



FAIR TREATMENT DENIED

The Trump Administration's Troubling Attempt to Expand "Fast-Track" Deportations

By Jose Magaña-Salgado

I. Introduction

Expedited removal refers to a fast-track process that the federal government, through the U.S. Department of Homeland Security (DHS), uses to quickly deport: (a) those who arrive at the border and are turned away; or (b) who enter without authorization and are encountered by immigration officials within 100 miles of the northern or southern border within two weeks of their arrival.¹ Since its inception in the 1990s, the federal government dramatically expanded the use of expedited removal, and as of fiscal year 2013, 44% of all removals from the United States were expedited removals and occurred without the due process protections of immigration court.¹

Unlike the immigration court system, where judges generally make decisions on deportation cases based on immigration law, immigration officers, who may be biased or abuse their discretion, are the ones who determine an individual's eligibility for expedited removal. **A person subject to expedited removal is usually detained before their deportation, has no right to appeal the decision, and is not usually afforded enough time to communicate with her family members or seek out legal counsel.** The tremendous authority held by immigration officers to unilaterally order someone's removal without any input from a judge raises serious concerns about lack of oversight and accountability, as well as the need for a recourse or remedy for the unknown number of immigrants who are mistakenly subject to expedited removal and deported in error.

Disregarding these serious due process concerns, on January 25, 2017, President Donald Trump signed Executive Order 13767 (EO 13767), *Border Security and Immigration Enforcement Improvements*, which directed DHS and its subcomponents to drastically expand the use of expedited removal.² On February 20, 2017, DHS Secretary Kelly issued preliminary guidance implementing EO 13767, directing DHS to issue a Federal Register notice to expand the category of individuals subject to expedited removal.³ Moreover, Secretary Kelly directed both the Commissioner of U.S. Customs and Border Protection (CBP) and Director of U.S. Immigration and Customs Enforcement (ICE) to align its enforcement practices with the forthcoming notice.⁴

In light of the current backlog of cases in our nation's immigration court system, estimated to be 585,930 as of April 2017,⁵ **expedited removal represents a cruelly efficient enforcement strategy to greatly abridge due process rights and drastically increase deportations.**⁶

¹ For questions regarding this report, please contact Jose Magaña-Salgado at jmagana@ilrc.org. The author would like to acknowledge and thank Jeffrey Passel, Philip Wolgin, Erin Quinn, Kemi Bello, Carol Gamble, and Jasmin Keskinen for their assistance with this report, with a special thanks to Robert Warren and the Center for Migration Studies for sharing internal projections regarding the 2017 undocumented population.

Though the Administration has yet to take formal steps to begin the expansion of the expedited removal process, numerous legal advocates have raised constitutional concerns over the lack of due process protections, signaling a potential battle in the courts over the legality of such an expansion. The expansion of expedited removal would particularly hit the most vulnerable, including those fleeing gang violence, victims of religious persecution, those seeking to return and reunite with their families after years of living in the United States, and those escaping from war-torn countries or other civil strife.

This report estimates the current and future undocumented immigrant population potentially subject to various expedited removal expansion scenarios under President Trump's January 2017 executive order and offers policy recommendations to address the legal concerns regarding such an expansion.

II. Expedited Removal 101

Originally created in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,⁷ expedited removal allows the federal government to remove, or deport,⁸ an undocumented immigrant on an expedited basis, outside the purview of our nation's immigration courts and the associated due process therein.⁹ The Immigration and Nationality Act (INA) allows expedited removal for undocumented immigrants who enter without inspection and are not "physically present in the United States continuously for the 2-year period" immediately before contact with immigration authorities at the border or anywhere in the nation's interior.¹⁰

Thus, under the full extent of the law, the federal government, in theory, can employ expedited removal to target undocumented immigrants who have not been physically present for two or more years and are found *anywhere* in the interior of the United States. Currently, however, the use of expedited removal is limited to undocumented immigrants who are encountered within 100 miles of the border and who cannot, to the satisfaction of an immigration officer, demonstrate that they have continuously resided in the United States for the 14-day period immediately before apprehension.¹¹

Expedited removal is also applied to undocumented immigrants who arrive by sea, other than a port of entry, and cannot, to the satisfaction of an immigration officer, demonstrate that they have been continuously present for two years preceding apprehension.¹² Finally individuals who arrive at a port of entry and are inadmissible because of misrepresentation or a false claim to U.S. citizenship or do not have valid entry documents are also subject to expedited removal.¹³

III. Due Process Concerns

Expedited removal substantially removes due process by eliminating the ability for an undocumented immigrant to present their case to an immigration judge. In removal proceedings,¹⁴ undocumented immigrants can retain counsel and apply for various forms of relief from removal, all under the purview of the Fifth Amendment's due process protections.¹⁵ In removal proceedings, an immigrant may question the evidence against her and has an opportunity to present

Key Due Process Concerns Surrounding the Federal Government's Practice of Expedited Removal

- **The Speed** – deported in as little as 24 hours, often with no ability to notify loved ones
- **The Burden of Proof** – required to provide proof of residence at the point of apprehension, which some immigrants may not carry on them or have readily available
- **The Conflict of Interest** – a conflict of interest in which your arresting officer is essentially also the same individual who adjudicates your case
- **No Day in Court** – no right to an appearance before a judge
- **No Access to Counsel** – no right to legal representation
- **Inadequate Screening** – challenges with quality control around credible fear interviews
- **No Safeguards for Mistakes** – nearly impossible to return to the United States for those mistakenly deported

evidence to an impartial adjudicator, rather than merely verbally to an immigration officer at the time of apprehension. Importantly, even if an immigration judge orders an individual removed, that individual may still appeal that decision through the Board of Immigration Appeals (an administrative court) and federal appellate courts.¹⁶

Under expedited removal, however, immigration officers from either CBP or ICE unilaterally issue removal decisions on an expedited basis without the benefit of the due process procedures of an immigration court.¹⁷ Moreover, there is no ability to appeal an order of expedited removal aside from a few minor exceptions.¹⁸ While there is a framework for individuals who have a fear of returning to their home country, that referral must be effectuated by the CBP or ICE officer conducting removal proceedings.

This referral by immigration officers subjects the process to potential abuse, particularly considering the current Administration's efforts to curtail the granting of relief based on credible fear interviews and claims.¹⁹ Examples of



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immigrants who are apprehended by immigration officers and who cannot establish “that they have been physically present in the United States continuously for [a] 2-year period” could potentially be removed through expedited removal, even if in actuality they have resided in the United States for more than the requisite period.²³

Consequently, the estimates in this report provide the *minimum* number of additional individuals who will be subject to expedited removal, with that number likely being greater due to the unlawful deportation of undocumented immigrants.

IV. Proposed Expansion of Expedited Removal

The Trump administration, as part of its unprecedented expansion and mobilization of our nation's immigration enforcement apparatus, 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.²⁴ 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.

Consequently, this report provides estimates for potential 90-day, 180-day, one-year, and two-year expansions. Importantly, in the draft memorandum implementing EO 13767's expansion of expedited removal, DHS Secretary Kelly proposed the expansion of expedited removal to 90 days.²⁵ However, in the final memorandum, Secretary Kelly failed to specify a specific numerical expansion, removing the explicit reference to 90 days, either hinting at a potential

these types of abuses include expedited removal interviews where children as young as three are coerced to “admitting” that they came to the United States for the purposes of obtaining employment.²⁰

There are a variety of due process problems as to how expedited removal is currently implemented. The very nature of expedited removal, substantial amount of latitude that officers enjoy, and lack of procedural safeguards mean that the process is currently rife with abuse.²¹ This abuse manifests in a variety of ways, including the use of expedited removal to target undocumented immigrants who are not eligible for expedited removal and the removal of undocumented immigrants with valid claims for relief.²²

An expansion beyond the current 14-day physical presence requirement would mean that undocumented

expansion greater than 90 days or providing a tacit acknowledgement that expansion of expedited removal greater than 90 days may be subject to litigation as a result of due process concerns.²⁶

To be subject to expedited removal under the forthcoming expansion, an undocumented immigrant must:

- (a) have entered without inspection or parole;
- (b) have been apprehended anywhere in the interior of the country; and
- (c) be unable to demonstrate continuous physical presence for the new required period, (e.g. potentially 90 days, 180 days, one year, or two years).

Thus, by examining previous immigration flows, the entry without inspection rate, and length of residency, this report's methodology can estimate the population that, at minimum, currently is and would be subject to expanded expedited removal.²⁷

Key Findings

Current Undocumented Population Subject to Expedited Removal Expansion

- **Two-Year Expansion.** The expansion of expedited removal to all undocumented immigrants who have lived in the United States for less than two years, the most likely scenario, could subject a minimum of **328,440** additional undocumented immigrants to expedited removal.
- **One-Year Expansion.** The expansion of expedited removal to all undocumented immigrants who have lived in the United States for less than one year could subject a minimum of **163,995** additional undocumented immigrants to expedited removal.
- **180-Day Expansion.** The expansion of expedited removal to all undocumented immigrants who have lived in the United States for less than 180 days could subject a minimum of **80,646** additional undocumented immigrants to expedited removal.
- **90-Day Expansion.** The expansion of expedited removal to all undocumented immigrants who have lived in the United States for less than 90 days could subject a minimum of **40,098** additional undocumented immigrants to expedited removal.

Future Undocumented Population Subject to Expedited Removal Expansion

- **Over a Decade.** Under *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.
- **Per Year.** Under *any* expansion of expedited removal, approximately **179,132** additional undocumented immigrants could be subject to expedited removal per year.

Unaccounted for but at Risk

- As a result of the inherent lack of due process protections of expedited removal, some undocumented immigrants who fall outside the scope of a potential expansion will still likely be subjected to expedited removal and deported unlawfully.

V. Policy Recommendations

Considering this potential expansion of expedited removal, we offer the following policy recommendations:

1. We call on President Trump to immediately rescind Section 11(c) of Executive Order 13767, which directs the Secretary of DHS to expand the current scope of expedited removal.
2. We call on Secretary Kelly to issue federal regulations to prohibit the use of expedited removal, instead of expanding its use.
3. We call on Congress to repeal the statutory authority for the use of expedited removal, so future Administrations cannot regulatorily expand the use of expedited removal.

VI. Methodology

A. Existing Population Subject to Expedited Removal

To calculate the existing, additional undocumented population that would be subject to an expansion of expedited removal, this report uses data from the Center for Migration Studies, or CMS, to obtain the portion of the 2017 undocumented population that entered without inspection and with less than two years of presence; excludes those likely to benefit from asylum; and divides this population into different lengths of residency.

1. Center for Migration Studies Data

In November of 2016, CMS released detailed estimates regarding the undocumented population as of 2014.²⁸ Using American Community Survey Census data, CMS estimated that as of 2014, approximately 10.9 million undocumented immigrants resided in the United States.²⁹ Importantly, for the purposes of estimating the existing undocumented population subject to an expansion of expedited removal, the 2014 undocumented population would no longer be subject to expedited removal under any expansion due to residing in the United States for more than two years. Instead, the undocumented population that settled in the United States during the last two years, e.g. the latter half of 2015 to the beginning of 2017, is the population that we must identify to calculate the impact of an expansion of expedited removal.

Fortunately, Robert Warren of CMS graciously provided CMS's internal, unreleased projections for the undocumented population as of March 2017, including the number of undocumented immigrants with less than two years of residency and the percentage who entered without inspection. Specifically, CMS, using historical migration flows, projects that the 2017 undocumented population is 11,100,000.³⁰ Of these, CMS estimates that 1,025,289 undocumented immigrants entered in the immediately preceding two years, with 355,167 entering without inspection.³¹ CMS obtained these projections by reviewing the historical immigration flows from different component countries and, with the 2014 number as a basis, projecting those immigration flows, including the percentage who entered without inspection, to estimate the 2017 undocumented population.³²

2. Undocumented Population that Entered Without Inspection with Less Than Two Years of Residency

Initially, this report begins with the total number of undocumented immigrants who entered without inspection and with less than two years of residency; excludes those likely to receive asylum; and subsequently derives the number of undocumented immigrants who entered without inspection, have less than two years of residency, and likely will not receive asylum. By dividing this number by 729 (number of days that signify less than two years of residency), we can obtain the average number of undocumented immigrants who entered without inspection per day during the last two

years. Accordingly, this number, 451, represents the number of undocumented immigrants that would be additionally subject for every additional day that expedited removal is expanded.

Table 1. Undocumented Population that Entered Without Inspection with Less Than Two Years of Residency

Total undocumented population, 2017	11,100,000
Entered w/o inspection w/ less than two years of residency	355,176
Likely to receive relief through asylum	26,736
Entered w/o inspection w/ less than two years of residency and no asylum relief	328,440
	729
Entered w/o inspection per day and no asylum relief	451

Source: CMS 2017; DHS 2015; Part VI.D.2 of this Report.

3. Existing Undocumented Population Subject to Expedited Removal Under Proposed Expansions

Knowing the average number of undocumented immigrants subject to expedited removal who entered per day during the last two years, we are now able to calculate how many undocumented immigrants would be subject to 90-day, 180-day, one-year, and two-year expansions of expedited removal. To do so, we multiply 451 by one less day than a potential expansion.

For example, for a theoretical 90-day expansion, an undocumented immigrant must demonstrate that they have “been continuously physically present in the United States for the 90-day period immediately prior to the determination of their inadmissibility.”³³ Thus, under a 90-day expansion, undocumented immigrants with 89 days of presence would be subject to expedited removal, while undocumented immigrants with 90 days of presence or more would not. Accordingly, for a 90-day expansion, we multiply by 89; for a 180-day expansion, we multiply by 179; for a one-year expansion, we multiply by 364; and for a two-year expansion, we multiply by 729.

Table 2. Undocumented Population Subject to Expedited Removal Under Proposed Expansions

Subject to expedited removal per day	451
Continuous presence requirement (90 days)	89
Subject to 90-day expansion of expedited removal	40,098
Subject to expedited removal per day	451
Continuous presence requirement (180 days)	179
Subject to 180-day expansion of expedited removal	80,646
Subject to expedited removal per day	451
Continuous presence requirement (365 days)	364
Subject to one-year (365 days) expansion of expedited removal	163,995
Subject to expedited removal per day	451
Continuous presence requirement (730 days)	729
Subject to two-year (730 days) expansion of expedited removal	328,440

Source: CMS 2017; DHS 2015; Part VI.D.2. of this Report.

4. Future Undocumented Population Subject to Expedited Removal

To calculate the undocumented population that would be subject to an expansion of expedited removal in the future, this report examines historical entries of undocumented immigrants without inspection, projects those flows for future years, and excludes those likely to benefit from asylum. Specifically, Pew, using historical data, estimates that an average of 350,000 undocumented immigrants enter every year.³⁴ As previously stated, Pew also estimates that approximately 55% of undocumented immigrants enter the United States without inspection.³⁵

Thus, this report begins with the number of entries by undocumented immigrants per year; determines how many of those individuals will enter without inspection; excludes those likely to eventually receive relief through asylum (calculated in Part VI.D.2); obtains the number of future additional undocumented immigrants subject to expedited removal per year; and then multiplies that number by ten to determine the number additionally subject to expedited removal over ten years.

Table 3. Future Undocumented Population Subject to Expedited Removal

Entries by undocumented immigrants per year	350,000
Percentage who enter without inspection	55%
Entries by undocumented immigrants w/o inspection per year	192,500
Likely to receive relief through asylum	13,368
Undocumented immigrants subject to expedited removal per year	179,132
Undocumented immigrants subject to expedited removal over a decade	1,791,318

Source: Pew 2016; DHS 2015; Part VI.D.2. of this Report.

C. Notices to Appear

For the existing population subject to expedited removal, this report does not exclude undocumented immigrants who are currently in the United States and who have been issued Notices to Appear (NTA). NTAs are legal notices that formally place an undocumented immigrant into removal proceedings in our nation's immigration court.³⁶ Individuals with NTAs are not excluded, as DHS could potentially move to withdraw previously issued NTAs and instead refer undocumented immigrants for expedited removal, particularly if they fall within the expanded scope of expedited removal.³⁷ Individuals with counsel may be able to contest DHS's position to withdraw an NTA, but those without counsel will likely face a substantial burden to do so. For the future undocumented population, the methodology assumes that undocumented immigrants would be placed into expedited removal instead of receiving NTAs, per EO 13767 and the accompanying implementing memorandum.³⁸

D. Credible Fear Determinations and Asylum Grants

This report, however, does exclude undocumented immigrants who would be protected from expedited removal because they likely will eventually obtain relief through either an affirmative or defensive grant of asylum.

1. Credible Fear Determinations

If an undocumented immigrant, apprehended by immigration officers and subject to expedited removal, indicates they will apply for asylum or have a fear of returning to their home country,³⁹ that individual will be referred to an asylum officer for a "credible fear interview."⁴⁰ Importantly, the undocumented immigrant will be referred back to DHS for the resumption of expedited removal proceedings, if: (a) the asylum officer does not make a positive credible fear determination; or (b) an immigration judge who reviews a previous negative credible fear determination affirms that determination.⁴¹ Thus, while an undocumented immigrant may receive an initial positive credible fear determination, she may not ultimately receive asylum and instead may be referred back to DHS for expedited removal. Thus, a positive

credible fear determination, by itself, does not except an individual from the universe of those subject to expedited removal. Accordingly, this report looks at the population that will likely succeed in their asylum claim and not those who initially receive a positive credible fear determination but ultimately do not prevail on the underlying asylum claim.

2. Relief Under a Future Grant of Asylum

Undocumented immigrants who demonstrate credible fear of returning to their home country are issued an NTA, placed into removal proceedings before a judge, and given the opportunity to apply for asylum.⁴² Individuals pursuing defensive asylum, e.g. those applying for asylum while in removal proceedings, will wait an average of more than three years for approval.⁴³ Affirmative asylum applications, e.g. those filed with U.S. Citizenship and Immigration Services, take a minimum of two years to be completed.⁴⁴

Many will be protected from expedited removal because they pass their credible fear determination and eventually, years later, obtain an asylum grant. Thus, this report excludes, from current and future projections, the undocumented population that is protected from expedited removal because they will likely, one day, obtain a grant of asylum.

To determine approximately how many undocumented immigrants would be protected from expedited removal in this manner, we begin with the total number asylum grants over the most recent ten-year period for which data are available from DHS, 2006 through 2015, inclusive.⁴⁵ Then, we obtain the average number of asylum grants for this ten-year period.

Table 4. Affirmative and Defensive Asylum Grants (2006 - 2015)

Year	Grants
2006	26,352
2007	25,307
2008	23,021
2009	22,280
2010	19,746
2011	23,557
2012	28,146
2013	25,151
2014	23,374
2015	26,124
Total	243,058
Average	24,306

Source: DHS 2015.

As previously stated, Pew estimates that approximately 55% of undocumented immigrants enter the United States without inspection, e.g. do not enter with a valid visa, parole, or other legal entry.⁴⁶ Thus, to obtain the average number of these grants that were provided to an undocumented immigrant who entered without inspection, we multiply this average by 55%.⁴⁷ The resulting number represents the average historical number of undocumented immigrants who obtained asylum per year and originally entered without inspection.

Table 5. Undocumented Immigrants Not Subject to Expedited Removal due to Asylum

Average asylum grants per year between 2006 - 2015	24,306
Percentage who entered w/o inspection	55%
Obtained asylum but initially entered w/o inspection	13,368
Future entries w/o inspection not subject to expedited removal per year	13,368

Source: DHS 2015; Pew 2016.

Below, when estimating the current population subject to expedited removal, we assume that asylum grants for the last two years and next ten years will be similar to this historical average. Consequently, when estimating the current population subject to expedited removal, we discount this number from our projections. Importantly, this report does not take into consideration the number of asylees who have received asylum after qualifying for an exception to the one-year bar on asylum (and would not be subject to expedited removal because they may have one or two years, or more, of residency),⁴⁸ mostly because of the limited and narrow application of the exceptions associated with the bar⁴⁹ and the lack of data regarding this population.⁵⁰ Thus, the actual number of undocumented immigrants who will not be subject to expedited removal because of a likely future asylum grant is in all likelihood slightly lower because the total number of granted asylum applicants includes some that have been in the United States for many years.

E. Other Forms of Temporary and Permanent Relief

The report does not take into consideration undocumented immigrants who may be able to successfully contest the use of expedited removal due to eligibility for humanitarian or other forms of relief, such as withholding of removal, which is not considered because of the low number of annual grants⁵¹ and the uncertainty in determining how many individuals apply for and receive withholding of removal within the first two years of their residency. Additionally, this report does not consider other forms of permanent relief that would remove individuals from the universe of immigrants subject to expedited removal, such as adjustment through a family or employment petition, particularly because INA § 245(c) bars most undocumented immigrants from adjusting status through employment or through a non-immediate relative petition as a result of *any* previous unlawful presence or unlawful presence at the time of applying for relief.⁵² Moreover, INA § 245(a) bars undocumented immigrants from adjusting status if they entered without inspection.⁵³ Thus, jointly, INA § 245(c) and 245(a) comprehensively function to essentially bar undocumented immigrants who entered or will enter without inspection (the population covered by this report) from obtaining permanent status. Importantly, and as a testament to the extreme nature of expedited removal, even if an individual were eligible for adjustment of status, that individual could still be subject to expedited removal and would have no relief outside the asylum and credible fear process, per statute.

Furthermore, the methodology does not consider forms of temporary relief, such as Temporary Protected Status or Deferred Action for Childhood Arrivals, because undocumented immigrants who entered in the last two years or who will enter in the future are not eligible due to the respective date-of-entry requirements of these forms of relief.⁵⁴

VII. Conclusion

The current use and potential expansion of expedited removal represent a cruel and potentially constitutionally unsound exercise of this Administration's executive authority. Radically expanding the use of expedited removal is an unprecedented departure from previous Administrations and would not only further erode the due process rights of immigrants, but also disproportionately impact the most vulnerable, including asylum seekers, minors, and migrants fleeing horrific conditions. Our system of immigration laws is premised on the unshakeable promise that those who are eligible for relief and protection under our laws may avail themselves of those protections. Consequently, it is incumbent on President Trump to keep that promise and reverse his proposed expansion of expedited removal.

End Notes

- ¹ *A Primer on Expedited Removal*, American Immigration Council, Feb. 3, 2017, <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>.
- ² Border Security and Immigration Enforcement Improvements, Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017), available at <https://www.federalregister.gov/documents/2017/01/30/2017-02095/border-security-and-immigration-enforcement-improvements> [hereinafter “EO 13767”].
- ³ Memorandum from John F. Kelly, Secretary, U.S. Department of Homeland Security on Implementing the President's Border Security and Immigration Enforcement Improvements Policies 6–7, to Kevin McAleenan, Acting Commissioner, U.S. Customs and Border Protection, et. al. (Feb. 20, 2017), available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [hereinafter “DHS Border Enforcement Memo”].
- ⁴ *Id.* at 7.
- ⁵ TRAC Immigration, *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, http://trac.syr.edu/phptools/immigration/court_backlog/ (last accessed May 26, 2017).
- ⁶ Michael D. Shear and Ron Nixon, *New Trump Deportation Rules Allow Far More Expulsions*, N.Y. TIMES, Feb. 21, 2017, <https://www.nytimes.com/2017/02/21/us/politics/dhs-immigration-trump.html>.
- ⁷ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 302, Pub. L. No. 104-208, 110 Stat. 3009, available at <https://www.uscis.gov/sites/default/files/ocomm/ilink/0-0-0-10948.html#0-0-0-1185>.
- ⁸ This report uses the terms “removal” and “deportation” interchangeably. Before 1996, the federal government employed the terms “deportation” and “exclusion” when expelling noncitizens. After 1996, these mechanisms were merged and are now formally referred to as “removal.”
- ⁹ INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) (West 2017).
- ¹⁰ *Id.*
- ¹¹ Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004); Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 Fed. Reg. 4902 (Jan. 17, 2017).
- ¹² See Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002).
- ¹³ INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (West 2017).
- ¹⁴ INA § 240, 8 U.S.C. § 1229a (West 2017).
- ¹⁵ See, e.g., *Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (“[I]mmigration proceedings must conform to the Fifth Amendment’s due process requirement.”).
- ¹⁶ INA § 240(c)(5), 8 U.S.C. § 1229a(c)(5) (West 2017); INA § 242, 8 U.S.C. § 1252 (West 2017).
- ¹⁷ INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (“If an immigration officer determines that an alien [is subject to expedited removal] 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.”) (emphasis added).
- ¹⁸ Kristin Macleod-Ball, et. al, *Expedited Removal: What has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements (Issued on January 25, 2017)* 3, National Immigration Project of the National Lawyers Guild, American Immigration Council, ACLU, Feb. 20, 2017, available at https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2017_17Feb-expedited-removal.pdf [hereinafter “NIPNLG Practice Advisory”].
- ¹⁹ EO 13767, *supra* note 2, at § 11(b); Tal Kopan, *Trump admin quietly made asylum more difficult in the US*, CNN, March 8, 2017, <http://www.cnn.com/2017/03/08/politics/trump-immigration-crackdown-asylum/>.

²⁰ American Immigration Lawyers Association, *Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States* 8, June 6, 2016, www.aila.org/File/DownloadEmbeddedFile/68331.

²¹ NIPNLG Practice Advisory, *supra* note 18, at 9–10.

²² *A Primer on Expedited Removal*, American Immigration Council, Feb. 3, 2017, <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>.

²³ INA § 235(b)(1)(A)(iii)(II), 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (West 2017); 8 C.F.R. § 235.3(b)(1)(ii) (2017).

²⁴ 8 C.F.R. § 235.3(b)(1) (2017).

²⁵ Draft Memorandum from John F. Kelly, Secretary, U.S. Department of Homeland Security on Implementing the President's Border Security and Immigration Enforcement Improvements Policies 6, to Kevin McAleenan, Acting Commissioner, U.S. Customs and Border Protection, et. al. (Jan. 25, 2017), available at <https://goo.gl/OQIQcz> [hereinafter “Draft DHS Border Enforcement Memo”].

²⁶ *Cf.* Draft DHS Border Enforcement Memo, *supra* note 25, with DHS Border Enforcement Memo, *supra* note 3. (The draft memorandum contains the following language: “I direct the Commissioner of CBP and the Director of ICE to apply the expedited removal provisions of section 235(b)(1)(A)(i) and (ii) of the INA immediately to all aliens described in section 235(b)(1)(A)(iii)(II)—specifically, aliens apprehended anywhere in the United States, who have not been admitted or paroled into the United States, and who have not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been continuously physically present in the United States for the 90-day period immediately prior to the determination of their inadmissibility.” The final memorandum instead used this language: “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)(1)(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.”).

²⁷ Numbers are rounded when applicable.

²⁸ Robert Warren, *US Undocumented Population Drops Below 11 Million in 2014, with Continued Declines in the Mexican Undocumented Population*, JOURNAL ON MIGRATION AND HUMAN SECURITY, (4)(1): 1-15 (2016), available at <http://jmhs.cmsny.org/index.php/jmhs/article/view/58> [hereinafter “CMS Report”].

²⁹ *Id.*

³⁰ Email from Robert Warren, Senior Visiting Fellow, Center for Migration Studies, to Jose Magaña-Salgado, Managing Policy Attorney, Immigrant Legal Resource Center, (March 13, 2017) (on file with author).

³¹ *Id.*

³² *Id.* For more information regarding the 2014 population projections that formed the foundation of the 2017 projections, please see CMS Report, *supra* note 28, or visit the Center for Migration Studies’ website at <http://cmsny.org/>.

³³ Draft DHS Border Enforcement Memo, *supra* note 25, at 6.

³⁴ Jeffrey S. Passel and D’Vera Cohn, *Unauthorized immigrant population stable for half a decade*, Pew Research Center, Sept. 21, 2016, <http://www.pewresearch.org/fact-tank/2016/09/21/unauthorized-immigrant-population-stable-for-half-a-decade/> (“The Center estimates that, since 2009, there has been an average of about 350,000 new unauthorized immigrants each year.”).

³⁵ *Modes of Entry for the Unauthorized Migrant Population*, Pew Research Center Hispanic Trends, May 22, 2006, <http://www.pewhispanic.org/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/> (“As much as 45% of the total unauthorized migrant population entered the country with visas that allowed them to visit or reside in the U.S. for a limited amount of time.”).

³⁶ 8 C.F.R. § 1239.1 (2004).

³⁷ Once an NTA is filed with the immigration court, only the judge has jurisdiction to terminate proceedings. However, great deference is given to ICE’s decision to prosecute. Those without counsel in proceedings are not likely to overcome a motion filed by ICE to withdraw an NTA and terminate removal proceedings.

³⁸ DHS Border Enforcement Memo, *supra* note 3.

³⁹ INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (West 2017); 8 C.F.R. § 235.3(b)(4) (2011).

⁴⁰ 8 C.F.R. § 208.30(d) (2011).

⁴¹ INA § 240, 8 U.S.C. § 1229a (West 2017); 8 C.F.R. § 1003.42(f) (2004).

⁴² INA § 240, 8 U.S.C. § 1229a (West 2017); 8 C.F.R. § 1003.42(f) (2004).

⁴³ *Asylum in the United States*, American Immigration Council, Aug. 22, 2016, <https://www.americanimmigrationcouncil.org/research/asylum-united-states> (“Asylum-seekers pursuing status through the defensive process (in immigration court) face wait times of more than three years, on average. In some states, the wait times can be as long as five years, as is the case in Texas.”).

⁴⁴ *Id.* (“Those applying for asylum affirmatively through USCIS wait, on average, at least two years for their initial interview with an asylum officer.”).

⁴⁵ OFFICE OF IMMIGRATION STATISTICS, U.S. DEPARTMENT OF HOMELAND SECURITY, *2015 Yearbook of Immigration Statistics* 43, Dec. 2016, https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf.

⁴⁶ *Modes of Entry for the Unauthorized Migrant Population*, Pew Research Center Hispanic Trends, May 22, 2006, <http://www.pewhispanic.org/2006/05/22/modes-of-entry-for-the-unauthorized-migrant-population/>.

⁴⁷ *Id.*

⁴⁸ INA § 208(a)(2)(B), 8 U.S.C. 1158(a)(2)(B) (West 2017) (“Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien’s arrival in the United States.”); 8 C.F.R. § 208.4(a)(2) (2009).

⁴⁹ Eleanor Acer, et. al, *The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency* 29, Human Rights First, Sept. 2010, available at <https://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf> (“Since the filing deadline was instituted, many legal experts have expressed concern that some asylum officers and immigration judges are applying the exceptions too narrowly, sometimes in direct contravention of Congressional intent.”).

⁵⁰ *Id.* at 29 (“These statistics do not reveal how many of these asylum seekers were later determined to be eligible for an exception (or should have been found to be eligible for an exception.”).

⁵¹ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEPARTMENT OF JUSTICE, *FY 2015 Statistics Yearbook* K5, April 2016, <https://www.justice.gov/eoir/page/file/fysb15/download> (noting that for FY2015 there were only 1,199 withholding of removal cases).

⁵² INA § 245(c), 8 U.S.C. § 1255(c) (West 2017).

⁵³ *Id.*

⁵⁴ See Memorandum from Janet Napolitano, Secretary, U.S. Department of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, et. al, (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; (requiring that an eligible individual “has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum,” e.g. June 15, 2012); U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, *Temporary Protected Status*, March 6, 2017, <https://www.uscis.gov/humanitarian/temporary-protected-status> (To be eligible for TPS, individuals must “[h]ave been continuously physically present (CPP) in the United States since the effective date of the most recent designation date of [their] country.”).



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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.