



Rule to Expand Expedited Removal: What You Need to Know

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What is expedited removal? [Expedited removal](#) is one of [three speedy deportation programs](#) in the immigration statute that allows the Department of Homeland Security (DHS) to remove people from the United States without a hearing or review. Expedited removal can be applied to people who enter the United States without proper documents or by fraud (and are inadmissible for one of these reasons) who have not admitted or paroled into the United States.

What is the new policy? On July 22, 2019, DHS published a [Notice](#) to “exercise the full remaining scope of its statutory authority” to qualifying noncitizens in “expedited removal” if they cannot prove they have been continuously physically present in the United States for two years.

What is the effective date of the Notice? The effective date of the Notice is July 23, 2019.

What legal authority is the administration relying upon to issue the Notice? DHS relies on the Immigration and Nationality Act (INA) section 235(b)(1)(A)(iii) which allows the government to apply expedited removal in their “sole and unreviewable discretion” to persons who came to the United States without proper documents or by fraud without being admitted or paroled in the United States who cannot prove they have been physically present in the United States continuously for two years.

Has the administration considered this expansion before? Historically, DHS has limited the scope of expedited removal to the border or within 100 miles of the border. Soon after inauguration, President Trump indicated his desire to expand expedited removal. On January 25, 2017, the President issued an [executive order](#) directing DHS to expand expedited removal in this way. DHS cites to this executive order in the Notice.

What are the concerns about expanding expedited removal? There are several concerns. The legal concerns include whether the new policy may violate statutes, the U.S. Constitution, or international treaties. Tied to the legal questions are the concerns about implementation. There is a concern that U.S. citizens, asylum seekers, green card holders, unaccompanied minors, and other noncitizens who are exempt from expedited removal by statute could be unlawfully targeted for removal because of the challenges DHS officers may face in identification. Further, noncitizens who fear return in the home countries may not be appropriately identified by DHS and referred to an asylum officer as required by law. Finally, noncitizens who have resided in the United States for years but who are unable to document their physical presence may be vulnerable to removal because of inadequate paperwork.

Is the administration required to place any qualifying person in expedited removal? No. Foremost, the choice by DHS to apply expedited removal under the current framework or to expand it as it does in this Notice is discretionary, not mandatory. Further, both the [INA and the general doctrine of prosecutorial discretion](#) allow DHS to place any person it encounters in regular removal proceedings after which they would see an immigration judge. [Historically](#), prosecutorial discretion has been exercised for humanitarian reasons and taking into consideration limited resources. In its Notice expanding expedited removal, DHS points to the availability of prosecutorial discretion for noncitizens with certain equities and indicates that it plans to issue guidance for immigration officers.

What is the position of the administration for expanding expedited removal? The administration alleges that expanding expedited removal is necessary because of the “ongoing crisis at the southern border” and their position that noncitizens who arrive in the United States without inspection or admission are a public safety threat. The Notice also states that expanding expedited removal will reduce the burdens at DHS and the Department of Justice.

Can a federal court review challenges to expedited removal? Limited judicial review is available under the [statute](#).

What is a Notice? How can DHS implement this new policy without notice and comment rulemaking? DHS has concluded that the rule making procedures of the Administrative Procedure Act do not apply. DHS cites to the “good cause” exception in the APA to conclude that delaying implementation of this new policy would be “impracticable, unnecessary, and contrary to the public interest.” Additionally, DHS believes that the statute alone provides authority for the expedited removal provision to be expanded at any time without notice-and-comment procedures.

Has the new expedited removal policy been challenged in court? On August 6, 2019, the American Immigration Council, the American Civil Liberties Union (ACLU), and the law firm of Simpson Thatcher & Bartlett LLP [filed a lawsuit in the U.S. District Court for the District of Columbia](#), challenging the expansion of expedited removal on behalf of Plaintiffs, who are three organizations with members who are subject to the new rule. The Plaintiffs claimed that the new rule violates the Due Process Clause of the Fifth Amendment, the Administrative Procedure Act, and federal immigration laws. Plaintiffs asked the court to prevent DHS from continuing to apply the rule.

What is the current status of this lawsuit? On September 27, 2019, a D.C. federal judge issued a nationwide [preliminary injunction](#) temporarily blocking the expanded expedited removal policy. The judge found that DHS did not follow the correct decision-making procedure, such as the formal notice-and-comment period required for major federal rule changes, and likely violated federal law in failing to do so. Currently, the preliminary injunction blocks the expanded expedited removal policy from being applied until the court has finished litigation on the matter. This means that expedited removal only applies to persons who arrive at a port-of-entry or within 100 miles of the border with fraudulent or insufficient documents for right now.

The goal of this document is to provide general information and is not meant to act as a substitute to legal advice from an attorney.

Where can I find more resources?

See the [Penn State Law Center for Immigrants' Rights Clinic](#) website for updates on this and other immigration policies. Also visit:

- [Department of Homeland Security](#)
- [American Immigration Lawyers Association](#)
- [American Immigration Council](#)
- [Human Rights First](#)

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