



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

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*Update: Following the initial publication of this Legal Sidebar, several immigration advocacy groups filed a [lawsuit](#) in the U.S. District Court for the District of Columbia, challenging the Department of Homeland Security's (DHS) nationwide expansion of expedited removal. The plaintiffs alleged, among other things, that DHS violated the Administrative Procedure Act (APA) because the agency failed to comply with [notice-and-comment procedures](#) before announcing the expedited removal expansion, and the agency did not offer a "reasoned explanation" for its decision. The plaintiffs also argued that the expedited removal 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. On September 27, 2019, the D.C. federal district court [granted](#) the plaintiffs' motion for a preliminary injunction pending the outcome of the litigation. The court determined that it has [jurisdiction](#) to review the plaintiffs' challenge under [§ 242\(e\)\(3\) of the Immigration and Nationality Act \(INA\)](#), which authorizes the court to review whether a regulation or written policy to implement expedited removal is unconstitutional or in violation of law; and that [INA § 235\(b\)\(1\)](#), which grants DHS the "sole and unreviewable discretion" to designate categories of aliens subject to expedited removal, [does not bar judicial review](#) of the manner in which DHS makes an expedited removal designation. In reviewing the expedited removal expansion, the court [concluded](#) that DHS likely violated the APA by not complying with notice-and-comment procedures before announcing the expansion, and failing 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. Given the court's decision, DHS may not implement its nationwide expansion of expedited removal pending the outcome of the litigation.*

*The original version of this Sidebar from July 26, 2019 is published below.*

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

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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. Based on that authority, DHS [recently announced](#) that it will expand expedited removal to the full extent permitted under the statute. The proposed expansion raises 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, and these proceedings are [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).

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.

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.

## DHS's Expansion of Expedited Removal

The July 23, 2019, DHS [notice](#) immediately expands 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 would now potentially be applicable to any alien physically present in the country for less than two years who either did not obtain valid entry documents or had procured admission through fraud or misrepresentation.

In the Notice, DHS [cites](#) “the ongoing crisis at the southern border, the large number of aliens who entered illegally and were apprehended and detained within the interior of the United States, and DHS's insufficient detention capacity both along the border and in the interior of the United States.” DHS argues that an interior expansion of expedited removal “will help to alleviate some of the burden and capacity issues currently faced by DHS and DOJ by allowing DHS to remove certain aliens encountered in the interior more quickly, as opposed to placing those aliens in more time-consuming removal proceedings.” The agency also argues that the expansion is warranted because some aliens who enter the United States without inspection, including some smuggled into the country, “evade apprehensions due to vulnerabilities in border operations resulting from U.S. Border Patrol's lack of sufficient resources.” DHS contends that the expansion “will reduce incentives” to enter the United States unlawfully and travel into the interior of the country; ensure the prompt removal of aliens apprehended in the United States; reduce costs; and improve national security and public safety.

DHS [observes](#) that any alien who falls within the newly designated classes subject to expedited removal, but indicates an intention to apply for asylum or expresses a fear of persecution or torture, will be referred to an asylum officer for a credible fear interview. As noted above, the expedited removal statute provides that if an alien subject to expedited removal establishes a credible fear of persecution or torture, the alien will be placed in formal removal proceedings where the alien's claim for relief may be pursued. In

addition, aliens who claim to be U.S. citizens, LPRs, asylees, or refugees will continue to receive “the same procedural safeguards that apply in all expedited removal proceedings.” DHS also recognizes that it may [exercise discretion not to place](#) an alien in expedited removal proceedings (e.g., for medical reasons or if the alien has substantial connections to the United States). DHS states that it also may permit an alien to voluntarily return to his country or place the alien in formal removal proceedings instead.

DHS [indicates](#) that the expansion of expedited removal will take effect immediately. The agency argues 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 will seek 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.”

Accordingly, based on the new DHS rule, the agency generally may apply expedited removal to aliens in *any part* of the United States who (1) are inadmissible on the grounds that 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.

## Potential Legal Challenges and Constitutional Issues

The expansion of expedited removal will assuredly prompt [legal challenge](#). These challenges may raise at least two types of issues: (1) jurisdictional issues concerning the extent to which the expansion is subject to judicial review; and (2) constitutional issues concerning whether expedited removals of aliens in the interior would violate due process.

### Jurisdictional Limitations

Generally, under [INA § 242\(a\)\(2\)\(A\)](#), there is no judicial review of DHS’s decision to invoke expedited removal. The provision purports to bar claims that an alien was improperly placed in expedited removal proceedings, challenges to the agency’s credible fear determination, and claims challenging the procedures and policies used to expedite removal. Under [INA § 242\(e\)\(3\)](#), however, an alien subject to an expedited order of removal may challenge the validity of the expedited removal system by filing a lawsuit in the U.S. District Court for the District of Columbia. The district court’s review is limited to whether:

1. the expedited removal statute or its implementing regulations is constitutional; and
2. a regulation or written policy directive, guideline, or procedure issued by DHS to implement expedited removal is consistent with the statute or other laws.

A lawsuit raising a systemic challenge to expedited removal must be brought within 60 days after implementation of the challenged statutory provision, regulation, directive, guideline, or procedure (a timeline that might be [slightly extended](#) if the deadline falls on a weekend or holiday). Thus, with regard to DHS’s new rule expanding expedited removal, any lawsuit challenging that rule under [INA § 242\(e\)\(3\)](#) would have to be brought in the D.C. federal district court by September 23, 2019.

Apart from challenging the expansion of expedited removal through a systemic challenge under [INA § 242\(e\)\(3\)](#), an alien who falls within the newly designated classes of aliens subject to expedited removal potentially could raise an *individual* challenge to the expansion in a habeas corpus proceeding. Under [INA § 242\(e\)\(2\)](#), an alien subject to expedited removal may challenge the underlying expedited removal order in a [habeas corpus](#) proceeding in federal district court. The court’s jurisdiction, however, is strictly limited to determining whether the petitioner is an alien, whether the petitioner was ordered removed under the expedited removal statute, and whether the petitioner is an LPR, refugee, or asylee. Given the limited

scope of review, [most courts have held](#) that INA § 242(e)(2) does not permit judicial review of whether the expedited removal statute was lawfully applied to an alien. The U.S. Court of Appeals for the Ninth Circuit, however, recently [held](#) that the limitations on habeas review under INA § 242(e)(2) violated the [Suspension Clause](#) as applied to an alien who was subject to expedited removal, and that the alien had the right to contest the validity of his expedited removal order in habeas proceedings.

Judicial review also may be restricted by [INA § 235\(b\)\(1\)](#), which provides that decisions to designate additional classes of aliens subject to expedited removal “shall be in the sole and unreviewable discretion” of the DHS Secretary. Under [INA § 242\(a\)\(2\)\(B\)](#), no court has jurisdiction to review “any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security” (other than the granting of asylum). But this jurisdictional bar [might not foreclose](#) judicial review of a *constitutional* challenge to the expansion of expedited removal given “the [well-established principle](#) that when constitutional questions are in issue, the availability of judicial review is presumed, and [courts] will not read a statutory scheme to take the ‘extraordinary’ step of foreclosing jurisdiction unless Congress’ intent to do so is manifested by ‘clear and convincing’ evidence.”

## Constitutional Considerations

Perhaps the key legal question raised by the expansion of expedited removal is whether or how due process considerations might limit its use 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](#) the 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 immigration 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 U.S. District Court for the District of Columbia [upheld](#) the expedited removal statute, citing Congress’s broad legislative authority over the admission of aliens and the “long-standing precedent” that aliens seeking to enter the United States have no constitutional due process protections concerning their applications for admission (the D.C. Circuit [affirmed](#) that decision on appeal).

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. And 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. 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." And more recently the Court [described](#) the Due Process Clause as extending protection to aliens within the United States "whether their presence here is lawful, unlawful, temporary, or permanent."

But the Supreme Court has not squarely addressed how procedural due process considerations attach to unlawfully present aliens placed in removal proceedings. And lower courts seem to have rarely considered this issue, perhaps because aliens identified for removal in the United States have typically been placed in formal removal proceedings, regardless of whether they unlawfully entered the country or had been lawfully admitted but engaged in conduct rendering them deportable. In the few published decisions where courts have considered challenges brought by aliens arrested in the United States and placed in expedited removal, those courts have emphasized the aliens' status as "[recent surreptitious entrants](#)." This characteristic, the courts reasoned, made it appropriate to treat them like applicants for initial admission into the United States, 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.