

C

Yale Law and Policy Review

2001

Article

***303 THE DUE PROCESS RIGHT TO SEEK ASYLUM IN THE UNITED STATES: THE
IMMIGRATION DILEMMA AND CONSTITUTIONAL CONTROVERSY**Kendall Coffey [FNd1]

Copyright © 2001 Yale Law and Policy Review; Kendall Coffey

I. Introduction: The Dilemma of Immigration

Stranded within the disquieting paradox of immigration, the constitutional right of an alien to seek asylum in this country remains a dilemma that strikes at our core values. [FN1] As a nation descended predominantly from immigrants, much that we represent as a people and the quality of life we enjoy today is owed to ancestors who braved myriad perils to reach our shores from foreign lands. [FN2] And yet, that same standard of living that each of us owes to refugees of the past is seemingly threatened by future immigrants who continue to flood across United States borders each year. [FN3] Therefore, deep-rooted ambivalence reaches across public and legal policies that cannot reconcile our legacy of compassion with present apprehensions about the massive consumption of finite resources that are professedly jeopardized by future immigrant multitudes. [FN4] This moral conflict is compounded by the enormous logistical challenge *304 in restricting immigration. Even hundred-mile walls have seen little success throughout history. Certainly, our country's thousands of miles of land and sea borders, along with undefinable access through the airways, eliminate any realistic possibility of effective physical containment.

As a result of the dilemma that immigration presents to our national ethic and the seemingly insurmountable obstacles that confront attempts at rigorous enforcement, the fusion of self-conflict and futility may have dispelled any sense that the challenge is truly solvable. [FN5] This equation of seeming intractability has deepened the already significant reluctance of the courts and the Congress to displace executive responsibility. Indeed, rather than challenge executive management of these largely unmanageable problems, [FN6] the other branches of government have typically avoided actions that might be seen as undermining the efforts of the Immigration and Naturalization Service. Yet, while declining roles of activism in immigration matters, the judiciary, like the Congress, has not awarded accolades to the INS. [FN7] To the contrary, criticisms *305 abound. [FN8] Accordingly, the unusual concentration of authority in the INS may reflect not just standard acknowledgments of administrative expertise, but also a judicial and legislative willingness to allocate public accountability for such hapless responsibilities almost entirely to the INS.

The ambivalence of the immigration paradox has profound constitutional dimensions. Perhaps no issue can be more basic than the threshold issue of the right of aliens to remain in this country. Strikingly, however, this transcendent question, a critical constitutional inquiry for millions of aliens, [FN9] has not been answered by the Supreme Court during the two decades since passage of the historic Refugee Act of 1980, establishing a statutory right to seek asylum. [FN10] When the issue of whether due process enveloped the alien's right to seek asylum was presented to the Court in 1985, it declined to reach the constitutional *306 question and opted for disposition on purely statutory grounds. [FN11] Nor was any such constitutional right addressed in 1993, when the Court held that the interdiction of aliens on the high seas fell beyond the jurisdictional reach of the U.S. asylum laws and treaty obligations. [FN12] As a result, the question of whether aliens on U.S. soil have a constitutionally protected right to petition for asylum has engendered deep conflict among the circuit courts of

appeals. [\[FN13\]](#) That conflict, and the absence of recent Supreme Court guidance, parallel the self-doubt that pervades much of our nation's immigration policy. With an estimated six million undocumented aliens within our borders, [\[FN14\]](#) few constitutional questions today embody such uncertain implications for so many people. Whatever may be the societal ambivalence that pervades immigration policy, it cannot be acceptable for the law to leave unanswered the question of whether so many men, women, and children who seek to remain here stand constitutionally invisible in their quest. Indeed, the doctrines that have traditionally defined the legal framework for those aspirations date back to the Nineteenth Century, an age of myriad constitutional abdications. [\[FN15\]](#) Plainly, in light of modern constitutional decisions, the Supreme Court should revisit and determine the due process safeguards for asylum seekers.

As is demonstrated in the pages that follow, it is submitted that a principled analysis of current due process doctrines will compel the conclusion that all aliens on U.S. soil do indeed have a due process right to seek asylum. Beginning with a brief overview of the early Supreme Court decisions, this Article turns to the passage of the Refugee Act of 1980, the landmark legislation conferring ***307** upon all aliens physically present within our lands a right to petition for asylum. [\[FN16\]](#) Based on that congressional enactment, the analysis demonstrates that a clear entitlement is created that due process must recognize and protect. The existing judicial controversy among federal circuits is thus properly resolved by validating the constitutional imperative on terms required by the settled principles of due process that govern all people within the sovereign jurisdiction of the United States.

II. Background of the Controversy

A. Immigrants and the U.S. Constitution

The saga of the immigrant's constitutional odyssey began in 1886 with the historic decision of *Yick Wo v. Hopkins*. [\[FN17\]](#) In that case, the Supreme Court invalidated a San Francisco ordinance which resulted in 200 Chinese laundries being closed while 80 other laundries remained open, all operated by non-Chinese. Finding that hostility to the race and nationality of petitioners could not be constitutionally tolerated, the Court applied the Equal Protection Clause to hold that their "rights . . . are not less, because they are aliens and subjects of the Emperor of China." Therefore, because the protections of the Fourteenth Amendment were universal in their application to "all persons within the territorial jurisdiction" of this country, the Court established that aliens were within the arms of the Constitution.

Three years later, however, amidst intensifying public concerns about Chinese immigration, [\[FN18\]](#) the Court decided the Chinese Exclusion case, [\[FN19\]](#) and issued resounding support for the power of the federal government to control immigration: "That the government of the United States . . . can exclude aliens from ***308** its territory is a proposition which we do not think open to controversy. Jurisdiction over its territory to that extent is an incident of every independent nation." [\[FN20\]](#) Therefore, while the Court established in *Yick Wo* the principle that aliens residing here are not beyond the reach of the Constitution, it defined in ensuing decisions a tradition of judicial unwillingness to extend rights to aliens seeking admittance. The anxieties of border protection became a recurring theme as the Supreme Court in 1892 further emphasized the right of the sovereign to exclude foreigners as "an accepted maxim of international law . . . essential to self preservation." [\[FN21\]](#) Along the same line, a year later, the Court in *Fong Yue Ting v. United States* [\[FN22\]](#) underscored the right to exclude or expel all aliens as "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare." As the public enthusiasm for unrestricted immigration continued to plunge, [\[FN23\]](#) court decisions piled up greater obstacles to gaining entry to the United States. In 1903, the Court observed that the power of Congress to "exclude aliens of a particular race from the United States . . . without judicial intervention, are principles firmly established by the decisions of this court." [\[FN24\]](#) While committing "the enforcement of the law to executive officers" the Court nonetheless declined to deny aliens already living in the United States protection of the Constitution. Thus, in *Wong Wing v. United States*, the Court rejected laws that subjected illegal Chinese immigrants to imprisonment at hard labor.

[FN25] While explicitly avoiding any mitigation of prior decisions on the issues of exclusion or admission, the Court nonetheless emphasized that, "[t]he provisions of the Fifth, Sixth and Thirteenth Amendments of the Constitution apply as well to Chinese persons who are aliens as to American citizens." [FN26] Finding that "person" for Fifth Amendment purposes includes, "any and every human being within the jurisdiction of the republic," the Court held that aliens lawfully residing in this country were entitled to "the same protection under the laws that a citizen is entitled to." [FN27]

As a result, the doctrine that developed in the late nineteenth century largely removed "judicial intervention" from the gateways of entry to this country. Nonetheless, the Court acknowledged the Constitution's recognition *309 of all persons actually arriving in our territorial jurisdiction. [FN28] Favorable distinctions were readily conferred upon resident aliens, individuals whose entry was lawful but who might thereafter be subject to expulsion. [FN29]

Other developments in legislation and case law would differentiate critically between "deportable" aliens and "excludables." [FN30] "Deportables" were aliens who secured entry into this country, either lawfully or illegally, without detection. Even if consigned to an illegal and undocumented status, the mere fact of their unimpeded physical arrival in the United States would typically require that any expulsion be predicated upon some form of deportation proceedings. "Excludable" aliens, on the other hand, never actually secured entry into this country, illegally or lawfully. [FN31] Often incarcerated by the authorities pending determination of their fate, [FN32] excludable aliens would often face summary or even immediate removal without the procedural safeguards of deportation. In human terms, this bifurcation reflected an attempt to deal more compassionately with "deportables," those human beings who already stood within U.S. borders. To underscore the border protection needs, however, constitutional recognition was completely denied to aliens who had not yet physically entered the country - the "excludables." [FN33] As one Court decision explained the traditional duality,

[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after entry, irrespective of its illegality." [FN34] Ironically, this dichotomy conferred greater legal protection upon aliens who entered the U.S. illegally and secretly than those who attempted to seek refuge by presenting themselves unsuccessfully to the officials at ports of entry. [FN35]

Because aliens who illegally crossed borders in the dead of night achieved a "deportable" status while aliens detained when attempting to enter lawfully were deemed "excludables," the law rewarded those illegal and undocumented aliens who successfully avoided our laws by evading interception.

*310 In addition to fostering unfairness, the deportable/excludable analysis also spawned other analytic contradictions. Because the legal determinant was based on the fact of physical entry into the United States, cases sought a rationalization for the status of aliens who remained present within our borders in detention or other forms of custody following interception by immigration authorities. As a result, the Court developed the so-called "entry fiction," a doctrine treating as "excludables" those aliens who were within government custody on U.S. lands following interception at the border as if they had never entered the country. [FN36]

These principles were revalidated during the McCarthy era [FN37] as the Supreme Court underscored the wholesale entrustment of immigration responsibilities to the executive branch. For example, in *United States ex rel. Knauff v. Shaughnessy*, [FN38] the Court held that an alien spouse of a U.S. citizen could be excluded from this country based on secret information without any form of hearing, a startling view of individual rights in any other context in our country. Similarly, in *Shaughnessy v. United States ex rel. Mezei*, [FN39] the Court affirmed the extended detention of an alien finding that, the "right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." As a result, even though the alien had been detained on Ellis Island for twenty-one months without any allegation of criminal wrongdoing, the Court concluded that immigration actions by other branches of

government are "largely immune from judicial control." [\[FN40\]](#)

As before, lawfully residing aliens were accorded far more rights. As a result, the Court held that the Constitution required a fair hearing before deportation could be effected. [\[FN41\]](#) Thus, in *United States ex rel. Accardi v. Shaughnessy*, [\[FN42\]](#) the Court found that the INS had failed to observe its own regulations in effecting the deportation of a resident alien. Because the Attorney General had publicly identified the alien subject as an undesirable, the Court reasoned that the resulting expulsion order, based on administrative proceedings conducted by an agency headed by that same Attorney General, failed to provide *311 the requisite fair and objective process. Therefore, while the Court did not validate the inherent rights of aliens to seek admission to this country, it found that when statutes and regulations provided particular safeguards, those rights should be judicially enforced based on constitutional due process. [\[FN43\]](#)

Accordingly, while Nineteenth Century doctrine continued to govern the immigrant's right to enter our country, due process reached those who had physically arrived. Resident aliens received most of the constitutional safeguards enjoyed by U.S. citizens. Even for illegally entering aliens, their status as "deportables" activated procedural due process that included the right to a fair hearing. Like other facets of immigration, though, the result of preferring illegal secret entrants to law-abiding asylum seekers was a policy of contradictory legal tenets and logistical inefficacy. Honest refugees were being dramatically penalized; illegal entry was effectively encouraged; border crossings were not substantially reduced and, if anything, more covert entries were assured.

B. The Refugee Act of 1980

Throughout the decades of inconsistency and frustration, the Congress's inaction on the issue of the alien's right to live in our country corresponded to the limited initiatives of the judiciary. [\[FN44\]](#) In fact, no federal statute delineated a right to seek asylum in this country and so the legislative vacuum was filled by executive branch regulations. [\[FN45\]](#) The legislative absenteeism was transformed, however, by a succession of international norms and conventions that reshaped the world's perspective toward refugees in the aftermath of the horrors of World War II. [\[FN46\]](#)

*312 In 1948, the Universal Declaration of Human Rights was issued which included recognition of each nation's duty to consider granting sanctuary to refugees fleeing persecution. [\[FN47\]](#) This broad proclamation crystallized further with the United Nations Convention Relating to the Status of Refugees in 1951 ("UN Convention"). [\[FN48\]](#) The obligations owed by countries to refugees were emphasized again in the 1967 United Nations Protocol Relating to the Status of Refugees, which the U.S. signed one year later ("UN Protocol"). [\[FN49\]](#) That Protocol adopted certain provisions of the U.N. Convention to define specific rights to seek asylum for refugees escaping persecution. While the United States did not become a direct party to the U.N. Convention, by signing the 1967 Protocol, it accepted by reference the duty to accept refugees "where their life or freedom would be threatened on account of their political opinion." [\[FN50\]](#)

Congress's commitment to this world-wide transformation [\[FN51\]](#) centered upon the Refugee Act of 1980, which embodied post-war norms and evolving ethics concerning refugees:

If one thing is clear from the legislative history of the definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress's primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees. [\[FN52\]](#) *313 To fulfill our nation's pledge to the refugee community, Congress enacted the right to seek asylum and required the executive branch to establish a uniform procedure for such adjudications:

It is the intention of the Conference that the Attorney General should immediately create a uniform procedure for the treatment of asylum claims. Present regulations and procedures now used by the immigration service do not conform to either the spirit or to the new provisions of this Act. [\[FN53\]](#)

This enactment marked a watershed in the rights of all aliens within our nation's borders. "Prior to the 1980 amendments there was no statutory basis for granting asylum to aliens who applied from within the United States." [\[FN54\]](#) As a result of this landmark legislation, "Congress, therefore, established for the first time a provision in federal law specifically relating to requests for asylum." [\[FN55\]](#) Along with uniformity and consistency, the Refugee Act was enacted to give "statutory meaning to our national commitment to human rights and humanitarian concerns." [\[FN56\]](#)

In validating the right to seek asylum, the congressional mandate resonated across the landscape of concepts such as "excludable," "deportable," "admitted" or "unadmitted" to reach every alien physically present in the United States: Any alien who is physically present in the United States 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), irrespective of such alien's status, may apply for asylum in accordance with this section, or where applicable, section 1225(b) of this title. [\[FN57\]](#)

Accordingly, by its own terms, the 1980 Refugee Act discarded traditional status-based distinctions concerning the right to apply for asylum so long as the alien is "physically present in the United States." [\[FN58\]](#)

*314 C. Modern Supreme Court Developments

The Supreme Court has yet to address the constitutional impact of the Refugee Act of 1980. Because due process reaches any "person" within the United States, it has been held, as a general proposition, that it reaches all aliens within our jurisdiction. [\[FN59\]](#) Therefore, in *Mathews v. Diaz*, [\[FN60\]](#) while rejecting the due process claim challenging a five-year residency requirement for aliens seeking federal medical benefits, the Court confirmed the Constitution's recognition of aliens. As the Court expressed the threshold issue, "Even one whose presence in this country is unlawful, involuntary or transitory is entitled to that constitutional protection." [\[FN61\]](#) In 1982, the Court held in *Plyler v. Doe* that the Equal Protection Clause of the Fourteenth Amendment embraced alien school children. Although undocumented and illegal, they were constitutionally entitled to public education at the taxpayer's expense. [\[FN62\]](#)

Beyond those broad premises, however, the specific constitutional questions concerning asylum-seeking have not been examined by the Supreme Court. Even so, a broad statement from a 1982 court decision addressing re-entry issues continues to influence several courts concerning asylum. In *Landon v. Plasencia*, the Court described the right of aliens to seek initial admission as a "privilege." [\[FN63\]](#) That mention represents dictum because the Court found that the alien facing deportation in that case did indeed have constitutional rights. [\[FN64\]](#) Holding that the alien continued to be a permanent resident after a trip abroad, she therefore retained her due process rights to a fair hearing when threatened with deportation. Therefore, the Court had no occasion to discuss, much less determine, whether the newly enacted Refugee Act of 1980 created a right to seek asylum with due process implications. Even so, later circuit court decisions would cite the *Landon* reference to "privilege" without acknowledging its limited force as a dictum or discussing the fact that it arose in a pre-Refugee Act setting. [\[FN65\]](#)

*315 III. The Circuit Split on the Constitutional Right To Seek Asylum

A. The Fifth and Second Circuits Apply Due Process

In the decades following the enactment of the 1980 Refugee Act, the gaps in Supreme Court decision-making have led to dramatic divergences among the circuit courts concerning the reach of due process. The first important decision, *Haitian Refugee Center v. Smith*, [\[FN66\]](#) arose in the Fifth Circuit under facts occurring prior to the effective date of the asylum legislation. One year before the enactment of the 1980 legislation, [\[FN67\]](#) a class action of over 4,000 Haitian refugees challenged INS procedures in Miami that were tantamount to perfunctory, assembly-line rituals providing each applicant with

a hearing that averaged 15 minutes of substantive dialogue. [FN68] With only twelve attorneys available to represent those thousands of applicants, and each asylum officer conducting 40 such proceedings daily, the applicants were frequently unrepresented because of scheduling conflicts. [FN69] Not surprisingly in view of these abject processes, the INS refused asylum for all of the 4,000 Haitian applicants during the course of this program. [FN70]

The district court found that the INS's "wide variety of defects" in the processing of Haitian asylum claims violated, among other things, the Due Process Clause of the U.S. Constitution. [FN71] On appeal, the Fifth Circuit reviewed the inadequate procedures of the INS and affirmed. Its starting point for analysis was the Supreme Court's recognition, in *Mathews v. Diaz*, [FN72] that the Fifth Amendment, like the Fourteenth Amendment, protects even illegal aliens within the jurisdiction of our country. [FN73] While acknowledging the broad power of Congress to exclude aliens altogether, the court found that "the executive is subject to the constraints of due process" in implementing congressional immigration policy. [FN74] Although observing that there are protected interests that originate in the Constitution itself, the court further recognized a separate source of liberty and property interests predicated upon state and federal laws that create "a substantive entitlement to a particular governmental benefit." Examining asylum procedure established by the INS's own regulation, *316 in conjunction with Congress's adoption of the UN Protocol in 1967, the Court concluded that aliens had been granted a right to submit and substantiate their claim for asylum. [FN75] Based on the creation of that substantive entitlement, the court applied the due process doctrine of Supreme Court cases like *Morrissey v. Brewer* [FN76] and found that the Constitution safeguarded the right to seek asylum. Because federal law established a right to petition for asylum, this entitlement gave rise to a protectible liberty interest, [FN77] even if the decision to grant asylum was discretionary. [FN78]

Therefore, while finding no constitutional right concerning the granting of asylum itself, the court found that due process was invoked by the right to seek this remedy. "Although fragile, the right to petition is nevertheless a valuable one to its possessor." [FN79] Because the right to apply for asylum stood upon a foundation of procedural due process, the court found that "some form of hearing" was required, and that the hearing must be conducted "at a meaningful time and in a meaningful manner." [FN80] Applying the three-part test of *Mathews v. Eldridge*, [FN81] the court, upon weighing the private interest at stake, the likelihood of error and the government's interest, found that the Haitian deportation program violated due process.

While the aliens before the court in *Haitian Refugee Center v. Smith* were allegedly deportables who had entered South Florida illegally, the Fifth Circuit did not rely on traditional distinctions elevating the status of deportable aliens over excludables. Instead, the court found that due process reached asylum seekers based on two premises: first, that the Constitution and due process had universal application to all people within our borders, even those whose presence might be "unlawful, involuntary or transitory" [FN82] and, second, that the applicable INS regulation and U.S. treaty commitments established a substantive right to present an asylum claim. [FN83] Predicated upon these conclusions, the court applied modern due process cases concerning governmental entitlements, rather than long-standing alienage doctrine defining the constitutional rights of "deportables." Later Fifth Circuit decisions would further dispel any thesis *317 that *Haitian Refugee Center v. Smith* and the Due Process clause were confined to deportable aliens. [FN84]

Two years later, the Second Circuit expressly invoked the Refugee Act of 1980 in *Augustin v. Sava* [FN85] to hold that the absence of adequate translation of asylum proceedings violated the procedural due process rights of a Haitian refugee. Applying analysis that paralleled *Haitian Refugee Center v. Smith*, the court, like the Fifth Circuit, found no inherent constitutional rights in the asylum process, but reasoned that aliens "do have such statutory rights as Congress grants." [FN86] Because the Refugee Act of 1980 conferred upon aliens a substantive entitlement to seek asylum, the court ruled that, while a grant of asylum is discretionary, the right to apply for asylum and receive a fair hearing required adequate procedural safeguards. [FN87]

Reviewing the traditional distinction between "excludables" and "deportables," the Second Circuit concluded that Augustin had waived any claim of "deportable" status by failing to raise the issue below and was therefore subject to exclusion proceedings. Even so, the court criticized the doctrines that accorded illegal deportable entrants greater rights than those excludables who had properly petitioned for entry. [\[FN88\]](#)

Rather than historic alienage analysis, the court applied the broadly prevailing due process cases [\[FN89\]](#) in light of the entitlement to seek asylum established by the Refugee Act. As a result, even though the court held that Augustin was "excludable," he was still protected by due process. Addressing the merits of the due process claim, the court found that his asylum hearing had been fraught with apparent confusion and error due to inadequate translations of Augustin's native Creole. Accordingly, the court found he was denied a reasonable opportunity to present this asylum claim and remanded with directions to assure a fair hearing.

***318** B.Jean v. Nelson and the Denial of Constitutional Safeguards

One year later, however, the en banc Eleventh Circuit initiated a constitutional perspective in opposition to those holdings in Jean v. Nelson. [\[FN90\]](#) Strikingly, the genesis of the Eleventh Circuit doctrine was not conceived upon the right to seek asylum. Instead, the Jean class action was brought on behalf of Haitian aliens being held in various INS detention facilities pending exclusion proceedings. Rather than the right to receive a fair asylum hearing, the center of the Fifth and Second Circuit holdings, the facts of Jean v. Nelson stood largely in the fundamentally different province of "challenging the government's refusal to grant them parole." [\[FN91\]](#) Because the issues in Jean v. Nelson did not include the actual right to seek asylum, the court had no occasion to discuss the impact of the statutory entitlement conferred by the Refugee Act of 1980. Instead, the court's opinion spoke primarily to INS responsibility for managing the detention and parole of aliens who faced pending exclusion proceedings. Unlike petitioning for asylum, an entitlement guaranteed by Congress in 1980, matters of alien detention as well as release in the form of parole [\[FN92\]](#) were explicitly delegated by statute to the discretion of the Attorney General. Undeniably, these are subjects that present a daunting array of logistical, administrative and practical issues. Like other courts, the Eleventh Circuit described the temporary release of an otherwise ineligible alien to be "an act of extraordinary sovereign generosity." [\[FN93\]](#) According to the court's comprehensive survey of federal case law, the only circuit decision to have imposed due process limits upon INS discretion over the detention of excludable aliens was a Tenth Circuit holding that invalidated the indefinite detention of Mariel refugees. [\[FN94\]](#) As a result, rather than a direct treatment of the right to seek asylum, Jean v. Nelson unveiled a compendium of tributes to deference to the INS centering on issues of detention and release.

***319** Although not a primary focus, asylum rights did not emerge unscathed from Jean v. Nelson. Because the plaintiffs had claimed below that the INS was affirmatively obliged to inform aliens of their right to seek asylum, this alleged duty of notification was drawn into the analysis. Citing the declaration in Landon v. Plasencia [\[FN95\]](#) that an alien seeking admission invokes merely a "privilege," the Court not only rejected the theory of Miranda-type notification, it issued a broader opposition to due process for excludable aliens: "Aliens seeking admission to the United States therefore have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges are granted by Congress." [\[FN96\]](#) While noting that the government granted significant benefits to aliens, including the right to an asylum hearing, the court omitted any mention of the Supreme Court doctrine that imbued such entitlements with due process. From its premise of rejecting a constitutional duty to notify aliens of their asylum rights, the Court proceeded to disavow the constitutional ruling of Haitian Refugee Center v. Smith that had applied due process simply to assure fair hearings. [\[FN97\]](#) Even so, the Eleventh Circuit sustained certain of the alien's claims on non-constitutional grounds due to alleged failures to comply with the INS's own regulatory criteria concerning parole and detention. [\[FN98\]](#)

Because *Jean v. Nelson* arose from critically different facts than *Haitian Refugee Center v. Smith*, its sweeping reference to a lack of due process in the asylum process could have been applied restrictively by its later decisions, even reconciled with the Fifth Circuit holding. As matters would develop, [\[FN99\]](#) *320 however, subsequent Eleventh Circuit cases would instead firmly entrench the view that due process does not reach aliens seeking refuge in this country. [\[FN100\]](#)

When *Jean v. Nelson* reached the Supreme Court in 1985, the constitutional tension among the Second, Fifth and Eleventh Circuits' due process holdings was not resolved. [\[FN101\]](#) Instead, the Court declined to reach the Fifth Amendment issue [\[FN102\]](#) and sustained the lower court findings that valid claims had been raised against the INS based on statutory and regulatory criteria. Justice Marshall dissented to the refusal to address the constitutional questions in an extensive opinion joined by Justice Brennan. [\[FN103\]](#) The dissent argued that, first, excludable aliens clearly enjoy Fifth Amendment protection in matters such as criminal prosecution; second, existing precedent precluded unlawful deprivations of an alien's property interests; and, third, denying due process to excludable aliens could not be logically supported since, for example, the Attorney General presumably could not "justify a decision to stop feeding all detained aliens." [\[FN104\]](#) Because neither the Court majority in *Jean v. Nelson* nor any later decision would address the due process issues, the dissent of Justice Marshall would remain, even today, the last words written on the subject of due process for excludable aliens by any member of the Supreme Court. [\[FN105\]](#)

*321 C. The Circuit Conflict Continues To Grow

With the Supreme Court's decision not to reach the due process issues, the aftermath of *Jean v. Nelson* left the Fifth and Second Circuits in conflict with the Eleventh Circuit doctrine that would continue to reject constitutional asylum rights for excludable aliens. This divergence apparently expanded in 1987 when the First Circuit repeated the Eleventh Circuit's broad disclaimers of due process in the asylum scenario. [\[FN106\]](#) In that case, several refugees from war-torn Afghanistan had been confined in INS detention centers for months following their arrival in the U.S. through third countries, an arrival secured with the use of bogus documents. Like the en banc decision in *Jean, Amanullah v. Nelson* treated detention and parole for excludable aliens, not their right to a fundamentally fair asylum hearing. Even so, citing the Eleventh Circuit holding as well as the "requests a privilege" statement from *Landon v. Plasencia*, the First Circuit reiterated the general thesis that aliens seeking admission have no constitutional rights with regard to their applications and denied the refugees' due process claims. [\[FN107\]](#)

Several years later, the circuit split deepened further as the Circuit for the District of Columbia in *Maldonado-Perez v. INS* [\[FN108\]](#) followed the Fifth Circuit's analysis to recognize a procedural due process right to petition the government for political asylum. [\[FN109\]](#) Relying on *Haitian Refugee Center v. Smith*, the D.C. Circuit found that due process enfolded a Salvadoran farmer who illegally entered Texas without inspection and suffered an adverse deportation order following a hearing in absentia. While determining that due process did not create a right to asylum itself, the court ruled that it required "a meaningful or fair evidentiary hearing with a reasonable opportunity to be present." [\[FN110\]](#) Concluding that due process did indeed apply, the court found that, because the applicant had been accorded a fair opportunity to be present at his hearing, there was no constitutional violation. [\[FN111\]](#) In framing the analysis, the court did not rely on *Maldonado-Perez's* apparent status as a deportable alien. Instead, the court cited the Fifth Circuit's due process holding, as well as non-immigration Supreme Court decisions that define due process in broader settings, such as *Logan v. Zimmerman Brush Co.* [\[FN112\]](#) As a result, the D.C. Circuit, like the Second *322 Circuit in *Augustin v. Sava*, relied on the Refugee Act of 1980 as the source of substantive entitlement that created the protectible interest that warranted constitutional safeguards. [\[FN113\]](#)

With five courts issuing varying declarations on opposing sides of a critical due process issue, the Third Circuit offered a third position in 1996 that was lodged in the middle of the divide. In *Marincas v. Lewis*, [\[FN114\]](#) the court addressed the

asylum rights of stowaway aliens, traditionally among the least favored of immigrant asylum seekers. The alien in *Marincas*, a former soldier in the Romanian army, challenged an interview procedure for stowaways that did not provide a neutral fact-finder to hear the claim initially and lacked other basic safeguards. Observing that the INS regulations distinguished between the procedures governing stowaways and those afforded other applicants, the court found that stowaway asylum claims were not being determined by "a neutral immigration law judge with a full panoply of due process safeguards." [FN115] Upon analysis of the INS's procedures for stowaways, the Third Circuit found that they were legally inadequate and held that these immigrants were entitled to the same asylum procedures extended to other applicants.

The court's holding, though, did not rely on constitutional due process. Indeed, the Court specifically held that the stowaway applicants were not entitled to constitutional protection in seeking admission to the United States. [FN116] This finding was not detailed and was apparently premised upon a recitation of the Supreme Court's reference in *Landon v. Plasencia* to the seeking of asylum as a "privilege" rather than a constitutional right. [FN117] While expressly disclaiming any application of constitutional analysis, [FN118] the Third Circuit nonetheless relied on general due process cases decided by the Supreme Court on constitutional grounds. [FN119]

To construct a due process methodology upon a non-constitutional foundation, the court relied on the judicial duty to construe federal statutes like the Refugee Act consistently with congressional intent because "it can be assumed that Congress intends that procedure to be a fair one." [FN120] Even though basing its analysis upon tenets of statutory construction, the Third Circuit explicitly spoke in terms of due process. Thus, to effectuate the 1980 Refugee Act's mandate for an asylum procedure, as well as U.S. treaty obligations and maxims *323 of fundamental fairness, the court held that the INS process had to provide "the most basic of due process." [FN121] Rejecting any contention that, as "excludable aliens," stowaways deserved a deprecated form of asylum hearing, the court observed that the congressional mandate for asylum procedures applied "irrespective of such alien's status." [FN122] In finding that stowaway applicants therefore deserved the same asylum process created for other applicants, the court required a number of safeguards, including: a hearing before a neutral immigration judge; a transcribed record of proceedings and adequate translation services; notification of the applicant's right to counsel; the availability of free legal representation; the right to submit evidence and to present and subpoena witnesses; and the right seek subsequent administrative review. [FN123]

Accordingly, while acknowledging the "privilege" language of *Landon v. Plasencia* and expressly gainsaying any reliance on constitutional analysis, the decision in *Marincas v. Lewis* clearly applied due process principles to override multiple procedural infirmities in the INS's asylum procedures. [FN124] Therefore, seemingly to reconcile the Supreme Court's 1982 reference to "privilege" with the subsequent analysis evolving under the Refugee Act, the court avoided any constitutional labeling by crafting a purely statutory thesis of due process.

In another appellate encounter with stowaway aliens, the Fourth Circuit stated a succinct but clear rationale for validating their constitutional due process right to seek asylum in the 1999 decision of *Selgeka v. Carroll*. [FN125] An ethnic Albanian fleeing Kosovo, Selgeka stowed away aboard a U.S. ship in January, 1996, and thus the substance of his claim arose before the effective date of the 1996 immigration legislation. [FN126] Besnik Selgeka claimed that he had been denied procedural due process because his right to asylum was not determined by an impartial immigration judge in a hearing with appropriate safeguards. [FN127] Citing decisions such as *Marincas v. Lewis* [FN128] and *Augustin v. Sava* [FN129] the *324 court similarly found that aliens have no independent constitutional right to asylum but enjoy minimum due process concerning statutory entitlements. By virtue of the Refugee Act, the court found that Congress had spoken in no uncertain terms in directing the Attorney General to establish an asylum procedure for aliens within the United States, "irrespective of such alien's status." [FN130] This enactment, the court observed, underscored U.S. treaty obligations under the UN Protocol and provided legislative substance to the national commitment to refugees. [FN131] While placing heavy emphasis on *Marincas*

v. Lewis, the Fourth Circuit made no mention of that decision's reliance on due process that was non-constitutional. Instead, the court in Selgeka cited Marincas, as well as Augustin v. Sava to support its constitutional due process holding. [\[FN132\]](#)

Because the majority in Selgeka concluded that the congressional mandate for an asylum procedure required a single, uniform process, the diminished procedural safeguards for stowaways were found to violate due process. The dissent did not challenge the alien's right to constitutional due process but disputed the premise that INS procedures for stowaways were inadequate. Accordingly, in its decision in Selgeka v. Carroll, the generally conservative Fourth Circuit issued a clear validation of the constitutional right of any alien on U.S. soil to seek asylum.

IV. Resolving the Circuit Split

A. IIRIRA and the New Concepts of Admitted and Unadmitted Aliens

Resolution of this wide variance among circuit courts requires not only analysis of their rulings, but also of the impact of new immigration legislation that became effective subsequent to the events underlying those decisions. In 1996, Congress amended the Immigration and Naturalization Act by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). [\[FN133\]](#) The principal substantive features of IIRIRA became effective on April 1, 1997, [\[FN134\]](#) and thus post-dated the factual circumstances giving rise to the divergent decisions among the Second, Third, Fourth, Fifth, Eleventh, and D.C. Circuits, and, potentially, the First Circuit. Significantly, the key provision for asylum purposes under pre-existing law, Section 1158(a) from the original Refugee Act, was not altered. Thus, the predicate for statutory entitlement recognized in decisions such as Augustin v. Sava and Selgeka v. Carroll *325 remains intact. [\[FN135\]](#) The long-standing definitions of "excludable" and "deportable" aliens, however, were replaced by new statutory terms and concepts. Under IIRIRA, instead of excludable aliens, the statute speaks to "inadmissible" aliens. [\[FN136\]](#) Inadmissible aliens are those who have not lawfully entered this country. Broader than the former category of "excludables," inadmissible aliens include not only immigrants detained at a port of entry, but also those who succeeded in an illegal, surreptitious entry upon U.S. soil. [\[FN137\]](#) As a result, aliens denied admission by immigration authorities ("excludables") are now equated with aliens who illegally gained physical entry ("deportables"), so that both groups are merged into the new classification of unadmitted aliens. [\[FN138\]](#) "Admitted" aliens, on the other hand, are those who were lawfully permitted to enter the country free from conditions of detention or parole. These immigrants would correspond to that component of formerly deportable aliens whose arrival was permitted by immigration authorities.

The impact of the elimination of the excludable/deportable dichotomy in favor of the unadmitted/admitted alien demarcation has not been explicitly resolved subsequent to the enactment of IIRIRA. In a decision arising since the 1997 effective date of the new law, the district court and Eleventh Circuit in Gonzalez v. Reno [\[FN139\]](#) both dispatched the due process claim of six-year-old Elian with a one sentence reference to the circuit court's opinion in Jean v. Nelson. [\[FN140\]](#) Despite its notable brevity, the rejection of due process may still be important for several reasons. Significantly, in rejecting a child's constitutional claim, the court relied on Jean v. Nelson rather than any contention that refugee children have a lesser constitutional status than adults. As a result, the court's approach left unchallenged the impact of Polovchak v. Meese [\[FN141\]](#) and Johns v. Department of Justice, [\[FN142\]](#) leading circuit court decisions concerning *326 the rights of immigrant children. [\[FN143\]](#)

Other consequences are more specifically signaled by Gonzalez v. Reno. For the first time, the Eleventh Circuit's doctrine rejecting due process for excludable aliens was applied directly to an asserted right to seek asylum, as opposed to ancillary issues such as parole, detention, and pre-asylum notification claims. [\[FN144\]](#) Second, while not explicitly addressing the impact of the 1996 passage of IIRIRA, the court's rejection of due process for Elian, an unadmitted alien, necessarily confirms that the Eleventh Circuit will apply the same constitutional standard to unadmitted aliens that previously

encompassed "excludables."

As courts continue to address the right to asylum in the aftermath of IIRIRA, the decisions that have validated due process can also be expected to maintain the same constitutional course. As described earlier, the holdings of the Second, [\[FN145\]](#) Third, [\[FN146\]](#) and Fourth Circuits [\[FN147\]](#) that sustained rights for "excludables," addressed asylum-seekers who would constitute unadmitted aliens under IIRIRA. Moreover, the Fifth Circuit's original validation of due process in 1982, like the D.C. Circuit's similar holding in 1989, extended due process rights for deportable aliens who, having entered illegally, would constitute unadmitted aliens under the current definitions. Therefore, not only did the analysis of those deportable alien cases evince no reliance upon any traditional distinctions, the facts of those cases, if transplanted to the current modern statutory concepts, would similarly endorse due process rights for today's unadmitted aliens.

Moreover, because the critical asylum provision in the Refugee Act of 1980 remains undiminished by the 1996 amendments to the INA, the predicate of statutory entitlement that anchored all but one of these decisions maintains ***327** the same protectible interest in seeking asylum. [\[FN148\]](#) Also undiminished is the reach of the asylum provision to all aliens "physically present" in the United States, "irrespective of such alien's status." Just as this language sweeps across any differentiation between "excludables" or "deportables," the asylum law should be equally indifferent to distinctions that otherwise apply to unadmitted and admitted aliens. Therefore, in examining the due process decisions in light of the subsequent transition to unadmitted and admitted aliens, the facts as well as the legal analysis of those cases reflect that their constitutional outcomes should remain constant.

Accordingly, the enactment of IIRIRA should not revise the existing circuit alignment which arrays the Second, Fourth, Fifth and D.C. Circuits as proponents of Fifth Amendment due process, the Third Circuit in a middle ground of non-constitutional due process, while the Eleventh Circuit, perhaps joined by the First, rejects any such safeguards. With the Eleventh Circuit's rejection of en banc consideration in *Gonzalez v. Reno*, the reaffirmation of *Jean v. Nelson* by that important immigration law tribunal assures a future of unacceptable divergence concerning the human rights of millions until the constitutional issue is resolved by the Supreme Court.

***328** V. The Future of Asylum Rights

A. Clarifying *Landon v. Plasencia* and Applying Modern Due Process

In further constitutional development of the right to seek asylum, the Court's 1982 opinion in *Landon v. Plasencia* should not continue to denigrate the asylum rights under the Fifth Amendment for countless refugees today. [\[FN149\]](#) As described earlier, *Landon v. Plasencia*'s reference to "privilege" constituted dictum because the subject of that case was found to have been a lawful resident alien with undeniable constitutional rights concerning any expulsion from this country. Moreover, in critical respects, *Landon v. Plasencia* embodied outdated notions at odds with the prevailing Supreme Court directives for due process. The older case law relied on labels such as "deportables" and "excludables" that have now been erased statutorily under IIRIRA. Those words, in turn, were used to delineate whether "rights" or "privileges" were at stake, pinning one set of outmoded concepts upon a second set of conceptual antiques.

Neither mode of labeling should overcome modern concepts of basic human rights. Thus, the deportable/excludable delineation was not only mechanical, it unfairly bestowed greater constitutional rights upon some aliens even though they were illegal and undocumented. [\[FN150\]](#) Immigrants who succeeded in an unlawful, surreptitious landing were rewarded over excludable aliens who, following an unsuccessful appearance at a port of entry, might remain imprisoned in INS detention facilities for months or more. [\[FN151\]](#)

Fortunately, with the 1996 statutory elimination of the deportable/excludable definitions, the traditional basis for

distinguishing between aliens with constitutional rights and those with mere privileges, has been erased. While arguably the rights and privileges duality could be reattached to the current concepts of unadmitted and admitted aliens, modern constitutional analysis discourages any further revival of the older methodology. While the Eleventh Circuit established its rule by minimizing asylum with the label of a "privilege," [\[FN152\]](#) the premise that individuals forfeit vital safeguards whenever those safeguards are denominated "privileges" rather than "rights" has largely *329 disappeared from our jurisprudence. [\[FN153\]](#)

Thus, the "privileges" language of Landon and Jean represents a largely abandoned methodology. In discussing the interment of privilege analysis, Professor Van Alstyne recalled its long-standing and irremediable deficiency: "Thus Holmes himself readily admitted that to deny that a person had a "right" to do something was merely to announce the conclusion that a court would not give him any relief; but the denial itself provides no reason whatsoever why such relief should be denied." [\[FN154\]](#)

Thus, as modern constitutional philosophies have firmly established, "this Court now has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' [\[FN155\]](#) or as a 'privilege'" [\[FN156\]](#) Instead, today the Supreme Court relies on constitutional standards that examine the nature of the legislatively-created rights, [\[FN157\]](#) a doctrine launched with the seminal decision of *Goldberg v. Kelly*. [\[FN158\]](#) In that case, the Court found that because the New York Legislature had created a right to receive welfare benefits, those rights could not be eliminated without complying with due process, an adherence that required a fair hearing. Other cases such as *Mathews v. Eldridge* [\[FN159\]](#) have extended and clarified due process. [\[FN160\]](#) Finding that a denial of social security benefits invoked due process safeguards, the Court announced a three-part test, balancing the private interest and the likelihood of erroneous deprivation along with the competing interest of the government. [\[FN161\]](#) In another decision, treating revocation of a convicted felon's discretionary entitlement to parole, the opinion authored by the late Chief Justice Burger similarly required a due process hearing: "Nor are we persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion." [\[FN162\]](#)

Thus, the Court's due process decisions established that, while legislatures may elect not to confer a particular liberty or property interest on an individual *330 once conferred, that interest should not be erased without appropriate safeguards. [\[FN163\]](#) As applied to the right to seek asylum by cases like *Selgeka v. Carroll*, this dimension of constitutional recognition is not derived directly from the Due Process Clause itself, but arises from the separate source of constitutional protection that encompasses legislatively-created enactments. [\[FN164\]](#)

Even apart from the 1982 discussion of near-obsolete labeling for rights and privileges, however, is the fact that *Landon v. Plasencia* nowhere addresses the Refugee Act of 1980, the due process linchpin of ensuing circuit court holdings. When properly viewed as a declaration of previous law, the *Landon v. Plasencia* disclaimer of constitutional rights for aliens seeking admission is consistent with an era in which no asylum entitlement had been legislated. [\[FN165\]](#) Since the statutory right to seek asylum postdated the facts underlying that decision, the Court's statement in 1982 is no obstacle to holding that the Refugee Act is a separate predicate for Fifth Amendment protection.

Although *Landon v. Plasencia* is compatible with a finding that the Refugee Act established a constitutionally protected right to seek asylum, it remains unanswered so far. As discussed earlier, the Court has never addressed the constitutional impact of the Refugee Act. Meanwhile, the circuit courts addressing that watershed legislation have understandably treaded carefully around *Landon*, declining to confront its "privilege" declaration, either as dictum or as a pronouncement supplanted by later developments. While the Fourth Circuit's treatment of *Landon* in *Selgeka v. Carroll* comes closer than others to providing a

needed clarification, its discussion may be too brief to provide the level of analysis needed to resolve any lingering concerns about the current impact of this frequently cited Supreme Court decision. [\[FN166\]](#)

B. Resolving the Due Process Question: The Third Circuit's Middle Ground

In *Marincas v. Lewis*, the court apparently side-stepped the issue by acknowledging Landon's apparent constitutional subtractions and therefore predicating due process on statutory and treaty-based analysis. While the non-constitutional due process findings seemingly navigated a middle course between the opposing circuit alignments, the Third Circuit's apparently safe passage *331 arguably collided with a different set of principles concerning statutory construction and judicial deference to agency interpretations.

The Third Circuit's middle ground was reached through a judicially active extrapolation of legislative intent that overrode contrary agency regulations and practices of the INS. In the modern era of judicial review of administrative actions, however, the long shadows cast by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, [\[FN167\]](#) make such judicial overrides debatable. Indeed, judicial deference to agencies on statutory questions is the overwhelming reality in most cases, unless statutes are clear and unambiguous. [\[FN168\]](#) When statutes are "silent or ambiguous," on the other hand, agencies like the INS enjoy significant latitude to fashion procedures and results within the scope of their administrative expertise. Since the Refugee Act of 1980 did not speak directly to the nature or methods of the asylum tribunal, the various requirements imposed in *Marincas v. Lewis* arguably constituted judicial improvements upon zones of silence or ambiguity that, absent constitutional safeguards, should arguably have been controlled by INS discretion.

Commendably, the Third Circuit insisted upon fundamentally fair procedures for alien stowaways, an outcome functionally consonant with the constitutional due process holdings, while steering between the divided circuits on the constitutional issue. [\[FN169\]](#) While averting one source of decisional conflict, though, the Third Circuit's methodology arguably encounters a different controversy with respect to the measure of judicial deference to agency interpretations. Accordingly, while the Third Circuit's premise of non-constitutional due process averted any confrontation with the still resonant dictum of *Landon v. Plasencia*, [\[FN170\]](#) it did not avoid the deep entanglements of agency discretion and *332 presents a close question on the issue of *Chevron* deference. [\[FN171\]](#)

C. The Majority Circuit View and Constitutional Due Process

When the statutory right to seek asylum is tested against the criteria of modern Supreme Court holdings, those decisions support the outcome of the majority of circuit decisions that apply due process. [\[FN172\]](#) The starting point is recognition that by its terms, the Due Process Clause encompasses every person on U.S. soil, a basic reality underscored in *Mathews v. Diaz*. [\[FN173\]](#) From the fact that an alien, too, is undeniably a person, the analysis is driven further by the long-standing premise reiterated in *Plyler v. Doe* that the Constitution reaches each person within the sovereign territory of the United States. [\[FN174\]](#) This rule has been applied unfailingly and has assured due process protections for aliens charged with crimes [\[FN175\]](#) as well as for foreigners threatened with potential *333 confiscation of their property. [\[FN176\]](#) Thus, when the Supreme Court held in *Plyler v. Doe* [\[FN177\]](#) that illegal and undocumented immigrant children cannot be denied a public education, it observed that "[w]hatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term," and is therefore a "person" guaranteed due process of law by the Fifth and Fourteenth Amendments. [\[FN178\]](#) Therefore, because the Due Process Clause encompasses all persons - including immigrants - who are "physically present" in the U.S., they cannot be constitutionally quarantined beyond the reach of the Fifth Amendment.

Since aliens are not constitutionally invisible, the statutory entitlements conferred upon immigrants should be defined by the same due process analysis that prevails for all other "persons" in this country. Thus, as is already established in various

circuits, the mantle of due process is extended to the asylum process by fusing the statutory right to seek asylum with the procedural due process doctrine of cases such as *Goldberg and Zimmerman Brush*. This fusion does not meld entitlements that are inherent in the Constitution but, rather, envelopes property and liberty interests with constitutional protection once they are duly conferred by substantive law. Accordingly, while there is no intrinsic constitutional duty to provide social security or welfare benefits, [\[FN179\]](#) when a government chooses to grant them, due process governs a substantial deprivation of such entitlements. In much the same fashion, the statutory grant of the right to seek asylum, standing upon decades of evolving U.S. commitments to international norms concerning refugees, readily satisfies the threshold criteria for an interest sufficient to invoke the protection of due process. [\[FN180\]](#)

In defining the protected entitlement, courts have long recognized the serious consequences of being expelled from this country, and therefore, the right to seek asylum has been characterized as a liberty interest. [\[FN181\]](#) While courts *334 have confirmed that asylum processes are not equatable with criminal proceedings [\[FN182\]](#) in post-World War II decisions, the Supreme Court has acknowledged solemnly that "Here the liberty of an individual is at stake . . ." [\[FN183\]](#) In further emphasizing the grave consequences of the alien's removal from this country, the court has characterized such issues as "basic to human liberty and happiness, and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself." [\[FN184\]](#) In addition to cognizance as a liberty interest, the right to bring a claim for asylum may also embody a property interest of equal or greater dignity to the unemployment benefits claim [\[FN185\]](#) or individual claim in a class action [\[FN186\]](#) that modern Supreme Court decisions have safeguarded through due process. [\[FN187\]](#)

Therefore, by applying current doctrine to the right to seek asylum conferred by the 1980 Refugee Act, the safeguards of constitutional due process should be extended to the asylum seeker. When rights ascend to constitutional recognition, they reside in the province of the judiciary and cannot be reduced through the discretion of administrative agencies. [\[FN188\]](#) Therefore, this issue is critical, not only to effectuate Congress's desire for a fair and uniform procedure, but also to assure that agency expediencies are not permitted to transcend basic constitutional rights. [\[FN189\]](#)

D. The Impact of Due Process for Asylum Seekers

Any such enlargement of judicial responsibility does not threaten the INS *335 with unmanageable new burdens. Thus, while extending due process to asylum seekers, circuit court decisions have not overwhelmed the INS by imposing a vast revision of existing procedures. Instead, the due process decisions have insisted on a minimum of procedural fairness, often borrowing safeguards already provided by the INS in one asylum context to assure fairness in others.

Thus, the features that due process requires typically would begin with the right to an adversarial hearing before a neutral fact-finder in which the applicant may, among other things, present witnesses and other evidence to substantiate the asylum claim. [\[FN190\]](#) Consistently with Supreme Court rulings, the requirement of "some form of hearing," [\[FN191\]](#) conducted "at a meaningful time and in a meaningful manner," [\[FN192\]](#) is integral to any adjudication secured by due process. [\[FN193\]](#)

Circuit court decisions have further mandated that adequate translation services be provided, obviously a critical need for most aliens to be able to comprehend and participate effectively in the asylum process. [\[FN194\]](#) To assure a record to afford meaningful subsequent review, hearing transcripts have been required. [\[FN195\]](#) Additionally, one court found that asylum applicants must be notified of their right to counsel, the availability of free legal representation and the right to a public hearing, as well as the opportunity to examine and object to adverse evidence, to compel testimony of witnesses by subpoena and to obtain subsequent review of the asylum hearing. [\[FN196\]](#) These procedures are neither unduly burdensome nor unreasonable. Indeed, because asylum seekers are individuals who face an adjudication with "grave and potentially irreversible consequences," [\[FN197\]](#) such safeguards represent a minimum foundation for basic fairness and decency.

E. The Necessity for Judicial Definition of Human Rights

No court has attempted to catalogue all the features that due process might require in the asylum process, nor could it. [FN198] The strictures of due process necessarily vary with the circumstances. [FN199] But the proper constitutional inquiry must concern the scope of the constitutional rights at stake, not whether *336 the Due Process Clause can be invoked at all. [FN200] Clearly, the dramatic consequences of removal from this country compel a corresponding need to maintain realistic and effective assurances that the process is fair, consistent and neutrally determined. Thus, because he was safeguarded by the Constitution, a refugee-seeker from Kosovo, like Selgeka, could not be expelled through a short form process, which he barely understood, without access to an impartial forum. Similarly, stripped of any deference that might insulate INS procedures in non-constitutional settings, the token fifteen minute hearings at issue in Haitian Refugee Center v. Smith could not escape firm judicial action to impose badly needed constitutional safeguards.

Conversely, where due process was not applied, in the high-profile, controversial case of Elian Gonzalez, the INS was able to deny any form of asylum hearing, reverse fields concerning his status [FN201] and ultimately ignore its own official criteria announced the year before with respect to asylum claims for young children. Indeed, as the court had initially discussed in granting an injunction pending appeal, the INS Guidelines For Children's Asylum Claims envisioned that young children, even a six-year-old, "will be active and independent participants in the asylum adjudicative process." [FN202] Even so, the court concluded in its final opinion that the INS, in its discretion, had the authority to reject the claim of Elian's independent asylum rights based on Chevron deference. [FN203] While, at various points, the court suggested possible doubts about the *337 correctness of the INS's statutory interpretation, it nonetheless concluded that it was obliged under Chevron to accept the INS's application of the law, [FN204] a deference trumpeted throughout the court's opinion.

By allowing the INS to ignore its own announced guidelines, the Eleventh Circuit may have expanded agency latitude exceeding even the broad discretion awarded in Jean v. Nelson. [FN205] Whether the rationale for such extraordinary deference is the INS's role in foreign policy or the realities of its complex and chronically unmanageable burdens, the result is striking. Manifestly, in the absence of constitutional safeguards, the INS is free to revise and reduce the calculus of the most basic human rights, even for a child.

VI. Conclusion

Because the definition of the rights of the individual is more properly reposed in our judiciary, the courts should accept the constitutional duty to safeguard the fundamental rights for millions of immigrant men, women and children who walk upon our lands. That duty transcends any debate over the societal impact of immigration [FN206] a controversy that has endured since our nation was founded. [FN207] The enormous, perhaps still expanding discretion of the INS wherever the Constitution is silenced, may deprecate refugees as non-persons in legal and moral terms. While such may be the fabric of many countries from which refugees flee, it should never be a principle acceptable to the American people. The troubling turnover of human rights to the INS may perhaps be understandable in the context of history and the current milieu of intractable *338 numbers and challenges. No such abdication, however, can be faithful to the traditions of a country that has always entrusted basic liberties to the federal judiciary: "In sum, our Constitution unambiguously enunciates a fundamental principal - that the 'judicial power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence." [FN208] Therefore, especially in light of the current breadth of Chevron deference, constitutional recognition of asylum rights is imperative to maintain the judiciary's "function as a check on any aggrandizing tendencies in the other branches." [FN209] Through constitutional recognition, human rights are not reduced by deference doctrines. Instead, the vindication of liberties under the Constitution is entrusted not to bureaucrats, but to judges, the only acceptable guardians with so much at stake. [FN210] Like the world community, the federal courts have repeatedly acknowledged the enormity of the

consequences of removal from this country. As one court observed, "the consequences of deportation may more seriously affect the deportee than a jail sentence." [\[FN211\]](#) Indeed, in *INS v. Cardoza-Fonseca*, the Supreme Court observed [\[FN212\]](#) "Deportation is always a harsh measure. It is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." [\[FN213\]](#)

While due process validation of asylum rights for all aliens on U.S. soil may have further constitutional ramifications [\[FN214\]](#) the inevitability of other due ^{*339} process questions should not detain further the compelling case for constitutional recognition of asylum. Moreover, the truth is that constitutional acknowledgment of all aliens on our soil will not impair border security measures such as the interdiction of aliens on the high seas, [\[FN215\]](#) since those passages are simply not lodged within the constitutional enclosures of U.S. territory. [\[FN216\]](#) Nor is there any great difficulty in applying the appropriate standard for due process. Since the Supreme Court has firmly embraced a three-part test for defining the minimum safeguards in other constitutional provinces, extending that analysis to all immigrants within our nation will enhance, rather than reduce, the consistency of constitutional doctrine. [\[FN217\]](#)

Accordingly, whatever may be the trepidations of implicating itself further in the human, moral and legal morass of immigration, the courts should stand firm to that responsibility. Rather than surrender the definition of human rights to the INS, the judiciary should honor its traditions of protecting the constitutional rights of all human beings who stand on U.S. soil. [\[FN218\]](#) As our nation's history reflects, the ebbs and flows of immigration tides, as well as the accompanying emotion and controversy, will continue to buffet public sentiment and political decision makers. The one constant, however, since the creation of our Constitution, has been the independent federal judiciary. That sentinel must continue to assure that no controversy or temporal attitude stands taller than the great haven of the United States Constitution.

[\[FNd1\]](#). Co-Founder and Partner, Coffey, Diaz & O'Naghten, Miami, Florida. B.S., University of Florida; J.D., University of Florida.

[\[FN1\]](#). As one commentator described the emotional impact of immigration, "No war, no national crisis has left a greater impress on the American psyche than the successive waves of new arrivals that quite literally built the country." Bernard A. Weisberger, *A Nation of Immigrants*, *American Heritage* (Feb. - March, 1994) at 75.

[\[FN2\]](#). Immigrants flooded to this country without restriction throughout much of our history. In 1790, our population stood at four million and reached thirty-two million by 1860. Weisberger supra note 1, at 82. Immigrant waves continued after the Civil War with fourteen million arriving between 1860 and 1900 with another 18,600,000 following between 1900 and 1930. *Id.* at 83-84

[\[FN3\]](#). As the Supreme Court established in *Plyler v. Doe*, 457 U.S. 202 (1982), illegal and undocumented immigrant children are constitutionally entitled to a public education. Another source of public concern has been the impact of immigration on taxpayer obligations for government entitlements. While only a small fraction of immigrants are on welfare, their rate of 6.6 % is slightly higher than the 4.9 % for Native Americans. That usage is concentrated among the elderly who comprise 28 % of welfare benefits among immigrants. Michael Fix et al., *The Use of SSI and Other Welfare Programs By Immigrants*, Testimony Before the House Ways and Means Committee (May 23, 1996) (<http://www.urban.org/testimon/fix.htm>).

[\[FN4\]](#). The true economic impact of immigration is the subject of active debate. A report by the Urban Institute has challenged the widespread assumption that immigrants represent an aggregate drain on societal resources. Michael Fix & Jeffrey S Passel, *Immigration and Immigrants, Setting the Record Straight*, The Urban Institute (May 1994) (<http://www.urban.org/pubs/immig/immig.htm>).

This misperception regarding immigrants' net fiscal impact has been reinforced by several highly publicized recent studies that overlook three basic facts about immigration. First, integration of immigrants is dynamic; their incomes and tax contributions both increase the longer they live in the United States. Second, incomes vary considerably for different types of immigrants with legally admitted immigrants, as a group, generally having significantly higher incomes than illegal immigrants or refugees. Finally, the studies do not take into account the indirect benefits of job creation from immigrant businesses or consumer demand.

The Urban Institute Report acknowledges, though, that a disproportionate impact may fall upon state and local governments. Contrary to the public's perception, when all levels of government are considered together, immigrants generate significantly more in taxes paid than they cost in services received. This surplus is unevenly distributed among different levels of government, however, with immigrants (and natives) generating a net surplus to the federal government, but a net cost to some states and most localities.

[FN5]. In a hearing before the House Judiciary Committee on June 10, 1999, Representative Smith, Chair of the Subcommittee on Immigration and Claims, was blunt in describing the perceived problems of the present tide of immigration: "Many long-time residents are forced to move away from the communities where they grew up. Those who appeal to the federal government for immigration law enforcement receive little or no help." Transcript of Hearing Before the Subcommittee On Immigration On Claims of the Committee On the Judiciary, House of Representatives, 106th Congress, 1st Sus. (June 10, 1999) at 6 ([http:// commdocs.house.gov/committees/judiciary/hju62494.000/hju62494_O.htm](http://commdocs.house.gov/committees/judiciary/hju62494.000/hju62494_O.htm)) (hereinafter Remarks of Rep. Smith). In discussing the effectiveness of the INS, Representative Smith was equally direct: "Meanwhile, the interior enforcement strategy recently unveiled by the Immigration and Naturalization Service effectively gives up on removing illegal aliens from the United States. Except for a small fraction of convicted criminal aliens, illegal aliens have little or no fear that they will ever be deported." *Id.*

[FN6]. Immigrant poverty is another deep concern. Although the level of poverty is higher among immigrants, significantly, only 10% of immigrants who have become naturalized citizens live in poverty as opposed to 29 % of non-citizen immigrants. Fix, *supra* note 3, ([http:// www.urban.org/testimon/fix.htm](http://www.urban.org/testimon/fix.htm)). Also underscoring the reality of poverty among immigrants is a report by the Center for Immigration Studies indicating that the number of immigrant households below poverty nearly tripled from 2.7 million in 1979 to 7.7 million in 1997. Michael A. Fletcher, *Immigrants' Growing Role in U.S. Poverty Cited*, Wash. Post, Sept. 2, 1999, at A2. Throughout that same period, a relatively constant 12 % of the native born population lived in poverty while poverty among immigrants increased from 15.5 to 21.8 %. *Id.*

[FN7]. As one court expressed its view toward INS processes: "The proceedings of the Immigration and Naturalization Service are notorious for delay, and the opinions rendered by its judicial officers, including the members of the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality." [*Salameda v. INS*, 70 F.3d 447, 449 \(7th Cir. 1995\)](#). In another case, the court observed, "the Board seems unaware of the elementary facts of contemporary history, even those that bear vitally on its mission." [*Osmani v. INS*, 14 F.3d 13, 14 \(7th Cir. 1994\)](#); see also [*Bastanipour v. INS*, 980 F.2d 1129, 1133 \(7th Cir. 1992\)](#) ("The Board's handling of the question of apostasy makes us wonder whether the Board's knowledge of Iran is any greater than its knowledge of Biafra, about which we commented critically"). Other courts have also been blunt in expressing their skepticism. "Under any ordinary meaning that decent, compassionate human beings would attach to the words 'abuse of discretion,' the BIA has abused its discretion." [*Watkins v. INS*, 63 F.3d 844, 852 \(9th Cir. 1995\)](#); see also [*Melendez v. Dep't of Justice*, 926 F.2d 211, 219 \(2d Cir. 1991\)](#) (stating that INS position "turns logic on its head," "extraneous influences" may have influenced INS and therefore "the administrative proceeding in such case would simply be a charade.") [*Mikhael v. INS*, 115 F.3d 299, 306 \(5th Cir. 1997\)](#) ("The IJ gave cursory allegiance to both the Supreme Court's and this Circuit's precedent"). In [*Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 \(1999\)](#) the Supreme Court dismissed as a "mirage" the jurisdiction position advanced by the INS. [*Id.* at 482](#).

[FN8]. While Congress and much of the public may criticize the INS for failing to do enough to contain immigration, others castigate its heavy-handed measures. According to the Human Rights Watch World Report 1999: United States: Human Rights Developments, ([http:// www.hrw.org/hrw/worldreport99/usa/index.html](http://www.hrw.org/hrw/worldreport99/usa/index.html)) (hereinafter Human Rights Report), the recent enactment and subsequent enforcement of IIRIRA has led to widespread violations of international human rights standards against asylum seekers. Much of that concern centered on the INS's treatment and incarceration of refugees:

More than half of the immigrants held in INS custody during 1998, some 9,000 people, were sent to local jails to await immigration proceedings. Faced with an overwhelming, immediate demand for detention space, the agency handed over control of its detainees to local sheriffs and other jail officials without ensuring that basic international and national standards requiring humane treatment and adequate conditions were met.

Id., at 8.

[FN9]. Although the issue of constitutional recognition for illegal and unadmitted aliens has varied ramifications, the focus of this article is the right to seek asylum, a discretionary remedy permitting an alien to remain in this country on account of potential persecution in a foreign land. The majority of illegal immigrants who arrive on our shores seek a better life by leaving behind poor economic conditions in their home countries. Although a laudable objective, and one often pursued heroically, at great sacrifice and in the face of grave dangers, economics do not create a basis for asylum. Asylum may be granted "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." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987), citing 8 U.S.C. § 1101 (a)(42) (2000). Although asylum requires a particularized showing, it is, for many, a process that should present a realistic hope for success. Significantly, the test for showing a "well-founded fear" does not require a showing of probable harm and could, depending on the circumstances, be satisfied by a ten percent prospect of persecution. 480 U.S. at 440.

[FN10]. 8 U.S.C. §1101 et. seq. (1994); 8 U.S.C. § 1158 (a) (1994).

[FN11]. *Jean v. Nelson*, 472 U.S. 846 (1985).

[FN12]. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (addressing extraterritorial effect of U.S. asylum laws and treaty obligations). See also *Cuban American Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1424 (11th Cir. 1995).

[FN13]. As is analyzed below, most courts to address the issue have validated a due process right to an asylum hearing.) *Selgeka v. Carroll*, 184 F.3d 337 (4th Cir. 1999); *Maldonado-Perez v. INS*, 865 F.2d 328, 332 (D.C. Cir. 1989); *Augustin v. Sava*, 735 F.2d 32, 36-37 (2d Cir. 1984); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1034-38 (5th Cir. Unit B 1982). Other courts, including the Eleventh Circuit, subdivided aliens finding that only deportable or admitted aliens have any constitutional interest in the right to seek asylum even though it is congressionally mandated for all aliens in this country "irrespective of such alien's status." 8 U.S.C. §1158(a)(1). Compare *Amanullah v. Nelson*, 811 F.2d 1, 6 (1st Cir. 1987) (citing *Jean*, 727 F.2d at 977). Meanwhile, the Third Circuit has recognized that unadmitted aliens are constitutionally protected, *Chi Thon Ngo v. INS*, 192 F.3d 390, 395 (3d Cir. 1999), and finds that their right to seek asylum requires judicially-imposed safeguards, but characterizes their due process rights as a doctrine of statutory construction rather than a constitutional predicate. *Marincas v. Lewis*, 92 F. 3d 195, 203 (3d Cir. 1996).

[FN14]. According to one source, as many as 6,000,000 illegal and undocumented aliens currently reside in the U.S. Remarks of Cong. Smith. This is roughly consistent with the INS estimate that, as of October 1996, there were 5 million illegal aliens living in this country with the number growing by 275,000 each year. Steven Canarota, 5 Million Illegal Immigrants, An Analysis of New INS Numbers, Immigration Review No. 28 (Spring,1997), at ([http:// www.cis.org/articles/1997/IR28/5million.html](http://www.cis.org/articles/1997/IR28/5million.html)). That estimate assumes 420,000 new illegal entries annually, a total which is

reduced by emigration, deaths and adjustment to legal status.

[FN15]. [Plessy v. Ferguson, 163 U.S. 537 \(1896\)](#).

[FN16]. The asylum provision of the Refugee Act, [8 U.S.C. §1158\(a\)\(1\)](#) provides:

Any alien who is physically present in the United States 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), irrespective of such alien's status, may apply for asylum in accordance with this section, or where applicable, section 1225(b) of this title.

[FN17]. [Yick Wo v. Hopkins, 118 U.S. 356 \(1886\)](#).

[FN18]. In 1882, Congress began its policy of restrictions by excluding Chinese from entry and citizenship. Weisberger supra note 1, at 86. In 1924, Congress enacted the Johnson-Reed Act, which began to assess various quota limits on immigrants from outside the Western Hemisphere.

[FN19]. [Chae Chan Ping v. United States, 130 U.S. 581 \(1889\)](#) (validating legislation that prohibited the return of Chinese laborers). While there were no quota-based restrictions on immigration prior to 1882, immigrants nonetheless confronted various forms of resistance, even hostility upon arrival. The Irish were the focus of anti-immigrant feelings that accelerated through the 1840's. The potato famine had created massive starvation that killed as many as a million of Ireland's 8.5 million inhabitants in 1845, prompting the first of many mass migrations to our shores. Such immigrants have not always been welcome. Quinn, "The Tragedy of Bridget Such-A-One" American Heritage (Dec. 1997 at 36). "Our Celtic fellow citizens," wrote a New York businessman, "are almost as remote from us in temperament and constitution as the Chinese." Weisberger supra note 1, at 82. Some of the anti-Irish feeling stemmed from anti-Catholic sentiments and led to acts of violence, including the burning of a convent in Boston and pre-civil war riots in Philadelphia. Id. at 83.

[FN20]. [130 U.S. at 603-04](#).

[FN21]. [Nishimura Ekiu v. United States, 142 U.S. 651, 659 \(1892\)](#).

[FN22]. [149 U.S. 698, 711 \(1893\)](#).

[FN23]. In the latter part of the 19th century, the "immigrant problem" intensified. An Immigration Restriction League was formed among old New England families concerned about our "unguarded gates" and the "wild motley throng" from Russia and Eastern Europe. Weisberger supra note 1, at 86.

[FN24]. [Yamataya v. Fisher, 189 U.S. 86, 97 \(1903\)](#).

[FN25]. [Wong Wing v. United States, 163 U.S. 228 \(1896\)](#).

[FN26]. [163 U.S. at 242](#).

[FN27]. Id.

[FN28]. [Yamataya v. Fisher, 189 U.S. 86, 101 \(1903\)](#) ("... no person shall be deprived of his liberty without opportunity, at some time, to be heard... although alleged to be illegally here. No such arbitrary power can exist where the principles involved in due process of law are recognized.")

[FN29]. [Bridges v. Wixon, 326 U.S. 135, 161 \(1945\)](#) ("... [O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders... None of these provisions acknowledges any distinction between citizen and resident aliens."); see also [Kwong Hai Chew v. Colding, 344 U.S. 590, 603 \(1953\)](#) (due process required that alien who was lawful permanent resident could not be detained and deported by Attorney General's order without reasonable notice of charges and adequate hearing).

[FN30]. [Leng May Ma v. Barber, 357 U.S. 185, 187 \(1958\)](#).

[FN31]. [Garcia-Mir v. Smith, 766 F.2d 1478, 1483-1484 \(11th Cir. 1985\)](#).

[FN32]. *Id.*

[FN33]. As explained by the Supreme Court, "... 'exclusion' means preventing someone from entering the United States who is actually outside of the United States or is treated as being so." [Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.4 \(1953\)](#).

[FN34]. [Sale v. Haitian Centers Council, Inc., 596 U.S. 155, 175 \(1993\)](#).

[FN35]. [Augustin v. Sava, 735 F.2d 32, 36 n. 11 \(2d Cir. 1984\)](#).

[FN36]. [Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 \(1953\)](#); [Nishimura Ekiu v. United States, 142 U.S. 651, 661 \(1892\)](#)

[FN37]. Because of the "fear ridden climate of McCarthyism," attempts to overhaul the immigration laws in 1952 were made but maintained the national origins quotas. Nonetheless, because of concern about refugees from China as well as Hungary in the wake of the failed anti-Soviet uprising, special dispensations were made reflecting that refugees from these countries were fleeing communism. Weisberger *supra* note 1, at 87.

[FN38]. [338 U.S. 537, 544 \(1950\)](#).

[FN39]. [345 U.S. 206, 216 \(1953\)](#).

[FN40]. [345 U.S. at 210](#).

[FN41]. [Kwong Hai Chew v. Colding, 344 U.S. 590, 596 \(1953\)](#); See also [Rosenberg v. Fleuti, 374 U.S. 449 \(1963\)](#) (stating that an "innocent," casual and "brief" trip does not constitute a new entry that would forfeit a resident alien's right to remain in this country.).

[FN42]. [347 U.S. 260 \(1954\)](#).

[FN43]. Described in later cases as the Accardi doctrine, this principle provides for judicial enforcement when an agency fails to follow its own established procedures. [Montilla v. INS, 926 F.2d 162, 166 \(2d Cir. 1991\)](#). As described in Montilla, it is "premised on fundamental notions of fair play underlying the concept of due process." [926 F.2d at 167](#).

[FN44]. Thus, the Supreme Court "has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." [Fiallo v. Bell, 430 U.S. 787, 792 \(1977\)](#). This philosophy of expansive consignment to the other branches of government cascades across court decisions. Earlier, Justice Frankfurter wrote that, "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political

conduct of government." [Galvon v. Press, 347 U.S. 522, 531 \(1954\)](#).

[FN45]. Prior to the enactment of the Refugee Act of 1980, more humane legislation was passed in 1965, the same year that saw the passage of landmark civil rights legislation and other components of the Great Society. In large part, the new immigration legislation attempted to reduce reliance on national origin quotes and instead delineated policy considerations such as the objectives of reuniting families, opening access to refugees and attracting certain skills and professions. In signing the legislation at the base of the Statue of Liberty, President Lyndon Johnson observed that, "the days of unlimited immigration are past. But those who come will come because of what they are - not because of the land from which they sprung." Weisberger supra note 1, at 88.

[FN46]. In addition to addressing finally the post-World War II momentum of the international community, the back drop of congressional action in 1980 included the fall of U.S. supported governments in Cambodia and South Vietnam in 1975. Those events "unleashed floods of refugees who are a special responsibility of the United States." Id. at 89.

[FN47]. Article 14 of the Universal Declaration of Human Rights provides:

- (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
- (2) This right may not be invoked in the case of prosecutions arising from non-political crimes or other acts contrary to the purposes and principles of the United Nations.

[FN48]. The UN Convention described the world community's "profound concern for refugees" and the "social and humanitarian nature of the problem of refugees" in its preamble. In its definitional section, it set forth the standard of a "well-founded fear of being persecuted by reasons of race, religion, nationality, membership of a particular social group or political opinion," a criterion that would later be embodied in U.S. asylum laws. Article 33 thus imposed a prohibition of the involuntary return of refugees "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Art. 33(1), UN Convention.

[FN49]. [19 U.S.T. 6223](#); 606 U.N.T.S. 267 (1967). The UN Protocol reaffirmed the international commitment to refugees. Broadening its scope to encompass new refugee situations arising after 1951, it reincorporated Articles 2 through 34 of the treaty retaining the definition of "refugees" embodied in the UN Convention.

[FN50]. [Nicosia v. Wall, 442 F.2d 1005, 1006 n.4](#) (5th Cir. 1971).

[FN51]. Subsequent to the passage of the 1980 Refugee Act, the international community has continued to address concerns for refugees in related contexts. The 1989 Convention on the Rights of the Child provides that participating nations: shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures and shall, whether accompanied or unaccompanied by his parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights...

Another international compact, while not centered on refugee issues, provides that even if wrongfully abducted, a child should not be returned to the nation of origin if there is "grave risk" of "physical or psychological harm" if such repatriation would place the child "in an intolerable situation." Art. 13(b), Hague Convention On The Civil Aspects Of International Child Abduction.

[FN52]. [INS v. Cardoza-Fonseca, 480 U.S. 421, 436 \(1987\)](#).

[FN53]. 125 Cong. Rec. 3, 759 (1979) (emphasis added).

[FN54]. [Cardoza-Fonseca, 480 U.S. at 433.](#)

[FN55]. [Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 552 n. 8 \(9th Cir. 1990\).](#)

[FN56]. S.Rep. No. 256, 96th Cong., 4, U.S. Code Cong. & Admin. News 1980, at 141. In amending the Immigration and Nationality Act, the Refugee Act of 1980 was conceived primarily "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States." [Pub.L. 96-212, tit. 1, §101\(b\), 94 Stat. 102 \(1980\)](#). In providing statutorily for a uniform asylum procedure for refugees, the Refugee Act brought U.S. laws into conformity with the treaty obligations of the U.N. Protocol. [Marincas v. Lewis, 92 F.3d 195, 197 \(3d Cir. 1996\)](#). Thus, in its preamble, the Act proclaimed "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of [1980, Pub. L. 96-212](#), 94 Stat. 102 (1980).

[FN57]. [8 U.S.C. §1158\(a\)\(1\)](#) (emphasis added).

[FN58]. *Id.* The legislative history of the asylum law emphasized the necessity of requiring a uniform asylum process. "The bill requires the Attorney General to establish a uniform procedure for passing upon an asylum application." S. Rep. Number 256 at 96 Cong. 2d Sess. 9 (1980), reprinted in 1980 U.S. Code Cong. & Adm. News, 141, 149 (cited in [Jean v. Nelson, 727 F. 2d 957](#) (11th Cir. 1984), *aff'd* on other grounds, [472 U.S. 846 \(1985\)](#) (emphasis supplied)).

[FN59]. [Mathews v. Diaz, 426 U.S. 67, 77 \(1976\)](#). There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. [Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 \(1950\)](#); [Wong Wing v. United States, 163 U.S. 228, 238 \(1895\)](#); See [Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 \(1931\)](#); see also [Wang v. Reno, 81 F. 3d 808, 816-17 \(9th Cir. 1996\)](#) (citing [United States v. Verdugo-Urquidez, 494 U.S. 259 \(1990\)](#)) ("However, as the Verdugo-Urquidez Court expressly noted, the Fifth Amendment provides protection to the "person" rather than "the people."); [Lynch v. Cannatella, 810 F.2d 1363 \(5th Cir. 1987\)](#) (illegal, unadmitted alien, a "person" for due process purposes and cannot constitutionally be subjected to physical abuse).

[FN60]. [426 U.S. 67 \(1976\)](#).

[FN61]. [Mathews, 426 U.S. at 77.](#)

[FN62]. [457 U.S. 202, 223-226 \(1982\)](#).

[FN63]. [459 U.S. 21, 32 \(1982\)](#), on remand, [719 F.2d 1425 \(9th Cir. 1983\)](#).

[FN64]. [Landon, 459 U.S. at 34.](#)

[FN65]. [Jean v. Nelson, 727 F.2d 957, 968 \(11th Cir. 1984\)](#) (en banc), *aff'd* on non-constitutional grounds, [472 U.S. 846 \(1985\)](#); See also [Marincas v. Lewis, 92 F.3d 195, 202 \(3d Cir. 1996\)](#); [Amanullah v. Nelson, 811 F.2d 1, 8 \(1987\)](#).

[FN66]. [676 F.2d 1023 \(5th Cir. 1982\)](#)

[FN67]. The right to seek asylum prior to 1980 was established by an INS regulation, 8 C.F.R. §108.

[FN68]. [Haitan Refugee Center, 676 F.2d at 1031.](#)

[FN69]. [Id. at 1031](#). Not infrequently, counsel for asylum applicants would confront three hearings at the same hour in different buildings.

[FN70]. [Id.](#)

[FN71]. [Id. at 1036](#) (citing [Haitian Refugee Center v. Civiletti](#), 503 F.Supp. 442,455 (S.D. Fla. 1980)).

[FN72]. [426 U.S. 67 \(1976\)](#).

[FN73]. [Haitian Refugee Center](#), 676 F.2d at 1036.

[FN74]. [Id.](#)

[FN75]. [Haitian Refugee Center](#), 676 F.2d at 1037.

[FN76]. [408 U.S. 471 \(1972\)](#).

[FN77]. [Haitian Refugee Center](#), 676 F.2d at 1037. The Court cited the [Japanese Immigrant Case](#), 189 U.S. 86, 100-01 (1903), for the principle that deportation proceedings implicate the alien's liberty interest in the right to remain in the U.S.

[FN78]. [Haitian Refugee Center](#), 676 F.2d at 1038.

[FN79]. [Id. at 1039](#).

[FN80]. [Id. at 1039](#) (citing [Logan v. Zimmerman Brush Co.](#), 455 U.S. 422 (1982)).

[FN81]. [424 U.S. 319 \(1976\)](#).

[FN82]. [Mathews v. Diaz](#), 426 U.S. at 77.

[FN83]. [Haitian Refugee Center](#), 676 F.2d at 1038-39. Subsequently, the finding that the ratification of the UN Protocol conferred enforceable federal rights was rejected by the Eleventh Circuit in [Haitian Refugee Center v. Baker](#), 949 F.2d 1109,1110 (11th Cir. 1991).

[FN84]. In [Lynch v. Cannatella](#), 810 F.2d 1363, 1375 (5th Cir. 1987), the court found that "excludables," even illegal stowaways apprehended aboard a barge, remained within the reach of due process and could not be physically abused by port officials. "Excludable aliens are not non-persons." See also [Zadvydas v. Underdown](#), 185 F.3d 279, 289 (5th Cir. 1999) (while status can affect measure of protection, "in this Circuit it is clear" that excludables are within the ambit of the Constitution).

[FN85]. [735 F.2d 32 \(2d Cir. 1984\)](#). Previously, in the context of alien detention, the Second Circuit had seemingly minimized due process for excludable Haitians in [Bertrand v. Sava](#), 684 F.2d 204 (2d Cir. 1982). That decision encompassed the issues of detention and parole of aliens, matters that are explicitly committed to the discretion of the Attorney General. By contrast, the right to seek asylum, is not a humble suggestion to the INS, but rather, represents a mandate of Congress.

[FN86]. [735 F.2d at 36](#).

[FN87]. [Augustin](#), 735 F.2d at 37. The Second Circuit cited the Fifth Circuit's decision in [Haitian Refugee Center v. Smith](#), as

well as the original panel decision by the Eleventh Circuit in [Jean v. Nelson, 711 F.2d 1455](#) (11th Cir. 1983), vacated, [727 F.2d 957](#) (11th Cir. 1984) (en banc).

[FN88]. [Augustin, 735 F.2d at 36 n.11.](#)

[FN89]. [Id. at 37](#) (citing [Wolff v. McDonnell, 418 U.S. 539, 577 \(1974\)](#)).

[FN90]. [727 F.2d, 957 \(11th Cir. 1984\)](#)

[FN91]. [Id. at 962.](#)

[FN92]. [Id. at 963](#) (citing [8 U.S.C. §1182\(d\)\(5\)\(a\)](#)). In the immigration context, parole represents a discretionary determination to release an alien from INS physical custody, which can encompass temporary liberty as well as a permanent discharge. One frequently disputed scenario is the detainee's obvious desire for a temporary release allowing the alien to remain at liberty pending the determination of the immigration status through administrative or judicial proceedings. Detention issues have been litigated regularly and successfully by the INS which has been accorded wide discretion in treating, for example, the status of 2,746 Mariel Cubans. [Garcia-Mir v. Smith, 766 F.2d 1478](#) (11th Cir. 1985). Even in dealing with juveniles, the Supreme Court reversed both lower courts to underscore the broad latitude of the INS in handling detention, parole and release issues. [Reno v. Flores, 507 U.S. 292 \(1993\)](#).

[FN93]. [Jean, 727 F.2d at 972.](#)

[FN94]. [Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382](#) (10th Cir. 1981). In that case, the court held an alien who had been held for more than a year in a maximum security federal prison could not be "punished" through an incarceration of limitless duration. Illustrating perhaps colorfully the necessary presence of at least minimal constitutional safeguards, the court noted that, "Surely Congress could not order the killing of Rodriguez-Fernandez and others in his status on the ground that Cuba would not take them back and this country does not want them." [654 F.2d at 1387.](#)

[FN95]. [459 U.S. 21 \(1982\).](#)

[FN96]. [Jean, 727 F.2d at 968.](#)

[FN97]. [Id. at 976 n. 27.](#) While dramatically undercutting the constitutional rights of excludable aliens in the asylum process, the Eleventh Circuit nonetheless recognized the extensive case law extending to others constitutional guarantees in matters ranging from criminal prosecutions, [Wong Wing v. United States, 163 U.S. 228 \(1896\)](#), to unlawful takings of property. [Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 \(1931\)](#).

[FN98]. [Jean, 727 F.2d at 976](#) ("agency deviation from its own regulations and procedures may justify judicial relief").

[FN99]. The Eleventh Circuit's deepening opposition to constitutional recognition of asylum rights may have been due, at least in part, to the unique dilemma posed by criminal aliens arriving from Mariel, a minute but problematic component of the 1980 influx of some 125,000 refugees. In discussing the Mariel detainees, one court noted that, "[m]any of them were hardened convicts" whose return was refused by the Cuban government. [Chi Thon Ngo v. INS, 192 F.3d 390, 395 \(3d Cir. 1999\)](#). "Consequently, many of the Mariel Cubans - approximately 1,750- still remain in INS detention because of their danger to the community." [Id.](#) One year after the Eleventh Circuit's opinion in [Jean v. Nelson](#), that court confronted a class action on behalf of the Mariel detainees for which the district court had granted certain relief, ordering some to be released. [Garcia-Mir v. Smith, 766 F.2d 1478](#) (11th Cir. 1985). In addressing the district court's premise that the Mariel plaintiffs

"should be accorded at least some of the legal protections given to those who have effected entry into this country," [766 F.2d at 1483](#), the Eleventh Circuit issued a resounding rejection of any notion that excludable aliens enjoy constitutional protection concerning their initial admission to the U.S. [Id. at 1483-84](#). Although its constitutional discussion was addressed only to the detention issues, and the right to seek asylum under the 1980 Refugee Act was nowhere mentioned, the court relied on *Jean v. Nelson* to assert a broad erasure of rights concerning asylum. [766 F.2d at 1482-84](#).

[FN100]. In [Gonzalez v. Reno, 215 F.3d 1243](#) (11th Cir. 2000), the Court summarily rejected due process for six-year-old Elian based on *Jean v. Nelson*. In [Richardson v. Reno, 162 F.3d 1338, 1361](#) (11th Cir. 1998) the court cited *Landon v. Plasencia*, *supra*, and *U.S. ex rel Knauff v. Shaughnessy*, *supra*, to reaffirm the broad proposition that "an alien seeking admission to the United States has no constitutional rights regarding an application for admission." In another Eleventh Circuit holding to oppose the rationales of *Smith*, the Court held in [Haitian Refugee Center v. Baker, 949 F.2d 1109, 1110](#) (11th Cir. 1991) that Haitian plaintiffs had no enforceable rights under the UN Protocol because the key provision found in Article 33 was not self-executing. See also [Garcia-Mir v. Smith, 766 F.2d 1478, 1483-84](#) (11th Cir. 1985) (Parole and detention case in which excludable aliens were said to have no constitutional rights in the asylum process based on *Jean v. Nelson*). On the other hand, when a lawfully admitted alien faced deportation based on a felony conviction, the Eleventh Circuit confirmed his constitutionally protected status and overrode the INS's refusal to let him seek waiver of deportation. [Yeung v. INS, 76 F.3d 337](#) (11th Cir. 1995).

[FN101]. [472 U.S. 846 \(1985\)](#).

[FN102]. [Id. at 854](#). In opting for decision on non-constitutional grounds, the Court observed: "This is a 'fundamental rule of judicial restraint.'" *Id.* (citing [Three Affiliated Tribes of Berthold Reservation v. Wold Engineering, 467 U.S. 138 \(1984\)](#)).

[FN103]. [Id. at 856](#).

[FN104]. [Id. at 874](#). Presumably because the core issue was detention rather than seeking asylum, the dissent did not address the Refugee Act of 1980 or the Court's modern series of procedural due process cases.

[FN105]. In [Sale v. Haitian Centers Council, 509 U.S. 155 \(1993\)](#), the court addressed the rights of aliens interdicted on the high seas to seek a withholding of deportation. Because the Court's analysis centered on finding no extra-territorial application of the relevant immigration laws, its holding did not implicate asylum rights for those on U.S. lands. In [Reno v. Flores, 507 U.S. 292 \(1993\)](#), the Supreme Court examined the constitutional adequacy of INS regulations governing the detention of juvenile aliens. Because the Court found that the role of due process in deportation proceedings was well-established, [507 U.S. at 306](#), it neither analyzed more broadly the threshold standards for activating due process nor addressed the rights of excludable aliens. *Id.*

[FN106]. [Amanullah v. Nelson, 811 F.2d 1](#) (1st Cir. 1987). Although not treating the issue of the right to seek and substantiate asylum, the sweeping language of *Amanullah* and its general adherence to *Jean v. Nelson* indicated an alignment with the Eleventh Circuit's positions concerning due process and asylum seekers.

[FN107]. [811 F.2d at 9](#). ("To be sure, outside the context of admission and exclusion procedures, excludable aliens do have due process rights.").

[FN108]. [275 U.S. App. D.C. 109, 865 F.2d 328 \(D.C. Cir. 1989\)](#).

[FN109]. [865 F.2d at 331](#).

[\[FN110\]](#). [Id. at 333.](#)

[\[FN111\]](#). [Id. at 337.](#)

[\[FN112\]](#). [455 U.S. 422, 433 \(1982\).](#)

[\[FN113\]](#). [865 F.2d at 337.](#)

[\[FN114\]](#). [92 F.3d 195 \(3d Cir. 1996\).](#)

[\[FN115\]](#). [Id. at 200.](#)

[\[FN116\]](#). [Id. at 203.](#)

[\[FN117\]](#). [Id. at 203.](#)

[\[FN118\]](#). The Third Circuit did not cite *Jean v. Nelson*. Instead, while rejecting any role for constitutional due process, it cited approvingly the Second Circuit's decision in *Augustin v. Sava*.

[\[FN119\]](#). [Id. at 203 \(citing *Meachum v. Fano*, 427 U.S. 215, 226 \(1976\)\).](#)

[\[FN120\]](#). [Id. at 203 \(citing *Califano v. Yamaski*, 442 U.S. 682, 693 \(1979\)\).](#)

[\[FN121\]](#). [Id. at 203.](#)

[\[FN122\]](#). [Id. at 201.](#)

[\[FN123\]](#). [Id. at 204.](#) Evidently, these applicants had already invoked the asylum process and, thus, any concomitant duties of notification, arguably different circumstances than those of aliens facing removal who had not yet requested asylum, the scenario found in *Jean v. Nelson*.

[\[FN124\]](#). Even though indicating its conformity to the words of *Landon v. Plasencia*, the Third Circuit made approving references to [Augustin v. Sava](#), 735 F.2d 32 (2d Cir. 1984). Moreover, it applied the same methodology utilized by in the Second Circuit in relying upon the 1980 Refugee Act and other sources of federal law to define the source of statutory entitlement that should be safeguarded by due process.

[\[FN125\]](#). [184 F.3d 337 \(4th Cir. 1999\).](#)

[\[FN126\]](#). The only feature of the Illegal Immigration Reform and Immigrant Responsibility Act relevant to *Selgeka* was the jurisdictional provision, [8 U.S.C. §1252\(a\)](#), a provision which did not change the outcome of the case. [Selgeka](#), 184 F.3d at 340-44.

[\[FN127\]](#). [Id. at 341-42.](#)

[\[FN128\]](#). [92 F.3d 195 \(3d Cir. 1996\)](#)

[\[FN129\]](#). [735 F.2d 32 \(2d Cir. 1984\).](#)

[\[FN130\]](#). [Selgeka](#), 184 F.3d at 342 (citing [8 U.S.C. §1158\(a\)](#)).

[FN131]. [Id. at 342.](#)

[FN132]. [Id. at 342-45.](#)

[FN133]. Pub. No. 104-208, 110 Stat. 3009 (1996).

[FN134]. [Selgeka, 184 F.3d at 341.](#)

[FN135]. [Id. at 342](#) ("The linchpin of Selgeka's case is [8 U.S.C. §1158\(a\)](#)..."); see [Augustin v. Sava, 735 F.2d 32, 36 \(2d Cir. 1984\)](#) (noting with reference to the Refugee Act of 1980 that aliens "do have such statutory rights as Congress grants.").

[FN136]. [Chi Thon Ngo v. INS, 192 F.3d 390, 395 n.4 \(3d Cir. 1999\).](#)

[FN137]. [Id.](#)

[FN138]. [8 U.S.C. §1101\(13\)\(A\).](#)

[FN139]. [215 F.3d 1243 \(11th Cir. 2000\).](#)

[FN140]. [727 F.2d 957 \(11th Cir. 1984\)](#) (en banc) approved on non-constitutional grounds, [472 U.S. 846 \(1985\).](#)

[FN141]. [774 F.2d 731 \(7th Cir. 1985\).](#) In Polovchak, the court recognized that at age 12, Walter Polovchak had an independent constitutional right to seek asylum, just as his parents had a constitutional right to intervene in such proceedings to insist that their son be returned to them in the Soviet Union. Since Walter entered the U.S. legally, however, the case is more significant in its inclusion of children as well as parents within the reach of due process and does not address the rights of excludable or illegally entering aliens. The Seventh Circuit continues to confirm a child's right to a hearing. [DeSilva v. DiLeonardi, 125 F.3d 1110, 1115 \(7th Cir. 1997\).](#)

[FN142]. [624 F.2d 522 \(5th Cir. 1980\).](#) In Johns, the court found that the Due Process Clause protected five-year-old Cynthia, a Mexican girl subject to deportation proceedings. Due to the cross-fire between her Mexican natural mother and the U.S. husband and wife who had brought her illegally into this country when Cynthia was an infant, the court ordered the appointment of a guardian ad litem. A "deportable" under existing law, Cynthia would be an unadmitted alien under today's definitions.

[FN143]. Nor did the Eleventh Circuit attempt to distinguish leading Supreme Court decisions that speak to the rights of minors in other contexts. As the Supreme Court observed in its landmark proclamation of children's constitutional rights, "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." [In Re Gault, 387 U.S. 1 \(1967\)](#); see also [Goss v. Lopez, 419 U.S. 565, 574 \(1975\)](#) ("Those young people do not 'shed their constitutional rights' at the schoolhouse door."). In another decision underscoring the separately protected rights of children, this Court said, "A child, merely on account of his minority, is not beyond the protection of the Constitution." [Belloti v. Baird, 443 U.S. 622, 633 \(1979\)](#). Thus, a child's well-being have long embodied societal values that the Constitution does not ignore. [Prince v. Massachusetts, 321 U.S. 158 \(1944\)](#); Jehovah's Witnesses in the [State of Washington v. King's County Hospital, 278 F. Supp. 488 \(W.D. Wash.\), aff'd, 390 U.S. 598 \(1968\)](#); see also [Parham v. J.R., 442 U.S. 584, 607 \(1979\)](#) (children being admitted to mental hospitals by parents have independent constitutional rights). In fact, even more than their parents, illegal alien children deserve enhanced constitutional protection because they are innocents concerning their presence in our country. [Plyler v. Doe, 457 U.S. 202, 210 \(1982\).](#)

[FN144]. [Garcia-Mir v. Smith, 766 F.2d 1478](#) (11th Cir. 1985); *Jean v. Nelson*, supra.

[FN145]. [Augustin v. Sava, 735 F.2d 32](#) (2d Cir. 1984).

[FN146]. [Marincas v. Lewis, 92 F.3d 195](#) (3d Cir. 1996).

[FN147]. [Selgeka v. Carroll, 184 F.3d 337](#) (4th Cir. 1999).

[FN148]. While *Haitian Refugee Center v. Smith* cited a federal regulation that predated [8 U.S.C. §1158\(a\)](#), the subsequent passage of the Refugee Act provided, if anything, an even more compelling basis for the Fifth Circuit's due process analysis.

[FN149]. [Jean v. Nelson, 727 F.2d 957](#) (11th Cir. 1984); [Amanullah v. Nelson, 811 F.2d 1](#) (1st Cir. 1987).

[FN150]. That bifurcation arose from the view that by gaining entry upon U.S. lands, immigrants began to attach to the local community and therefore were gaining the practical as well as legal attributes of other residents. Because no easy standard existed for triggering the legal threshold for the development of such ties, however, aliens were elevated to deportable status simply by reaching land without interception by the authorities.

[FN151]. [Augustin v. Sava, 735 F.2d 32, 36 n.11](#) (2d Cir. 1984).

[FN152]. [Jean, 727 F.2d at 968](#).

[FN153]. Alfred C. Aman, Jr., & William T. Mayton, *Administrative Law*, §7.3 at 157 (1998 ed.).

[FN154]. Williams W. Van Alstyne, The [Demise Of The Right-Privilege Distinction in Constitutional Law](#), 81 HARV. L. REV. 1439, 1459 (1968). As Justice Holmes acknowledged long ago, "One phrase adds no more than the other to what we know about it."

[FN155]. [Id. at 1459](#).

[FN156]. [Elrod v. Burns, 427 U.S. 347, 361](#) (1976) (quoting [Sugarman v. Dougall, 413 U.S. 634, 644](#) (1973)).

[FN157]. [Morrissey v. Brewer, 408 U.S. 471](#) (1972). As this Court noted 28 years ago, "It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable." [Id. at 482](#).

[FN158]. [397 U.S. 254](#) (1970).

[FN159]. [424 U.S. 319](#) (1976).

[FN160]. [Id. at 334-35](#).

[FN161]. [Id. at 334-335](#).

[FN162]. [Morrissey, 408 U.S. at 483](#).

[FN163]. [Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 541](#) (1985).

[FN164]. [Prisoners' Rights--Punishments Imposed By Administrative Proceedings, 109 Harv. L. Rev. 141](#) (1995) (citing

Sandin v. Conner, 555 U.S. 472, 479 n.4 (1995))

[FN165]. Indeed, as decisions like *Augustin v. Sava* and *Selgeka v. Carroll* have observed in sustaining due process based on [8 U.S.C. §1158\(a\)](#), there is no independent or inherent right to seek asylum under the Constitution. Thus, their finding that due process must instead be based on a statutory entitlement is not incompatible with the statements in *Landon*.

[FN166]. In *Selgeka*, the court cited *Landon* for the proposition that there are no independent asylum rights and therefore applied due process upon the theory of a statutory entitlement created by the Refugee Act. [Selgeka, 184 F.3d at 342](#). There was no discussion of whether *Landon's* much quoted constitutional phrases were dictum or whether its rights/privileges dichotomy remained viable. The Fourth Circuit also stopped short of explaining that the 1982 court decision nowhere addressed the Refugee Act.

[FN167]. [467 U.S. 837 \(1984\)](#).

[FN168]. To overcome the heavy hand of *Chevron* deference in immigration cases, [Reno v. Flores, 507 U.S. 292 \(1993\)](#), the Third Circuit relied on [INS v. Cardoza-Fonseca, 480 U.S. 421 \(1987\)](#), cited at [92 F.3d at 200](#) for the proposition that "the judiciary is the final authority on issues of statutory construction" [467 U.S. at 843 n.9](#). Arguably, however, the Third Circuit overextended *Cardoza-Fonseca* because that decision is normally read to confirm the basic rule that clear expression of legislative intent will override contrary agency interpretations and is not applied as a disparagement of *Chevron* deference. [INS v. Aguirre-Aguirre, 526 U.S. 415 \(1999\)](#).

[FN169]. Although the Fifth and D.C. Circuits did not rely on any distinction between "deportables" and "excludables," the facts of those cases appeared to encompass deportation proceedings. As a result, no direct confrontation with the *Landon v. Plasencia* dictum was required. In *Augustin v. Sava*, like *Marincas v. Lewis*, the court sustained the asylum rights of excludable aliens. The Second Circuit, however, did not address *Landon*, while, as discussed, the Third Circuit apparently avoided its constitutional implications through a statutory premise of due process.

[FN170]. More recently, the Third Circuit discussed approvingly the Eleventh Circuit's premise in *Jean* that prolonged detention of excludable aliens did not ordinarily implicate constitutional offenses. [Chi Thon Ngo v. INS, 192 F.3d 390, 393 \(3d Cir. 1999\)](#). The Third Circuit emphasized, though, that even an excludable alien is a person entitled to substantive due process under the Fifth Amendment. [Id. at 396](#) (citing [Wong Wing v. United States, 163 U.S. 228, 238 \(1896\)](#)). As a result, the court held that excludable aliens in detention required an "opportunity for an evaluation of the individual's current threat to the community and his risk of flight." [Id. at 398](#). The court found that interim rules announced by the INS for detainees such as *Chi Thon Ngo*, appeared to satisfy constitutional requisites, if applied meaningfully. On the other hand, "superficial review is not satisfactory and does not offer due process." [192 F.3d at 399](#). Thus, by clearly extending constitutional due process to excludable aliens in detention, the Third Circuit's ruling in *Chi Thon Ngo*, in conjunction with *Marincas*, further confirms that this court is aligned more closely with the holdings of the Second, Fifth and D.C. Circuits than with the Eleventh Circuit position, even if the Third Circuit's analytic framework is not stated in the identical terms.

[FN171]. As a statutory decision based on plain meaning and legislative intent, [INS v. Cardoza-Fonseca, 480 U.S. 421, 447 n. 30](#), represents the foremost Supreme Court impediment to broadening of INS discretion. See also [Rosenberg v. Fleuti, 374 U.S. 449 \(1963\)](#) (overruling INS view that a permanent alien's return to the U.S. after a couple of hours departure does not constitute an "entry"). Even in statutory cases, however, the Court usually defers to the INS. [INS v. Aguirre-Aguirre, 526 U.S. 415 \(1999\)](#); [INS v. Doherty, 502 U.S. 314 \(1992\)](#); [INS v. Rios-Pineda, 471 U.S. 444 \(1985\)](#); [INS v. Bagamasbad, 429 U.S. 24 \(1976\)](#); [INS v. Jong Ha Wang, 450 U.S. 139 \(1981\)](#);

[FN172]. Although not dispositive of the Ninth Circuit's position on asylum issue, in [Wang v. Reno, 81 F.3d 808](#) (9th Cir. 1996), the court held that an excludable Chinese alien, paroled into the U.S. to assist as a government witness, was entitled to due process protection from extraordinary prosecutorial misconduct. That decision did not address asylum rights or the Refugee Act but nonetheless supports the position that even excludable aliens were within the reach of the Due Process Clause. This ruling indicates that the Ninth Circuit may be favorably disposed toward the majority circuit position concerning asylum.

[FN173]. [426 U.S. 67, 77 \(1976\)](#); see also [United States v. Verdugo-Urquidez, 494 U.S. 259, 265 \(1990\)](#) (finding that the Fourth Amendment "by contrast with the Fifth and Sixth Amendment, extends its reach only to 'the people' "). Based on such analysis, this Court in [Plyler v. Doe, 457 U.S. 202 \(1982\)](#), confirmed that this principle applies to aliens, for "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term." [Id. at 210](#); see also [Mathews v. Diaz, 426 U.S. 67, 77 \(1976\)](#). As one court explained, the Constitution necessarily reaches even excludable aliens who are physically within our border, "Surely Congress could not order the killing of Rodriguez-Fernandez and others in his status." [Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387](#) (10th Cir. 1981). As another court explained, because the Due Process Clause of the Fifth Amendment protects each "person," its mantle enveloped even an unadmitted alien who faced serious peril if removed to China. [Wang v. Reno, 81 F.3d 808, 817](#) (9th Cir. 1996) ("However, as the Verdugo-Urquidez Court expressly noted, the Fifth Amendment provides protection to the 'person' rather than 'the people'.") (citing [United States v. Verdugo-Urquidez, 856 F.2d 1214](#) (9th Cir.1988) rev'd [494 U.S. 259 \(1990\)](#)); see also [Lynch v. Cannatella, 810 F.2d 1363](#) (5th Cir. 1987) (illegal, unadmitted alien, a "person" for due process purposes and cannot constitutionally be subjected for physical abuse).

[FN174]. "These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." [Yick Wo v. Hopkins, 118 U.S. 356, 369 \(1886\)](#).

[FN175]. The right of an unadmitted alien to Fifth Amendment due process protections at trial has been acknowledged as early as [Wong Wing v. United States, 163 U.S. 228 \(1896\)](#) and has been validated unfailingly by the lower federal courts. See, e.g., [United States v. Henry, 604 F.2d 908, 912-913](#) (5th Cir. 1979); [United States v. Casimiro-Benitez, 533 F.2d 1121](#) (9th Cir. 1976), cert. denied, [429 U.S. 926 \(1976\)](#).

[FN176]. Even non-resident aliens cannot be subjected to unlawful takings of their property. [United States v. Demanett, 629 F.2d 862, 866 \(3d Cir. 1980\)](#), cert. denied, [450 U.S. 910 \(1981\)](#); [Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387](#) (10th Cir. 1981). Accordingly, in [Russian Volunteer Fleet v. United States, 282 U.S. 481 \(1931\)](#), the Supreme Court stated, "[a]s alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country." [Id. at 491-492](#).

[FN177]. [457 U.S. 202 \(1982\)](#).

[FN178]. [Plyler, 457 U.S. at 210](#); see also [Wang v. Reno, 81 F.2d 808, 816](#) (9th Cir. 1996) (A Chinese alien paroled into this country to assist as government witness, though apparently an excludable alien entitled to due process protection from prosecutorial misconduct).

[FN179]. [Mathews v. Eldridge, 424 U.S. 319, 334-35 \(1976\)](#); [Goldberg v. Kelly, 397 U.S. 254 \(1970\)](#).

Even in the early 1950's, courts appeared to recognize that procedures enacted by Congress implicated due process. "It has been held that 'whatever the procedure authorized by Congress, it is due process as far as an alien denied entry is concerned.'" [Han-Lee Mao v. Brownell, 93 U.S. App. D.C. 102, 107, 207 F. 2d 142, 146 \(D.C. Cir. 1953\)](#) (citing [Knauff v. Shaughnessy, 338 U.S. 537, 544, 70 S. Ct. 309, 313, 94 L.Ed. 317 \(1950\)](#)).

[FN180]. As another court expressed the stark realities that confront an alien facing deportation:

If he loses, he will be removed from this country - a promised land for many. He may face deprivation, torture or even death when he is returned to his homeland. He may also lose contact with his family and friends. [Padilla-Augustin v. INS, 21 F.3d 970, 978](#) (9th Cir. 1994) (later overruled on other grounds); see also [Yepes-Prado v. INS, 10 F.3d 1363, 1369 n. 11](#) (9th Cir. 1993) ("Deportation is a drastic measure and at times the equivalent of banishment or exile.").

[FN181]. [INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 \(1984\)](#) ("various protections that apply in the context of a civil trial do not apply in a deportation hearing"), [Maldonado-Perez v. INS, 275 U.S. App. D.C. 109, 114, 865 F.2d 328, 333 \(D.C. Cir. 1989\)](#).

[FN182]. [Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038](#) (5th Cir. 1982) (citing [Bridges v. Wixon, 326 U.S. 135, 154 \(1945\)](#) (deportation visits a great hardship on the individual and "deprives him of his right to stay and live and work in this land of freedom.")).

[FN183]. [Wong Yang Sung v. McGrath, 339 U.S. 33, 50 \(1950\)](#). As one circuit court expressed this reality, while deportation is not a criminal action, "the consequences may more seriously affect the deportee than a jail sentence." [Johns v. Department of Justice, 624 F.2d 522, 524](#) (5th Cir. 1980) ("liberty of the individual is at stake."). As one court described the equation, "deportation is a drastic measure and at times the equivalent of banishment or exile." [Yepes-Prado v. INS, 10 F.3d 1363, 1369 n.11 \(9th Cir. 1993\)](#).

[FN184]. [Logan v. Zimmerman Brush Co., 455 U.S. 422 \(1982\)](#) (right to use state adjudicatory procedures a property interest for due process purposes).

[FN185]. [Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 \(1950\)](#).

[FN186]. Clearly, this Court has found claims of lesser magnitude than asylum to constitute property interests protected by due process. [Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 483 \(1988\)](#); see also [Mullane, 339 U.S. at 306](#).

[FN187]. [Califano v. Sanders, 430 U.S. 99, 109 \(1977\)](#).

[FN188]. Id.

[FN189]. [Selgeka v. Carroll, 184 F.3d 337 \(4th Cir. 1999\)](#); [Marincas v. Lewis, 92 F.3d 195 \(3d Cir. 1996\)](#).

[FN190]. [Logan v. Zimmerman Brush Co., 455 U.S. 422 \(1982\)](#).

[FN191]. [Armstrong v. Manzo, 380 U.S. 545, 552 \(1965\)](#).

[FN192]. The alien's right to be heard has long been recognized in deportation settings. [Yamataya v. Fisher, 189 U.S. 86, 101 \(1903\)](#) ("[N]o person shall be deprived of his liberty without opportunity ... to be heard").

[FN193]. [Augustin v. Sava, 735 F.2d 32, 37 \(2d Cir. 1984\)](#); [Marincas, 92 F.3d at 203](#).

[FN194]. [Marincas, 92 F.3d at 203](#).

[FN195]. Id.

[FN196]. [Polovchak v. Meese](#), 774 F.2d 731,737 n. 10 (7th Cir. 1985).

[FN197]. [Augustin](#), 735 F.2d at 37; [Marincas](#), F.3d at 203.

[FN198]. [Mathews v. Eldridge](#), 424 U.S. 319, 334-35 (1976).

[FN199]. Compare [Plyler v. Doe](#), 457 U.S. 202 (1982) (illegal alien children are innocent of parental transgressions and deserve constitutional protection), with [Morrissey v. Brewer](#), 408 U.S. 471 (1972) (criminals have constitutional right to a hearing before parole can be revoked).

[FN200]. The INS's vacillating positioning was highlighted by its December 1, 1999 announcement that Elian would remain in the U.S. pending state family proceedings, followed a month later by the decision that state court proceedings were irrelevant and he should be returned to communist Cuba.

[FN201]. Order dated April 19, 2000, ("Injunction Order") [Gonzalez v. Reno, later opinion at 215 F.3d 1243](#) (11th Cir. 2000). Emphasizing the INS's own guidelines, announced on the 50th anniversary of the Declaration of Human Rights on December 14, 1999, the INS criteria made it clear that, "asylum officers should not assume that a child cannot have an asylum claim independent of the parents." Injunction Order at 11 n.12. The court further pointed to circumstances in which the guidelines proposed methodologies for resolving parent and child conflict, "when...it appears that the will of the parents and that of the child are in conflict, the adjudicator 'will have to come to a decision as to the well foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt.'" ' Id. (See Guidelines at 20 (citations omitted). The court even noted that, "the training guidelines provide an example of a statement from a six year old child and provide information which can be used to assess statements by children of that age." Id. Notwithstanding the overwhelming evidence of support in the INS's own guidelines for a child's independent asylum claim, the Eleventh Circuit final opinion discarded those guidelines stating that they did not have the force of law.

[FN202]. [Gonzalez](#), 215 F.3d at 1244-1245. Arguably, the Eleventh Circuit accorded excessive deference to the INS action that constituted a litigation position. [Bowen v. Georgetown University Hospital](#), 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate."); see also [INS v. Cardoza-Fonseca](#), 480 U.S. 421, 447 n. 30 (1987). While the Supreme Court's decision in [Christensen v. Harris Co.](#), 120 S.Ct. 1655 (2000) appeared to cast doubt on according deference to agency views "contained in an opinion letter," [120 S.Ct. at 1662](#), both the en banc court and the Supreme Court declined to disturb the panel ruling. As a result, the measure of agency discretion accorded in [Gonzalez v. Reno](#) may constitute a further enlargement of already accelerating agency power.

[FN203]. Id. at 1245.

[FN204]. [Jean v. Nelson](#), 727 F.2d 956 (11th Cir. 1984), had sustained claims based, in part, upon the INS's obligation to apply its own announced guidelines, id. at 976-978, and found that enforcing "the announced policies" of agencies are among the appropriate judicial functions, id. at 984. In [Gonzalez v. Reno](#) the court summarily disposed of the issue by saying that such criteria have no force of law.

[FN205]. Another source, the Federation for American Immigration Reform contends that, even after allowing for immigrants' contributions in taxes, the net cost of legal and illegal immigrants arriving during the last three decades is the annual expense of \$65 billion (\$40.5 billion from legal and \$24.5 billion from illegal aliens). This yearly cost is assertedly going to rise to \$108 billion by 2006. That same organization has also issued reports contending that immigrants are displacing native-born workers attributing a fifty percent of the wage-loss among low-skilled Americans to low-skilled

immigrant workers. "Immigration Lower Wages for American Workers," Issue Brief, The Federation For American Immigration Reform, (<http://www.fairus.org/html/04148711.htm>).

In another analysis, the author concluded that the increased number of workers resulting from immigration costs native workers roughly \$135 billion annually (1.9 percent of a \$7 trillion economy) but creates a net gain due to the benefits accruing to employers. Those savings range from large agricultural enterprises to households who might otherwise be unable to afford domestic help. "The New Economics of Immigration," *The Atlantic Monthly* (Nov. 1996). (<http://www.theatlantic.com/issues/96nov/immigrat/borjas/htm>). The author's conclusion is that the more affluent gain from the influx of alien workers while lower income Americans are correspondingly penalized.

[FN206]. As recognized by one author, "Now that the arguments against immigration are rising again, it is well remembered that every single one of them has been heard before." Weisberger *supra* note 1, at 75.

[FN207]. [Northern Pipeline Construction Co. v. Marathon Pipeline Construction Co.](#), 458 U.S. 50, 60 (1982).

[FN208]. [Thomas v. Union Carbide Agricultural Products Co.](#), 473 U.S. 568, 594 (1985). Indeed as has been recognized, further augmentation of agency power comes at the expense of access to the judicial forum. [Crowell v. Benson](#), 285 U.S. 22, 46-47 (1932).

[FN209]. [Califano v. Sanders](#), 430 U.S. 99, 109 (1977). Such acknowledgment is also critical in assuring that deprivation of individual rights can be judicially reviewed. [McNary v. Haitian Refugee Center, Inc.](#), 498 U.S. 479 (1991).

[FN210]. [Johns v. Department of Justice](#), 624 F.2d 522, 524 (5th Cir. 1980). As the Supreme Court itself has stated in examining the impact of expulsion from this country, it visits "a great hardship on the individual and deprives him of his right to stay and live and work in this land of freedom." [Bridges v. Wixon](#), 326 U.S. 135, 154 (1945).

[FN211]. [480 U.S. 421, 449](#) (1987).

[FN212]. *Id.*

[FN213]. It is beyond the scope of this article to assess whether due process rights concerning a statutory mandate for asylum would implicate constitutional protection in the parole and detention scenarios. Compare [Garcia-Mir v. Smith](#), 766 F.2d 1478, 1483-84 (11th Cir. 1985), with [Rodriguez-Fernandes v. Wilkinson](#), 654 F.2d 1382 (10th Cir. 1981) (applying due process to assess the permissible limits of indefinite detention). Undoubtedly, though, the recognition that "unadmitted" aliens have due process rights concerning asylum could affect other immigration issues. Among the INS's procedures that constitutional due process could confront the expedited removal procedures enacted in 1996 as part of IIRIRA. Such procedures have been criticized by the Human Rights Watch:

Implementation of the 1996 Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) Reform and Immigration Responsibility Act (IIRIRA) continued to violate international human rights standards that apply specifically to asylum seekers, as well as the human rights of other immigrants, through detention in often inhumane conditions. The IIRIRA's expedited removal proceedings, intended to process and deport individuals who enter the United States without valid documents as quickly as possible, imperiled bona fide refugees and resulted in immigrants being detained in increasing numbers.

Human Rights Report, at 7-8.

[FN214]. [Sale v. Haitian Centers Council, Inc.](#), 509 U.S. 155 (1993); [Cuban American Bar Association, Inc. v. Christopher](#), 43 F.3d 1412, 1424 (11th Cir. 1995).

[FN215]. [Mathews v. Diaz, 426 U.S. 67, 77 \(1976\)](#).

[FN216]. [Mathews v. Eldridge, 424 U.S. 319, 334-35 \(1976\)](#). The Court has not found constitutional due process to be unduly burdensome or complicated entitlement in other alienage cases. In [Kwong Hai Chew v. Colding, 344 U.S. 590, 602-03 \(1953\)](#), the Court deemed it sufficient, for purposes of deportation confronting a lawful permanent resident, to direct that the subject be given "reasonable notice of the charges against him" and a "hearing sufficient to meet the requirements of procedural due process." In [Wong Yong Sung v. McGrath, 339 U.S. 33, 50, \(1950\)](#). In its general formulation, the Court has observed, "We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.'" [Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 \(1985\)](#) (quoting [Boddie v. Connecticut, 401 U.S. 371, 379 \(1971\)](#)).

[FN217]. [Yick Wo v. Hopkins, 118 U.S. 356, 369 \(1886\)](#) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality").

END OF DOCUMENT

Westlaw Attached Printing Summary Report for COFFEY, KENDALL 240230

Date/Time of Request:	Friday, February 17, 2006 15:48:00 Eastern
Client Identifier:	KENDALLCOFFEY.COM
Database:	KEYCITE-REFS
Citation Text:	19 Yale L. & Pol'y Rev. 303
Service:	KeyCite
Lines:	26
Documents:	1
Images:	0

The material accompanying this summary is subject to copyright. Usage is governed by contract with Thomson, West and their affiliates.

KEYCITE

C THE DUE PROCESS RIGHT TO SEEK ASYLUM IN THE UNITED STATES: THE IMMIGRATION DILEMMA AND CONSTITUTIONAL CONTROVERSY, 19 Yale L. & Pol'y Rev. 303 (2001)

Citing References

Secondary Sources (U.S.A.)

- 1 13 Am. Jur. Proof of Facts 3d 665, Political Asylum--Well-Founded Fear of Persecution (2005)
- C** 2 ACCESS DENIED: BARRIERS TO REMEDIES UNDER THE VIOLENCE AGAINST WOMEN ACT FOR LIMITED ENGLISH PROFICIENT BATTERED IMMIGRANT WOMEN, 54 Am. U. L. Rev. 485, 539 (2004)
- C** 3 THE MURKY DEPTHS OF THE ENTRY FICTION DOCTRINE: THE PLIGHT OF INADMISSIBLE ALIENS POST-ZADVYDAS, 25 Cardozo L. Rev. 2029, 2077 (2004)
- C** 4 LEADING CASES, 115 Harv. L. Rev. 366, 376 (2001)
- C** 5 THE FUTURE OF ALIENS ORDERED REMOVED FROM THE UNITED STATES IN THE WAKE OF ZADVYDAS V. DAVIS, 25 Hous. J. Int'l L. 195, 228 (2002)
- 6 STEP AWAY FROM THE ALTAR, JOAB: THE FAILURE OF RELIGIOUS ASYLUM CLAIMS IN THE UNITED STATES IN LIGHT OF THE PRIMACY OF ASYLUM WITHIN HUMAN RIGHTS, 12 Transnat'l L. & Contemp. Probs. 453, 486 (2002)
- C** 7 FAILURE TO ADVISE NON-CITIZENS OF IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: SHOULD THIS BE GROUNDS TO WITHDRAW A GUILTY PLEA?, 36 U. Mich. J.L. Reform 691, 735 (2003)