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Jean v. Nelson, 105 S. Ct. 2992 (1985)

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Immigration Law—Race and National Origin Discrimination and the Haitian Detainees—*Jean v. Nelson*, 105 S. Ct. 2992 (1985)

I. Introduction

Since *Yick Wo v. Hopkins*[1] in 1886, the United States Supreme Court has considered numerous cases involving the immigration status of foreign-born individuals who questioned whether they were protected by the Constitution when they sought entry into the United States.[2] The latest major immigration case to reach the Court was brought by a group of Haitian refugees seeking asylum[3] in this country. *Jean v. Nelson*[4] (*Jean III*) was a class action on behalf of Haitian refugees who were detained[5] by the Immigration and Naturalization Service (INS) upon their arrival in South Florida in 1981. In a series of cases[6] that began in the United States

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1. 118 U.S. 356 (1886) (fourteenth amendment guarantees equal protection to all persons within territorial jurisdiction of the United States).

2. *See generally* Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1 (1984); Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 Colum. L. Rev. 957 (1982).

3. Under the Refugee Act of 1980, Pub. L. No. 96-212, § 207(c)(1), 94 Stat. 102, 103 (codified at 8 U.S.C. § 1101(a)(42) (1982)), the attorney general has the discretion to admit into this country any person who is unable or unwilling to return to his or her country of nationality "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."

4. 105 S. Ct. 2992 (1985) [hereinafter cited as *Jean III*]. The class was originally certified to include:

> [A]ll Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the U.S. and who are presently held in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion has not been entered and who are unrepresented by counsel.

Louis v. Meissner, 530 F. Supp. 924, 930 (S.D. Fla. 1981) [hereinafter cited as *Louis I*].

The class definition was subsequently expanded to include those Haitian detainees "represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association." Louis v. Meissner, 532 F. Supp. 881, 884 (S.D. Fla. 1982) [hereinafter cited as *Louis II*].

5. Detention is authorized under 8 U.S.C. § 1225(b) (1982). "Every alien . . . who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry." *Id.*

6. This series of seven cases is briefly and chronologically described as follows:

Louis I (Louis v. Meissner, 530 F. Supp. 924 (S.D. Fla. 1981)) was an action seeking a preliminary injunction to prevent INS from deporting Haitian refugees.

Louis II (Louis v. Meissner, 532 F. Supp. 881 (S.D. Fla 1982)) was a petition for writ of habeas corpus and request for declaratory and injunctive relief based on seven different issues regarding the exclusion proceedings. Because the Haitians had not exhausted their administrative remedies, and because the INS assured that individual exclusion hearings would be held, the court dismissed several claims and directed the INS to submit a plan detailing the manner in which the exclusion hearings would be conducted.

District Court for the Southern District of Florida, the issues were narrowed until ultimately the Supreme Court was asked to decide whether the authority of the attorney general to parole[7] aliens pending a determination on exclusion[8] is limited by the fifth amendment. In a six-to-two decision, the Court evaded the constitutional issue by concluding that INS regulations resolved the issue.[9]

Jean III presented the Court with an opportunity to clarify a critical issue which is repeatedly raised in immigration law. Instead, the Court evaded the matter: while appearing to follow the settled principle of refraining to address a constitutional question

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Doris Meissner, Acting Commissioner of the INS when the Haitians' suit was filed, was succeeded by Alan C. Nelson.

Louis III (Louis v. Nelson, 544 F. Supp. 973 (S.D. Fla. 1982)) was the trial of the case in which the Haitian refugees challenged the parole and detention policies of the INS. The court held there had been no race or national origin discrimination against the Haitians, but that the INS had adopted a new parole policy in violation of the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982).

Louis IV (Louis v. Nelson, 544 F. Supp. 1004 (S.D. Fla. 1982)) comprised the district court's determination of how to implement its ruling in *Louis III*. The court ordered release of 2,000 Haitians in detention and dissolved the injunction issued in *Louis I*, directing the INS to conduct individual exclusion hearings for all Haitian refugees.

Jean I (Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983)) was an appeal by the government to the United States Court of Appeals for the Eleventh Circuit, challenging the release order of *Louis IV*. The Haitians cross-appealed the district court's rulings adverse to the class. A three-judge panel affirmed the release based on the APA violation and reversed the lower court on the discrimination issue, holding that INS had impermissibly discriminated against the Haitians in making parole determinations.

Jean II (Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984)) was a rehearing by the court en banc. The court held that excludable aliens have no constitutional rights, therefore, the panel had improperly made a finding of discrimination. However, the court remanded the case to determine whether lower-level INS officials had properly adhered to immigration policy as formulated by the executive and congressional branches.

Jean III (Jean v. Nelson, 105 S. Ct. 2992 (1985)) was the final appeal of the constitutional issue to the Supreme Court, which held that it need not reach the question of whether excludable aliens are protected by the Constitution because the statutes and INS regulations prohibit race and national origin discrimination. The Court affirmed the Eleventh Circuit's remand to the court below for a determination of whether INS officials had adhered to the laws and regulations in making exclusion determinations.

7. The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (codified at 8 U.S.C § 1182(d)(5)(A) (1982)), gives the attorney general discretion to release temporarily, or "parole," an alien into the community during the asylum application and appeal process, which may last years.

8. In the parlance of immigration law, "exclusion" refers to initial nonadmission of an alien seeking entry into the country; "deportation" refers to removal of an alien from within the jurisdiction of the United States. "Deportation" also refers to the act of expelling an alien once a final order of deportation or exclusion have been issued.

9. *Jean III*, 105 S. Ct. at 2999.

when lesser grounds for decision are present,[10] the Court construed "other grounds" where none existed. Fortunately, the Haitian detainees achieved their desired end: the Court held that considerations of race and national origin may not bear upon parole decisions.[11] Nevertheless, judicial decision-making is vulnerable to criticism when the rationale employed to hurdle a constitutional issue evades comprehension. This outcome perpetuates the unsavory means by which aliens are denied certain constitutional safeguards—the use of a legal fiction, one particularly insidious in that the fates of thousands of human beings are implicated by its use. The practice in immigration law of refusing to regard certain persons as "persons" protected by the Bill of Rights, a practice reminiscent of the *Dred Scott Decision*,[12] remains intact, undisturbed by the nation's highest court.[13]

The purpose of this Note is to review the movement of the Haitian class action through the federal courts and to discuss the implications of the Supreme Court's decision concerning parole policy in *Jean III*. In order to discuss these cases thoroughly, explanations of the "excludable" status, its concomitant legal fiction, and a brief history of the parole policy in immigration law are necessary.

A. Entry Doctrine

Historically, the judiciary has deferred questions of immigration law to the executive and legislative branches.[14] In the *Chinese Ex-*

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10. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

11. *Jean III*, 105 S. Ct. at 2998-99.

12. Scott v. Sandford, 60 U.S. (19 How.) 393, 404-11 (1856) (the words "people of the United States" in the Constitution do not encompass freed slaves).

13. The word "citizens," indicating a specific class deserving rights not granted "persons" in general, appears in but two contexts: the privileges and immunities clause, U.S. CONST. amend. XIV, § 1, and the voting amendments, U.S. CONST. amends. XV, XIX, XXIV, XXVI.

14. Opinions in immigration law cases often begin with a statement similar to that made in Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)): " '[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.' "

While properly the subject of a separate article, this inordinately deferential stance is grossly inappropriate when it permits the government to discriminate invidiously against non-Americans. For a stimulating discussion of how immigration law differs from other areas of law in terms of this "judicial passivity," and of the likelihood of change, see Schuck, *supra* note 2. For an eloquent challenge to the injustice of "judicial abdication," see Hull,

clusion Case[15] of 1889, the Court first articulated the principle that the power to determine who shall be admitted into the country is a fundamental prerogative of government, "an incident of sovereignty."[16] While the Supreme Court stated that sovereign powers are "restricted in their exercise only by the Constitution itself,"[17] it made quite a different statement three years later.[18] Reviewing a decision by the California commissioner of immigration refusing entry to a Japanese woman, the Court stated, "As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, *are* due process of law."[19] These decisions illustrate the tension that characterize exclusion decisions and immigration law in general: the power exercised with regard to excludable aliens is either beyond constitutional protections, or, like other inherent federal powers, it is bound by the strictures of the Bill of Rights.[20]

While the problem may be framed as whether or not the government is constrained by the Constitution in deciding to exclude an alien, the issue in exclusion cases is more often viewed as whether a particular alien is protected by the Constitution. The question is not so much whether the fifth amendment prohibits the government from depriving an individual of life, liberty, or property without due process of law, but whether the alien in question is a "person" under the Constitution. Courts often consider excludable aliens as "stopped at the border."[21] Whether confined on Ellis Island in the 1940's or within the Krome North detention camp in South Florida in the 1980's, the "entry doctrine" fiction[22] allows the INS to characterize excludables as legally "outside" the country[23] and thus beyond the reach of the Bill of Rights.

The Rights of Aliens: National and International Issues, in THE UNAVOIDABLE ISSUE 251 (D. Papademetriou & M. Miller eds. 1983).

15. Chae Chan Ping v. United States, 130 U.S. 581 (1889).

16. *Id.* at 609.

17. *Id.* at 604. Additional constraints upon the government include "considerations of public policy and justice which control, more or less, the conduct of all civilized nations." *Id.*

18. Nishimura Ekiu v. United States, 142 U.S. 651 (1892).

19. *Id.* at 660 (emphasis added) (citations omitted).

20. *See generally* Note, *supra* note 2, at 966-74.

21. *E.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953).

22. Jean v. Nelson, 727 F.2d 957, 969 (11th Cir. 1984), *aff'd*, 105 S. Ct. 2992 (1985) [hereinafter cited as *Jean II*].

23. For example, in *Mezei*, the Court considered the status of aliens awaiting administrative proceedings and said, "[H]arborage at Ellis Island is not an entry into the United States." *Mezei*, 345 U.S. at 213 (citations omitted). The Court rationalized:

> Aliens seeking entry from contiguous lands obviously can be turned back at the border without more. While the Government might keep entrants by sea aboard

The entry doctrine can be traced to *Nishimura Ekiu v. United States*,[24] in which a Japanese immigrant was permitted to stay in a local mission pending a decision on her admissibility into the country. There, the Court said:

> Putting her in the mission house, as a more suitable place than the steamship, pending the decision of the question of her right to land . . . left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship.[25]

This statement merely indicates that an alien allowed into the country by the government has no "right" to stay.[26] Thirteen years after *Nishimura Ekiu*, the concept of limited rights was described more precisely by Justice Holmes in *United States v. Ju Toy*:[27] "The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate."[28] Justice Holmes' statement has been used to justify the entry doctrine fiction—that the alien is not yet within the United States—which is then employed to justify the denial of constitutional rights.[29] Having been permitted to enter the country, an excludable alien may not take advantage of being on United States soil to shift his immigration status. This is sound policy designed to prevent manipulation of an admissibility appraisal, and it should describe the limits of the entry doctrine. However, it has been extended: because the alien technically has not entered the

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> the vessel pending determination of their admissibility, resulting hardships to the alien and inconvenience to the carrier persuaded Congress to adopt a more generous course. By statute it authorized, in cases such as this, aliens' temporary removal from ship to shore. But such temporary harborage, an act of legislative grace, bestows no additional rights. Congress meticulously specified that such shelter ashore "shall not be considered a landing." . . . [The alien] is treated as if stopped at the border.

Id. at 215 (citations omitted).

24. 142 U.S. 651 (1892).

25. *Id.* at 661.

26. That policy was not questioned in *Jean III*, nor is it at issue in this Note. The excludable alien is in a different position from the alien who has succeeded in illegally entering the country. Because the deportable alien has begun establishing ties in America, he or she is conceded a fifth amendment due process right to a deportation hearing. The Japanese Immigrant Case, 189 U.S. 86, 99-101 (1903). The petitioners in *Jean III* did not argue that detention of excludables should automatically shift their status to that of deportable aliens.

27. 198 U.S. 253 (1905).

28. *Id.* at 263.

29. *See Mezei*, 345 U.S. at 212; *Jean II*, 727 F.2d at 970.

country for purposes of determining admissibility, he or she is also held not to have physically entered. Hence, the excludable alien is outside United States jurisdiction and unprotected from governmental abuse by the Constitution—or so the argument goes. But as one court has noted, "The legal fiction that an excludable alien is 'waiting at the border' wears quite thin after a year at the Atlanta Federal Penitentiary."[30]

In contrast, resident aliens are protected by some provisions of the Constitution. In *Mathews v. Diaz*,[31] Justice Stevens emphasized that the fifth and fourteenth amendments guarantee that no resident alien may be deprived of life, liberty, or property without due process of law,[32] although such aliens are still denied enjoyment of other constitutional rights granted to citizens.[33]

B. *Parole Policy*

Between 1892 and 1954, Ellis Island was the nation's chief immigration station, serving as a detention and screening site for prospective immigrants. The facility was closed after the INS Commissioner declared that "mass detention was inhumane and unnecessary."[34] In 1954, the Attorney General announced that the INS would detain only those excludables "likely to abscond or . . . whose freedom of movement could be adverse to the national security or the public safety."[35] Soon after the closing of Ellis Island

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30. Soroa-Gonzalez v. Civiletti, 515 F. Supp. 1049, 1056 n.3 (N.D. Ga. 1981). The Krome Avenue North Center (Krome North) in Dade County, Fla., was a military facility converted into a detention camp for Mariel Cubans and Haitian refugees. Severe overcrowding, separation of families, and stultifying boredom were some of the conditions most frequently protested. J.C. MILLER, THE PLIGHT OF HAITIAN REFUGEES 127-28 (1984). Psychological and physical problems developed among the incarcerated. *Id.* at 127-30; *Suicide Attempts Reported Rising Among Haitians in U.S. Detention*, N.Y. Times, June 22, 1982, at A15, col. 3; *The Shame of Krome*, Miami Herald, Jan. 9, 1982, at 18A, col. 1; *see* Schuck, *supra* note 2, at 28 n.149 ("[T]he length of many detentions and the conditions of confinement suggest that the term 'imprisonment' more accurately depicts reality.").

31. 426 U.S. 67 (1976).

32. *Id.* at 77. "Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to [due process] protection." *Id.* See *supra* note 13 for a listing of the few amendments enacted for citizens only. In addition, the privileges and immunities clause of U.S. CONST. art. IV, § 2, applies only to citizens, as do *id.* art. I, § 2, cl. 2, *id.* art. I, § 3, cl. 3, and *id.* art. II, § 1, cl. 5, which indicate citizenship requirements for United States representatives, senators, and the President, respectively.

33. *Diaz*, 426 U.S. at 78.

34. Jean v. Nelson, 711 F.2d 1455, 1469 (11th Cir. 1983), *reh'g en banc granted*, 714 F.2d 96 (11th Cir. 1983), *dismissed in part, rev'd in part, remanded with instructions*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 105 S. Ct. 2992 (1985) [hereinafter cited as *Jean I*].

35. Address of the Attorney General, Nov. 11, 1954, 32 INT. REL. No. 12, *quoted in Jean I*, 711 F.2d at 1469.

in 1954, the Supreme Court decided a case involving a woman who alleged that her release on parole made her eligible for a deportation hearing. After reiterating that parole has no bearing on the admissibility status of an alien, the Court commented, "Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond. Certainly this policy reflects the humane qualities of an enlightened civilization."[36]

In the late 1970's, however, the INS and Justice Department implemented a "Haitian Program" to process and expel Haitian asylum applicants at an unprecedented rate. A key element of the program was a denial of parole to Haitians awaiting exclusion hearings. Then, in 1981, detention became the rule when the Reagan administration initiated a restrictive parole policy in response to the Mariel boatlift of April 1980, and the increasing number of Haitian refugees.[37] These developments, aimed primarily at Haitians, sparked a massive pro bono effort to protect the minimal legal rights of these excludables. From this controversy emerged *Louis v. Meissner*,[38] which culminated in the Supreme Court decision in *Jean v. Nelson*.

II. HAITIAN MIGRATION AND LITIGATION

Haitians had been braving the 800-mile ocean journey from Haiti to South Florida since 1972, when sixty-five Haitians in a leaky

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The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (codified at 8 U.S.C. § 1182 (d)(5)(A) 1982)), codified the practice of paroling excludable aliens "temporarily under such conditions as [the attorney general] may prescribe for emergent reasons or for reasons deemed strictly in the public interest." The statute continues:

> [B]ut such parole of [an] alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Id.

36. Leng May Ma v. Barber, 357 U.S. 185, 190 (1958) (citation omitted).

37. Approximately 125,000 Cubans were brought into the United States by the "Freedom Flotilla." By the beginning of 1981, an estimated 35,000 undocumented Haitians had arrived in South Florida. Louis v. Nelson, 544 F. Supp. 973, 978 (S.D. Fla. 1982), *enforced*, 544 F. Supp. 1004 (S.D. Fla. 1982), *aff'd in part, rev'd in part sub nom.* Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), *reh'd en banc granted*, 714 F.2d 96 (11th Cir. 1983), *dismissed in part, rev'd in part, remanded with instructions*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 105 S. Ct. 2992 (1985) [hereinafter cited as *Louis III*].

38. 530 F. Supp. 924 (S.D. Fla. 1981); *see supra* note 6.

sloop arrived in Pompano Beach.[39] Most who fled Haiti's political repression and poverty chose the Bahamas as the most suitable country for a new life.[40] But in 1978 the Bahamian government stepped up its expulsion policy to improve employment prospects for its own citizens.[41] Haitian "boat people" sought refuge in the United States in greater numbers, and by 1980, Haitian exclusion cases had multiplied tenfold.[42]

A. The Haitian Influx into the United State

When Haitians applied for political asylum in the United States, they were usually rejected because they were thought to be fleeing economic hardship rather than political persecution.[43] Haitians and those who supported their status as bona fide refugees disputed the rationality of drawing a line between economic and political exigencies in Haiti's repressive dictatorship.[44] Critics of current refugee policy also charged that despite the Refugee Act of

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39. J.C. MILLER, *supra* note 30, at 62; Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy*, in U.S. IMMIGRATION POLICY 163 (R. Hofstetter ed. 1984).

40. Historic hostility between the Dominican Republic and Haiti militated against extensive movement across that border. The need for laborers in the sugar fields of Cuba at one time attracted large numbers of Haitians, but this ceased when Fidel Castro came to power. The limited employment opportunity in Jamaica discouraged migration to that country. And immigration to France and French Canada was limited to those who could gather the necessary resources. J.C. MILLER, *supra* note 30, at 37-58.

41. J. CREWDSON, THE TARNISHED DOOR 72 (1983).

42. J.C. MILLER, *supra* note 30, at xii. The following table shows the annual number of Haitian arrivals to the United States subject to exclusion and deportation proceedings:

Prior to 1978	1,926
1978	1,905
1979	3,859
1980	22,499
1981	9,505

In comparison, the Mariel boatlift brought 124,789 Cubans in 1980. Between 1975 and 1981, 600,424 Southeast Asians immigrated to the United States. *Id.* at xii-xiii.

43. *See supra* note 3.

44. A review of Haitian history points out the difficulty of separating economic from political factors. During almost two centuries of political instability, the military and economic elite have consistently dominated the rural 80% of the nation's people. B. WEINSTEIN & A. SEGAL, HAITI; POLITICAL FAILURES, CULTURAL SUCCESSES 5 (1984). Upset by Haitian hostility toward the United States on the eve of World War I, the United States occupied the island in 1915 and remained for 20 years. Post-occupation dictators have received intermittent military and economic aid from the United States.

Francoise "Papa Doc" Duvalier was elected President in 1957 and used his paramilitary forces, the *tontons macoute*, to crush his opposition. His son and successor, Jean-Claude "Baby Doc" Duvalier, used the same coercive tactics and neglected the rural populace. *Id.* at 1-130. *See generally* C.R. FOSTER & A. VALDMAN, HAITI—TODAY AND TOMORROW, AN INTERDISCIPLINARY STUDY (1984).

1980,[45] which was designed to eliminate the Communist/non-Communist approach to grants of asylum, the United States still grants "a blanket presumption of persecution to those fleeing Communist states, while maintaining a far stricter standard for those fleeing rightist authoritarian regimes."[46]

In the early years of Haitian migration, the INS typically paroled applicants for asylum into the community.[47] But, even before the Mariel exodus from Cuba and the arrival of more than 22,000 Haitians in 1981, INS policy concerning Haitians had significantly changed. In mid-1978, there was a staggering deportation caseload resulting not from a sudden wave of immigration but from the "slow trickle" of Haitians who had arrived during the past decade.[48] To deal with the massive overload, the INS initiated an "accelerated processing of Haitian cases,"[49] a project dubbed the Haitian Program.[50] Pursuant to written instructions[51] and personal

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In recent years almost 50% of government income fell into private pockets, and while 80% to 90% of the people were farmers, only 7% to 10% of the national budget was earmarked for agriculture. "It must be recognized that for Haiti—perhaps more than for any other country in the nonsocialist world—the term 'political economy' is most appropriate." Stepick, *supra* note 39, at 175-76.

After Baby Doc and his family fled Haiti on Feb. 7, 1986, Haitians began returning from exile in the United States and other countries. *Haiti's Exiles, Returning Steadily, Carry Home Formulas for Change*, N.Y. Times, Mar. 25, 1986, at 1, col. 3. This development may mark the end of illegal Haitian immigration to the United States, but given Haiti's long, tortured history, a recurrence is not impossible.

45. *See supra* note 3.

46. Stepick, *supra* note 39, at 168. For example, of more than 5,000 Haitian applications for asylum in 1982, only seven were granted. E. HULL, WITHOUT JUSTICE FOR ALL 139 (1985). In comparison, in 1984, 51% of Russian, 39% of Rumanian, 43% of Afghan, and 33% of Polish applications were granted. Complaint for Declaratory and Injunctive Relief at 37-38, American Baptist Churches v. Meese, No. C85-3255 RFP (N.D. Cal. filed May 7, 1985). Between 1980 and 1982, 463,665 refugees were admitted; of these, only 393 came from non-Communist nations. Anker, *The Development of U.S. Refugee Legislation*, in IN DEFENSE OF THE ALIEN 162 (L. Tomasi ed. 1984). Its Cold War orientation makes suspect the integrity of the United States' asylum policy, suggesting that the policy is merely a tool of American foreign policy. "It is not altogether clear that family reunion or economic motives are less important in these movements from Communist countries." Keely, *Current Status of U.S. Immigration and Refugee Policy*, in U.S. IMMIGRATION AND REFUGEE POLICY 349 (M. Kritz ed. 1983).

47. *Louis III*, 544 F. Supp. at 978.

48. Haitian Refugee Center v. Smith, 676 F.2d 1023, 1029 (5th Cir. 1982). Between six and seven thousand deportation cases had accumulated in the Miami INS office. *Id.*

49. *Id.* at 1030.

50. *Id.* at 1029-30.

51. One such letter asserted that Haitians were economic rather than political refugees, and that "favorable treatment of these Haitians would encourage further immigration." *Id.*

visits[52] by immigration officials, deportation hearings jumped from an average of five per day to between fifty-five and eighty. Average asylum interviews were reduced from ninety to thirty minutes, with language translation limiting actual dialogue to fifteen minutes. Hearings on deportation, withholding deportation, and asylum were simultaneously scheduled at various locations, forcing the twelve attorneys who were representing thousands of Haitians to miss some clients' proceedings.[53] Several of lawsuits were filed to challenge these procedures, and, in 1979, an injunction prohibiting INS from ordering further deportations ended the eight-month Haitian Program.[54]

This harsh treatment of Haitians, however, did not end; it intensified following the Mariel boatlift. In 1980, President Carter designated the Marielitos and Haitians as "entrants," entitling them to resettle in the United States with the aid of local organizations.[55] Shortly after taking office in 1981, President Reagan appointed a task force to examine the nation's immigration policy and practices. One of the group's recommendations, approved by the President and implemented by the INS, was to replace the liberal parole policy with one of detention,[56] reviving the practice that had virtually ceased with the closing of Ellis Island almost thirty years earlier.

Krome North, a former missile base[57] on the outskirts of Miami, was used to process the Haitian and Cuban entrants. Sheer num-

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at 1030. This was damning in that each person applying for asylum in the United States is implicitly entitled to an individual determination of whether there is good cause for a "well-founded fear of persecution." 8 U.S.C. § 1101(a)(42)(A) (1982); 8 C.F.R. § 208 (1986).

52. The INS Deputy Commissioner encouraged INS trial attorneys to recognize " 'THE DIMENSIONS OF THE HAITIAN THREAT' and the fact that 'these are unusual cases dealing with individuals that are threatening the community's well-being—socially & economically.' " *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1030 (5th Cir. 1982).

53. *Id.* at 1031-32. "None of the over 4,000 Haitians processed during this program were granted asylum." In fact, the forms on which daily totals from the proceedings were recorded had no space provided for registering grants of asylum—only denials. The United Nations High Commission on Refugees charged that less than half of asylum applicants were even granted interviews. Stepick, *supra* note 39, at 183.

54. Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), *modified sub nom.* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

55. *Louis III*, 544 F. Supp. at 979.

56. *Id.* at 979-80. Detention was officially initiated between May 20 and July 31, 1981. *Id.* at 981. President Reagan also approved an interdiction program authorizing the Coast Guard to patrol the seas beyond United States territory and return all vessels apprehended that carried undocumented aliens. Exec. Order No. 12,324, 17 WEEKLY COMP. PRES. DOC. 1057 (Sept. 29, 1981).

57. Helton, *Political Asylum Under the 1980 Refugee Act*, in IN DEFENSE OF THE ALIEN 204 (L. Tomasi ed. 1984).

bers continued to overwhelm the INS, illustrated by the more than 11,000 Haitian asylum claims pending in February 1981.[58] INS officials began holding mass exclusion hearings in early June to combat the backlog. These hearings were frequently conducted in locked courtrooms where access was denied even to the Haitians' counsel. Translation from Creole was so inaccurate that the Haitians were, for the most part, unable to understand either their rights or courtroom dialogue.[59] These grossly inadequate proceedings resulted in deportation orders for ninety Haitians,[60] eleven of whom were sent back to Haiti before a court order halted the practice.[61]

B. Litigation in United States District Courts

In response to the mass hearings, the National Emergency Civil Liberties Committee (NECLC) won a temporary restraining order preventing further action on the deportation orders until INS conducted new hearings.[62] While the rehearings were pending, INS began transferring Haitians from the overcrowded Krome North detention center to facilities outside Florida, including Fort Drum, New York; the federal penitentiary in Lexington, Kentucky; and Fort Allen, Puerto Rico.[63] Because the pro bono team organizing litigation strategy for the Haitians was centered in Miami, as were the Creole translators, the move effectively deprived the Haitians of legal representation.[64] The NECLC filed a successful class action on the Haitians' behalf requesting an injunction against further ex-

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58. Stepick, *supra* note 39, at 189.

59. *Jean I*, 711 F.2d at 1462-63.

60. Kurzban, *The Haitian Saga*, 11 IMMIGRATION NEWSLETTER 1 (Nov.-Dec. 1982).

61. *Jean I*, 711 F.2d at 1463 n.1.

62. Kurzban, *Eleventh Circuit Vindicates Haitians' Claim of Discrimination*, 12 IMMIGRATION NEWSLETTER 3 (May-June 1983).

63. J. CREWDSON, *supra* note 41, at 87. The INS asserted the moves were necessary in order to comply with the representation it had made to the state of Florida in Graham v. Smith, No. 81-1497-CIV-JE (S.D. Fla. 1981), a suit brought by Florida against the United States to alleviate overcrowding at Krome North. *See Louis III*, 544 F. Supp. at 983 n.27.

64. *Louis I*, 530 F. Supp. at 926. Judge Hastings said:

> Indeed, even though INS officials have been rudderless in the enunciation and application of an immigration policy, when they decided to move the Haitians to these remote areas, they acted with laser-like precision. . . . INS has distributed them to remote areas lacking attorneys with experience in immigration law, or for that matter, any attorneys at all willing to represent them.

Id.

Excludable aliens have a statutory right to private counsel in connection with exclusion proceedings. 8 U.S.C. § 1362 (1982); 8 C.F.R. § 236.2(c) (1986). Some Haitians transferred from Krome North were given incorrect telephone numbers of attorneys, correct numbers

clusion hearings.[65] In *Louis I*, the district court converted the previously issued temporary restraining order into a preliminary injunction prohibiting the INS from continuing any exclusion proceedings involving members of the now-certified class, unrepresented Haitians who had arrived in Florida since May 20, 1981.[66]

The plaintiffs[67] subsequently sought release of the incarcerated Haitians through a writ of habeas corpus and a complaint for declaratory, injunctive, and mandatory class action relief.[68] INS officials were cited with seven counts of violating the Haitians' rights to fair exclusion proceedings and counsel.[69] The court dismissed each claim that would be encompassed by an ultimate order of exclusion,[70] citing the Immigration and Nationality Act provision that authorizes judicial review of an exclusion order by habeas corpus proceedings only after a final order has been given and the alien has exhausted all administrative remedies.[71] These claims essentially charged that the refugees were denied representation during both preliminary interviews with INS and the exclusion proceedings, and that the INS had failed to give proper notice to the Haitians regarding their rights.[72] The court reserved jurisdiction over claims that INS had changed its parole and detention policy

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yet no access to telephones, long-distance numbers, or numbers of organizations unable to provide representation. *Louis I*, 530 F. Supp. at 926-27.

65. *Louis I*, 530 F. Supp. at 929-30.

66. *Id.* at 930. For the precise class definition, see *supra* note 4.

67. Plaintiffs also included the Haitian Refugee Center, Inc., a nonprofit corporation organized to provide support and legal advocacy for Haitian refugees. *Louis III*, 544 F. Supp. at 984 n.28.

68. *Louis II*, 532 F. Supp. at 883.

69. *Id.* The court dismissed four counts entirely and two counts in part because of the lack of subject matter jurisdiction as well as the refugees' lack of standing; the court retained jurisdiction over one count and part of two others. The court modified the definition of the class to include detained Haitians "represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association." *Id.* at 884-85.

70. *Louis II*, 532 F. Supp. at 888. The Haitians argued that the INA provision was not intended to preclude review of "separate or preliminary matters" before entry of an order, but only review of a final order itself or findings made during an exclusion hearing *after* the proceedings had concluded. According to the court, however, Congress intended to eliminate entirely dilatory procedural attacks in order to consolidate the procedure available for challenging an exclusion order. Judicial efficiency requires that administrative proceedings should be completed before a complainant may be permitted to attack errors. *Id.* at 886-87. Closely associated with the requirement of finality was the court's finding that plaintiffs lacked standing to complain of potential injury from improper procedures when no final orders of exclusion had been issued. *Id.* at 889-92.

71. 8 U.S.C. § 1105a(c) (1982).

72. Such rights included right to counsel, to select either a public or private hearing, and to apply for political asylum. *Id.* at 883-84.

for Haitians without complying with the rulemaking requirements of the Administrative Procedure Act (APA),[73] that detained Haitians were denied access to persons not in detention, and that the Haitian Refugee Center was denied access to detainees, all in violation of the first amendment. The court also reserved jurisdiction over the claim that the INS was discriminating against Haitian refugees on the basis of race and national origin by detaining them and no other refugees, in violation of the equal protection clause of the fifth amendment.[74] The court ordered the INS to develop and file a plan describing how the agency would conduct individual hearings for members of the class.[75]

The trial challenging INS parole and detention policies began in 1982. Thousands of Haitians had been incarcerated since INS resurrected its detention policy one year. Many were suffering physically and psychologically from the prolonged inactivity and confinement, and the National Institute of Mental Health discovered an "alarming increase" in psychiatric illness. Nearly thirty suicide attempts or "gestures" were reported within a ten-week period in early 1982.[76] Newspapers carried daily articles and photographs of Haitians looking beyond the confines of the caged detention camps, and protesters frequently posted themselves in front of Krome North.[77]

In *Louis III*, the district court held that the detention policy, although not applied to the Haitians discriminatorily, violated the Administrative Procedure Act and was void.[78] The court ordered the class released on parole pending final determination of admis-

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73. Administrative Procedure Act § 553, 5 U.S.C. § 553 (1982).

74. *Louis II*, 532 F. Supp. at 883-84, 889.

75. *Id.* at 892-93.

76. *Suicide Attempts Reported Rising Among Haitians in U.S. Detention*, N.Y. Times, June 22, 1982, at A15, col. 3. "Suicidal gestures" were defined as "less likely to be fatal" than actual attempts. *Id.*

77. *U.S. Judge Voids Policy on Detention of Haitians*, N.Y. Times, June 19, 1982, at 8, col. 2.

78. *Louis III*, 544 F. Supp. at 1003-04. The APA requires an administrative agency to publish new substantive rules in the *Federal Register* to permit comment from interested members of the public. The agency must then publish the final rule and entertain petitions regarding repeal, revision, or issuance of the rule. *Id.* at 993-94. The INS adopted more restrictive criteria for granting parole pursuant to the Reagan task force recommendations of detention. Except for "significant humanitarian reasons" such as pregnancy, old age, health problems, or reuniting families, *id.* at 993, the agency did not publish the new "rule." Although the parole authority of 8 U.S.C. § 1182(d)(5)(a) (1982) had not been changed, the APA definition of "rule" requiring publication includes codifying the criteria for parole. Ad-

sibility.[79] Although the Haitians' claim for relief was granted based on the APA violation, the court also chose to address the discrimination question. The court affirmed that the determination of admissibility is within the plenary power of Congress, but reasoned that parole has no bearing on an alien's status with regard to admission, so discriminatory distinctions Congress may authorize in exclusion policies are inapplicable to parole decisions. The court stated, "[The Haitians] are entitled to the same constitutional protections afforded all persons within the territorial jurisdiction of the United States. [They] may not be deprived of their liberty without due process of law and cannot be denied parole solely because of their race and/or national origin."[80] The Haitians asserted that they were not challenging congressional authority to make racial or national origin distinctions when enacting immigration legislation, but that because the parole provision was neutral on its face, discriminatory application violated the fifth amendment equal protection guarantee.[81] The Haitians would continue to advance this argument in subsequent appeals.

Nevertheless, the court found no support for the contention that the Haitian prgram policies were directed only at Haitians. Rather, the court concluded, these practices and policies were developed to handle a general immigration "crisis" and would apply to all illegal aliens seeking admission.[82] Statistical evidence produced by the

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ministrative Procedure Act § 2(c), 5 U.S.C. § 551(4) (1982). The court noted, "A change in a longstanding informal practice is as much a rule as repeal of a formal regulation if the result has a substantial impact on those regulated." *Louis III*, 544 F. Supp. at 997.

79. Louis v. Nelson, 544 F. Supp. 1004, 1006 (S.D. Fla. 1982), *aff'd in part, rev'd in part sub nom.* Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), *reh'g en banc granted*, 714 F.2d 96 (11th Cir. 1983), *dismissed in part, rev'd in part, remanded with instructions*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 105 S. Ct. 2992 (1985) [hereinafter cited as *Louis IV*]. The court found that the first amendment access issue had been mooted in light of the release order in the final judgment. *Id.* at 1005 n.2.

80. *Louis III*, 544 F. Supp at 998 (citations omitted).

81. *Id.* at 998-99. The court cited Washington v. Davis, 426 U.S. 229, 241 (1976), in support of the Haitians' claim: "A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." *Louis III*, 544 F. Supp. at 998-99 (citation omitted).

While the fifth amendment contains no explicit equal protection provision, the Supreme Court has established in numerous cases that a finding of discrimination by the federal government, using a fourteenth amendment analysis, would also violate the due process clause of the fifth amendment. *Id.* at 999.

82. The court employed a fourteenth amendment approach to the discrimination contention—whether the defendants had intentionally and purposefully detained Haitians on the basis of race—using the factors set forth in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). Although the Haitians might have felt the impact of the detention policy more than other excludables, the record indicated the policy was aimed

Haitians' expert witness showed that Haitians were being detained longer and were being denied parole more often than were non-Haitians, indicating "a statistically significant relationship between being detained and being Haitian."[83] However, the court disputed the expert's conclusions because the study only compared Haitians to non-Haitians rather than examining more narrow classes of "similarly situated individuals."[84] Perhaps the court would have found the data more meaningful had the statistician analyzed groups of individuals according to characteristics commonly considered by INS officials when making parole decisions,[85] and then determined whether a discriminatory selection process had been used.

Having declared the new detention policy void, the court determined that class members could not be denied parole under the previous policy that singled out security risks and those likely to abscond. Thus continued detention was not justified.[86] More than 2,000 Haitians were paroled under the order. The INS was also instructed to desist from detaining newly arrived excludable aliens until it had promulgated a rule under the APA.[87]

In *Louis IV*, the district court adopted a schedule of exclusion hearings, including details that implicitly admonished the agency to ensure each class member due process. This parole program enabled the court to dissolve the *Louis I* injunction against further exclusion proceedings.[88]

C. *Appeal to the Eleventh Circuit*

The Department of Justice and INS appealed on grounds that the APA was not applicable to immigration decisions, and therefore the Haitians had been improperly released. On cross-appeal the Haitians argued that the district court had erred in finding no discrimination by the federal government and in not addressing the first amendment access issue.[89]

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at deterring another influx. The evidence documenting disproportionate impact was not enough to persuade the court. *Louis III*, 544 F. Supp. at 999-1001.

83. *Louis III*, 544 F. Supp. at 982.

84. *Id.*

85. These factors include age, health, being accompanied by children, and pendency of an exclusion hearing. *Id.*

86. *Louis IV*, 544 F. Supp. at 1006.

87. *Id.* The former policy was left intact, meaning security risks could still be detained.

88. *Id.* at 1008.

89. *Jean I*, 711 F.2d at 1464.

In *Jean I*, the class was again vindicated, this time on all counts, by a three-member panel of the United States Court of Appeals for the Eleventh Circuit. The panel agreed that the restrictive detention policy had been adopted informally, and thus improperly.[90] It found that INS detention and parole policies had been discriminatorily enforced against Haitians, and it limited the entry doctrine to determinations of admissibility.[91] The panel concluded that parole decisions could not be made on the basis of race. Lastly, the panel held that notice of the right to claim asylum should have been given to the Haitians,[92] and that access to counsel and to clients is a first amendment right enjoyed by detainees and advocates.[93]

The panel's decision was vacated when the court granted a rehearing en banc.[94] In *Jean II*, the Eleventh Circuit rejected the argument that excludable aliens are constitutionally protected against discriminatory treatment by the government.[95] Accepting the government's contention that the INS regulations were facially neutral, the court remanded the case to permit the district court to determine whether low-level officials had abused their discretion by discriminating against the Haitians.[96] The rule that would control such a finding was an INS regulation promulgated in 1982 establishing the criteria immigration officials should employ in future parole decisions.[97] Because this new rule was developed

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90. In litigation that centers around a complex change in policy we find it significant that INS inspectors were authorized to perform the task of discretionary parole with a complete lack of guidance. It is clear no one knew exactly what the policy was, and no one in authority attempted to supervise the exercise of discretion under the new policy. Not surprisingly, the discretion was exercised with harsh results.

Id. at 1474.

91. *Id.* at 1484. Rather than conceding that excludable aliens are beyond the reach of the Constitution, the panel cited several circuit and Supreme Court decisions which have recognized fifth and fourteenth amendment protection of aliens: Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. . . . Aliens . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981); United States v. Henry, 604 F.2d 908 (5th Cir. 1979).

92. *Jean I*, 711 F.2d at 1507.

93. *Id.* at 1508-09.

94. *Jean III*, 105 S. Ct. at 2996 (citing 11TH CIR. R. 26(K)).

95. *Jean II*, 727 F.2d at 968-75.

96. *Id.* at 978-79.

97. Parole under 8 U.S.C. §§ 1101, 1182(d)(5)(A) (1982) may be granted for "emergent reasons" and applies to those whose medical problems would be aggravated by detention. 8

according to the notice and comment requirements of the APA,[98] the APA claim of *Louis II* was mooted and dismissed.[99] Furthermore, although aliens are entitled to apply for political asylum under the Refugee Act of 1980,[100] the court held that neither the Constitution, the Act, nor any immigration statutes or regulations require the INS to notify aliens of such a right.[101] Finally, the court remanded the first amendment access issue, asserting that it was no longer moot because Haitians again were being held in detention and that failure to address the question below deprived the court of a record on which to decide the issue.[102]

The bulk of the court's opinion concerned the equal protection of excludable aliens. Unlike the district court and the panel—which regarded parole decisions as distinct from admissibility and thus constrained by the fifth amendment—the Eleventh Circuit viewed parole decisions as "an integral part of the admissions process . . . [permitting] the Executive to discriminate on the basis of national origin."[103] In making this point, the court relied chiefly on the 1953 Supreme Court decision in *Shaughnessy v. United States ex rel. Mezei*.[104]

C.F.R. § 212.5(a)(1)(2)(1986). "The public interest" warrants parole of pregnant women, juveniles, persons with close relatives in the United States, those acting as witnesses in official proceedings, and "aliens whose continued detention is not in the public interest as determined by the district director." 8 C.F.R. § 212.5(a)(2) (1986).

98. Compliance with the APA requirements are found at 47 Fed. Reg. 30,044 (1982), as amended 47 Fed. Reg. 46,494 (to be codified at 8 C.F.R. pts. 212 and 235) (proposed July 9, 1982 and amended Oct. 19, 1982).

99. *Jean II*, 727 F.2d at 962.

100. *See supra* note 3.

101. *Jean II*, 727 F.2d at 979-83. "In the absence of a constitutional right, the only procedures to which plaintiffs are entitled are those granted by the statute or agency," and no explicit notice requirement exists. *Id.* at 982. The court responded to the Haitians' argument that a right to asylum is meaningless without the chance of exercising it: "Congress provides many opportunities to the people of this country without requiring the government to publicize their availability or to take affirmative action to notify possible beneficiaries." *Id.*

102. *Id.* at 983-84.

103. *Id.* at 963.

104. 345 U.S. 206 (1953) (5-4 decision). The decision has been harshly criticized. "[E]xclusion's extraconstitutional status has encouraged and legitimated some of the most deplorable governmental conduct toward both aliens and American citizens ever recorded in the annals of the Supreme Court." Schuck, *supra* note 2, at 20. *Mezei* is an "aberration" which "ignore[s] the painful forward steps of a whole century of adjudication." Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1396 (1953). "[It is] a rather scandalous doctrine, deserving to be distinguished, limited, or ignored . . . ." Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 176 (1983).

In *Mezei,* an alien was detained on Ellis Island and permanently excluded from admission based on "information of a confidential nature, the disclosure of which would be prejudicial to the public interest."[105] More than a dozen countries also refused to accept Mezei, and he filed a series of petitions for writs of habeas corpus after twenty-one months of confinement.[106] When the government refused to divulge why Mezei was classified as a security risk, the district court ordered his release on parole and the court of appeals affirmed.[107] The Supreme Court reversed, emphasizing the apparent danger to national security, and stating that Congress had properly authorized a denial of parole for security risks.[108] In dissent, Justices Black, Douglas, Jackson, and Frankfurter did not contest the government's power to detain excludable aliens, but they castigated the majority for condoning a deprivation of liberty without due process of law.[109]

III. THE CASE REACHES THE SUPREME COURT

The Haitians questioned the Eleventh Circuit's reliance on *Mezei*, "whose continuing validity . . . should be reassessed," and given the ease with which that court had "misconstrued" the holding, they urged the Supreme Court to "clarify the meaning" of that decision.[110] *Mezei* presented precisely the type of situation the entry doctrine is intended to preclude—because no country in the world would accept him, parole entry would have effectuated Mezei's admission. The Haitians, on the other hand, were not security risks;[111] parole would have had no effect on their potentially limited stay in the United States.

The Haitians disputed the Eleventh Circuit's conclusion that invidious racial or nationality-based discrimination by a federal

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105. *Mezei,* 345 U.S. at 208 (otherwise characterized as "security reasons").

106. *Id.* at 209.

107. *Id.*

108. *Id.* at 216.

109. *Id.* at 216-28. Justice Jackson stated:

> Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. . . .
>
> Our law may, and rightly does, place more restrictions on the alien than on the citizen. But basic fairness in hearing procedures does not vary with the status of the accused.

Id. at 224-25 (Jackson, J., dissenting).

110. Petitioners' Brief for Writ of Certiorari at 14, *Jean III.*

111. *Louis IV,* 544 F. Supp. at 1006.

agency was beyond constitutional review, citing the plain language of the fifth amendment[112] and several court decisions.[113] The en banc court, holding that the Haitians were safeguarded from discrimination by facially neutral parole criteria, had instructed the district court on remand to determine only whether lower-level officials had "a facially legitimate and bona fide reason" for denying parole.[114] This "novel, non-constitutional standard" would deprive the Haitians of the strict scrutiny appropriate for claims of racial or nationality-based discrimination and, furthermore, would not reach future INS treatment of those class members already released on parole. Discrimination in subsequent exclusionary matters would be unaffected.[115]

The INS insisted that aliens have no constitutional rights regarding entry decisions and that discretion to parole is "inextricably related" to the admission decision process.[116] Therefore, the entry doctrine removes all rights to challenge parole policy by excludable aliens. Interference with the attorney general's parole authority would constitute interference with "the inherent sovereign authority to exclude and detain aliens"[117] because, according to the government, permissive parole would attract more illegal aliens. Once paroled, an alien could easily matriculate into the community, and "an alien with a skilled attorney [could] delay the exclusion process for years."[118]

Rather than address the question of whether constitutional protection from invidious discrimination is available to excludable aliens, the Court held in *Jean III* that, because statutes and federal regulations preclude discrimination, the Eleventh Circuit

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112. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

113. Plyler v. Doe, 457 U.S. 202, 210 (1981) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."); Mathews v. Diaz, 426 U.S. 67, 77 (1975) ("The Fifth Amendment . . . protects every [alien within the jurisdiction of the United States] from deprivation of life, liberty, or property without due process of law . . . ."); Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed [by the fifth amendment] . . . and that even aliens shall not be . . . deprived of life, liberty, or property without due process of law."); 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, of color, or of nationality . . . .").

114. *Jean II*, 727 F.2d at 978.

115. Petitioners' Reply Brief at 5-6, *Jean III*.

116. Respondent's Brief Opposing Petition for Writ of Certiorari at 11, 15, *Jean III*.

117. Brief for Respondent at 36, *Jean III*.

118. *Id.* at 37-38. "Thus, the availability of parole may have a corrosive effect on the government's plenary authority to exclude aliens." *Id.* at 38.

should not have reached the fifth amendment issue. The majority determined that, in the absence of clear legislative or agency instructions ordering discrimination, such action was prohibited.[119] While this interpretation strains credulity, the holding will protect similarly situated aliens from biased parole decisions as long as the present rules remain in effect. Unfortunately, by not ruling on the constitutional question, the Court left unsettled an issue that should be resolved to end the confusion among federal courts.[120]

The crux of the Court's opinion rests upon the statute authorizing parole and the regulatory list of excludables who might be considered eligible for parole "in the public interest."[121] Because the provisions are facially neutral—they do not explicitly state that "race and national origin are factors that must be considered when making a parole decision"—and because the parties agreed the language required evenhanded application,[122] the Justices decided no further action was required.[123] The majority thus accepted statements made by the parties as accurate depictions of the limits beyond which immigration officials could not venture. The decision, therefore, has no bearing upon whether the INS may, in the future, modify these regulations and intentionally discriminate against a different refugee population, with the likely consequence of another protracted round of litigation.

The majority's analysis, written by Justice Rehnquist, was at best a clipped treatment of what has been a painful ordeal for thousands of refugees. While the decision fortunately militates against further discriminatory treatment of these Haitian refugees, Justice Marshall's eloquent and comprehensive dissent, articulates the deficiencies in the court's reasoning.

> Purporting to exercise restraint, the Court creates out of whole cloth nonconstitutional constraints on the Attorney General's dis-

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119. *Jean III*, 105 S. Ct. at 2998.

120. *See* Augustin v. Sava, 735 F.2d 32 (2d Cir. 1984) (excludable alien was entitled to due process protection); Yiu Sing Chun v. Sava, 708 F.2d 869 (2d Cir. 1983) (same); Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982) (excludable aliens have limited due process rights in petitioning for political asylum); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) (indefinite detention conflicts with requirements of due process under the law).

121. *See supra* note 97 and accompanying text.

122. Responding to an inquiry from the bench, the Solicitor General confirmed that INS regulations "inhibited" immigration agents from permitting discrimination, consistent with the Haitians' argument that the INS is required to apply its policies without regard to race or national origin. *Jean III*, 105 S. Ct. at 2998-99.

123. *Id.* at 2998.

> cretion to parole aliens into this country, flagrantly violating the maxim that "amendment may not be substituted for construction," . . . . In my mind, there is no principled way to avoid reaching the constitutional question presented by the case. Turning to that question, I would hold that petitioners have a Fifth Amendment right to parole decisions free from invidious discrimination based on race or national origin.[124]

Justice Marshall's central objection to the majority decision was that no statutory or regulatory authorities nor policy statements produced by the government foreclosed discriminatory decision-making. The "lengthy list of neutral criteria" cited by the majority which affect the denial or grant of parole is in fact a list of four named groups with a fifth category—"aliens whose continued detention is not in the public interest"[125]—and are used at the discretion of the district INS director. These categories are intended to be merely "*consider[ed]*"[126] when making a parole decision; they are not the only factors open for evaluation. Indeed, the fact that several other INS regulations authorize national origin distinctions supports a conclusion that such considerations are not beyond the discretionary powers of INS officials.[127]

Stipulation by the parties appears to have been the real basis for the majority's confidence in the allegedly mandatory neutrality of the parole power.[128] Yet, the dissent makes a persuasive argument that positions taken by advocates at oral argument do not warrant such deference from the Court. Regardless of representations made by the Solicitor General and the Haitians' counsel, no statutory or regulatory documentation was produced that would carry real weight; in fact, the government's reply brief to the Eleventh Circuit en banc court stated, "Congress knows how to prohibit nation-

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124. *Id.* at 3000 (citation omitted) (Marshall, J., dissenting).

125. *See supra* note 97.

126. 8 C.F.R. § 212.5(a) (1986). The regulation states, "In determining whether or not aliens who have been or are detained . . . will be paroled out of detention, the district director should consider the following . . . ." *Id.* There follows a list of exceptions that would be "in the public interest": pregnant women, juveniles, detainees with close relatives, witnesses, and the fifth, undefined category. "Unless such criteria are exclusive, however, they are not necessarily inconsistent with distinctions based on race or national origin. Certainly no plausible argument can be made that the criteria of 8 C.F.R. § 212.5(a) (1986) were intended to be exclusive." *Jean III*, 105 S. Ct. at 3004 (Marshall, J., dissenting).

127. *Jean III*, 105 S. Ct. at 3002 (five regulations listed).

128. In a footnote, Justice Rehnquist wrote, "[W]hen all parties, including the agency which wrote and enforces the regulations, and the en banc court below, agree that regulations neutral on their face must be applied in a neutral manner, we think that interpretation arrives with some authority in this Court." *Id.* at 2999 n.3.

ality-based distinctions when it wants to do so. In the absence of such an express prohibition, it should be presumed that the broad delegation of authority encompasses the power to make nationality-based distinctions."[129] This statement supports Justice Marshall's contention that the stipulation of neutrality was merely a litigation strategy adopted by the government.

Justice Marshall criticized the Eleventh Circuit's reliance on *Mezei*, distinguishing that holding as limited to denial of due process when the excludable alien is a security risk.[130] Any weight which dicta in *Mezei* and other cases might have carried in supporting the inapplicability of constitutional protections to excludable aliens has been dissolved by subsequent Court decisions.[131] To regard the entry doctrine as placing an excludable alien beyond the reach of the fifth amendment would be as specious as conceding the legal fiction used by the *Dred Scott* Court.[132]

Justice Marshall closed by articulating governmental interests that might justify classifying Haitians by race or national origin: (1) that overall parole denial would deter undocumented Haitians and not other nationalities from seeking entry, or (2) that adjudication of asylum applications is hastened by denial of parole.[133] If, however, the Haitians were detained because the INS believed they, or blacks in general, are more prone to criminal behavior, or would otherwise have a detrimental effect upon their new communities, such detention policy would surely be unconstitutional.[134]

IV. CONCLUSION

Jean III may be considered a partial victory in that henceforth facially neutral immigration rules, regulations, and statutes may not be administered in a fashion that discriminates against any

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129. *Id.* at 3002 (Marshall, J., dissenting).

130. *Id.* at 3007.

131. Justice Marshall cited to the same cases discussed in Petitioners' Brief for Writ of Certiorari, *Jean III*. Also cited was Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931), where a Russian corporation successfully filed a claim against the United States seeking compensation for two vessels it had built for the defendant. The corporation was held to have been protected against deprivation of property by the fifth amendment: "As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said their property is subject to confiscation here . . . ." *Id.* at 491-92. *Volunteer Fleet* is frequently cited in immigration cases addressing the scope of constitutional protection: if alien property warrants protection, so much more does an alien's liberty. *See Jean III*, 105 S. Ct. at 3008 (Marshall, J., dissenting).

132. *See supra* note 12 and text accompanying notes 21-30.

133. *Jean III*, 105 S. Ct. at 3011 (Marshall, J., dissenting).

134. *Id.* at 3012.

refugee group based on race or national origin.[135] In addition to eliminating discriminatory denial of parole to eligible refugees, the decision should preclude consideration of race and nationality in other immigration proceedings, including deportation and asylum hearings. In the event of a future influx of refugees—which seems inevitable in light of the political and economic instability throughout the world—such draconian measures against an isolated group would be illegal under present INS regulations.

At the same time, it now appears that no particular group may be favored, meaning those fleeing Marxist regimes should not enjoy expedited asylum hearings that are less than rigorous in examining each claimant's alleged "fear of persecution." Salvadorans, Afghans, and Soviet Jews all should be on the same footing in the eyes of an immigration judge.

In fact, the holding of *Jean III* permits subsequent plaintiffs a less demanding showing of discrimination than would have been required had the Court determined that the fifth amendment applies to excludable aliens. On remand, this class of Haitians—and other aliens similarly situated in future litigation—need only show that race or nationality was considered by an immigration official deciding whether to grant parole; a constitutional challenge would have required a far more difficult showing of intentional discrimination on the part of INS officials. Still, immigration officials need only offer a "facially legitimate and bona fide reason"[136] for such a decision in order to counter a claim of discrimination—not a difficult burden to meet. In any case, the Court's requirement of even-handed treatment based on facially neutral regulations is an important step toward a more humane immigration law.

The absence of a solid constitutional ruling by the Court does nothing to ensure that facially neutral policies will remain so. In response to some future wave of refugees, the INS is free to modify the current rules by conditioning parole on any number of invidious classifications, such as religion, national or regional origin, race, or economic status. Because the Court still has not addressed whether the fifth amendment precludes such arbitrary government conduct, the same challenge as was presented by the Haitians in *Jean III* would again be raised.

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135. The majority instructed the district court to examine whether INS officials made individual parole decisions, and whether the officials made such decisions without regard to race or national origin. *Id.* at 2999.

136. *Id.* at 2997 (citing Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

Because the United States is experiencing a resurgence of nativist hostility toward immigrants and illegal aliens,[137] it is critical that the federal courts consistently uphold the principles of equal protection and due process in the government's dealings with vulnerable alien minorities. When Congress authorizes the INS to adopt discriminatory regulations, such minorities have recourse only to the courts, and the courts will continue to disagree as to what is constitutionally permitted unless the Supreme Court resolves the issue. Recognizing that the fifth amendment protects incarcerated excludable aliens would hardly interfere with the authority now vested in the executive branch and Congress to decide which individuals may or may not enter the United States. Rather, it would ensure integrity in the treatment of refugees.

Viewed differently, the Court's unwillingness to address the constitutional question—the primary point of contention between the parties in *Jean III*[138]—and its approval of a nondiscriminatory parole policy may indicate a disposition to require evenhanded INS treatment of refugees that might eventually ripen into recognition of a constitutional mandate. It may be significant that the Court did not express support of *Mezei*. In coming years the Court may be willing to scrutinize immigration law and policy more keenly than in the past.

Some commentators predict that immigration law may become less restrictive as a result of a gradual liberalization of attitudes among the American public toward aliens.[139] In *Jean III*, the Supreme Court construed an executive and legislative policy of nondiscrimination with no explicit foundation in statute or agency regulations, rather than abdicating discretionary power to lower-level immigration officials. The decision may indeed convey a willing-

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137. Elizabeth Hull, Professor of Political Science at Rutgers University, characterizes this nativism as a kind of "compassion fatigue" toward Third World refugees, brought on by a host of domestic economic and political pressures. *See* Hull, *supra* note 14, at 236. Hull presents the view of several scholars that developed nations have a responsibility to address the needs of undeveloped nations and, by implication, to aid displaced persons who seek refuge in wealthier countries. *Id.* at 247-48 n.94.

138. Brief for Petitioners at 3-4, 21-39, *Jean III*; Brief for Respondent at 20-35, *Jean III*. The first of two questions certified to the Court asked, "Is racial or national origin discrimination by immigration officials in incarcerating nonresident Haitian aliens seeking asylum subject to constitutional scrutiny?" Jean v. Nelson, 53 U.S.L.W. 3717 (U.S. Apr. 9, 1985) (No. 84-5240).

139. Schuck, *supra* note 2, at 1-5, 54-85. The author discusses recent decisions indicating that courts are more willing to permit "rights against the government to accrue to aliens without the government's consent and without the formal conditions for immigration having been observed." *Id.* at 70.

ness of the Court to require that INS adhere to policies that guarantee a standard of treatment commensurate with constitutional standards, even though the Constitution itself was not invoked.[140]

In any case, speculation as to the implications of *Jean III* cannot substitute for what was clearly neglected. The Court's failure to address the constitutional issue permits survival of the legal fiction that has too long been attached to the entry doctrine and was unquestioningly approved by the Eleventh Circuit: that excludable aliens are not "persons" under the fifth amendment. The entry doctrine is effective and legitimate when applied to decisions concerning the admissibility of an alien but should not be used to bootstrap the illegitimate proposition that the political branches may ignore contemporary standards of constitutional due process and equal protection with respect to excludable aliens. An excludable alien is indeed "on the threshold of initial entry" into the national community until legally declared otherwise. Yet this does not justify invidious discrimination that would be intolerable in other contexts. "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[141] Under *Jean III*, parole and detention decisions cannot incorporate considerations of race or national origin. However, because the majority chose not to discuss the reasoning of the court below, the INS and the federal courts are free in other contexts to assign an extraterrestrial status to excludable aliens. The Court should ultimately excise the fiction from the entry doctrine and discard it as artificial, unworthy to serve as even a stone in the foundation of constitutional doctrine.

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140. Schuck labels the ideals toward which immigration law may be moving as "communitarian," where aliens' legal rights are "based upon individuals' essential and equal humanity." *Id.* at 4. The trend would be comparable to that of the development of public administrative law away from the individualistic private-law model toward a jurisprudence that recognizes the "public interest." *Id.* at 51-53. In the context of exclusion and detention, this might entail recogniton of greater legal protection of aliens pending admissibility decisions.

141. Berkey v. Third Ave. Co., 155 N.E. 58, 61 (N.Y. 1926).