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Immigration Reform: Congress Expedites Illegal Alien Removal and Eliminates Judicial Review from the Exclusion Process

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Immigration Reform: Congress Expedites Illegal Alien Removal and Eliminates Judicial Review from the Exclusion Process

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I. OVERVIEW

This note discusses one significant change made by a series of new legislation regarding immigration, namely, the new authority vested in the Immigration and Naturalization Service ("INS") to remove undocumented aliens found in the interior of the country without judicial review. Part II reviews the current conditions of illegal immigration in the United States. Part III distinguishes the two categories of undocumented aliens based on the immigrant's entry status. Part IV examines the new legislation as it applies to illegal immigrants who seek entry into the United States. Part V discusses procedural due process concerns raised by the change made by the new law. Part VI concludes with a summary of the significance of the new law in addressing the problem of illegal immigration in the United States.

II. INTRODUCTION

Between four and five million illegal aliens currently populate the United States. Approximately eighty percent of them live in only seven states: Arizona, California, Florida, Illinois, New Jersey, New York, and

Texas.[1] An estimated 400,000 additional illegal aliens enter the United States each year.[2] One major area of concern raised by this growing number of undocumented aliens is employment.[3] Nearly thirty percent of all jobs in the United States require low-skilled work, which illegal aliens typically seek.[4] Professor Donald Huddle of Rice University claims that for every twenty undocumented aliens working in this country, thirteen Americans are out of jobs.[5] The economic cost, according to Huddle, may run as high as thirty billion dollars a year in unemployment payments, services, and lost taxes.[6]

In the early 1970s, the Federal Government's attention to immigration heightened. At that time, Haitians began a steady migration to the United States. By 1981, the number of undocumented Haitians living in the South Florida area was estimated at thirty-five thousand.[7] The number of Haitian immigrants, however, pale somewhat in the face of the Cuban migration of 1980. The Mariel boatlift or "Freedom Flotilla" brought approximately 125,000 Cubans to the United States within a matter of weeks.[8] Today, the number of illegal aliens estimated in this country continues to grow.[9] Contributing substantially to the illegal population is the influx of approximately 250,000 undocumented Mexican aliens that cross the border into Texas every year.[10] The increasing number of illegal aliens and their calculated burden imposed on the seven states with heavier concentrations of illegal aliens have caused some politicians to seek action.[11]

On March 14, 1995, Florida Governor Lawton Chiles appeared before the Senate Subcommittee on Immigration to request reimbursement for the

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1. John Boehner, *Immigration in the National Interest Act*, FED. DOCUMENT CLEARING HOUSE, Mar. 18, 1996, at 4, *available in* 1996 WL 8784701.

2. *Id.* at *5.

3. David Goddy, *Illegal Immigrants: What They Cost, What They Contribute*, SCHOLASTIC UPDATE, Sept. 6, 1985, at 12, available in LEXIS, News Library, Arcnws File.

4. *Id.*

5. *Id.*

6. *Id.*

7. Jean v. Nelson, 711 F.2d 1455, 1464 (11th Cir. 1983), *cert. granted*, 469 U.S. 1071 (1984), *aff'd*, 472 U.S. 846 (1984).

8. *Id* at 1464.

9. Dick Kirschten, *After The Flood, Boom Times?*, 26 THE NAT'L J. 91, Jan. 8, 1994, at 12, *available in* LEXIS, News Library, Arcnws File.

10. Gretchen Parker, *Study Cites Inaccuracies in Illegal Immigrant Data*, HOUSTON CHRON., Oct. 5, 1995, at 6.

11. Ellen Debenport, *Chiles Now Has Captive Audience on Immigration Series*, ST. PETE. TIMES, Mar. 15, 1995, at 4B.

one billion dollars a year the State spends for education, medical care, and a justice system for illegal immigrants.[12] Requests like these, as well as the growing concern over terrorism in this country,[13] prompted Congress to make changes in the immigration laws.[14] On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[15] One week later, the Senate voted to amend certain provisions in the AEDPA including the replacement of expedited procedures for removing undocumented aliens seeking entry into this country (as well as illegal aliens found in the interior of the United States) with a less stringent process.[16] Following months of debate concerning the amendments proposed by the Senate, on the issue of expedited removal procedures, the legislature struck a compromise which closely resembled the original version of the AEDPA.[17] On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[18] With regard to the issue under discussion in this note, the IIRIRA makes only slight conceptual changes to the law under the AEDPA while leaving its substantive effect intact.

III. BACKGROUND

The legal rights of aliens vary according to their status under the Immigration and Nationality Act of 1952 ("INA").[19] Two categories of aliens were developed based on the alien's entry status: deportable aliens and excludable aliens.[20] If the alien had effected an "entry" into the United

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12. *Id.*

13. Recent acts of terrorism commonly cited in legislative discussion include the 1993 bombing of the World Trade Center, the 1995 bombing of the federal building in Oklahoma City, and the 1988 bombing of Pan Am flight 103.

14. Thomas Martin, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201, 205 (1996).

15. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8 U.S.C.).

16. *Senate Votes to Amend Terrorism Bill, Criminal Aliens Feel Impact*, 73 INTERPRETER RELEASES 650 (1996).

17. *Clinton Vows Veto of Immigration Bill if Gallegly Amendment is Included*, 73 INTERPRETER RELEASES 1111, 1112 (1996).

18. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.).

19. *Jean*, 711 F.2d at 1466.

20. Debora A. Gorman, *Indefinite Detention: The Supreme Court's Inaction Prolongs the Wait of Detained Aliens*, 8 GEO. IMMIGR. L.J. 47, 49 (1994).

States, whether lawfully or otherwise, and upon the INS' finding of statutory reasons for the alien's removal from this country, the alien was "deportable" and required a more extensive procedural course for removal.[21] On the other hand, aliens who had not yet "entered" this country and met the statutory requirements for removal[22] were "excludable" and were afforded less procedural due process rights in an adjudication of their claim of entry.[23]

The INA defined "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise . . . ."[24] An alien who had entered this country and was subject to deportation was protected by the constitutional right to procedural due process.[25] As part of this procedural due process, the deportable alien had the right to advance notice of the charges against him.[26] The alien was given a hearing before an immigration judge where the burden of proof was placed on the government.[27] He had the privilege of being represented by counsel (at no expense to the Government) and was given reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government.[28] Final deportation orders entered against an alien were reviewable directly in federal courts of appeal.[29] Other determinations made in the course of deportation proceedings were also reviewable on appeal, as well as determinations that were made incident to motions to reopen such proceedings.[30]

An alien who was seeking entry into the United States and was subject to exclusion was limited in procedural rights as compared to an alien subject to deportation. Prior to the enactment of the AEDPA, an alien seeking entry who was found to be excludable by an immigration officer at the port of arrival (e.g., the alien was attempting to enter without legal documentation) would be detained for further inquiry to be made by an immigration judge.[31] In such proceedings before the immigration judge, the excludable alien had

21. 8 U.S.C. § 1251(a) (1994).
22. 8 U.S.C. § 1182 (1994).
23. *Jean*, 711 F.2d at 1467.
24. 8 U.S.C. § 1101(a)(13) (1994).
25. Shaughnessy v. United States, 345 U.S. 206, 213 (1953).
26. 3A AM. JUR. 2D *Aliens and Citizens* § 1135 (1986).
27. *Id.* § 1149.
28. 8 U.S.C. § 1252(b) (1994).
29. 3A AM. JUR. 2D *Aliens and Citizens* § 1247 (1986).
30. *Id.*
31. 8 U.S.C. § 1225(b) (1994).

the privilege of being represented by counsel at no expense to the Government.[32] During an exclusion hearing, a record of the proceedings was kept.[33] An alien who was excluded from the United States by a decision from the immigration judge, while not entitled to judicial review, was entitled to administrative review.[34] Both excludable and deportable aliens had the right to habeas corpus review with certain individual limitations on the scope of the review.[35]

Under this system of illegal alien removal, aliens entering the country unlawfully were afforded greater constitutional rights in their removal than aliens who presented themselves to the proper immigration authorities for entry and had their admission request denied or delayed for something as minor as improper documentation.[36] Unfortunately, this scheme rewarded the aliens who surreptitiously gain entry through unlawful means and served to punish those aliens who sought entry in this country through the proper channels.[37] With respect to this anomalous dispensation of due process among deportable and excludable aliens, the AEDPA and the IIRIRA make a significant change.

IV. THE NEW LEGISLATION

The IIRIRA substantially changes the way excludable aliens may be removed from this country by amending the INA to read:

> (b)(1)(A)(i) In general.—If an immigration officer determines that an alien . . . [other than a Cuban] who is arriving in the United States or is described in clause (iii)[38] is inadmissible under section 1182(a)(6)(C)[39] or 1182(a)(7),[40] the *officer* shall order the alien

32. 8 U.S.C. § 1362 (1994).
33. 8 U.S.C. § 1226(a) (1994).
34. *Id.* § 1226(b).
35. *See* 8 U.S.C. § 1105a(d)(1)(A)–(D) (1994). *Compare* 8 U.S.C.A. § 1105a(e)(2)(A)–(C) (West Supp. 1996).
36. Gorman, *supra* note 20, at 49.
37. *Id.*
38. Clause (iii) refers to undocumented aliens found in the United States who have not been physically present in the country continuously for the prior two years. 8 U.S.C.A. § 1225 (West Supp. 1997).
39. 8 U.S.C.A. § 1182(a)(6)(C) (West Supp. 1997). The text of the statute provides: "(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or entry into the United States or other benefit provided under this chapter is excludable." *Id.*

> removed from the United States *without further hearing or review* unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.[41]

This section of the statute apparently gives the INS the authority to remove an excludable alien from the country solely upon its own determination without the necessity of a hearing before an immigration judge. The IIRIRA further expands on this provision of limited judicial review by providing that "no court shall have jurisdiction to review . . . any individual determination or to entertain any other cause or claim," arising from the expedited removal process.[42] No court will have jurisdiction to enter declaratory, injunctive, or other equitable relief, or to certify a class.[43] Judicial review is limited only to habeas corpus proceedings.[44] Even so, such proceedings are limited to determinations of: 1) whether the petitioner is an alien; 2) whether the petitioner was ordered removed pursuant to the summary removal procedures; and 3) whether the petitioner is a lawful permanent resident, has been admitted as a refugee under section 207 of the INA, or has been granted asylum under section 208.[45] If the court determines that the alien was not subject to expedited removal, the court may not grant any relief beyond requiring that the alien be given a hearing.[46] Furthermore, in an action against an alien for improper entry or re-entry under section 275 of the INA (entry at improper place and concealment of facts) or

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40. *Id.* § 1182(a)(7)(A)(i). The text of § 1182 provides:

> Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission—
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> (I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or . . . other valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under regulations issued by the Attorney General under section 1181(a) of this title, or
>
> (II) whose visa has been issued without compliance with the provisions of section 1153 of this title, is excludable.

Id.

41. *Id.* § 1225(b)(1)(A)(i) (alteration in original).

42. *Id.* § 1252(a)(2)(A).

43. 8 U.S.C.A. § 1252(e)(2).

44. *The 1996 Immigration Act: Asylum and Expedited Removal—What the INS Should Do*, 73 INTERPRETER RELEASES 1565, 1572 (1996) [hereinafter *Asylum and Expedited Removal*].

45. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Section-by-Section Summary*, 73 INTERPRETER RELEASES 1317, 1337 (1996) [hereinafter *Illegal Immigration*].

46. *Id.*

section 276 of the INA (reentry of deported aliens), no court shall have jurisdiction to hear claims collaterally attacking the validity of orders of exclusion.[47] The IIRIRA also precludes administrative review of an exclusion order, except in cases of aliens who claim that they are permanent residents.[48] The Attorney General shall provide a prompt review of a claim made by an alien who maintains, under oath or under penalty of perjury, that they have been lawfully admitted for permanent residence.[49]

This new authority to summarily exclude an undocumented alien was broadened even further by the following provision in the AEDPA found in 8 U.S.C. § 1251:

> (d) Notwithstanding any other provision of this subchapter, an alien found in the United States who has not been admitted to the United States after inspection in accordance with section 1225[50] is deemed for purposes of this chapter to be seeking entry and admission to the United States and shall be subject to examination and exclusion by the Attorney General under part IV of this subchapter.[51] In the case of such an alien the Attorney General shall provide by regulation an opportunity for the alien to establish that the alien was so admitted.[52]

Prior to the enactment of this law, the rather broad statutory definition of "entry" was left to the courts to interpret when applying the term to excludable aliens. In the case of *In re* Phelisna,[53] a boat carrying approximately 200 undocumented Haitian immigrants landed on a beach near Miami.[54] While walking across a nearby causeway, Phelisna was apprehended by officials.[55] Phelisna claimed that she had made an entry into the United States and therefore qualified for the more comprehensive deportation proceeding rather than exclusion proceedings.[56] The court noted that

47. 8 U.S.C.A. § 1225(b)(1)(D) (West Supp. 1997).
48. *Id.* § 1225(b)(1)(C).
49. *Id.*
50. *Id.* § 1225. This section references § 235 of the AEDPA entitled "Inspection by Immigration Officers."
51. Chapter Four of the AEDPA was entitled: "Terrorist and Criminal Alien Removal and Exclusion."
52. 8 U.S.C.A. § 1251 (West Supp. 1996).
53. 551 F. Supp. 960 (E.D.N.Y. 1982).
54. *Id.* at 961.
55. *Id.*
56. *Id.* at 962.

"the statute cannot be read to mean that mere presence in the United States is enough to show an entry."[57]

In the case of *In re* Pierre,[58] a small boat of Haitian immigrants became distressed at sea and was towed into West Palm Beach.[59] Once in port, the INS determined that the group did not appear to be entitled to entry and, under the old statute, their case was referred to an immigration judge.[60] While waiting for their case to be heard, the immigrants were paroled from detention into the custody of a group of ministers.[61] After a claim for political asylum was denied, the petitioners claimed that their removal should be heard in deportation proceedings since they had made an entry into this country.[62] The court in *Pierre* set out its conclusions of the elements of entry: "An 'entry' involves (1) a crossing into the territorial limits of the United States, i.e., physical presence; plus (2) inspection and admission by an immigration officer; or (3) actual and intentional evasion of inspection at the nearest inspection point; coupled with (4) freedom from restraint."[63]

The AEDPA appeared to clarify the previous statutory ambiguity concerning entry in section 1251(d) and essentially eliminated the third and fourth elements of the court's analysis. Undocumented aliens found in the interior of the country, under the AEDPA, were considered to be seeking entry and therefore met the requirements for the more expeditious exclusion proceedings, regardless of their previous ability to elude immigration officials.

In section 301(a) of the IIRIRA, the new law supersedes the AEDPA by replacing the definition of "entry" with the concept of "admission."[64] The terms "admission" and "admitted" now refer to "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[65] In addition, the law replaces the term "excludable" throughout the INA with the term "inadmissible."[66] The IIRIRA only delineates

57. *Id. See also* Brancato v. Lehmann, 239 F.2d 663, 665 (6th Cir. 1956).
58. 14 I. & N. Dec. 467 (1973).
59. *Id.*
60. *Id.* at 468.
61. *Id.*
62. *Id.*
63. *In re* Pierre, 14 I. & N. Dec. at 468 (citations omitted).
64. *The 1996 Immigration Act: Grounds of Inadmissibility and Deportability and Available Waivers*, 73 INTERPRETER RELEASES 1641, 1642 (1996).
65. *Id.* (quoting 8 U.S.C.A. § 1101(a)(13)(A) (West Supp. 1997) (as amended)).
66. *Id.* at 1641.

between "inadmissible" aliens who are subject to the statutory "screening" process, which is in essence an expedited removal procedure similar to the exclusion process of the AEDPA, and aliens who are subject to removal proceedings, which is similar to the deportation procedure under the AEDPA. Under the IIRIRA, an alien who is encountered by the INS after they have entered the United States, and who in removal proceedings cannot show by clear and convincing evidence that they were lawfully admitted, will have the burden of showing that they are admissible.[67] The change in terminology made by the IIRIRA may appear to be a matter of semantics, but this change may have avoided what some might have considered a legal fiction in the AEDPA with respect to "entering" this country. Nevertheless, the IIRIRA leaves intact the underlying effect of the change in "entry" status originally made by the AEDPA. The enlarged authority given to the INS to summarily remove aliens found in the United States who have not been admitted without judicial review raises concerns for those aliens who are in this country illegally and are seeking political asylum.

A person may apply for asylum by two methods—affirmatively or defensively.[68] If the person seeks asylum affirmatively, then the person files

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67. *Id.* The text of the IIRIRA concerning "admission" provides:

> (13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.
>
> (B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.
>
> (C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien –
>
> (i) has abandoned or relinquished that status,
>
> (ii) has been absent from the United States for a continuous period in excess of 180 days,
>
> (iii) has engaged in illegal activity after having departed the United States,
>
> (iv) has departed from the United States while under the legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
>
> (v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or
>
> (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

8 U.S.C.A. § 1101(a)(13).

68. Maureen O. Hurley, *The Asylum Process: Past, Present, and Future*, 26 NEW ENG. L. REV. 995, 1013 (1992).

his or her claim before the government is aware that the applicant is in this country illegally.[69] A defensive claim of asylum is filed as a defense to deportation or exclusion charges.[70] The burden of proof in an asylum case requires the alien to produce evidence of past persecution or a well-founded fear of persecution.[71] The persecution the asylum seeker suffers from must be on account of race, religion, nationality, political opinion, or membership in a particular social group and not merely economic oppression.[72] Because expedited removal places almost complete decision making authority in the hands of the INS asylum officers, one commentator points out that the applicant will not have the opportunity to present his or her case de novo in front of an immigration judge, nor will the applicant have the ability to appeal an unfavorable decision to the Board of Immigration Appeals.[73]

In 8 U.S.C. § 1225, the Act addresses how the new provisions of the IIRIRA approach the issue of asylum seekers in removal proceedings. When an immigration officer encounters an alien who has not been admitted into the United States or is suspected of carrying documents that were procured by fraud, the officer will conduct a pre-screening interview to determine whether the alien intends to apply for asylum or fears persecution.[74] If the officer concludes that the alien does not have an intent to apply for asylum or fear of persecution, the immigration officer can order the alien summarily removed from the United States.[75] "This officer's removal determination is not subject to any further administrative review, hearing or judicial oversight."[76]

If the immigration officer determines that the alien is inadmissible (notice that under the AEDPA they would have been termed "excludable") and the alien indicates either an intention to apply for asylum or a fear of persecution, the officer must refer the alien for an interview by an asylum

69. *Id.* at 1013.

70. *Id.*

71. *Id.* at 1016.

72. *Id.* at 1017.

73. Stacy R. Hart, *Don't Call U.S., We'll Call You: A Look at Summary Exclusion as a Means of Asylum Reform*, 72 WASH. U. L.Q. 1741, 1756 (1994).

74. *Asylum and Expedited Removal*, *supra* note 44, at 1571.

75. *Id.*

76. *Id.* The pre-screening process does not apply to Cuban immigrants arriving by plane by operation of 8 U.S.C.A. § 1225, which states: "[s]ubparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry." *Id.* § 1225(b)(1)(F).

officer.[77] The asylum officer will determine whether the alien has a "credible fear" of persecution.[78] A summary of the remaining process in asylum determinations under the IIRIRA is as follows:

> If applicants do not demonstrate "credible fear" they will be removed without further review unless they request review by an immigration judge (IJ). The IJ review must be within seven days of the asylum officer's decision, during which time the applicant is to be detained. If credible fear is demonstrated, the applicant will be detained pending "non-expedited" consideration of the application. Aliens may consult with anyone prior to their asylum interview or review, but at no expense to the government. The consultation must not "unreasonably delay the process."[79]

Note that the review by the immigration judge is limited to inspection of the immigration officer's determination of "credible fear."[80] To assist in expediting this review within the seven day requirement, immigration judges may conduct the inspection via a telephonic or video connection rather than in person.[81]

V. DUE PROCESS CONCERNS

A. *Supreme Court Cases from 1889 to 1902*

The underlying issue among all of this legislation is whether the expedited procedures for removing undocumented aliens without judicial review infringes on the immigrant's right to procedural due process. Of the earliest cases concerning the government's authority to exclude aliens is *The Chinese Exclusion Case of 1889*.[82] In that case, the Supreme Court held that the power of exclusion of foreigners was an incident of sovereignty "belonging to the government of the United States as a part of those sover-

77. *Id.* § 1225(b)(1)(A)(ii).

78. *Id.* § 1225(b)(1)(B)(ii). "Credible fear" of persecution means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under § 1158 of this title. *Id.* § 1225(b)(1)(B)(v).

79. *Illegal Immigration, supra* note 45, at 1335.

80. 8 U.S.C.A. § 1225(b)(1)(B)(iii)(III).

81. *Asylum and Expedited Removal, supra* note 44, at 1571.

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

eign powers delegated by the Constitution . . . ."[83] In 1892, the Supreme Court had the opportunity to address the due process rights of an excludable alien in *Nishimura Ekiu v. United States*.[84]

In *Nishimura Ekiu*, a Japanese immigrant was stopped at the port of San Francisco and was refused entry after inspection by immigration officials.[85] The immigrant claimed that her husband was living in the United States but that she did not know his address.[86] She had twenty-two dollars and told officials that she was supposed to stop at a hotel and wait for her husband to call for her.[87] The Inspector of Immigration at the port of San Francisco determined that the immigrant was "without means of support, without relatives or friends in the United States . . . and a person unable to care for herself . . . ."[88] The inspector concluded that the immigrant was liable to become a public charge and therefore inhibited her from landing.[89] The circuit court ruled that an immigration law vesting in immigration officials the exclusive authority to determine a person's right to land did not deprive that person liberty without due process of law.[90] Considering this case on appeal, the Supreme Court recognized that the power to exclude or admit foreigners into the United States was a power "vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war."[91] The Supreme Court

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83. *Id.* at 609; *see also* Richard F. Hahn, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982).

84. 142 U.S. 651 (1892).

85. *Id.* at 652.

86. *Id.*

87. *Id.*

88. *Id.* at 656.

89. *Nishimura Ekiu*, 142 U.S. at 656.

90. *Id.*

91. *Id.* at 659. The Supreme Court elaborated on how the Constitution vests in the national government the authority to admit or exclude aliens:

> It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon who the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof.

Id. (citing U.S. CONST. art. I, § 8; Chae Chan Ping v. United States, 130 U.S. 581, 604, 609 (1889); Edye v. Robertson, 112 U.S. 580 (1884)).

determined, as to those immigrants seeking entry into the United States, "the decisions of executive or administrative officers, acting within powers expressly conferred by [C]ongress, are due process of law."[92]

Similar conclusions were made by the Supreme Court in *Li Sing v. United States.*[93] In *Li Sing*, a Chinese immigrant was denied reentry into this country based on a federal statute prohibiting the entry or reentry of Chinese laborers.[94] In order for the immigrant to establish that he was previously a merchant in the United States, as opposed to a laborer, and therefore qualified for reentry, the statute required the testimony of two credible witnesses who were not Chinese.[95] Li Sing challenged the statute claiming that it violated the constitutional guarantees of "equal rights and equal law to all."[96] The Supreme Court answered this claim by recognizing that deportation is not equivalent to punishment for a crime.[97] The Court reasoned that the deportation of immigrants is a method of enforcing the return of aliens to their own country who have not complied with the conditions, upon the performance of which, the government has determined that the aliens' continuing residence here shall depend.[98] Accordingly, the Court declared that there was no deprivation of life, liberty, or property without due process of law.[99]

Concluding the early line of Supreme Court cases concerning the due process rights of excludable aliens was *Lee Lung v. Patterson.*[100] In *Lee Lung*, a Chinese immigrant who had spent twenty years in Portland, Oregon as a merchant went back to China and returned to the United States with his wife and daughter.[101] The collector of customs at Portland agreed to admit the merchant, but denied entry for his wife and daughter due to a technical discrepancy in their certificates identifying them and their relation with the

92. *Id.* at 660 (citing Hilton v. Merritt, 110 U.S. 97 (1884)).
93. 180 U.S. 486 (1901).
94. *Id.*
95. *Id.* at 492.
96. *Id.* at 494.
97. *Id. See also* Fong Yue Ting v. United States, 149 U.S. 698 (1893).
98. *Li Sing*, 180 U.S. at 495.
99. *Id.* The Supreme Court recognized a delineation between forbidding aliens from entering the country or expelling them from the country and subjecting them to hard labor or confiscating their property. *Id.* The Supreme Court noted that if the latter circumstances were the case, then the aliens would have a right to a judicial trial to establish guilt or innocence. *Id.*
100. 186 U.S. 168 (1902).
101. *Id.* at 169.

merchant.[102] Upon further inquiry, it was discovered that the wife who returned to the United States with the merchant was his second wife (in a polygamous relationship) and the daughter was that of the merchant and his first wife.[103] Based on the evidence, the immigration officials stood on their denial of entry as to the wife and daughter.[104] The merchant claimed that the applicable statute made the certificates evidence and the collector exceeded his jurisdiction by not giving the certificates valid consideration.[105] The Court cited *Nishimura Ekiu*[106] and noted that it was determined in that case that "Congress might entrust to an executive officer the final determination of the facts upon which an alien's right to land in the United States was made to depend . . . ."[107] The Supreme Court held that if Congress did so, then the executive officer's order was "due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency."[108] Therefore, the Court reiterated that because jurisdiction is given to the collector over the right of an alien to land, then jurisdiction is necessarily given to the collector to pass on the evidence presented to establish that right.[109]

B. *Supreme Court Cases from 1950 to Present*

Shortly after World War II and almost fifty years since *Lee Lung*, the Supreme Court made the determination that admission into the United States was a privilege and not a claim of right in *Knauff v. Shaughnessy*.[110] In *Knauff*, a United States Army veteran of World War II returned from Germany in 1948 with a German born wife.[111] Immigration officials entered a final order of exclusion against the German woman without a hearing

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102. *Id.*

103. *Id.* at 173. The Supreme Court pointed out that even though plural marriages may be recognized in China, the laws of the United States do not consider them valid and therefore Lee Lung's second wife is not his valid wife under the laws of this country. *Id.*

104. *Lee Lung*, 186 U.S. at 173.

105. *Id.* at 168.

106. 142 U.S. at 651.

107. *Lee Lung*, 186 U.S. at 175.

108. *Id.*

109. *Id.* at 176. *See also* Lee Gon Young v. United States, 185 U.S. 306 (1902); Fok Young Yo v. United States, 185 U.S. 296 (1902); Lem Moon Sing v. United States, 158 U.S. 538 (1895).

110. 338 U.S. 537 (1950).

111. *Id.* at 539.

based on security reasons.[112] The Supreme Court began its analysis of this case by ruling that an alien seeking entry into this country does so under no claim of right.[113] The Court held that "[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government."[114] The Court explained that because the exclusion of aliens is a fundamental act of sovereignty, the right is inherent in the executive power to control the foreign affairs of the nation and does not stem from legislative power alone.[115] Therefore, according to the Court, the decision to admit or exclude an alien is 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."[116] The Court stated that "[t]he action of the executive officer under such authority is final and conclusive."[117] As to those persons seeking entry into the United States, the Court concluded that whatever the rule may be concerning the removal of such persons, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."[118]

Further support for the Court's view in *Knauff* that rules pertaining to persons seeking entry into this country fall outside the supervision of any court comes from *Kwong Hai Chew v. Colding*.[119] Kwong Hai Chew was a Chinese seaman who was admitted to the United States in 1945.[120] Thereafter Chew married a native American and the two bought a home in New York.[121] Chew was also a World War II veteran having served in the United States Merchant Marines.[122] After proving his good moral character for the

112. *Id.* Pursuant to the War Brides Act of June 21, 1941, the President, on November 14, 1941, issued a proclamation which stated that the interest of the United States required the imposition of additional restrictions upon the entry into and departure of persons from the United States and he also authorized the promulgation of regulations jointly by the Secretary of State and the Attorney General. *Id.* at 540–41.

113. *Id.* at 542.

114. *Knauff*, 338 U.S. at 542.

115. *Id.*; United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

116. *Knauff*, 338 U.S. at 543.

117. *Id.*

118. *Id. See also* Ludecke v. Watkins, 335 U.S. 160 (1948); *Fong Yue Ting*, 149 U.S. at 698; *Nishimura Ekiu*, 142 U.S. at 651. *Cf.* Yamataya v. Fisher, 189 U.S. 86 (1903).

119. 344 U.S. 590 (1952).

120. *Id.* at 592.

121. *Id.*

122. *Id.* at 593.

preceding five years, in 1949, Chew was admitted to permanent residence in the United States.[123] With his petition for naturalization pending and after being screened by the Coast Guard, in 1950, Chew accepted employment as a seaman on a merchant vessel.[124] The voyage on the merchant vessel which Chew had embarked included ports in the Far East.[125] Upon the vessel's return to port in the United States, Chew was "excluded" by immigration officials and not permitted to land.[126] The Supreme Court declined to follow *Knauff* in this case and stated that the decision in *Knauff* "relates to the rights of an alien *entrant* and does not deal with the question of a *resident* alien's right to be heard."[127] The Supreme Court in *Chew*, however, noted that "[Congress'] authorization of the denial of hearings raises no constitutional conflict if limited to 'excludable' aliens who are not within the protection of the Fifth Amendment."[128]

One month after *Chew*, the Supreme Court heard an unusual story of a man without a country in the case of *Shaugnessy v. United States*.[129] Ignatz Mezei, an immigrant from Hungary, had lived in this country as a resident alien from 1923 to 1948.[130] In 1948, Mezei went to Hungary to visit his dying mother, was denied entry by the Hungarian government, and detained for nineteen months due to some difficulty in securing an exit permit.[131] Upon his eventual return to the United States, Mezei's entry was reviewed by immigration officials and permanent exclusion was ordered without a hearing based on concerns for national security.[132] Mezei was returned to countries he had come from on his trip to Europe; however, France and Great Britain refused to give him permission to land.[133] Also, the State Department negotiated with Hungary for Mezei's readmission with no success.[134] Mezei applied for entry to approximately twelve Latin American

123. *Id.* at 593–94.
124. *Chew*, 344 U.S. at 593–94.
125. *Id.* at 594.
126. *Id.* at 594–95.
127. *Id.* at 596 (emphasis added).
128. *Id.* at 600.
129. 345 U.S. 206 (1953).
130. *Id.* at 208.
131. *Id.* Mezei eventually obtained a quota immigration visa issued by the American Consul in Budapest and proceeded to France where he boarded the Ile de France in Le Havre bound for New York. *Id.*
132. *Id.*
133. *Mezei*, 345 U.S. at 209.
134. *Id.*

countries, all of which denied his request.[135] After twenty-one months of detention on Ellis Island and a series of habeas corpus proceedings, the district judge ordered Mezei's conditional parole on bond when the government declined to divulge evidence proving Mezei's danger to the public safety.[136]

The Supreme Court observed that Mezei, regardless of his prior presence in this country, was seeking entry and fell under the existing immigration laws governing the admissions or exclusions of such aliens.[137] The Court stated that an exclusion proceeding grounded on danger to the national security, statutorily, does not provide for the detained alien to be released on bond.[138] Furthermore, the Court noted that the federal statutes provide that exclusion based on confidential information, the disclosure of which may be prejudicial to the public interest, may be conducted without a hearing.[139] The Court reasoned that because the power to exclude aliens rests with the executive branch to enforce and the legislative branch to enact laws to regulate such enforcement, largely immune from judicial control, then the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case and the procedures elected for carrying out this "fundamental sovereign attribute" is due process of law.[140] Though this case dealt primarily with the issue of detaining excluded aliens, the Supreme Court reaffirmed its earlier findings that due process among aliens who have not been admitted into this country are limited to the protections afforded by Congress.

The most recent Supreme Court case involving the procedural due process rights of excludable aliens was the 1985 case of *Jean v. Nelson.*[141] "For almost thirty years before 1981, the INS had followed a policy of general parole for undocumented aliens arriving on our shores seeking

135. *Id.* Mezei then notified the INS that he would exert no further efforts to depart from the United States. *Id.*

136. *Id.* The district judge did not question the validity of the exclusion order but considered further detention excessive and justifiable only by affirmative proof of Mezei's danger to the public safety. *Mezei*, 345 U.S. at 209.

137. *Id.* at 213. *See also* Polymeris v. Trudell, 284 U.S. 279 (1932); Lem Moon Sing v. United States, 158 U.S. 538 (1895).

138. *Mezei*, 345 U.S. at 216.

139. *Id.* at 210–11.

140. *Id.* at 210 (citing Harisiades v. Shaughnessy, 342 U.S. 580 (1952); *Knauff*, 338 U.S. at 537; Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889)).

141. 472 U.S. 846 (1985).

admission to this country."[142] In the late 1970s and early 1980s, the influx of undocumented aliens arriving in South Florida raised concern regarding the unusually large number of immigrants and the current system of detention.[143] In response to such concerns, the Attorney General in the first half of 1981 ordered the INS to detain without parole any immigrants who could not present a prima facia case for admission.[144] The aliens were to remain in detention pending a decision on their admission or exclusion.[145] This new policy of detention rather than parole was not based on a new statute or regulation.[146] A group of Haitian immigrants who were incarcerated and denied parole under the new policy filed a class action suit seeking declaratory and injunctive relief.[147] The group alleged that the INS' sudden change in policy was unlawfully effected by not complying with the notice-and-comment rule-making procedures of the Administrative Procedure Act ("APA").[148] The group also alleged that the restrictive parole policy, as executed by INS officers in the field, violated the equal protection guarantee of the Fifth Amendment because it discriminated against petitioners on the basis of race and national origin.[149] The district court held that because the new policy of detention and restrictive parole was not promulgated in accordance with the APA rule-making procedures, the INS' policy under which petitioners were incarcerated was "null and void," and the prior policy

142. *Id.* at 849.

143. *Id.* Due to the sudden and massive immigration, President Carter appointed a Select Committee on Immigration to examine the country's immigration problems and that committee issued a report in February, 1981 finding that an "immigration crisis" existed in the United States. Jean v. Nelson, 711 F.2d 1455, 1464 (11th Cir. 1983). The "crisis" passed unresolved to the new Administration and in March 1981, President Reagan appointed a special task force to consider solutions. *Id.* at 1464. The task force included the Secretaries of State, Defense, Transportation, Labor, Commerce, Health and Human Services, and the Director of the Office of Management and Budget. *Id.* One of the solutions recommended by the task force was detaining aliens without parole pending a determination of their right to enter the United States. *Id.*

144. *Jean*, 472 U.S. at 849.

145. *Id.*

146. *Id.*

147. *Id.* at 851. The district court certified the class as "all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and who are presently in detention pending exclusion proceedings . . . for whom an order of exclusion has not been entered . . . ." *Id.* at 849–50 (quoting Louis v. Nelson, 544 F. Supp. 973, 1004 (S.D. Fla. 1982)).

148. *Jean*, 472 U.S. at 849.

149. *Id.*

of general parole was restored to "full force and effect."[150] The district court also concluded that the "petitioners had failed to prove discrimination on the basis of race or national origin in the denial of parole."[151] Appeals from both sides were made, yet in the meantime, pursuant to the district court's holding, the INS promulgated a new parole policy that was in compliance with the APA and that required evenhanded treatment and prohibited the consideration of race and national origin in the parole decision.[152] Since the INS was no longer detaining any class members under the stricken incarceration and parole policy other than those who have violated the terms of their parole or have arrived subsequent to the district court's judgment, the court of appeals, sitting en banc, held that the APA claim was moot and ruled that the Fifth Amendment did not apply to the consideration of unadmitted aliens for parole.[153] The court of appeals remanded the case to the district court for consideration of whether lower-level INS officials have abused their discretion by discriminating on the basis of national origin with regard to the remaining Haitian detainees.[154]

The Supreme Court held that the court of appeals properly remanded the case to the district court.[155] With great anticipation that the Supreme Court would rule on the constitutional issue involving the due process rights of the excludable aliens, the Court noted that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such

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150. *Id.* at 850 (citing *Louis*, 544 F. Supp. at 1006).

151. *Id.*

152. *Id.* at 850–51. The Supreme Court noted that this finding was based on the agreement between the petitioners and respondents that the new rule promulgated by the INS was neutral on its face and required evenhanded treatment of immigrants concerning parole decisions. *Jean*, 472 U.S. at 850–51.

153. *Id.* at 852. The Supreme Court stated:

> The question that the district court must therefore consider with regard to the remaining Haitian detainees is thus not whether high-level executive branch officials such as the Attorney General have the discretionary authority under the Immigration and Nationality Act (INA) to discriminate between classes of aliens, but whether lower-level INS officials have abused their discretion by discriminating on the basis of national origin in violation of facially neutral instructions from their superiors.

Id. at 852–53 (quoting Jean v. Nelson, 727 F.2d 957, 963 (11th Cir. 1984), *cert. granted*, 469 U.S. 1071 (1984), *aff'd*, 472 U.S. 846 (1985)).

154. *Id.*

155. *Id.* at 857.

adjudication is unavoidable."[156] The Supreme Court held that because the new INS policy and statutes provide petitioners with nondiscriminatory parole consideration, which is all they seek to obtain by virtue of their constitutional argument, therefore there was no need to address the constitutional issue.[157] One commentator criticized the Supreme Court's refusal to address the constitutional issue by stating, the "Court has failed to vindicate the due process rights of a group of persons who lack representation in the political branches of government and who have no other avenue for recourse."[158] That rejoins the question of whether excludable aliens have due process rights at all. Justice Marshall, joined by Justice Brennan, wrote a dissenting opinion in *Jean*,[159] where he defended the position that excludable aliens are protected by the Fifth Amendment.

Justice Marshall pointed out that the majority's decision rested "entirely on the premise that the parole regulations promulgated during the course of this litigation preclude INS officials from considering race and national origin in making parole decisions."[160] Justice Marshall argued, however, that the majority points to no authority other than arguments in the parties' briefs, which in turn, according to Justice Marshall, cite to nothing of relevance.[161] Justice Marshall then examined the applicable regulations, statutes, and administrative practices governing the parole of unadmitted aliens and concluded that there were not any nonconstitutional constraints on the executive's authority to make national-origin distinctions.[162] After this examination, Justice Marshall continued that the majority therefore should have addressed the constitutional issue involved, and proceeded with his own analysis of the Fifth Amendment as applied to this case.[163]

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156. *Jean*, 472 U.S. at 854 (quoting Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944)).

157. *Id.* at 854–55.

158. Gorman, *supra* note 20, at 54.

159. *Jean*, 472 U.S. at 858 (Marshall, J., dissenting).

160. *Id.*

161. *Id.* at 859. Justice Marshall claimed that the Solicitor General's representations to the Supreme Court were not supported by citation to any authoritative statement by the Attorney General or the INS to the effect that the statute and regulations prohibit distinctions based on race or national origin. *Id.* Furthermore, Justice Marshall stated that the Solicitor General's contention that the statute and regulations do not make such distinctions is merely an unsupported assertion by counsel apparently coming from the Solicitor General's office, to which the Supreme Court owes no deference at all. *Id.* at 865–66.

162. *Jean*, 472 U.S. at 859.

163. *Id.* at 868.

Among the cases cited by the Commissioner of the INS in *Jean*, in support of his constitutional claim that the Fifth Amendment did not apply to excludable aliens, was *Knauff v. Shaugnessy*, *Kwong Hai Chew v. Colding*, and *Shaugnessy v. United States*.[164] Justice Marshall stated that the narrow question decided in *Knauff* and *Shaugnessy* was that the denial of a hearing in a case in which the Government raised national security concerns did not violate due process.[165] Furthermore, Justice Marshall pointed out that the question decided in *Chew* was that the *resident* alien's due process rights *had* been violated.[166] Therefore, according to Justice Marshall, the broad judgment that excludable aliens are not within the protection of the Fifth Amendment is dicta and deserves no deference at all.[167]

Justice Marshall then made his argument, based on logic, for the application of the Fifth Amendment to excludable aliens. He observed that when an alien detained at the border is criminally prosecuted in this country, he must enjoy at trial all of the protections that the Constitution provides to criminal defendants.[168] Justice Marshall stated, "[s]urely it would defy logic to say that a precondition for the applicability of the Constitution is an allegation that an alien committed a crime."[169] Justice Marshall posited that there is "no basis for conferring constitutional rights only on those unadmitted aliens who violate our society's norms."[170]

Justice Marshall noted that the Fourteenth Amendment provides that "[n]o state . . . shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[171] Justice Marshall stated that the Supreme Court

164. *Id.* at 868–69.

165. *Id.*

166. *Id.* at 872.

167. *Jean*, 472 U.S. at 872–73.

168. *Id.* at 873. Justice Marshall quoted *Wong Wing v. United States*, 163 U.S. 228 (1896), in which the Court stated, in dictum, that "while Congress can 'forbid aliens or classes of aliens from coming within [our] borders,' it cannot punish such aliens without 'a judicial trial to establish the guilt of the accused.'" *Jean*, 472 U.S. at 873 (quoting *Wong Wing*, 163 U.S. at 237). Also, Justice Marshall claimed that the right of an unadmitted alien to Fifth Amendment due process protections at trial is universally respected by the lower federal courts and is acknowledged by the government. *Id.* *See also* United States v. Henry, 604 F.2d 908, 912–13 (5th Cir. 1979); United States v. Casimiro-Benitz, 533 F.2d 1121 (9th Cir.), *cert. denied*, 429 U.S. 926 (1976).

169. *Jean*, 472 U.S. at 873.

170. *Id.*

171. *Id.* at 875.

employed this standard in the case of *Plyler v. Doe*.[172] In *Plyler*, a Texas law allowed the withholding of state funds to school districts for the education of children not "legally admitted" into the United States and also authorized the denial of enrollment in public schools to these children.[173] While ruling that the state's law was unconstitutional, Justice Marshall argued that the Supreme Court made it clear that the Fourteenth Amendment applies to aliens by quoting the Court in *Plyler*, which stated, for "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."[174] Justice Marshall contends that this constitutional recognition and protection of aliens under the Fourteenth Amendment as applied to the states should also be found under the Fifth Amendment.[175]

According to Robert D. Ahlgren, writing for the *Practicing Law Institute*, courts that have dealt with AEDPA issues have avoided constitutional analysis almost completely.[176] "The court which took up the due process issue was a panel of the [Ninth Circuit Court of Appeals] and cited a progeny of Knauff-Megei [sic]."[177] The circuit court in *Duldulao v. INS*[178] held that section 440(a) of the AEDPA denying judicial review of deportation orders for aliens convicted of firearm offenses did not offend due process.[179] In its discussion of the AEDPA, the circuit court stated that "[f]or reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."[180] The circuit court further explained that "[t]he power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit."[181]

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172. *Id.* at 875 (referring to Plyler v. Doe, 457 U.S. 202 (1982)).

173. *Plyler*, 457 U.S. at 206–07.

174. *Jean*, 472 U.S. at 875 (quoting *Plyler*, 457 U.S. at 210).

175. *Id.*

176. Robert D. Ahlgren, *Procedural Due Process in Exclusion/Deportation*, *in* PRACTICING LAW INSTITUTE 1996, at 78 (PLI Corp. L. & Practice Course Handbook Series No. 71, 1996).

177. *Id.* (citing Duldulao v. INS, 90 F.3d 396 (9th Cir. 1996) (as amended on Oct. 8, 1996)).

178. 90 F.3d 396 (9th Cir. 1996). *See* Kolster v. INS, 101 F.3d 785 (1st Cir. 1996); Salazor-Haro v. INS, 95 F.3d 309 (3d Cir. 1996).

179. *Duldulao*, 90 F.3d. at 399–400.

180. *Id.* at 399 (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)).

181. *Id.* at 400 (quoting Carlson v. Landon, 342 U.S. 524, 537 (1951)).

VI. CONCLUSION

This country was founded by people who were trying to escape tyranny and longed for a life based on freedom. These people who fought to establish the United States of America and drafted its Constitution were immigrants themselves. Since then, the United States has traditionally been a place of refuge for those who seek to escape oppression from abroad. As a result, this country has the most open-door immigration policy in the world.[182] Between 1921 and 1986 approximately 650,000 legal immigrants were admitted to the United States each year.[183] In 1995, the number of legal immigrants admitted to this country rose to 800,000.[184] As the number of immigrants in this country, legal and illegal, continue to grow, so too does the population. As of January 1, 1996, the population in the United States was 264,290,000 people.[185] America is known as the land of opportunity, yet for the average worker that opportunity is finite. Currently, the unemployment rate in this country is 5.6%.[186] But in 1944, the unemployment rate was merely 1.2% and in the mid-to-late 1960s it rested in the 3% range.[187] The proliferation of illegal aliens in this country has grown to the point that it has moved to the forefront in legislative debate. The statistical data and effect that illegal aliens have on the United States economy requires something to be done. As a country willing to help immigrants who are oppressed, the United States must be watchful for those who seek to take advantage of our assistance and burden the welfare of United States citizens.

The IIRIRA takes bold steps towards addressing the ever growing problem of undocumented aliens in this country. The additional authority given to the INS may help make the process of removing illegal aliens more efficient. In 1995, approximately 80% of the 110,000 cases decided by immigration judges involved undocumented aliens found in the interior of

182. *Senate Approves Omnibus Immigration Bill After Removing Exclusion Provision*, 73 INTERPRETER RELEASES 601, 603 (1996).

183. Susan Crabtree, *Immigration Crossroads*, INSIGHT, Mar. 25, 1996, at 4, *available in* 1996 WL 8310958.

184. *Id.*

185. *Factoids*, RESEARCH ALERT, June 7, 1996, at 1, *available in* 1996 WL 8842298.

186. Richard Estrada, *Work Details Forget the Hype, Your Job Isn't Secure, Americans Are Concerned About Current and Future Job Prospects, and for Good Reason*, CHI. TRIB., May 1, 1996, at A15.

187. *Id.*

the country.[188] The new law may possibly free up the dockets of immigration courts, making more room for cases meriting a decision by an immigration judge.

Though the IIRIRA vests authority in the INS officer to summarily remove an undocumented alien found in the United States, the new law is not without its own checks and balances. The IIRIRA supplies an in-depth screening process of cases involving immigrants who may be truly fleeing persecution by seeking asylum in this country including a review of credible fear determinations by an immigration judge. The IIRIRA makes special provisions for increasing the training of INS officers who will be handling asylum cases. It also increases the administrative scrutiny of cases involving illegal immigrants claiming asylum as a defense to their removal as opposed to the typical removal procedure.

Whether or not an inadmissible alien enjoys constitutional protection under the Fifth Amendment is a question, according to Justice Marshall,[189] yet to be decided by the Supreme Court. However, since 1889, the Supreme Court has recognized, albeit in dictum, that excludable aliens are limited to whatever due process that Congress may set forth in legislation.[190] The IIRIRA is such legislation. Justice Marshall's dissent in *Jean* raises some valid points and illustrates the legal arguments opponents of the new legislation could raise. But as Justice Marshall rooted his analysis of the law in logic, perhaps the more proper position that should be adopted is reflected in a rather famous quote from Justice Oliver Wendell Holmes: "The life of the law has not been logic: it has been experience."[191] Justice Holmes explained that, "[t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[192]

The removal of undocumented aliens found in this country who have not been admitted to the United States is a method of managing nomadic citizens of other countries. The Court's historical view that matters of international relations are under the complete control of Congress would indicate that Congress' exercise of that power, to wit, the IIRIRA's provisions denying judicial review of inadmissible aliens should be left untouched

188. *Final Anti-Terrorism Bill Contains Major Immigration Changes*, 73 INTERPRETER RELEASES 517, 523 (1996).

189. *Jean*, 472 U.S. at 858 (Marshall, J., dissenting).

190. *Id.* at 865.

191. OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1881).

192. *Id.*

by the judiciary. Furthermore, the individuals who are affected by the new legislation are not citizens of the United States, therefore the resolution they seek (i.e., admission to the United States) is not grounded in any claim of right, but is a privilege granted by Congress. Accordingly, the denial of the privilege to bé admitted to the United States, which rests solely under the control of Congress, does not fasten to it any guarantees of procedural due process that the courts could review. Perhaps for the opponents of the IIRIRA, the new law is an overreaching attempt at correcting the immigration problems of this country. Nevertheless, endless discussion regarding what should be done to correct a problem does little to resolve the matter at hand. The IIRIRA is a comprehensive piece of legislation that includes reasonable internal checks on the law's administration. Yet most important of all, the IIRIRA is an affirmative attempt at remedying a problem in this country that burdens every citizen of the United States—illegal immigration.

Paul S. Jones