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Immigration Policy on Expedited Removal of Aliens

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Summary

Expedited removal, an immigration enforcement strategy originally conceived to operate at the borders and ports of entry, is being expanded, raising a set of policy, resource, and logistical questions. Expedited removal is a provision under which an alien who lacks proper documentation or has committed fraud or willful misrepresentation of facts may be removed from the United States without any further hearings or review, unless the alien indicates a fear of persecution. Congress added expedited removal to the Immigration and Nationality Act (INA) in 1996, making it mandatory for arriving aliens, 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. Until recently, expedited removal was only applied to aliens at ports of entry.

Some are calling for expanding mandatory expedited removal in the interior of the country. Proponents of expanding expedited removal point to the lengthy procedural delays and costs of the alien removal process. They cite statistics that indicate that the government is much more successful at removing detained aliens (aliens in expedited removal must be detained) than those not detained. They argue that aliens who entered the country illegally should not be afforded the due process and appeals that those who entered legally are given under the law. They point to the provision added to INA in 1996 that clarified that aliens who are in the United States without inspection are deemed to be “arriving,” i.e., not considered to have entered the United States and acquired the legal protections it entails. Advocates for requiring mandatory expedited removal further maintain that it is an essential policy tool to handle the estimated 10.4 million unauthorized aliens in the United States as of 2004.

Opponents of the expansion of mandatory expedited removal to the interior argue that it poses significant logistical problems. They cite increased costs caused by mandatory detention and the travel costs of repatriation. They also express concern that apprehended aliens will not be given ample opportunity to produce evidence that they are not subject to expedited removal. In addition, they argue that expedited removal limits an alien’s access to relief from deportation. Some also predict diplomatic problems if the United States increases repatriations of aliens who have not been afforded a hearing before a judge.

The Bush Administration is taking an incremental approach to expanding expedited removal. From April 1997, to November 2002, expedited removal only applied to arriving aliens at ports of entry. In November 2002, the Administration expanded expedited removal to aliens arriving by sea who are not admitted or paroled. 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 can not 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. This report will be updated.

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Immigration Policy on Expedited Removal of Aliens

Background

Overview

Expedited removal, an immigration enforcement strategy originally conceived to operate at the borders and ports of entry, recently has been expanded in certain border regions. Whether the policy should be made mandatory and extended into the interior of the country is emerging as an issue. Expanding expedited removal raises a set of policy, resource, and logistical questions.

Expedited removal is a provision in the Immigration and Nationality Act (INA),¹ under which an alien who lacks proper documentation or has committed fraud or willful misrepresentation of facts to gain admission into the United States is inadmissible² and may be removed from the United States without any further hearings or review,³ unless the alien indicates either an intention to apply for asylum⁴ or a fear of persecution. Aliens who receive negative “credible fear” determinations may request that an immigration judge review the case.⁵ Under expedited removal,

¹ INA §235(b)(1)(A)(i); 8 U.S.C. §1225(b)(1)(A)(i).

² All aliens must satisfy to immigration inspectors upon entry to the United States that they are not ineligible for admission under the so-called “grounds for inadmissibility” of INA §212. These categories are: health-related grounds; criminal history; national security and terrorist concerns; public charge; seeking to work without proper labor certification; illegal entrants and immigration law violations; lacking proper documents; ineligible for citizenship; and, aliens previously removed.

³ Aliens from Western Hemisphere countries with which the United States does not have full diplomatic relations (e.g., Cuba) are excluded from expedited removal. In addition, a former Immigration and Naturalization Service (INS) policy memorandum (Aug. 1997), stated that unaccompanied minors should be placed in expedited removal in limited circumstances.

⁴ The INA provides immigration protections to aliens who have a well-founded fear of persecution, most notably in the form of asylum status. Aliens seeking asylum must demonstrate a well-founded fear that if returned home, they will be persecuted based upon one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion.

⁵ Aliens who are in expedited removal and claim asylum are given a “credible fear” hearing to determine if there is support for their asylum claim. The INA states that “the term credible fear of persecution means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such

(continued...)

both administrative and judicial review are limited generally to cases in which the alien claims to be a U.S. citizen or to have been previously admitted as a legal permanent resident, a refugee, or an asylee.⁶

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.⁷ Although under law, the Attorney General⁸ may apply expedited removal to any alien who has not been admitted or paroled into the United States and cannot show that they have been continuously present for two years,⁹ expedited removal has been applied in a more limited manner.

Under regulation, expedited removal only applied to arriving aliens at ports of entry from April 1997 to November 2002.¹⁰ In November 2002, the Bush Administration extended expedited removal to aliens arriving by sea who are not admitted or paroled.¹¹ 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. international southwest land border, and have not established to the satisfaction of an immigration

⁵ (...continued)

other facts as are known to the officer, that the alien could establish eligibility for asylum...” (INA §235(b)(1)(B)(v); 8 U.S.C. §1225). Those who pass the credible fear hearing are placed into formal removal proceedings under INA §240. For a discussion of removal under §240 see *Appendix A*. For more on credible fear, see CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by Ruth Ellen Wasem.

⁶ The INA states that judicial review of an expedited removal order is available in habeas corpus proceedings, but the review is limited to whether the petitioner is an alien, was ordered expeditiously removed, or was previously granted legal permanent resident (LPR), refugee or asylee status.

⁷ INA §212(a)(9)(i).

⁸ The Homeland Security Act of 2002 (P.L. 107-296) abolished the INS and transferred most of its functions to various bureaus in the new Department of Homeland Security (DHS) effective Mar. 1, 2003. Expedited removal policy is being administered by the Secretary of Homeland Security.

⁹ Under regulation, any absence from the United States breaks the period of continuous presence (8 C.F.R. 325.3(b)(1)(ii)).

¹⁰ Department of Justice, “Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures; Final Rule,” 62 *Federal Register* 10311, Mar. 6, 1997.

¹¹ “Parole” is a term in immigration law that means the alien has been granted temporary permission to enter and be present in the United States. Parole does not constitute formal admission to the United States and parolees are required to leave when the parole expires, or if eligible, to be admitted in a lawful status. Department of Justice, “Notice Designating Aliens Subject to Expedited Removal Under §235(b)(1)(A)(iii) of the Immigration and Nationality Act; Notice,” 67 *Federal Register* 68923, Nov. 13, 2002.

officer that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of encounter.

Legislative History

Failure to have valid documents has long been a ground for exclusion from the United States.¹² With regard to fraudulent entry in general, the INA provides that “any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.”¹³

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.¹⁴ 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 1986.¹⁵

In 1993, during the 103rd 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 104th 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

¹² INA §212(a)(7).

¹³ INA §212(a)(6)(C).

¹⁴ In addition to an inadmissibility hearing, aliens lacking proper documents could request asylum in the United States at that time.

¹⁵ P.L. 99-603, S. 1200.

in the United State without inspection to be arriving.¹⁶ 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.”¹⁷ 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.¹⁸

Current Policy

Basics of Expedited Removal

An immigration officer can summarily exclude an alien arriving without proper documentation or an alien present in the United States for less than two years, unless the alien expresses an intent to apply for asylum or has a fear of persecution or torture. According to DHS immigration policy and procedures, Customs and Border Protection (CBP) inspectors, as well as other DHS immigration officers, are required to ask each individual who may be subject to expedited removal (i.e., arriving aliens who lack proper immigration documents) a series of “protection questions” to identify anyone who is afraid of return.¹⁹

If the alien expresses a fear of return, the alien is supposed to be detained by the Immigration and Customs Enforcement (ICE) Bureau and interviewed by an asylum officer from DHS’ Bureau of Immigration and Citizenship Services (USCIS).²⁰ The asylum officer then makes the “credible fear” determination of the alien’s claim. Those found to have a “credible fear” are referred to an EOIR immigration judge, which places the asylum seeker on the *defensive* path to asylum.²¹ In those cases in which the alien requests it, an immigration judge may review the USCIS asylum

¹⁶ §302 of H.R. 2202 in the 104th Congress.

¹⁷ §141 of S. 1664 in the 104th Congress. In the Senate version of a related bill (S. 269), as introduced, §141 was characterized as “special port-of-entry exclusion procedure for aliens using documents fraudulently or failing to present documents, or excludable aliens apprehended at sea.”

¹⁸ The IIRIRA provisions amended §235 of the INA. For an earlier enacted version of expedited removal see The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA; P.L. 104-132, §422).

¹⁹ The required “protection questions” are Why did you leave your home country or country of last residence? Do you have any fear or concern about being returned to your home country or being removed from the United States? Would you be harmed if you were returned to your home country or country of last residence? Do you have any questions or is there anything else you would like to add?

²⁰ For further discussions of expedited removal, see CRS Report RL32621, *U.S. Immigration Policy on Asylum Seekers*, by Ruth Ellen Wasem.

²¹ For more information, see *Obtaining Asylum in the United States: Two Paths to Asylum*, at the USCIS website [<http://uscis.gov/graphics/services/asylum/paths.htm#seekers>].

officer's determination that the alien does not have a credible fear of persecution. Under IIRIRA, the review must be concluded "as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days" after the asylum officer's finding of no credible fear.²²

The law states that expedited removals are not subject to administrative appeals; however, those in expedited removal who claim a legal right to reside in the United States based on citizenship, legal permanent residence, asylee or refugee status are to be provided with additional procedural protections, rather than being immediately returned. Aliens whose visas have been revoked by the Department of State are subject to expedited removal. The expedited removal provisions provide very limited circumstances for administrative and judicial review of those aliens who are summarily excluded or removed.²³ Additionally, those in expedited removal are subject to mandatory detention.²⁴

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).²⁵ The discussion accompanying the regulation defining expedited removal procedures and "arriving aliens" clarifies:

The [Justice] Department acknowledges that application of the expedited removal provisions to aliens already in the United States will involve more complex determinations of fact and will be more difficult to manage, and therefore wishes to gain insight and experience by initially applying these new provisions on a more limited and controlled basis.

The Department does, however, reserve the right to apply the expedited removal procedures to additional classes of aliens within the limits set by the statute, if, in the [INS] Commissioner's discretion, such action is operationally warranted. It is emphasized that a proposed expansion of the expedited removal procedures may occur at any time and may be driven either by specific situations such as a sudden influx of illegal aliens motivated by political or economic unrest or other

²² INA §235(b)(1)(B)(iii)(III).

²³ INA §235(b)(1)(C).

²⁴ For more information on mandatory detention of aliens see CRS Report RL31606, *Detention of Noncitizens in the United States*, by Alison Siskin and Margaret Mikyung Lee; and CRS Report RL32369, *Immigration-Related Detention: Current Legislative Issues*, by Alison Siskin.

²⁵ "The term *arriving alien* means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains such even if paroled pursuant to §212(d)(5) of the Act, except that an alien who was paroled before Apr. 1, 1997, or an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of §235(b)(1)(A)(i) of the Act." 8 CFR §1.1(q).

events or by a general need to increase the effectiveness of enforcement operations at one or more locations.²⁶

Expedited Removal Procedure at the Ports of Entry. The logistics of expedited removal at ports of entry are fairly straightforward. Aliens placed in expedited removal proceedings are detained pending a determination of their removability. 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.²⁷

Arrivals at Sea

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.²⁸ 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.²⁹ 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.³⁰

Expansion Along the Border

In addition, on August 11, 2004, DHS published a notice potentially expanding the use of expedited removal by authorizing the agency to place in expedited removal proceedings aliens who:

- are determined to be inadmissible because they lack proper documents;
- are present in the United States without having been admitted or paroled following inspection by an immigration officer at a designated port of entry;
- are encountered by an immigration officer within 100 air miles of the U.S. international land border; and

²⁶ Department of Justice, "Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures; Final Rule," 62 *Federal Register* 10313, Mar. 6, 1997.

²⁷ INA §241(c), (d).

²⁸ Department of Justice, "Notice Designating Aliens Subject to Expedited Removal Under §235(b)(1)(A)(iii) of the Immigration and Nationality Act," 67 *Federal Register* 68923, Nov. 13, 2002.

²⁹ 23 I&N Dec. 572 (A.G. 2003).

³⁰ For more information on Haitian migration and this incident, see CRS Report RS21342, *U.S. Immigration Policy on Haitian Migrants*, by Ruth Ellen Wasem.

- have not established to the satisfaction of an immigration officer that they have been physically present in the United States continuously for the 14-day period immediately preceding the date of encounter.

The notice was given effect with respect to apprehensions made within the border patrol sectors of Laredo, Rio Grande Valley (McAllen), Del Rio, Marfa, El Paso, Tucson, Yuma, El Centro, San Diego, Blaine, Spokane, Havre, Grand Forks, Detroit, Buffalo, Swanton, and Houlton. Expedited removal is only applied to nationals who are not from Mexico or Canada,³¹ and Canadians and Mexicans with histories of criminal activities or immigration violations.³² DHS stated that expanding expedited removal on the border “will enhance national security and public safety by facilitating prompt immigration determinations, enabling DHS to deal more effectively with the large volume of persons seeking illegal entry, and ensure the removal from the country of those not granted relief, while at the same time protecting the rights of the individuals affected.”³³ DHS also maintains that the expansion of expedited removal will interfere with the operation of human trafficking and smuggling organizations.³⁴

Nonetheless, DHS states that expedited removal currently can not be applied to the nearly one million aliens who are apprehended annually on the southwest border, as it is not possible to initiate formal removal proceedings against all of the aliens. The majority of aliens apprehended along the southwest border are Mexican nationals who are “voluntarily” returned to Mexico without a formal removal hearing.³⁵ Nationals from countries other than Mexico (often referred to as Other-than Mexicans or OTMs)³⁶ must be returned to their home country by aircraft (when apprehended at an airport) or placed into removal proceedings.³⁷

Although the August 2004 notice stated that expedited removal could be applied to numerous border patrol sectors along the southwest and northern borders, *it was*

³¹ Nonetheless, Mexican nationals have historically been the largest group subject to expedited removal. From FY2000-FY2003, Mexicans comprised 85.1% of all aliens issued expedited removal orders. U.S. Commission on International Religious Freedom, *Study on Asylum Seekers in Expedited Removal, Statistical Report on Expedited Removal, Credible Fear, and Withdrawal, FY 2000-2003*, Feb. 2005.

³² Cubans are not subject to expedited removal under this regulation.

³³ Department of Homeland Security, “Designating Aliens for Expedited Removal,” 69 *Federal Register* 48877, Aug. 11, 2004.

³⁴ Department of Homeland Security, “Designating Aliens for Expedited Removal,” 69 *Federal Register* 48877-48881, Aug. 11, 2004.

³⁵ Voluntary departure is a cost saving measure as DHS does not have to pay for aliens to be returned to their home countries. Nonetheless, since aliens who agree to voluntary departure who are not at the border, agree to leave the United States on their own, the aliens may not depart from the United States.

³⁶ For more information on the treatment of OTMs encountered on the southwest border, see CRS Report RL33097, *Border Security: Apprehensions of ‘Other Than Mexican’ Aliens*, by Blas Nuñez-Neto, Alison Siskin, and Stephen Viña.

³⁷ Department of Homeland Security, “Designating Aliens for Expedited Removal,” 69 *Federal Register* 48877-48881, Aug. 11, 2004.

only expanded to all eligible southwest border patrol sections in September 2005. Beginning in August 2004, expedited removal was piloted in the Laredo, Texas and Tucson, Arizona sectors, and then expanded to the Rio Grande Valley, Texas sector. In addition, expedited removal was used in the Yuma and El Centro Arizona, and the San Diego, California sectors only for aliens who met the criteria for expedited removal and had illegally reentered the United States while being subject to prior orders of exclusion, removal, or deportation.³⁸ On September, 14, 2005, the Secretary of Homeland Security stated that border patrol agents had been trained in the application of expedited removal and expanded the use of expedited removal to the entire southwest border. The Secretary also reported, that because of support from Congress, DHS would acquire the additional detention space needed to detain the increased number of aliens subject to expedited removal.³⁹

Statistics

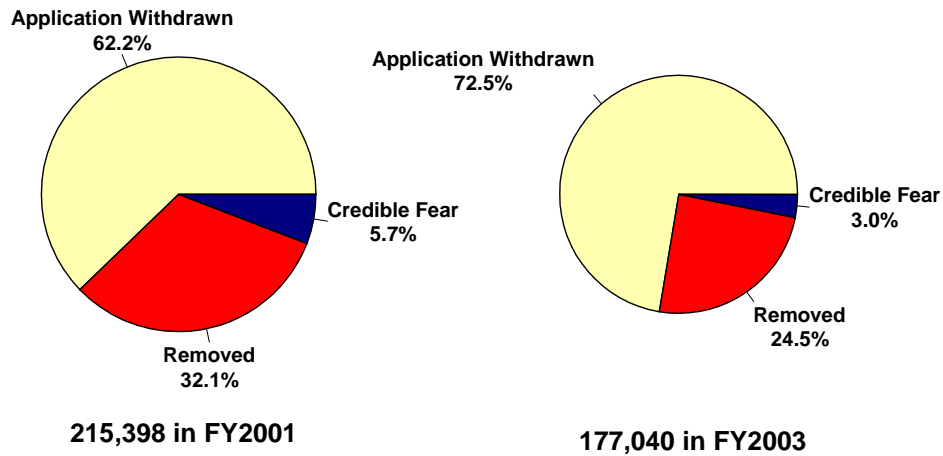
Although expedited removal has recently been expanded, the currently available data on expedited removal only includes expedited removals at the ports of entry. As **Figure 1** indicates, many aliens subject to expedited removal are given the opportunity to withdraw their application for admission, and thus they are not subject to any of the bars from reentry caused by a formal removal from the United States. Of the 177,040 aliens subject to expedited removal in FY2003, almost three quarters (72.5%) withdrew their application. That same year, 3% were referred to USCIS for a credible fear determination. During the four-year period spanning FY2000-FY2003, 93% of all the aliens who were referred for a credible fear determination were approved.⁴⁰

³⁸ Testimony of Chief, Office of the Border Patrol, David Aguilar, in U.S. Congress, House Committee on Appropriations, Subcommittee on Homeland Security, *Coping with Illegal Immigration on the Southwest Border*, hearings, 109th Cong., 2nd sess., July, 12, 2005. (Hereafter, Aguilar, *Coping with Illegal Immigration on the Southwest Border*.)

³⁹ Department of Homeland Security, "DHS Expands Expedited Removal Authority Along Southwest Border," Sept. 14, 2005. Available at [<http://www.dhs.gov/dhspublic/display?content=4816>].

⁴⁰ U.S. Commission on International Religious Freedom, *Study on Asylum Seekers in Expedited Removal*, Feb. 2005, pp. 32-33.

**Figure 1. Aliens Subject to Expedited Removal:
Comparative Outcomes in FY2001 and FY2003**



Source: CRS presentation of data compiled by the U.S. Commission on International Religious Freedom from Immigration and Customs Enforcement, Customs and Border Protection, and U.S. Citizenship and Immigration Services.

Over 264 million aliens were inspected in FY2003. The majority of travelers (approximately 80%) enter the United States at a land port of entry, and, as a result, the majority of expedited removals are issued at land ports of entry. Over the years, the southwest border has seen the highest volume of travelers seeking entry into the United States, and the largest number of expedited removals.⁴¹

Mexicans comprised 85.1% of all aliens issued expedited removal orders from FY2000-FY2003. They received a total of 199,079 orders during these four years. Aliens from Brazil followed at a distant second with 2.0% (4,705) and aliens from the Dominican Republic were third with 1.5% (3,602) of all expedited removal orders from FY2000-FY2003.⁴² An earlier study found that Mexicans made up 91%

⁴¹ For data analysis of immigration inspections, see CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*, coordinated by Ruth Ellen Wasem; for data analysis of expedited removal, see U.S. Commission on International Religious Freedom, *Study on Asylum Seekers in Expedited Removal, Statistical Report on Expedited Removal, Credible Fear, and Withdrawal, FY 2000-FY2003*, Feb. 2005.

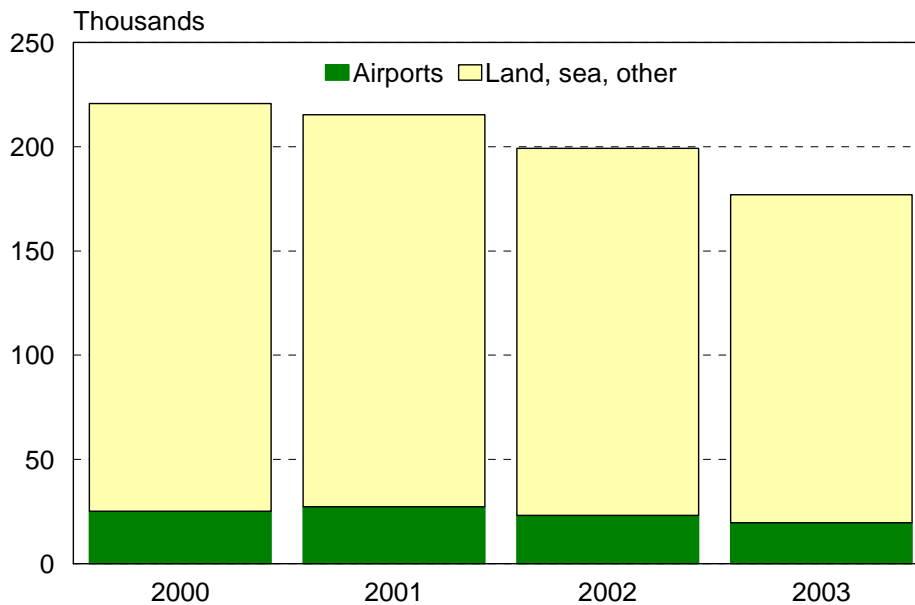
⁴² Compilation of data from Immigration and Customs Enforcement, Customs and Border Protection, and U.S. Citizenship and Immigration Services presented in U.S. Commission on International Religious Freedom, *Study on Asylum Seekers in Expedited Removal, Statistical Report on Expedited Removal, Credible Fear, and Withdrawal, FY 2000-FY2003*, (continued...)

of the approximately 190,000 persons removed pursuant to expedited removal from FY1997-FY1999.⁴³

Issues

Due Process

Figure 2. Aliens Expeditiously Removed, FY2000-FY2003



Source: CRS presentation of data compiled by the U.S. Commission on International Religious Freedom from Immigration and Customs Enforcement, Customs and Border Protection, and U.S. Citizenship and Immigration Services.

In terms of procedural due process under the Fifth Amendment, critics of expedited removal maintain that immigration law has long made a distinction between those aliens seeking admission to the United States and those who are already within the United States, irrespective of the legality of the entry.⁴⁴ In the latter instance, they observe, the Supreme Court has recognized additional rights and privileges not extended to those in the former category, who are merely “on the

⁴² (...continued)
Feb. 2005.

⁴³ Center for Human Rights and International Justice, University of California, Hastings College of Law, *Report on the First Three Years of Implementation of Expedited Removal*, May 2000.

⁴⁴ For further analysis of legal issues, see CRS Report RL32399, *Border Security: Inspections Practices, Policies, and Issues*, by Ruth Ellen Wasem, Jennifer Lake, James Monke, Lisa Seghetti, and Stephen Viña.

threshold of initial entry.”⁴⁵ Some legal scholars continue to question whether the Constitution applies at all to aliens seeking entry at the border or a port of entry, particularly in determining an alien’s right to be here.⁴⁶

Proponents of expedited removal state that it is well settled in the courts that aliens seeking admission have no constitutional rights with respect to their applications for admission. Accordingly, they cite the 1998 U.S. District Court decision in *AILA v. Reno*, in which the court concluded that the aliens “cannot avail themselves of the protections of the Fifth Amendment to guarantee certain procedures with respect to their admission.”⁴⁷ Proponents similarly reject arguments based upon equal protection claims for discrimination.⁴⁸

Protections for Asylum Seekers

Proponents of expedited removal reference the provisions giving aliens who express a fear of persecution or an intention to seek asylum the opportunity for a credible fear determination. They usually cite statistics indicating that more than 90% of aliens who express a fear are deemed to be credible (pass their credible fear hearing) and are able to bring their cases to an immigration judge. They also note that the U.S. Commission on International Religious Freedom (USCIRF) study found that DHS has mandatory procedures in place to ensure that asylum seekers are protected under expedited removal.⁴⁹ Testifying on the issue of expedited removal, C. Stewart Verdery, Jr., formerly Assistant Secretary for Border and Transportation Security Policy and Planning in DHS, concluded, “I am heartened to see that internal and external reviews of the asylum process largely have concluded that DHS has handled this subset of cases appropriately.”⁵⁰

Critics of expedited removal maintain that a low-level immigration officer’s authority to order removal is virtually unchecked. The officer’s decision to place the person in expedited rather than regular removal proceedings, they argue, can result in the person losing substantive rights. Indeed, they assert that there have been

⁴⁵ *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (articulating the “entry fiction” doctrine).

⁴⁶ For an example of this argument see Mary Kenny, *DHS Announces Unprecedented Expansion of Expedited Removal to the Interior*, American Immigration Law Foundation Legal Action Center Practice Advisory, Aug. 13, 2004. Available at [http://www.aifl.org/lac/lac_pa_081704.asp]. (Hereafter Kenny, *DHS Announces Unprecedented Expansion of Expedited Removal to the Interior*.)

⁴⁷ *American Immigration Lawyers Association (AILA) v. Reno*, Nos. 97-0597, 97-1237, and 97-1229 (D.D.C. 1998).

⁴⁸ *Ibid.*

⁴⁹ U.S. Commission on International Religious Freedom, *Study on Asylum Seekers in Expedited Removal*, Feb. 2005

⁵⁰ U.S. Senate Committee on the Judiciary, Subcommittee on Terrorism, Technology and Homeland Security and Subcommittee on Immigration, Border Security and Citizenship, hearing on “The Southern Border in Crisis: Resources and Strategies to Improve National Security,” June 7, 2005.

reports of abuse of the procedure since it was first implemented at the ports of entry and many individuals with valid claims have been erroneously removed.⁵¹ Critics refer to one investigation that found cases where aliens had requested the opportunity to apply for asylum but were refused and “pushed back” at primary inspection.⁵²

Mandatory Detention of Asylum Seekers. As discussed, 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.⁵³ 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 enabled inadmissible aliens falsely claiming persecution to enter the country. As a result, many argued that the only way to deter fraudulent asylum claims was to detain asylum seekers rather than releasing them on their own recognizance. Indeed the practice of detaining asylum seekers has reduced the number of fraudulent asylum claims.⁵⁴

However, others contend that the policy of detaining all asylum seekers who enter without proper documentation is too harsh. The position of the United Nations High Commission on Refugees is that detention of asylum seekers is “inherently undesirable.”⁵⁵ They argue that detention may be psychologically damaging to an already fragile population such as those who are escaping from imprisonment and torture in their countries. Often the asylum seeker does not understand why they are being detained. Additionally, asylum seekers are often detained with criminal aliens. From April 1, 1997 through September 30, 2001 there were 34,736 aliens in expedited removal who made a claim of credible fear. Of these, 33,551 were detained, and 1,185 were paroled.⁵⁶

⁵¹ For examples of this view, see American Immigration Law Foundation, *DHS Announces Unprecedented Expansion of Expedited Removal to the Interior*, by Mary Kenney, Aug. 13, 2004; and Center for Human Rights and International Justice, University of California, Hastings College of Law, *Report on the First Three Years of Implementation of Expedited Removal*, May 2000.

⁵² CBP has stated that it is “very concerned and dismayed that this is happening contrary to policy, and is taking steps to address this.” U.S. Commission on International Religious Freedom, *Study on Asylum Seekers in Expedited Removal*, Feb. 2005.

⁵³ H.R. 257, introduced on Mar. 2, 2005, and H.R. 2092, introduced on May 23, 2005, by Representative Sheila Jackson Lee, would remove the requirement that those in expedited removal are subject to mandatory detention.

⁵⁴ CRS Issue Brief IB93095, *Immigration: Illegal Entry and Asylum Issues*, coordinated by Ruth Ellen Wasem. This report is archived and available from the author.

⁵⁵ Office of the of the United Nations High Commissioner for Refugees. *UNHRC Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, February 1999. p. 1.

⁵⁶ Phone call with Maureen Stanton, INS Congressional Affairs, Aug. 6, 2002.

Coordination Across Agencies

Concerns about the coordination across agencies involved in expedited removal are arising, an issue that some observers argue has been exacerbated by the dispersal of immigration functions into four different agencies.⁵⁷ While one evaluation points to longstanding immigration management issues,⁵⁸ another study that focused on expedited removal concludes “[t]he impediments to communication and information sharing within DHS ... are serious.” This study further maintains:

Some procedures were applied with reasonable consistency, but compliance with others varied significantly, depending upon where the alien arrived, and which immigration judges or inspectors addressed the alien’s claim. Most procedures lacked effective quality assurance measures to ensure that they were consistently followed.⁵⁹

Supporters of expedited removal point to evidence of cooperation among the agencies and maintain that proper training has been a key part of the expedited removal deployment.⁶⁰ The Administration states that all immigration officers who conduct expedited removal proceedings have been trained in how to implement the statutory provisions and regulations. It further argues that it “developed extensive, detailed regulations and procedures that go far beyond the statutory requirements to ensure fair and consistent application of the law,” and adds that these regulations, “were developed following public comment and input from various immigrant, legal and community-based groups...”⁶¹

Expansion of Expedited Removal

There have been discussions about expanding expedited removal to include all groups authorized under statute. In other words, aliens who had illegally entered the United States and could not prove that they had been continuously present for more than two years would be detained and removed without hearings or review unless they claimed asylum. Proponents argue that expedited removal is necessary to stretch

⁵⁷ Homeland Security Act of 2002 (P.L. 107-296) abolished INS and transferred most of its functions from the Department of Justice (DOJ) to several bureaus in DHS. The responsibilities for expedited removal are spread across Customs and Border Protection (apprehensions and inspections), Immigration and Customs Enforcement (investigations, arrests, detention and deportation), U.S. Citizenship and Immigration Services (credible fear determination, as well as all other immigration and naturalization adjudications), and DOJ’s Executive Office for Immigration Review (asylum, immigration and removal hearings).

⁵⁸ U.S. Government Accountability Office, *Management Challenges Remain in Transforming Immigration Programs* GAO-05-81, Oct. 2004.

⁵⁹ U.S. Commission on International Religious Freedom, *Study on Asylum Seekers in Expedited Removal*, Executive Summary, p. 4, Feb. 2005.

⁶⁰ U.S. Senate Committee on the Judiciary, Subcommittee on Terrorism, Technology and Homeland Security and Subcommittee on Immigration, Border Security and Citizenship, hearing on “The Southern Border in Crisis: Resources and Strategies to Improve National Security,” June 7, 2005.

⁶¹ U.S. Citizenship and Immigration Services, Fact Sheet, *Expedited Removal*, Nov. 8, 2002.

enforcement resources.⁶² Opponents note that there are other ways to accelerate the removal process (such as, the Institutional Removal Program)⁶³ which are efficient and do not sacrifice the aliens rights.⁶⁴

Protection of Rights. When aliens are placed in expedited removal, they do not have access to relief from deportation other than asylum protections and protections under the torture convention, unless they claim a legal right to reside in the United States based on citizenship, or legal permanent resident status. For example, those in expedited removal would not be eligible for relief from deportation under the Violence Against Women Act, Temporary Protected Status, or as trafficking victims.⁶⁵ As discussed above, aliens in full removal proceedings (under INA §240, see **Appendix A** for a discussion of §240 removal proceedings) have access to more types of relief from removal than those in expedited removal.

Opponents of expanding expedited removal argue that aliens in the United States have a fundamental right to due process and other constitutional protections, and that the expansion would deprive aliens of significant rights and safeguards (including the opportunity to apply for immigration benefits for which they are eligible), and would be constitutional unsound.⁶⁶ In addition, those opposed to the expansion of expedited removal express concerns that since there is no review by EOIR and only limited judicial review, the immigration officer's authority to order the alien removed is almost unchecked, and that there have been reports of abuse of the expedited removal procedure since its inception, including aliens with valid legal status who were expeditiously removed.⁶⁷

⁶² Testimony of C. Stewart Verdery, Jr., in U.S. Congress, Senate Judiciary Committee, Subcommittees on Immigration, Border Security and Citizenship, and Terrorism, Technology and Homeland Security, *The Southern Border in Crisis: Resources and Strategies to Improve National Security*, hearing 109th Cong., 1st sess., June 7, 2005. (Hereafter, Verdery, *The Southern Border in Crisis: Resources and Strategies to Improve National Security*.)

⁶³ The Institutional Removal Program (IRP) is a program during which incarcerated criminal aliens undergo their removal proceedings while they are serving their criminal sentences. Once the alien has served his criminal sentence, he is taken into ICE custody and quickly deported from the country.

⁶⁴ Letter from Robert D. Evans, Director Governmental Affairs Office, American Bar Association, to Public Comment Clerk, regarding the Federal Register Notice of Expansion of Expedited Removal to Certain Jails in Texas, Nov 22, 1999.

⁶⁵ For more information on these types of relief see CRS Report RS20844, *Temporary Protected Status: Current Immigration Policy and Issues*, by Ruth Ellen Wasem and Karma Ester, and CRS Report RL30559, *Immigration: Noncitizen Victims of Family Violence*, by Andorra Bruno and Alison Siskin.

⁶⁶ Letter from Robert D. Evans, Director Governmental Affairs Office, American Bar Association, to Public Comment Clerk, regarding the Federal Register Notice of Expansion of Expedited Removal to Certain Jails in Texas, Nov. 22, 1999.

⁶⁷ Kenny, *DHS Announces Unprecedented Expansion of Expedited Removal to the Interior*.

Proponents of expanding expedited removal point to the law which states that aliens subject to expedited removal have not “entered” the United States, and therefore are not entitled to these rights. In addition, aliens in primary and secondary inspection do not have a right to representation unless the alien has become the focus of a criminal investigation.⁶⁸ Proponents reiterate that all expedited removal orders are reviewed by the immigration officers’ supervisors, providing a built-in check to the system, and that there are safeguards built into the expedited removal system for those who fear persecution.⁶⁹

Cost and Resources. Arguments for and against the expansion of expedited removal invoke the issue of resources. While expanding expedited removal will increase the need for some resources, it will also lessen the need for others. As a result, it is difficult to ascertain whether the expansion of expedited removal will increase or decrease the cost of removing aliens. Since expedited removal accelerates the removal of aliens by limiting the aliens’ access to judicial hearings and reviews, it can reduce the costs of the DHS lawyers who represent the government’s position in removal cases, the EOIR courts, and detention — both staff and bed space — , as the aliens are detained for shorter periods of time.⁷⁰ Similarly, as aliens in expedited removal are not eligible for bond, they are also, unlike aliens in formal removal procedures, ineligible for bond redetermination hearings⁷¹ in front of an immigration judge. In addition, there is evidence that the most recent expansion of expedited removal along the southwest border has decreased the apprehensions of OTMs along the border,⁷² which may imply that the expansion of expedited removal has been a deterrent to those trying to enter the country illegally.

However, both the availability of detention bed space and transportation of aliens placed in expedited removal (i.e., transporting the aliens to detention facilities, and returning the alien to their home country) present barriers to expanding expedited removal.⁷³ Aliens placed in expedited removal are subject to mandatory detention, yet many of these individuals do not have criminal records, multiple re-entries, or

⁶⁸ Department of Justice, “Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures; Final Rule,” 62 *Federal Register* 10319, Mar. 6, 1997.

⁶⁹ Department of Justice, “Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures; Final Rule,” 62 *Federal Register* 10357, Mar. 6, 1997.

⁷⁰ Using expedited removal on these OTMs along the southwest border has reportedly reduced the average amount of time in detention from 90 to 26 days. Verdery, *The Southern Border in Crisis: Resources and Strategies to Improve National Security*.

⁷¹ Aliens who are not subject to mandatory detention may be released on bond. The minimum bond amount is \$1,500, and the bond amount may be set by ICE. Aliens given bond by ICE may request that an immigration judge have a hearing to redetermine the bond amount. In addition, aliens in detention who are not mandatory detainees, may have a hearing in front of an immigration judge to determine whether the alien will be released on bond.

⁷² Aguilar, *Coping with Illegal Immigration on the Southwest Border*.

⁷³ *Ibid.*

other characteristics that would make them subject to mandatory detention absent expedited removal. Since aliens under expedited removal are subject to mandatory detention while noncriminal aliens in removal proceedings are often not detained, expanding expedited removal may raise detention costs (including transporting aliens to the detention facilities), and make fewer beds available for other aliens to go through removal proceedings.⁷⁴ Notably, ICE has been at or above their detention capacity for several years.⁷⁵ In addition, expanding expedited removal would increase the need for deportation officers to arrange the physical removal of the aliens, and USCIS asylum officers, to conduct the additional credible fear hearings.

Removal Proceeding Delays. Proponents of expanding expedited removal note the delays imposed by immigration judges in adjudicating removal cases, as well as additional postponements resulting from the appeals process, which can take years.⁷⁶ In addition, they contend that aliens use frivolous appeals to postpone deportation.⁷⁷ Some note that any improvement that can reduce the delays in the removal process, including both the courts and the actual deportation, can enhance the government's ability to enforce immigration laws.⁷⁸ Opponents of expanding expedited removals contend that removing EOIR's role in removal proceedings infringes on the rights of aliens and creates a situation where there is little oversight, noting that recent changes in EOIR have helped streamline the removal procedures.⁷⁹

Logistics. Expanding expedited removal raises questions about how the policy would be implemented. As discussed previously, the process of expedited removal at ports of entry is fairly straightforward, but there are issues that need to be explored to expand expedited removal into the interior. For example, if an alien is arrested and placed in expedited removal, would he have a chance to collect documents, or contact family or friends? Would the alien be released to gather

⁷⁴ Verdery, *The Southern Border in Crisis: Resources and Strategies to Improve National Security*.

⁷⁵ *Ibid.*

⁷⁶ For an example of this argument, see Michelle Malkin, *The Deportation Abyss*, Center for Immigration Studies, Background, (Sept. 2002); and Testimony of the Former Acting Director of the Office of Detention and Removal Operations, David Venturella, in U.S. Congress, Senate Judiciary Committee, Subcommittees on Immigration, Border Security and Citizenship, and Terrorism, Technology and Homeland Security, *Strengthening Interior Enforcement*, hearing 109th Cong., 1st sess., Apr. 14, 2005. (Hereafter, Venturella, *Strengthening Interior Enforcement*.)

⁷⁷ Howard Mintz, "Fight for Refuge," *San Jose Mercury News*, Sept. 18, 2005, p. 1. (Hereafter, Mintz, *Fight for Refuge*.)

⁷⁸ Venturella, *Strengthening Interior Enforcement*.

⁷⁹ In 2002, the Board of Immigration Appeals (BIA) was streamlined. While some argue that this has increased the efficiency of the BIA and reduced the backlog, others note that, especially in the 9th U.S. Circuit Court of Appeals, there has been an increase in the number of cases being heard by the federal circuit court and being overturned and sent back to EOIR to begin the removal proceeding process all over again, which extends the time that an alien is in removal proceedings. Mintz, *Fight for Refuge*, p. 1.

documents to prove that he is not subject to expedited removal?⁸⁰ Since those in expedited removal are subject to mandatorily detention, would the alien be detained?⁸¹ In addition, what happens to aliens who are unable to be returned to their home countries because the country will not produce travel documents? Would these aliens be subject to the same post-order-custody reviews as those who were given final orders of removal and are unable to be returned to their native country?⁸² For example, in 1999, INS published an advance notice that it intended to apply expedited removal on a pilot basis to certain criminal aliens beings held in three correctional facilities in Texas.⁸³ The program was never implemented. Under this pilot program expedited removal would have only been applied when the federal courts had affirmatively determined that the alien fell within the illegal entry criteria for expedited removal.⁸⁴

As discussed above, the INS wrote in the interim rule on expedited removal that the “ application of the expedited removal provisions to aliens already in the United States will involve more complex determinations of fact and will be more difficult to manage....”⁸⁵ Nonetheless, expedited removal has been in practice for eight years, providing DHS with insight on the process, and presumably putting DHS in a better position to expand expedited removal than when the policy was new. Furthermore,

⁸⁰ Interestingly, the issue of proving eligibility for expedited removal was addressed during the discussion of expanding expedited removal to three jails in Texas. Under the proposed program, expedited removal would only be applied to aliens that the Federal Courts had affirmatively determined have entered illegally. Since these aliens have been convicted of illegal entry, the court records and documentation in the file will clearly establish the time, place, and manner of entry, thereby establishing eligibility for expedited removal.

⁸¹ Kenny, *DHS Announces Unprecedented Expansion of Expedited Removal to the Interior*.

⁸² Detained aliens who have been ordered removed and have not been removed within six months after the 90 removal period has expired, are subject to a post-order-custody review to determine whether the alien can be removed in the foreseeable future. If the review rules that the alien can not be removed in the foreseeable future, in almost all cases the alien must be released. For more details on post-order-custody reviews, see CRS Report RL31606, *Detention of Noncitizens in the United States*, by Alison Siskin and Margaret Mikyung Lee

⁸³ To have been subject to expedited removal under the pilot program, the aliens would have: (1) either had to have been convicted of illegal entry into the United States, or have had the court establish the time, place and manner of entry; (2) not to have been admitted or paroled into the United States; and (3) not to have been physically present for two years. The correctional facilities were Big Spring Correction Center, Eden Detention Center, or Reeves County Bureau of Prisons Contract Facility.

⁸⁴ Department of Justice, “Advance Notice of Expansion of Expedited Removal to Certain Criminal Aliens Held in Federal, State, and Local Jails,” 64 *Federal Register* 51338, Sept. 22, 1999. The rationale for the pilot program was that each year thousands of criminal aliens had undergone removal proceedings prior to their release from criminal custody. If the alien was removable, the alien was removed from the country upon completion of their criminal sentence, shortening the amount of time the alien would have to be in immigration custody, and lessening the cost of detaining the alien. Many incarcerated aliens had been convicted of illegal entry, and were given relatively short sentences that made it difficult to complete removal proceedings prior to the completion of their criminal sentences.

⁸⁵ *Federal Register*, vol. 62, no. 44, p. 10313 (Mar. 6, 1997).

to expand expedited removal, proper training would have to be provided to immigration officers implementing expedited removal. DHS stated that training was one of the reasons that expedited removal was implemented in stages along the southwest border.⁸⁶

⁸⁶ Department of Homeland Security, "DHS Expands Expedited Removal Authority Along Southwest Border," Sept. 14, 2005. Available at [<http://www.dhs.gov/dhspublic/display?content=4816>].

Appendix A: Overview of §240 Formal Removal Procedures

When DHS encounters an alien that DHS thinks should be removed from the United States, the alien is presented a Notice-to-Appear (NTA),⁸⁷ which commences the removal proceeding.⁸⁸ The NTA is comparable to a charging document in criminal courts. The NTA outlines the charges against the alien, and identifies which part of the immigration statute the alien is being charged with violating.

If the alien's NTA is issued by the border patrol and the alien is not taken into custody, the alien is released on his own recognizance. If the NTA is issued by ICE, an alien not subject to mandatory detention may be released on bond. If the alien is not a mandatory detainee and is not released on bond, the alien may request a bond redetermination hearing before an immigration judge to have the bond lowered, or to be given bond. During the bond hearing, the alien must prove that he is not a flight risk or a danger to society.⁸⁹ Bond hearings are not considered part of the removal process.

The alien's first appearance in immigration court is at the master calendar hearing, a preliminary hearing to review the case. *In absentia* cases,⁹⁰ and cases where the respondent concedes removability and does not apply for relief, are decided at the master calendar hearing. Relief from deportation can be granted at the master calendar hearing if both the government and the alien agree to the relief. Frequently the cases of detained aliens are also concluded at the master calendar hearing. Nonetheless, under most circumstances, at the master calendar hearing, a time is set for an individual merit hearing. The individual merit hearing is the time when the government's attorney must prove the charges on the NTA, witnesses are presented, and the judge rules on whether the alien is removable from the United States and is eligible for relief from removal.⁹¹ Within 30 days after the hearing, the government's attorney or the alien may appeal the decision to the Board of Immigration Appeals (BIA). After the BIA decision the alien may appeal to a federal court.

⁸⁷ CBP, the Bureau of Immigration and Customs Enforcement (ICE), and USCIS issue NTAs.

⁸⁸ As discussed above, IIRAIRA eliminated the distinction between exclusion and deportation proceedings, combining them into removal proceedings. Removal proceedings are generally the sole procedure for determining whether an alien is inadmissible, deportable, or eligible for relief from removal.

⁸⁹ In FY2004, 37% of those released on bond or on their own recognizance, and 40% of aliens who were never detained failed to appear for their removal hearings. Department of Justice, Executive Office of Immigration Review, *FY2004 Statistical Yearbook*, pp. 24-26.

⁹⁰ In absentia cases are where the alien does not attend the hearing, and thus the immigration judge summarily rules on removability.

⁹¹ Examples of relief from deportation are voluntary departure, cancellation of removal, and asylum.

The first step in a court removal proceeding is that DHS must establish that the person in court is indeed an alien.⁹² Then, if the alien establishes that he/she was admitted, then the burden shifts back to DHS to prove that the alien is deportable. The alien has the burden to prove that he/she is eligible for any form of relief. An alien who fails to appear for a removal hearing (absent exceptional circumstances) can be removed in absentia and is ineligible for relief from removal for 10 years.⁹³ In addition, the alien becomes inadmissible for five years.⁹⁴

The courts have ruled that removal proceedings are civil not criminal, and that deportation is not punishment. Thus, there is no right to counsel, no right to a jury trial, and the due process protections are less than in a criminal trial. Furthermore, a decision on removability does not have to be proven beyond a reasonable doubt. In addition, because deportation is not punishment, Congress may impose new immigration consequences for actions that previously occurred (i.e., actions which would not have made the alien deportable when they occurred, may make the alien deportable at a later date if Congress changes the law). IIRAIRA limited the time and number of motions to reopen⁹⁵ and reconsider⁹⁶ removal cases for the alien.

⁹² Gordon, Charles, et al. *Immigration Law and Procedure* §64.11.

⁹³ INA §240(b)(7). Relief includes being able to adjust status or change nonimmigrant classification or take advantage of the registry.

⁹⁴ An alien is inadmissible to the United States under §212(a)(6)(B) if he/she failed to attend his/her removal proceeding without “reasonable cause.”

⁹⁵ A motion to reopen is filed if there are new facts or law or intervening circumstances which may change the results of the hearing. With some exception, only one motion to reopen may be filed and it must be filed within 90 days of the final administrative order of removal. Gordon, Charles, et al. *Immigration Law and Procedure* §64.18.

⁹⁶ A motion to reconsider must be filed within 30 days of the final administrative order of removal, and may assert that the IJ or BIA made errors of law. Only one motion to reconsider may be filed. Charles Gordon, et al. *Immigration Law and Procedure* §64.19.