

NOTE

SMITH V. UNITED STATES CUSTOMS AND BORDER PROTECTION: THE TROUBLING REALITY FOR COURTS REVIEWING EXPEDITED ORDERS OF REMOVAL

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Immigration law and policy became a hot topic in 2014 due to the “crisis at the border.”¹ However, while the potential for immigration reform has hit the headlines over the past year, Congress has been slow to act despite pressure from reformists.² Even President Obama jumped on the immigration reform bandwagon, promising immigration reform through executive

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1. See generally Halimah Abdullah, *5 Things You Need to Know About the Immigration Crisis*, CNN (July 7, 2014, 9:59 PM), <http://www.cnn.com/2014/07/07/politics/5-things-immigration-reality-check> (stating “partisan hyperbole has ratcheted up as the Obama administration grapples” with the immigration crisis); Suzanne Gamboa, *In Texas, a Look at the Border Children Crisis by the Numbers*, NBC NEWS (July 18, 2014, 8:25 AM), <http://www.nbcnews.com/storylineimmigration-border-crisis/texas-look-border-children-crisis-numbers-n157496> (commenting on the high number of child immigrants coming through Texas); Tamara Keith, *Two Ways President Obama Could Act on Immigration*, NPR (Aug. 11, 2014, 4:16 PM), <http://www.npr.org/2014/08/11/339596510/two-ways-president-obama-could-act-on-immigration> (referencing the different options the Obama administration has available to alleviate the immigration crisis); Evan Perez, *Number of Unaccompanied Minors Crossing into U.S. Tops 60,000*, CNN (Aug. 2, 2014, 10:33 AM), <http://www.cnn.com/2014/08/02/us/border-crisis-milestone> (stating that “the child-immigrant crisis was at the center of the roiling political fight in recent days”).

2. See Brett LoGiurato, *Obama Gives Boehner One Last Deadline for Immigration Reform*, BUS. INSIDER (May 28, 2014, 10:00 AM), <http://www.businessinsider.com/immigration-reform-obama-boehner-deportation-policy-house-2014-5>; see also Chuck Todd, Mark Murray & Carrie Dann, *Why Immigration Reform Died in Congress*, NBC NEWS (July 1, 2014, 9:09 AM), <http://www.nbcnews.com/politics/first-read/why-immigration-reform-died-congress-n145276>.

action.³ While the federal legislative and executive branches have been promising change, the judiciary has taken a more active role in immigration policy. The Ninth Circuit Court of Appeals in particular has taken a dangerous leap into immigration policy and politics. While seemingly insignificant, the Ninth Circuit's assumption of jurisdiction in *Smith v. United States Customs and Border Protection* has potentially drastic precedential potential because the court in effect ignored the jurisdictional limit placed on the courts by Congress and opened the door for legislation of expedited removal orders in the courtroom.⁴

This Note evaluates the Ninth Circuit's decision in *Smith* to assume jurisdiction in a case where the Immigration and Nationality Act specifically bars such jurisdiction.⁵ This Note attempts to explain why that decision is contrary to the current reading of the Immigration and Nationality Act and is an improper policy choice on behalf of the court. First, this Note outlines the facts and procedural history of *Smith*. Next, this Note presents the policy backdrop that led to the legal background relevant in *Smith*. Then, this Note examines *Smith's* limited analysis of the expedited removal provisions and evaluates the court's statement that there was "limited jurisdiction to consider" *Smith's* case.⁶ Finally, this Note argues that the court acted inappropriately in exercising judicial power over an area of the law where

3. See Eyder Peralta, *Obama Says He Will Use Executive Action to Address Immigration System*, NPR (June 30, 2014, 3:13 PM), <http://www.npr.org/blogs/thetwo-way/2014/06/30/326998127/obama-says-he-will-use-executive-action-to-address-immigration-system>.

While President Obama stalled his decision to use executive orders to effect immigration reform until after the 2014 midterm elections, he has since reinstated his threat to reform the immigration system through executive orders. See Bill Chappell, *Obama Will Put Off Executive Actions on Immigration*, NPR (Sept. 6, 2014, 1:36 PM), <http://www.npr.org/blogs/thetwo-way/2014/09/06/346360291/obama-will-put-off-executive-actions-on-immigration>; see also Sam Sanders, *Obama Says He'll Use Executive Orders for Immigration Reform*, NPR (Nov. 9, 2014, 6:33 PM), <http://www.npr.org/blogs/thetwo-way/2014/11/09/362797856/obama-on-midterm-elections-i-ve-got-to-take-responsibility-for-it>. On November 20, 2014, President Obama announced two executive actions on immigration, referred to as Deferred Action for Childhood Arrivals 2.0 and Deferred Action for Parents of Americans. *Presidential Address: Immigration* (MSNBC television broadcast Nov 20, 2014); see also Executive Actions on Immigration, USCIS, <http://www.uscis.gov/immigrationaction> (last updated Apr. 15, 2015) (noting that a district court issued a temporary injunction in early 2015 preventing the federal government from implementing the two executive orders).

4. *Smith v. U.S. Customs & Border Prot.* (*Smith II*), 741 F.3d 1016, 1018 (9th Cir. 2014).

5. *Id.*; see also 8 U.S.C. § 1252(a)(2) (2012).

6. *Smith II*, 741 F.3d at 1020.

Congress has explicitly limited the jurisdiction of the courts.⁷ While the court ultimately reached the same conclusion it would have had it not taken jurisdiction—that is, despite assuming jurisdiction in *Smith*, the Ninth Circuit still reached the conclusion that Smith was not entitled to a hearing—the court disrespected its role and the role of Congress in the larger federal scheme.⁸ The power to determine and describe the rights of arriving non-citizens falls within the scope of Congress’s power and should not be usurped by the courts.⁹ The courts should respect their role in the three-branch system and not make policy decisions that have otherwise been delegated to the legislative branch, particularly when it comes to highly contested issues such as immigration policy and reform. Thus, the Ninth Circuit should not have assumed jurisdiction in *Smith* because jurisdiction was not conferred on the court by Congress through the Immigration and Nationality Act.

I. SMITH’S FACTUAL BACKGROUND

John Smith is a citizen of Canada who sought entry into the United States by crossing the United States-Canada border in his mobile home on October 12, 2009.¹⁰ When asked by Oroville, Washington, Customs and Border Protection (“CBP”), Smith stated that his purpose in visiting the United States “was to travel to SkyDive, Arizona, to sky dive, take photographs, video, and have fun.”¹¹ Smith stated that he had no items—such as tobacco, alcohol, crops, weapons, meats, or drugs—to declare, but that he was traveling with \$8,000.¹² CBP referred Smith to a second inspection during which Smith declared \$8,630 in cash.¹³ The secondary inspection also included a search of Smith’s mobile

7. See 8 U.S.C. § 1252(a)(2) (2012).

8. *Smith II*, 741 F.3d at 1020.

9. See U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (stating that admission to the United States is a “privilege . . . granted to an alien only upon such terms as the U.S. shall prescribe”); see also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (stating that “over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens”).

10. *Smith II*, 741 F.3d at 1018.

11. *Smith v. U.S. Customs & Border Prot.* (*Smith I*), 785 F. Supp. 2d 962, 964 (W.D. Wash. 2011).

12. *Id.*

13. *Smith II*, 741 F.3d at 1018.

home that revealed Smith's possession of nine cartons of cigarettes.¹⁴ When confronted about the cigarettes, Smith then revealed that he also had \$20,000 in a safe underneath his bed.¹⁵ CBP found \$15,000 in cash and \$10,000 in endorsed traveler's checks in the safe.¹⁶ In addition, CBP found advertisements of Smith's photography business stating that he would be available "Oct '09 thru April '10" from "Tucson to Phoenix & all points between" for "flexible rates" with specialization in "skydiving, motorcycle events, aircraft, and nudes."¹⁷ The advertisements also listed his name and website, on which customers could purchase the photographs and videos Smith took.¹⁸

CBP, believing Smith was operating a business within the United States without proper documentation, took a sworn statement from Smith.¹⁹ In this statement, Smith admitted that he lied to the CBP agents about the cigarettes and money, but claimed that he only wished to enter the United States to skydive, take pictures, and have fun.²⁰ Smith told CBP that he was not paid to take photographs or video, and claimed that he was compensated instead with free jump tickets and the "occasional glass of scotch."²¹ However, Smith admitted to selling the photographs and video on his website, an activity that he characterized as a form of work.²² Smith further conceded that he was aware of the reporting requirements for tobacco and money and admitted that he purposefully failed to report the tobacco and money in his possession.²³

CBP determined that Smith was seeking entry into the United States for the purpose of operating a photography business in Arizona.²⁴ Therefore, CBP classified Smith under § 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act as an "immigrant at the time of application for admission who is not in

14. *Id.*

15. *Id.*

16. *Smith I*, 785 F. Supp. 2d at 964.

17. *Id.*

18. *Id.*

19. *Smith II*, 741 F.3d at 1018.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Smith I*, 785 F. Supp. 2d at 964–65.

24. *Smith II*, 741 F.3d at 1018–19.

possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document . . . and a valid unexpired passport, or other suitable travel document, or document of identity and nationality”²⁵ Thus, CBP found Smith inadmissible because he lacked any documentation permitting him to work as a photographer or videographer in the United States.²⁶ As mandated by 8 U.S.C. § 1225(b)(1)(A)(i), CBP placed Smith in expedited removal proceedings.²⁷ Smith was removed to Canada the same day, October 12, 2009, and never gained entry into the United States.²⁸

II. LEGAL BACKGROUND

A. Policy Behind the Expedited Removal Provisions

Expedited removal is a special procedure implemented by Congress to minimize the number of admitted arriving non-citizens at the border.²⁹ Lack of valid documentation, such as the absence of a valid passport or visa, has long been a reason for the exclusion of arriving non-citizens.³⁰ The desire to limit the number of admitted arriving non-citizens began in the 1980s with the mass migration of approximately 155,000 Cubans and Haitians claiming to seek asylum in southern Florida.³¹ Before the implementation of the expedited removal procedure, any arriving non-citizen was eligible for a hearing before an immigration judge for a determination of admissibility, a procedure known as “summary exclusion.”³² The goal of the 1980s “summary exclusion” procedure was to end the influx of arriving non-citizens and general unlawful migrations by heavily restricting the options

25. 8 U.S.C. § 1182(a)(7)(A)(i)(I) (2012); *Smith II*, 741 F.3d at 1019.

26. *Smith I*, 785 F. Supp. 2d at 965.

27. *Smith II*, 741 F.3d at 1019.

28. *Id.*

29. ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 3 (2005). “Arriving alien,” or arriving non-citizen, is defined 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, or an alien interdicted in international or United States water and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport.” *Id.* at 5 n.25.

30. *Id.* at 3.

31. *Id.*

32. *Id.*

available to arriving non-citizens.³³ Thus, in the Immigration and Reform Control Act of 1986 (“IRCA”), Congress intended to strip unlawful arriving non-citizens of the hearing and review processes.³⁴ The “summary exclusion” provisions were later deleted from the legislation.³⁵ In the early 1990s, the Clinton administration proposed a similar policy under the Expedited Exclusion and Alien Smuggling Enhanced Penalties Act of 1993.³⁶ The proposed Act was targeted at non-citizens arriving in the United States at ports of entry without proper documentation.³⁷ The House of Representatives, however, took no action on the proposed Act.³⁸

Thus, it was not until 1995, when the 104th Congress House of Representatives passed the Immigration in the National Interest Act of 1995, that language providing for the expedited removal of arriving non-citizens began to make headway in the law.³⁹ This Act, however, was stripped of its expedited removal language in the Senate.⁴⁰ Finally, in 1996, the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (“IIRIRA”) established the expedited removal provisions found today in 8 U.S.C. § 1225.⁴¹ The IIRIRA significantly amended the Immigration and Nationality Act of 1952 (“INA”) through the establishment of a new expedited removal process for “adjudicating claims of aliens who arrive in the United States without proper documentation.”⁴²

Because of the reforms in the IIRIRA, an immigration officer may exclude an arriving non-citizen if the non-citizen lacks proper documentation unless the non-citizen expressly states that he intends to apply for asylum, withholding of removal, or protection under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 3–4.

40. *Id.* at 4.

41. *Id.*; see 8 U.S.C. § 1225 (2012).

42. *Am. Immigr. Lawyers Ass’n. v. Reno*, 18 F. Supp. 2d 38, 41 (D.D.C. 1998).

Punishment.⁴³ If an arriving non-citizen makes such a statement to CBP agents, the non-citizen is detained by an Immigration and Customs Enforcement (“ICE”) agent and interviewed by an asylum officer from United States Citizenship and Immigration Services (“USCIS”).⁴⁴ If USCIS determines that the arriving non-citizen has no “credible fear” of persecution or torture, USCIS refers the arriving non-citizen to an immigration judge, and the “defensive” asylum application process begins.⁴⁵

Today’s policy behind the expedited removal process mirrors that of the policy underlying the proposed “summary exclusion” procedure in the 1980s.⁴⁶ Congress’s finding that “thousands of aliens arrive in the [United States] at airports each year without valid documents and attempt to illegally enter the [United States]” again prompted the idea of an expedited removal system.⁴⁷ The implementation of the expedited removal process was intended to increase national security and public safety by enabling the Department of Homeland Security “to deal more effectively with the large volume of persons seeking illegal entry” through the facilitation of quick immigration status decisions and removal of those not granted relief.⁴⁸ The purpose of this system “is to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted to the United States.”⁴⁹

43. SISKIN & WASEM, *supra* note 29, at 4.

44. *Id.*

45. *Id.* Applications for asylum are characterized as “affirmative” or “defensive” based on the time when the application is filed. *See* Procedures for Asylum and Withholding of Removal, 8 C.F.R. §§ 1208.4(b)(1)–(3) (2004). An applicant who is not placed into removal proceedings by the Department of Homeland Security may file an “affirmative” application. *Id.* §§ 1208.4(b)(1)–(2). An applicant who is already in removal proceedings, such as an applicant taken into custody at a port of entry or an applicant that has received a Notice to Appear from the Department of Homeland Security, may file a “defensive” application. *Id.* § 1208.4(b)(3).

46. SISKIN & WASEM, *supra* note 29, at 3–4.

47. H.R. REP. NO. 104-469, pt. 1, at 158 (1996).

48. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004); *see also* SISKIN & WASEM, *supra* note 29, at 7.

49. H.R. REP. NO. 104-828, at 209 (1996) (Conf. Rep.).

B. Procedure and Judicial Review of Expedited Removal

The IIRIRA first took effect in 1997 and its procedure for expedited removal is straightforward.⁵⁰ If a CBP agent determines that a person is an arriving non-citizen without proper documentation, the arriving non-citizen is first detained pending determination of her immigration status.⁵¹ For example, in *Smith*, CBP determined that Smith was inadmissible under 8 U.S.C. § 1182(a)(7) because he was “not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by [the INA]”⁵² Thus, after CBP made the determination that Smith was inadmissible under 8 U.S.C. § 1182(a)(7), CBP ordered Smith “removed from the United States without further hearing or review,”⁵³ under 8 U.S.C. § 1225(b)(1)(A)(i), because Smith did not indicate “either an intention to apply for asylum . . . or a fear of persecution.”⁵⁴ If the port of entry is on land, like in *Smith*, the arriving non-citizen is then denied entry to the United States.⁵⁵

The IIRIRA removes the option of administrative appeal for non-citizens in expedited removal proceedings.⁵⁶ The only judicial review reserved for arriving non-citizens in expedited removal proceedings is through the writ of habeas corpus.⁵⁷ Even

50. SISKIN & WASEM, *supra* note 29, at 5–6.

51. *Id.*

52. 8 U.S.C. § 1182(a)(7) (2012); *Smith I*, 785 F. Supp. 2d 962, 964 (W.D. Wash. 2011).

53. *Smith I*, 785 F. Supp. 2d at 966.

54. *Id.*; *see also* 8 U.S.C. § 1225(b)(1)(A)(i) (2012).

55. SISKIN & WASEM, *supra* note 29, at 6. If the port of entry is at sea or an airport, the carrier (either the ship or the airline) takes the arriving non-citizen back on board or has another vessel operated by the same company return the arriving non-citizen to his country of departure. 8 U.S.C. §§ 1231(c)–(d) (2012).

56. 8 U.S.C. § 1225(b)(1)(C) (2012) (stating that “a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath . . . to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section [8 U.S.C. § 1157], or to have been granted asylum under section [8 U.S.C. § 1158]”); SISKIN & WASEM, *supra* note 29, at 5.

57. SISKIN & WASEM, *supra* note 29, at 2 n.6; *see also* 8 U.S.C. § 1252(a)(2)(A) (2012). The statute states, in relevant part:

(A) Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision . . . no court shall have jurisdiction to review—

so, judicial habeas review is specifically limited to an arriving non-citizen's right to contest three determinations: whether the petitioner is a non-citizen, whether the petitioner was ordered removed under the expedited removal provisions, and whether the petitioner is a lawfully admitted permanent resident, refugee, or asylee.⁵⁸ The Ninth Circuit has held that the REAL ID Act of 2005 "eliminated the availability of habeas corpus as a separate means of obtaining judicial review of a final order of removal."⁵⁹ Even constitutional challenges to the statutory scheme regarding expedited removal orders have been unsuccessful because arriving non-citizens are not considered to have rights under the Constitution and only have such rights that Congress has afforded them.⁶⁰

(i) except as provided in subsection (e) . . . any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section [8 U.S.C. §] 1225(b)(1) of this title,

(ii) except as provided in subsection (e) . . . a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section [8 U.S.C. §] 1225(b)(1) . . . or

(iv) except as provided in subsection (e) . . . procedures and policies adopted by the Attorney General to implement the provisions of section [8 U.S.C. §] 1225(b)(1) . . .

8 U.S.C. § 1252(a)(2)(A) (2012).

58. *SISKIN & WASEM*, *supra* note 29, at 5; *see also* 8 U.S.C. § 1252(e)(2) (2012). The statute states, in relevant part:

(2) Judicial Review of any determination made under section [8 U.S.C. §] 1225(b)(1) is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section [8 U.S.C. §] 1157, or has been granted asylum under section [8 U.S.C. §] 1158] . . . such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section [8 U.S.C. §] 1225(b)(1)(C).

8 U.S.C. § 1252(e)(2) (2012).

59. *Garcia de Rincon v. Dep't of Homeland Sec.*, 539 F.3d 1133, 1141 (9th Cir. 2008) (*quoting* *Wang v. Dep't Homeland Sec.*, 484 F.3d 615, 618 (2d Cir. 2007)).

60. *Id.* (*quoting* *Meng Li v. Eddy*, 259 F.3d 1132, 1136 (9th Cir. 2001)), *vacated on reh'g as moot*, 324 F.3d 1109, 1110 (9th Cir. 2003) (restating that arriving non-citizens have "no constitutional due process right to challenge [their] immigration status or to petition for entry into the United States because [they are] non-resident alien[s] seeking entry at

III. SMITH'S PROCEDURAL HISTORY

On March 1, 2010, five months after Smith was denied entry by CBP, Smith requested that his expedited removal order be vacated.⁶¹ On March 11, 2010, CBP stated that it would not vacate the order.⁶² Then, on December 20, 2010, Smith filed an instant habeas petition in United States District Court for the Western District of Washington challenging his expedited removal order.⁶³ CBP filed a response and a motion to dismiss on January 20, 2011.⁶⁴

After briefing by both parties, the District Court dismissed Smith's action for lack of jurisdiction.⁶⁵ The court held that Smith failed to dispute any of the statutory elements required for a successful habeas review of an expedited removal order.⁶⁶ Smith failed to dispute that he was not a non-citizen, failed to contend that he was not ordered removed under the expedited removal provisions, and failed to argue that he was a lawfully admitted permanent resident, refugee, or asylum applicant.⁶⁷ The court further held that Smith did not have a lucrative due process claim under the United States Constitution because non-citizens arriving at the United States border do not have any procedural due process rights relating to admission or exclusion.⁶⁸ Because Smith

the border into the United States The Supreme Court has held that the discretion of Congress to determine which and on what basis aliens may enter this country is paramount."); see also U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); H.R. REP. NO. 104-469, pt. 1, at 158 (1996) ("Unless such aliens claim to be U.S. nationals, or state a fear of persecution, there is no requirement under the Constitution or international treaty to do anything other than return them, as promptly as possible, to where they boarded the plane to come here. Neither international law nor the Due Process Clause of the Fifth Amendment require that such aliens be given a hearing before an immigration judge or a right to appeal.").

61. *Smith I*, 785 F. Supp. 2d 962, 965 (W.D. Wash. 2011).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 963.

66. *Id.* at 966.

67. *Id.*

68. *Id.* at 969. The Court also found Smith's case distinguishable from the Supreme Court case *INS v. St. Cyr*, 533 U.S. 289 (2001), because Smith was removed under the expedited removal provisions whereas *St. Cyr* discussed the application of statutory restrictions against a non-citizen who was denied discretionary relief due to his guilty plea for a deportable crime. *Id.* at 968. In addition, *St. Cyr* held that any law suspending the right to habeas relief had to be clear and contain specific language limiting such relief. *Id.*; see *INS v. St. Cyr*, 533 U.S. 289 (2001). The provision Smith attacked, however,

was unable to make a colorable habeas claim, the District Court dismissed Smith's action for lack of jurisdiction.⁶⁹ Smith then appealed the court's decision to the Ninth Circuit Court of Appeals, arguing that he was entitled to traditional habeas relief and to habeas relief under 8 U.S.C. § 1252(e).⁷⁰

IV. THE NINTH CIRCUIT'S ANALYSIS IN *SMITH*

A. "Limited" Jurisdiction

In a few hidden words in its opinion in *Smith*, the Ninth Circuit nudged the door open for the review of expedited removal orders. The court merely stated, "we agree with Smith that there is limited jurisdiction to consider his case under § 1252(e)(2)(B)."⁷¹ The court performed no further analysis as to why it came to such a dramatic, albeit disguised, conclusion. Nor did the court explain why it would decide to take jurisdiction over what should have been a straightforward denial of Smith's petition for review for lack of jurisdiction. Instead, the court went on to discuss the three issues that are reviewable under § 1252(e)(2) and find that Smith could not "prevail because he was in fact removed under § 1225."⁷² The court's superficially undetectable policy leap begs several questions. What does the court mean by its cryptic phrase "limited jurisdiction"? How far is the court willing to march into the void? Is the court only willing to consider the threshold question of whether Smith was eligible for expedited removal in addition to the three other reviewable claims in the INA? While the answers to the questions are left to be decided by the court,

did not implicate any of the jurisdictional issues raised in *St. Cyr* because § 1252 is clear in its intent to restrict judicial review. *Smith I* at 968–969; see also *Garcia de Rincon v. Dep't of Homeland Sec.*, 539 F.3d 133, 1141 (9th Cir. 2008) (holding that the Court could not "avoid the unambiguous effect of the statutory restrictions on review of expedited removals."); *Meng Li v. Eddy*, 259 F.3d 1132, 1134–35 (9th Cir. 2001) (finding that "[w]ith respect to review of expedited removal orders . . . the statute could not be much clearer in its intent to restrict habeas review"). Thus, because *St. Cyr* is inapplicable and because "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," Smith did not have a colorable due process claim. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

69. *Smith I*, 785 F. Supp. 2d at 966.

70. *Smith II*, 741 F.3d 1016, 1016 (9th Cir. 2014).

71. *Id.* at 1020.

72. *Id.* at 1020–21.

one idea is made glaringly clear: the court is willing to overstep the jurisdictional roadblock erected by Congress in the INA.⁷³

While the Ninth Circuit ultimately came to the legally correct conclusion that Smith was ineligible for both traditional habeas relief and habeas relief under 8 U.S.C. § 1252(e),⁷⁴ the court ignored the unambiguous intent of 8 U.S.C. § 1252(e) in taking jurisdiction over Smith's claim.⁷⁵ In so finding, the court took power denied it by Congress and dove into a hotly contested policy debate.⁷⁶ The power to determine the admissibility of arriving non-citizens is a power vested squarely in the hands of Congress.⁷⁷ The Ninth Circuit's decision in *Smith* not only ignored the explicit intent of Congress to limit the jurisdiction of the courts in expedited removal proceedings in the INA,⁷⁸ but also established the Ninth Circuit as a lone outlier in the application of the law.⁷⁹ The Ninth Circuit should not have assumed jurisdiction

73. While *Smith II* is a published case and thus is valid precedent in the Ninth Circuit, it has not been cited by any subsequent decisions made in the Ninth Circuit Court of Appeals or any lower courts in the Ninth Circuit with respect to expedited removal orders. However, *Smith II* has been mentioned by the Sixth Circuit Court of Appeals and distinguished by the United States District Court for the Western District of Louisiana. *Dugdale v. Customs & Border Prot.*, No. 13-1976, 2014 U.S. App. LEXIS 24818, *3 (6th Cir. April 7, 2014) ("Even assuming that a claim of U.S. citizenship could be adjudicated in a habeas petition regardless of whether the petitioner met § 2241's 'in custody' requirement . . ."); *Rodriguez v. U.S. Customs & Border Prot.*, No. 6:14-cv-2716, 2014 U.S. Dist. LEXIS 131872, *7 n.7 (W.D. La. Sept. 18, 2014) (stating that the petitioner's interpretation of *Smith II*—that the Court "could have jurisdiction to determine whether the noncitizen was properly in the expedited removal system at all"—was expansive).

74. *Smith II*, 741 F.3d at 1018.

75. *Id.*

76. See 8 U.S.C. § 1252(a)(2) (2012).

77. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

78. See 8 U.S.C. § 1252(e) (2012).

79. See *Succar v. Ashcroft*, 394 F.3d 8, 13 (1st Cir. 2005) (stating that "[e]xpedited removal proceedings provide little opportunity for relief"); see also *Pineda v. Customs & Border Prot.*, 554 F. App'x 925, 926 (11th Cir. 2013) ("The INA bars judicial review of any claims arising from or relating to the implementation or operation of an expedited removal order, notwithstanding any other provision of law."); *Shunaula v. Holder*, 732 F.3d 143, 146 (2d Cir. 2013) ("Section 1252(a)(2)(A) deprives this court of jurisdiction to hear challenges relating to the Attorney General's decision to invoke expedited removal."); *Kahn v. Holder*, 608 F.3d 325, 330 (7th Cir. 2010) ("Under § 1252(e), which sets forth the limited exceptions to the jurisdictional bar, a court has jurisdiction to inquire only whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal."); *Camara v. Att'y Gen.*, 580 F.3d 196, 199 n.8 (3d Cir. 2009) (stating that unless there is a credible fear of persecution the non-citizen "is removed from the country without further review"); *William v. Gonzales*, 499 F.3d 329, 339 (4th Cir. 2007) ("The IIRIRA contained many provisions aimed at protecting the

in *Smith* because jurisdiction specifically was withheld from the courts by Congress in the INA.⁸⁰

B. Double Edged Sword of a “Troubling Reality”⁸¹

The expedited removal procedure, as it is now, can lead to puzzling and unfair results. The procedure leaves the decision of admissibility in the discretion of several CBP agents, who are thus vested with the potential power to make arbitrary decisions about who is admitted and who is not admitted.⁸² Immigration reform is necessary to prevent the “troubling reality of the expedited removal procedure.”⁸³ However, as the Seventh Circuit in *Kahn* recognized, the courts are not “free to disregard jurisdictional limitations.”⁸⁴ Without reform, the courts are statutorily ineligible to determine the real issues in many expedited removal cases, including *Smith*’s case: Whether the petitioner is admissible or entitled to relief from removal.⁸⁵ Thus, the Ninth Circuit should have held—though the potential for capriciously made admissibility determinations is present in the current system—that it lacks jurisdiction to consider the issue. Because of the highly politicized nature of immigration law and policy, changes in the law should come from Congress and the nation’s other elected representatives.⁸⁶ At a minimum, immigration reform should stem from an elected official rather than an appointed one.

There are two camps lobbying for reform of the expedited removal procedure. The opponents of the procedure and the advocates for restricting its use argue that arriving non-citizens are being deprived of significant rights and safeguards because of the

Executive’s discretion from the courts—indeed, that can fairly be said to be the theme of the legislation.”); *Vaupel v. Ortiz*, 244 F. App’x 892 (10th Cir. 2007) (“The scope of judicial review of orders of removal under § 1225(b)(1) is extremely narrow.”); *Brumme v. INS*, 275 F.3d 443, 445–47 (5th Cir. 2001) (reviewing 8 U.S.C. § 1252(e) to determine that the court lacked jurisdiction).

80. See 8 U.S.C. § 1252(e)(1) (2012).

81. *Kahn*, 608 F.3d at 329.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*; *Smith II*, 741 F.3d 1016, 1021–22 (9th Cir. 2014).

86. See Brianna Lee, *Immigration Reform 2014: Executive Action Prompts Blame Game Between Obama and New Midterm Congress*, INT’L BUS. TIMES (Nov. 10, 2014, 3:30 PM), <http://www.ibtimes.com/immigration-reform-2014-executive-action-prompts-blame-game-between-obama-new-midterm-1721524>.

procedure.⁸⁷ The limited judicial review afforded to arriving non-citizens, according to opponents of expanding expedited removal, leaves CBP agents virtually unchecked and allows for abuse of the system.⁸⁸ Opponents urge for the curtailment of the expedited removal procedure, citing its arbitrary application and discriminatory undertones.⁸⁹ Proponents of the expedited removal procedure counterclaim that, while the system may have some issues, the procedure serves its fundamental purpose of allowing for the expeditious removal of arriving non-citizens that are deemed inadmissible to the United States.⁹⁰ They also point to decisions made in the courts holding that arriving non-citizens have not yet “entered” the United States and thus do not have any rights other than those afforded to them by Congress.⁹¹ Further, proponents argue that the secondary inspection and built-in checks in the system—for example, the review of all expedited removal orders by CBP agent’s supervisors⁹²—protects arriving non-citizens from becoming victims of discrimination or arbitrary determinations of admissibility.⁹³ Finally, proponents contend that no real harm is done to arriving non-citizens subject to expedited removal orders because of the provisions that allow for a hearing before an immigration judge if the arriving non-citizen alleges a credible fear of persecution.⁹⁴

If immigration reform is to occur, elected officials must step up to the plate instead of playing the blame game for whom or which party is to fault for the delay.⁹⁵ In light of upcoming 2016 presidential and congressional elections, it may seem unreasonable to ask for a coalition of members of both parties to

87. SISKIN & WASEM, *supra* note 29, at 14.

88. *Id.*

89. *Id.*

90. *Id.* at 15.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. See Brianna Lee, *supra* note 86; see also Paula Mejia, *Obama Says Shifting Political Attitudes to Blame in Immigration Reform Delay*, NEWSWEEK (Sept. 7, 2014, 3:17 PM), <http://www.newsweek.com/obama-claims-shifting-political-attitudes-blame-immigration-reform-delay-268866>.

come together to act on immigration policy reform.⁹⁶ But, if no one takes the reins, the same arbitrary, capricious, and misguided decisions that caused the Seventh Circuit in *Kahn* to call the expedited removal procedure a “troubling reality” will continue.⁹⁷ While the Ninth Circuit’s decision in *Smith* was an inexcusable usurpation of power over policy, the continuation of an unfair system should also not be permitted.

V. CONCLUSION

The necessity of the expedited removal system, particularly in the context of the current “crisis at the border,” is evident.⁹⁸ Between January and October 2014, 68,000 children were caught crossing the U.S. border.⁹⁹ Though special provisions apply to children immigration proceedings,¹⁰⁰ the continued use of expedited removal proceedings for those to whom it applies provides a crucial release for the immigration system as a whole. The expedited removal procedure not only increases national security and public safety,¹⁰¹ but also allows for the Department of Homeland Security to effectively deal with the large volume of people seeking illegal entry into the United States, thereby freeing up otherwise consumed resources for application to the crisis at the border and other immigration issues.¹⁰² In the reforms that are eventually made to the immigration laws and the policy choices that are eventually expressed, the continuation of the expedited removal procedure is of the imperative.

Determining removal procedures is an important and necessary task delegated to the legislative branch. It is inappropriate for the courts to assume jurisdiction and power over claims where Congress has explicitly limited their jurisdiction—particularly with regards to hotly contested policy topics such as

96. In the 2014 midterm elections, the Republican Party took control of the Senate and the House of Representatives. *Election 2014: Results*, CNN (last updated Nov. 10, 2014, 12:13 PM), http://www.cnn.com/election/2014/results/main?hpt=elec_flippertkr.

97. *Kahn v. Holder*, 608 F.3d 325, 329 (7th Cir. 2010).

98. See Haeyoun Park, *Children at the Border*, N.Y. TIMES (Oct. 21, 2014), http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?_r=0.

99. *Id.*

100. See 8 C.F.R. § 236.3 (2015).

101. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48877 (Aug. 11, 2004).

102. *Id.*

immigration law, policy, and reform. Such a usurpation of power by a court is an inappropriate exercise of power that warps the role of the judiciary in the federal system. The courts should abide by their role in the system unless and until arriving non-citizens are recognized to have constitutional rights with regard to expedited removal proceedings. Otherwise, the courts assume an inappropriate role in determining and weighing policy considerations.

The Ninth Circuit clearly overstepped its bounds in *Smith* by taking limited jurisdiction over Smith's expedited removal proceedings when no exceptions to the restriction on jurisdiction were present.¹⁰³ The danger in the Court's decision lies with the maintenance of a system where elected representatives should be responsible for policy determinations. In order for the immigration system to be legitimate, the methods of enforcement must be legitimate as well. This cannot be done if the courts decide to ignore the explicit intent and function of the INA because they disagree with the wisdom of Congress. While it is time for reconsideration of the current expedited removal procedure, such a consideration should be done at the Capitol rather than in the courthouses across the United States.

103. *Smith II*, 741 F.3d 1016, 1020–21 (9th Cir. 2014).