The DHS Border Memo: Ramping Up Expedited Removal and Raising Tensions with Mexico and with Due Process

By **Peter Margulies**
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Department of Homeland Security (DHS) Secretary John Kelly has just sent two memos to the White House for review that could fundamentally reshape U.S. immigration enforcement and exacerbate tensions with Mexico. The memos lay the groundwork for reducing procedural safeguards on removal of noncitizens through expanded use of "expedited removal" procedures.

In 1996, Congress authorized the expedited removal of noncitizens in order to alleviate persistent delays in removal proceedings—adversarial hearings conducted by Immigration Judges (IJs) within the Department of Justice. Expedited removal, set out in 8 U.S.C. 1225, was a streamlined process—inquisitorial rather than adversarial—that Congress provided for noncitizens who had entered the U.S. without inspection (typically by surreptitiously crossing the Mexican-U.S. border) and could not prove that they had been physically present in the U.S. for two years prior to their apprehension. (See 1225(b)(1)(A) (iii)(II)). Under this provision, an immigration officer (now in DHS) could summarily order the removal of a noncitizen who was inadmissible to the U.S. for range of reasons, including lack of valid visa. Noncitizens who claimed that they were eligible for asylum because of a well-founded fear of persecution abroad received a "credible fear" interview conducted by a U.S. asylum officer. (See 1225(b)(1)(A) (ii)).

While a noncitizen could retain counsel to advise him or her on the credible fear process, the truncated timeline for interviews often made obtaining counsel impossible; moreover, counsel had no formal role in the interview beyond mere attendance and the ability to seek a pause to confer with their client, granted at the asylum officer's discretion. At the noncitizen's request, a denial by the asylum officer would trigger IJ review, which would include a chance for the IJ to hear and question the noncitizen, again with minimal formal participation by counsel. The INA bars *judicial* review of negative IJ decisions in the expedited review process.

From 1996 to the present, immigration officials have used expedited removal almost exclusively for noncitizens apprehended at or near the border, where the need for efficient removal has appeared to be strongest. In 2004, DHS modestly expanded expedited removal, authorizing it for noncitizens who entered by sea and certain noncitizens who had been in the U.S. for 14 days or fewer and were apprehended within 100 miles of the border. (DHS expressly excepted unaccompanied minors from expedited removal.)

In the newly released memos, Secretary Kelly has now announced that a new Notice in the Federal Register will soon expand the group of noncitizens subject to expedited removal (although unaccompanied minors will continue to be processed separately). Historically, immigration officials have cited exigent immigration enforcement problems in issuing such Notices without opportunity for pre-publication Notice and Comment under the Administrative Procedure Act.

The new authority for expedited removal will assuredly expand its coverage for noncitizens who have been in the U.S. for *more* than 14 days and are *more* than 100 miles from the border. How much remains to be seen. However, the takeaway is that DHS will use expedited removal for noncitizens who, because of their longer stay in the U.S. interior, are more likely to have accrued ties to the U.S., including housing, employment, friendships, and family relationships.

Since *Yamataya v. Fisher* (1903), courts have held that the Due Process Clause governed removal of such individuals. There are substantial questions about whether expedited removal is consistent with due process, at least for noncitizens with these stronger ties to the United States. Under the test for procedural due process articulated by the Supreme Court in *Mathews v. Eldridge* (1976), a court assessing the adequacy of procedures would look to the petitioner's interest, the interest of the government, the risk of error, and the feasibility of alternative procedures. At the very least, expanding expedited removal to cover noncitizens with ties to the U.S. would face questions regarding the heightened interest of the petitioner in avoiding removal. The risk of error is a constant, given the absence of adversarial IJ proceedings, the preclusion of judicial review, and the obstacles to obtaining assistance of counsel in developing and documenting an asylum claim. The government would also face a higher hurdle in demonstrating that fuller procedures were not feasible, since the government has long used adversarial hearings before IJs to handle such cases. (Limits on judicial review for this group of noncitizens might also clash with the Suspension Clause's guarantee of access to habeas corpus.)

To the extent that a substantial expansion of expedited removal would trigger questions under the Due Process Clause, it would also stoke further tensions with Mexico. Under a 2004 Memorandum of Understanding, Mexico has agreed to repatriation of its nationals subject to human rights guarantees. A clash with due process safeguards would also run afoul of human rights protections against arbitrary deportation. One hopes that the forthcoming Notice will be tailored to these concerns. Otherwise, DHS will risk the same chaotic rollout that afflicted President Trump's Executive Order on refugees.

Peter Margulies is a professor at Roger Williams University School of Law, where he teaches Immigration Law, National Security Law and Professional Responsibility. He is the author of Law's Detour: Justice Displaced in the Bush Administration (New York: NYU Press, 2010).

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