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ASYLUM ADJUDICATION: SOME DUE PROCESS IMPLICATIONS OF PROPOSED IMMIGRATION LEGISLATION*

*John A. Scanlan***

INTRODUCTION

The Refugee Act of 1980[1] revised and liberalized the grounds for seeking political asylum in the United States and gave those seeking withholding of deportation or exclusion new procedural rights. Since the passage of the Act, the number of pending asylum applications has increased dramatically, exceeding by recent count 105,000.[2] Recent events in countries such as Cuba, Ethiopia, and Iran, continuing strife in El Salvador and other parts of Central America, and the likelihood of continued migration from Haiti virtually assure that these numbers will remain high. A flow of this magnitude has caused a strain on the current asylum processing system—a strain that has resulted in long delays in the handling of particular cases and has encouraged the rendering of assembly-line, highly politicized decision-making by the Department of State and the Immigration and Naturalization Service, each of which plays a role in the determination of claims.

Consequently, there has been concerted legislative effort to enact new statutory asylum procedures designed to expedite the processing of such claims by establishing a more efficient body for the rendering of initial decisions and by restructuring the process under which initial decisions are reviewed. Two significantly different versions of the Simpson-Mazzoli "Immigration Reform and Control Act of 1981"[3] are currently pending in the House and Sen-

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1. Pub. L. No. 96-212, 94 Stat. 102 (1980).

2. This figure is based on unpublished, unofficial State Department and I.N.S. estimates as of September 1, 1982.

3. On March 17, 1982, identical versions of the "Immigration Reform and Control Act of 1982" were introduced in the Senate and the House of Representatives by Senator Alan Simpson (R-Wyo.), the Chairman of the Senate Judiciary Subcommittee on Immigration and Refugee Pol-

ate respectively. Both place initial determinations in the hands of "specially designated" immigration judges,[4] create a new "United States Immigration Board" with authority to administratively review those determinations[5] and statutorily link "asylum" to "withholding of deportation or exclusion."[6] The House bill requires that the United States Immigration Board be presidentially appointed and confirmed by the Senate[7] and makes no reference to any continuing State Department "advisory" role in asylum proceedings.[8] Prior to committee action, the bill had amended the judicial review provisions set forth in the Immigration and Nationality Act (I.N.A.) to provide that "there . . . be no judicial review of a final order of exclusion or a final order respecting an application for asylum,"[9] and that

> no court of the United States . . . has jurisdiction to review determinations of administrative law judges or of the United States Immigration Board respecting the reopening or reconsidering of exclusion or deportation proceedings or asylum determinations outside of such proceed-

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icy, and Representative Romano Mazzoli (D-Ky.), the Chairman of the House Judiciary Subcommittee on Immigration, Refugees, and International Law. The original Bill was designated "S. 2222" in the Senate, "H.R. 5872" in the House. It is referred to below as "S. 2222/H.R. 5872." The Senate Bill was amended in Committee and on the floor, where it passed, 80-19, on August 17, 1982. It is referred to below as "S. 2222, 97th Cong., 2nd Sess. (1982)" [S. 2222]. The House Bill, after mark-up, was replaced by a clean bill, H.R. 6514, which incorporating Committee amendments, was reported out of the House Judiciary Committee on September 28, 1982. It is referred to below as "H.R. 6514, 97th Cong., 2d Sess. (1982)" [H.R. 6514].

At the time this article was written, a printed report on S. 2222, as amended, was available. *See* S. REP. No. 485, 97th Cong., 2d Sess. (1982). H.R. 6514 is reported at H.R. REP. No. 890, 97th Cong., 2d Sess. (1982). For detailed information on the content of H.R. 6514 and its relationship to other versions of the bill, the author thanks staff members of the Senate and House subcommittees who were generous with their time, and S. Masanz and J. Vialet whose report prepared for the Congressional Research Service, "Section-by-Section Comparison of the Immigration Reform and Control Act of 1982, S. 2222/H.R. 5872 as Introduced, S. 2222 as Passed by the Senate, and H.R. 6514 as Reported," has proved most helpful.

4. S. 2222, § 124(a)(2) (referring to such officers as "immigration judges"); H.R. 6514, § 124(a)(1) (referring to such officers as "administrative law judges").

5. S. 2222, § 122(a); H.R. 6514, § 122(a).

6. S. 2222, § 124(a)(3), (b); H.R. 6514, § 124(a)(3), (b).

7. H.R. 6514, § 122(a).

8. Under current regulations—although nowhere required by statute—district directors of the Immigration and Naturalization Service (I.N.S.) and immigration judges hearing asylum claims submit each case to the Department of State's Bureau of Human Rights and Humanitarian Affairs (B.H.R.H.A.) for an "advisory opinion." *See* 8 C.F.R. § 208.10 (1982).

For a critique of the evidentiary standards employed in compiling such "advisory opinions," *see* Scanlan, *Who is a Refugee? Procedures and Burden of Proof Under the Refugee Act of 1980*, 5 IN DEFENSE OF THE ALIEN, 23-37 (1983).

9. S. 2222/H.R. 5872, § 123(b) (proposing amendment to I.N.A. § 106(b)(1), 8 U.S.C. § 1105a(b)(1) (1976)). *See also* S. 2222/H.R. 5872, § 123(a)(6).

> ings, the reopening of an application of asylum because of changed circumstances, [or] the Attorney General's denial of a stay of execution of an exclusion or deportation order.[10]

This provision would have made the new United States Immigration Board the exclusive agency for reviewing all asylum determinations and might have precluded collateral review under class action lawsuits brought under authority of Section 279 of the I.N.A.[11]

A number of major amendments in the House Judiciary Committee, however, have significantly liberalized the opportunity for review afforded to asylum applicants whose request for withholding has been denied. Thus, the House bill in its present form will permit the Courts of Appeals to review all decisions of the Immigration Board, including all denials of asylum.[12] The courts will have authority directly to review decisions affecting excludable aliens, who at present have no access to the judiciary except through *habeas corpus* proceedings.[13] Though prohibitions against indirect or collateral review of asylum decisions are retained by the House Bill, the scope of *habeas corpus* is expanded beyond that authorized by the Senate Bill. Denial of due process may be litigated to the extent permitted by present law[14] and, in particular, *habeas corpus* proceedings may be brought as class-action lawsuits.[15]

10. *Id.* (proposing amendment to I.N.A. § 106(b)(3), 8 U.S.C. § 1105a(b)(3) (1976)).

11. I.N.A. § 279, 8 U.S.C. § 1329 (1976) provides:

> The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any provisions of this [8 U.S.C.] title.

This language must be distinguished from the considerably more limited grant of jurisdiction to the district court to hear appeals relating to individual exclusion and deportation decisions. *See* I.N.A. § 106, 8 U.S.C. § 1105a (1976). For a discussion of how I.N.A. § 279 comes into play when systematic government conduct is at issue, *see infra* note 83, and accompanying text.

12. H.R. 6514, § 123(a)(9) would grant the Courts of Appeals *limited* jurisdiction to determine whether (1) an immigration law judge or the Immigration Board properly exercised its jurisdiction over an asylum claim; (2) the determination with respect to such a claim was in accordance with applicable statutes and regulations; (3) such statutes or regulations were constitutional; and (4) the decision upon which a final order was based was arbitrary or capricious.

13. *See* S. REP. No. 485, 97th Cong., 2d Sess. 12-13 (1982) (Constitutionally-guaranteed right to seek a writ of *habeas corpus* in asylum cases exists, provided that the alien is in actual or constructive custody).

14. Thus, the Senate Bill, as amended, is identical with S. 2222/H.R. 5872, § 123(b). Both acknowledge the right of *habeas corpus* only to the extent guaranteed by the Constitution. Yet the Senate Report, *id.*, at 13, notes that the right of *habeas corpus* set forth in 28 U.S.C. § 2241 (1976) may be identical in scope to "the 'privilege of the writ of *habeas corpus*' guaranteed in U.S. CONST. art. I, § 9, cl.2. *See Developments in the Law-Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970)."

15. H.R. 6514, § 123(b) (would permit *habeas corpus* petitions to be brought on an individual or multiple-party basis).

The Senate bill, on the other hand, as modified in committee, would permit "summary exclusion" of aliens who have not yet entered the country, unless they specifically claim asylum.[16] Unlike a similar House provision requiring all cases to go before an immigration judge for initial processing,[17] the Senate bill thus permits exclusion without any adjudication and maximizes the possibility that individuals with valid refugee claims will be returned to their country of origin before the claims are raised. The Senate bill also places the appointment of the Immigration Board in the hands of the Attorney General, with no requirement of Senate confirmation,[18] and stipulates a role for the State Department in the asylum process. Specifically, the Department must make human rights reports available "on a continuing basis" for use as "general guidelines" in making asylum determinations[19] and has the opportunity to "submit comments to the immigration judge" on individual cases brought to its attention by the I.N.S.[20] Finally, the Senate bill, while retaining the basic restrictions on administrative review in the original House bill, permits the Attorney General to overrule the Immigration Board.[21] In such a case, the Attorney General's decision will be reviewable by the Court of Appeals.[22]

The purpose of this article is to analyze some of the due process implications of the proposed changes in asylum determination and review. It will be argued that although Congress has considerable discretion in defining the procedures to be employed in excluding aliens seeking to enter the United States or seeking to remain here after the institution of deportation proceedings, the issue presented is not due process with respect to exclusion or deportation but rather, is due process with respect to asylum or its close relative, the withholding of deportation or exclusion. The ramifications of this distinction, and of Congress' unwillingness to abrogate the privilege of "non-returnability" for those capable of demonstrating probable persecution in their country of origin, will thus be examined. In the

16. S. 2222, § 121(a)(2). It is notable that the Senate Bill more closely represents the position of the Reagan Administration in a number of respects.

17. H.R. 6514, § 121.

18. S. 2222, § 122(a)(1).

19. S. 2222, § 124(a) (adding proposed § 208(a)(1)(B)(i)).

20. *Id.* (adding proposed § 208(a)(1)(B)(ii)).

21. S. 2222, § 122(a).

22. S. 2222, § 123(a).

light of the examination, a number of constitutional difficulties with the changes proposed by the Senate will be discussed.

I.

"Due process," as the term is commonly used, has three distinct meanings. The least problematic refers both to the procedures the government actually employs when it impinges on the property or liberty interests of a private party, and to the list of rules—statutory or administrative—that regulate the government's conduct. Due process, so delineated, is strictly procedural. Thus, if the I.N.S. chooses to incarcerate or to dispose of the claims of those seeking asylum in a manner not authorized by legally promulgated regulations or the agency's operating instructions, a legal remedy exists via a *habeas corpus* proceeding[23] or a class action law suit.[24] Yet in both instances, the promulgation of a new regulation or the issuance of new operating instructions can prospectively validate otherwise enjoinable conduct and, permit a resumption of expedited asylum processing or a renewal of detention. Where the sole grounds for a due process complaint are that the government has ignored the rules it is bound to follow, no principle prevents the government from changing those rules whenever it desires.

Due process, however, is concerned not only with adherence to established procedural rules but also with the conformity of such rules to more basic societal values. In this sense, the term is normative and looks to the fundamental "fairness" or "unfairness" of the government's action as it affects or might affect particular individuals. Determining what conduct is "fair" with respect to particular parties necessitates evaluating the threat to private interests posed by governmental conduct. Two distinct types of evaluation inform due process theory and, to a lesser degree, due process jurisprudence. The first type, which is favored by those who represent private parties, is essentially absolutist. Looking to sources as diverse

23. *Habeas corpus* is the exclusive judicial remedy available for excludable aliens denied asylum. *See* I.N.A. § 106(b), 8 U.S.C. § 1105a(b) (1976); Pierre v. United States, 547 F.2d 1281, 1286, 1289-90 (5th Cir. 1977).

However, aliens who have formally entered the United States and are ordered deported may seek a review of administrative failure to withhold deportation on grounds of probable persecution by perfecting an appeal in the Court of Appeals.

24. *See, e.g.*, Jean v. Meissner, 90 F.R.D. 658 (S.D. Fla. 1981); Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd* 676 F.2d 1023 (11th Cir. 1982); Bertrand v. Sava, 535 F. Supp. 1020 (S.D.N.Y. 1982), *rev'd on other grounds* 684 F.2d 204 (2d Cir. 1982).

as natural law theory, the custom of the ages, and specific passages of the United States Constitution, it argues that certain sorts of threatened deprivation are so fundamentally violative of individual rights, or are so fraught with that potential, that the government must either be enjoined from acting at all or have its actions rigidly limited through the elaboration of "constitutional" procedural standards.

The great body of substantive due process law from the days of *Lochner*,[25] when the "right" of private contract was put beyond the reach of governmental control, to the days of *Griswold*,[26] when the right of private contraception was put beyond the reach of legislative interference, is absolutist, as are the many procedural cases guaranteeing "some sort of hearing"[27] for those threatened with loss of liberty or deprivation of a significant property interest. As will be noted below, there are problems with applying this sort of absolutism to immigration cases involving excludable aliens, since in such cases the courts have been reluctant to find any fundamental interests implicated or have completely subordinated the interest of the individual to that of the government. Yet it is noteworthy that at least since 1915 "deportation [cannot] be ordered without a fair hearing, notice of the charges, an opportunity to defend, to examine and cross-examine witnesses and to be represented by counsel,"[28] and that since 1966, no deportation order may be entered unless the government proves by clear, unequivocal, and convincing evidence that the facts alleged as the grounds of deportation are true.[29]

Opposed to an absolutist conception of due process is a more elaborate method of evaluation in which the interests of the private party are given significant attention but are balanced against the interests of the government. It is clear that governmental interests have always been important to the courts and have often prevailed over the interests of individuals harmed by governmental conduct when the interests alleged are substantial, such as those involving

25. Lochner v. New York, 198 U.S. 45 (1905) (the Federal Constitution prevents states from passing maximum work hours legislation, since such legislation interferes with the right of individuals to enter into contracts).

26. Griswold v. Connecticut, 381 U.S. 479 (1965) ("due process embraces the right of 'marital privacy' ").

27. Wolff v. McDonnell, 418 U.S. 539, 557-58 and nn. (1974). *See also* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

28. Gordon, *Due Process of Law in Immigration Proceedings*, 50 A.B.A.J. 34, 34 (1964).

29. Woodby v. INS, 385 U.S. 276, 276 (1966).

national security in time of war. Although Judge Friendly noted in *Wolff v. McDonnell* that "[d]eprivation of liberty, even conditional liberty, is the harshest action the state can take against an individual through the administrative process,"[30] during World War II thousands of Japanese-Americans were administratively detained with the blessing of the Supreme Court and the approval of one of its most "liberal" members, the late Justice Douglas.[31] The example is extreme, but the principle is not. The government can argue that due process is relative, and that certain individuals in certain circumstances are entitled to less protection than others in similar circumstances: thus the assertion of the Supreme Court in one case that "[d]ue process . . . is not a technical conception with a fixed content unrelated to time, place, and circumstances"[32] and in another that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[33] In *Mathews v. Eldridge* the Court summarized earlier cases and explicitly adopted a specific balancing rationale:

> that identification of the specific dictates of due process generally requires consideration of three distinct factors: first the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[34]

Where, as in immigration cases, the process of balancing gives greater weight to the governmental interest than to the interest of the private party, the process can lead to a new species of absolutism in which whatever sort of process the government grants will be deemed "due."

II.

In examining the due process implications of the present system of

30. Friendly, *supra* note 25, at 1296.

31. *See* Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944). Justice Douglas voted with the majority in both decisions. However, in *Ex parte* Endo, 323 U.S. 283 (1944), he wrote the majority opinion refusing to apply the executive order upheld in *Korematsu* to persons of Japanese ancestry whose loyalty was not questioned by the government.

32. Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

33. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

34. 424 U.S. 319, 335 (1976).

administrative and judicial review of political asylum decisions or decisions to grant or deny withholding of deportation or exclusion, and in examining the implications of proposed changes in that system now pending before Congress, it is important to begin with an awareness that the governmental function involved is directly related to immigration control. With respect to that function, the courts have traditionally recognized the government's assertions of interest, either by refusing to permit a higher degree of judicial review of administrative actions than required by statute[35] or by displaying extreme deference in review.[36] Conversely, the courts have paid relatively little attention to similar assertions by aliens or their representatives, particularly if the aliens have not yet physically entered the United States, or if, by virtue of a legal fiction, they are physically present but deemed not to have effected entry and are hence "excludable."[37] In 1972 the Supreme Court, relying on "ancient principles of the international law of nations"[38] and strong judicial precedent,[39] asserted that "the power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government.' "[40]

By validating the "exclusive exercise" of the exclusionary power via the political branches of government, the Court has continued to lend support to the general proposition that review of immigration decisions, whether by judicial or administrative bodies, is a matter of legislative grace rather than constitutional right.[41] This

35. *See, e.g.*, Cheng Fan Kwok v. INS, 392 U.S. 206 (1968). *But see* Shaughnessy v. Pedreiro, 349 U.S. 48 (1955); Foti v. INS, 375 U.S. 217 (1963); and Giova v. Rosenberg, 379 U.S. 18 (1964).

36. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) ("We hold that when the executive exercises [his] power [to exclude communists] on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion . . .. What . . . other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.").

37. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1952) ("[H]arborage at Ellis Island is not an entry into the United States"; "temporary refuge on land . . . or [continuous tenure] aboard ship" have identical legal consequences.).

38. Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).

39. *Id.* at 765-66. The origins of the precedent were traced back to The Chinese Exclusion Case, 130 U.S. 581, 609 (1889) and Fong Yue Ting v. United States, 149 U.S. 698 (1893).

40. 408 U.S. at 765.

41. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("Admis-

was clearly the view of the first Justice Harlan in 1895. Writing for the Court in a decision denying judicial review to an excludable alien, he stated:

> The power of the Congress to exclude aliens altogether from the United States, or to proscribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.[42]

A similar position was taken by the Court more than half a century later in *Knauff v. Shaughnessy*, which permitted administrative officers, during a time of national emergency, to carry out summary exclusion without the benefit of any hearing whatsoever.[43] The Court stated:

> [T]he decision to admit or exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive official under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of government to exclude a given alien.[44]

The only apparent exception to the principle of non-justiciability that was elucidated in *Knauff* is the long-standing but limited right of judicial access granted to excludable aliens via a *habeas corpus* proceeding—a right that is of constitutional rather than statutory origin.[45]

Recent Supreme Court decisions addressing the reviewability of legislative classifications affecting the rights of aliens to enter the United States or of those not formally admitted to receive social benefits have continued to emphasize the limited authority of the courts to review essentially "political" decisions with respect to such

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sion of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted only upon such terms as the United States shall prescribe.").

42. Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

43. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

44. *Id.* at 543.

45. *See supra* note 14. Thus, the Supreme Court in Ekiu v. United States, 142 U.S. 651, 660 (1892) permitted an excludable alien seeking an opportunity to land in the United States access to the federal courts *via* a *habeas corpus* proceeding despite the fact that no statute so provided, and that the immigration treatment he sought was not required by statute.

aliens.[46] Thus they lend additional support to the longstanding view, boldly expressed in *Knauff*, that "[w]hatever the procedure authorized by Congress is [for exclusion], it is due process as far as an alien denied entry is concerned."[47] If this view is applicable to asylum adjudication proceedings, then at least to the extent that those proceedings affect applicants who are potentially excludable rather than deportable, no legal issues are raised with respect to appropriateness of the review format proposed by the Simpson-Mazzoli Bill in any of its versions. The governmental interest will be paramount, no interest-balancing will be required, and the only issue, clearly addressable *via* a writ of *habeas corpus*, will be whether the procedures for determining and reviewing claims, as set forth in statute and by regulation, are actually being followed.[48]

III.

Given the reluctance of the Supreme Court in any recent decision to renounce precedent—in this instance, a line of cases that constitutes "not merely 'a page of history' . . . but a whole volume"[49]—it is highly unlikely that any *per se* legislative limitation on the right of aliens to enter the United States will be found to be an unconstitutional denial of due process. Thus, should Congress abolish the present provisions of the I.N.A. providing for asylum and the withholding of exclusion, renounce the 1967 Protocol relating to the Status of Refugees,[50] and subject all aliens not yet in the United States to summary exclusion proceedings, irrespective of claimed persecution, such action—despite its patent inhumanity and clear disregard for international legal standards—might well prove nonjusticiable. Similarly, if the statutory and treaty provisions providing for with-

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46. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977); Matthews v. Diaz, 426 U.S. 67, 81-82 (1976).

47. 338 U.S. 521, 544 (1950).

48. *See* S. Rep. No. 485, *supra* note 3, at 14:

> the restriction on judicial review [proposed by the Senate] is not intended to prevent a federal court from correcting through habeas corpus proceedings a violation of due process. On the other hand, the Committee intends that there be no judicial review of the merits of any individual asylum case, and no judicial review of the procedural aspects of any particular adjudication unless the petitioner has alleged procedural defects which are fundamental and clearly prejudicial.

49. Galvan v. Press, 347 U.S. 522, 530 (1954) (citation omitted), *cited with approval in* Fiallo v. Bell, 430 U.S. 787, 792-93 n.4 (1977) and Kleindienst v. Mandel, 408 U.S. 753, 766 (1972).

50. *Done* Jan. 21, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967, *entered into force* for U.S. Nov. 1, 1968) [hereinafter cited as 1967 Protocol].

holding of deportation and non-*refoulement* (non-returnability) were abolished, deportable aliens might well find that probable persecution afforded them no protection in the United States courts.[51] Thus, it is likely that the right to seek asylum or withholding is no more absolute than is the right to obtain an abortion at public expense.[52]

Yet nothing in the Simpson-Mazzoli bill suggests that Congress has any intention of limiting the substantive right it granted by treaty in 1968 and fully incorporated into domestic law in 1980. Instead, both the Senate and House bills retain the I.N.A. provisions for statutory asylum and the provisions that modified the "withholding of deportation" provisions of I.N.A. § 243(h) to provide for withholding of exclusion.[53] Nor, as the Senate Report makes clear, do any of the provisions of the Simpson-Mazzoli bill "change the mandatory nature of the relief under I.N.A. § 243(h)"[54] that was first established in 1980.

Here a distinction must be made between "asylum" and "withholding". "Asylum" can be granted before an order of exclusion or deportation issues. As set forth in I.N.A. § 208, asylum is a matter of administrative discretion. Asylum, if granted, gives the recipient a right to remain in the United States until the well-founded fear of persecution disappears. During the asylum period the recipient, under some circumstances, will be permitted to adjust his or her status to that of permanent resident.[55] "Withholding of deportation or exclusion," as set forth in I.N.A. § 243(h), is modeled on the opera-

51. A more difficult question was presented prior to the enactment of the 1980 Refugee Act, when the protection afforded by the 1967 Protocol was, in literal terms, more extensive than the provisions of I.N.A. § 243(h), 8 U.S.C. § 1253(h) (1976) (prior to amendment). The position commonly taken by administrative agencies and the courts was that the 1967 Protocol afforded rights no more extensive than those granted by statute. *See In re* Dunar, I. & N. Dec. (BIA 1973); Pierre v. United States, 547 F.2d 1281 (5th Cir. 1977). *But see* Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977).

The Refugee Act of 1980 has recently been interpreted as bringing domestic law into conformity with international standards. *See infra* note 67.

52. *See* Harris v. McRae, 448 U.S. 297 (1980).

53. The 1980 revisions of I.N.A. § 243(h), codified at 8 U.S.C. § 1253(h) (Supp. IV 1980), qualify the circumstances under which the Attorney General may "deport *or return* (emphasis added) an alien whose life or physical safety is threatened. This clause, which is reflected in current regulations, makes the section applicable to aliens in deportation as well as exclusion proceedings. *See e.g.*, 8 C.F.R. §§ 208.3(b), 208.10(f) (1981).

54. S. REP. No. 745, *supra* note 3, at 37.

55. Such adjustment of status is controlled by the provisions of I.N.A. § 209, 8 U.S.C. § 1159. In general, only 5,000 asylees per year can adjust their status, and no adjustment can occur until a year has elapsed from the grant of asylum.

tive language of Article 33(1) of the 1951 Convention.[56] It is equally applicable to aliens at a port of entry or already physically present in the United States but is not available until deportation or exclusion proceedings commence.[57] Withholding gives the successful applicant no positive immigration status; that is, excludable aliens can still be excluded and deportable aliens deported. But under the terms of both the treaty and the statute, no alien whose life or physical safety is threatened because of his race or religion, political opinion, or membership in a particular social group can legally be returned *to the country of threatened persecution* so long as the threat persists. As the Refugee Act of 1980 and several Courts of Appeals cases interpreting it make clear, the government *must* withhold deportation or exclusion if probable persecution can be shown.[58]

Withholding thus creates an entitlement that is at once more limited and more unequivocal than statutory asylum. The entitlement is more limited than asylum because it does not necessarily permit the grantee to remain in the United States, although that may be the practical effect of a decision in his favor.[59] Yet the entitlement is also more unequivocal than asylum because it *requires* the government fairly to evaluate every claim and to observe the principle of non- *refoulement* even after excludability or deportability is found, provided that probable persecution is shown. Withholding is therefore the final recourse of an alien claiming persecution: it permits the alien to claim protection as a matter of statutory and treaty right when it is not afforded as a matter of

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56. Article 33(1) of the Convention relating to the Status of Refugees, *Done* July 28, 1951, 189 U.N.T.S. 137 [hereinafter cited as 1951 Convention] provides:

> No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.

In operative terms, this provision is identical to I.N.A. § 243(h), 8 U.S.C. § 1253(h) (Supp. IV 1980), which provides:

> (1) The Attorney General shall not deport *or* return any alien . . . to a country if [he] determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

57. 8 C.F.R. § 208.3(b) (1982).

58. *See, e.g.*, Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982); McMullen v. Immigration and Naturalization Service, 658 F.2d 1312 (9th Cir. 1981). *See also* Braithwaite v. INS, 633 F.2d 657 (2d Cir. 1980).

59. Thus, for example, because under present law an excludable alien must be returned *to his country of origin*, a finding of probable persecution should prevent exclusion proceedings from being completed. *See* I.N.A. § 237(a), 8 U.S.C. § 1227(a) (1976).

administrative grace.[60] The law at present recognizes the fundamental distinction between statutory asylum and withholding by providing more extensive procedural rights to those seeking withholding. Thus, it appears that a denial of asylum by an immigration judge is not reviewable as a matter of right in any forum, administrative or judicial.[61] On the other hand, a denial of withholding is subject to *de novo* review before the currently constituted Board of Immigration Appeals,[62] may be collaterally attacked thereafter through law suits in the district courts by bringing class actions alleging systematic violation of I.N.S. procedures,[63] and, in the case of deportable aliens, may ultimately be reviewed by the Court of Appeals.[64]

The question presented by the changes currently proposed in asylum adjudication procedures therefore is not whether Congress may abolish the right to non-*refoulement*, nor even whether it may provide for the summary exclusion of aliens, but rather, given the continuing commitment of the Congress to the principle of non-*refoulement*, whether the changes it is presently proposing meet the requirements of due process.

Before 1970, this question would have had little constitutional relevance, since it is clear that the opportunity to seek asylum is, in traditional terminology, a "privilege" rather than a "right". Yet in that year, the Supreme Court rendered a landmark decision in *Goldberg v. Kelly*,[65] which ordered that a hearing not provided by statute or existing administrative procedures be held before the government was permitted to cut off public assistance benefits, even though these benefits were not constitutionally required. In *Goldberg*, the Court rejected the governmental contention that because "public assistance benefits are a 'privilege' and not a 'right,' "

60. It has not been settled as to whether the provisions of the 1967 Protocol, as it incorporates the 1951 Convention, are "self-executing," and thus an independent source of rights for an asylum applicant. *See* Vigile v. Sava, 535 F. Supp. 1002, 1018 n.28 (S.D.N.Y.), *rev'd on other grounds sub nom.* Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982).

61. Although current regulations *(see* 8 C.F.R. § 208 (1982)) administratively link "asylum" and "withholding" proceedings, they remain statutorily distinct. Thus, the finding in Fleurinor v. INS, 585 F.2d 129, 135 (5th Cir. 1978) that "[a] 'feared persecution' claim under § 243(h) . . . is part and parcel of the deportation proceeding" while "[a]n asylum claim, on the other hand, can obviate the need for any deportation proceedings at all" continues to be applicable.

62. *See* 8 C.F.R. §§ 103.5, 236.7 (1982).

63. *See, e.g.*, Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd* 676 F.2d 1023 (11th Cir. 1982); Fernandez-Roque v. Smith, 91 F.R.D. 117 (N.D. Ga. 1981).

64. I.N.A. § 106(a), 8 U.S.C. § 1105a(a) (1976).

65. 397 U.S. 254 (1970).

no hearing rights could be implied.[66] Two years later, in *Board of Regents v. Roth*, Justice Stewart, speaking for the Court, stated that "the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights . . .. [T]he Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process."[67]

The *Goldberg* line of cases is consistent with the distinction made in 1954 by Justice Frankfurter in *Galvan v. Press*, namely, that while the "formulation of [immigration] policies is entrusted exclusively to Congress," in their "enforcement . . . the Executive Branch of the Government must respect the procedural safeguards of due process."[68] *Galvan*'s underlying rationale—that property and, in particular, liberty interests, however created, are entitled to procedural protection—is clearly relevant to requests for withholding of deportation or exclusion. The statutory and treaty provisions establishing withholding (or non-*refoulement*) are both based on the objective of protecting individuals from the ultimate deprivations of liberty, namely, persecution and death. In having chosen to extend protection to those facing persecution, Congress must therefore be presumed to intend the natural consequence of that act. "Due process," in the context of I.N.A. § 243(h) application processing, is not merely "what the Congress says it is," but, instead, is the minimal set of procedures that will guarantee that the applicant has the right to be heard and that the hearing is fundamentally fair. In determining whether these standards have been met, the principles of fairness incorporated in the international standards to which the United States has adhered in its ratification of the 1967 Protocol and the I.N.A.[69] as well as the more general standards elucidated by general domestic legal principles must be followed.

IV.

The guidance provided by controlling international standards suggests that the currently proposed House procedures for adjudicating asylum claims will fulfill the requirements of due process in every respect. The Senate bill is considerably more problematic because

66. *Id.* at 261-63 (quoting Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969)).

67. Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972).

68. Galvan v. Press, 347 U.S. 522, 531 (1954).

69. *See* Stevic v. INS, 678 F.2d 401, 407-10 (2d Cir. 1982). *See also* Scanlan, *supra* note 6.

of the differential treatment it affords applicants who are excludable rather than deportable and because of the continuing State Department role it delineates.

The relevant texts are Articles 1(A)(2) and 33(1) of the 1951 Convention relating to the Status of Refugees and the interpretation of their terms by the United Nations High Commissioner for Refugees (U.N.H.C.R.). Article 33(1), which serves as the basis for I.N.A. § 243(h),[70] restricts the right of every contracting state to "expel or return" any refugee except those who, under Article 33(2), constitute "a danger to the security" of the country of refuge, or who may be deemed to constitute a danger to the community because of the commission of a serious non-political crime. An implied definition of "refugee" exists in Article 33 which is fully consistent with that set forth in Article 1(a)(2) and, despite a Senate interpretation adjudging it more restrictive, probably as extensive. Both the Article 33 and the Article 1(A)(2) definition are consistent with that set forth in I.N.A. § 101(a)(42).[71] A finding of refugee status under I.N.A. § 101(2)(42) is a necessary predicate of asylum under INA

70. *See supra* note 56.

71. Article 1 A.2 of the 1951 Convention, *supra* note 56, *as modified* by Art. 1(2) of the 1967 Protocol, *supra* note 48, defines a "refugee" as a person who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality [or former habitual residence] and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.

This definition contains no specific reference to a "threat" to an individual's "life or freedom", as does Article 33(1).

The 1951 Convention definition has been adopted with only minor changes in I.N.A. § 101(a)(42), 8 U.S.C. § 1101(a)(42) (Supp. IV 1980), which in the aftermath of the 1980 Refugee Act, defines the term "refugee." The discretionary grant of asylum under I.N.A. § 208, 8 U.S.C. § 1158 (1976) is applicable to refugees, who must demonstrate such well-founded fear. The current position of the Senate is that applicants for withholding under I.N.A. § 2-13(h), 8 U.S.C. § 1253(b) (1976) must demonstrate something more than fear, i.e., must demonstrate the existence of the threat giving rise to that fear. Thus, S. Rep. No. 745, *supra* note 3, at 37 states:

> deportation of aliens denied asylum is subject to the treaty obligations of the United Nations under the Protocol . . .. Such treaty obligations require that the United States not return an alien to a country where his 'life or freedom' would be threatened . . .. *Therefore, where the 'persecution' involved is not so severe as to threaten life or freedom . . . then the Attorney General may deport the alien.*

(emphasis added).

This interpretation of I.N.A. 243(h) was never employed by Congress when the 1980 Refugee Act was drafted. Instead, the House and Senate at that time both announced an intention to conform U.S. law to international legal standards. *See* H.R. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980); S. Rep. No. 256, 96th Cong., 1st Sess., 4 (1979). A substantial body of interpretation existing in 1980 indicated that despite differences in the formulation of Art. 1.A2 and Art. 33(1), the drafters of the 1951 Convention had never intended to distinguish between the circumstances

§ 208 and is specifically required of applicants for withholding under every version of the Simpson-Mazzoli bill.

Since 1951, the U.N.H.C.R. has developed a substantial body of criteria to be used by nations in determining which applicants are refugees. These criteria are collected and systemized in the U.N.H.C.R. *Handbook on Procedures and Criteria for Determining Refugee Status* ("Handbook").[72] In general, they interpret the nature of persecution that entails protection under the 1951 Convention and 1967 Protocol and provide the appropriate analytical method of determining whether persecution exists in a particular case. Although the individual applicant bears the burden of proof,[73] the individual's need to be heard, the importance of credibility in proceedings where hard facts are difficult to obtain, the fact-finders' obligation to use information from all available sources to determine that credibility,[74] and the necessity of giving the applicant "the benefit of the doubt"[75] in evaluating his or her testimony are considered.

Nothing in the 1951 Convention or 1967 Protocol "specifically regulate[s]"[76] the procedures according to which the appropriate criteria should be applied. Nevertheless, in a report to the United Nations General Assembly, the U.N.H.C.R. has recommended that the refugee (i.e., non- *refoulement*) procedures of all countries

> should satisfy certain basic requirements. Those basic requirements, *which reflect the special situation of the applicant for refugee status, . . . and which would ensure that the applicant is provided with certain essential guarantees*, are the following:
>
> (i) The competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. *He should be required to act in accordance with the principal of non-refoulement and to refer such cases to a higher authority.*

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of the individuals covered by each. *See* Weiss, *International Protection of Refugees*, 48 AM. J. INT. L. 193 (1954).

72. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1979).

73. *Id.* at ¶ 196, p. 47.

74. *Id.*

75. *Id.* at ¶ 203, p. 48.

76. *Id.* at ¶ 189, p. 45.

(ii) The applicant should receive the necessary guidance as to the procedure to be followed.
(iii) *There should be a clearly identified authority (wherever possible a single central authority) with responsibility for examining requests for refugee status and making a decision in the first instance.*
(iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
(v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.
(vi) *If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.*
(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country *while an appeal to a higher administrative authority or to the courts is pending.*[77]

Although the House bill does not make it entirely clear how the government will grant potential claimants access to either the asylum/non-*refoulement* system or the U.N.H.C.R. representative, the bill otherwise conforms procedurally to the minimal standards elucidated by the U.N.H.C.R. with respect to the competency of those conducting initial hearings and the conduct of the hearings. The use of specially trained immigration judges and their participation in every exclusion and asylum case, when coupled with the omission of a specific State Department role in the determination process, should result in fairer initial evaluations than are obtainable under the present United States system. However, because the Senate bill establishes summary exclusion as the norm, it is by no means clear that the immigration officer first handling a case will be under any pressure to "act in accordance with the principle of non-*refoulement*" or will in fact do so. It is equally unclear whether every potential applicant will "receive the necessary guidance as to the procedure to be followed" in claiming refugee status or will be afforded any opportunity to contact a U.N.H.C.R. representative.

77. 32 U.N. G.A.O.R. Supp. (No. 12) para. 53(6)(e), U.N. Doc. A/32/12/Add. 1 (19—), reprinted in HANDBOOK, *supra* note 72, at ¶ 192, p. 46 (emphasis added).

Under a summary exclusion model the right to remain in the country of asylum pending appeal may also prove to be illusory, since the opportunity to apply for asylum before rapid removal from the country may be the critical issue.

In evaluating the due process implications of summary exclusion as they relate to asylum and, by implication, to withholding, the emphasis is necessarily on the likely practical implications of procedures that have not yet been promulgated. Obviously, it is possible that summary exclusion could be put in the hands of a dedicated cadre of I.N.S. officials sensitive to the potential asylum claims of every alien, and responsive to their rights under international law. But experience suggests otherwise.[78] Similarly, experience suggests that when the basis of an I.N.S. decision on a particular claim is predicated on a State Department evaluation of the claim's merits, international legal standards will often be ignored in the interests of political expediency.[79] The Senate bill's explicit directive that immigration judges hearing asylum applications use State Department human rights reports as "general guidelines"[80] in making their determinations, with no provision made for alternative sources of human rights information, thus renews existing concerns about the use to which so-called State Department "advisory opinions" will be put. It is possible that the State Department will use its power to preclude an individual applicant from making his or her aslyum claim, given specific language in the Senate bill that would permit the "Secretary of State [to] submit comments to the immigration judge" with respect to a particular claim.[81]

V.

Summary exclusion and the continuing State Department role in the asylum process have the potential not only of undercutting the general principle of non-*refoulement* but of vitiating that privilege as it is afforded by I.N.A. § 243(h). Thus summary exclusion may have the effect of denying a deserving potential applicant of the opportu-

78. Thus, a consistent theme in litigation involving Haitian and Salvadorian asylum applicants has been the unwillingness of those processing their claims to give more than *pro forma* attention to the *bona fides* of their assertions of "well-founded fear." *See* Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd* 676 F.2d 1023 (11th Cir. 1982).

79. Kasravi v. INS, 400 F.2d 675, 677 n.1 (9th Cir. 1968); Paul v. INS, 521 F.2d 194, 200 (5th Cir. 1975); *Cf.* Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976).

80. S. 2222, *supra* note 3, at § 124(a)(1)(B)(i).

81. *Id.* at § 124(a)(1)(B)(ii).

nity to be heard; State Department intervention may make the hearing *pro forma* and deny the applicant the practical opportunity of bearing his burden of proof. Yet the due process implications of each denial are different.

It has already been noted that summary exclusion, at least under traditional views of the plenary power of Congress to legislate restrictively with respect to aliens not yet admitted to the United States, is probably not *per se* unconstitutional. Yet if such a procedure is enacted, its practice may quickly demonstrate that it is incompatible with the guarantee of non-*refoulement* contained elsewhere in the I.N.A. and in the Simpson-Mazzoli bill. In such a case, it would be entirely appropriate for the judiciary to reconcile the objective of summary exclusion, namely, greater governmental efficiency in stemming unwanted immigration, with that of non-*refoulement*, namely, the protection of all refugees, including those who have been administratively precluded from filing apparently valid claims. Since it can be presumed that deserving claimants would file applications on their own behalf if they were aware of their legal rights, the appropriate plaintiffs in such a legal action will probably be third parties with the standing necessary to bring a suit under I.N.A. § 279,[82] which in its present form grants the District Court general jurisdiction over matters arising under the immigration laws, including systematic denials of rights afforded by those laws.[83] Although the Senate may have sought to preclude the possibility of bringing such a suit, nothing in its version of the Simpson-Mazzoli bill clearly succeeds in doing so. Even if such a restriction could be implied, the observation of Professors Gellhorn and Byse, which is buttressed with examples from two deportation cases, might well control: "Although explicit statuory provisions purporting to bar judicial review are not common, on occasion Congress has directed that designated administrative action shall be final. When vital personal interests are at stake, finality clauses are given a restrictive meaning."[84]

82. 8 U.S.C. § 1329 (1976).

83. *See* Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 459-61 (S.D. Fla. 1980), *aff'd* 676 F.2d 1023, 1035 (11th Cir. 1982). (In affirming, the Circuit distinguished between the authority to hear cases based on individual deportation orders, and "the authority of a district court to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged." 676 F.2d at 1033.)

84. W. GELLHORN and C. BYSE, ADMINISTRATIVE LAW, 220-21 (6th ed. 1975) citing Lloyd Sabudo Soc'y v. Elting, 287 U.S. 329 (1932) and Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

Prejudicial State Department evaluations of particular claims, because they arise in the context of ongoing asylum adjudications, have a somewhat different status. Recent judicial decisions[85] and commentary evaluating those decisions[86] suggest that individual applicants denied withholding stand a good chance of obtaining reversal of negative determinations that are not based on substantial evidence in the record considered as a whole. All determinations based primarily on State Department opinions about the "general conditions" prevailing in particular countries, if rebutted by evidence of persecution particular to the applicant, are inherently suspect.[87] The present mechanism for obtaining reversal is for the applicant to obtain *de novo* administrative review in the Board of Immigration Appeals, to be followed, if necessary, by direct recourse to the Court of Appeals by deportable aliens and discretionary recourse to the District Court under I.N.A. § 279 by excludable aliens. It is precisely these avenues of review that the Senate bill, as well as the original version of the House bill, would explicitly abrogate through the creation of a new, exclusive reviewing agency, the United States Immigration Board. The remaining questions to be addressed are whether such a board, with such responsibilities and jurisdiction, can ever meet the requirements of due process and if so, under what conditions.

VI.

It is likely that due process in dealing with asylum claims asserting the right of non- *refoulement*, under both prevailing international and domestic legal standards, requires some avenue of review of initial negative determinations. It is fairly clear, however, that the power of review is not limited to the judiciary but can be delegated exclusively to an administrative body.

Accordingly, the U.N.H.C.R. guidelines, although requiring an opportunity "for a formal reconsideration of the decision", specify that such reconsideration can be "either to the same or different au-

85. McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981); Stevic v. INS, 678 F.2d 401 (2d Cir. 1982).

86. *See* Scanlan, *supra* note 56, at 272.

87. *See* Zamora v. INS, 534 F.2d 1055, 1061-1063 (2d Cir. 1976). Judge Friendly's analysis in that case lends inevitably to the findings in *McMullen* and *Stevic* that under the new refugee act, the creditable testimony and documentary evidence presented by individual applicants weighs more heavily than generalized official opinions, unsupported by substantial evidence, about ineligibility for withholding of deportation.

thority [as that which issued the original determination], whether administrative or judicial, according to the prevailing system."[88] The United Nations has recently reviewed the procedures for evaluating and reviewing asylum claims in 28 nations, including such western democracies as Canada, Australia, Austria, West Germany, and Belgium. Only *one* of these nations, Lesotho, provided for direct judicial review of the asylum decision by a court of law. Three others permitted limited review in the indigenous administrative court system. The remainder permitted the original evaluator to renew the evaluation proceeding but provided no hearing before a second body; permitted a special administrative review board, similar to the United States Immigration Board, or a specially-designated government official, to review the initial decision; or made no provision whatsoever for any type of review, administrative or judicial.[89]

Domestic law similarly permits review that is exclusively non-judicial, at least in some circumstances. Whatever right to judicial review the Constitution affords in certain circumstances, it does not always afford such a right. According to Professor Jaffe: "Congress, barring constitutional impediments, may indeed exclude judicial review."[90] In *Estep v. United States*, the Supreme Court stated, "Except when the Constitution requires it, judicial review of an administrative action may be granted or withheld as Congress chooses."[91] According to Professor Davis:

> Cutting off judicial review of some administrative action is impermissible in some circumstances. One reason we have so much judicial review of discretion is that our constitutional tradition calls for it. But [Prof. Raoul] Berger's position . . . that all discretion must be reviewable for arbitrariness or abuse . . . is not at all supported by constitutional doctrine. My position is that *some* administrative discretion is unreviewable for arbitrariness or abuse . . . under the Constitution.[92]

The assumption underlying this discussion is that review of non-*refoulement* determinations is no longer discretionary. Thus, the question of review is addressed to the minimal protection necessary

88. HANDBOOK, *supra* note 77, at ¶ 192.

89. United Nations General Assembly, *Note on Procedures For the Determination of Refugee Status Under International Standards* (A/AC.96/INF 152/Rev. 1) 21 Sept. 1979.

90. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 432 (1958).

91. 327 U.S. 114, 120 (1946).

92. Davis, *Administrative Arbitrariness—a Postscript*, 114 U. PA. L. REV. 823, 831 (1966).

to guarantee that the mandate expressed in Article 33 and I.N.A. § 243(h) is actually and fairly carried out by administrative officers. Review of some sort is clearly necessary to achieve this objective.[93] Yet the special judicial deference to immigration-related decision-making renders it highly unlikely that the courts will be required to participate as a reviewing body.

Deportation cases provide a useful analogy. For at least a hundred years, the courts have recognized that expulsion implicates a number of important personal interests of the deportable alien—interests that are comparable to, if not as weighty as, the interests of a criminal defendant seeking to avoid imprisonment.[94] Recognition of these interests led Congress, over the course of some eighty years, significantly to expand the opportunity afforded an alien in deportation proceedings to obtain administrative and judicial review of a negative decision. Yet the Supreme Court, in a long series of cases, refused to find any constitutional right of judicial review.[95] Thus, the current law appears to be that stated in 1952 in *Carlson v. Landon*, namely, that "[t]he power to expel aliens . . . may be exercised entirely through executive officers, with such opportunity for judicial review as Congress may see fit to authorize or permit."[96] Yet this broad grant of authority is conditioned by the following language: "[t]his power is, of course, subject to judicial intervention

93. The gravamen of current objections to the present asylum process is not only that it is too slow, but that in too many cases, the government's mandatory duty to grant withholding upon an applicant's meeting of the burden of proving probable persecution is ignored. The Senate's proposed structure of review appears to be unprecedented in establishing a final, "discretionary" level of review for a duty which remains by its terms mandatory, by permitting the Attorney General, upon his determination of the "national interest" (S. 2222, *supra* note 3, at § 122(a)), to overturn the findings of the U.S. Immigration Board. Such a structure of review, which would effectively subordinate the U.S. Immigration Board's Function of quasi-judicial review to the Attorney General's political determination, appears to be the "perfect exemplification of the practices so unanimously condemned," Wong Yang Sung v. McGrath, 339 U.S. 33, 45 (1950), by President Roosevelt's Committee on Administrative Management in 1937—the progenitor of the Administrative Procedure Act. *Id.* at 37, 41-44. It would render nugatory the requirement that administrative decisions be based on a reviewable record. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

94. *See, e.g.*, Carlson v. Landon, 342 U.S. 524, 537 (1952). ("Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the constitution. [Yet it] is a particularly drastic remedy.") *Cf.* Woodby v. INS, 385 U.S. 276, 285-86 (1966) (deprivation threatened is so extreme that no deportation can be enforced except upon "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.").

95. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893); Marcello v. Bonds, 349 U.S. 302 (1955).

96. Carlson v. Landon, 342 U.S. 524, 537 (1952).

under the paramount law of the Constitution."[97] And in *The Japanese Immigrant Case*, it was made clear that in deportation proceedings, executive officers cannot, under the Constitution, "arbitrarily . . . cause an alien . . . to be deported without giving him the opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized."[98] *Goldberg* extended the principles of due process with respect to hearings to privileges of statutory origin. The implication arising from the fact that administrative agencies cannot act arbitrarily is unmistakable: some body must have authority to review their acts. If that body need not be the courts (outside of the limited context of a *habeas corpus* hearing), then at least it must be an administrative body disciplining the conduct of administrative officers.[99] Thus, as the Court noted in *Japanese Immigrant*, the order of deportation at issue in that case only became "final and conclusive" when administrative means at the appellant's disposal had not been exhausted: "no appeal was taken to the Secretary from the decision of the Immigration Inspector."[100]

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97. *Id.*

98. The Japanese Immigrant Case, 189 U.S. 86, 101 (1893).

99. In the area of immigration, administrative review of initial agency decisions has grown increasingly systematic, and increasingly independent of the original decisionmaker since 1921, when an advisory Board of Review was created in the Department of Labor, the agency then empowered to decide immigration cases. In 1931, the Wickersham Commission recommended that an independent tribunal for handling deportation cases be established, completely separate from the agency handling enforcement functions. However, final decisions continued to be made by the Secretary of Labor upon the recommendation of an advisory board until 1940, when the Immigration and Naturalization Service was established, and the present Board of Immigration Appeals (BIA) created. Approximately 80% of the cases reaching the BIA are never subjected to any additional review, either because, as in the case of exclusion decisions, statutory appeal is not available, or because no appeal is taken to the courts. The BIA is not entirely independent of the INS, since its members are appointed by the Commissioner, and have no statutory tenure of office. The BIA, under the provisions of 8 C.F.R. § 3.1(h) (1982), may also refer its decisions to the Attorney General for final decision, although such referrals are in fact rare. Thus, the BIA does not entirely meet the objective of providing an impartial, non-judicial authority to review INS decisions, *see* Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW. 644 (1981). But its existence points, nevertheless, to the sort of long-developing independence which is threatened by the provisions of S. 2222. *See* Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977).

100. 189 U.S. at 102. However, the case was decided during a period when the existence of the Secretary's review power implied no limitation of any sort on the discretion of the government in deciding the cases before it.

VII.

Since *Japanese Immigrant*, decided 80 years ago, due process jurisprudence has developed rapidly, although probably less rapidly in immigration law than in any other area. There has been greater emphasis on the particular liberty interests implicated by governmental action, greater awareness of the personal effects of particular deprivations, greater differentiation between the standards of review—and reviewability—applicable to discretionary governmental conduct on the one hand and mandatory conduct on the other, and (it is likely) greater willingness to see that administrative officers do not always act fairly. All these suggest that today a method of review that would permit only the Secretary of a Department to monitor the behavior of his subordinates when such behavior has life-or-death implications for an asylum seeker would be found constitutionally infirm. I use the word "suggest" because I know of no case directly on point. Nevertheless I am convinced that the review mechanism envisioned by the Senate would in fact deny due process to asylum applicants.

In so suggesting, I am not arguing against the probable legality of a United States Immigration Board's functioning as the sole means of reviewing initial asylum and withholding determinations. Properly constituted as a Title I administrative court or its equivalent or as an independent administrative agency, such a board would be fully competent to assess the sufficiency of evidence elucidated by immigration judges. Appointed by the President and subject to Senate confirmation, and free of any oversight by the Department of Justice, it could function in a judicial rather than a political manner to develop fair standards for adjudicating asylum claims. Such a board could probably do all of this more expeditiously than could a Court of Appeals and arguably might better balance the interests of the government, which seeks to control immigration, and the individual applicant, who seeks to avoid persecution.

The Senate bill, however, by taking away the Board's independence and assiduously rooting out all direct and collateral means of reviewing its decisions, essentially makes it a political rather than a quasi-judicial body. By subjecting the Board's decisions to the Attorney General's veto, the bill further politicizes it. Permitting judicial review of the Attorney General's action after he has exercised his veto is a hollow concession, since the standards under which the

Court of Appeals would be permitted to overturn the Attorney General are by no means clear.[101]

Withholding of deportation is an important privilege. It has been subject to extensive manipulation in the past, to the detriment of individual applicants. The courts are only now beginning to address these abuses of the administrative process. To institutionalize a system that prevents the courts from continuing their inquiry, yet substitutes no alternative mechanism for insuring fairness, is surely to sacrifice due process in the interests of expediency. What is needed is a better balance—one that finds a clearer equilibrium between the undoubted interests of the state and the unnegotiable interests of the individual who faces persecution.

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101. As proposed by S. 2222, *supra* note 3, at § 122(a), a decision could be made by the Attorney General on cases certified to him at his request by the United States Immigration Board. Such certification would follow a determination on his part that his review was "necessary for the national interest." The proposed statutory language requires that the Attorney General's decision then be rendered within thirty days. But it lists no considerations that the Attorney General would be required to take into account, nor stipulates any evidentiary standard that would be required before he could reverse a ruling below. In other words, his discretion would be absolute. Therefore, despite the fact that as proposed by Section 123(b), the Attorney General's decision would be subject to judicial review under INA § 106(a), 8 U.S.C. § 1105a(a), and apparently would be reviewable on the basis of "substantial evidence in the record considered as whole," such evidence would probably be unavailing if the Attorney General asserted that he was acting within his discretionary authority in order to facilitate some national interest.