

**SEA INTERDICTIONS: ARE ALIENS
APPREHENDED ON THE HIGH SEAS ENTITLED
TO PROTECTIONS AFFORDED BY THE
IMMIGRATION AND NATIONALITY ACT?**

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I. INTRODUCTION

As more and more foreign nationals attempt entry into the United States by sea, legal scholars and lay persons have become interested in issues related to alien rights. This topic has also created much controversy because litigants are challenged with issues of first impression and the courts are pressed to interpret a very complicated immigration statute. This paper seeks to address the complexities of the recently enacted Immigration Reform and Immigration Responsibility Act of 1996 (“IIRIRA”) as it relates to the interdiction of aliens on the high seas.

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II. UNDOCUMENTED ALIENS¹ INTERDICTED IN UNITED STATES INTERNAL WATERS:² DO SUCH ALIENS HAVE RIGHTS UNDER THE IMMIGRATION AND NATIONALITY ACT?

Whether an alien interdicted in United States waters has an entitlement under the United States immigration laws depends on whether the alien qualifies as an “applicant for admission” under Section 235(a)(1) of the Immigration and Nationality Act (“INA”), as amended by IIRIRA.³

IIRIRA, sometimes also referred to as The Reform Act, has created the new category of “Aliens Treated as Applicants for Admission” under section 235 of the INA.⁴ An alien’s classification within that category determines whether such alien has a right to be heard, or whether he may be summarily repulsed, or returned without any procedural requirements attendant to the INA.⁵

In determining whether an alien qualifies as an applicant for admission, it is necessary to examine section 235(a)(1) of the INA which provides as follows:

(1) Aliens Treated as Applicants for Admission -

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States *after* having been interdicted in international or United States waters) shall be deemed for purposes of this Act an applicant for admission.⁶

Based on the clear language of section 235(a)(1) of the INA, it appears that

1. The term “Undocumented Aliens” refers to those aliens lacking a visa or other authorization for lawful entry into the United States.

2. The term “Internal Waters” is defined for purposes of domestic law under 33 U.S.C. § 2003 as “[t]he navigable waters of the United States shoreward of the navigational demarcation lines dividing the high seas from harbors, rivers, and other inland waters of the United States and the waters of the Great Lakes on the United States side of the International Boundary.” This could include, for example, such locations as the straits between the Florida Keys, portions of the Chesapeake Bay, or even the upper reaches of the Potomac River.

3. It is significant to note that the amendments to the INA enacted by the Reform Act have supplanted the technical term “entry” for “applicant for admission” as a legal threshold for such procedural entitlements. Therefore, prior to IIRIRA, this issue would consider whether such an alien effected an “entry” within the meaning of the INA and is thus entitled to deportation proceedings. Before enactment of the Reform Act, an alien’s “entry” into the United States was generally regarded as a prerequisite to his entitlement to deportation. *Yang v. Murgans*, 68 F.3d 1540, 1547 (3d Cir. 1995).

4. IIRIRA § 302(a).

5. This includes a removal proceeding under INA section 240, in the case of certain applicants for admission whom the inspection officer determines are “not clearly and beyond a doubt entitled to be admitted.” *See* INA § 240.

6. INA § 235(a)(1).

aliens who are “present in,” or have “arrived in” the United States, are deemed applicants for admission.⁷ Upon a finding that an alien is an applicant for admission, subject to the INA, the result is either *admission to the United States* or *removal from the United States*.⁸

This conclusion raises the question whether an alien interdicted on a vessel in the internal waters of the United States, *before he has disembarked on dry land*, shall be deemed *present* in the United States or to have *arrived* in the United States. It is conclusive that the wording of section 235 yields a negative answer to that question.

Section 235 considers certain circumstances where an alien is “*brought to the United States after having been interdicted in United States internal waters.*”⁹ If an unlanded alien interdicted in United States waters still must be *brought to* United States soil, it follows that Congress did not deem that an alien to be present or to have physically arrived in the United States at that time.¹⁰ Rather, Congress provides that the unlanded alien interdicted in United States waters must be taken ashore to *dry land* before *actual arrival*. As a result, this arrival must occur before he acquires the right for treatment as an applicant for admission.

This offers the conclusion that unlanded aliens interdicted in internal waters do not constitute applicants for admission, and therefore do not require inspection or screening pursuant to section 235(b). It necessarily follows that such aliens are *not* entitled to removal proceedings¹¹ under section 240. If the examining officer determines that the interdicted alien qualifies as an applicant for admission and is not “[c]learly and beyond a doubt entitled to be admitted,” the next step is removal proceedings.¹² In contrast, those aliens who do not land on United States soil do not constitute applicants for admission and do not

7. Under the law, once an alien has legally entered the United States, that individual has certain rights adjudicated only pursuant to a full removal hearing. However, if the individual is *found* in the United States but never legally entered within the meaning of section 101 of the INA, the alien can be excluded through the summary process of a removal hearing.

8. Removal Proceedings will be discussed in length in Part VI.

9. INA § 235(a)(1).

10. The definition of “United States” currently followed does not include waters or airspace subject to the jurisdiction of the United States. 8 U.S.C. § 1101(a)(38). Furthermore, as emphasized in a recent Third Circuit Court of Appeals opinion, it cannot be said that the current definition implicitly includes territorial waters. *Yang*, 68 F.3d at 1548. The court in *Yang* noted that the definition of United States prior to the 1952 enactment of the INA *did* include “waters . . . subject to United States jurisdiction.” This ascribed considerable significance to the absence of *waters* from the current definition concluding that the “physical presence” requirement of the former “entry” test is satisfied “*only when an alien reaches dry land.*” *Id.* at 1548-49.

11. The amended INA’s substitute for deportation proceedings.

12. IIRIRA § 302(a), INA § 235(b)(2)(A).

require inspection or screening by an immigration officer.¹³

The conclusion on this issue is a reflection of numerous Court decisions which interpret the ambiguous concept of “physical presence in the United States” in deciding whether aliens had effected an “entry” under the pre-Reform Act provisions of the INA. These judicial decisions demonstrate that an arriving alien’s mere presence in United States waters does not establish the requisite physical presence in the States unless and until the alien has physically “landed” on United States soil.¹⁴

The text of the amended section 235 of the INA is consistent with this holding in that it declines to associate presence in United States *waters* with presence in the United States. Accordingly, both the text of the amended INA and pertinent judicial precedents confirm the view that an unlanded alien is not entitled to removal proceedings, or any other proceedings under the INA, merely because he is apprehended in the internal waters of the United States. Only when such an alien has reached the United States or physically “brought to the United States”¹⁵ does he attain the status of an “applicant for admission” and initiate the procedural requirements linked to that status.¹⁶

III. THE APPREHENSION AND TEMPORARY CUSTODY OF UNLANDED ALIENS IN UNITED STATES INTERNAL WATERS: DOES THIS CONSTITUTE AN ARREST?

Section 287 of the INA empowers any officer or employee of the Immigration and Naturalization Service (“INS”) to make a warrantless arrest of “[a]ny alien who, in his presence or view, is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of any law regulating the admission, exclusion, or expulsion of aliens.”¹⁷ This possibly suggests that if INS officers apprehend aliens within internal waters who are entering or attempting to enter the United States, they are obligated to bring them to a port of entry for the initiation of administrative proceedings. However, pursuant to the following analysis, section 287(a)(2) does not entail that; merely by interdicting aliens within internal waters, the INS is required to initiate administrative proceedings against those aliens.

13. Section 235(a)(3) of the amended INA provides, “All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.”

14. *Yang v. Maugans*, 68 F.3d at 1546-49; *Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir. 1995), cert. denied, 116 S.Ct. 1271 (1996) (“an alien attempting to enter the United States by sea has not satisfied the physical presence element . . . until he has landed”).

15. The reference “brought to the United States” refers to dry land.

16. IIRIRA § 302(a), INA § 235(a)(1).

17. INA § 287(a)(2), 8 U.S.C. § 1357(a)(2).

Pivotal for this analysis is the concept of an *arrest*. To aid in construing the application of the immigration statute, concepts and procedures drawn from the criminal law can provide helpful analogies. One view may hold that an interdiction at sea will constitute an arrest under section 287(a)(2), at least when an INS officer takes the occupants of a vessel into custody or subjects them to actual restraints.¹⁸ Using case law as precedent to apply this view, aliens would be afforded, at a minimum, the inspection procedure called for by INS regulations.¹⁹ Additionally, as a practical matter, this entitled such aliens to a removal hearing.²⁰

While conceding that such an argument is plausible, it is not necessarily persuasive. In the criminal context, an arrest normally "eventuates in a trip to the station house and prosecution for the commission of a crime."²¹ More generally, an "arrest" is not simply *any* deprivation of liberty under color of law; rather, it is a seizure and subsequent detention of the person arrested for the purpose of instituting some form of legal process against that person.²² It further "[r]equires an intent on the part of the arresting officer to bring a person into custody to answer for a crime charged."²³ As will be discussed below, INS interdictions of aliens within the territorial waters of the United States do not involve taking aliens into custody and holding them for further legal proceedings. Further it is not considered an "arrest" as the traditional understanding of the term.

Unfortunately, several of the most common techniques of statutory construction are not instrumental in interpreting INA § 287(a)(2). Neither the statutory text nor the regulations under it provide significant guidance. Case law, at best, provides marginal guidance. Ultimately, this analysis will turn on an account of the purposes of the section 287, and on harmonizing it with other INA provisions.

18. Certain criminal cases reflect such a contention. *See, e.g.,* *Henry v. United States*, 361 U.S. 98, 103 (1959) (on facts of case, arrest took place when federal agents stopped car); *Douglas v. Buder*, 412 U.S. 430, 431-32 (1973) (under State law, "arrest: required either taking into custody or actual restraint").

19. *See* 8 C.F.R. § 287.3 (1993).

20. 8 C.F.R. § 287.3 provides that if the examining officer is satisfied that there is prima facie evidence that the arrested alien entered or attempted to enter the country illegally, that officer "[s]hall refer the case to an immigration judge for further inquiry in accordance with Parts 235 and 236 of this chapter or take whatever other action may be appropriate or required under the laws or regulations applicable to the particular case."

21. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

22. *United States v. Seslar*, 996 F.2d 1058, 1060 (10th Cir. 1993) (arrests "are seizures characterized by highly intrusive or lengthy detention").

23. *United States ex rel. Spero v. McKendrick*, 266 F. Supp. 718, 724 (S.D.N.Y. 1967), *aff'd*, 409 F.2d 181 (2d Cir. 1969).

The definitional section of the INA, section 101²⁴ does not include a definition of "arrest," nor do the INS regulations in the Code of Federal Regulations.²⁵ Case law fails to clarify, through definition or illustration, whether the interdiction of aliens within the territorial waters constitutes an arrest. Two cases in a related area provide help in answering this question. In the first case, a district court held that the seizure of a vessel is not an arrest of the vessel's crew.²⁶ Even if one assumes that a seizure of the JOSE GREGORIO vessel occurred on March 21, that seizure did not constitute an arrest of the defendants.²⁷ The United States District Court for the Southern District of New York found the three essential elements to evidence an arrest were lacking. These elements include the fact that the Coast Guard officers did not restrain them physically, curtail their liberty while aboard the ship, or conduct a search of their persons.²⁸ No arrest of the defendants occurred on March 21.²⁹ In the court's view, an arrest *did* occur the following day, when the Coast Guard boarded the vessel and placed two of the defendants under guard after finding bales of marijuana.³⁰

In the second case, the United States District Court for the District of Maine ruled that no arrest of an individual occurred when Coast Guard officers approached a vessel and informed crew members on deck that they intended to inspect the vessel for compliance with all United States laws.³¹ The court noted

24. INA § 101, U.S.C. § 1101.

25. 8 C.F.R. § 287 (1993). The regulations do, however, define the meaning by the reference in Section 287(d)(1) to "an alien who is arrested by Federal, State, or local law enforcement official for a violation of any law relating to controlled substances." "The term 'arrested,' as used in section 287(d) . . . means that an alien has been -- (1) Physically taken into custody for a criminal violation of the controlled substance laws; and (2) Subsequently booked, charged or otherwise officially processed; or (3) Provided an initial appearance before a judicial officer where the alien has been informed of the charges and the right to counsel." 8 C.F.R. § 287(g).

26. *United States v. Egan*, 501 F. Supp. 1252, 1268 (S.D.N.Y. 1980).

27. The Coast Guard patrol boat CAPE STRAIT was on routine patrol off Sandy Hook on March 20, 1980. Following instructions from the Coast Guard's Station, the officers were on alert for a vessel, the JOSE GREGORIO, suspected of smuggling. On the morning of March 21, the CAPE STRAIT sighted the vessel. Defendant's argued that JOSE GREGORIO was seized on the afternoon of March 21, upon the arrival of another Coast Guard cutter and that the seizure resulted in an arrest of their persons. The court found to the contrary that the seizure of the vessel did not result in an arrest. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 1274.

31. *United States v. Whitmore*, 536 F. Supp. 1284, 1284 (D. Me. 1982). On Sunday, July 12, 1981, the Coast Guard cutter POINT HANNON was on a routine law-enforcement and search-and-rescue patrol near the coast of Maine. The Commander noticed a sailboat (RELENTLESS) outside United States territorial waters approaching. Finding it unusual for a sailing vessel to be approaching the coast of Maine from the open sea, the Coast Guard paid special attention to their direction. Within two miles of POINT HANNON, the Coast Guard decided to investigate. As they neared RELENTLESS, the Commander could smell what

that “[w]hen a *stop* ends and an arrest begins has been the subject of numerous judicial decisions.”³² Here, even when the Coast Guard boarded the vessel with a display of fire arms and drug kits, the stop did not convert into an arrest.³³ “Utilization of force in making a stop will not convert the stop into an arrest if precipitated by the conduct of the individual being detained.”³⁴ The arrest occurred only *after* the discovery of the suspect behind a curtain below decks, standing in front of numerous bales of marijuana. That scenario created probable cause for the defendant’s arrest.³⁵

The Coast Guard cases suggest that law enforcement officials may stop a vessel, board it with fire arms, and even search it, without ultimately placing those aboard under arrest. As discussed above, case law does not draw a definitive line on this issue. Each situation is unique and involves the weighing and measuring of contrary indicators.

IV. EXECUTIVE ORDER 12,807 - A COMPARATIVE LOOK AT INTERDICTIONS IN INTERNATIONAL WATERS

The background and purposes of Executive Order 12,807 (“Order”) are described in the landmark Supreme Court decision *Sale v. Haitian Ctr. Council, Inc.*³⁶ Although the Order, frequently referred to as the “Kennebunkport Order,”³⁷ is not limited to a specific nationality of aliens, it did respond to the mass exodus from Haiti caused by the September 1991 military coup against the Aristide government.³⁸ Many of these Haitians fled their country to escape severe political persecution by military and paramilitary forces.³⁹ Within a month, the number of refugees fleeing Haiti by boat dramatically increased, outstripping the ability of the Coast Guard to process and safely accommodate them collectively.⁴⁰ The terms of the Order provided for the repatriation of

he believed from prior experiences and training to be marijuana. After a confrontation with defendant, the Coast Guard boarded RELENTLESS. The trail of a strong odor of marijuana led to bales of the substance. The Commander ordered the seizure of RELENTLESS and the arrest of its crew.

32. *Id.* at 1299, *quoted in* United States v. White, 648 F.2d 29 (D.C. Cir. 1981).

33. *Id.*

34. *Id. quoted in* United States v. Beck, 598 F.2d 497, 501 (9th Cir. 1979).

35. *Id.* at 1300.

36. *Sale v. Haitian Ctrs. Council, Inc.*, 113 U.S. 2549 (1993).

37. President Bush issued the Order from his vacation home in Kennebunkport, Maine.

38. *Id.* at 2554-56.

39. *Id.*

40. During the six months after October 1991, the Coast Guard interdicted over 34,000 Haitians. Because of the increase in crossings, the Coast Guard established temporary facilities at the United States Naval Base in Guantanamo Bay, Cuba to process the Haitians. The temporary facilities, however, had a capacity of only about 12,500 persons. In May 1992, the Coast Guard intercepted 127 vessels with 10,497 undocumented aliens. The United States Navy determined that no additional migrants could safely be

undocumented aliens without the benefit of any screening process. The Order reads in pertinent part as follows:

The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States.⁴¹

President Bush's promulgation of Executive Order 12,807 precipitated another round of legal challenges. The Supreme Court resolved those challenges by holding that repatriating migrants to Haiti without first determining whether they qualified as refugees⁴² was not prohibited by either section 243 of the INA or Article 33 of the United Nations Convention Relating to the Status of Refugees.⁴³ In an eight-to-one decision delivered by Justice Stevens, the Court found that since neither of those provisions contained extra-territorial applications, migrants interdicted at sea were not entitled to deportation or exclusion proceedings.⁴⁴ Both Section 243 and Article 33 apply only to actions taken by the United States within its own territorial waters. Therefore, nothing in domestic or international law prevents the President or the Attorney General from involuntarily repatriating undocumented aliens interdicted at sea even though some may have valid claims for political asylum.⁴⁵

accommodated at Guantanamo. Sharon E. Jacks, *Bound by Past Policy: The Scope of Executive Discretion in Political Asylum Determinations*, 15 *HAMLIN L.REV.* 389, 403 (1992).

41. The Order further reads in relevant part as follows:

(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (citations omitted) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States; (3) Proclamation No. 4865 suspends the entry of all undocumented aliens into the United States by the high seas; and (4) there continues to be a serious problem attempting to come to the United States by sea without necessary documentation and otherwise illegally. Exec. Order 12,807, 57 Fed. Reg. 23,133 (1992).

42. 8 U.S.C. § 1101(a)(42)(A) defines a "refugee" as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

43. *Sale*, 113 U.S. at 2558.

44. As of April 1, 1996, "exclusion and deportation proceedings" were replaced with one consolidated proceeding known as "removal proceedings."

45. See also *Haitian Refugee Ctr., Inc. v. Christopher*, 43 F.3d 1431, 1433 (11th Cir. 1995) (finding no statutory provision under the law of the Eleventh Circuit to prevent repatriation).

The instructions to the Coast Guard included directives to "return the vessel and its passengers to the country from which it came, or to another country . . . provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent."⁴⁶ This language strongly suggests that the Coast Guard is assigned the lead role in enforcing the Order, and in particular, delegates to that agency the President's power to repatriate the aliens interdicted under the Order. Coast Guard officers acting pursuant to their general law enforcement authority are deemed agents of those executive agencies charged with administration of a particular law.⁴⁷ When the Coast Guard interdicts aliens at sea, in order to assist in the enforcement of the INA, it is acting solely as the agent of the INS.⁴⁸

The primary difference between international sea interdictions and United States internal water interdictions is that undocumented aliens are not afforded any rights under the INA upon an *international* sea interdiction. They are deprived of any screening process and the Coast Guard, upon their discretion, can return the alien to the country from which they came.

V. THE INTERDICTION OF OUTBOUND CONVEYANCES WITHIN UNITED STATES JURISDICTION

The principle purpose of interdicting aliens on the high seas is to prevent illegal immigration and criminal alien smuggling.⁴⁹ The traditional approach involves the apprehension of aliens headed to the United States. Another approach involves the apprehension of *outbound* vessels; vessels suspected of departing the United States for purposes of illegal alien smuggling. The question is whether the Coast Guard has the authority to stop a vessel departing the United States upon grounds to believe crew members are about to engage in illegal alien smuggling. Case law does not specifically address the issue of outbound interdictions. This is an issue of first impression. Courts, however, have addressed the issue of whether vessels engaged in illegal acts⁵⁰ in international waters are within United States jurisdiction giving the Coast Guard authorization to search the vessel. Such illegal acts provide a direct analogy to illegal alien smuggling which has become more popular. An analysis of such case law follows.

46. Exec. Order No. 12,807 § 2(a).

47. 14 U.S.C. §§ 2, 89(b).

48. *Id.* See also *United States v. One (1) 43 Foot Sailing Vessel*, 405 F. Supp. 879, 882 (S.D. Fla. 1975). (The powers of the Coast Guard boarding officers as agents of other agencies under 14 U.S.C. § 89 "are in addition to and not a limitation on their powers to enforce laws as Coast Guard Officers.")

49. *United States v. Padilla-Martinez*, 762 F.2d 942, 945 (11th Cir. 1985).

50. For example, drug smuggling.

When the Coast Guard attempts to seize a foreign vessel, they must fully comply with certain standards set forth in 14 U.S.C. §89(a) which reads as follows:⁵¹

The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken.

Section 89(a) empowers the Coast Guard to "search and seize any vessel on the high seas that is subject to the jurisdiction or operation of any law of the United States."⁵² In effect, the Coast Guard is not limited solely to the search of domestic vessels, but rather to those over which the United States has jurisdiction.⁵³ Thus, merely because a vessel is of foreign registry or beyond United States territorial waters, does not mean that the vessel is also beyond United States jurisdiction.⁵⁴ The United States has marked its position that its jurisdiction extends to persons whose extraterritorial acts are intended to have an effect within the sovereign territory.⁵⁵ Consequently, if the members upon a vessel commit illegal acts that will subsequently effect the United States, the Coast Guard is within its jurisdiction to stop and seize the vessel.

Case law supports the notion that the Coast Guard may stop and board a foreign vessel in international waters under 14 U.S.C. §89(a) if it has "reasonable suspicion" that the vessel is engaged in criminal activity or any other non-criminal activity which will affect the United States negatively.⁵⁶ Whether the Coast Guard has reasonable suspicion must depend on the "totality

51. 14 U.S.C. § 89(a) (West 1999).

52. Padilla-Martinez, 762 F.2d at 949.

53. *Id.* at 950.

54. *Id.*

55. *Id.*, quoting *United States v. Loalza-Vasquez*, 735 F.2d 153 (5th Cir. 1984).

56. *United States v. Pearson*, 791 F.2d 867, 870 (11th Cir. 1986).

of the circumstances.”⁵⁷ If suspicion remains after the initial boarding and document check, reasonable suspicion is sufficient to justify the search of the common areas of a foreign vessel on the high seas.⁵⁸ In *United States v. Pearson*, the Coast Guard stopped and seized a vessel in international waters whose intentions were to off-load its cargo of marijuana onto smaller vessels bound for the United States.⁵⁹ Likewise, in *United States v. Meadows*, the Coast Guard had reasonable suspicion to board a vessel and investigate criminal activity in the Caribbean for marijuana cargo bound for the United States.⁶⁰

These types of scenarios require a case-by-case analysis and serve as a direct analogy to illegal alien smuggling. A generous amount of case law supports the Coast Guard and grants them, in the abundance of caution, the power to stop, search, and seize vessels conducting activity which will have a negative impact on the United States.⁶¹ Criminal activity in international waters has the specific intention to facilitate such unlawful activities in the United States. The effect of such crimes committed outside United States territory takes place in the United States for jurisdiction purposes, and, in terms of the regulation of immigration, it is unimportant where acts constituting the crime occur.

VI. REMOVAL PROCEEDINGS

IIRIRA was implemented last September and took effect on April 1, 1997, and it represents one of the most significant changes to United States immigration law in decades.⁶² Congress extended its plenary power to affect almost all immigrants and non-immigrants, whether in the United States legally

57. *Id.*, quoting *United States v. Reeh*, 780 F.2d 1541 (11th Cir. 1986).

58. *Id.*, quoting *United States v. Williams*, 617 F.2d 1063, 1089 (5th Cir. 1980) (en banc).

59. *Id.* at 871. While patrolling the waters of the Yucatan Peninsula, the Coast Guard received an intelligence report of a large vessel dead in the water with only a mast light on. Approaching with its lights out, the Coast Guard observed a rendezvous with a smaller vessel. The Coast Guard reasonably suspected drug interactions. Upon such actions, the overwhelming smell of marijuana necessitated a search. After a search, they discovered 17,500 pounds of marijuana. There was sufficient evidence to affirm that the smaller vessels were bound for the United States.

60. *United States v. Meadows*, 839 F.2d 1489, 1490 (11th Cir. 1988). The Coast Guard observed a vessel sitting very low in the waters of the Caribbean indicating the transportation of a heavy cargo. When in contact with the captain, he claimed that their purpose was fishing, contrary to the conspicuous lack of any fishing gear on board. The Coast guard officials also noticed apparently fresh damage to the vessel of the kind found when two ships meet on the high seas and bump, as frequently occurs when marijuana is off-loaded from a mother ship onto smaller ships for importation.

61. *See also*, *United States v. Lopez*, 761 F.2d 632 (11th Cir. 1985), *United States v. Padilla-Martinez*, 762 F.2d 942 (11th Cir. 1985); *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967); *United States v. Williams*, 464 F.2d 599 (2nd Cir. 1972).

62. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

or not.⁶³ IIRIRA substantially amended the INA of 1952 and established a new summary removal process for the adjudication of aliens claims who arrive in the United States without proper documentation. The new rule reflected Congress's conclusion that thousands of immigrants venture to enter the United States illegally without the proper documentation each year.⁶⁴

The purpose of the new removal procedures serves to expedite the removal of aliens who clearly had no authorization for admission into the United States. These new rules separate removal proceedings into two distinct categories. Section 235 of the INA provides the qualifications for aliens subject to expedited removal in which an immigration inspector can order these aliens removed without a formal hearing before an immigration judge.⁶⁵ On the other hand, describes the procedures for aliens subject to "regular," non-expedited removal proceedings which entitles them to a "full blown" hearing conducted by an immigration judge.

A. *Section 235 - Expedited Removal*

Evidence of fraud, misrepresentation,⁶⁶ or the lack of valid entry documents⁶⁷ will automatically subject an alien to expedited removal and an order out of the country by the immigration inspector without further hearing or review.⁶⁸ If the alien indicates an intention to apply for asylum or expresses a fear of persecution from their home country, the alien will be referred to an asylum officer⁶⁹ for a "credible fear of persecution" determination followed by expeditious review by an Immigration Judge ("IJ"), if requested by the alien.⁷⁰ The asylum officer will evaluate whether "[t]here is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."⁷¹ A person who

63. INA §§ 212, 237 8 U.S.C. §§ 1182, 1227 (1994 & Supp. II 1996).

64. H.R. Rep. No. 104-469, pt. 1 at 158 (1996).

65. Under the regulations, any removal order by an inspecting officer "must be reviewed and approved by the appropriate supervisor before the order is considered final." 8 C.F.R. § 235.3(b)(7).

66. INA § 212(a)(6)(C).

67. INA § 212(a)(7).

68. INA § 235(b)(1)(A)(I). An applicant may, in the discretion of the Attorney General, be permitted to withdraw his or her application and depart immediately from the United States. *Id.* § 235(a)(4).

69. For purposes of expedited removal, an "asylum officer" is an immigration officer with professional training in country conditions, asylum law, and interviewing techniques comparable to the training the INS provides to its full-time asylum officers, and supervised by someone who has had such training as well as "substantial experience" adjudicating asylum claims. *Id.* at § 235(b)(1)(E).

70. *Id.* § 235(b)(1)(A)(ii).

71. *Id.* § 235(b)(1)(B)(v).

demonstrates a credible fear shall be “[d]etained for further consideration of the application for asylum.” The failure to demonstrate a credible fear renders an automatic order of removal and detention until removed.⁷²

A removal order issued by either an IJ or an immigration officer is equally effective. These expedited removal orders are generally not subject to judicial review. The only situation that necessitates review is through habeas corpus proceedings and those types limited to determinations of whether the petitioner is a foreign person; whether the petitioner was ordered removed under expedited procedures; and whether the petitioner can prove by a preponderance of the evidence that he or she is a lawful, permanent resident, refugee or asylee.⁷³ Therefore, it is crucial that the process be subject to strict scrutiny by the public, advocate groups, and Congress. This ensures that the basic rights of all foreign nationals are preserved and that persons who face removal from the United States are given every opportunity to express any concerns at any point during the expedited removal process.

The consequence of an expedited removal order is that the alien is precluded from returning to the United States for a period of five years. If the alien is subject to a second or subsequent removal, the preclusion period is twenty years. Applicants for admission who have been removed and convicted of an aggravated felony⁷⁴ will be permanently barred from entry into the United States.⁷⁵ IIRIRA significantly amended the definition of “aggravated felony” to include any crime for which the term of imprisonment exceeds one year.⁷⁶ Furthermore, this new definition of aggravated felony provides for retroactivity to varying degrees.⁷⁷ Therefore, an alien may find an aggravated felony on his or her record even if the conviction was entered before the enactment of the statute.

B. Section 240 - Non-Expedited Removal

Aliens who cannot establish that their admissibility does not fall within the

72. *Id.* §§ 235(b)(1)(B)(ii), (B)(iii).

73. INA. § 242(e)(2).

74. This bar applies even if the alien is not charged and removed as an aggravated felon.

75. *Id.* at § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(c) (Supp. II 1996).

76. An *aggravated felony* now includes certain crimes of violence, theft, burglary, racketeering, gambling offenses, counterfeiting, document fraud, commercial bribery, forgery or trafficking in vehicles with altered identification numbers, obstruction of justice, perjury, and bribery of a witness. Also included are crimes involving rape and sexual abuse of a minor and violations of laws relating to protecting the identity of an undercover agent. *See* IIRIRA, § 321 (1996).

77. For a more detailed discussion of the retroactivity issue, *See*, Sara Candioto, *The Antiterrorism and Effective Death Penalty Act of 1996: Implications Arising from the Abolition of Judicial Review of Deportation Orders*, 23 J. Legis. 159 (1997) and Anjali Parekh Prakash, *Changing the Rules: Arguing Against Retroactive Application of Deportation Statutes*, 72 N.Y.U. L. REV. 1420 (1997).

scope of the expedited removal procedures of section 235(B)(1) are placed into regular removal proceedings under section 240.⁷⁸ The statute gives the Attorney General the discretion, however, to apply expedited removal procedures to persons already present, but without having previous admission, and who would otherwise be subject to regular removal proceedings, unless they can establish continuous presence in the United States for the last two years.⁷⁹

Once the INS chooses to charge an alien with removability under section 240, the INS initiates an administrative hearing before an IJ by filing a Notice to Appear ("NTA") for removal proceedings.⁸⁰ The INS must decide after filing the NTA whether the alien will remain in detention until the hearing or released on bond.⁸¹

At the initial removal hearing before the IJ, the alien and the INS have the opportunity to present evidence and to cross-examine witnesses.⁸² The alien will generally testify and plead to the allegations if he or she has not already pled.⁸³ The burden of proof is initially on the alien to demonstrate lawful residence in the United States.⁸⁴ The burden then shifts to the INS to prove deportability grounds.⁸⁵ At the conclusion of the administrative hearing, the IJ must decide whether to issue an order of removal or to grant relief from removal.⁸⁶ Either party maintains the option to appeal an adverse decision by the IJ to the Board of Immigration Appeals by either party.⁸⁷

VII. CONCLUSION

It appears that the Congress is moving toward stricter immigration practices as evidenced by the enactment of IIRIRA. It will be interesting to see what direction the INS will take to enforce the provisions of IIRIRA. It appears that the Congress has given the INS the tools to deter illegal immigration, and whether these tools will be utilized remains to be seen.

78. An exception exists for crewman and stowaways, who are not eligible for such proceedings. See INA § 235 (b)(2). Stowaways may apply for asylum but cannot apply for admission. See *id.* § 235 (a)(2). In addition, a provision in the statute exempts Cubans who arrive by air. Expedited removal procedures may not apply to "an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry." *Id.* § 235 (b)(1)(F). Such persons would be placed into regular removal proceedings.

79. See INA § 235(b)(1)(A)(iii).

80. INA § 239(a), 8 U.S.C. § 1229(a) (Supp. II 1996).

81. *Id.* at § 236(a), 8 U.S.C. § 1226(a) (Supp. II 1996).

82. *Id.* at § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (Supp. II 1996).

83. 8 C.F.R. § 242.16(b) (1997).

84. INA § 240(c)(2)(B), 8 U.S.C. § 1229a(c)(2)(B).

85. *Id.* at § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A).

86. *Id.* at § 240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A).

87. 8 C.F.R. § 242.21(a) (1997).