INA 235 HANDOUT
CLE Spring 2017
University of Minnesota Law School

INA: ACT 235 - INSPECTION BY IMMIGRATION OFFICERS; EXPEDITED REMOVAL OF INADMISSIBLE ARRIVING ALIENS; REFERRAL FOR HEARING

(b) Inspection of Applicants for Admission.-

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled.-

(A) Screening.-

(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.
NOTEWORTHY DATES


1997 to 2002: Only aliens that entered through ports of entry were subject to expedited removal.

Nov. 13, 2002: 67 Fed. Reg. 68924 is published. “This Notice constitutes the first designation of an additional class of aliens who may be placed in expedited removal proceedings: aliens who arrive in the United States by sea, either by boat or other means, who are not admitted or paroled, and who have not been physically present in the United States continuously for the two-year period prior to a determination of inadmissibility by a Service officer.” DHS worried that aliens arriving by sea were causing a misuse of US Coast Guard resources, and wished to counteract it. “The designation may become effective upon publication in the Federal Register, or, if the delay caused by the publication would adversely affect the interests of the United States or the effective enforcement of the immigration laws, the designation may become effective upon issuance and be published as soon as practicable.”

Aug. 11, 2004: 69 Fed. Reg. 48877 is published. It created a new classification of aliens subject to expedited removal. “In the interests of focusing enforcement resources upon unlawful entries that have a close spatial and temporal nexus to the border, this notice does not implement the full nationwide expedited removal authority available to DHS pursuant to section 235 of the Act. Nor does this notice limit DHS from implementing the full nationwide enforcement authority of the statute through publication of a subsequent Federal Register notice. . . . At this time, DHS has elected to assert and implement only that portion of the authority granted by the statute that bears close temporal and spatial proximity to illegal entries at or near the border. Accordingly, this notice applies only to aliens encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border.”

Besides creating a new classification, it “transferred [designation authority] to the Secretary of Homeland Security, and references to the Attorney General or the Commissioner in the statute and regulations are deemed to refer to the Secretary.”
An illustration of both the trend and proportion of 235(b) removals since its enactment.*

Expedited Removals under 235(b) Per Year

* The data was compiled at https://www.dhs.gov/immigration-statistics/enforcement-actions.
Executive Order: Border Security and Immigration Enforcement Improvements
January 25, 2017

Sec. 11. Parole, Asylum, and Removal.

(c) 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).

Implementing the President’s Border Security and Immigration Enforcement Improvements Policies
DHS Secretary John Kelly
Feb. 20, 2017

This memorandum implements the Executive Order entitled "Border Security and Immigration Enforcement Improvements," issued by the President on January 25, 2017, which establishes the President's policy regarding effective border security and immigration enforcement through faithful execution of the laws of the United States.

G. Expanding Expedited Removal Pursuant to Section 235(b)(l)(A)(iii)(I) of the INA

Pursuant to section 235(b)(l)(A)(iii)(I) of the INA and other provisions of law, I have been granted the authority to apply, by designation in my sole and unreviewable discretion, the expedited removal provisions in section 235(b)(l)(A)(i) and (ii) of the INA to aliens who have not been admitted or paroled into the United States, who are inadmissible to the United States under section 212(a)(6)(C) or section 212(a)(7) of the INA, and who have not affirmatively shown, to the satisfaction of an immigration officer, that they have been continuously physically present in the United States for the two-year period immediately prior to the determination of their inadmissibility. To date, this authority has only been exercised to designate for application of expedited removal, aliens encountered within 100 air miles of the border and 14 days of entry, and aliens who arrived in the United States by sea other than at a port of entry.

To ensure the prompt removal of aliens apprehended soon after crossing the border illegally, the Department will publish in the Federal Register a new Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(l)(a)(iii) of the Immigration and Nationality Act, which may, to the extent I determine is appropriate, depart from the limitations set forth in the designation currently in force. I direct the Commissioner of CBP and the Director of ICE to conform the use of expedited removal procedures to the designations made in this notice upon its publication.
CHALLENGES TO EXPEDITED REMOVAL

INA 242(e) [8 USCS § 1252(e)] Judicial review of orders under section 235(b)(1).

(2) Habeas corpus proceedings. Judicial review of any determination made under section 235(b)(1) [8 USCS § 1225(b)(1)] is available in habeas corpus proceedings, but shall be limited to determinations of--

(A) whether the petitioner is an alien,
(B) whether the petitioner was ordered removed under such section, and
(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 207 [8 USCS § 1157], or has been granted asylum under section 208 [8 USCS § 1158], such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 235(b)(1)(C) [8 USCS § 1225(b)(1)(C)].

(3) Challenges on validity of the system.

(A) In general. Judicial review of determinations under section 235(b) [8 USCS § 1225(b)] and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--

(i) whether such section, or any regulation issued to implement such section, is constitutional; or
(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this title or is otherwise in violation of law.

(B) Deadlines for bringing actions. Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal. A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases. It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.


Challenged the validity of expedited removal. The plaintiffs argued that expedited removal "creates an unreasonably high danger that [those] entitled to enter the United States . . . will be erroneously removed." The government counters that aliens seeking initial admission to the United States have no constitutional rights with respect to their immigration status. The plaintiffs then cite cases explaining that as an alien’s ties to the United States have grown, so too have their due process rights.
The court ruled in favor of the government. “Plaintiffs rely on cases which suggest that permanent residents or those with "substantial connections" to the United States may be entitled to constitutional protections. Here, however, [the plaintiffs] are not lawful permanent residents. Moreover, there is no indication that either has developed ‘substantial connections’ with the United States.”

The District Court in Reno suggested that aliens that have developed ‘substantial connections’ with the United States may have more due process rights. This puts into question the expedited removal process especially for those aliens that have lived here for a year or even two years, the full thrust of the statute. The longer the time frame and the broader the geographical scope that Secretary Kelly makes subject to expedited removal, the more due process will be put into question. It is important to remember that the clock for the sixty-day deadline to challenge its validity starts running as soon as Secretary Kelly’s guideline is implemented.

The court also addressed third party standing. Each of the organizational plaintiffs seeks to vindicate the rights of unnamed third parties--namely, aliens who have been or will be processed pursuant to the new expedited removal law and regulations. Just as Congress has the power to expand federal jurisdiction, it also has the power to contract. “There is no reason why, for instance, a statute could not expressly state that, without exception, each party to a lawsuit must raise only their rights and not the rights of others.” Id. at 1364. “Congress may not have gone so far in IIRIRA.” Id. However, the Court’s analysis still led to the conclusion that the organizational plaintiffs did not have standing on behalf of the unnamed third party aliens that would be subject to expedited removal.

*Castro v. United States Dep't of Homeland Sec.*, 163 F. Supp. 3d 157 (E.D. Pa. 2016). Court dismissed the case for lack of subject matter jurisdiction. Additionally, the case was constitutional because expedited removal does not implicate suspension clause issues.

*United States v. Peralta Sanchez*, 847 F.3d 1124 (9th Cir. 2017). Court gets around jurisdiction because this case deals with illegal reentry, a criminal matter. This allows us to peek into how the courts feel about expedited removal. Plaintiff argued for a right to hire counsel in an expedited removal proceeding. Specifically, the plaintiff argued that because he was caught a mile from the border, instead of at a port of entry, he was entitled to more due process. In light of the limited benefit a right to counsel was likely to provide in the expedited removal context, and in light of the significant cost the government would likely incur, the Ninth Circuit ultimately refused to find that aliens who illegally entered the United States and were subject to expedited removal proceedings under INA 235 were constitutionally entitled to counsel.

However, this holding was a 2-1 split. The dissent found that there was a due process right to counsel in expedited removal proceedings.

Conclusion: the amount of due process that a noncitizen is entitled to under an expedited removal is already controversial. The farther that a noncitizen is apprehended from a border and subjected to expedited removal, the greater the constitutionality of expedited removal is strained.