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EXPANSION OF EXPEDITED REMOVAL: WHY PUSHING TO THE LIMITS OF THE STATUTE UNCONSTITUTIONALLY DEPRIVES PEOPLE OF DUE PROCESS OF LAW

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The Trump Administration published an announcement in the Federal Register on July 22, 2019 stating that beginning the next day on July 23, it would exercise its full statutory authority to place in expedited removal proceedings essentially all

> "aliens determined to be inadmissible under sections 212(a)(6)(C) or (a)(7) of the Immigration and Nationality Act (INA or the Act) 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 they have been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility."

Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 at 35409. This is a major expansion from the regulations previously in effect, which applied expedited removal proceedings only to people who were arriving at a port of entry, had previously arrived by sea, or were found within 100 miles of the border and could not show that they had been present in the United States for 14 days.

There are a number of problems with this sudden expansion, many of which will likely be covered in detail in the lawsuit that the American Immigration Council and the ACLU have said will be forthcoming. In this blog post, I want to focus on one particular problem that has struck me, with the awareness that the very skilled lawyers at those organizations are soon likely to file papers that

go into more depth on this same point and render my post somewhat superfluous. Even though the INA purports to give the government the authority to expeditiously remove people in this broader class, applying expedited removal to people just because they have not "shown, to the satisfaction of an immigration officer, that they have been physically present in the United States continuously for two-year period," INA § 235(b)(1)(iii)(II), 8 U.S.C. § 1225(b)(iii)(II), appears inconsistent with the guarantee of the Fifth Amendment to the U.S. Constitution that "no person shall . . . be deprived of life, liberty, or property, without due process of law"

To understand why, some brief background on how expedited removal works is helpful. More comprehensive background is available from the American Immigration Council and from the Congressional Research Service (by way of a reposting of the CRS report by the Federation of American Scientists), but to summarize, persons subjected to expedited removal are provided with very limited review of the decision to remove them. If they fear persecution, they are given a credible fear interview by a USCIS officer (though there has recently been talk of allowing CBP officers to perform that function), and if they are found not to have a credible fear of persecution or torture that might allow them to qualify for asylum or related relief, there is a review of that finding by an immigration judge. There can also be review by an immigration judge of a claim that someone is a U.S. citizen, lawful permanent resident, or already granted asylee or refugee status. But there is otherwise no hearing before an immigration judge, and there is no appeal to the Board of Immigration Appeals. There is also very limited judicial review according to the statute—although some Court of Appeals cases, such as the Ninth Circuit's March 2019 decision in *Thuraisiggiam v. Department of Homeland Security*, have found greater judicial review mandated by the Constitution, and in a recent blog post I wrote about a possible expansion on that case law. According to the statute, with limited exceptions, the Department of Homeland Security agent issuing the order (usually from Customs and Border Protection, CBP), and his or her supervisor, have the final say over the person's removal.

It is bad enough to apply this limited review process to the case of someone just arriving at the border, or found near the border and alleged to have been here for less than fourteen days. Even under those circumstances, errors can be made, or the proper procedures not provided with regard to credible fear determinations, and as *Thuraissigiam* explains, the Constitution requires under

some circumstances that a detainee be allowed to show in court that he or she is being detained because of legal error, whatever Congress may have tried to say about the unavailability of judicial review. In the context of an arrest near the border allegation of very recent arrival, however, one can at least see the argument for a CBP officer being able to determine somewhat reliably that a person did in fact just come across the border. It is hard to say as much about the prospect of an officer from Immigration and Customs Enforcement (ICE) encountering someone far away from any border, and determining that they have been here in the United States for less than two years rather than more than two years.

How, exactly, is an undocumented immigrant stopped on the street supposed to prove to the satisfaction of an ICE officer that he or she has been here for more than two years? Some people may have pay stubs or tax documents or evidence of rent payments, but most would not be carrying such things, leaving them to hope that a family member could provide evidence to the ICE officer's "satisfaction" in time. And what if the officer simply chooses not to be "satisfied" by the evidence, or at least pretends not to believe it?

Immigrants who have actually been here even for more than 10 years, and who have U.S. citizen children or other qualifying relatives, such that if placed in regular removal proceedings before an Immigration Judge they could try to show "exceptional and extremely unusual hardship" so as to qualify for cancellation of removal under INA 240A(b)(1), 8 U.S.C. § 1229b(b)(1), could be erroneously subjected to expedited removal instead, under this new rule. So too might spouses or parents of U.S. citizens who were admitted into the United States through a so-called "wave-through" process not producing obvious documentation, yet qualifying them for adjustment of status as immediate relatives of U.S. citizens under INA § 245(a), 8 U.S.C. § 1255(a), pursuant to the BIA's decision in *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010). People in these situations could, it seems, simply be removed on ICE's word alone despite their legal eligibility to seek lawful permanent residence.

The statute may seem to allow for this, but the Constitution does not permit Congress to have arranged for arbitrary deprivation of liberty or property rights without due process. Well over a century ago, the Supreme Court recognized that the constitutional right to due process of law applies even to immigrants who have been here less than a year (let alone for longer periods of time) and are alleged to be here illegally. As explained in the *Japanese Immigrant Case,*

189 U.S. 86, 100-101 (1903):

> his Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.
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> One of these principles is that no person shall be deprived of his liberty without opportunity at some time to be heard before such officers in respect of the matters upon which that liberty depends -- not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

As the Supreme Court elaborated fifty years later, even in a case taking a dismally restrictive view of the constitutional rights available to those who were actually applying for admission at the border: “aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

That is not to say that the relevant standards of what constitutes sufficient due process are those of 1903 when the *Japanese Immigrant Case* was decided, or 1953 when *Mezei* was decided.. Rather, the relevant standards evolve over time. As the Supreme Court also held almost 70 years ago: “When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality.” *Wong Yang Sun v. McGrath*, 339 U.S. 33, 50 (1950).

Two of the leading modern-era cases regarding procedural due process rights

as they relate to the requirement of a hearing are *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mathews v. Eldridge*, 424 U.S. 319 (1976). Both acknowledge that decisions potentially resulting in greater deprivation require additional process. To quote from *Mathews*, 424 U.S. at 341: "As Goldberg illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process." *Mathews* also explained that in addition to "the private interest that will be affected by the official action", other relevant factors include "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

To leave to "the satisfaction of an immigration officer" with no further hearing or administrative process, the question of whether a particular noncitizen has "been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility", creates an unacceptably high risk of erroneous deprivation of the statutory right to full removal proceedings for those who have, in fact, been present for more than two years. And being forcibly removed from one's long-term home to a country where one may not have been for many years is an extremely substantial deprivation, as the Supreme Court has long recognized: "deportation may result in the loss 'of all that makes life worth living'." *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). Thus, a basic due process analysis suggests that the expedited-removal procedure is not appropriate in these contexts not involving recent border crossings.

The purported authority seized by the Trump Administration in its recent announcement has lain dormant in the statute since the late 1990s (having been passed as part of the "Illegal Immigration Reform and Immigrant Responsibility Act" of 1996, IIRIRA for short, which took effect April 1997). Over 20 years of both Republican and Democratic Administrations, no previous Administration had attempted to stretch its authority to the very limits of the statute, perhaps because it was understood that this would be Constitutionally dubious. One hopes that the courts, in response to the forthcoming lawsuits, will intervene to confine the Administration's authority within Constitutional

limits.

Anyone who is subjected to expedited removal proceedings under this new rule within 60 days of its implementation may have the option of becoming a party to the lawsuit or lawsuits which will likely be filed in the U.S. District Court for the District of Columbia under 8 U.S.C. § 1252(e)(3), the statutorily accepted means for challenges to validity of expedited removal regulations. (The statute refers to implementation of the rule, not promulgation of the rule, so presumably DHS could not run out the clock simply by declining to actually implement the new rule for 61 days.) After that time or if there is some other problem with becoming a party to a 1252(e)(3) action, however, others subjected to expedited removal despite having resided in the United States for a significant period of time should be able to bring Constitutionally-protected habeas corpus petitions under the Suspension Clause of the U.S. Constitution as explained in *Boumediene v. Bush*, 553 U.S. 723 (2008). Just as Congress could not deprive inmates at Guantanamo Bay of their habeas rights in *Boumediene*, the Congress that passed IIRIRA should not be able to deprive immigrants who have lived in the United States for a period of time of their habeas rights. Even when the Court of Appeals for the Third Circuit denied constitutional habeas rights to recent unlawful entrants in a decision heavily criticized by this author in another post, *Castro v. Dep't of Homeland Security*, it conceded that the statutory limitations on habeas corpus might be unconstitutional as applied to, for example, "an alien who has been living continuously for several years in the United States before being ordered removed under ." So regardless of which Court of Appeals jurisdiction they live in, those detained under the new expansion of authority, who by definition are not the sort of very recent entrants at issue in *Castro*, should have access to constitutionally protected habeas. The Trump Administration may want to remove residents of the United States without judicial oversight, but the Constitution will not allow that.