



September 23, 2019

Acting Secretary Kevin McAleenan
Department of Homeland Security
Washington, DC 20528

Via: Federal e-Rulemaking Portal <https://www.regulations.gov>

Subject: *Designating Aliens for Expedited Removal*, Docket No. DHS-2019-0036

Dear Acting Secretary McAleenan:

The Constitution Project at the Project On Government Oversight writes in response to Docket No. DHS-2019-0036, *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35409 (July 23, 2019).¹ The Department of Homeland Security (DHS)'s proposed nationwide expansion of expedited removal would empower immigration officers to arbitrarily detain and deport anyone they suspect of having entered the United States without inspection, in violation of the Constitution's protection of due process. It also represents an unconstitutional suspension of the writ of *habeas corpus*, and creates an unacceptable risk of chilling constitutionally protected activities by citizens and noncitizens alike.

Many of these risks come from the text of the expedited removal statute itself, which places the burden on detained noncitizens to prove that they should not be summarily deported, and severely curtails judicial review.² Precisely for that reason, the U.S. government has never attempted to apply the statute nationwide before.

As summarized by one federal judge, "the expedited removal process begins and ends" with an immigration officer, and provides "no right to appear in front of a judge and no right to hire legal representation." Furthermore:

There is no hearing, no neutral decision-maker, no evidentiary findings, and no opportunity for administrative or judicial review. This lack of procedural safeguards in expedited removal proceedings creates a substantial risk that noncitizens subjected to expedited removal will suffer an erroneous removal.³

There have been many examples of individuals wrongfully subjected to expedited removal over the years. These include noncitizens who have lawful immigration status; undocumented people

¹ *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35,409 (July 23, 2019).

<https://www.federalregister.gov/documents/2019/07/23/2019-15710/designating-aliens-for-expedited-removal>

² 8 U.S.C. § 1225(b). <https://www.law.cornell.edu/uscode/text/8/1225>

³ *United States v. Peralta-Sanchez*, 847 F.3d 1124, 1142 (9th Cir. 2017) (Pregerson, J., dissenting).

<http://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/07/14-50393.pdf>

who fall outside the expedited removal statute or regulation; legitimate asylum seekers; and even U.S. citizens.⁴ The nationwide expansion of expedited removal would drastically increase the number of these cases.

The dangers of expanding immigration agents' summary deportation power are dramatically illustrated by the recent experience of Francisco Erwin Galicia, a U.S. citizen who was detained by DHS for 26 days this summer in squalid conditions. According to news reports, Galicia recently testified in federal court that he showed border patrol agents a U.S. birth certificate and a Texas driver's license, but they did not believe the documents were authentic.⁵ He was not allowed to call his mother, and had no means of communicating with the lawyer she hired. When the lawyer brought proof of Galicia's citizenship to immigration officials, they initially refused to even confirm he was in custody. Galicia was held in an overcrowded border patrol holding cell with 60 other men. He could not shower for over three weeks, and lost over 20 pounds due to inadequate food. Galicia told the *Dallas Morning News* the day after his release, "It got to the point where I was ready to sign a deportation paper just to not be suffering there anymore. I just needed to get out of there."⁶

DHS's notice, echoing the expedited removal statute, places the burden on a detained immigrant to have "affirmatively shown, to the satisfaction of an immigration officer," that they have been present in the United States for two years or more. But it does not provide any mechanism for a noncitizen to gather evidence. There is no right to a lawyer, even at one's own expense. There is also no right to obtain evidence, and no mechanism to appeal to a judge or other independent decision-maker, except in extremely narrow circumstances.

The July 24, 2019, implementing guidance from Acting Immigration and Customs Enforcement (ICE) Director Matthew Albence to ICE employees ("Albence memo") similarly provides no meaningful protection against abuses like Galicia's detention.⁷ Either an initial entry into the United States *or* two years of continuous presence makes it unlawful for DHS to subject an individual to expedited removal, but the Albence memo places the burden on individuals to provide proof of both their initial entry into the U.S. *and* their continuous presence in the U.S. for two years before their arrest.

⁴ American Civil Liberties Union, *American Exile: Rapid Deportations that Bypass the Courtroom* (December 2014). <https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom>; American Immigration Council, *The Perils of Expedited Removal* (May 2017). [https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations_jeopardize_detained_asylum_seekers.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations jeopardize_detained_asylum_seekers.pdf); *Lyttle v. United States*, 867 F. Supp. 2d 1256, 1272-73 (M.D. Ga 2012). <https://www.leagle.com/decision/infdc020120402921>; Ian James, "Wrongly Deported, American Citizen Sues INS for \$8 Million," *Los Angeles Times*, September 3, 2000. <https://www.latimes.com/archives/la-xpm-2000-sep-03-mn-14714-story.html>

⁵ Carlos Sanchez, "Migrants Testify to Sleeping Near Urine and Feces in South Texas Border Patrol Holding Facilities," *Texas Monthly*, September 6, 2019. <https://www.texasmonthly.com/news/migrants-sleeping-feces-and-urine-south-texas-border-patrol-holding-facilities/>

⁶ Obed Manuel, "No shower for 23 days; U.S. citizen says conditions were so bad that he almost self-deported," *Dallas Morning News*, July 24, 2019. <https://www.dallasnews.com/news/immigration/2019/07/24/no-shower-for-23-days-u-s-citizen-says-conditions-were-so-bad-that-he-almost-self-deported/>

⁷ Memorandum from Acting Director Matthew T. Albence to ICE employees about implementation of July 2019 designation of aliens subject to expedited removal, July 24, 2019. <https://www.aila.org/infonet/ice-memo-implementation-expedited-removal>

The Albence memo states:

If an alien is unable to personally provide such evidence at the time of encounter but claims to have access to such evidence, the alien shall be permitted a brief but reasonable opportunity to obtain it or communicate with a third party to obtain such evidence.⁸

The Albence memo does not provide any additional detail on what constitutes a “brief but reasonable opportunity,” and states that individuals subjected to expedited removal have no legal right to enforce this limit. It does not provide any mechanism for obtaining testimonial evidence of U.S. presence, for obtaining reliable translations, or for authenticating documents that immigration agents claim are fraudulent or insufficient. The Albence memo also provides:

Other potentially relevant factors for consideration by immigration officers in exercising their discretion include, but are not limited to, whether an alien’s case presents mental competency issues, whether the alien is the sole caregiver of a U.S. citizen child(ren) or appears eligible for relief available in section 240 removal proceedings, the duration of the alien’s presence in the United States and nature of his or her ties to the country, and whether ICE seeks to charge additional inadmissibility grounds (e.g., due to criminal history).⁹

But describing these factors as “potentially relevant” is not the same as a legally enforceable protection for individuals who are eligible for relief from removal, longtime U.S. residents, caretakers of U.S. citizen children, or noncitizens whose competency is in doubt.

All of these procedural inadequacies are compounded by DHS officials’ track records of including inaccurate information on removal forms; attempting to coerce detainees into signing documents that they do not fully understand; and failing to refer asylum seekers for credible fear interviews.¹⁰ There has also been evidence of DHS employees engaging in racial profiling, using dehumanizing language, and verbally abusing detainees, and serious allegations of their detaining people in retaliation for First Amendment activity.¹¹

⁸ Memorandum from Acting Director Matthew T. Albence to ICE, July 24, 2019, 3 [see note 7].

⁹ Memorandum from Acting Director Matthew T. Albence to ICE, July 24, 2019, 3 [see note 7]

¹⁰ U.S. Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* 2, 18-23 (2016). <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>; Astrid Galvan, “Complaint: US officials coerced migrants to sign documents,” Associated Press, August 23, 2018. <https://apnews.com/e5eeb241115843eab5a8716d6f76a263>; Bianca Bruno, “Immigrant Parents Coerced Into Waiving Rights, ACLU Says,” Courthouse News, July 25, 2018. <https://www.courthousenews.com/immigrant-parents-coerced-into-waiving-rights-aclu-says/>; John Washington, “Bad Information: Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims,” *Intercept*, August 11, 2019. <https://theintercept.com/2019/08/11/border-patrol-asylum-claim/>

¹¹ Kavitha Surana, “How Racial Profiling Goes Unchecked in Immigration Enforcement,” *ProPublica*, June 8, 2018. <https://www.propublica.org/article/racial-profiling-ice-immigration-enforcement-pennsylvania>; Complaint, *Zelaya v. Miles*, No. 19-cv-00062 (E.D. Tenn. February 21, 2019); A.C. Thompson, “Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes,” *ProPublica*, July 1, 2019.

For all these reasons, if implemented, DHS’s nationwide expansion of expedited removal is a violation of the Fifth Amendment, which the Supreme Court has held for over a century protects noncitizens’ rights to due process even if they are not lawfully present in the United States.¹² When combined with the expedited removal statute’s limitations on judicial review, it also presents an unconstitutional attempt to suspend the writ of *habeas corpus*.¹³ Finally, the expansion of the unfettered discretion afforded to immigration officials to determine whether a person is subject to expedited removal threatens to chill constitutionally protected activity by citizens and noncitizens throughout the United States. The notice should be rescinded.

If you have questions or need additional information, please contact me at khawkins@pogo.org or (202) 347-1122.

Sincerely,



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<https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes>; *Ragbir v. Homan*, 923 F.3d 53 (2nd Cir. 2019). http://www.ca2.uscourts.gov/decisions/isysquery/ae80a494-e926-4685-b972-ce421e458590/3/doc/18-1597_complete_opn.pdf; Gaby Del Valle, “ICE Keeps Arresting Prominent Immigration Activists. They Think They’re Being Targeted,” *Vice News*, August 24, 2019. https://www.vice.com/en_us/article/ywady5/ice-keeps-arresting-prominent-immigration-activists-they-think-theyre-being-targeted

¹² *Yamataya v. Fisher*, 189 U.S. 86, 99–101 (1903). <https://caselaw.findlaw.com/us-supreme-court/189/86.html>; *Mathews v. Diaz*, 426 U.S. 67 (1976). <https://caselaw.findlaw.com/us-supreme-court/426/67.html>

¹³ *Thuraissigiam v. U.S. Department of Homeland Security*, 917 F.3d 1097 (9th Cir. 2019). <http://cdn.ca9.uscourts.gov/datastore/opinions/2019/03/07/18-55313.pdf>; *Osorio-Martinez v. United States*, 893 F.3d 153 (3rd Cir. 2018). <http://www2.ca3.uscourts.gov/opinarch/172159p.pdf>