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Constitutional Concerns with the Enforcement and Expansion of Expedited Removal

Ebba Gebisa†

Sharon McKnight, a New York resident who is a United States citizen of Jamaican descent, was taken into custody and handcuffed by the Immigration and Naturalization Service ("INS") upon her arrival at New York's John F. Kennedy International Airport on June 10, 2000.1 The INS officials at the airport took McKnight into custody because they incorrectly believed she was attempting to commit fraud by presenting an allegedly fake passport.2 McKnight had been returning from a trip to Jamaica to visit her sick grandfather, and because the 35 year old woman had the mental capacity of a young child, her concerned family was awaiting her arrival at the airport.3 Despite McKnight's family presenting the INS with a copy of her birth certificate, INS officials proceeded to detain her overnight at the airport, shackled her legs to a chair, and neither fed her nor permitted her to use the restroom.4 The next morning, McKnight, a United States citizen, was deemed inadmissible and forced to return to Jamaica.5

Under the Illegal Immigration Reform and Responsibility Act of 1996 ("IIRIRA"),6 Congress created a procedure for "expedited removal of inadmissible arriving aliens."7 This procedure allows immigration inspection officers, when assessing the admissibility of aliens entering the United States, to order an inadmissible alien's immediate removal from the United States

† B.B.A. 2005, University of Wisconsin; J.D. Candidate 2008, University of Chicago.
2 Id.
3 Id.
4 Id.
5 Musalo, 28 Hum Rts Mag at 12 (cited in note 1).
7 IIRIRA § 302, codified at 8 USC § 1225.
Enforcement of the expedited removal procedure has resulted in fundamental and controversial changes to the admission and exclusion policies in the United States.

Prior to IIRIRA, aliens were entitled to challenge the officer's removal order and defend their admissibility at an exclusion hearing before an immigration judge. Now, under IIRIRA, an immigration officer may order an alien's removal from the United States without any hearing or review. This streamlining of the removal process substantially impairs protections that exist to guard against illegal and discriminatory enforcement of the removal procedure. Moreover, because of strict statutory restrictions, challenges to expedited removal are extremely limited. In *American Immigration Lawyers Association* ("AILA") *v* Reno, the D.C. Circuit held that organizational plaintiffs lack standing, statutorily or constitutionally, to challenge expedited removal procedures on behalf of aliens who were not parties to the lawsuits.

This Comment will discuss the emergence of expedited removal as one of the most controversial removal procedures by highlighting the barriers to challenging expedited removal, the lack of judicial review of expedited removal orders, and the wide discretion granted to low-level immigration inspection officers to make unreviewable admission and removal decisions. The Comment will also discuss due process concerns surrounding expedited removal and address how resolution of whether expedited removal violates due process could greatly affect United States immigration policy. Moreover, the Comment will critique the expedited removal process by challenging the "entry fiction" and "plenary power" doctrines, both of which served as key rationales behind the initial articulations of expedited removal. In order to address those discussion points and critiques of expedited removal, first, Part I will lay out the emergence of expedited removal under IIRIRA and depict how it has fundamentally

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9 See 8 USC § 1226(b) (1994) ("From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal.").
11 199 F3d 1352 (DC Cir 2000).
12 Id at 1359–62 (explaining that Congress only intended aliens impacted by the new procedures to bring challenges in court).
changed immigration removal procedures. Then, Part II will address the constitutional concerns surrounding expedited removal by focusing on the lack of judicial review, the recent expansions to the expedited removal process, and the discriminatory enforcement of expedited removal procedures.

I. THE EMERGENCE OF EXPEDITED REMOVAL IN IMMIGRATION POLICY

A. Changes to Removal Procedures under IIRIRA

Every alien who enters the United States at a port of entry is subject to primary inspection, whereby an immigration inspection officer analyzes the validity of the alien’s visa (or other entry document). If the inspection officer questions the alien’s admissibility, the alien is then subject to secondary inspection. Under IIRIRA, Congress drastically reformed the secondary inspection process by creating the process of expedited removal, which has become one of the most controversial provisions of United States immigration law and policy. The expedited removal provision was codified under Section 235 of the Immigration and Nationality Act (“INA”) of 1952, replacing the prior secondary inspection process in order to streamline the removal of certain inadmissible aliens who indisputably lack authorization to enter the United States.

The IIRIRA provides that in the event an immigration inspection officer finds an alien arriving in the United States inadmissible because of fraudulent documentation or lack of valid documentation, the officer shall order the alien’s removal from

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13 See id at 1354 (describing the primary inspection process under IIRIRA).
14 Id.
16 See INA § 235(b), 8 USC § 1225(b) (2000) (codifying the IIRIRA expedited removal provision). See also AILA, 199 F3d at 1355 (noting that the IIRIRA reformed the secondary inspection process, removing the right of an alien to defend his eligibility before an immigration judge, in order to “expedite the removal from the United States of aliens who indisputably have no authorization to be admitted”), quoting HR Conf Rep No 104-828 at 209 (1996).
the United States without any hearing or review of that order. Upon removal, these individuals may not return to the United States for the following five years, regardless of whether they have obtained proper documentation.

While the statute prohibits administrative and judicial review of expedited removal orders, the alien may be able to contest the officer's order by filing a petition for a writ of habeas corpus. However, it remains very difficult to file a habeas petition.

Section 1252(e)(2) authorizes habeas review only with regard to the following set of issues: whether the individual is an alien; whether the alien was ordered removed under Section 1225(b)(1); or whether the individual is a previously admitted permanent resident, refugee, or asylee who is entitled to additional administrative procedures. Moreover, Section 1252(e)(5) expressly instructs that courts assessing whether an alien has been "ordered removed" may only analyze whether expedited removal was in fact ordered and may not review whether the alien is actually inadmissible.

Prior to the creation of expedited removal under IIRIRA, aliens were entitled to challenge the immigration officers' removal orders and defend their admissibility at an exclusion hearing before an immigration judge ("IJ"). In addition, aliens were entitled to counsel at the hearing and could appeal adverse rulings to the Board of Immigration Appeals ("BIA"), and eventually, federal court.

The hearing and the opportunity to appeal

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18 See 8 USC § 1182(a)(9) (2000) (providing that any alien who has been ordered removed under 8 USC § 1225(b)(1) who seeks admission within five years is inadmissible).
21 8 USC § 1252(e)(5). See also Gerald L. Neuman, *Restructuring Federal Courts: Immigration: Federal Courts Issues in Immigration Law*, 78 Tex L Rev 1661, 1673 (2000) (stating "this prohibits the habeas court from addressing clear errors of law on uncontested facts, as well as from examining the officials' factfinding").
22 See 8 USC § 1226(b) (1994) (providing for an appeal from a decision by a special inquiry officer excluding an alien).
23 See 8 USC § 1105a (1994) (describing procedures for judicial review of final orders of deportation); 8 USC § 1362 (1994) (providing the right to counsel "[i]n any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings").
afforded the alien some judicial protections against invalid and discriminatory removal orders.

For example, in *Tavakoli-Anaraki v Ilchert*, the federal court held that the BIA’s summary dismissal of the immigrant’s appeal was improper and sufficiently prejudicial to effect a denial of the immigrant’s due process rights. The immigrant, an Iranian citizen who sought admission into the United States as a foreign student, had appealed the IJ’s ruling that he was excludable for fraud in obtaining a passport and for possession of an invalid visa. The case was remanded to the BIA because the IJ improperly denied the immigrant’s application for political asylum and likewise should have found that the alien demonstrated a credible fear of persecution if forced to return to Iran.

In *Molaire v Smith*, the court found that the IJ denied due process of law by depriving the alien in question (a Haitian asylum-seeker) of procedural safeguards, such as the right to representation by counsel, and that the BIA abused its discretion by denying the alien’s motion to reopen the exclusion proceeding. The court supported its decision by noting that several federal courts had found that the INS has engaged in illegal and discriminatory practices with respect to Haitian asylum-seekers. These two pre-IIRIRA cases demonstrate that the additional layers of judicial review are critical to protecting the aliens from illegal and discriminatory treatment in immigration proceedings.

Today, however, any alien who is removed pursuant to expedited removal provisions has extremely limited opportunities for review and may not reenter the country for five years. In addition, the alien’s only form of relief is an opportunity to voluntarily withdraw his admission application granted by the immigration inspection officer. This constitutes a form of “relief” only insofar as it allows the alien to avoid the five-year bar to re-entry.

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25 Id at *10–12.
26 Id at *1.
27 Id at *10.
28 743 F Supp 839 (S D Fla 1990).
29 Id at 843–44.
30 Id at 850.
33 Id.
B. Expedited Removal Exemptions

Since the inception of expedited removal, some courts have recognized due process rights for aliens facing expedited removal if the alien in question has established "substantial connections" with a community in the United States.\textsuperscript{34} For example, in \textit{Ramirez-Landeros v Gonzales},\textsuperscript{35} the Ninth Circuit asserted that an alien who has already entered the United States is entitled to due process rights and held that "an alien may establish the ten years' physical presence required for cancellation of removal so long as her departures from the United States during that time did not exceed ninety days per departure or 180 days in the aggregate."\textsuperscript{36} Furthermore, in an immigration proceeding the Supreme Court has declared that the text of the Constitution supports the assertion that

"the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.\textsuperscript{37}

Moreover, IIRIRA expressly exempts certain aliens from expedited removal. Pursuant to Section 1225(b)(1)(A)(ii), aliens who intend to apply for asylum or who demonstrate fear of persecution if forced to return to their home country are exempt from expedited removal.\textsuperscript{38} Such aliens are referred to an asylum officer, who will determine if the alien has established a "credible fear" of persecution.\textsuperscript{39} The "credible fear" determination is based on whether the credibility of the alien's statements made in support of his or her claim, as well as the other relevant facts known

\textsuperscript{34} Id at 228.
\textsuperscript{35} 2005 US App LEXIS 19796 (9th Cir).
\textsuperscript{36} Id at *10, citing 8 USC § 1229(b)(d)(2) (2000).
\textsuperscript{37} United States v Verdugo-Urquidez, 494 US 259, 265 (1990) (holding that the Fourth Amendment protections against unreasonable searches and seizures did not apply because respondent was a Mexican citizen with no voluntary attachment to the United States and because the residence searched was in Mexico).
to the officer, sustain a significant possibility that the alien is eligible for asylum under INA § 208.40

If the officer finds the alien lacks a credible fear of persecution and orders the alien's removal, the alien can request that an IJ review the removal order.41 On the other hand, if the asylum officer finds that the alien has established a credible fear of persecution, the alien will be granted a full hearing under 8 USC § 1229(a).42

Also exempt from expedited removal are "Cubans who arrive in the United States by plane, pre-April 1, 1997, parolees, or persons granted advance parole which they applied for and obtained in the United States prior to departure from the United States."43 Furthermore, expedited removal generally does not apply to unaccompanied minors.44

C. Expansions of Expedited Removal Procedures

While expedited removal was created under an agency statute, rather than a federal law enacted by Congress, the removal procedure has since become embedded in federal immigration law and policy. Because of the pervasiveness of expedited removal in the immigration arena today, constitutional challenges to the process of expedited removal could greatly affect current admission and removal procedures in the United States. For example, aliens who enter the United States under the Visa Waiver Program, which provides an expedited admission process for aliens from certain countries and authorizes admission for up to ninety days, may also be subject to expedited removal.45 The Visa Waiver Program provides that prior to admittance to the United States, the alien is required to sign a waiver of his or her right to contest removal, unless through an application for asylum.46

40 8 USC § 1225(b)(1)(B)(v) (2000). See also § 1158(b)(1)(B)(iii) (2000) (enumerating the factors accounted for in the credibility determination, such as the demeanor, candor, or responsiveness of the applicant or witness).
42 Id.
44 Id at 4.
45 8 USC § 1187(b)(2) (2000).
46 Id. See also Ferry v Gonzalez, 457 F3d 1117, 1120, 1127 (10th Cir 2006) (discussing how the Visa Waiver Program subjects the alien in question to an expedited removal process).
Contributing to the controversial character of expedited removal is the fact that while it has become embedded in various components of immigration policy, the exact procedural and geographical boundaries surrounding the enforcement of expedited removal remain unsettled. Initially, expedited removal was limited to aliens seeking admission at a port of entry, such as an airport. Two controversial doctrines, the "entry fiction" and "plenary power" doctrines, both of which apply to much of immigration policy, were key rationales behind the initial articulation of expedited removal.

The "entry fiction" doctrine is derived from immigration law's historical distinction between those aliens who "come to our shores seeking admission and those who are within the United States after an entry, irrespective of its legality." The Supreme Court has articulated the doctrine by expressing that certain constitutional rights are not extended to those "who are merely on the threshold of initial entry," such as aliens at an American airport. The "plenary power" doctrine protects immigration issues from judicial inquiry or interference and provides that judges are denied jurisdiction to analyze the constitutionality of a congressional statute regarding the admission or exclusion of aliens to the United States. Essentially, the plenary power doctrine grants Congress full authority over the creation and review of federal immigration law and policy. Therefore, the constitutionality of expedited removal is controversial because low-level immigration inspection officers are given relatively wide discretion to make admission and exclusion decisions that will not be reviewed by any court.

47 See 8 CFR § 1.1(q) (2007) (defining "arriving alien" as 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). The initial articulation of expedited removal under IIRIRA provided that the process applied to inadmissible "arriving aliens."


49 See Leng May Ma v Barber, 357 US 185, 187 (1958) (holding that INA § 243(h) only applied to aliens within the United States, not aliens seeking admission, such as detained aliens in custody during pending deportation). See also Niskimura Ekiu v United States, 142 US 651, 660 (1892) (holding the alien was not entitled to review of her writ of habeas corpus because the Act forbidding certain alien immigrants from entrance was constitutional).

50 Leng May Ma, 357 US at 187, citing Shaughnessy v United States ex rel Mezei, 345 US 206, 212 (1953).


52 Id at 214.
However, the wide discretion and lack of judicial review of expedited removal determinations have not prevented further expansion of the procedure. In 2002, the procedure was expanded to apply to aliens who arrive in the United States by sea, and who have not been physically and continuously present in the United States for two years prior to the alien's inadmissibility determination. The expedited removal procedure was again expanded in October 2004, to include aliens within one hundred miles of any United States international land border who had entered the United States within the last fourteen days. After piloting the expansion in select southwestern sectors this expansion was applied to all eligible southwest border patrol sections in September 2005, and expanded to include the northern and coastal borders in January 2006. Those expedited removal expansions have yet to be codified; however, it is possible that pending legislation could either codify the current expansive procedures or even further expand expedited removal. Moreover, the House passed the “Immigration Law Enforcement Act of 2006” on September 21, 2006, which, among other things, calls for further expansions to the expedited removal process. If enacted, the bill will broaden expedited removal by granting state and local law enforcement officials the authority to enforce immigration laws and remove individuals, without judicial review or a fair hearing, whom the officials believe are recently arrived undocumented immigrants within one hundred miles of the border.

53 See Immigration and Naturalization Service, Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed Reg 68924, 68924 (Nov 13, 2002) (establishing that aliens who arrive in the United States by sea and who have not been physically present in the United States continuously for two years prior to the inadmissibility determination may be placed in expedited removal proceedings).

54 See Bureau of Customs and Border Protection, Designating Aliens for Expedited Removal, 69 Fed Reg 48877-01, 48880–81 (Aug 11, 2004) (expanding expedited removal to include aliens “encountered by an immigration officer within 100 air miles of any U.S. international land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the date of encounter”).


57 Id.
D. Challenges to Expedited Removal Orders

Due to strict statutory limitations, challenges to expedited removal orders are very rare. Pursuant to 8 USC § 1252(e)(3)(A), lawsuits challenging expedited removal orders must be filed within sixty days of implementation, may be brought only in the United States District Court for the District of Columbia, and are restricted to challenges regarding the constitutionality of the applicable statute or regulation and whether the regulation is consistent with the law. However, it should be noted that a sixty-day limitation for judicial review of agency action, as well as Congress designating the District of Columbia as the exclusive venue for judicial review, are common statutory limitations. Moreover, in AILA, an expedited removal case subject to those statutory limitations, the District of Columbia Court of Appeals dismissed the lawsuits on jurisdictional grounds. As a result of that jurisdictional holding, as well as the § 1252(e)(3)(A) statutory limitations, other courts have not had the opportunity to assess the merits of the legal challenges to expedited removal. The AILA court dismissed the individual plaintiffs’ claims for lack of jurisdiction and held that the organizational plaintiffs lacked third-party standing to represent aliens who were not parties to the lawsuit.

The D.C. Circuit supported its holding in AILA that organization plaintiffs lacked third-party standing by asserting that Congress clearly intended to allow challenges only from aliens who have personally been subject to expedited removal. To that end, the court emphasized the expedited removal statute’s jurisdictional and injunctive relief provisions. The jurisdictional provision provides that “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceed-

60 AILA, 199 F3d at 1364.
61 Id at 1354. See also Musalo, et al, 15 Notre Dame J L, Ethics, & Pub Pol at 23 (cited in note 15).
62 See AILA, 199 F3d at 1359–60 (concluding that “[n]one cannot come away from reading this section [8 USC § 1252] without having the distinct impression that Congress meant to allow litigation challenging the new system by, and only by, aliens against whom the new procedures had been applied”).
63 Id.
ings, adjudicate cases, or execute removal orders against any alien under this Act."\(^{64}\)

In light of the AILA holding, as well as the statutory limitations on challenging expedited removal procedures, post-AILA challenges to expedited removal can be brought only in the Supreme Court.\(^{65}\) In *Reno v American-Arab Anti-Discrimination Committee*,\(^ {66}\) the Supreme Court did not address expedited removal directly; however, the Court did address judicial review of INS operations and the Attorney General's decisions.\(^ {67}\) The Court's opinion suggests that the Court would hesitate to bar judicial review entirely.\(^ {68}\) Therefore, in the event that the Supreme Court addresses constitutional challenges to expedited removal, there is potential for tension between the expedited removal statute's strict denial of judicial review and the disagreement and hesitance within the Supreme Court to completely bar judicial review.

Further hindering the Supreme Court from scrutinizing the need for judicial review of expedited removal procedures is the principle that the expedited removal statute falls within the "plenary power" doctrine.\(^ {69}\) Long-standing acceptance of the "plenary power" doctrine and the lack of information available regarding the implementation of expedited removal procedures are among the factors that make challenging expedited removal determinations very difficult.\(^ {70}\) Consequently, while expedited removal has remained an extremely controversial immigration procedure, the constitutionality of expedited removal remains relatively unchallenged.

In addition, there are several noteworthy concerns surrounding the implementation and enforcement of expedited removal, including due process violations, the continued failure of statutory safeguards for expedited removal, immigration inspection officers' failure to follow proper admission and removal proce-

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\(^{64}\) Id, citing 8 USC § 1252(g) (2000).

\(^{65}\) Laplante, 25 NYU Rev L & Soc Change at 270 (cited in note 32).


\(^{67}\) Id at 476–79.

\(^{68}\) Laplante, 25 NYU Rev L & Soc Change at 241 (cited in note 32) (discussing Justice Ginsberg's and Justice Souter's constitutional concerns regarding barring judicial review in *Reno v American-Arab Anti-Discrimination Committee*).

\(^{69}\) Id at 269 (stating that "[t]he greatest hurdle to judicial review requires the court to scrutinize Congressional acts that fall squarely within the plenary power doctrine").

\(^{70}\) See Musalo, et al, 15 Notre Dame J L, Ethics, & Pub Pol at 1–2 (cited in note 15) (noting that the Immigration and Naturalization Service refused non-governmental organizations' requests to observe the implementation of expedited removal).
dures, and the potential for corrupt enforcement by state and local border patrol. It is particularly important to address these concerns in light of the potential for further expansion of expedited removal due to pending legislation. If further expansions of expedited removal are enacted without first addressing the fundamental and constitutional shortcomings in the process, it will be extremely difficult to ensure that the procedure is legally and constitutionally enforced.

II. CONSTITUTIONAL CONCERNS SURROUNDING EXPEDITED REMOVAL

A. Enforcement of Expedited Removal Procedures Can Result in Due Process Violations

Due process entails a constitutional guarantee that no person shall be deprived of life, liberty, or property, without receiving certain procedural safeguards.\(^7\) In immigration proceedings prior to the passage of IIRIRA, that guarantee meant that aliens seeking admission into the United States could expect minimal due process guarantees, such as the right to counsel, to present evidence at a hearing, to challenge the government's evidence, and to appeal an immigration judge's decision.\(^7\) However, expedited removal procedures strip certain aliens seeking admission of those minimal due process guarantees by authorizing immigration inspection officers to order the alien's removal from the United States without any hearing or review of that order. Consequently, a due process violation occurs when a low-level officer incorrectly enforces expedited removal of an alien who is then denied the opportunity to seek judicial review.\(^7\)

Existing evidence provides numerous instances in which inspection officers have abused and incorrectly enforced expedited removal procedures. For example, one scholar has asserted that "[t]he press, along with immigration attorneys and advocates, have collected many stories of low-level INS inspectors misusing the new procedure to remove and impose a five-year bar against legal permanent residents, foreign nationals carrying valid business or visitor visas, refugees, and asylum seekers."\(^7\) Moreover,

\(^{71}\) US Const Amend V, Amend XIV.
\(^{72}\) See note 23.
\(^{73}\) See Laplante, 25 NYU Rev L & Soc Change at 216 (cited in note 32) (asserting that constitutional violations arise under the enforcement of expedited removal).
\(^{74}\) Id at 215–16.
the Government Accountability Office ("GAO") has reported that "second-line supervisors" at some of the busiest United States airports failed to review expedited removal orders in up to 3 percent of the cases, in violation of the requirements of 8 CFR § 235.3(b)(7). In such instances, permanent residents and other legally admissible aliens are deemed inadmissible and denied any judicial review of that determination. They are therefore subjected to due process violations that, as the preceding Section demonstrated, are extremely difficult to challenge under current immigration law.

For example, in \textit{Perez v Gonzales}, the challenging alien asserted that his 2000 expedited removal order violated due process because it was enforced despite his valid visa. The court held that it could not reopen or review the merits of the removal order, regardless of the potential for a clear due process violation, because the reinstatement of a previously issued order of removal constituted a final order. The \textit{Perez} court stated that "[w]e may review the validity of an underlying removal order only when there is a showing of a gross miscarriage of justice in the initial proceedings." Moreover, Section 1231(a)(5) provides that under expedited reinstatement proceedings the prior removal order is not subject to reopening or review; therefore, the limited habeas review granted to certain expedited removal orders will not be granted in reinstatement proceedings.

One may dispute due process violation claims by asserting that non-citizens who have not yet entered the United States are not afforded traditional due process rights. However, in order to properly analyze the due process concerns surrounding expedited removal, it is critical to understand the traditional approach that courts have followed regarding due process rights for non-citizens. In \textit{Kaoru Yamataya v Fisher}, the Supreme Court es-

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76 2006 US App Lexis 20235 (5th Cir).
77 Id at *3.
78 Id.
79 Id.
81 189 US 86 (1903).
established the framework for procedural due process in deportation proceedings and asserted that a non-citizen in the United States (even if present illegally) should not be removed without the opportunity to be heard regarding his rights to remain in the United States.\textsuperscript{82} In \textit{Nishimura Ekiu v United States},\textsuperscript{83} the Court established the due process framework for exclusion proceedings by asserting that exclusion proceedings are determined solely by administrative officers and are not subject to due process inquiry.\textsuperscript{84}

Therefore, the traditional approach asserts that non-citizens who have already entered the United States are afforded traditional due process rights as defined under the Constitution; however, non-citizens who have not yet entered the United States are not afforded traditional due process rights.\textsuperscript{85} The traditional due process framework was modified by the Supreme Court's holding in \textit{Landon v Plasencia}.\textsuperscript{86} The Court held that Plasencia, a legal permanent resident returning to the United States after a brief, two-day trip to Mexico, was entitled to a level of due process not usually accorded to non-citizens seeking admission.\textsuperscript{87} The Court explained the determination by noting that Plasencia, as a permanent resident, had already developed ties to her community and stated that "once an alien gains admission to our country and begins to develop ties that go with permanent residence his constitutional status changes accordingly."\textsuperscript{88}

The Court's holding in \textit{Plasencia} is persuasive in assessing due process claims in expedited removal proceedings because the Court suggests that one's constitutional status should be based on more than just one's geographic location.\textsuperscript{89} Moreover, this holding evidences a shift away from focusing solely on one's geographic location for purposes of determining which constitutional rights a non-citizen is afforded, to focusing on the individual's

\begin{footnotes}
\item[\textsuperscript{82}] Id at 101.
\item[\textsuperscript{83}] 142 US 651 (1892).
\item[\textsuperscript{84}] Id at 660.
\item[\textsuperscript{85}] See \textit{Zadvydas v Davis}, 533 US 687, 693 (2001) (asserting that "the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); John L Pollock, \textit{Missing Persons: Expedited Removal, Fong Yue Ting, and the Fifth Amendment}, 41 Ariz L Rev 1109, 1113-15 (1999) (discussing the traditional due process framework).
\item[\textsuperscript{86}] 459 US 21 (1983).
\item[\textsuperscript{87}] Id at 32-35.
\item[\textsuperscript{88}] Id at 32.
\item[\textsuperscript{89}] Id at 32–33.
\end{footnotes}
rights and well-being. However, one could critique the assertion that *Plasencia* is persuasive in expedited removal analysis because in at least some expedited removal cases, the non-citizen seeking admission has no previous ties to the United States.

Contrary to the Supreme Court's suggestion in *Plasencia* that one's constitutional status depends on more than geographic location, the expansions of expedited removal have focused almost exclusively on geographic location. As noted above, in 2002 the expedited removal process was expanded to apply to aliens arriving by sea who have not been physically and continuously present in the United States for two years prior to the inadmissibility determination, and the 2004 expansion included all aliens within one hundred miles of the border who had entered the United States within the last fourteen days. Then in 2006, the provisions were expanded to include all coastal waters. These expansions directly conflict with the traditional due process framework whereby non-citizens who have already entered the United States are afforded traditional due process rights. In addition, the expansions conflict with the shift away from focusing solely on one's geographic location for purposes of determining which constitutional rights a non-citizen is afforded, as depicted in *Plasencia*.

In *Plasencia*, the Supreme Court supported that shift by upholding the *Mathews v Eldridge* due process "balancing test" in order to determine the constitutional sufficiency of the procedures provided to the non-citizen seeking admission. Under the *Mathews v Eldridge* balancing test, the court must consider three factors: "[f]irst, the private interest that will be affected by the official action; second, 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." Moreover, modern immigration cases tend to emphasize the flexibility of procedural due process and several cases have acknowledged the *Mathews v
The Eldridge balancing test as the modern procedural due process framework.  

1. The potential for due process violations is exacerbated by the lack of judicial review and wide discretion given to low-level inspection officers.

The lack of judicial review and the wide discretion given to low-level inspection officers contribute to the constitutionally defective nature of expedited removal. It is a generally accepted legal principle that in order to restrain abuse of discretion in administrative determinations, courts should insist on and carry out judicial review of those determinations. Despite the importance of judicial review, the REAL ID Act of 2005 significantly restricts the system of judicial review of immigration proceedings. However, the “jurisdiction-stripping” Act also created a new provision, INA § 242(a)(2)(D), which expressly allows the Courts of Appeals to exercise judicial review of constitutional claims or questions of law raised in a petition for review. While the Act depicts the tension between Congress’s efforts to streamline immigration proceedings through limited judicial review and the significance of judicial review, the Act clearly demonstrates recognition by Congress of the critical role judicial review plays in ensuring that immigration policy is enforced in a constitutional manner.

Moreover, as discussed in Part II, the statutory restrictions to challenging expedited removal, as well as the AILA holding, make it extremely difficult for courts to evaluate expedited removal for compliance with conventional constitutional norms. These barriers suggest a need for evaluating the enforcement of

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96 See Morales-Izquierdo v Gonzales, 477 F3d 691, 702–05 (9th Cir 2007) (en banc) (finding, under the Mathews v Eldridge due process framework, that the regulation, 8 CFR § 241.8, provided sufficient procedural safeguards and did not offend due process; and holding that a previously removed alien who reentered the country illegally was not entitled to a hearing before an immigration judge to determine whether to reinstate a prior removal order).


99 See REAL ID Act § 106, to be codified at 8 USC § 1252 (eliminating habeas review of most types of immigration claims and prohibiting judicial review in Federal District Courts).

100 See INA § 242(a)(2)(D); 8 USCA § 1252(a)(2)(D) (2007) (granting the court of appeals full review of constitutional claims or questions of law).
expedited removal, and more specifically, the role of state border police and other local means of enforcement along the United States border. The nationwide "Expedited Removal Study" conducted by the University of California-Hastings College of Law, reported several incidents in which Cuban asylum seekers were denied admission to the United States, despite the fact that under the expedited removal statute they should have been granted a "credible fear" interview.\footnote{Musalo, et al, 15 Notre Dame J L, Ethics, & Pub Pol at 37–40 (cited in note 15).} The study reported numerous incidents at the U.S.-Mexico border in which expedited removal procedures were not properly applied by the low-level officials entrusted with executing the policies.\footnote{Id at 37–39.} This pattern of improper enforcement of expedited removal evidences the potential for state border police officers to abuse the power granted to them by the expedited removal procedure and obstruct an alien's due process rights. Moreover, this demonstrates the need for judicial review in order to curtail such abuse of power and the obstruction of aliens' rights.

The potential for abusive enforcement of expedited removal procedures is exacerbated by the recent proliferation of civilian border patrol organizations, most notably the "Minutemen Project," combined with pending legislation regarding expedited removal.\footnote{See Jessica Conaway, Note, Reversion Back to a State of Nature in the United States Southern Borderlands: A Look at Potential Causes of Action to Curb Vigilante Activity on the United States/Mexico Border, 56 Mercer L Rev 1419, 1419–21 (2005) (discussing the rise of vigilante border control groups since the late 1980s and early 1990s). See also The Official Minuteman Civil Defense Corps, available at <http://www.minutemanhq.com/hq/> (last visited Apr 27, 2007).} If enacted, HR 6095 will expand expedited removal and authorize state and local police to enforce federal immigration law.\footnote{See HR 6095 §§ 101, 301 (cited in note 56); Stephen R. Vina, et al, Civilian Patrols Along the Border: Legal and Policy Issues, CRS Report RL33353 (Apr 7, 2006), available at <http://www.fas.org/sgp/crs/homesec/RL33353.pdf> (last visited August 30, 2007) (discussing how the "Minutemen Project" initiated in spring 2005 placed hundreds of civilian volunteers on the Arizona-Mexico border).} Moreover, the Minutemen Project consists of approximately two thousand volunteers stationed on the United States-Mexico border in Arizona who search for aliens attempting to enter the country illegally.\footnote{Brian R. Whalquist, Note, Slamming the Door on Terrorists and the Drug Trade While Increasing Legal Immigration: Temporary Deployment of The United States Military at the Borders, 19 Georgetown Immig L J 551, 561 (2005).} When illegal immigrants are found, the Minutemen are ordered not to take any direct action against the illegal aliens; rather, they are instructed to call the Border
Patrol to inform them of the illegal entrant. Significantly, the Minutemen generally are not formally trained border agents. Therefore, by decentralizing the enforcement of expedited removal, the combination of civilian border patrol initiatives with more stringent and expansive expedited removal legislation makes it more difficult to ensure that enforcement is being executed in compliance with statutory restrictions and safeguards, as well as within constitutional bounds.

2. Limiting judicial review and streamlining admission and removal procedures under IIRIRA.

One critique of judicial review-based challenges to expedited removal is that the lack of judicial review is justified because the fundamental goal of IIRIRA was to substantially limit judicial review and streamline admission and removal procedures. Furthermore, in *Reno v American-Arab Anti-Discrimination Committee*, the Supreme Court asserted that numerous IIRIRA provisions are aimed to protect the executive's discretion from the courts, listing several provisions applicable to expedited removal proceedings.

Moreover, when Congress passed the expedited removal statute in 1996, Congress continued what one scholar describes as "the recent trend of cracking down on illegal immigration by increasing the number of border patrols, limiting judicial review, and introducing new penalties for a variety of immigration control violations." However, while limiting judicial review is one of the fundamental goals of IIRIRA, it is critical that immigration policy consider at what expense this goal is being enforced. Government agencies' and courts' actions should not be driven and justified by underlying policy goals that result in gross injustices to citizens.

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106 Id.
107 Id.
108 See id (stating "[t]here have not been any publicized incidents of violence between Minutemen and illegal immigrants, but given the growing number of civilians patrolling the border, dangerous confrontations are likely to arise").
109 525 US at 471.
110 Id at 486 ("[o]f course *many* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation. See, for example, 8 USC § 1252(a)(2)(A) (limiting review of any claim arising from the inspection of aliens arriving in the United States); § 1252(a)(2)(B) (barring review of denials of discretionary relief authorized by various statutory provisions); § 1252(a)(2)(C) (barring review of final removal orders against criminal aliens")").
111 Pollock, 41 Ariz L Rev at 1109 (cited in note 85).
and non-citizens alike. For example, due process clause violations that arise from improper enforcement of expedited removal upon an alien who is then denied judicial review should not be dismissed as merely incidental to the underlying policy goal.

Furthermore, the practical implications of such policy goals need to be assessed. As at least one scholar has argued, IIRIRA's aim of limiting judicial review of INS action merely encourages litigants to reframe their claims in order to take advantage of alternative grants of jurisdiction.\textsuperscript{112} On the one hand, this could be problematic because it may indicate IIRIRA's failure to advance Congress's goal of streamlining the removal process and limiting jurisdiction. Alternatively, it could merely be an indication that IIRIRA was not intended to foreclose all avenues of judicial review.

Moreover, because Congress appears to be continuing its trend of restrictive immigration law and policy, there is a heightened need for courts to ensure that trend is enforced within constitutional bounds. To that end, some scholars criticize the way in which the constitutionality of immigration law is evaluated from the perspective of aliens and suggest that federal immigration law should be considered from the perspective of its consequences for citizens.\textsuperscript{113} Professor Adam B. Cox of the University of Chicago Law School, a proponent of the "citizen standing" approach, asserts that federal immigration law should not be insulated from challenges by citizens and compliance with conventional constitutional norms.\textsuperscript{114} This "citizen standing" approach is discussed further below.

B. The "Entry Fiction" and "Plenary Power" Doctrines, Which Served as Key Rationales Behind Initial Notions of Expedited Removal, Are Outdated and Racist

Calling the entry fiction and plenary power doctrines into question undermines the basis for expedited removal insofar as they have served as key rationales behind the initial articulations of expedited removal. Illegitimating these doctrines chal-

\textsuperscript{112} See Benson, 29 Conn L Rev at 1464–65 (cited in note 19) (asserting that the IIRIRA provisions encourage litigants to tailor their claims to constitutional challenges of the substantive and procedural provisions of the law, as well as seek judicial review of a final order through the writ of habeas corpus).


\textsuperscript{114} Id at 375.
lenges the process of expedited removal by recognizing that the outdated rationales can no longer serve as justifications for expedited removal proceedings.\footnote{115}

1. Discrediting the entry fiction doctrine.

First, one could challenge the entry fiction doctrine—which provides that certain constitutional rights are not extended to those on the threshold of initial entry—by asserting that even if the doctrine itself is valid, it cannot apply to aliens who are already within the United States border. As noted in Part II, the 2004 expansion authorizes enforcement of expedited removal of aliens that are already within one hundred miles of the border.\footnote{116} Therefore, the expansion of expedited removal is directly in conflict with one of the underlying doctrines behind the initial articulation of expedited removal.

Furthermore, years of Supreme Court precedent support the assertion that when a non-citizen alien has entered and remained in the country, even unlawfully or for a brief period of time, he or she is entitled to some constitutional rights, including Fifth, Sixth, and Fourteenth Amendment protections.\footnote{117} Moreover, in 1903 the Supreme Court provided that an alien’s four-day presence in the country prior to deportation proceedings was significant enough to accord the alien procedural due process.\footnote{118}

2. Refuting the legitimacy of the plenary power doctrine.

The plenary power doctrine is vulnerable to critique, as applied to immigration, insofar as the motivations behind the doc-

\footnote{115} Laplante, 25 NYU Rev L & Soc Change at 219 (cited in note 32).

\footnote{116} See Part II C.

\footnote{117} See \textit{Zadvydas}, 533 US at 690 (holding that a statute permitting indefinite detention of an alien would raise constitutional problems because the Fifth Amendment due process clause prohibits the government from depriving any person of liberty without due process of law, and freedom from imprisonment falls within that protection); \textit{Graham v Richardson}, 403 US 365, 371 (1971) (holding that the Fourteenth Amendment "entitles citizens and aliens to equal protection of the laws of the State in which they reside"); \textit{Kaoru Yamataya v Fisher}, 189 US at 100–01 (holding the alien was entitled to procedural due process despite only being in the country for four days); \textit{Wong Wing v United States}, 163 US 228, 242 (1896) (holding that non-citizen aliens subject to criminal proceedings are afforded Fifth and Sixth Amendment protections); \textit{Yick Wo v Hopkins}, 118 US 356, 368–69, 374 (1886) (holding the Fourteenth Amendment is not confined to the protection of citizens, and protects aliens within the jurisdiction of the U.S. from deprivation of life, liberty, or property without due process of law).

\footnote{118} See \textit{Kaoru Yamataya}, 189 US at 100–01.
trine's creation are both outdated and racist.\textsuperscript{119} When the Supreme Court established the plenary power doctrine in 1890, the Court wanted to avoid interference with a congressional act that denied admission to Chinese nationals despite those individuals' substantial liberty or property interests in the United States.\textsuperscript{120} Today, at least one legal scholar has suggested that the Supreme Court continues to enforce the plenary power doctrine, in the context of immigration, in a racist and discriminatory manner. Professor Kevin R. Johnson of the University of California Davis School of Law asserts that "the Supreme Court has invoked the [plenary power] doctrine to permit the federal government, and at times the states, to discriminate against immigrants with the lawful right to remain permanently in this country."\textsuperscript{121}

Moreover, prior to the enactment of IIRIRA, courts were able to use the judicial review stage of immigration proceedings to screen for racist and discriminatory practices by the INS. In Molaire v Smith, the District Court for the Southern District of Florida expressly stated that federal courts have found that the INS has engaged in illegal and discriminatory practices with respect to Haitian asylum-seekers.\textsuperscript{122} As noted in Part I, this case illustrates the critical role that additional layers of review play in ensuring that exclusion and deportation proceedings meet constitutional requirements.\textsuperscript{123} In addition, this case highlights the controversial nature of expedited removal because without judicial review there are fewer safeguards against discriminatory treatment by immigration officials.

The racist stimulus behind the congressional plenary power doctrine could lead one to assert that devolution of immigration

\textsuperscript{119} See Kevin R. Johnson, Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness, 73 Ind L J 1111, 1113–14, 1148–54 (1998) (noting that the "plenary power" doctrine was "[b]orn in an era when Congress acted with a vengeance to exclude Chinese immigrants from this nation's shores" and discussing how the differential treatment of citizens and non-citizens reveals the dominant societies' views towards minorities); Frank H. Wu, The Limits of Borders: A Moderate Proposal for Immigration Reform, 7 Stan L & Pol Rev 35, 35–36 (1996) (stating that "the Court should abolish the archaic doctrine of 'plenary power,' which it developed a century ago in a series of cases upholding immigration policies that today a consensus would regard as being based on race in the most objectionable sense").

\textsuperscript{120} Johnson, 73 Ind L J at 1120 (cited in note 119) (discussing how the Supreme Court's holding in the "Chinese Exclusion cases" led to the development of the plenary power doctrine, which was shaped by racism and prejudices).

\textsuperscript{121} Id at 1113.

\textsuperscript{122} 743 F Supp at 850.

\textsuperscript{123} See Part I A.
authority to the states would be beneficial. The devolution argument declares that "[b]y ridding ourselves of the racist vestiges of the plenary power doctrine . . . we might be able to start afresh, creating new immigration policy free and clear of racism." One scholar, Professor Victor Romero of the Pennsylvania State University Dickinson School of Law, however, has responded to the devolution argument by asserting that both the federal and state governments are just as likely to employ racist policies.

If governments are prone to applying immigration policies in a racist manner, and no legal decisions have stepped in to prevent immigration laws from discriminating on the basis of race, ethnicity, or national origin, it may appear as though little ground is gained by merely labeling an immigration policy as racist. However, immigration policy needs a system that implements effective safeguards against continued discriminatory treatment. Clear evidence demonstrates that immigration policy has been subject to trends of discriminatory treatment against particular racial and ethnic groups. For example, at the time of the exclusion cases it was Chinese-Americans, then in the late twentieth century it was Haitian asylum-seekers, and more recently, largely in response to recent terrorist attacks, Arab-Americans have been subjected to discriminatory admission and deportation proceedings.

Immigration law and policy should neither waver with the racist sentiments of the time nor should it be allowed to exclude or discriminate against those who are merely perceived as "foreign." By allowing a high level of discretion that is influenced by the racist sentiments of the time, this arrangement aggravates the problem that facially neutral immigration laws can, in practice, discriminate on the basis of race. This could be particularly problematic in the enforcement of expedited removal because statistics covering the first few years of its enforcement clearly indicate that, from its inception, the procedure has been used

124 Victor C. Romero, Migration Regulation Goes Local: The Role of States in US Immigration Policy: Devolution and Discrimination, 58 NYU Ann Surv Am L 377, 382 (2002) ("[G]iven the racially-tinged origins of congressional plenary power in the Chinese exclusion/deportation cases and their progeny, one might suppose that devolution to the states of some immigration authority might be desirable.").
125 Id.
126 Id at 383.
disproportionately to remove certain nationalities. In addition, it is estimated that since 1996 expedited removal has been used wrongly to deny entry into the United States to approximately 20 thousand genuine asylum seekers.

3. Plenary power as a standing doctrine.

Scholars have noted that courts have implemented the plenary power doctrine as a "standing doctrine." Accordingly, the courts protect immigration laws from constitutional challenges by aliens because they lack the right to seek judicial review of those laws. Professor Cox avers that "[o]n this conception [of plenary power], a lack of enforceable rights by aliens, rather than a more general immunity from constitutional constraints, drives the judicial insulation of immigration law." Cox asserts that the perspective that the plenary power is essentially a doctrine of standing, coupled with the fact that U.S. citizens have standing to challenge immigration laws, provides that immigration policy must be constrained by conventional constitutional norms. Moreover, Cox suggests that immigration law does not necessarily have to be subject to the same constitutional constraints as domestic law, but at the very least, "citizens should more frequently have standing to seek a judicial determination of what those constraints are."

Professor Frank H. Wu of Wayne State University Law School, another proponent of citizen standing, argues that the same constitutional limits that apply in other legal arenas should be applied in the immigration arena. Wu asserts that citizens should be allowed to challenge discriminatory immigra-

128 See id at 238 ("Statistics on the expedited removal system already reveal a clear pattern in which the new procedure has been applied disproportionately to remove particular nationalities, namely those who have already been characterized as suspect classes."), citing Office of Policy and Planning, United States Immigration and Naturalization Service, Expedited Removals: FY 1998 and 1999 (1999).
130 Cox, 92 Cal L Rev at 386 (cited in note 113).
131 Id at 387.
132 Id at 374.
133 Id at 423.
134 Wu, 7 Stan L & Pol Rev at 55 (cited in note 119) (stating that "[t]he change proposed here would bring to the immigration debate the limits which are recognized in every other sphere of American law").
tion policies by suing under the traditional constitutional framework that has shaped American law. 135

Support for citizen standing stems from the fact that some courts have recognized that immigration law has and continues to cause legally cognizable injuries to U.S. citizens. 136 For example, legally cognizable injuries can arise from citizens' familial ties to immigrants subject to U.S. immigration law. Such injuries are exacerbated when immigration law is enforced in a discriminatory and racist manner and is not subject to judicial review.

Critics of the "citizen standing" approach assert that focusing on citizens' rights and challenges to immigration policies could deter and distract from development of immigrants' rights. 137 One such critic, Stephen Lee, further challenges the "citizen standing" approach by asserting that the Supreme Court has already "signaled" a trend toward establishing immigrant rights by articulating a duty to hear challenges brought by citizens, narrowing the scope of the plenary power doctrine, and issuing decisions driven by individual rights. 138 Expedited removal challenges from the citizen's perspective would likely focus on the rights of the citizen (such as the citizen's right to associate with the removed alien) and not on the discriminatory treatment to which the alien was subject. Therefore, one could argue the "citizen standing" approach would be particularly prohibitive as applied to expedited removal because of the potential for discriminatory treatment that could potentially escape any form of judicial review.

Despite the proposed "immigrants' rights" trend asserted by Lee, the expansion of expedited removal clearly demonstrates a move by Congress in the opposite direction. Accordingly, expanding expedited removal strongly impedes the development of immigrants' rights by limiting judicial review and removing their means of challenging removal orders. Constitutional violations

135 Id at 49–51 (discussing the advantages of the citizens standing approach and asserting that "[c]itizens could challenge immigration policies that, either facially or as applied, discriminated by race rather than alienage" and "citizens should be allowed to sue under traditional constitutional theories of race discrimination").

136 Cox, 92 Cal L Rev at 390–94 (cited in note 113) (discussing how courts have determined that immigration law can injure citizens by encroaching on their associational and economic interests).

137 See Stephen Lee, Comment, Citizen Standing and Immigration Reform: Commentary and Criticisms, 93 Cal L Rev 1479, 1484 (2005) (stating "[t]o embark on a road toward citizen challenges to immigration policies would distract judges from developing a robust theory of immigrants' rights").

138 Id at 1483.
seem inevitable insofar as the expansions have occurred despite evidence that expedited removal procedures have been enforced in a discriminatory manner.

CONCLUSION

Since the passage of IIRIRA, expedited removal has emerged as a controversial and unsettled removal procedure. Despite clear evidence of illegal and discriminatory enforcement of expedited removal, many of those injustices have not been addressed because challenging expedited removal on procedural grounds remains extremely difficult. Moreover, challenging expedited removal on doctrinal grounds, through illegitimizing the entry fiction and plenary power doctrines, reveals clear instances of due process violations that need to be addressed prior to further expansions of the removal procedure.

While many of the constitutionally problematic aspects of expedited removal addressed herein may not individually provide sufficient grounds for completely repudiating expedited removal, taken together they call attention to the need for critically reassessing the legality and constitutionally of the process. Even if a complete repudiation of the expedited removal process cannot be attained in the near future, it remains critical that we discern the components and implications of expedited removal that need to be addressed by Congress and immigration officials at all levels.