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VIA Federal eRulemaking Portal

DHS Docket No. 2019-0036: Public Comment of Immigration Reform Law Institute Regarding Designating Aliens for Expedited Removal

Dear Mr. Gunduz:

The Immigration Reform Law Institute (IRLI) submits the following public comments to the Department of Homeland Security (DHS) in response to the Notice of the agency's exercise of the full remaining scope of its statutory authority to place certain aliens in expedited removal proceedings, as published in the Federal Register, 84 Fed. Reg. 35409 (July 23, 2019).

IRLI is a non-profit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal services, training, and resources to public officials, the legal community, and the general public.

IRLI strongly supports the policy rationales articulated in the Notice for expanded designation, which accurately notes "the ongoing crisis at the southern border," the large number of entrants without inspection (EWI) apprehended within the interior of the United States, DHS's "insufficient detention capacity both along the border and in the interior," and the "historic backlog of removal cases." 84 Fed. Reg.

at 35411. IRLI notes the compelling data points showing that close to 40 percent of aliens apprehended in the interior in recent years were present for less than two years, and the remarkable difference in recent times in custody duration for aliens placed in expedited removal proceedings compared with those placed in "section 240" proceedings: 11.4 days versus 51.5 days on average. *Id.*

I. A well-managed expedited removal program is essential to a sustainable national immigration enforcement regime.

Expedited removal is essentially an administrative system for the efficient and prompt expulsion of aliens who arrive at the border without valid documentation required for admission, or who have unlawfully entered the United States without inspection or admission (EWI). An alien who lacks proper documentation or has committed fraud or willful misrepresentation of fact—making him inadmissible under 8 U.S.C. § 1182(a)(6)(C) or (a)(7)—may be removed from the United States without any further hearings or review, unless the alien indicates a fear of persecution. 8 U.S.C. § 1225(b)(1).

When Congress added expedited removal to the Immigration and Nationality Act (INA) in 1996, diversion into the new track became mandatory for arriving aliens. Congress reformed the secondary inspection process in order to "expedite the removal from the United States of aliens who indisputably have no authorization to be admitted…." H.R. Conf. Rep. No. 104-828, at 209 (1996). Significantly for this Notice, Congress also gave the Attorney General (under authority since transferred to the Secretary of Homeland Security) the "sole discretion" to apply it to all aliens found 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. 8 U.S.C. § 1225(b)(1)(A)(iii)(I).

Significant limitations and restrictions on placement of aliens in expedited removal proceedings exist, none of which is modified by the subject Notice. Most importantly, persons lawfully admitted or paroled are not subject to expedited removal proceedings. 8 C.F.R. § 235.3(b)(5). Aliens charged under any additional ground of inadmissibility, other than revocation of a visa by the U.S. State Department, must be placed in an extended removal ("section 240") proceeding. 8 U.S.C §1229a, 8 C.F.R. §235.3(b)(3). Unaccompanied alien children are by law transferred from DHS to HHS custody and may only be removed in a section 240 proceeding. 8

U.S.C. § 1232(a)(5)(D).[1] Citizens of any Western Hemisphere nation with whose government the United States "does not have full diplomatic relations and who arrive by aircraft at a port of entry" are also exempt from expedited proceedings. 8 U.S.C. § 1225(b)(1)(F).

These restrictions on the scope of expedited removal are balanced with other provisions, a policy consistent with the intent of Congress that the net effect of a fully expanded designation would, with minor exceptions, apply generally to those illegal entrants without inspection who are either "undocumented" or have lied to representatives of DHS about their immigration status or history, and have no ground for seeking relief. For example, any absence from the United States breaks the statutory period of continuous physical presence. 8 C.F.R. § 235.3(b)(1)(ii). Congress also intended to balance the availability of credible fear screenings against the one year deadline for filing an asylum application. EWIs who are unlawfully present for more than 364 days will presumptively receive a negative credible fear determination, barring their transfer to a section 240 proceeding. 8 U.S.C. § 1158(a)(2)(B).

In the larger context, an effective civil removal system is a core element of Westphalian national sovereignty, which requires a state to have control of the defined territory in which the national population resides. *See, e.g., Convention on the Rights and Duties of the State* art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 (Montevideo Convention). In the era of mass migration, modern nation-states face very large and diverse flows of migrants and entrants. A streamlined system of administrative civil removal is by far the predominant approach adopted by members of the United Nations. In general, only an efficient civil removal system will have the capability to consider and adjudicate millions of annual applications for admission. Only the exceptional nations that make little to no distinction between civil and criminal law or decline to recognize rights of expatriation or migration at all will adjudicate immigration removals in a criminal context.

For many U.S. and international organizations advocating for deregulation of immigration (open borders), a longstanding goal has been the replacement of this administrative system with what would more resemble a criminal procedure. They advocate that aliens be afforded the constitutional rights and privileges of a criminal defendant. Government ability to expel or *refouler* applicants for entry or admission would be restricted through expanded legal presumptions and burdens of proof, more like those imposed on prosecutors and juries in a criminal trial. This approach might be characterized as one of "denization," where persons obtain status rights

[1] Mexican and Canadian UACs are excluded from both expedited and section 240 proceedings, and with few exceptions may be administratively returned to civil authorities in their (adjacent) countries. 8 U.S.C. § 1232(a)(5)(D).

primarily through physical presence, not formal citizenship or naturalization. These organizations accurately see the expedited removal process as a threat to their transnational interests.

By contrast, it is strongly in the national interest of the United States that expedited removal be the default means of immigration enforcement, with section 240 proceedings appropriately treated as legislative privileges extended by a generous American people to the small faction of applicants for admission whom Congress has included under a statutory ground for relief from removal.

II. The statutory and constitutional basis for nationwide expedited removal is well established.

Public comments submitted in opposition to the Notice, and similar opinion and analysis in immigration bar and advocacy media, show that opponents of expedited removal rarely contend that its establishment under discretionary INA provisions is not authorized by statute. IRLI knows of no successful judicial challenge to the April 1997 implementation of the mandatory provisions for arriving aliens following IIRIRA, nor to the incremental expansion of the discretionary program, in particular under the Bush administration, 2001-2008.

These previous expansions of the discretionary reach of the statute have all been implemented through publication of Federal Register notices substantially similar to the current notice. *See, e.g.*, U.S. Department of Justice, *Notice Designating Aliens Subject to Expedited Removal Under §235(b)(1)(A)(iii0 of the Immigration and Nationality Act*, 67 Fed. Reg. 68923 (Nov. 13, 2002) (placing certain aliens arriving by sea but not admitted or paroled into expedited removal proceedings); DHS, *Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48877 (Aug. 11, 2004) (applying expedited removal to certain aliens apprehended within 100 miles of the Mexican border within 14 days of entry).

The subject Notice, moreover, was prompted by Executive Order 13767, which publicly instructed the Secretary of Homeland Security to apply expedited removal to the fullest extent of the law. Executive Order 13767, *Border Security and Immigration Reform Improvements* § 11(c), published at 82 Fed. Reg. 8793 (Jan. 25, 2017). IRLI thus sees little reason for agency concern regarding the possible success of an Administrative Procedure Act challenge to the Notice based on theories that nationwide implementation is statutorily *ultra vires*, arbitrary, or has not complied with relevant public notice and comment standards.

III. Claims that nationwide expedited removal will cause violations of the due process rights of aliens are incorrect.

With the statutory basis and operative regulations not in serious dispute, it seems the most widely circulated charge leveled against nationwide expedited removal has been the claim that if the statute is construed to restrict review of challenges to the expedited removal process itself, it would violate the Fifth Amendment's guarantee of due process.

So far, the regulations issued under the statute have never been overruled in a due process challenge, for reasons that would still operate in any such challenge to the Notice. *See AILA v. Reno*, 199 F.3d 1352, 1356-57 (D.C. Cir 2000) (upholding district court grant of dismissal for lack of standing of bar association, and of individual aliens for failure to state a cause of action); *AILA v. Reno*, 18 F. Supp. 2d 38, 60 (D.D.C. 1998) ("[C]ases cited by defendant are representative of the overwhelming case law, including that of this circuit, holding that initial entrants have no due process rights with respect to their admission").

Congress barred federal appeals courts from reviewing expedited removal orders under petitions for review. 8 U.S.C. §§ 1252(a)(2)(A). Habeas review is limited to three determinations, (1) whether the petitioner has a claim to citizenship, (2) whether the petitioner actually received an order for expedited removal, and (3) whether the prisoner can prove by a preponderance of the evidence that he or she is a lawful permanent resident (LPR), has been admitted as a refugee, or has been granted asylum. 8 U.S.C. §§ 1252(e)(2)(A)-(C). If the petitioner prevails, the remedy provided by Congress is transfer of the case to an extended (section 240) removal proceeding. 8 U.S.C. §§ 1252(e)(4).

The predominant view had been stated by the U.S. Court of Appeals for the Third Circuit, which "join[ed] the majority of courts that have addressed the [restricted] scope of judicial review under § 1252 in the expedited removal context." *Castro v. U.S. Dep't Homeland Sec.*, 835 F.3d 422, 431-32 (3rd Cir. 2016) (finding lack of subject matter jurisdiction). *Castro* cited, *inter alia*, *Shunaula v. Holder*, 732 F.3d 143, 145-47 (2d Cir. 2013) (holding that § 1252 "provides for limited judicial review of expedited removal orders in habeas corpus proceedings" but otherwise deprives the courts of jurisdiction to hear claims related to the implementation or operation of a removal order, and finding that an alien's claims disputing that he sought to enter the country through fraud or misrepresentation and asserting that he was not advised that he was in an expedited removal proceeding or given the opportunity to consult with a lawyer "f[ell] within this jurisdictional bar"); *Brumme v. I.N.S.*, 275 F.3d 443, 448 (5th Cir. 2001) (characterizing a challenge as "… an attempt to make an end run around [the] clear" language of § 1252(e)(5); *Li v. Eddy*, 259 F.3d 1132, 1134-35 (9th Cir. 2001), *op'n vacated as moot*, 324 F.3d 1109 (9th Cir. 2003) ("With respect to review

of expedited removal orders, . . . the statute could not be much clearer in its intent to restrict habeas review."); *Khan v. Holder*, 608 F.3d 325, 329-30 (7th Cir. 2010) (same); *Diaz Rodriguez v. U.S. CBP*, 2014 U.S. Dist. LEXIS 131872, (W.D.La. 2014) ("The expedited removal statutes are express and unambiguous. The clarity of the language forecloses acrobatic attempts at interpretation.").

After an extensive review of Supreme Court Suspension Clause and plenary power doctrine decisions, *Castro* reaffirmed longstanding precedent that "aliens seeking initial admission to the country—as well as those rightfully assimilated to that status on account of their very recent surreptitious entry—are prohibited from invoking the protections of the Suspension Clause in order to challenge issues relating to their application for admission. *Castro*, 835 F.3d at 444-49.

Castro also noted (without deciding) an issue that will be relevant for potential jurisdictional claims by the undocumented EWIs who will be diverted to expedited removal proceedings under the subject Notice. Although their surreptitious entry—after up to 24 months of illegal presence—may no longer be "very recent," *Castro* noted that

> when the Supreme Court in *Landon* stated that certain aliens lack constitutional rights regarding their application for admission, it did not categorize aliens based on whether they have *entered* the country or not; rather, the Court focused (as IIRIRA and the expedited removal regime focus) on whether the aliens are 'seeking initial *admission* to the United States.' *Landon*, 459 U.S. at 32 (emphasis added); *see also, e.g.,* 8 U.S.C. § 1225(b)(1) (conditioning aliens' eligibility for expedited removal, in part, on inadmissibility, even if aliens are physically present in the United States).

Id. at 448.

The Secretary should thus expect that expanding expedited removal to its full statutory scope, to encompass most aliens who entered without inspection and cannot prove continuous physical presence for at least 730 days thereafter, will also survive judicial review on constitutional and statutory grounds.

IV. The likelihood that citizens and lawful permanent residents will be detained by mistake is very low.

A second common objection to nationwide expedited removal is that the "absence of an immigration court hearing with limited time to obtain counsel prior to deportation is almost certain

to lead to people being erroneously deported…. there almost certainly will be instances of people with valid asylum claims or other removal defenses being deported without being able to make their case to an immigration judge." *Public Comment of National Immigration Forum* re DHS Docket No. DHS-2019-0036 (August 19, 2019). The National Immigration Forum argues that "this dramatic expansion of expedited removal *is almost certain* to sweep up U.S. citizens, lawful permanent residents (LPRs), and individuals on visas who may *face accidental deportation* with only limited avenues to challenge them (sic)." *Id.* (emphasis added).

On its face, this claim is meritless. "To say that this [expedited removal] procedure is fraught with risk of arbitrary, mistaken, or discriminatory behavior . . . is not, however, to say that courts are free to disregard jurisdictional limitations. They are not . . ." *Castro*, 835 F.3d at 433 (citing *Khan v. Holder*, 608 F.3d at 329).

As the Notice correctly notes, any newly designated alien placed in expedited removal will continue to benefit from the procedural safeguards that apply in all expedited removal proceedings under 8 U.S.C. 1252(e)(2) and 8 C.F.R. 235.3(b). The primary elements of this established scheme for verification of status include (1) "a check of all available Service data systems and any other means available to the officer;" (2) discretionary waiver of documentary requirements for LPRs making an application for admission, (3) review of a pending expedited removal order by an appropriate supervisor, and (4) referral to an immigration judge for review of the expedited removal order. 8 C.F.R. §§ 235.3(b)(5), (b)(6).

In section 240 removal proceedings, whether a particular individual is an "alien" rather than a citizen of the United States is a jurisdictional fact that must be established by DHS in order for the immigration judge to assert authority over the respondent. By implication, the burden of showing alienage for diversion into expedited proceedings also rests with the government. This is an important protection in itself, as evidence of alienage must be established by clear and convincing evidence. *Matter of Amaya*, 21 I&N Dec. 583, 588 (BIA 1996). In expedited proceedings, aliens not admitted or paroled then bear the burden of proof that they are (1) not inadmissible and (2) they satisfy the continuous physical presence requirement. 8 CFR § 235.3(b)(1)(ii).

In addition to the four protections noted above, the Notice clearly points out that an important fifth protection against erroneous diversion is provided to persons whose claims of LPR, refugee, asylee, or citizenship status cannot be immediately verified. Such persons are entitled to make a sworn statement and submit a corresponding written statement that their claim to status is true, and have these statements reviewed by an immigration judge who will decide whether the

persons ever held such status, with termination of the expedited removal proceedings the result if they did . 8 U.S.C. § 1225(b)(1)(C), 8 C.F.R. §§ 235.3(b)(5)(i),(iv).

The Notice further states that "DHS plans to issue guidance to immigration officers to guide the exercise of discretion in referring aliens for expedited removal." 84 Fed. Reg. 35412. One useful topic for such agency guidance would be a listing of samples or types of documents that could generally be considered as evidence of more than two years continuous physical presence. In particular, it would be helpful if the guidance stated whether photocopies of certain documents would be acceptable evidence, and whether notarization or other additional evidence of authentication might be required. IRLI believes this additional guidance would be of particular benefit to lawfully admitted aliens in a non-immigrant, humanitarian, or parolee status, who are ineligible for the affidavit-based additional status verification review available for U.S. citizens, LPRs, refugees, and asylees under 8 U.S.C. § 1225(b)(1)(C).

V. The potential for litigation raising due process challenges to nationwide expedited removal could be vitiated by a regulatory post-removal request to reopen process.

It seems likely that, regardless of the low ultimate potential for a judicial challenge on APA or due process grounds, open borders and alien rights interests will seek to enjoin the nationwide expanded designation in the Notice. *See, e.g.,* National Immigration Project Practice Advisory *Expedited Removal: What Has Changed Since Executive Order No. 13767*, at 11 (Feb. 20, 2017) (stating that the American Immigration Council, the National Lawyers Guild, and the ACLU Immigrants' Rights Project are "investigating the expansion of expedited removal" and soliciting potential test case clients).

One regulatory action which could significantly vitiate due process challenges to expedited removals by newly designated aliens would be to create a procedure for post-removal submission of new information showing that a removed alien had in fact been lawfully admitted, or was continuously present in the United States for more than two years as of the date of the expedited removal order. The sole focus of this narrow regulatory roll-back of the maximum application of expedited removal would be to insure that errors by individual immigration officials about documentation of prior lawful admissions and continuous physical presence by aliens would not rise to the level of constitutional violations.

While nothing in 8 U.S.C. § 1225 provides for statutory authorization for post-removal reopening on the basis of new facts, the INA arguably bars *reconsideration* of *legal issues*. *See* 8 U.S.C. § 1225(b)(1)(C) (Limitation on administrative review), 8 U.S.C. § 1252(a)(2)(A) (Review relating to section 235(b)(1). But as the subject Notice demonstrates, the Secretary may modify

the scope of discretionary expansions of expedited removal "at any time." 8 U.S.C. § 1225(b)(1)(A)(iii)(I). Using the motion to reopen procedure for section 240 removal orders at 8 U.S.C. § 1229a(c)(4)(B) as a starting point, a hypothetical regulation could, for example, provide for a single request to the cognizant immigration judge, with a 30-day filing deadline (in this case after physical removal). The option to request reopening would only be available to an alien who either had sought *de novo* review by an immigration judge of a negative credible fear determination by an asylum officer, or verification of status by an immigration officer under one of the various provisions of 8 C.F.R. §§ 235.3(b)(4), (5), or (6). To simplify the procedure of aliens who are likely unrepresented post-removal, filing of the request might be permitted at a consulate in the alien's home country, for forwarding to the immigration court.

Unlike a section 240 motion to reopen, a post-expedited removal request to reopen would be limited to submission of documentary evidence that the alien was a United States citizen, was a previously admitted LPR or refugee, had previously been granted asylum, or had continuous physical presence for more than two years.

A citizen who prevailed in reopening proceedings would be immediately admitted to the United States. Unlike aliens in section 240 proceedings, the remedy for an alien whose post-removal request to reopen was granted by an immigration judge would be the transfer of the alien's case on for a section 240 master calendar hearing, qualifying the alien to seek parole to re-enter and attend.

Conclusion

The expansion of designation of aliens for expedited removal to the full extent authorized by Congress is a long-delayed but essential action if the United States is ever to experience a sustainable system of immigration admission and enforcement. The expedited removal system is *de facto* the default procedure for achieving sustainable control of illegal immigration, and its fundamentals are recognized by governments of every ideological stripe worldwide.

The statutory basis for the subject notice is not at issue. Claims that expedited removal as a whole is unconstitutional, or that its nationwide expansion will somehow provoke pervasive errors in summary adjudication, do not withstand analysis. Nonetheless, in today's highly divisive immigration federal policy arena, legal attacks intended to disable agency operations seem inevitable. IRLI hopes that the Office of Policy will consider whether a proposal for very narrow post-removal re-openings might mitigate the risks to sustainable governance that hostile litigation over the expanded designation will create.

Respectfully submitted,

Immigration Reform Law Institute

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