies so long as the agency acknowledges and sufficiently explains the reasons for the policy change. DHS, at some point, could decide to employ expedited removal within the full extent permitted by statute, as it did in 2019 (i.e., throughout the entire United States); or the agency could expand expedited removal on a more limited basis (e.g., to cover aliens encountered within 200 miles of the border).

Perhaps the key legal question left open by the D.C. Circuit's decision upholding DHS's 2019 expansion of expedited removal 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*. Separate from admission considerations, the Court also 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* had claimed 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. The Court suggested, however, that 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."

In other cases, the Court has seemed to indicate that an alien's U.S. *physical presence* alone 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. The Court, however, 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 in 2020, the Court stated 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." 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. These cases, though, concerned aliens whose presence in the country was significantly less than the two-year window set forth in the expedited removal expansion. A future expansion of expedited removal 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

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United

States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.