



# **The Past, Present, and Future of Expedited Removal**

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## **I. What is Expedited Removal**

Expedited removal is a procedure that allows an official from the Department of Homeland Security (DHS) to remove a noncitizen without a hearing before an immigration judge or review by the Board of Immigration Appeals (BIA). *See* 8 U.S.C. § 1225(b)(1).

Aliens subject to expedited removal must be detained until they are removed and may only be released due to medical emergency or if necessary for law enforcement purposes. In addition, aliens who have been expeditiously removed are barred from returning to the United States for five years. INA §212(a)(9)(i).

## **II. History of Expedited Removal**

The policy option known as expedited removal was proposed in the early 1980s under the name “summary exclusion.” The proposal was triggered largely by the mass migration of approximately 125,000 Cubans and 30,000 Haitians to South Florida in 1980. While this dramatic influx of asylum seekers, commonly known as the Mariel boatlift, lasted only a few months, it cast a long shadow over U.S. immigration policy. At that time, aliens arriving at a port of entry to the United States without proper immigration documents were eligible for a hearing before an Executive Office for Immigration Review (EOIR) immigration judge to determine whether the aliens were admissible. If the alien received an unfavorable decision from the immigration judge, he or she also could seek administrative and judicial review of the case. The goal of “summary exclusion” was to stymie unauthorized migration by restricting the hearing, review, and appeal process for aliens arriving without proper documents at ports of entry. It was included and then deleted from legislation that became the Immigration Reform and Control Act of 1986.

In 1993, during the 103<sup>rd</sup> Congress, the Clinton Administration proposed “summary exclusion” in S. 1333/H.R. 2836, the “Expedited Exclusion and Alien Smuggling Enhanced Penalties Act of 1993,” to address the problem of aliens arriving at ports of entry without proper documents. The goal of these provisions was to target the perceived abuses of the asylum process by restricting the hearing, review, and appeal process for aliens at the port of entry. The bill would have instituted a “summary exclusion” procedure for such aliens who did not articulate a plausible asylum claim. The House took no action on H.R. 2836, but approved H.R. 2602, a similar bill that would have created a summary exclusion process.

During the 104<sup>th</sup> Congress, the House-passed version of H.R. 2202 “The Immigration in the National Interest Act of 1995” (which subsequently became the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) had language providing for the “expedited removal of arriving aliens” and deemed aliens who were in the United State without inspection to be arriving. H.R. 2202 also restructured the laws on deportation and exclusion into a single “removal” process. During the debate on its related bill, S. 1664, however, the Senate eliminated the bill’s “expedited removal” provisions, replacing them with a more limited special exclusion process to be used only in “extraordinary migration situations.” The Illegal Immigration Reform

and Immigrant Responsibility Act of 1996 (IIRIRA; P.L. 104-208, Division C) established the expedited removal policy that is in place today.

With the adoption of IIRIRA in 1996, expedited removal was added to the Immigration and Nationality Act (INA), making it mandatory for arriving aliens who engage in misrepresentation or lack travel documents and giving the Attorney General the option of applying it to aliens in the interior of the country who have not been admitted or paroled into the United States and who cannot affirmatively show that they have been physically present in the United States continuously for two years.

Before its expansion by the Bush Administration, expedited removal was only applied to aliens at ports of entry. From April 1997, to November 2002, expedited removal only applied to arriving aliens at ports of entry. When expedited removal initially went into effect in April 1997, the INS applied the provisions only to “arriving aliens” as defined in 8 CFR §1.1(q). At land ports of entry, the aliens who are issued expedited removal orders are denied entry to the United States. After the expedited removal order is issued at an air or sea port of entry, the airline or sea carrier is required to take the inadmissible alien back on board or have another vessel or aircraft operated by the same company return the alien to the country of departure.

In November 2002, the Administration expanded expedited removal to aliens arriving by sea who are not admitted or paroled. On November 13, 2002, INS published a notice clarifying that certain aliens arriving by sea who are not admitted or paroled are to be placed in expedited removal proceedings. This notice concluded that illegal mass migration by sea threatens national security because it diverts the Coast Guard and other resources from their homeland security duties. This expansion of expedited removal was in response to a vessel that sailed into Biscayne Bay, Florida on October 29, 2002, carrying 216 aliens from Haiti and the Dominican Republic who were attempting to enter the United States illegally.

Subsequently, in August 2004, expedited removal was expanded to aliens who are present without being admitted or paroled, are encountered by an immigration officer within 100 air miles of the U.S. southwest land border, and cannot establish to the satisfaction of the immigration officer that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of encounter.

### **III. Executive Order 13767: Border Security and Immigration Enforcement Improvements**

On January 25, 2017 President Trump signed Executive Order 13767, Border Security and Immigration Enforcement Improvements. The Executive Order, among other things, instructs the Secretary of Homeland Security to apply expedited removal to the fullest extent of the law. See Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (2017). Section 11(c) of the Executive Order states in full:

Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section

235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II).

Id. at 8796.

The subsections of INA 235(b)(1)(A) mentioned in Trump's Executive Order describe the authority of the Secretary of Homeland Security to interpret and implement expedited removal. INA 235(b)(1)(A) states in full that:

(i) In general.-If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(6)(C) or 212(a)(7) , the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution.

(ii) Claims for asylum.-If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(6)(C) or 212(a)(7) and the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens. -

(I) In general. -The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described. -An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2- year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

Based on the broad authority granted in INA 235(b)(1)(A), the Trump administration could potentially expand expedited removal to the maximum extent permissible under existing law, to all undocumented immigrants who have entered without inspection or parole and apprehended *anywhere in the country* who cannot demonstrate that they have lived in the United States for the past two years.

#### **IV. DHS Memo dated February 20, 2017**

While Secretary Kelly did indicate an intention to publish changes to the current policy, DHS has not yet implemented any expansion of expedited removal. In a February 20, 2017 memorandum, DHS Secretary John Kelly stated that he would publish a notice in the Federal Register

designating who would be subject to expedited removal. John Kelly, Implement the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017). The memorandum did not specify when the Federal Register notice would be published or the extent to which it would expand expedited removal; rather, Kelly stated that the notice might, “to the extent [he] determine[s] is appropriate, depart from the limitations set forth in the designation currently in force.” Id.

Following issuance of the Executive Order, DHS has continued to issue expedited removal orders against individuals allegedly apprehended at ports of entry, or within two weeks of entry into the United States and within 100 air miles of an international land border.

## **V. Difference Between Expedited Removal and “Regular” Removal Proceedings**

Expedited removal is a summary form of removal (or deportation), which is only authorized in certain specific situations as detailed below. With some exceptions, including for asylum seekers, immigrants in general cannot seek a judge’s review of an immigration officer’s expedited removal decision. However, supervisors are required to review immigration officers’ removal decisions before the removal order is issued. U.S. General Accounting Office, *Illegal Aliens: Changes in the Process of Denying Aliens Entry Into the United States*, March 1998. By contrast, the regular removal process, known as a “240 proceeding” or “regular removal proceeding,” involves a removal hearing before an immigration judge. At the hearing, an attorney for the government argues for the deportation of the individual and the individual has the opportunity to make a claim to remain in the United States, based on benefits and protections available under U.S. immigration laws.

## **VI. Persons Currently Vulnerable to Expedited Removal**

“Expedited removal proceedings provide a streamlined process by which U.S. officers can remove aliens who attempt to gain entry to the United States but are not admissible.” *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1080 n.2 (9th Cir. 2011) (citing 8 U.S.C. § 1225(b)); see also August 21, 2015 Order, 212 F. Supp. 3d at 912 n.4. Under the Immigration and Nationality Act (INA), any individual who arrives at a port of entry in the United States and who is inadmissible under either 8 U.S.C. § 1182(a)(6)(C) (misrepresentations and false claims to U.S. citizenship) or § 1182(a)(7) (lack of valid entry documents), is subject to expedited removal. 8 U.S.C. § 1225(b)(1)(A)(i).

The Secretary of DHS has the authority to apply expedited removal to any individual apprehended at a place other than a port of entry, who is inadmissible under either of those grounds, has not been admitted or paroled, and cannot show that he or she has been continuously present in the United States for two or more years. 8 U.S.C. §§ 1225(b)(1)(A)(i), (iii). However, expedited removal has traditionally been applied in a more limited manner.

To date, DHS has limited its application of expedited removal to noncitizens inadmissible for 8 U.S.C. § 1182(a)(6)(C) (misrepresentations and false claims to U.S. citizenship) or § 1182(a)(7) (lack of valid entry documents) who either arrive at a port of entry or are apprehended within 14

days of their arrival and within 100 miles of an international land border. See Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877, 48880 (2004).

## VII. What happens to someone in Expedited Removal?

“The expedited removal statute, § 1225(b), provides that when an alien seeks admission to the United States after arriving at a port of entry and does not have entry documents, misrepresents the alien’s identity or citizenship, or presents fraudulent identity or immigration documents, ‘the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates an intention to apply for asylum . . . or a fear of persecution.’ § 1225(b)(1)(A)(i).” Barajas- Alvarado, 655 F.3d at 1081. “[T]he expedited removal statute and the accompanying regulations generally require the detention of undocumented detainees apprehended at the U.S.-Mexican border, who have been placed in expedited removal proceedings, until eligibility for relief is established. There are, however, statutory exceptions.” Flores v. Sessions, 85-04544, Order dated June 27, 2017 [Doc. #363] at 22.

In expedited removal, the DHS officer who is authorized to issue an order of expedited removal operates as prosecutor and judge and often arrests an individual and orders him or her deported on the same day. With limited exceptions, discussed below, the government takes the position that noncitizens subject to expedited removal have no right to an appeal. At least one court has held that certain immigrants in expedited removal proceedings have no right to counsel. United States v. Peralta- Sanchez, Nos. 14-50393, 14-50394, \_ F.3d\_, 2017 U.S. App. LEXIS 2165 (9th Cir. Feb. 7, 2017).

If the undocumented detainee intends to seek asylum or expresses a fear of persecution, the expedited removal statute requires the immigration officer to refer the detainee for an interview with an asylum officer. Flores v. Sessions, 85-04544, Order dated June 27, 2017 [Doc. #363] at 21. (citing 8 U.S.C. § 1225(b)(1)(A)) 8 U.S.C. §§ 1225(b)(1)(A)(ii), (B); 8 C.F.R. § 235.3(b)(4). IIRIRA requires that aliens in expedited removal be detained, and thus aliens in expedited removal who claim asylum are detained while their “credible fear” cases are pending. However, the district court in *Flores* noted that such detention was, “subject to a few exceptions. 8 C.F.R. § 235.3(b)(2)(iii) (“An alien whose inadmissibility is being considered under this section or who has been ordered removed pursuant to this section shall be detained pending determination and removal, except that parole of such alien, in accordance with section 212(d)(5) of the Act,<sup>1</sup> may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.”); see *infra*, section IV.C.1.ii (discussing standards for parole).” Flores v. Sessions, ,

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<sup>1</sup> INA 212(d)(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 214(f), in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207.

Order [Doc. #363] at 21.

Prior to IIRIRA, most aliens arriving without proper documentation who applied for asylum were released on their own recognizance into the United States (and given work authorization), a practice which some argued enabled inadmissible aliens falsely claiming persecution to enter the country.

DHS officers are required to read individuals subject to expedited removal a script that informs them of their right to speak to an asylum officer if they express a fear of return. See 8 C.F.R. § 235.3(b)(2)(i) (requiring reading of Form I-867A); DHS Form I-867A (including an advisal that individuals who express “fear or . . . concern about being removed from the United States or about being sent home . . . will have the opportunity to speak privately and confidentially to another officer about [their] fear or concern”).

Upon referral, the asylum officer will conduct a “credible fear interview,” which is designed “to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture.” 8 C.F.R. § 208.30(d). An individual will be determined to have a credible fear of persecution if there is a “significant possibility,” taking into account the credibility of his or her statements and any other facts known to the asylum officer, that the individual can establish eligibility for asylum under 8 U.S.C. § 1158 or for withholding of removal under 8 U.S.C. § 1231(b)(3). 8 C.F.R. § 208.30(e)(2).

If the asylum officer determines that the individual satisfies the credible fear standard, the applicant is taken out of the expedited removal process, is served with a Notice to Appear, and is placed in removal proceedings before an immigration judge under 8 U.S.C. § 1229a where he or she can pursue an asylum application and any other form of relief for which he or she is eligible. 8 C.F.R. § 208.30(f); see also 8 U.S.C. § 1225(b)(1)(B)(ii). Where an asylum officer determines that the detainee has a credible fear of persecution, he or she “shall be detained,” 8 U.S.C. § 1225(b)(1)(B)(ii) [“the alien shall be detained for further consideration of the application for asylum.”], and placed in regular INA section 240 removal proceedings before an immigration judge, rather than the expedited removal proceedings discussed above, for a determination of the asylum claim. See 8 C.F.R. §§ 208.30(f), 1235.6(a)(1)(ii) (referral to immigration judge). *Flores at 21*.

If the asylum officer makes a negative credible fear determination, the officer must provide a written record of the determination. Upon request, the individual must be provided with prompt review of the determination by an immigration judge. 8 U.S.C. §§ 1225(b)(1)(B)(iii)(II)-(III); see also *Flores Order* at 21; 8 C.F.R. §§ 208.30(g)(1), 1003.42, 1208.30. “‘Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge, the alien shall be detained.’ 8 C.F.R. § 235.3(b)(4)(ii) (emphasis added); 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (‘Mandatory Detention—Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.’) (emphasis added).” *Flores Order* at 21. If the immigration judge determines that the individual has a credible fear of persecution, the expedited removal order will be vacated and DHS will institute removal proceedings under 8 U.S.C. § 1229a. 8 C.F.R. § 1003.42(f).

## VIII. DHS' Discretion to Place Individuals into Expedited Removal

DHS has discretion to elect between issuing an expedited removal order, allowing withdrawal of an application for admission pursuant to 8 U.S.C. § 1225(a)(4), or issuing a Notice to Appear and placing the individual in removal proceedings before an immigration judge.

The Board of Immigration Appeals (BIA) and DHS agree that the use of expedited removal is in the discretion of DHS. In *Matter of E-R-M-*, DHS argued before the BIA that it had discretion to place an arriving alien in section 240 removal proceedings rather than invoking expedited removal. The BIA agreed, finding that “Congress’ use of the term ‘shall’ in section 235(b)(1)(A)(i) of the Act does not carry its ordinary meaning, namely, that an act is mandatory. It is common for the term ‘shall’ to mean ‘may’ when it relates to decisions made by the Executive Branch of Government on whether to charge an individual and on what charges to bring.”

DHS may also limit the use of expedited removal as a matter of policy. For example, on August 21, 1997, several months after implementation of expedited removal began at ports of entry, the INS issued a memorandum stating that unaccompanied minors generally would not be placed into expedited removal proceedings. Since that time, it has been the practice of immigration enforcement authorities to charge an arriving unaccompanied child with a ground of inadmissibility for which expedited removal is not required and place the child into 240 proceedings instead.

Finally, if an immigration officer charges an individual with inadmissibility under *other* sections of the INA (in addition to or instead of 212(a)(6)(c) or 212(a)(7)), the individual must be placed in 240 removal proceedings. As described in the section on expedited removal of the U.S. Customs and Border Patrol Inspector’s Field Manual:

“Officers may, but need not, charge more than one ground of inadmissibility. If 212(a)(6)(c) and/or 212(a)(7) are the only charges lodged, the alien must be processed under expedited removal and may not be referred for an immigration judge hearing under section 240. If additional charges are lodged, the alien must be referred for a section 240 hearing, but this should only occur in extraordinary circumstances. Generally speaking, if an alien is inadmissible under 212(a)(6)(c) and/or 212(a)(7), additional charges should not be brought and the alien should be placed in expedited removal. There will be very few instances where it will be advantageous to the government to lodge additional charges and institute section 240 removal proceedings if a solid expedited removal proceeding can be concluded.”

## IX. DHS' Discretion to Release an Individual in Expedited Removal

“Although Section 1225(b) generally mandates the detention of aliens seeking admission pending their removal proceedings, individuals detained under the statute may be eligible for discretionary parole from ICE custody.” *Rodriguez v. Robbins*, 715 F.3d 1127, 1132 (9th Cir. 2013) (citing 8 U.S.C. § 1182(d)(5)(A)). Congress authorizes the Attorney General to permit parole or release “temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit,” provided that the person

presents neither a danger nor flight risk. INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (emphasis added); 8 C.F.R. § 212.5. Under the regulations promulgated by the Attorney General, detainees in expedited removal are eligible for parole if they are pregnant, have serious medical conditions, are juveniles who meet certain conditions, or will be witnesses in judicial, administrative, or legislative proceedings. 8 C.F.R. § 212.5(b); see also 8 C.F.R. § 208.30(f) (“Parole of the alien may be considered only in accordance with section 212(d)(5) of the [INA] and [8 C.F.R.] § 212.5”).

Thus, a detainee in expedited removal “whose inadmissibility is being considered . . . or who has been ordered removed” may be paroled under the above standards. See 8 C.F.R. § 235.3(b)(2)(iii). In particular, with regard to juveniles, the regulations governing parole state that Defendants “shall follow the guidelines set forth in § 236.3(a) of this chapter and paragraphs (b)(3)(i) through (iii) of this section” in determining under what conditions a juvenile should be released from detention. 8 C.F.R. § 212.5(b)(3). Section 236.3(a) merely defines a juvenile as “an alien under the age of 18 years.” 8 C.F.R. § 236(a). Section 212.5(b)(3) sets forth the order of preference governing the conditions for a minor’s parole:

- (i) Juveniles may be released to a relative (brother, sister, aunt, uncle, or grandparent) not in Service detention who is willing to sponsor a minor and the minor may be released to that relative notwithstanding that the juvenile has a relative who is in detention.
- (ii) If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention.
- (iii) If the Service cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a non-relative in detention who accompanied him or her on arrival, the question of releasing the minor and the accompanying non-relative adult shall be addressed on a case-by-case basis; 8 C.F.R. § 212.5(b)(3)(i)–(iii).

## **X. Concerns Raised by Expedited Removal**

The expedited removal process as it exists currently raises serious due process concerns even without the Trump Administration’s expended interpretation of the statute.

In application, there have been instances of DHS officials denying even the most basic procedural protections provided by the expedited removal process. *See, e.g., Raya-Vaca*, 771 F.3d at 1204-06 (holding a CBP official violated due process rights of Petitioner in expedited removal proceedings by failing to provide notice of charges or opportunity to respond).

These concerns are especially grave for individuals who would otherwise be eligible to apply for asylum because they have a fear of persecution in their home country. While CBP officers are required to refer people with a fear of return to asylum officers—and to inform people subject to expedited removal of the protections to which they are entitled if they fear return, practitioners and organizations report that officers regularly fail to do so.

The expedited removal system also ensnares people with a legal right to remain in the United States—such as U.S. citizens and lawful permanent residents—who are unable to explain their immigration status or citizenship claims before they are rushed or coerced through the

deportation process, including people with serious mental disabilities. See, e.g., *American Exile* at 44-58.

Additionally, individuals expressing fear of return who are subsequently diverted from expedited removal are detained pending completion of the credible or reasonable fear process. Because of this, their cases are prioritized by the government. Asylum Office resources are therefore diverted to these interviews, contributing to the backlog of affirmative asylum cases.

## **XI. Could Legal Services Providers Bring a Successful Legal Challenge the Practice of Expedited Removal in Court?**

Under the government's construction of the applicable statutory provisions, federal court review of expedited removal orders is extremely limited.

The INA bars courts of appeals from reviewing expedited removal orders on petitions for review. See 8 U.S.C. §§ 1252(a)(2)(A), (e); see also *Shunaula v. Holder*, 732 F.3d 143 (2d Cir. 2013); *Khan v. Holder*, 608 F.3d 325 (7th Cir. 2010); *Brumme v. INS*, 275 F.3d 443 (5th Cir. 2001).

The INA provides for habeas review of expedited removal orders, but purportedly limits the scope of review to the following determinations: (1) whether the petitioner is a noncitizen (i.e., whether the person has a citizenship claim); (2) whether the petitioner was ordered removed under § 1225(b)(1) (the expedited removal provision); and (3) whether the petitioner can prove by a preponderance of the evidence (i.e., 50.1%) that he or she (a) is an LPR; (b) has been admitted as a refugee; or (c) has been granted asylum, and that such status has not been terminated. 8 U.S.C. §§ 1252(e)(2)(A)-(C). Title 8 U.S.C. § 1252(e)(5) further defines the scope of this inquiry; it provides that review is limited to the existence of the order and whether it relates to the petitioner and further precludes review of actual inadmissibility or eligibility for relief from removal.

There are ongoing challenges to the government's interpretation, asserting that if the statute is construed to restrict review of challenges to expedited removal, it would violate the Constitution. See, e.g., *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016) (discussed further below)

In *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016), twenty-eight families sought review of their expedited removal orders based on negative credible fear determinations. They asserted that the expedited removal statute had to be construed to provide for such review, and that otherwise, the Suspension Clause would be violated. The Third Circuit rejected the availability of habeas corpus review under § 1252(e)(2)(B). 835 F.3d at 429-34. The court also found that because they were seeking initial admission to the United States, the petitioners were unable to invoke habeas review under the Suspension Clause, even though they had entered the country before CBP apprehended them. *Id.* at 444-49. On December 22, 2016, the petitioners filed a petition for writ of certiorari to the Supreme Court (Case No. 16-812). The government's response is due March 13, 2017.

Finally, although the INA provides for systemic challenges to the validity of determinations under § 1225(b) and implementation of the expedited removal system, such review is subject to the statute's accompanying venue, deadline, and scope of review provisions. See 8 U.S.C. § 1252(e)(3). Venue is only permissible in the U.S. District Court for the District of Columbia. 8 U.S.C. § 1252(e)(3)(A). The district court is limited to reviewing: (1) the constitutionality of § 1225(b) or any implementing regulation; or (2) whether any regulation or written policy is inconsistent with certain sections of the INA or is otherwise unlawful. 8 U.S.C. § 1252(e)(3)(A).

Any such action must be filed “no later than 60 days after the challenged [regulation or written policy] is first implemented.” 8 U.S.C. § 1252(e)(3)(B). Past systemic challenges under this provision have not been successful. See *AILA v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000).

## **XII. For now..**

The full scope of any expansion of expedited removal will not be clear until notice of the expansion is published in the Federal Register.

The Trump administration, as part of its unprecedented expansion and mobilization of mass deportation efforts, could expand expedited removal to the maximum extent permissible under existing law, e.g. for undocumented immigrants apprehended anywhere who have lived in the United States for less than two years. Alternatively, the Administration could expand expedited removal to those who cannot demonstrate they have been continuously present for any designated period less than two years. (e.g. 90 days, 180 days, 1 year)

According to estimates by ILRC, “[u]nder any expansion of expedited removal, over a decade, a minimum of 1.8 million (1,791,318) additional undocumented immigrants could be subject to expedited removal. Additionally, “[u]nder any expansion of expedited removal, approximately 179,132 additional undocumented immigrants could be subject to expedited removal per year.” Jose Manaña-Salgado, ILRC, *Fair Treatment Denied*, June 2017.

The same avenues that currently exist for a federal court or administrative review of an expedited removal order in an individual case will continue to exist following any expansion of expedited removal, including for individuals subjected to expedited removal despite being present in the United States for sufficient time that they should not fall within the scope of any expansion.

The INA also provides for review over a systemic challenge to the validity of determinations under § 1225(b) and the implementation of the expedited removal system. 8 U.S.C. § 1252(e)(3). In particular, there are statutory restrictions on where such a challenge can be brought, when it can be brought, and what the court can review. *Id.*