EXPEDITED REMOVAL AT U.S. BORDERS: A WORLD WITHOUT A CONSTITUTION

LISA J. LAPLANTE*

I. INTRODUCTION

Gregorio Diaz, an American citizen of Mexican descent, is an Illinois resident. On February 18, 1998, Mr. Diaz arrived at O'Hare International Airport, Chicago from a trip abroad. When passing through customs, he was detained by an Immigration and Naturalization Service ("INS") inspection officer[1], at which time he submitted documentation of his citizenship. Instead of allowing Mr. Diaz to enter the United States, the inspection officer judged him inadmissible, confiscated his documents, and summarily "removed" Mr. Diaz, deporting him to Mexico. By the time Mr. Diaz was permitted to return to the U.S., he had lost his job, suffered emotional distress, and only retrieved his documents after suing INS.[2] Despite the fact that Mr. Diaz's American citizenship gave him full legal entitlement to enter the United States, he never had a chance to defend his constitutional rights by proving his admissibility before an immigration judge. A new immigration law, put into effect only a year before Mr. Diaz's failed attempt to return to the United States, authorized the new INS procedure which precluded judicial review of the inspection officer's determination that excluded Mr. Diaz.

---

* Furman Protection Fellow, Lawyers Committee for Human Rights. B.A., 1991, Brown University; M.Ed., 1994, University of Massachusetts, Amherst; J.D., 1999, New York University School of Law. I would like to thank Arthur C. Helton, Senior Fellow for Refugee Studies and Preventive Action, Council on Foreign Relations, who served as my advisor in the initial stages of writing this article. I also thank Judy Rabinovitz, American Civil Liberties Union Immigrants' Rights Project, and Ann Pilsbury, Central American Legal Assistance, for offering thoughtful comments about the complex issues raised by the new expedited removal system. In addition, many thanks to Jeff Prescott, Daniel Shanfield, Damien Atkins, and Craig Brumfield for their constructive comments in the final stages of writing. This article is dedicated to my grandmother, Janet, whose support was indispensable to the writing of this article, but which came long before the research even started. Finally, any contribution made by this article is dedicated to people like Jaime, whose own story inspired me to write this article.

1. Facts taken from *Diaz v. Reno*, 40 F. Supp. 2d 984, 985 (N.D. Ill. 1999), which was a civil action seeking redress after Mr. Diaz cleared his immigration status.

2. 40 F. Supp. 2d at 985. Mr. Diaz brought a tort action seeking monetary damages against the INS officers, alleging that he was wrongfully placed in the expedited removal proceedings and sought declaratory relief based on the claim that "the defendant's actions in removing him from the country were arbitrary and capricious and a failure to comply with 8 C.F.R. 235." *Id.* at 985-986. He also sought mandamus for the return of his documents. *Id.* at 987. The court granted the government's motion to dismiss for these two claims for lack of subject matter jurisdiction. *Id.* at 986-987.

Mr. Diaz's story exemplifies the dramatic outcome of the INS procedure known as "expedited removal."[3] The expedited removal procedure is one of the changes brought about with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[4] Congress created the new procedure to screen out foreign nationals[5] upon arrival at United States "ports of entry" without proper documents or who use misrepresentation or fraud to gain admission to the United States in violation of federal immigration law. When "removed" under the expedited removal procedure, the foreign national is also banned from readmission to the United States for five years and faces possible imprisonment and further time sanctions if she attempts to return to the country during that time.[6]

The key feature that makes expedited removal controversial is that low-level INS inspection officers have been granted significantly wider discretion to make admission determinations that, unlike in the past, cannot be reviewed by any court.[7] And while the expedited removal procedure

3. Immigration and Nationality (McCarran-Walter) Act ("INA"), § 235, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §1225 (1999)).

4. INA § 235; Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Division C, 110 Stat. 3009. Division C enacts the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996. Defense Department Appropriations Act, 1997, H.R. 3610, Pub.L. No. 104-208, 110 Stat. 3009 (1996). IIRIRA amended the INA.

5. For the purposes of this article, the term "foreign national" will be used instead of the term "alien," but is intended to encompass the same groups of individuals. "Alien" is defined under the INA as "any person not a citizen or national of the United States." INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1999). Technically those immigrants with special status, such as permanent residents with permission to live in the United States, or those with permission to study or work, may enter because they have government consent to do so. As discussed in Part II.D, *infra*, these immigrants run the risk of being denied this privilege due to either misunderstanding of INS inspection officers or administrative errors in their documentation. Thus for the purposes of this note, the term "foreign national" should *not* be construed to be only those illegally crossing into U.S. territory. It should also be read to include legal residents and foreigners with valid tourist, business or labor visas. For a discussion on the negative inferences raised by the use of the word "alien," see Kevin R. Johnson, *Colloquium Proceedings: Panel One: "Aliens" And The U.S. Immigration Laws: The Social And Legal Construction Of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-7).

6. 8 U.S.C. § 1326 (a) provides that, with certain exceptions, "any alien who . . . has been denied admission, excluded, deported or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter . . . enters, attempts to enter, or is at any time found in, the United States . . . shall be fined . . . or imprisoned." INA § 276(a) 8 U.S.C. § 1326(a) (1999). *See also* Stephen Yale-Loehr & Rachel J. Valente, *Current Trends in Illegal Reentry Cases,* 3 T.M. COOLEY J. PRAC. & CLINICAL L. 1, 1 (1999). *See* discussion *infra*, in Part II.A.

7. 8 U.S.C. § 1252 (a)(2)(A)(I) reads: "no court shall have jurisdiction to review – except as provided in (IIRIRA). . .any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to [expedited removal]. . ." 8 U.S.C. § 1252 (g) provides the exclusive jurisdictional basis for challenging the application of expedited removal procedures: "Except as provided in this section and not withstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases,

works in conjunction with the previous and currently existing admission procedure (which, in contrast, provides judicial review), codified in the Immigration and Nationality Act ("INA") §240, this procedure can only be used to clarify the status of foreign nationals *other* than those suspected of using fraud or misrepresentation.[8] In theory, this dual procedure system may appear sound.[9] In practice, however, many foreign nationals who should be referred to an INA §240 hearing are instead removed under the expedited removal procedure because initial INS inspection officers at United States ports of entry misjudge these individuals to be using fraud or misrepresentation to gain admission.[10] Since all incoming foreign nationals must first pass the scrutiny of the initial low-level INS inspection officers, they are all vulnerable to the authority of these inspection officers, who are given an unprecedented degree of discretion to make judgements that were once reserved for immigration judges, whose decisions, in turn, could be reviewed by the Board of Immigration Appeals ("BIA") and the federal courts.[11] In the current system, the approval of a supervising secondary INS inspector, not a judge, is the final check on the decisions made by these low-level INS inspection officers. As a result, errors which sometimes rise to the level of constitutional violations go unchecked on a regular basis.[12]

Academics as well as practical experience validate the theory that judicial review of administrative decisions is necessary to curtail abuse of discretion. Since its implementation on April 1, 1997, expedited removal has further confirmed the necessity of judicial review. The new admissions procedure has generated many "extraordinary [and] troubling stories" of foreign nationals caught in the web of the expedited removal system, even though they fall outside of the class of foreign nationals Congress intended to exclude.[13] The press, along with immigration attorneys and advocates, have collected many stories of low-level INS inspectors misusing the new procedure to remove and impose a five-year bar against legal permanent

or execute removal orders against any alien under this Act." INA § 242, 8 U.S.C. §1252(g) (1999).

8. INA § 240, 8 U.S.C. 1229a (1999). Unlike the expedited removal procedure, these INA §240 hearings provide basic procedural due process protections, as well as the opportunity to appeal an adverse decision made by an INS inspection officer. INA § 240(c)(4), 8 U.S.C. § 1229a(c)(4) (1999).

9. Senator Patrick Leahy (D-Va.) would not even agree that the new system is sound but instead considers the expedited removal system to be "fundamentally unwise and unfair, both in theory and practice." 145 CONG. REC. S14696-03, S14701.

10. Professor Benson has predicted that the denial of discretionary relief would be one of the major defects in the procedure's application. *See* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1452-3 (1997) [hereinafter Benson, *Back to the Future*].

11. 8 U.S.C. § 1105(a)(4) (1970) (repealed and replaced by Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996)).

12. *See* discussion in Part II.B, *infra*.

13. 145 CONG. REC. S14696-03, S14701 (1999). *See* discussion in Part II, *infra*.

residents, foreign nationals carrying valid business or visitor visas, refugees, and asylum seekers.[14]

The unintended negative effects of expedited removal indicate that this procedure is bad policy and should be repealed by Congress.[15] Should Congress fail to correct itself, however, this article argues that broader constitutional grounds exist for dismantling the expedited removal system. Foreign nationals at U.S. borders are technically excluded from asserting constitutional rights because they are deemed to fall outside of the protection of the Constitution, but a line of cases has carved out various exceptions to this general rule and have established that certain classes of foreign nationals with particular liberty and property interests are entitled to due process—even at ports of entry.[16] Thus, under expedited removal, there is a constitutional violation every time an INS inspection officer incorrectly removes and imposes a five-year bar on one of these protected foreign nationals on an expedited basis without giving the individual an opportunity to seek judicial review of the erroneous determination of her immigration status. Furthermore, the case of Mr. Diaz, not a foreign national because he was born in America, illustrates the extreme, even if rare, example of how expedited removal violates the Constitution.[17]

Despite these important constitutional issues, the author recognizes that no judge will hear a challenge against the expedited removal procedure on its face or as applied because Congress dramatically limited judicial review of the new expedited removal system.[18] Now that the Court of

14. *See* discussion *infra* Part II.B-D.

15. The practical consequences of the expedited removal system have moved some Congress members to address the over inclusive effect of expedited removal by introducing various bills to reform IIRIRA. One such bill, the Refugee Protection Act of 1999, S. 1940, would seek to limit the use of expedited removal procedures to immigration emergencies. Introduced by Senators Patrick Leahy (D-Va.) and Sam Brownback (R-Kan.), this proposal mirrors an amendment introduced but rejected in 1996 during the promulgation of expedited removal. 145 CONG. REC. S14696-03, S14701 (1999). The Bill proposes, among other things, to reinstate pre-1996 due process procedures, including judicial review. *Id.* at S14703. Sponsors of the Bill note that "the inhumanity of the new immigration regime that Congress imposed in 1996" demonstrate how expedited removal is a "failed experiment." *Id.* at S14701. One of the most staunch supporters of IIRIRA, Representative Bill McCollum (R-Fl.), introduced the Fairness for Permanent Residents Act of 1999 (H.R. 2999) because he recognized that the "1996 law went too far. We are a just and fair nation and must strike a just and fair balance in our immigration laws." 145 CONG. REC. E2020-01 (1999).

16. *See* discussion *infra* Part V.B.

17. *See* Kevin R. Johnson, *The Anti-terrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997). Johnson writes,

> [B]y looking at the harsh treatment of immigrants, valuable insight is gained into how the government would act towards particular groups of citizens if legal constraints were not in place to protect undesirable citizens.

Id. at 879.

18. 8 U.S.C. § 1252(a)(2)(A)(I) provides that "no court shall have jurisdiction to review—except as provided in [IIRIRA]. . . any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to [expedited removal]." For a discussion of the treatment of judicial-

Appeals for the District of Columbia Circuit has dismissed for (for lack of jurisdiction) the only permissible challenges brought within the required sixty-day window,[19] this bar to review is even more solid.[20] Unsurprisingly, the sixty-day limit to judicial review imposed by Congress has gone unchallenged. Congressional acts which regulate immigration policy, unlike any other area of American law, are insulated from judicial review even where constitutional issues are implicated.[21] This principle is so accepted by judges that, in *American Immigration Lawyers Association v. Reno*, the Court of Appeals, while affirming the district court decision, remarked in a footnote that "[p]laintiffs did not challenge the constitutionality of the sixty-day limit,"[22] "perhaps in recognition of the longstanding principle that determining the conditions of governing the admission of aliens is 'so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'"[23] The court is

---

stripping provisions in cases brought subsequent to the passage of IIRIRA, see Sara A. Martin, *Postcards from the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRIRA*, 19 B.C. THIRD WORLD L.J. 683 (1999).

19. 8 U.S.C. § 1252(e)(3)(A)-(B).

20. 8 U.S.C. § 1252(a)(2) precludes judicial review of admissibility determinations made by INS inspection officers. 8 U.S.C. § 1252(e)(3)(A)-(B) permitted judicial review of the expedited removal new system but all deadlines had to be "filed no later than 60 days after the date the challenged section, regulation, directive, guidance, or procedure. . .[was][f]irst implemented," which was April, 1997. This provision specifies that review is limited to "whether [expedited removal], or any regulation issued to implement [expedited removal] is constitutional," 8 U.S.C. §1252 (e)(3)(A)(I), and "whether such regulation, or written policy directive. . .[or] guideline, or written procedure. . .is not consistent with applicable provisions of this title or is otherwise in violation of the law." 8 U.S.C. § 1252 (e)(3)(A)(ii) (1999). Any challenge had to be filed in a District of Columbia district court.

After the Attorney General issued regulations in April, 1997, ten organizations and twenty aliens, some added after the deadline had expired, brought constitutional, statutory, and international law challenges. The cases were disposed by the district court on jurisdictional grounds pursuant to Fed. R. Civ. Pro. 12(b)(1), with the exception of two plaintiffs whose claims were rejected on the merits for failure to state a cause of action under Fed. R. Civ. Pro. 12(b)(6). American Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38, 46-47, 52-60 (D.D.C. 1998), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000). The court dismissed many of the named plaintiffs' claims because they were filed after the 60-day limitation. 18 F. Supp. 2d at 58. On appeal, the circuit court held that "the organizational plaintiffs lacked standing to litigate the rights of aliens not parties to the lawsuits and that the judgment of the district court should be affirmed on all other aspects." 199 F.3d at 1356. Legislative history indicates that "under the conference report, there would be judicial review of the process of implementation, which would cover the constitutionality and statutory compliance of regulations and written policy directives and procedures. It was very important to me that there be judicial review of the implementation of these provisions. Although review should be expedited, *the INS and the Department of Justice* should not be insulated from review. 142 CONG. REC. S11491 (statement of Sen. Hatch) (1996) (emphasis added).

21. *See, e.g.*, Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and The Courts*, 22 HASTINGS CONST. L. Q. 925, 936 (1995) [hereinafter Legomsky, *Ten More Years*]. See section III.B, *infra*, for discussion.

22. 18 F. Supp. 2d at 47 n.8 (citation omitted).

23. 18 F. Supp. 2d 38, 46-47, 52-60 (D.D.C. 1998), *aff'd*, 199 F.3d 1352, 1356 n. 5 (D.C. Cir. 2000) (citing *Bruno v. Albright*,197 F.3d 1153, 1999 WL 1082957, at *5 (D.C.Cir. Dec.3, 1999) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952))).

referring to the fact that Congress is insulated by the "plenary power doctrine," which denies judges jurisdiction to scrutinize the constitutionality of congressional statutes, or the actions permitted by the statute, if the statute deals with the admission or exclusion of foreign nationals at United States ports of entry.[24]

The new expedited removal procedure demands a fresh examination of this limitless power given to Congress to regulate immigration law.[25] For years, critics have argued that the unenumerated plenary power doctrine should be abandoned so that judges can scrutinize immigration laws.[26] The troubling implications of the expedited removal system not only supports this campaign to end a troubling legal tradition of insulating the world of immigration law, but may be the strongest example of the dangers in allowing one branch of government to go unchecked.[27] By creating this system of expedited removal which delegates unfettered power to the executive branch,[28] Congress essentially created a sphere of government activity in which the Constitution does not apply.

---

24. The power of Congress to regulate the treatment of foreign nationals, known as the plenary power doctrine, is discussed in Part III, *infra*. *See Auguste v. Reno*, 152 F.3d 1325, 1328 (11th Cir. 1998) (explaining that "[a]lthough the Constitution contains no direct mandate regarding immigration matters, the federal courts have long recognized that the political branches of the federal government have plenary authority to establish and implement substantive and procedural rules governing the admissions of aliens to this country").

25. In general, the area of immigration law relates to the regulation of admission, expulsion, and naturalization of foreign nationals. *See, e.g.*, Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power,* 1984 SUP. CT. REV.255, 256 [hereinafter Legomsky, *Immigration Law).*

26. *See, e.g.,* Michael Scaperlanda, *Polishing the Tarnished Golden Door,* 1993 WIS. L. REV. 965, 972 [hereinafter Scaperlanda, *Polishing the Tarnished Golden Door*]; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights,* 92 COLUM. L. REV. 1625, 1627-8(1992) [hereinafter Motomura, *Procedural Surrogates*]; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny,* 100 HARV. L. REV. 853, 863 (1987); Linda S. Bosniak, *Membership, Equality,and The Difference that Alienage Makes,* 69 N.Y.U. L. REV. 1058, 1091-92 (1994) (noting that the plenary power doctrine which allows many of these regretful immigration decisions is a "national embarrassment" which the courts have been called upon to abandon) [hereinafter Bosniak, *Membership*].

27. Gary E. Endelman, an immigration lawyer, wrote in anticipation of IIRIRA: "Immigration lawyers have always justifiably relied on the maxim that one wins by losing slowly . . . No longer . . . The concept of discretionary review has been shaken to its very core and we have all been present at the creation of a new legal universe." Gary Endelman, *Congress Tightens Its Control,* 146 N.J. L.J. 808 (1997). The magnitude of the new expedited removal procedure was recognized by the INS, which considered the new procedure the "most significant changes" to immigration law. *Immigration Changes: Oversight Hearing on the Implementation of Title III of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Before the Subcommittee on Immigration and Claims of the House Committee on the* Judiciary, 105th Cong. (Feb. 11, 1997) (statement of Paul Virtue, Acting Executive Associate Commissioner, Office of Programs, Immigration and Naturalization Service) [hereinafter *Immigration Changes* (statement of Paul Virtue)].

28. Professor Medina notes that "the reason for separating the functions of government and guarding against amassing of power by one branch, however, was to ensure the liberty of the individual. . ." M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act*

Renewed challenges to the plenary power doctrine build on previous arguments to expose how the assumptions upon which the doctrine rests have dramatically changed.[29] In the late 1890s, the Supreme Court created the plenary power doctrine to avoid scrutinizing a Congressional act that excluded Chinese nationals even if they had substantial liberty or property interests in the United States.[30] The decision was motivated by xenophobic fears and conceptions of sovereignty that no longer apply to contemporary America.[31] In particular, since the creation of the plenary power doctrine, there has been a shift both at the international and national level towards balancing the rights of individuals with the rights of the sovereign, an approach that further undermines the plenary power doctrine. Challenging the insulation of immigration law relies on the legal principle that, as the assumptions that led to a seminal decision changes, so should the precedent. Scholars and advocates alike call upon the courts to recognize that the plenary power is no longer tenable and should be abandoned. The author presents these arguments believing that if the Court finally conceded that the plenary power doctrine can no longer be justified, it would free itself to find the expedited removal procedure in violation of the Fifth Amendment of the Constitution.

II.
EXPEDITED REMOVAL: DISMANTLING DUE PROCESS PROTECTIONS

A. Once Upon a Time There Was Due Process

A visa issued by a consular office still does not by itself authorize a foreign national to enter the United States. It "does no more than entitle

---

of 1996, 29 CONN. L. REV. 1525, 1545 (1997) [hereinafter Medina, *A Nice Thing?*]. Regarding IIRIRA specifically and the removal of judicial review, Professor Medina concludes that

> the fact that the consolidation of control in the Executive over the legislation, adjudication, and execution of removal decisions has been accomplished by concerted action on the part of the three branches is particularly problematic. It essentially means that the checks and balances thought so vital to the system have failed.

Id. at 1556.

29. *See, e.g.* Maureen Callahan VanderMay, *The Misunderstood Origins of the Plenary Power Doctrine*, 35 WILLAMETTE L. REV. 147, 147-49 (1999) [hereinafter VanderMay, *Misunderstood Origins*]; Meredith K. Olafson, *Note: The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 GEO. IMMIGR. L.J. 433, 443 (1999) [hereinafter, Olafson, *Concept of Limited Sovereignty*]; Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 28-33 (1998) [hereinafter Chin, *Segregation's Last Stronghold*]; Medina, *A Nice Thing? supra* note 28, at 1525.

30. Chae Chan Ping v. United States, 130 U.S. 581 (1889) [hereinafter *Chinese Exclusion Cases*]. *See* discussion in Part III.B, *infra*.

31. For a thorough analysis of how racism and prejudices shaped the plenary power doctrine as well as other immigration legislation, see Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998)[hereinafter Johnson, *Magic Mirror*]. *See also* discussion Part III.C, *infra*.

[the] alien to present himself at a port of entry to prove his admissibility before the INS."[32] Under this rule, foreign nationals must establish to an INS inspection officer that they are entitled to enter the United States. Prior to IIRIRA and the implementation of the expedited removal procedure, if an immigration inspector doubted the foreign national's right to enter, the officer referred the foreign national to a process known as "secondary inspection." In secondary inspection, a second officer briefly interviewed the foreign national who could either withdraw her admission application or request a hearing before an immigration judge, a decision-maker independent of INS.[33] In this hearing, the foreign national was entitled to defend her eligibility to enter the United States.[34]

Those foreign nationals referred to a hearing could expect minimal guarantees of due process such as rights to counsel, to present evidence, and to challenge the government's evidence.[35] Foreign language translators were provided if necessary.[36] After a fact finding determination, the immigration judge exercised her discretion and ordered the foreign national's admission or issued a final order of removal, which included a one-year bar to readmission.[37] The foreign national could appeal an immigration judge's adverse decision to the BIA, whose decision in turn could be reviewed by federal courts.[38] On appeal, courts often reversed the decisions made by immigration judges, permitting admission to the United States.[39] This trend might be explained by a BIA holding that "given the harsh consequences of a finding of excludability under the first clause of 212(a), the factual basis of such finding should be subject to close scrutiny. This is particularly true where the alleged fraud or misrepresentation involves a disputed issue with respect to an alien's intent."[40]

---

32. Castaneada-Gonzales v. INS, 564 F.2d 417, 426 (D.C. Cir. 1977). *See generally* INA § 221, 8 U.S.C. § 1201 (1996); 8 C.F.R. § 235.1(d)(1) (1999).

33. The Bureau of Immigration Appeals ("BIA") is a part of the Executive Office for Immigration Review.

34. INA § 235, 8 U.S.C. § 1225(1) (1994).

35. 8 U.S.C. § 1231(b)(2) (1994).

36. *Id.*

37. 8 U.S.C. § 1229(a) (1994).

38. 8 U.S.C. § 1252(b) (1994).

39. Interview with Judy Rabinovitz, Attorney, American Civil Liberties Union Foundation Immigrants' Rights Project (March 20, 1999). *See also* GENERAL ACCOUNTING OFFICE, ILLEGAL ALIENS: CHANGES IN THE PROCESS OF DENYING ALIENS ENTRY INTO THE UNITED STATES 71 (Mar. 31, 1998) (reporting that from October 1, 1996 through March 31, 1997, 92% of individuals referred to secondary inspection were admitted to the United States) [hereinafter GAO 1998 REPORT].

40. Matter of Healy and Goodchild, 17 I. & N. Dec. 22, 29 (B.I.A. 1979). INA § 212(a) is now INA § 212(a)(6)(c), 8 U.S.C. 1182 (a)(6)(C) (1999). Aside from personal and financial consequences, such as losing a job or being separated from family, an excluded foreign national can face criminal charges if she attempts to reenter the United States. *See* INA § 276(a), 8 U.S.C. § 1326(a) (1999) (stating that "any alien who. . . has been denied admission, excluded, deported or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter. . . attempts to enter, or is at any time found, in the United States. . . shall be fined. . . or imprisoned").

IIRIRA substantially amended the previous admission law by establishing the new summary removal process for adjudicating the claims of foreign nationals who arrive at U.S. ports of entry without proper documentation or who are perceived to be using misrepresentation or fraud to enter the U.S.[41] The new system includes the former "secondary inspection" procedure, now found in INA §240, and adds the expedited removal procedure found in INA §235. Under the current system, all foreign nationals continue to present themselves to an INS inspection officer. The officer may still refer a foreign national to a "regular" non-expedited removal proceeding under INA §240, which includes the right to judicial appeal. This referral is made, however, only if the individual can show that she is "clearly and beyond a doubt entitled to be admitted," and is not inadmissible under INA §212 (i.e., posing a national security, health or financial risk)[42] or by "clear and convincing evidence." If the foreign national claims to be a permanent legal resident,[43] an asylum seeker,[44] or is Cuban, then she is also supposed to be referred to a §240 hearing. Similar to the pre-IIRIRA procedure, once this referral is made, the foreign national prove her entitlement to admission if rejected by an inspection officer before an immigration judge empowered to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses . . . [and] . . . issue subpoenas for the attendance of witnesses and presentation of evidence."[45] Furthermore, the individual can expect minimal guarantees of due process such as the opportunity to be represented by counsel, present evidence, examine evidence against her, and cross-examine witnesses.[46] The final decision of the immigration judge may be appealed.[47]

The significant change brought by the current expedited removal system is that the INS inspection officer never refers the foreign national to a INA §240 hearing if the applicant falls into the other two categories enumerated in INA §212(a), specifically INA §212(a)(6), which includes misrepresentation, and INA§212(a)(7) which includes incomplete or

41. For a detailed examination of many significant changes brought about by IIRIRA, see Benson, *Lenni B. Benson, The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1998) [hereinafter Benson, *The New World*].

42. INA § 212(a) grounds include: § 212(a)(1) (health related grounds); § 212(a)(2) (criminal and related grounds); § 212(a)(3) (Security and related grounds); § 212(a)(4) (public charge grounds); § 212(a)(5) (labor certification and qualifications for certain immigrants); § 212(a)(8) (ineligibilities for citizenship); § 212(a)(9) (aliens previously removed); § 212(a)(10) (miscellaneous). INA § 212(a) is codified at 8 U.S.C. § 1182(a) (1999).

43. *See generally* INA §§ 216, 245, 8 U.S.C. §§ 1186(a), 1255 (1999).

44. An applicant for asylum must have a "credible fear of persecution." INA § 235(b)(1)(A)(ii)-(B)(ii), 8 U.S.C. § 1225(b)(A)(ii)-(B)(ii) (1999).

45. INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (1999).

46. INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (1999).

47. INA § 240 (b)(4)(A), 8 U.S.C. § 1229a(c)(4) (1999).

inadequate documentation.[48] A foreign national may fall into one of these categories if she has no travel documents or if the INS officer suspects that the documents are: 1) false, 2) not suitable for the type of admission requested[49], or 3) facially valid but believed by the INS officer to have been obtained through misrepresentation or fraud (such as a nonimmigrant tourist visa although the person seems like they intend to live and work in the U.S.)[50] In any of the above instances, the INS officer applies the expedited removal procedure and issues an order of removal and a five-year bar to readmission to the United States.[51] If the foreign national attempts to return before the five year ban runs, he may face criminal sanctions of two

48. The specific two provisions under which the officer exercises this discretion are INA §212 (a)(6) ("Illegal entrants and immigration violators") and INA § 212(a)(7)("[d]ocumentation requirements").

49. § 212(a)(7) provides that "any immigrant at the time of application for admission... who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality," § 212 (a)(7)(A)(i)(I), or those with visas issued not in compliance with INA § 203, 8 U.S.C. §1181(a), which regulates the U.S. immigration quotas that decide each year which categories of foreign nationals will be granted visas (e.g. spouse, parent, child, brother, sister of a U.S. legal resident or citizen)). § 212(a)(7)(A)(i)(II). The same standard applies to nonimmigrants, *i.e.* visitors. INA § 212(a)(B)(i), 8 U.S.C. § 1182(a)(B)(i) (1999).

50. The specific two provisions under which the officer exercises this discretion are INA §212 (a)(6) ("Illegal entrants and immigration violators") and INA § 212(a)(7) ("Documentation requirements"). § 212 (a)(6) includes misrepresentation which means a foreign national 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 admission into the United States" § 212(a)(7)(C)(i) or by falsely claiming citizenship § 212(a)(7)(C)(ii). § 212(a)(7) provides that "any immigrant at the time of application for admission- (I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality," § 212 (a)(7)(A)(i)(I) or those with visas issued not in compliance with § 203, 8 U.S.C. §1181(a), which regulates immigration quotas that decide which categories of foreign nationals will be granted visas for each year (e.g. spouse, parent, child, brother, sister of a U.S. legal resident or citizen). INA § 212(a)(7)(A)(i)(II), 8 U.S.C. § 1182(a)(7)(A)(i)(II) (1999). The same standard applies to nonimmigrants, i.e. visitors. INA § 212(a)(B)(i), 8 U.S.C. § 1182(a)(B)(i) (1999). *See* Anthony Lewis, *Abroad at Home: Bullies at the Border,* N.Y. TIMES, June 15, 1998, at A8 (discussing how several Czech tourists with proper visas for a Florida vacation were denied entry because the officer "knew" they intended to clean "floors of some big store or warehouse").

51. INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i) (1999). If the foreign national attempts to return before the five year ban runs, he may face criminal sanctions of two years imprisonment and an additional bar of ten years. INA §§ 276(a)(2), 212(4)(A), 8 U.S.C. § 1182 (1999). Time bars of five years apply to any foreign nationals who are summarily removed through expedited removal. One bizarre consequence of the expedited removal provision is that it creates a vicious cycle by increasing the pool of inadmissible foreign nationals but who become "inadmissible" due to the original misjudgment of an INS inspector officer that led to a removal order. The following scenario exemplifies this result: a foreign national is removed at the United States border under expedited removal because the inspector officer believed his travel documents were false. The foreign national returns to his country of origin and manages to amend the error that kept him from being admitted in the first place. He then attempts to re-enter the United State. His earnest attempt will

years imprisonment and an additional bar of ten years.[52] The INS officer's decision becomes final once it is reviewed and approved by a field supervisor.[53] If an INS inspection officer determines a foreign national falls under §212(a)(6) or (7), the INS discourages the officers from acknowledging whether the foreign national also falls under any of the other categories enumerated in §212(a), since the individual would then be entitled to a hearing under §240.[54]

If caught in the expedited removal procedure, a foreign national's only de facto relief comes if an officer decides to offer the foreign national the right to voluntarily withdraw her application of admission, upon which she must immediately return to the country from which she departed.[55] Since INS regulations to not permit the reopening of a removal decision after the alien has departed, this measure allows her to avoid a five-year bar to readmission.[56] According to one report, not all INS officers follow this policy,

---

cause him to be excluded again for attempting entry despite a 5-year ban (thus is misrepresenting entitlement to enter) and he will also be slapped with an additional 10-year penalty. 8 U.S.C. 1182(a)(9)(A)(ii)(II) (20 years for second or subsequent removal, permanently for aggravated felons). Persons who have been ordered removed, or who have been here for one year or more, and who enter or attempt to reenter the United States without authorization, are permanently inadmissible. 8 U.S.C. 1182(a)(9)(C)(i)(I). Another time bar of 3 years is issued against any foreign national, unless lawfully admitted for permanent residence, who overstays his/her visa for more than 180 days (but less than one year). The time bar is issued even if the visitor voluntarily leaves. *See* 8 U.S.C. 1182(a)(9)(B)(i)(I) (redesignating paragraph (9) as paragraph (10) and inserting after paragraph (8), a new paragraph (9)). If the foreign visitor stays beyond a year, she will be faced with a 10-year bar. 8 U.S.C. 1182(a)(9)(B)(i)(II). With new plans to install better exit recording devices, casual, albeit irresponsible tourists will find themselves banished from the United States for a sizable period of time, often unknowingly. *See, e.g.* Anthony Lewis, *A Bad Time for Civil Liberties,* 5 ANN. SURV. INT'L & COMP. L. 1, 6 (1999) [hereinafter Lewis, *A Bad Time*]. IIRIRA creates other conditions, particularly when adjustment of status is pending, that if broken, even inadvertently, lead to the same tragic consequences if they temporarily leave the United States even for emergencies. Such is the case with pending fiancée visas. 8 U.S.C. 1201(a) (1999); *see also* Anthony Lewis, *Newly Bolstered INS Steps Over the Line,* NEWS OBSERVER, Aug. 30, 1997, at A18.

52. INA §§ 276(a)(2), 212(4)(A), 8 U.S.C.§ 1182 (1999). David M. Grable argues that when prosecuted under this INA provision, due process attaches to the proceedings and the defendant, a "removed" foreign nationals who sought re-entry, would be able to contest the original order of removal. *Note: Personhood Under The Due Process Clause: A Constitutional Analysis Of The Illegal Immigration Reform And Immigrant Responsibility Act Of 1996,* 83 CORNELL L. REV. 820, 857-859, 861-862 (1998) [hereinafter Grable, *Personhood*].

53. 8 C.F.R. § 235.3 (b)(7). IIRIRA does not require this review, but the executive office issued regulations that provide that "[s]uch supervisory review shall not be delegated below the level of the second line supervisor, or a person acting in that capacity" *Id.*

54. Memorandum from the Office of the Deputy Commissioner on Implementation of Expedited Removal 1 (Mar. 31, 1997) (on file with author) (stating that "[i]f additional charges are lodged, the alien may be referred for a section 240 hearing, but this should only occur in extraordinary circumstances.")

55. 22 C.F.R. 41.122(h); INS Operations Instruction (OI) 212.9 (on file with author).

56. *See* 62 Fed Reg. 10321 (1997).

and thus impose penalties on those who would otherwise choose to voluntarily depart.[57] However, even if a foreign national accepts the option of withdrawal, she may face difficulties in persuading the consul in her home country to issue a new visa, since her last visa would have been canceled and the record might note that she previously attempted entry by fraud or misrepresentation.[58]

B. Expedited Removal: Not Just a Bad Policy, but a Constitutional Violation

Congress reformed the admission/exclusion procedures, at United States ports of entry, in order to "expedite the removal from the United States of aliens who *indisputably* have no authorization to be admitted. . . ."[59] Legislators intended the expedited removal procedure as a way to quickly weed out foreign nationals violating U.S. immigration law.[60]

57. Anthony Lewis, *Abroad at Home: Vigilance and Fairness,* N.Y. TIMES, Sept. 22, 1997, at A27. An INS memorandum (IN 98-05) provides the following guidance for deciding to offer the option to withdraw: "a careful balancing of relevant favorable and unfavorable factors" including consideration of: 1) the seriousness of the immigration violation; 2) previous findings of inadmissibility against the individual; 3) intent on the part of the individual to violate the law; 4) ability to overcome the ground of inadmissibility; 5) age or poor health of the individual; and 6) other humanitarian or public interest considerations." Memorandum from the INS on Withdrawal of Application for Admission (Dec. 22, 1997) (on file with author).

58. Stanley Mailman & Stephen Yale-Loehr, *Withdrawing the Application for Admission,* N.Y. L.J., June 23, 1997, at 3. *See, e.g.* Lewis, *A Bad Time, supra* note 51, at 6.

59. H.R. CONF. REP. No. 209, 103rd Cong., 1st Sess. (1996) (emphasis added).

60. Congress gained motivation to enact the summary exclusion procedure from the fact that "thousands of aliens arrive in the U.S. at airports each year without valid documents and attempt to illegally enter the U.S." H.R. CONF. REP. No. 158, 103rd Cong., 1st Sess. (1996). Although it is difficult to ascertain the exact number, there were an estimated 5 million undocumented foreign nationals in the United States, according to Naturalization Service Commissioner Doris Meissner. Jerry Seper, *Reno Claims Record for Yearly Deportations,* WASH. TIMES, Oct. 31, 1997, at A8. Professor Abriel argues that until Congress deals with the economic "pulls" that result in a high rate of undocumented foreign nationals seeking entry to the U.S., no measure like expedited removal can be truly effective. Evangeline G. Abriel, *Immigration Reform Laws: Redefining Who Belongs: Article: Ending The Welcome: Changes In The United States' Treatment Of Undocumented Aliens (1986 To 1996),* 1 RUTGERS RACE & L. REV. 1, 33 (1998). Although viewed as a reaction to faulty enforcement of immigration policy, some view IIRIRA as politically motivated and designed to pressure President Clinton, who signed the law approximately a month before the 1996 federal elections. *See* Ken Fireman, *GOP Sponsor Halts Immigration Bill,* NEWSDAY, Sept. 18, 1996, at A16 (highlighting the unsavory politics behind another Republican-backed immigration bill that would have allowed states to expel illegal-immigrant children found in public schools, but was stopped by Senator Alan Simpson (R-Wyo.) who recognized the measure, like others, was being turned into a "Machiavellian vehicle to embarrass President Bill Clinton," of which the sole purpose was to "craft something that would eventually fail" but that would make Clinton look "soft on immigrants" when forced to defeat the unreasonable proposal). Such shenanigans, or "political football," suggest the policy motivations of this dramatic new law did not arise out of genuine concern over the domestic impact of immigration. *Immigrants as an Issue,* LAKELAND LEDGER, Oct. 7, 1996, at A12 [hereinafter *Immigrants as an Issue*]. For a general discussion of the factors which also influenced anti-immigration policy, see Dulce Foster, *Note: Judge, Jury and Executioner: INS Summary-*

Despite the narrow purpose of the expedited removal procedure, the reformed admission system punishes many unintended classes of foreign nationals not meant to fall under the ambit of the new procedure.[61] Unfortunately, as commentators have noted, "[t]he law takes aim at the right problem, illegal immigration, but this scattershot approach takes out a lot of innocent bystanders."[62]

One of the most tragic misapplications of the expedited removal procedure impacts asylum seekers.[63] Critics point out that these individuals are most vulnerable to being removed under the expedited removal system because they usually arrive with false travel documents, if any at all.[64] For refugees, the price could literally be their life if returned to the hands of their persecutors. Despite explicit directives to refer asylum seekers to an asylum officer, the referral must first be made by an INS officer after the refugee first articulates an unsolicited request to apply for asylum based on a "fear of persecution." Practice has already shown that some officers fail

---

Exclusion Power Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 82 MINN. L. REV. 209, (1997) [hereinafter Foster, *Judge, Jury and Executioner*].

61. 145 CONG. REC. S14696-03, S14701 (1999). *See generally* William Branigan, *INS's Expedited Removal Attacked*, WASH. POST, April 4,1998, at A2.

62. *See* William Branigan and Pamela Constable, *New Immigration Policy Generates Confusion, Another Legal Challenge*, WASH. POST, Apr. 2, 1997, at A1. (quoting Frank Sharry, director of the National Immigration Forum).

63. The effect of this law on refugees is terribly serious and deserves separate examination that falls outside the scope of this article. Their situation under expedited removal, however, goes towards a general criticism of the expedited removal system its over-inclusive reach. Advocates hold grave concern that legitimate asylum seekers are being turned away because of a subjective judgment that their fears were not credible. After just three months activation, of the "14,400 people handled under the new regulation, only 5 percent had been given the opportunity to have a credible fear interview about their fear of returning to their country" and 80% of those people met the criteria for entry. Vincent J. Schodolski, *New INS Rules Worry Immigrant-Rights Advocates*, CHI. TRIB., Jul. 10, 1997, at 4N. Since one symptom of torture is the inability to reveal details of an experience, this complicates an adjudicator's ability to quickly assess a victim's status. Moreover, language and cultural barriers enhance this difficulty. *See generally* Celia W. Dugger, *In New Deportation Process, No Time, or Room, for Error*, N.Y. TIMES, Sept. 20, 1997, at A1. One Albanian woman who fled her country after being gang-raped in retaliation for her husband's refusal to fight for the government failed to convince immigration officials that she had "a credible fear" because she feared the male translator, also from Albania, thereby delaying informing the court of her gang-rape. The judge used this delay against her, interpreting it as a lack of truthfulness. Upon returning, she was found on a street near the airport in Tirana, the capital of Albania, unable to return to her family where the "masked men" could get her. *Id.* Due to the publicity and pressure, the INS eventually granted her asylum. Interview with Eileen Bretz, Attorney for Albanian Woman (Mar. 1999). *See generally, Controversial New INS Rules: Morning Edition* (National Public Radio broadcast, May 16, 1997); Sara T. Campos, *The Mistreatment of Tortured Refugees*, S.F. EXAMINER, June 17,1997, at A17; Vanessa Redgrave, *Seek Aslyum, Go to Jail: The Actress Confronts the INS*, L.A. WEEKLY, Oct. 10, 1997, at 16 (interviewing asylum seekers jailed while awaiting relief, i.e asylum).

64. *See, e.g.*, Brian L. Aust, *Fifty Years Later: Examining Expedited Removal and the Detention of Asylum Seekers Through the Lens of the Universal Declaration of Human Rights*, 20 HAMLINE J. PUB. POL'Y 107 (1998).

to make these referrals, either because they question the credibility of the claim or because they lack an understanding of the claim being made.[65]

The expedited removal procedure also works against foreign nationals whose status in the United States is pending; many of whom temporarily leave the country without realizing that they may be refused readmission. For example, Martina Diederich met her American husband while visiting the United States in 1994. The two decided to visit her family in Germany, confirming twice with the INS that she was allowed to leave. Upon returning to the United States, however, Diedrich was jailed for eight days by INS officials and eventually sent back to Germany handcuffed and chained to her seat, without any notice to her husband. The INS claimed that Diedrich was not supposed to leave while she had a pending application for adjustment of status, and that her re-entrance was therefore "unlawful."[66]

Business travelers are also easily caught in the web of expedited removal. One of the earliest examples of its misapplication involved a businesswoman from China who arrived in Seattle with a valid business visitor's visa to buy supplies for her company. She was detained, strip-searched, and transferred to jail to be considered for an asylum application she did not request. She later was removed from the United States, never receiving notice of the specific grounds for this decision.[67] Another example of this misapplication occurred when a Venezuelan citizen traveled to Miami on a valid work visa, which he had used on numerous occasions. However, when he tried to use the visa again after the new 1996 law took hold, the inspection officer accused the businessman of planning to live permanently in the United States. He was barred re-entry after twenty hours of detention and was never even allowed a phone call. The businessman's original visa was restored only after his company sued INS.[68]

---

65. For discussion, see Bo Cooper, *Procedures for Expedited Removal and Asylum* SCREENING UNDER THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996, 29 Conn. L. Rev. 1501 (1997); Philip G. Schrag & Michelle R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267 (1997).

66. Anthony Lewis, *Newly Bolstered INS Steps Over the Line*, THE NEWS & OBSERVER, Aug. 30, 1997, at A18. Scott Shelley, a physicist from Toronto married to an American citizen, had almost the exact same experience. *See* Lewis, *A Bad Time, supra* note 51, at 1-3.

67. Rachel D'oro, *Visa Questions Land Beijing Woman in Jail,* ANCHORAGE DAILY NEWS, June 23,1997, at 2.

68. Jacob Bernstein, *Welcome to America. Now Go Home,* MIAMI NEW TIMES, Jan. 1-7, 1998, at 23; MUSALO ET AL., REPORT ON THE FIRST YEAR OF IMPLEMENTATION OF EXPEDITED REMOVAL 45-47 (1998). Another example of a business traveler involved a woman from Canada who acted as a quality-control consultant for an American fruit and vegetable company and her work required that she travel to the United States. After expedited removal took effect, she was stopped and interrogated. The INS officer said she needed a work visa even though she was only trying to attend a meeting. The Canadian returned to her employer in Canada to get a company letter to state her visit to the U.S. was to attend a meeting and not to work. When she attempted to enter the U.S. a second time, the same INS officer who inspected her the first time, accused her of lying and barred her from entry

Another story involved a Swiss film distributor who was locked up and coerced into signing an incriminating statement or else face deportation and then was forced to buy a $833 return ticket. His detention forced him to miss a meeting with a German financier visiting Hollywood, as well as the head of a special effects company, and led him to comment, "You just can't do that to people who are coming to this country and bringing millions of dollars in business."[69]

Various other groups of foreign nationals have contributed their own horror stories about the expedited removal system. A Canadian yachtsman making a regular stop at the Seattle-Tacoma International Airport, as he had done without incident in the past, was suddenly barred for five years.[70] A Mexican woman was also stopped and barred when she attempted to visit her husband in Texas, where she was also scheduled for a hernia operation. The couple's two-month old son was with her at the time.[71] A young Costa Rican bride was detained at the border even though she and her American husband had "done everything by the book . . . [and] never dreamed anything like this could happen."[72]

Previous to IIRIRA, all of these individuals would have had an opportunity to correct mistakes or clarify misunderstandings before an immigration judge. Most of them would have been admitted to the United States after such a hearing, or at least would have been able to appeal a negative decision. These pre-IIRIRA due process measures were considered to be provided at the discretion of Congress and not because valid visa holders could have claimed a constitutional right to procedural due process. In reference to these foreign nationals who arrive at ports of entry, courts consider "such aliens [not to be] considered to be within the United States, but rather at the border, [consequently] courts have long recognized that such aliens have 'no constitutional right[s]' with respect to their application for admission."[73] This legal fiction allows courts to declare that in the absence of a liberty interest, most foreign nationals have no constitutional

---

and gave her a five year bar to readmission. Solange De Santis, *U.S. Traps Canadians in a One-Size-Fits-All Border-Control Policy.* WALL ST. J., June 4, 1998, at A13.

69. Patrick J. McDonnell, *INS Inspectors' Power to Reject Visitors Criticized Immigration: Attorneys Say Law Targeting Deceptive Claims for Asylum is Being Used to Expel Swiss Businessman and Thousands of Arriving Foreigners, Agency Denies Wrongdoing,* L.A. TIMES, Jan. 19, 1998, at B1. The economic effect of this treatment of business travelers has not gone unnoticed: "if businesspeople from around the world are treated disrespectfully at our ports of entry, they are likely to take their business elsewhere." 145 CONG. REC. S14696-03, S14701 (1999).

70. Anthony DePalma, *New Rules at U.S. Borders Provoke Criticism,* N.Y. TIMES, Nov. 14, 1997, at Al [hereinafter DePalma, *New Rules*].

71. *Id.*

72. Nancy San Martin, *New Immigration Law Leaves Couple in Limbo,* SUN-SENTINEL, Dec. 12, 1997, at 13.

73. *American Immigration Lawyers,* 18 F. Supp 2d at 62 (citing *Landon v. Plasencia,* 459 U.S. 21, 32(1982) (citing *United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 544 (1950)) (other citations omitted).

right to any procedural protections and "whatever Congress by statute provides is obviously sufficient, so far as the Constitution goes."[74]

However, jurisprudence over the years has granted due process rights to certain classes of foreign nationals who also have been caught in the expedited removal system. In particular, foreign nationals "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the [U.S.]."[75] Under the "substantial connections" test, a foreign national arriving at a U.S. port of entry generally enjoys liberty and property interests cognizable under the Due Process Clause if he can demonstrate a certain level of community ties to the U.S.[76] Above all else, the risk that the expedited removal will exclude lawful permanent residents, presents the most compelling constitutional arguments, since erroneous exclusion without a hearing deprives these individuals of a liberty interest.[77] The same conclusion applies to United States citizens, including naturalized citizens, who have an indisputable right to admission and who always enjoy liberty interests cognizable under the Constitution.

In fact, the new expedited removal procedure reflects the seriousness of this right by explicitly providing that persons claiming lawful status based on citizenship or permanent residence should be referred by the inspection officer to an immigration judge.[78] Yet, in practice, all of these individuals remain vulnerable to exclusion under the expedited removal procedure because there is a limited check on this referral system and an inspection officer convinced that the foreign national is lying may deny

74. *Id.* at 65 (citing *Rafeedie v. INS,* 880 F.2d 506, 520 (1989)). Professor Wani writes in relation to the plenary doctrine in immigration law that this

> [f]iction can be used to escape the duty of reasoned analysis, to perpetuate mythologies upon which the law thrives, to avoid criticism, to mask the true intent and purpose of the communicator, to avoid moral responsibility for decision, to dehumanize the cases perhaps to lessen the burden of decision-making, and, to pursue an agenda, usually political, that is inconsistent with the mainstream of thought and therefore inarticulable and indefensible.

Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 59 (1989) (footnotes omitted).

75. United States v. Verdugo-Urquidez, 494 U.S. 259, 271, *reh'g denied*, 494 U.S. 1092 (1990), *and vacated*, 902 F.2d 773 (9th Cir. 1990).

76. *See* Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) (noting that "[t]he alien. . .has been accorded a generous and ascending scale of rights as he increases his identity with our society."); Haitian Ctrs. Council, Inc. v. Sale, 823 F.Supp. 1028, 1042 (E.D.N.Y. 1993) (arguing that "[a]s [foreign nationals'] ties to the United States have grown, so have their due process rights"). *See* discussion *infra* Part V.

77. The *Fleuti* doctrine also preserves due process protection for lawful permanent residents who re-enter after brief, casual, and innocent departures. *See* Fleuti v. Rosenberg, 374 U.S. 449 (1963). For a discussion on how expedited removal impacts the rights of lawful permanent residents see Michelle Slayton, *Interim Decision No. 3333: The Brief, Casual, and Innocent Conundrum*, 33 NEW ENG.L. REV. 1029 (1999).

78. INA §§ 235(b)(1)(A)(ii); 235(b)(1)(C) (codified at 8 C.F.R. § 235.3(b)(2)(iii) (1999). This applies to individuals who have been lawfully admitted for permanent residence. INA 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C) (1999).

him access to a hearing. The case of Mr. Diaz perfectly exemplifies the high risk of erroneous determinations inherent to this referral system. Consequently, despite the fact that Congress attempted to build in protections for certain classes of foreign nationals, the design of the expedited removal procedure and its infrastructure undermines these safety measures because INS inspection officers have full authority and discretion to decide *who* gets referred to a hearing or who gets excluded without a hearing. Often the decision is an ultimately faulty judgment call.

C. INS Interim Regulations Provide Insufficient Safety Measures

Soon after the implementation of the new expedited removal procedure, the press began to diligently collect the dramatic stories illustrating how INS officers misapply the new procedure:

> The provision was aimed originally at people who arrived at ports of entry with fraudulent documents, notably asylum claimants who might not really be fleeing persecution. But it is in fact being applied primarily to ordinary visitors. Since the new law took effect in April, thousands of people with valid U.S. visas have been summarily turned away because an INS officer thought, for example, that their frequent previous stays here showed an intention to do more than visit.[79]

One attorney representing an "excluded" foreign national who was barred for five years despite holding a valid visa, argued, "Congress did not intend to keep people out who have visas legally issued by the United States . . . They were looking to keep out people who had fake documents. I think the INS agents just don't understand the law. They keep accusing people of willful misrepresentation or fraud but they won't say what the people did that was fraudulent or misrepresentation."[80]

It seems that the INS itself also recognized the potential pitfalls in allowing its own low-level officers to make judicial-like judgments regarding a foreign national's intent to violate immigration laws and attempted to erect various safety measures when it enacted Interim Regulations in April 1997 for implementing IIRIRA's new expedited removal procedure so as to guide the INS officers who suddenly acquired this immense responsibility from Congress.[81] The Regulations' guidelines instruct an INS officer to "[o]btain forensic analysis, if appropriate" in the process of determining

79. Anthony Lewis, *Abroad at Home: Newly Bolstered INS Steps Over the Line*, *supra* note 51, at A18.

80. Rachel D'oro, *Visa Questions Land Beijing Woman in Jail*, *supra* note 72, at 2.

81. Given the new congressional limits on judicial review, Professor Kanstroom made an early call on the agency to exercise self-restraint and to promulgate rules to limit and guide the exercise of discretion. Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 717, 805 (1997) [hereinafter Kanstroom, *Surrounding the Hole*].

the validity of travel documents.[82] The officer is instructed not to "rush to judgement" or "expeditiously remove aliens based on incomplete evidence."[83] Saddled with the responsibility of implementing Congress's new law, the INS expresses its own concerns with granting such unprecedented power to low level INS officers and cautions:

> [a]ll officers should be especially careful to exercise objectivity and professionalism when refusing admission to aliens under this [expedited removal] provision. Because of the sensitivity of the program and the potential consequences of a summary removal, *you must take special care to ensure that the basic rights of all aliens are preserved...* Since a removal order under this process is subject to very limited review, you must be absolutely certain that all required procedures have been adhered to and that the alien has understood the proceedings against him or her... All officers should be aware of precedent decisions and policies relating to the relevant grounds of inadmissibility... [I]t is important that any expedited removal be justifiable and non-arbitrary.[84]

The regulations, in response to Congress' delegation, attempt to fit a civil servant with a judge's wig, but human error and bias undermine the high expectations of the INS and Congress.

In deciding *American Immigration Lawyers v. Reno*, the district court determined that the Interim Regulations withstood "review on an arbitrary and capricious standard because the regulations provide more procedural protections than the statute itself."[85] The court declined to hear challenges to the *unwritten policies and practices* of INS officers who apply the Interim Regulations.[86] Justifying this decision, the court pointed to the clear language of the jurisdictional provision that requires a court to "[limit] its

82. INS INSPECTOR'S FIELD MANUAL, ch. 17.15(b)(5).

83. *Id.*

84. *Id.* at ch. 17.15(a)-(b) (emphasis added).

85. 18 F. Supp. 2d at 55 (applying the deferential test for reviewing agency regulations that result from when Congress delegates to the Attorney as established in *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 41 (1983)). The plaintiffs challenged the ban on the foreign national's communicating with family, friends and counsel during secondary inspection and "the failure to provide adequate language interpretation at secondary inspection," "the failure to provide adequate access to and participation of counsel prior to and during secondary inspection," "the failure to provide adequate information on charges and procedures, the opportunity to contest those charges, and the failure to provide for review of removal orders." *Id.* at 53. In reference to those procedural due process protections not provided for in the Interim Regulations, the court writes that "[p]laintiffs cannot impose upon the Attorney General any obligation to afford more procedures than the governing statute explicitly requires or that she has chosen to afford in her discretion." *Id.* at 56.

86. *Id.* at 57-58 (emphasis added). One of the plaintiffs, a 70 year old woman, was denied adequate food, water and restroom access during a nineteen hour detention and was told to sign a document that was not explained or translated into Spanish, the only language she knew. *Id.* at 57.

review to a 'regulation, a written policy directive, written guideline, or written procedure.'"[87] After exercising this self-restraint, the court added:

> The Court is, nevertheless, troubled by the effects of Congress' decision to immunize the unwritten actions of an agency from judicial review, particularly where, as here, so much discretion is placed in the hands of individual INS agents who face only a supervisor's review of their decisions. In their complaints, plaintiffs have alleged serious failures by the INS to follow its own regulations in the treatment of aliens arriving in the United States. Therefore, the Court, in the strongest language possible, admonishes the [INS] to comply with its own regulations, policies, and procedures in providing aliens with the treatment, facilities, and information required by the agency's regulations, policies, and procedures.[88]

The court's admonishment highlights that even the most carefully planned and written instructions fail to ensure that INS officers will make fair and correct admission determinations. Although the regulations provide some due process measures not required by statute, practice reveals that serious mistakes occur regularly, often resulting in the violation of the constitutional right to due process.[89]

D. Low Level INS Officers Make Judicial Determinations

The inherent weakness of the expedited removal system is its reliance on the accuracy of the low-level officers responsible for making a whole category of decisions that were previously made by judges. These inspectors now make decisions which, prior to IIRIRA, could have been reviewed at several stages in the judicial system, yet now cannot be reviewed at all. Although the risk of human error comes with any delegation of power, such deviance is minimized when supervised by upper-level managers and reviewed by the courts. In contrast, under the expedited removal system, the overbroad discretion granted to inspection officers coupled with an explicit bar to judicial review leads to alarming results.[90]

---

87. *See id.* at 58 (citing INA § 242(e)(3)(A)(ii)).

88. *Id.*

89. As long as mistakes are an "expected and natural part of the process," as conceded by Rep. Lamar Smith, then due process protection during the admission process and judicial review are the only assurances of just results. Anthony Depalma, *New Rules*, *supra* note 70, at A1 (quoting Rep. Lamar Smith (R-TX)).

90. *See* discussion in Part II.F, *infra*, on judicial review, discussing the concurring opinion of Justice Ginsberg and the dissent of Justice Souter in *Reno v. American-Arab Anti-Discrimination Committee* in which they express an unwillingness to read an absolute preclusion of review in removal decisions. It is not clear that their opinion reflects that of the majority. *See generally American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

Many lawyers and advocates working closely with immigrants immediately recognized the severity of this new discretion.[91] The grant of power now given to INS officers under the expedited removal system is unprecedented: "an immunity not afforded to the IRS, the FBI, the Drug Enforcement Agency or any other federal police force."[92] In a sense, the officer becomes "judge, jury and executioner."[93] As already mentioned, even the INS recognized the potential risks of the expedited removal procedure. In a memorandum issued on March 31, 1997, Deputy Commissioner Chris Sale acknowledged this astonishing power when cautioning his employees that:

> [t]he expedited removal provisions present a tremendous challenge and responsibility to INS officers, and will be the subject of close scrutiny by Congress, the Department of Justice, advocacy groups, and others. Every officer must adhere strictly to required procedures to ensure that the rights of aliens are protected, particularly those who express a fear of persecution, at the same time ensuring that aliens who clearly seek to violate the immigration laws are quickly removed from the United States in a professional, fair and objective manner.[94]

More than two years after its implementation, Senator Leahy also recognized the expedited removal procedure "places too much authority in the hands of low-level INS officers."[95] The Senator no doubt calls it "too much" in reaction to the drastic consequences which result from misapplication: "[I]n the hands of thousands of individual agents with minimal training and supervision. . .families are being separated, individuals' ability to work is being restricted and lives are being disrupted without warning and, in some cases, without cause."[96]

Exposing the ways in which INS officers misapply the expedited removal has proven difficult since information about the new expedited removal system is reluctantly shared by the agency.[97] In addition, it may be

91. Anna Marie Gallagher, an attorney with the American Immigration Law Foundation in Washington, D.C., describes the expedited removal procedure as "absolutely horrifying" and declares that the "most frightening aspect of it. . .is the power it gives to low-level Government officials." DePalma, *New Rules, supra* note 70, at A1.

92. *Immigrants as an Issue, supra* note 60.

93. *See* DePalma, *New Rules, supra* note 70, at A1 (quoting Gallagher). *See generally* Patrick J. McDonnell, *INS Inspectors' Power to Reject Visitors Criticized*, L.A. TIMES, Jan. 19, 1998, at B1; Robert Kuttner, *The Land of the Free or a Police State?* SAN DIEGO UNION-TRIBUNE, June 17, 1998, at B7.

94. Memorandum from the Department of Justice on Implementation of Expedited Removal (March 31, 1997) (on file with author).

95. 145 CONG. REC. S14696-03, S14701 (1999).

96. DePalma, *New Rules, supra* note 70, at A1.

97. "Two years after its enactment, the public has been provided with little information on the manner in which this process is being implemented. The [INS] has denied non-governmental organizations (NGOs) and the *The Expedited Removal Study* access to statistical data as well as to secondary inspections and credible fear interviews for observation

impossible to truly understand the actual impact of the new procedure since many individuals, whose applications for admission get processed on an expedited basis, return to their point of departure before they have an opportunity to seek counsel or notify family or friends.[98] Most of the documentation for demonstrating the negative impact of the law is anecdotal and comes either from press reports or lawyers representing victims of the expedited removal system.[99] *The Expedited Removal Study*, a project of the Center for Human Rights and International Justice at the University of California, Hastings College of the Law, had collected more than 600 cases from attorneys and NGOs.[100] The study relies on these sources because the INS denies or limits their access to direct information, such as statistical data or observation of secondary inspections and credible fear interviews.[101]

---

purposes." CTR. FOR HUMAN RIGHTS AND INTERNATIONAL JUSTICE AT UNIV. OF CAL., HASTINGS COLLEGE OF THE LAW, REPORT ON THE SECOND YEAR OF IMPLEMENTATION OF EXPEDITED REMOVAL 10 (1999) (citation omitted) [hereinafter CTR. FOR HUMAN RIGHTS 1999 REPORT].

98. Robert Rubin, *Raining on An Immigration Crusade*, INVESTOR'S BUS. DAILY, Aug. 21, 1997, at A30. Rubin, an attorney with the Lawyers Committee for Civil Rights, also indicates that there is "no way to know the truth" because applicants are turned away so quickly. *Id. See also Morning Edition* (National Public Radio broadcast, October 14, 1997). Senator Leahy testified that ". . .perhaps the most distressing part of expedited removal is that there is no way for us to know how many deserving refugees have been excluded. Because secondary inspection interviews are conducted in secret, we typically only learn about mistakes when refugees manage to make it back to the U.S. a second time." 145 CONG. REC. S14696-03, S14701 (1999).

99. The only public study released thus far has come from the General Accounting Office, which issued a report in March, 1998, pursuant to a Congressional mandate to evaluate the expedited removal law. Congress directed the GAO to evaluate whether expedited removal served its intended purpose (deterring illegal entry), was cost efficient and an effective procedure. GAO 1998 REPORT, *supra* note 39. *See* IIRIRA, *supra* note 4, at App. B (Requirements for Study and Report on Implementation of Removal Procedures). The report, however, fails to evaluate the quality or accuracy of the decisions made pursuant to the expedited removal provision, although Congress explicitly called for such an evaluation. The GAO evaluation included a very limited on-site observation of the process and "relied largely upon INS's own records of compliance or non-compliance with formal requirements." CTR. FOR HUMAN RIGHTS 1999 REPORT, *supra* note 103, at 17. A second study has been initiated under the International Religious Freedom Act of 1998, passed by Congress on October 27, 1998, and is scheduled to be submitted to Congress on September 1, 2000. One of the purposes of this study will be to examine whether expedited removal is correctly applied to all classes of foreign nationals, not just those seeking asylum. International Religious Freedom Act § 605(a)(2), Pub. L. No. 105-292, 112 Stat. 2787 (1998).

100. *Id.*

101. The Expedited Removal Study was initiated in May 1997 "to conduct a comprehensive nationwide review of the expedited removal process" including an examination of all components of the new procedure to advise policy makers and the public. The Study was funded by the Ford Foundation and the Joyce Mertz-Gilmore Foundation. CTR. FOR HUMAN RIGHTS AND INTERNATIONAL JUSTICE AT UNIV. OF CAL., HASTINGS COLLEGE OF THE LAW, REPORT ON THE FIRST YEAR OF IMPLEMENTATION OF EXPEDITED REMOVAL 22-25 (1998) [hereinafter CTR. FOR HUMAN RIGHTS 1998 REPORT]; CTR. FOR HUMAN RIGHTS 1999 REPORT, *supra* note 97.

Even this limited information demonstrates that expedited removal has had unintended and devastating consequences due to a design that from the start predicted failure. The unlimited power to determine whether or not a foreign national has proper travel documents or is using fraud or misrepresentation gives officers alarmingly wide discretion to determine who may or may not enter the United States. The stories confirm that the current system leaves wide breadth for human error and bias. Such was the case when a Mexican teenage girl was excluded despite holding valid documents to visit her sister; she was denied admission because the INS officer used "something like a (sixth) sense" to decide her documents were obtained under false pretenses.[102] It may be true that the exclusion of the teenager, although perhaps a callous outcome, may not rise to the level of a constitutional violation under the law, but these INS officers no doubt exercised this same "sixth sense" against individuals like Mr. Diaz, an American citizen, who do enjoy constitutional due process rights.[103]

Along with faulty judgment, wrong decisions are also made due to simple human error, exacerbated by heavy workloads of INS officers and the increased pressure by administrators to keep foreign nationals out. INS inspectors at ports of entry traditionally have had very limited time to make very quick decisions as to whether a foreign national should be admitted or referred to an immigration judge.[104] The quick pace of the work is complicated by a tradition of disorganization at the institutional level. In the past, the INS has come under attack for its lack of organization that inevitably negatively impacts performance in the field.[105] In fact, for years,

102. Edward Hegstrom, *Controversial Law Blocks Mexican Teenager's Visit; Local Couple Protest Treatment of Relative by INS.* HOUS. CHRON., Aug. 22, 1999, at 4. (quoting INS spokeswoman Thu Nhi Barrus' explanation for the basis of summary deportation decisions); Senator Leahy referred to the risk of using this "sixth sense" when proposing his new bill to put judicial review back in place. 145 CONG. REC. S14696-03, S14701 (1999).

103. See *Diaz v. Reno, supra* note 1, at 985.

104. *See Morning Edition* (National Public Radio broadcast, Oct. 14, 1997) (interviewing Joe Well, a passport inspector who processes one person per minute).

105. In the spring of 1997, INS Commissioner Doris Meissner was admonished by Congress for the disorganized naturalization process which led to many foreign nationals with criminal records being made citizens. *Hearing Before the Subcommittees on Commerce, Justice, State and Judiciary* (Mar. 13, 1998) (statement of Doris Meissner, INS Commissioner). The disarray of INS led to GAO report GGD-97-132, which confined the impact on field officers. GENERAL ACCOUNTING OFFICE, INS MANAGEMENT FOLLOW-UP ON SELECTED PROBLEMS (1997). The report responded to an earlier report, GGD-91-28, that first delineated the major problems which had gained public attention that field performance was uneven and poorly coordinated with minimal accountability. GENERAL ACCOUNTING OFFICE, INS MANAGEMENT REPORT (1991). In the later report, the GAO determines that despite reorganization efforts, the INS still encounters problems with communication and coordination among offices, and which has resulted in the confusion and frustration of members of the field operations. Moreover, a survey reported that 73% of field managers believed headquarters were not in touch with events, problems and concerns of the field. *Id.*, GENERAL ACCOUNTING OFFICE, INS MANAGEMENT: FOLLOW-UP ON SELECTED PROBLEMS (1997).

field officers worked without updated manuals that led to the practice of "field personnel all [doing] their own thing."[106] The habit of ad hoc policy implementation created a professional culture in which regional staff believed the policy was *not* to put things in writing; a system they admitted to being chaotic since there was no record to check for accuracy.[107]

This historically weak infrastructure now bends under the added pressure of the expedited removal system which places a premium on the quantity not the quality of the admissibility determinations.[108] According to Rosemary Jenks, a senior fellow at the Center for Immigration Studies, "[The INS has] been under a lot of pressure from Congress to increase the number of criminal and illegal foreign nationals deported . . . and until now they did not have numbers to show for [added money to their budget]. They are trumpeting [record numbers] to get Congress off their back."[109]

In delegating such wide discretion to low-level INS officials, Congress may have given the INS an impossible task. Yet, at the same time, Congress members anticipated that inevitable human error would lead to improper application of the expedited removal procedure. Republican Congressman Lamar Smith of Texas, the principal sponsor of the law, did not hesitate to point the finger of blame at the INS:

> It's not the fault of the law . . . It's the fault of the INS. When you have hundreds of millions of entries every year, and you have human nature involved, there are inevitably going to be some

106. GENERAL ACCOUNTING OFFICE, INS MANAGEMENT: FOLLOW-UP ON SELECTED PROBLEMS (1997).

107. All of this chaotic procedure is exacerbated by a chronic staffing shortage which continued to keep the agency from meeting its demands. *Hearing Before the Subcommittees on Commerce, Justice, State and Judiciary* (Mar. 13, 1998) (statement of Doris Meissner, INS Commissioner).

108. This contrasts with recommendations made in a report to Congress by the U.S. Commission on Immigration Reform that emphasize a customer service ethic among staff. UNITED STATES COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 58 (1997).

109. Naftali Bendavid, *Deportation Up as INS tries to Please Congress*, CHI. TRIB., Oct. 31, 1997, at 5N (interviewing Joel Najar of the National Council of La Raza, who states that "[t]he INS is digging through old records in order to pump up the number - to get big numbers like 111,000 [referring to the total number of illegal foreign nationals deported in fiscal year 1997]"). Although Najar is referring to deportation cases, the same pressure permeates the Governments general policy regarding minimizing the presence of illegal foreign nationals in the country. *See generally* Marisa Samuelson, *INS Deports Record Number; Some Latinos Sue,* THE NEWS, Oct. 1, 1997, at 6. In his testimony before the House Immigration and Claims Subcommittee, Paul Virtue Acting Executive Associate Commissioner Office of Programs conveyed this emphasis stating, "[. . .] Commissioner Meissner has brought renewed emphasis to the removal of criminal and other foreign nationals unlawfully in the United States. With the strong support of the Congress and the Administration, INS has raised the number of removals to record levels. . ." *Immigration Changes* (statement of Paul Virtue), *supra* note 27. Rep. Lamar Smith (R-Tex.), one of INS's harshest critics applauded the agencies deportations efforts although expressing a desire for the numbers to increase even more. Dena Bunis, *US Touts Record in Deported Illegals,* ORANGE CTY. REG., Oct. 31, 1997, at A21.

> lapses. That doesn't excuse them. I hope it won't be interpreted as rationalizing any kind of insensitivity. It is simply a comment on what is a fact of life.[110]

Acknowledgment of the high risk that human error and/or bias will lead to the expeditious removal of foreign nationals who hold a constitutional right to prove their entitlement to be admitted to the United States warrants special scrutiny of the expedited removal procedure, since no INS regulation can guard against potential abuse.[111]

E. Likelihood of Arbitrary Decisionmaking Mandates Judicial Review

Legal scholars provide many reasons for why judicial review of administrative decisions is necessary. In particular, they speak of the need for consistency in statutory interpretation and application.[112] The main concern is that without review, decision-making will become arbitrary, and at worst abusive.[113] Agencies discretion must be restrained to guarantee that they follow and implement the Legislature's intent[114], preserve the rule of law[115] and its legitimacy.[116] Making decisions about admissions and exclusions involves consideration of many unclearly defined factors and lends itself to arbitrary and at times abusive decision-making.[117] Experience and studies reveal that subjectivity influences any decision-making process and

---

110. *Immigration Law has Mixed Effect,* DENVER POST, Dec. 23, 1997, at B11

111. Professor Medina writes, "Commentators and courts. . .expressed concern that the pre-IIRAIRA system of administrative discretionary decisionmaking posed substantial problems which the level of judicial review available pre-IIRAIRA barely ameliorated." Medina, *A Nice Thing?, supra* note 28, at 1539-1540 (1997) (citations ommitted).

112. Harold J. Krent, *Reviewing Agency Action For Inconsistency With Prior Rules And Regulations,* 72 CHI.-KENT. L. REV. 1187, 1187 (1997) [hereinafter, Krent, *Reviewing Agency Action*]. In private conversation with one immigration attorney, the author learned that INS inspection officers at particular ports of entry are not applying the expedited removal procedure as rigorously as in other locations. The lawyer speculated that these officers did not administer the procedure because they recognized the harshness of the law. While it is hard to resist appreciating their action, the practice speaks to the fact that the new law is not being applied evenly and consistently and instead impacts some foreign nationals differently depending on where they arrive at the United States borders.

113. Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory,* 72 CHI.-KENT. L. REV. 1159, 1170 (1997) (writing that review brings procedural regularity, making sure "act within the scope of their statutory jurisdiction."); *see also,* Krent, *Reviewing Agency Action, supra* note 112, at 1187 (noting that "[j]udicial review remains an essential, if at times controversial, check on administrative action. Judges protect individuals and firms from the coercive power of the regulatory state. They review administrative action both for procedural regularity and substantive coherence").

114. Foster, *Judge, Jury and Executioner, supra* note 60, at 231.

115. Olafson, *Concept of Limited Sovereignty, supra* note 29, at 451.

116. Kanstroom, *Surrounding the Hole, supra* note 81, at 711.

117. Professor Kanstroom explains that "the exceptional fluidity of the concept of discretion and how that fluidity makes discretion, as currently understood, a dangerous engine for a system as important as immigration law." Kanstroom, *Surrounding the Hole, supra* note 81, at 716. Professor Benson cites to case examples in which the appropriateness of the agency interpretation of the statute or challenges to the sufficiency of the evidence was

that no amount of training or written instructions can eliminate all conscious and unconscious prejudice and bias.[118]

One compelling reason for judicial review of agency decisions is to minimize the risk that skin color and other arbitrary classifications will become an ad hoc indicator for those who should be subjected to the expedited removal procedure.[119] Before the implementation of expedited removal, the INS had already come under attack for its treatment of nationals of particular countries of origin, most notably our southern neighbors: Latin America and the Caribbean.[120] This concern continues to

---

challenged, such as *Gegiow v. Uhl*, 239 U.S. 3 (1915) (rejecting executive's broad interpretation of public charge exclusion provision). Benson, *The New World*, *supra* note 41, at 262 & n.174.

118. *See, e.g.*, Janet A. Gilboy, *Deciding Who Gets In: Decisionmaking by Immigration Inspectors*, 25 L. & Soc. Rev. 571, 580 (1991) In reference to preparation for the implementing the expedited removal procedure, one reporter writes: "[A]fter three days of formal training, any agent can challenge to the authenticity of an foreign national's credentials right at the border checkpoint. If agents determine that the foreign national simply made a mistake did not bring sufficient documentation, the foreign national can be sent home as before. If agents determine that the documents are false, or that a misrepresentation was made, they now have the power to prohibit that person from entering the United States for five years." DePalma, *New Rules, supra* note 70, at A1. A former chairman of the BIA confirmed that decisions of removal are not dependent on a special expertise but rather "on the subjective attitudes of the administrators." Maurice Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 San Diego L. Rev. 29, 31 (1977).

119. Kevin R. Johnson, *Fear of the "Alien Nation*, 7 Stan. L. & Pol'y. Rev 111, 113 (1996) [hereinafter, Johnson, *Alien Nation*]. Other areas of the U.S. immigration system indicate prejudicial policy influences decisions. Ad hoc identifications were used in a Brazilian consulate to issue visas, and the court ruled against the State Department which created this internal policy and explicitly demanded prejudicial decisions. Olsen v. Albright, 990 F.Supp. 31 (D.D.C. 1997); *see also* Philip Shenon, *Judge Denounces U.S. Visa Policies Based on Race or Looks*, N. Y. Times, Jan. 23, 1998, at A1. A former member of the United States Foreign Service lost his position when he refused to use the procedures for deciding to grant visas to Brazilians, in particular the codes such as: "LP": Looks Poor; "TP": Talks Poor; or "LR":Looks Rough. Court documents displayed the notations of consular diplomats who wrote comments such as: "slimy looking" and "poor, poor, poor." The official manual also cautioned against Chinese, Korean and Arab applicants, and pressured diplomats to increase denials in areas of predominantly black populations. *Olsen*, 990 F.Supp. at 34. This personal preference arises in detention choices: "While INS purports to have a 'uniform detention policy nationwide,' field officers must exercise discretion to choose among competing detention priorities. The result is a detention system random, so illogical, so arbitrary that it fails in [many] crucial missions'." Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 Hastings Const. L.Q. 1087, 1108 (1995) [hereinafter Taylor, *Detained Aliens*]. "A recent investigative report on INS detention concluded, 'in reality, there is no [single] detention policy. There are as many policies as there are INS bosses." Lizette Alvarez & Lisa Getter, *Detention: The Failed Deterrent*, Miami Herald, Dec.16, 1993, at A1.

120. In the beginning stages of implementing deportation procedures under IIRIRA, 75 percent of those removed were from Mexico, followed by El Salvador, Honduras and Guatemala. Seper, *Reno Claims Record for Yearly Deportations, supra* note 60. Previous to the enactment of IIRIRA, of all removals in fiscal year 1995, Mexicans accounted for 74% of total deportation, and Honduras, El Salvador, Guatemala and the Dominican Republic rounded out to be the top five countries of origin. Joseph Chrysdale, *Domestic News*, United Press Int'l, Nov. 12, 1996. According to the President of the National Council of La Raza, 90% of INS enforcement activities are targeted at Latinos, "though they make up

extend to other ethnic groups who encounter racial and ethnic discrimination, such as Arab Americans, who have encountered racism due to recent terrorists scares.[121] Statistics on the expedited removal system already reveal a clear pattern in which the new procedure has been applied disproportionately to remove particular nationalities, namely those who have already been characterized as suspect classes.[122] Professor Kevin Johnson, who writes extensively on the topic of racial profiling in immigration especially in relation to Latinos and Hispanic Americans, comments that "[t]he ability to achieve racial goals through facially neutral means makes it difficult to ascertain the extent to which racism influences the call for restrictionist measures."[123] The INS, however, has even admitted to making these decisions using acknowledged stereotypes, or "pigeonholes" when "inspection becomes largely a matter of rules worked out by the inspectors from experience or followed as a matter of custom or administrative routine."[124] The officers create a whole system of profiles, using "tip offs" to spot "high risk categories" that often fall along ethnic lines.[125]

Treatment of particular refugees has, in the past, given rise to class action suits in which the plaintiffs pointed toward discriminatory practices. These cases provide useful indices of prejudicial bias within INS:

> Until recently, the INS had no guidelines to focus its detention resources on what would seem to be the logical targets: those who

---

less than 90% of the undocumented population." *Citizenship: Hearings before the Immigration Subcommittee, Senate Judiciary Committee* (Oct. 22, 1996) (statement of Raul Yzaguirre, President of National Council of La Raza). *See also*, Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 26, at 967 & n. 8 (noting that Congress has the power to expel classes of foreign nationals on the basis of race);.

121. *See, e.g.*, Sarah Gauch, *Arab Americans Say they are targeted at U.S. Ports of Entry. Some Metro Detroiters are Subject to Discrimination Because of Their Looks, Dress*, DET. NEWS, Sept. 29, 1994, at B6.

122. OFFICE OF POLICY AND PLANNING, EXPEDITED REMOVALS: FY 1998 AND 1999 (1999). In FY 1998, 76, 490 people were expedited. The breakdown by region is: 1,107(Asia); 1,506 (South America); 792 (Central America); 70,767 (Mexico); 1,058 (Caribbean); 437 (Europe); 341 (Canada). In 1999, the number of expedited removals decreased sizably to 33,999 but the difference in impact on the different regions remained the same. CTR. FOR HUMAN RIGHTS 1999 REPORT, *supra* note 97 (providing a statistical breakdown of regional expedited removals).

123. See, e.g., Johnson, *Alien Nation*, *supra* note 119.

124. Janet A. Gilboy, *Deciding Who Gets In: Decisionmaking by Immigration Inspectors*, 25 L. & SOC. REV.571, 580 (1991) (quoting WILLIAM C. VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURES 45 (1932)). In her analysis of how INS officers make decisions of admissability, Gilboy confirmed that Van Vleck's findings that inspectors make decisions using experience-based prejudices still held true more than fifty years later. *Id.* at 580. The use of "categories" and "generalities" is considered "crucial" to "competent inspection." *Id.* at 585.

125. *Id.* at 581, 583, 587. Referring to reports of mistreatment by INS officials, one news reporter writes this behavior "seems to reflect an endemic problem in the INS. Like policemen hardened by the viciousness they see in criminals, some immigration agents generalize from fraudulent foreign nationals to a skepticism of all. The great power given to individual agents by the new law increases the chance of abuse." Lewis, *Abroad at Home: Vigilance and Fairness*, *supra* note 57.

> abuse the asylum system by filing frivolous applications. Instead the agency sometimes used detention as a deterrent, singling out applicants from a particular country or region, such as Haiti or Central America, who often presented credible asylum claims.[126]

The suspect results of ad hoc deterrent measures led an Eleventh Circuit Panel to initially determine that Haitians were detained because of invidious discrimination.[127] The risk of any policy which targets any group of a particular origin, especially those whose skin color serves as an ad hoc identification mark for inadmissibility creates a very high risk for all incoming foreign nationals sharing the same racial or other defining characteristics.[128] It may be that an INS inspector targeted Mr. Diaz, a U.S. citizen of Mexican descent, on the basis of his ethnicity, that even if not evident by skin color could have been suspected by his name. Even in the absence of

126. Taylor, *Detained Aliens, supra* note 119, at 1108 (1995) (referring to GENERAL ACCOUNTING OFFICE, IMMIGRATION CONTROL: IMMIGRATION POLICIES AFFECT INS DETENTION EFFORTS 35-37 (1992), a field study of immigration detention discussing "three efforts to reduce the flow of foreign nationals entering illegally" which targeted foreign nationals from Haiti, Central America, and China for detention). *See also* Louis v. Nelson, 544 F.Supp.973, 979-84 (S.D. Fla. 1982) (describing new policy of detaining undocumented excludable foreign nationals, which was intended to "regain control" of our borders and had a disproportionate impact on Haitians); Roberto Suro, *U.S. is Renewing Border Detentions,* N.Y. TIMES, Feb. 8, 1990, at A22 (describing detention efforts in Texas to deter asylum applicants from Central America). Just three months after the new removal procedure started up, 80 percent of all removals under its mandate to place were at points of entry along the Mexican border, at a rate of 1,200 foreign nationals being turned away a day. Such numbers indicate a particular focus on this class of foreign nationals. *See INS Says Expedited Removal Works* (visited Apr. 3, 2000) <http://www.fairus.org/08612707.htm> (publication from the Fair Warning Newsletter (July 21, 1997)). Of the 111,000 illegal immigrants deported in fiscal year 1997, 76 percent were Mexican although this population only contributes 54% of the total 4 or 5 million illegal immigrants calculated to reside in the United States. Samuelson, *INS Deports Record Number, supra* note 109. The office of the National Council of La Raza reports that "[a]uthorities are 'stopping people that look Mexican' in many areas of the country. . ." *Id.*

127. Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983) (*en banc*), *vacated*, 727 F.2d 957 (11th Cir. 1984). Haitians, as excludable foreign nationals, could not claim equal protection under the Constitution leading this decision to be vacated by the court *en banc.* Regardless of this outcome, the court still agreed that the INS actions were prejudicial even if technically allowable.

128. Individuals within U.S. borders often get stopped by deportation round-ups on the basis of skin color and language. *See, e.g.* Ruben Navarrette Jr. *Constitutional Slights; Chandler's INS Sweep Another Black Mark in Valley's Treatment of Latinos,* ARIZ. REP., Aug. 31,1997. Such actions are reminiscent of "Operation Wetback" of the 1930'and 1950's in which more than 3 million Mexicans were deported in the name of protecting labor. At the later date, more than a million people, many U.S. citizens "were loaded onto railroad cars and shipped back to Mexico." *Id.* Despite the lessons of this ugly history, INS seems to have resumed activity reminiscent of an earlier era when skin color was enough to trigger probable cause, despite court decisions such as *Nicacio v. INS*, which explicitly demand that officers have a "particularized reasonable suspicion based on specific articulable facts" that the person being stopped, once inside the U.S. territory is an illegal immigrant. 797 F.2d 700, 701 (9th Cir. 1985). *See also* U.S. v. Montero Camargo, 208 F.3d 1122, 1123 (9th Cir. 2000) (declaring that INS Border Patrol agents may not consider an individual's "hispanic appearance" when stopping people at the U.S.-Mexico border).

official policy, INS officers may already be disposed to exercise such choices on their own due to an institutional culture that has explicitly used race to develop immigration policy.[129]

F. The Challenge to Reviewing the Elimination of the All Important Review Provision of Expedited Removal

The risks inherent to the exclusion/admission process demands that these determinations be carefully monitored by the judiciary to ensure correctness and fairness. Professor Medina writes,

> In theory, the judiciary is the ultimate guarantee/guarantor of liberty because it is the branch through which limits on the power of the sovereign to act over individual persons may be enforced and preserved. . .Tyranny, of course, results not just from having all governmental powers placed in one set of hands; it may just as easily result from bureaucratic rule. It occurs whenever the sovereign exerts power that is arbitrary, irrational, and capricious and when no recourse is available to correct or compensate for irrational, arbitrary, and capricious abuses of power by the sovereign against individual persons or the public.[130]

It is the high importance placed on the principle of judicial review, as explained by Professor Medina, that caused an outcry when Congress purposely eliminated access to review from the new admission process.[131] The twist to the story, however, is that calling on the courts to review the constitutionality of this court-stripping provision is almost impossible given historical precedent of the plenary power doctrine which insulates immigration law almost entirely from judicial review.[132] It is this deference that led the court in *American Immigration Lawyers v. Reno* to refuse to hear a challenge to how expedited removal procedure *as applied* violates due process.[133] Now that the D.C. Circuit has confirmed this case, the only remaining opportunity to remedy the defects in the expedited removal procedure lies with the Supreme Court or with Congress.

The Supreme Court had its first opportunity to visit the question of judicial review in 1999 while deciding *Reno v. American-Arab Anti-Discrimination Committee.* Although the Court ruled on a narrow issue of whether IRRIRA had retroactive application, the Justices nonetheless grappled with the concept of judicial review of INS operations in a way that

129. *See, e.g.* Johnson, *Magic Mirror*, *supra* note 31; Chin, *Segregation's Last Stronghold*, *supra* note 29.

130. Medina, *A Nice Thing?*, *supra* note 28, at 1559.

131. *See, e.g.* Benson, *Back to the Future*, *supra* note 10; Benson, *The New World*, *supra* note 41; Kanstroom, *Surrounding the Hole*, *supra* note 81; VanderMay, *Misunderstood Origins*, *supra* note 29.

132. *But see* Cole, *No Clear Statement*, *supra* note 24.

133. 18 F. Supp. 2d 38 at 58.

hints that they would resist altogether barring judicial review. The Court granted certiorari on the narrow question of whether IRRIRA barred federal jurisdiction to review a selective prosecution charge brought against the Attorney General and INS before the enactment of IRRIRA.[134] The Court struggled to reconcile ambiguous and textually contradictory statutory language in order to decide that IRRIRA applied retroactively to bar collateral attacks on pending deportation orders.[135] In her concurrence, Justice Ginsberg emphasizes in dicta that the majority's decision left open the constitutional question of selective enforcement that could still be reviewed once the removal order became final under § 1252.[136] Justice Ginsberg presents language that emphasizes how deportation is a "penalty" that puts an individual's liberty at stake.[137]

Justice Souter, in his dissent, expresses more alarm about the constitutional implications of IRRIRA's judicial bar and questioned the majority's "creative interpretation" used to read §1252(g) as only barring review of discrete INS actions in pre-final deportation proceedings; he warned that the statute could be read as an exhaustive bar to review.[138] He emphatically points out that "complete preclusion of judicial review of any kind for claims brought by aliens subject to proceedings for removal would raise the serious constitutional question whether Congress may block every remedy for enforcing a constitutional right."[139] Souter appears to be preparing the Court for the possibility that creative statutory interpretations aside, if IRRIRA is read to preclude review, the Court would be hard pressed to revisit the question that won't go away: Do foreign nationals have rights that trump the sovereignty's prerogative?

The greatest hurdle to getting the Court to address this question, in hearing a challenge against the statutory preclusion to judicial review on

134. 525 U.S. 471 (1999).

135. *Id.* at 492.

136. *Id.* Justice Ginsberg recognized the risk that a constitutional issue could not be raised and preserved in the administrative record and specifically held the Attorney General to her promise to allow a final order case to be remanded for fact-finding. *Id.* at 497. Justice Ginsberg's concern would be even more relevant in the case of expedited removal where there is no record of adjudication and where individuals may be turned away before they can even seek counsel to appeal a final order.

137. *Id.* at 497 (citation omitted). While Justice Ginsberg seems to imply all foreign nationals share this liberty interest, the majority interprets her opinion to apply only to permanent legal residents and citizens, who would have that constitutional protection anyway. *Id.* at 488. There is also an open question as to whether the Court's analysis will differ in reference to foreign nationals who have not even "entered" the United States, as occurs in the expedited removal procedure. Again, as mentioned in Part V, the semantic change that merged deportation and exclusion into one "removal" procedure will challenge the Court to address historical precedence that has granted due process to foreign nationals in deportation hearings. Although it is dicta, the majority seem to decide that the "unlawful" status of the respondents strips them of a constitutional claim, a conclusion that contradicts earlier jurisprudence, as discussed *supra* in Part II.E. *Id.* at 488.

138. *Id.* at 505.

139. Id at 508 (citation omitted).

the merits, is that it would be required to scrutinize a Congressional act that falls squarely within the plenary power doctrine, that is, the admission/exclusion of foreign nationals. Such a case, while not beyond imagination, would nonetheless require the Court to make a progressive, if not bold move. Perhaps, as with other monumental leaps of faith, the Court will hear their calling.[140]

III.
THE SUPREME COURT'S CHALLENGE: LIMITING CONGRESS'S UNLIMITED POWER TO REGULATE IMMIGRATION LAW

Although legal theory presupposes that all branches must act in accordance with the Constitution, *Marbury v. Madison* acknowledged that it is ultimately within the judicial branch's authority to determine if a statute conflicts with the U.S. Constitution.[141] Consequently, congressional acts

140. By analogy, such a move of overruling a long standing precedent might resemble overruling *Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525 (1923) and *Lochner v. New York*, 198 U.S. 45 (1905) by *Coast Hotel Company v. Parrish*, 300 U.S. 379 (1937) (the court noted that "[w]e think that the views thus expressed are sound and that the decision in the *Adkins* Case was a departure from the true application of the principles governing the regulation by the state of the relation of employer and employed"). Declaring that freedom of contract has limits the Court in *Coast Hotel* said "[t]here is an additional and compelling consideration which recent economic experience has brought into a strong light. . . We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved." *Coast Hotel Co. v. Parrish*, 300 U.S. at 381. Likewise, the Supreme Court overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896), by *Brown v. Board of Education*, 347 U.S. 483 (1954). The Court held in *Brown* that "[i]n approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 492-93. Professor Chin provides a comprehensive analysis of how these cases support the argument that the racist underpinnings of the plenary doctrine demand that it be overturned. Chin, *Segregation's Last Stronghold*, *supra* note 29, at 28-33. Some Supreme Court justices acknowledge their own mistakes or changed opinions while still on the bench. Justice Souter explained his changed mind in *City of Erie v. Paps A.M.* 1999 U.S. LEXIS 2347, *86-98 (Nov. 10, 1999) (Souter, J., concurring), by referring to Justice Robert H. Jackson's concurrence in *McGrath v. Kristensen* 340 U.S. 162, 178 (1950), where Jackson abandoned a position held ten years earlier. In his opinion, Justice Souter also alludes to Justice Felix Frankfurter, who explained his changed opinion by saying, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." 1999 U.S. LEXIS 2347, at *97 (citing Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600 (*per curiam*) (Frankfurter, J., dissenting)). *See also* Linda Greenhouse, *A Change of Mind and a Deft Mea Culpa*, N.Y. TIMES, Mar. 20, 2000, at A22 (referring also to Baron Bramwell, "a 19th-century English lawyer and judge, who explained himself in the 1872 case of *Andrews v. Styrap* by saying that "[t]he matter does not appear to me now as it appears to have appeared to me then").

141. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (holding in part that "[i]t is emphatically the province and duty of the judicial department to say what the law is . . . a law that is repugnant to the Constitution is void: and that courts, as well as other departments are bound by that instrument").

that violate the Constitution are normally subject to judicial scrutiny.[142] The Supreme Court created an exception to this general principle in its immigration law jurisprudence making this area of public law a "constitutional oddity."[143] The result is that Congress enacts legislation to regulate the admission and exclusion of foreign nationals and the Executive Branch administers these laws, and these laws as applied and on their face, are not subject to federal judicial review unless Congress says otherwise. When faced with a claim challenging an immigration law, the courts have declared themselves without power to scrutinize the constitutionality of the statute or the action permitted by the statute.[144]

The Court established this realm of unreviewable power by characterizing the regulation of immigration law as falling within "plenary power," a Supreme Court doctrine handed down under common law doctrine which gives Congress full power to create and review immigration law. This plenary power does not arise out of a specific constitutional enumeration, but rather comes from judge-made decisions dating back only a century.[145] A century later, the plenary power doctrine continues to allow courts to avoid questioning the constitutionality of the federal government's actions regarding immigration policy.[146] Thus, in many ways, our nation's borders offer us a warped vision of what our nation would resemble without some of its basic constitutional provisions.[147]

---

142. In general, the area of "immigration law" relates to the regulation of admission, expulsion, and naturalization of foreign nationals. *See, e.g.,* Stephen H. Legomsky, *Immigration Law*, *supra* note 25, at 256.

143. *See, e.g.* Legomsky, *Ten More Years of Plenary Power*, *supra* note 21, at 936.

144. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953), "[T]he power to expel or exclude foreign nationals [is] a fundamental sovereign attribute exercised by the Government's political departments [which are] largely immune from judicial control").

145. *See, e.g.*, Legomsky, *Immigration Law*, *supra* note 25. None of the enumerated constitutional provisions which usually grant Congress power to assert control explicitly encompass immigration law. *See, e.g.* U.S. CONST. art. 1, § 8 cl. 3; art. 1, § 9, cl. 1; art. I, § 8, cl. 4; art. 1, § 8,cl. I 1); STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 8-11 (1997 ed.). One interesting proposition is that concentrating on the absence of external constraints on setting immigration policy (i.e. sovereign prerogative) allowed the court to avoid addressing "the internal structural restraints designed to restrict governmental activity in international affairs. . ." that might arise if the enumerated powers were used to justify immigration law. Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 26, at 977 (referring to T. Alexander Aleinikoff, *Federal Regulation of Foreign Nationals and the Constitution*, 83 AM. J. INT'L. L. 862, 863-64 (1989)).

146. The principle of *stare decisis* contributes to giving independent life to the doctrine of plenary power, despite the risk of circular logic. After a long line of decisions, courts could regard the rationale as too entrenched to be overruled. *See generally* Galvin v. Press, 347 U.S. 522, 530-31 (1954); Fiallo v. Bell, 430 U.S. 787, 792 n.4 (1977); Kleindienst v. Mandel, 408 U.S. 753, 766-67 (1972).

147. For a discussion on how immigration law allows this speculation, see Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, And Ideological Regulation In The Immigration Laws: Important Lessons For Citizens And Noncitizens*, 28 ST. MARY'S L.J. 833 (1997). Johnson writes, "[b]y looking at the harsh treatment of immigrants, valuable insight is gained into how the government would act toward particular groups of citizens

A. *Before the Storm: An Open Door to All Brave Enough to Enter*

The regulation of immigration by the federal government is relatively new:

> [T]he first hundred years of our national existence was a period of unimpeded immigration. New settlers were important to the young nation and immigrants were welcomed. The gates were open and unguarded and all were free to come. This national policy paid rich dividends as the immigrants and their descendents contributed heavily to the growth of our nation.[148]

Congress's first attempts at restricting immigration met with little popular support. In fact, the first immigration law, the Alien Act of 1798, was allowed to expire without renewal.[149] Success with regulating admission of foreign nationals came when Congress passed the Chinese Exclusion Act. Ever since, immigration law has held a unique status in American law. Beginning with *The Chinese Exclusion Cases*[150] and continuing with *United States ex rel. Knauff v. Shaughnessy*[151] and *United States ex rel. Mezei*,[152] a long line of precedent has left immigration legislation virtually immune from judicial review. The reasoning in these cases gave rise to the idea that Congress has plenary power over immigration issues (i.e., the admission and exclusion of foreign nationals). In other words, Congress has unfettered power not only to create immigration policy, but also to determine the constitutionality of these laws.[153] As will be discussed *infra*, whether or not Congress has legitimate claim to such unlimited power becomes questionable when one deconstructs its origins: reactions to xenophobic social and political climates as well as an outmoded notion of national sovereignty.

---

if legal constraints were not in place to protect politically undesirable citizens" *Id.* at 879. Professor Medina notes that the ongoing dialogue between the three federal branches preserves the vitality of the American framework—a framework whose reason for being is the prevention of tyrannical rule." Medina, *A Nice Thing?*, *supra* note 28, at 1558.

148. CHARLES GORDON, ET. AL., IMMIGRATION LAW AND PROCEDURE, §§ 2.02-2.04 (1996).

149. *Id.* "The Act was part of the Alien and Sedition Laws which authorized the President to expel from the United States any alien he deemed dangerous." *Id.*

150. *Chinese Exclusion Cases,* 130 U.S. at 581.

151. 338 U.S. 537, 539-40(1950).

152. 345 U.S. 206 (1953).

153. "At the heart of the plenary power doctrine lies the belief that Congress and the Executive Branch must have unfettered authority to admit, exclude, or deport aliens. The doctrine has its roots in the late nineteenth century, when the Supreme Court upheld various provisions of the Chinese Exclusion Act, which embodied Congress's increasingly draconian restrictions on Chinese immigration." Taylor, *Detained Aliens, supra* note 119, at 1128 (1995) (referring to the *Chinese Exclusion Cases*).

B. *The First Wave of Judicial Abdication: The Chinese Exclusion Cases*

The doctrine that has allowed courts to avoid trespassing into what has been construed as an exclusive area of congressional plenary power grew out of overtly racist policies which infringed on fundamental rights of foreign nationals.[154] Marking the start of a long line of restrictive rulings creating the plenary power doctrine, the *Chinese Exclusion Cases* included a claim by Chan Chae Ping, a Chinese immigrant who was not allowed to enter the United States after returning from a trip abroad.[155] Despite his status as a lawful permanent resident of twelve years and as a holder of a certificate issued by the federal government intended to guarantee his reentry upon return, Mr. Ping was denied admission because during his time away the Chinese Exclusion Act was enacted to exclude all people of Chinese national origin.[156] The Supreme Court rejected the constitutional claim underlying his case and ignored the change in the law that had rendered Mr. Ping's certificate "void and with no effect" while Ping was abroad.[157]

In its decision, the Court upheld the Chinese Exclusion Act and its provision voiding the certificate guarantees on the basis that there was no

---

154. In the body of the opinion, Justice Field describes the political climate which led to the legislation barring admission of the Chinese:

> The differences of race added greatly to the difficulties of the situation [of Chinese immigrants coming to America]. . . they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration. The people there accordingly petitioned earnestly for protective legislation."

130 U.S. at 595 (emphasis added). In the *Chinese Exclusion Cases*, the Supreme Court noted that if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary." *Id.* at 606. *See also* Chin, *Segregation's Last Stronghold*, *supra* note 29, at 28-33.

155. 130 U.S. at 581.

156. *Id.*

157. The Court explained that

> To prevent the possibility of the policy of excluding Chinese laborers being evaded, the act of October 1, 1888, the validity of which is the subject of consideration in this case, was passed. It is entitled 'An act a supplement to an act entitled 'An act to execute certain treaty stipulations relating to Chinese,' approved the 6th day of May, eighteen hundred and eighty-two.' 25 St. p. 504, c. 1064. It is as follows: 'Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that from and after the passage of this act it shall be unlawful for and Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to or remain the United States. Sec. 2. That no certificates of identity provided for in the fourth and fifth sections of the act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in

limit to congressional power to exclude foreign nationals. The Court reasoned that the

> power of exclusion of foreigners being an incident of sovereignty belonging to the Government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interest of the country require it, cannot be granted away or restrained on behalf of any one.[158]

Analogizing the immigration of the Chinese to a foreign invasion, the Court decided that:

> Embracing our relations with foreign nations, we are but one people, one nation, one power. To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. [I]t matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.[159]

The Court again disregarded the arbitrary discrimination underlying Congress's immigration policy in deciding *Fong Yue Ting v. United States,* where it refused to invalidate a law requiring testimony of "at least one credible white witness" to avoid deportation.[160] The Court chose not to review immigration matters, saying they fell within Congress's discretion: The "rights of a nation to expel or deport foreigners . . . rests upon the same grounds, and is absolute and unqualified as the right to prohibit and prevent their entrance into the country."[161] The hands-off approach taken

---

pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.

130 U.S. at 599.

158. *Id.* at 609.

159. *Id.* at 606. The Court wrote:

> The presence of Chinese laborers had a baneful effect upon the material interests of the state, and upon public morals; that their immigration was in numbers approaching the character of an *Oriental invasion*, and was a menace to our civilization; that the discontent from this cause was not confined to any political party, or to any class or nationality, but was well nigh universal; that they retained the habits and customs of their own country, and in fact constituted a *Chinese settlement within the state*, without any interest in our country or its institutions; and praying congress to take measures to prevent their further immigration.

Id. at 595-6 (emphasis added).

160. 149 U.S. at 704.

161. *Id.* at 707. In both *Fong Yue Ting* and the *Chinese Exclusion Cases*, the Court approved of this testimonial requirement because "loose notions entertained by [Chinese] witnesses of the obligation of an oath." *Chinese Exclusion Cases*, 130 U.S. at 598; *Fong Yue Ting*, 149 U.S. at 730.

in these early decisions erected the formidable wall that now lies between foreign nationals and the Constitution.

C. *The Second Wave: Ideological Wars.*

After the scare of Chinese immigration quieted and times changed enough to prevent the promulgation of overtly racist legislation, people forgot (or chose to ignore) the racially unfriendly origin of the plenary power doctrine.[162] Often, in an attempt to articulate some legitimate basis for the deference, courts have characterized immigration law as a political question, inseparable from foreign affairs.[163] But even this tactic requires stretching and twisting the Constitution to wring out a convincing argument.[164] Paying more attention to the delicacy of the separation of powers as well as the relation between foreign nations, courts neglected to ask how individual rights factored into the analysis. The courts assumed, or rather decided, that foreign nationals had no individual rights and instead identified them with the nation of their origin.

This trend was strengthened by the second wave of judicial deference regarding immigration law, during the Cold War, which only highlighted this dramatic denial that any possible rights attached to persons seeking to enter the United States. The restrictive policy of immigration law revived during the Cold War reaffirmed the plenary power doctrine in two cases which "come close to saying that even though the Fifth Amendment due process protection applies to all 'persons' we simply do not regard excludable aliens as falling within that category."[165] Moreover, this new line of cases expanded judicial deference to both facial and as applied challenges to acts of Congress, thus leaving the acts of the executive branch completely immune from judicial scrutiny.

In *United States ex rel Knauff v. Shaughnessy,* the Supreme Court permitted the Attorney General to exclude, without a hearing, the wife of a United States citizen trying to immigrate pursuant to the War Brides Act of 1945 after having been a civilian employee of the U.S. War Department in Germany.[166] Without any explanation, she was excluded on the basis that her admission "would be prejudicial to the interests of the United

162. For a review of the different rationales for plenary power, see STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 301-24 (1987).

163. For a more recent example of this approach, see *Reno v. Flores*, which categorizes the regulation of foreign nationals as "committed to the political branches of the Federal Government." Reno v. Flores, 507 U.S. 292, 299, *on remand at* Flores v. Meese, 992 F.2d 243 (1993). *See generally* Legomsky, *Immigration Law*, *supra* note 25.

164. One scholar comments that the origin of the plenary power doctrine "has never been adequately explained on ground of either policy or precedent." Legomsky, *Ten More Years, supra* note 21, at 937. *See generally* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

165. David A. Martin, Due *Process and Membership in the National Community: Political Asylum and Beyond,* 44 U. PITT. L. REV. 165, 176 (1983).

166. 338 U.S. 537, 542-43 (1950).

States."[167] After a year confined on Ellis Island not knowing the charges against her, her *habeas corpus* petition was denied on the basis that "it [was] not within the province of any court . . . to review the determination of the political branch of the Government to exclude a given foreign national."[168] The Court then uttered the pronouncement that was to haunt immigration lawyers for years to come: "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[169]

Shaughnessy v. United States ex. rel Mezei, the companion case to *Knauff,* further restricted judicial review of immigration decisions and thus any possible rights of foreign nationals at ports of entry.[170] In this decision, the court excluded Mezei, the husband of a United States citizen, who had resided in the country for 25 years living "a life of unrelieved insignificance."[171] Mezei temporarily left the United States for nineteen months to visit an ailing mother and upon returning was denied entry.[172] Instead, Mezei was detained on Ellis island for two years without a hearing, on the grounds that he posed a threat to national security. The Attorney General refused to reveal the nature of the threat.[173] The Supreme Court reversed a lower court's grant of *habeas corpus,* deciding that Mezei should be "treated as if stopped at the border" for purposes of his due process claim, in other words, he had no due process rights regarding the denial of his admission.[174] This holding granted the Attorney General full discretion to deny entrance to Mezei without affording the detainee notice nor opportunity to demonstrate his entitlement to enter the United States.

In these judicial decisions, made during periods of increased tension with communist nations, the Court tolerated Congress' rationale to the point of allowing outrageous consequences. Justice Frankfurter's concurrence in *Harisiades v. Shaughnessy,* a deportation case during the same time period, reveals such tolerance. He wrote "whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress."[175]

---

167. *Id.* at 539-40.

168. *Id.* at 543.

169. *Id.* at 544.

170. 345 U.S. 206, 210 (1953).

171. *Id.* at 218 (Jackson, J., dissenting).

172. *Id.* at 219 (Jackson, J., dissenting).

173. *Id.* at 220.

174. *Id* at 215.

175. *See* 342 U.S. 580, 596 (1952) (finding legal residents, married to US citizens, deportable for being affiliated with the communist party). *See also Chinese Exclusion Cases,* 130 U.S. 581; Lees v. United States. 150 U.S. 476, 480 (1893) (holding that the exclusion of foreign nationals is an "absolute" power and "not open to challenge in the courts"); Fong Yue Ting v. United States. 149 U.S. 698, 706 (1893) (holding the decision of Congress is "conclusive upon the Judiciary").

The line of cases discussed, largely shaped by an era of political suspicion, continue to guide decision-making about the rights of foreign nationals seeking admission at United States ports of entry.[176] The spirit of this tolerance for intolerance continues to shape immigration law today.[177] On October 25, 1999, Hany Kiareldeen, a Palestinian immigrant married to an American citizen, was released after being held by INS for nineteen months in a correctional center, without any charges, but on the basis of secret evidence that he "posed a threat to national security."[178] In a period of heightened American suspicion of Middle East terrorist activity, Mr. Kiareldeen was one of 20 other individuals of Arab descent held by INS for undisclosed reasons.[179] His release only came after a district court granted Mr. Kiareldeen's habeas corpus petition and affirmed a BIA decision upholding an immigration judge's decision to release Mr. Kiareldeen and grant him resident alien status.[180] The district court also held that detention on the basis of secret evidence was a constitutional violation of the due process rights, declaring that the INS and Attorney General Janet Reno would be held in contempt if they continued to incarcerate Kiareldeen.[181] The *Kiareldeen* case reminds us that immigration policy is still shaped by contemporary political suspicions, but also illustrates that the court may be less tolerant than in the days of *Knauff* and *Mezei* of nebulous foreign policy and sovereignty concerns where a foreign national's life, liberty or property interests are at stake,[182] thus striking a balance between plenary power with the individual rights.

176. *See, e.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995), *cert. denied*, 516 U.S. 976 (1995); Cuban American Bar Association v. Christopher, 43 F.3d 1412 (11th Cir. 1995), *cert. denied*, Haitian Refugee Ctr. v. Christopher, 515 U.S. 1142 (1995), *cert. denied*, Cuban Am. Bar Ass'n v. Christopher, 516 U.S. 913 (1995); Amanullah v. Nelson, 811 F.2d 1 (1st Cir. 1987), *habeas corpus proceeding at* Amanullah v. Cobb, 673 F.Supp. 28 (D.Mass. 1987); *later proceeding at* Amanullah v. Cobb, 862 F.2d 362 (1st Cir. 1988), *vacated by* 872 F.2d 11 (1st Cir. 1989); Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985).

177. In the early nineties, events like the bombing of the World Trade Center in New York created general alarm that also motivated a pro-immigration law reform movement. *See, e.g.* Daniel James, *Lethal Mix Brings Terrorism Ashore*, Wash. Times, March 24, 1993, at G4. One result was the creation of the Anti- terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). See also, Enid Trucios-Haynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369 (1997).

178. *Testimony Before the House Judiciary Committee on the Use of Secret Evidence and H.R. 2121*, (May 23, 2000) (statement of Hany Kiareldeen) (available at < http:// www.fas.org/sgp/congress/2000/kiareldeen.html>).

179. American-Arab Anti-Discrimination Committee Press Release, *ADC Congratulates Hany Kiareldeen on his Release, Victory Over Secret Evidence* (Oct. 26, 1999) (available at <http://msanews.mynet.net/MSANEWS/199910/19991019.45.html>). *See also* Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales Of Ideological Exclusion*, 14 GEO. IMMIGR. L. J. 51 (1999) (writing on the courts continued reluctance to review secret evidence).

180. Hany M. Kiareldeen v. Reno, 71 F. Supp. 2d 402, 418 (1999)

181. *Id.*

182. For example, the district court in *Kiareldeen* noted that "due process concerns are not satisfied unless the government provides the detainee with an opportunity to cross-

IV.
INROADS TO THE PLENARY POWER DOCTRINE: INTERNATIONAL PATHS

Beyond the limited holding of the *Kiareldeen* case, an evolution in the balancing approach which accommodates sovereignty interests and individual interests dismantles the plenary power doctrine, an approach that gains strength when viewed with a global outlook. The growth of international law bolsters the argument that as notions of foreign sovereignty have changed, international law has come to accommodate the belief that individual rights must also be factored into any legal analysis in which these rights might be at stake. International law might even support the argument that individuals deserve protections based on their status as human beings and not their immigration status.[183] Moreover, while it is generally accepted that nations may exclude and deport foreign nationals, there are limits to this power that arise out of international law.[184]

A. Cracking the Foundation of Sovereignty

Since the plenary power doctrine originally arose out of sources of international law, it follows that, as international concepts change, the domestic ones should adjust accordingly.[185] The nineteenth century origin of

---

examine the affiant, or at the minimum, submits a sworn statement by a witness who can address the reliability of the evidence." *Id.* at 416.

183. *See, e.g.*, Louis Henkin, *The Constitution as Compact and as Conscience*, 27 WILL. & MARY L.REV. 11 (1985); Note, *The Extraterritorial Application of the Constitution – Inalienable Rights?*, 72 VA.L.Rev. 649 (1986); Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741 (1980); Berta Esperanza Hernandez-Truyol, *Natives, Newcomers And Nativism: A Human Rights Model For The Twenty-First Century*, 23 FORDHAM URB. L.J. 1075 (1996).

184. *See, e.g.*, GUY S. GOODWIN-GILL. INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES (1978); RICHARD PLENDER, INTERNATIONAL MIGRATION LAW (rev. 2d ed. 1988); James A.R. Nafziger, *A Commentary on American Legal Scholarship Concerning the Admission of Migrants*, 17 U. MICH. J. L. REFORM 165(1984).

185. The grounds for Congress' plenary power to exclude or remove foreign nationals were declared to be "an inherent and inalienable right of every sovereign and and independent nation." Fong Yue Ting, 149 U.S. 698, 711 (1893). *See also* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (stating that "it is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty"). In his concurrence in *Harisiades v. Shaughnessy*, Justice Frankfurter determined that "it is not for this Court to reshape a world order based on politically sovereign States." 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring). In *United States v. Hernandez-Gurerro*, the Ninth Circuit Court of Appeals stated that

> Article I of the United States Constitution contains no express reference to immigration among its enumeration of delegated powers; however, for more than a century, it has been universally acknowledged that Congress possesses authority over immigration policy as 'an incident of sovereignty.'

147 F.3d 1075, 1076 (9th Cir. 1998) (quoting the *Chinese Exclusion Cases*, 130 U.S. at 609). The court went on to say that "[t]he Supreme Court has called Congress's inherent immigration power 'plenary.'" *Id.* (citation omitted). Although other theories exist, the doctrine of sovereignty is the "cornerstone, the one theory that operates across the broad spectrum of plenary power cases." Scaperlanda *Polishing* the *Tarnished Golden Door*, *supra* note 26, at

sovereignty rested on the fears of national security that in most respects ring hollow today.[186] The pivotal point, as discussed, came from the majority's pronouncement in the *Chinese Exclusion Case* that

> [t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.[187]

The Court, by reiterating a premise established in earlier judicial interpretations, overlooked that sovereignty is in fact a flexible doctrine.[188] Yet, as is typical with the common law tradition, this mere omission became axiomatic to the Court. Moreover, the continuing adherence to this doctrine ignores the real changes in the relationship among nations which has diminished vulnerability to foreign invasion or control, especially by immigrants arriving for personal reasons.[189] The decision also neglected to explore the constitutional restrictions, especially found in the Bill of Rights, to this unenumerated power although admitting that such restrictions would trump the plenary power doctrine.[190]

---

974. *See also,* Chin, *Segregation's Last Stronghold*, *supra* note 29, at 60 ("By defining congressional power over immigration by reference to an external standard, the Court itself has provided for the possibility that domestic law will change as international law changes."); Louis Henkin, *The Constitution and the United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 853-54 (1987); McKay Bennet, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States,* 70 WASH. L. REV.589, 593 (1995) (noting that "notions of sovereignty [were] drawn from the public international law of the time were accepted as a source of Congressional power to exclude the Chinese.") [hereinafter Bennet, *A Lion in the Path?*]

186. *See* LEGOMSKY, IMMIGRATION AND THE JUDICIARY, *supra* note 162, at 177-222 (arguing that the sovereignty theory giving rise to the plenary power doctrine is unsound).

187. *Chinese Exclusion Cases*, 130 U.S. at 604 (quoting Chief Justice Marshall in *Schooner Exch. v. McFadden*, 11 U.S. (7 Cranch)116, 136 (1812)). The court echoed this sentiment in an expulsion case, saying that the power to exclude was a "weapon of defense and reprisal" even if bristling with severities that derived from international law "as a power inherent in every sovereign states." *Harisiades*, 342 U.S.at 587-88 (1952).

188. In *Schooner*, Chief Justice Marshall qualified the power of the sovereign stating that "all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage." 11 U.S. (7 Cranch) at 136.

189. In deciding that the power to "exclude aliens from its territory is a proposition which we do not think is open to controversy," the Supreme Court arrived at this conclusion by saying "[j]urisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power." *Chinese Exclusion Cases*, 130 U.S. at 603-04. For a discussion on how concepts of relations between nations is changing, see Olafson, *Concept of Limited Sovereignty, supra* note 29, at 443.

190. Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 26, at 999 (quoting the Court when it recognized that the exercise of sovereign power may be restricted "only

In other words, not only have the threats to sovereignties changed, so too has the notion that this power can not be constrained by considerations of individual rights. Before World War II, international law emphasized the rights of states to regulate themselves.[191] Following the war, when the world witnessed the atrocities that a nation can inflict on its own people,[192] nations came together to draft various multilateral treaties to promote the idea that all people are entitled to basic, fundamental rights which require a redefinition of sovereignty.[193] Currently, in a number of international forums, national leaders are engaging in an active examination of how the concept of sovereignty must adjust to changing political contexts.[194]

---

by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations," *Chinese Exclusion Cases*, 130 U.S. at 604). Scaperlanda also draws attention to dissent among the justices regarding the need to subordinate the sovereign power to the "limitations and restrictions imposed by the Constitution." *Id.* at 982 & n. 66 (quoting *Fong Yue Ting*, 149 U.S at 738 (Brewer, J. dissenting)). Although these dissents were referring to deportation powers, the argument that international law and the Constitution places limits on the political branch could extend to other exertions of this power. *Id.* at 983.

191. Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 26, at 1022-23.

192. "The seed of individual rights, inalienable and fundamental, deeply embedded in our national ethos, took root in the international community during the past half century. From the devastation wrought by Hitler's Thousand Year Reich a consensus emerged that individual rights, within the framework of sovereign nation-states, deserved global attention. In the period after World War II, what had previously existed only as a moral ideal—that individual humans did matter—found expression not only in the constitution of many newly formed countries, but also in positive international law. A metamorphosis occurred, transforming individuals from objects to subjects in the global community." Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 26, at 971.

193. In an address given to the Canadian Senate and the House of Commons in Ottawa, President of the Czech Republic Vaclav Havel said "[I]t would seem that the enlightened efforts of generations of democrats, the terrible experience of two world wars-which contributed so much to the adoption of the Universal Declaration of Human Rights-and the evolution of civilization have finally brought humanity to the recognition that human beings are more important than the state. . . Human rights are superior to the rights of states. Human freedoms represent a higher value than state sovereignty. International law protecting the unique human being must be ranked higher than international law protecting the state" Vaclav Havel, *Kosovo and the End of the Nation State*, (visited April 29, 1999) <http://www.northernlight.com>.

194. *See, e.g.*, KURT MILLS, HUMAN RIGHTS IN THE EMERGING GLOBAL ORDER: A NEW SOVEREIGNTY? (1998). *See also Importance Of State Sovereignty, Need To Address Human Rights Violations, Council Reform, Discussed In Assembly* Press Release GA/9633 (8 October 1999).; The representative of Brazil reminded the U.N. General Assembly Plenary that "While sovereignty was the cornerstone of the relationship between States and would remain so, it was not an absolute concept." *Questions Related To State Sovereignty And Role Of Security Council In International Peacekeeping Addressed During Assembly Discussion* Press Release GA/9629 29th Meeting (7 October 1999). In a meeting on Security Council intervention, the representative from Bangladesh "noted that while international relations were traditionally based on the sovereignty of States, today's interdependence might make reducing such sovereignty a rational choice—but only if based on the principle of equality of States." Representatives of Croatia and Slovenia echoed these views. *Security Council Debate Said To Help In Creating 'Ethos Of Conflict Prevention', Support For Intervention* SC/6761 (30 Nov 1999). The Security Council is adapting to a changing international situation where most conflicts are internal as opposed to between two nations. Although the United Nations Charter, specifically Chapters VI and VII (which

In the case of immigration law, the basic request for due process protections in the determination of a foreign national's status can be found in various international instruments such as the Universal Declaration of Human Rights ("UDHR"),[195] International Covenant of Civil and Political Rights ("ICCPR"),[196] and American Convention on Human Rights ("American Convention").[197] These treaties emphasize that "[u]niversal approaches require that [national] constitutional provisions that create rights with no express limitations as to the persons or places covered should be interpreted as applicable to every person and at every place."[198]

The implication of celebrating individual rights shifts the balance away from a sovereignty's absolutism,[199] and promotes "a notion of fundamental

---

instruct the Security Council to react to threats to international peace), was founded on the earlier concept of regulating nation to nation relations it must accommodate to a new world order. In light of these changes, the representative from France remarked,

> [m]ost conflicts were internal and preventive action might be viewed as infringing on States' sovereignty. . .Yet failure to act could lead to the destabilization of an entire region. A balance between those apparently contradictory concerns must be achieved. The Charter, in legal terms, did not prevent the Council from discussing an internal situation if the continuation of a dispute was likely to endanger international peace and security, as stipulated in Article 34.

Secretary-General Says Global Effort Against Armed Conflict Needs Change From 'Culture Of Reaction To Culture Of Prevention' SC/6759 (Nov. 29, 1999). The Foreign Minister of Singapore "stressed the concomitant principle of non-interference in internal affairs" but also pointed out that "those premises were now under assault. . .Two forces—the pressures of a truly integrated world economy and the end of the Cold War—were impelling change. . .And the challenge facing sovereign states was no longer one of interaction with other states. The real challenge was now within each state, forcing a reconceptualization of the very idea of government and statehood, and requiring a change of mindset that would be difficult and painful to achieve. . .[and] the interplay of globalization and the post-Cold War international order complicated matters." *Questions Of Sovereignty, The State System, The Future Of The Organization Raised By General Debate Speakers,* Press Release GA/9606 (Sept. 24, 1999) (on file with author). But as nations move away from "xenophobic nationalisms. . .there is a growing realization that the absolute sovereignty of states had to be qualified to require compliance with generally accepted standards of conduct and respect for human rights." *Id.*

195. G.A. Res. 217A, U.N. GAOR, 3d Sess., Res. 71, U.N. Doc. A/810 (1948).

196. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967) (entered into force Mar. 23, 1976). The United States ratified the covenant on June 8, 1992. *See* John Quigley, *The Ratification of the International Covenant on Civil and Political Rights: The International Covenant on Civil and Political Rights and the Supremacy Clause,* 42 DEPAUL L. REV. 1287, 1290 (1993) (discussing the lengthy Senate debates prior to ratification) [hereinafter Quigley, *Ratification of ICCPR*].

197. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 99 (entered into force Jul. 18, 1978).

198. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 916 (1991). This approach was emphasized in Justice Brennan's dissent in *Verdugo-Urquidez*, 494 U.S. at 271.

199. As discussed in Part III.B, *supra*, the concept of national sovereignty left no room for individual inalienable rights when it declared that Congress's unlimited right to "exclude or to expel foreign nationals, or any class of foreign nationals, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nations." *Wong Wing,* 163 U.S. at 231.

human rights that protects individuals regardless of their status."[200] The ICCPR begins by "[r]ecognizing that these [civil and political rights] derive from the inherent dignity of the human person."[201] It further acknowledges that it is the duty of all member states to "promote universal respect for, and observance of, human rights and freedoms."[202] Of these human rights, the right to due process is often viewed as fundamental, and basic guarantees of due process can be found in the ICCPR: a fair and public hearing with a competent, independent and impartial judge that will lead to an effective remedy.[203] The United States is a party to the ICCPR[204] and technically should abide by these principles, many of which mirror the basic principles found in the United States Constitution, including basic due process tenants of the Fifth Amendment. In fact, the ICCPR, along with another treaty, has come to be called the "International Bill of Rights,"[205]

200. T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 19 (1990) [hereinafter Aleinikoff, *Citizens, Aliens*]. See also, Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model For The Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1114-1115 (1996).

201. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967).

202. *Id.*

203. *See* ICCPR, *supra* note 196, at art. 12. Likewise, the ICCPR echoes this obligation to provide measures to ensure an effective remedy for those subjected to a signatories government. *Id.* At the regional level, the American Convention on Human Rights establishes the right to a fair trial and a minimal level of protection whenever an act of authority "violates any fundamental constitutional right." *See* American Convention, *supra* note 197, at art. 18. The American Convention declares: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." *Id.* The UDHR also provides these minimal due process rights. UDHR, *supra* note 195, at art. 8 (stating that "everyone has the right to an effective remedy by the competent national tribunal, in the determination of acts violating the fundamental rights granted by the constitution or law"); *see id.* at art. 10 (stating that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him"). Even if not bound by its signature to this and other treaties, the United States may be subject to customary law and accepted universal norms such as are found in the UDHR, which is "widely accepted as a basis of customary international law establishing genuine obligations for states." Gates Garrity-Rokous and Raymond H. Brescia, *Procedural Justice and International Human Rights: Towards Procedural Jurisprudence for Human Rights Tribunals*, 18 YALE J. INT'L L. 559, 567 (1993); *see also*, Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 60, 70-71 (1989) (writing that certain peremptory norms, such as human rights, are so universal to the international community that they transcend state sovereignty).

204. *See* Quigley, *Ratification of ICCPR*, *supra* note 196, at 1290.

205. The second partner to the International Bill of Rights is the Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), 993 U.N.T.S. 3, 6 I.L.M. 360 (1967) (entered into force, Jan. 3, 1976).

extending to all the world's people the rights found in our own Bill of Rights.[206]

Representative Lamar Smith justified the expedited removal procedure on grounds that "[b]y being able to turn people around at the border before coming across. . .we are better able to maintain our sovereignty and better able to maintain our border security."[207] In light of the above discussion, this classic sovereignty justification should be balanced with the treatment of individuals. Even if Congress is responding "to the desire of the American people to really know who is coming into the country, why, and for how long and whether they are coming in legally or illegally," it must do so in a way that does not blatantly disregard our basic canons of justice.[208] In other words, it must strike a balance with individual rights.

B. The United States: Dragging Its Feet to Meet the New World Order

The international rights movement has revealed the reluctance of the United States government to recognize international human rights despite expecting other nations to do so.[209] The International Bill of Rights and other sources of international law prove useless in protecting the interests of foreign nationals if Congress ignores or purposefully circumvents them.[210] The fact that the United States often falls short of its political accountability to the international community presents a great challenge to applying international law principles that encourage reform of the plenary power doctrine. As a member of the world community, the United States

206. For analysis of how the advent of international human rights law has begun to impact on judicial enforcement in the domestic arena, see Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Rights Law*, 100 YALE L.J. 2335 (1991).

207. DePalma, *New Rules*, *supra* note 70, at A1.

208. *Id.*

209. Christopher Wall, *Human Rights And Economic Sanctions: The New Imperialism*, 22 FORDHAM INT'L L.J. 577 (1998) (arguing that the U.S. uses economic sanctions to expect compliance with international human rights while not holding itself to the same compliance expectations).

210. The U.S. hardens its infamous reputation for sabotaging the creation of an international human rights baseline every time it refuses to sign an international treaty, fights the creation of a new convention or criminal tribunal, refuses to pay its contribution to the U.N. or generally resists its own subjection to international human rights standards. Elisa Massimino, *Addresses: Moving From Commitment to Compliance: Human Rights Treaties in U.S. Law*, 5 GEO. J. FIGHTING POVERTY 263 (1998). (discussing the U.S.'s failure to ratify of the Convention on the Rights of the Child); Henry T. King and Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47, (1999) (discussing the United States' resistance to the creation of the International Criminal Court); Stacy Williams, *Note, A Billion Dollar Donation: Should the United Nations Look a Gift Horse in the Mouth?* 27 GA. J. INT'L & COMP. L. 425 (1999) (discussing the U.S. failure to pay its contribution to the U.N. budget); Peter J. Spiro, *Human Rights On The Eve Of The Next Century: Aspects Of Human Rights Implementation: The States And International Human Rights*, 66 FORDHAM L. REV. 567 (1997) (discussing how the reservations the continued use of the death penalty contravenes the International Covenant on Civil and Political Rights).

supposedly holds itself to international law, yet, its immigration policy flagrantly disregards many international treaties and customs.[211] In fact, the *Chinese Exclusion Act Cases*, discussed above, violated a treaty between the United States and China.[212]

Although treaties enjoy the status as "supreme law of the land"[213], the national legislature is not bound to comply with its obligations under international law until it has enacted legislation to trigger the treaty. In other words, international treaties are not self-executing in the United States system of law.[214] However, an important rule of construction interprets statutes, to the extent possible, to be consistent with treaties.[215] Despite this theoretical alignment, in practice "immigration policy makers have become

211. The *Chinese Exclusion Cases* not only shut the door to judicial review of immigration policy, as discussed in Part III.B, *supra*, but also to the role played by international law in protecting the rights of non-citizens. In particular, the Burlingame Treaty of 1868 with China did not prevent eventual negative national legislation against Chinese immigration but did however manage to forestall it for some time. Bennet, *A Lion in the Path? supra* note 185, at 598-600.

212. The treaty of 1868 provided for the free migration and emigration of citizens of the United States and China and that each group would enjoy the "same privileges, immunities, or exemptions in respect to travel or residence as there may be enjoyed by the citizens or subjects of the most favored nation." *Chinese Exclusion Cases*, 130 U.S. at 593 (quoting the Burlingame Treaty, United States-China, art. 5, 16 Stat. 739, 740, T.S. No. 48, at 3 (1868)). The Supreme Court conceded that the Act of 1888, which barred admission to Mr. Ping, was in contravention of express stipulations in the 1868 treaty with China but determined that the 1888 act was "not on that account valid, or to be restricted in its enforcement." *Id.* at 600.

213. U.S. CONST. art. VI.

214. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 (1987). Treaties can also be nullified by a conflicting statute that is enacted later in time. *See, e.g.*, Head Money Cases, 112 U.S. 580, 599 (1884) (stating that "so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as [C]ongress may pass for its enforcement, modification, or repeal"); Whitney v. Robertson, 124 U.S. 190, 194 (1888); *Chinese Exclusion Cases*, 130 U.S. at 600-01 (concluding that because treaties and Congressional legislation are equally authoritative under the Constitution, "the last expression of the sovereign will must control" and treaties may be "repealed or modified at the pleasure of [C]ongress"); Whitney v. Robertson, 124 U.S. 190, 194-95 (1888) (holding that since treaties and Congressional legislation are on equal footing, if they cannot be construed so as to be consistent, "the one last in date will control the other").

215. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (observing that Congressional acts should not be constructed to violate the laws of other nations if any other construction is possible, so that laws shall never be construed to violate neutral rights beyond what is warranted and understood). This principle may not apply to customary norms however. Ralph G. Steinhardt argues that Judge Peckham's interpretation in *American Baptist Churches v. Meese,* 712 F.Supp. 756 (N.D.Cal. 1989), regarding the return of El Salvadorans and Guatemalans to worn torn country of origin, sees Congress' failure to codify an international norm as intention to abrogate uncodified customary norms. Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction,* 43 VAND. L. REV. 1103, 1170 (1990).

increasingly indifferent to international obligations, disingenuously misconstrued international norms, and paid undeserved deference to the law-breaking conduct of a coordinate branch."[216]

Even when the United States passes an act to implement an international treaty, such as with the Refugee Act of 1980,[217] it manages to avoid its obligations, even disregarding fundamental norms such as *non-refoulement* (non-return):[218]

> [T]he United States has taken a narrow, some would say hyper technical, view of its international obligation in order to forestall mass attempts at immigration. Through aggressive interdiction at sea, the use of "safe havens," and the deferential review of its actions by federal courts, the United States has avoided the spirit, if not the letter of nonrefoulement."[219]

This underhanded approach can be seen in the case involving interdiction of Haitian refugees on the high seas.[220] The *Sales* decision permitted a narrow and contrived reading of the Refugee Protocol to

> put the best face on a bad policy, by creating a pretense that it is not, contrary to all appearances, in breach of international law. On the other hand specious interpretation of international agreements has become rather a bad habit for the present-day Court.[221]

---

216. Bennet, *A Lion in the Path?*, *supra* note 185, at 592.

217. Pub.L. 96-212, 94 Stat. 102 (March 17, 1980) (codified at 8 U.S.C. s 1158(a) (1988)) (implementing the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268).

218. Nonrefoulement is a matter of legal right, both in international law and domestic law. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 443-44 (1987) (stating that the Court's view that only those refugees who can show a clear probability of persecution are entitled to mandatory suspension of deportation, or non-refoulment, and eligible for discretionary asylum even though other refugees who can show only a well-founded fear of persecution are entitled only to discretionary asylum relief is not anomalous); INS v. Stevic, 467 U.S. 407, 421 n. 15 (1984) (discussing § 203(e) of the Refugee Act of 1980 as amending the language of § 243(h) to conform to Article 33 of the United Nations Protocol).

219. Michael J. Churgin, 30 INT'L MIGRATION REV. 310 (1996); *see also* Sale v. Haitian Ctrs. Council, 509 U.S. 155, 166-67 (1993). Although it was eventually discarded, government policy did reflect a half-hearted attempt to conform its policy to international norms by requiring interviews of alleged refugees detained on Coast Guard vessels. This partial regard indicates that respect for international law is not obsolete but rather negligently followed. Bennet, *A Lion in the Path? supra* note 185, at 618-22.

220. Sale v. Haitian Center Council, 509 U.S. 155 (1993). Although it was eventually discarded, government policy did reflect a half-hearted attempt to conform to international norms by requiring interviews of alleged refugees detained on Coast Guard vessels. This partial regard for international norms indicates that respect for international law is not altogether absent but rather is negligently followed. For more history, see Bennet, *A Lion in the Path?*, *supra* note 185, at 618-622.

221. *Id.* at 622. Under IIRIRA, the policy of detaining asylum seekers has been considered a breach of the 1951 Refugee Convention according to Dennis McNamara, Director of the United Nationals High Commissioner for Refugees's International Protection Division. *U.N. Official Criticizes the U.S. for Detaining Illegal Refugees*, MIAMI HERALD, Mar. 8,

When dealing with foreign nationals in exclusion proceedings, adherence to international norms by the United States falls short of compliance. In fact, the new expedited procedure raises new issues of non-compliance with the Refugee Protocol.[222] In the specific case of the expedited removal procedure, foreign nationals with liberty and property interests are often denied the basic due process rights championed by these international treaties. If an INS inspection officer misunderstands or overlooks a foreign national's valid entitlement to enter, the victim of this error has no opportunity to correct such mistakes before a fair and impartial judge. Yet, the adjustment that it would take to follow international norms would require the same effort that it would take to follow the U.S. Constitution. The basic due process rights listed in international treaties, as shown above, mirror those enumerated in the Fifth Amendment. The challenge is to push the Supreme Court to overcome its stubborn reluctance to universalize its own constitutional rights by interpreting "all persons" to include foreign nationals.

V.
INROADS TO THE PLENARY POWER DOCTRINE: DOMESTIC PATHS

Changing concepts of sovereignty and the balance of individual rights within the United States also make it possible to argue that the plenary power doctrine should be abandoned. A general shift in U.S. domestic law has paralleled the international "rights" movement as best reflected in the civil rights movement,[223] As will be discussed, this domestic shift has also impacted the way in which the federal government can treat foreign nationals. This reconsideration of the rights of foreign nationals in domestic law, as argued by advocates through various legal strategies, demonstrates that immigration law may not be entirely insulated from judicial review and that foreign nationals enjoy greater due process protections.

This trend, recognizing that foreign nationals do enjoy life, liberty and property interests that should be balanced with the government's sovereign prerogative, has resulted in a slow encroachment upon the limitless power that the courts have granted Congress at the turn of the 20th century. Up until the height of the Cold War in the 1950s, the Supreme Court defined

1999. An INS representative Russ Bergeron rebutted this accusation by noting that "international law fully recognizes the right of a country to detain someone seeking entry when issues of their identity and credibility are in questions." John M. Goshko, *INS Rejects U.N. Suggestion on Jailing Refugees*, WASH. POST, Feb. 23, 1999. However, issues of identity and credibility arise for every refugee.

222. *See* Jason H. Ehrenberg, *A Call for Reform of Recent Immigration Legislation*, 32 U. MICH. J. L. REF. 195, 200-203 (1998).

223. *See* Chin, *Segregation's Last Stronghold*, *supra* note 29, at 25-27; VanderMay, *Misunderstood Origins*, *supra* note 29, at 147-149; Olafson, *Concept of Limited Sovereignty*, *supra* note 29, at 442.

Congress's unlimited immigration power broadly, as including "any policy toward aliens."[224] However, as will be shown below, the courts began in the 1960s to narrow the scope of this limitless power through a line of cases that chipped away at the plenary power doctrine by establishing rights for foreign nationals located within U.S. territory. This process left only the area of *per se* immigration law, the exclusion and admission of foreign nationals, insulated from review. By 1982, however, even that front became vulnerable to judicial attack when the Supreme Court issued the landmark decision in *Landon v. Plasencia,* in which it extended due process protection to exclusion proceedings of a permanent legal resident.[225] In fact, it could be argued that the evolution of rights in immigration law would lead to an opposite outcome should the *Chinese Exclusion Cases* or *Knauff* and its companion case *Mezei* were to be decided today in contemporary courts, despite the ostensible perseverance of the plenary power doctrine.[226]

A. Confronting the Legal Fiction: Location, Location, Location

While the rights of foreign nationals in exclusion hearings, and thus not technically within U.S. territory, exist at the whim of Congress and INS, the Constitution does protect foreign nationals located physically within United States borders and will review laws regulating them.[227] In *Yick Wo v. Hopkins,* the Supreme Court struck down a municipal ordinance regulating laundries in a manner which discriminated against Chinese immigrants and held that

> [t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . [its] provisions are universal in their application to all persons within the territorial jurisdiction without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.[228]

---

224. *Harisiades*, 342 U.S. 580, 588 (1952).

225. 459 U.S. at 23 (1982). *See* discussion in Part V.C, *infra.*

226. The plaintiff in *Haitian Ctrs. Council*, like Mr. Ping in the *Chinese Exclusion Cases*, was a lawful permanent resident; this legal status established the "substantial connections" to trigger due process. Likewise, Mr. Mezei, the plaintiff in *Haitian Ctrs. Council, Inc.*, was detained by INS for two years, but in the more recent case the court held that the two years detention established the "substantial connections" that gave rise to due process rights. *Haitian Ctrs. Council*, 823 F. Supp. at 1042. Also, Mr. Mezei's 25 years in the States, along with his marriage to a U.S. citizen, would have also weighed in on the "substantial connections" test.

227. The status of foreign nationals and thus the constraint on congressional power alters depending on whether the issue is "inside" or "outside" of immigration law which regulates the admission and exclusion of foreign nationals. *See generally* Bosniak, *Membership, supra* note 26.

228. 118 U.S. 356, 369 (1886).

This decision "spawned a line of cases, central to the aliens' rights tradition, protecting foreign nationals from invidious discrimination by state and local officials."[229] Essentially, foreign nationals falling under the *Yick Wo* tradition can expect treatment indistinguishable from that afforded to full citizens. For example, foreign nationals, even undocumented foreign nationals, enjoy the protection of the Fourth, Fifth, Sixth and Eighth amendments of the Constitution in criminal proceedings.[230] In addition, permanent legal residents may, for the most part, rely on First Amendment protection.[231] Additionally, states must meet a substantial burden of justification before denying foreign nationals economic benefits or opportunities.[232]

In *Wong Wing v. United States,* the Court revealed its willingness to challenge congressional acts which violated the fundamental rights of foreign nationals residing within the U.S. borders.[233] The Court struck down a congressional act that would have subjected Chinese, unlawfully present in the U.S., to one year's imprisonment and hard labor. Following this sentence, the Chinese foreign national would have been deported. This harsh sentence would have been made without indictment or trial by jury.[234] The Court concluded that

229. Taylor, *Detained Aliens, supra* note 119, at 1133. Taylor refers to numerous examples, such as cases in which foreign national classifications made by state or local governments restricting a foreign national's access to government benefits were subject to a heightened level of scrutiny. *See* Graham v Richardson, 403 U.S. 365 (1971) (invalidating state statute denying welfare benefits to resident foreign nationals). States also cannot bar foreign nationals from ordinary trades and professions and many civil service jobs. *See* Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating statutory prohibition against employment of foreign nationals in state competitive civil service); *In Re* Griffiths, 413 U.S. 717 (1973) (invalidating state statute prohibiting resident foreign nationals from practicing law). The exception is where foreign nationals are excluded from Governmental positions when such restriction serves a "political function." Cabell v. Chavez-Salido, 454 U.S. 432, 445-46, (1982) (upholding state statute barring foreign nationals from employment as probation officers). *See* Foley v. Connelie, 435 U.S. 291 (1978) (applying exception to police officers); Ambach v. Norwick, 441 U.S. 68 (1979) (applying exception to public school teachers).

230. *See, e.g.,* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (extending Fourth Amendment); Wong Wing v. United States. 163 U.S. 228, 237 (1896) (applying the Fifth and Sixth amendments); Equan v. INS, 844 F.2d 276, 279 (5th Cir. 1988) (holding that "[a]n alien subject to detention may raise the Eighth Amendment prohibition against cruel and unusual punishment. . .if he is in custody after being convicted of a crime.").

231. *See, e.g.,* Bridges v. Wixon, 326 U.S. 135, 148 (1945) (noting that "[f]reedom of speech and of the press is accorded aliens residing in this country" (citing *Bridges v. California,* 314 U.S. 252 (1941)).

232. *See* Plyler v. Doe, 487 U.S. 202, 230 (1982) (holding that Texas statute violated equal protection clause by allowing the withholding of funds from local school districts for the education of children not legally admitted to the [United States and authorizing districts to deny enrollment to such children); Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that state statutes denying welfare benefits to certain foreign nationals violate the equal protection clause).

233. *Wong Wing,* 163 U.S. 228 (1896).

234. 163 U.S. at 235.

> all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.[235]

Thus, the Court seems to interpret the wording of the Fifth Amendment of the Constitution to protect all "persons" regardless of citizen status.[236]

This same principle was applied in *Plyler v. Doe*, a case in which the state of Texas argued that children of undocumented foreign nationals could not access state provided public education.[237] The Court held that the protection of the Fourteenth Amendment extends to all persons within a state's territory and thereby rejected Texas' argument.[238] This holding established the proposition that the governments' treatment of immigrants has limits when pertaining to matters falling outside of decisions regarding admission and exclusion of foreign nationals.[239]

The basic premise of *Yick Wo* and *Wong Wing* is that if already present in the United States or involved in legal matters not pertaining to admission and/or exclusion, foreign nationals are insulated from adverse applications of the plenary power doctrine and judges may review the constitutionality of these congressional acts and executive decisions.[240] This protection contrasts with the absence of protection when foreign nationals are seeking admission at ports of entry, thus fall squarely within the parameters of immigration law. The *Yick Wo* tradition suggests that the foreign national's status as non-citizen does not itself necessarily preclude the protection of the Constitution. This conclusion makes it less clear why foreign nationals subjected to the expedited removal procedure should be denied constitutional protections only because the procedure pertains to the preliminary determination of admission or exclusion and because the foreign nationals are considered to be located outside of the United States' jurisdiction.

---

235. *Id.* at 238.

236. *See* U.S. CONST. amend. V (stating that "No person shall . . . be deprived of life, liberty, or property, without due process of law").

237. *Plyler*, 457 U.S. at 210.

238. *Id.* at 215.

239. Bosniak, *Membership*, *supra* note 26, at 1099.

240. *Id.* at 1097. Bosniak points out that a foreign national is so defined by the federal government's immigration power, but this power does not follow the foreign national wherever she may go, instead "although the immigration power is extraordinarily broad, it must nevertheless be exercised within its own domain." *Id.*

B. *The Enroachment: Creative Judicial Interpretation in Immigration Law*

The *Yick Wo* tradition generally leaves immigration law untouched since it does not apply to the admission or exclusion of foreign national. A recent trend, however, indicates that even within the field of *per se* immigration law—admission and exclusion decisions—foreign nationals can expect minimal protection from the U.S. Constitution at certain points in the process.[241] For example, detention is an area of immigration law where judges have heard due process claims by excluded foreign nationals who were subjected to harsh conditions of detainment.[242] In particular, excluded foreign nationals are entitled to be free from "gross physical abuse" by state and federal officials if found on United States soil.[243] Where detention is excessive or irrational it begins to resemble punishment, even if unintentional, and such punishment can not be imposed without due process protections.[244]

Deportation proceedings comprise another area of immigration law where foreign nationals can expect minimum due process rights. Deportation traditionally involved the process whereby foreign nationals found to be illegally present in the U.S. are removed. The *Japanese Immigration Case* established that "administrative officers, when executing the provisions of a statute involving the liberty of persons, may [not] disregard the fundamental principles that inhere in 'due process of law.'"[245] The Court held that a foreign national, even if illegally present in the U.S., cannot be arbitrarily taken into custody and deported without "all opportunity to be heard upon the questions involving his right to be and remain in the United States."[246] In so deciding, the court softened the plenary power doctrine and actually reached the merits of the case as opposed to pronouncing they

241. Stephen H. Legomsky cautions that as "[w]elcome as such decisions are, they are hard to square with a long line of Supreme Court decisions holding due process inapplicable to excluded foreign nationals . . . The issues raised in these modern cases seem relevant only to the content of due process, once due process is deemed relevant. Yet content becomes irrelevant if, as the Supreme Court has said, an excluded foreign national may not challenge the procedures authorized by Congress at all. Legomsky, *Ten More Years*, *supra* note 21, at 932.

242. *See* Talyor, *Detained Aliens*, *supra* note 119.

243. *See* Medina v. O'Neill, 838 F.2d 800, 803 (5th Cir. 1988) (supporting this principle, but finding facts of case amounted to negligence and not "gross physical abuse"), *rev'g* 589 F.Supp. 1028, 1032-33 (S.D. Tex. 1994) (finding gross physical abuse to which due process constraints were applicable for excluded foreign nationals); *c.f.* Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987) (stating that, despite any limits on non-citizens' constitutional rights, due process does protect them from gross physical abuse by state or federal officials, but dismissing case against defendants on grounds of immunity and remanding for clarifications of claims against remaining defendants).

244. *Alvarez-Mendez v. Stock*, 941 F.2d 956, 962 (9th Cir. 1991), *cert. denied*, 506 U.S. 842 (1992)

245. 189 U.S. 86, 100 (1903).

246. *Id.* at 101.

had no jurisdiction to review the case at all pursuant to the plenary power doctrine.[247]

Dictum in some cases hint at a leaning in favor of more judicial involvement in immigration cases. *Fiallo v. Bell* provided an example of this view expressing an ". . .acceptance of a limited Judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of foreign nationals. . ."[248] Residual resistance to judicial review exists due to *stare decisis* of the plenary power doctrine. Slowly, though, courts have begun to acknowledge that this precedent has been reinforced by passive acceptance, evidenced by opinions in which judges repeatedly invoked the plenary power doctrine to escape deciding pressing constitutional legal questions.[249]

IIRIRA presents a new challenge, however, to how deportation-like protections might be extended to exclusion proceedings. While the two types of procedures—exclusion and deportation—were distinguishable previous to IIRIRA, the new law merges the two into one procedure called "removal." In this change, geography technically does not matter anymore since both classes of foreign national will be subsumed under the same procedure. As yet, it is unclear how this semantic change will alter the rights of the respective parties since the merger has not been effected.[250] If it

247. *See* Raya-Ledesma v. INS, 42 F.3d 1263, 1265 (9th Cir. 1994) (stating that "[a]liens are entitled to equal protection under the laws" and applying rational basis review to challenged statute), *amended and superceded by* 55 F.3d 418 (9th Cir. 1994); Azizi v. Thornburgh, 908 F.2d 1130, 1133 & n. 2 (2d Cir. 1990) (applying the limited rational basis analysis to statutory provision in light of Congress's plenary power over immigration and naturalization); Tran v. Caplinger, 847 F.Supp. 469, 478-79 (W.D. La. 1993) (stating that "aliens are protected by the constitutional provisions which refer to 'persons'"); Gomez-Arauz v. McNary, 746 F.Supp. 1071, 1075 (W.D. Ok. 1990) (noting that "judicial review of legislation involving immigration matters is limited").

248. 430 U.S. at 793 & n. 5 (upheld a statute which discriminated against foreign national fathers of illegitimate children by conferring benefits only to mothers).

249. Aleinikoff, *Citizen, Aliens, supra* note 200, at 11.

250. The new law also merges deportation proceedings (which applies to foreign nationals unlawfully present *within* US borders) with exclusion hearings (which applies to foreign nationals still outside of US borders) creating one mechanism which determines whether a foreign national regardless of her location can be found *"admissible."* Michael D. Patrick, *Significant Changes to Take Place in April,* N.Y. L.J., Mar. 24, 1997, at 3. INA § 235(b)(1)(A)(iii) allows the Attorney General to apply Expedited Removal to individuals who surreptitiously entered the U.S. without inspection, thus are illegally present, and who can not establish that they have been physically present in the U.S. for a two-year period prior to the determination of inadmissibility (which would formerly have been deportation). INA § 235(b)(1)(A)(iii), 8 U.S.C. § 1225(b)(1)(A)(iii) (1999). As of May, 1999, the Attorney General "declined to apply expedited removal to this category of persons." CTR. FOR HUMAN RIGHTS 1999 REPORT, *supra* note 97, at 10; 8 C.F.R. § 235(b)(1)(A)(iii). However, the INS noted in its regulations: "[A] proposed expansion of the expedited removal procedure may occur at any time and may be driven either by specific situations such as a sudden influx of illegal aliens motivated by political or economic unrest or other events or by a general need to increase the effectiveness of enforcement operations at one or more locations." 62 Fed. Reg. 10,312, 10,314 (Mar. 6, 1997) (preamble). For discussion of implication of this merge in terms, see *Note, The Constitutional Requirement Of Judicial Review For Administrative Deportation Decisions,* 110 HARV. L. REV. 1850 (1997).

ever does take effect, a true test of the plenary power doctrine will be inevitable in light of the legal precedent now in place to protect foreign nationals located within the U.S. territory and subjected to traditional "deportation" procedures.

C. *Further Encroachment: When Even Location Doesn't Matter*

While the *Japanese Immigration Case* and other cases discussed above have begun to crack open the door to affording foreign nationals more constitutional rights once located on U.S. soil,[251] courts still show a reluctance to expand this trend to those foreign nationals seeking admission when still located at United States ports of entry. Commentary on the irony of this double standard notes that

> the due process clause should mean so little at the border and so much in the interior is curious to say the least. The absurdity of the line drawn is manifest when one considers that a [foreign national] who has entered this country surreptitiously and has stayed in San Diego for a week is afforded, as a matter of constitutional rights, a hearing, an opportunity to present evidence and cross examine adverse witnesses, an unbiased decision maker, a translator, and sometimes counsel.[252]

The geographical distinction, however, began to melt in the landmark case *Landon v. Plasencia,* in which the court extended due process protections to exclusion proceedings in which the foreign national is a lawful permanent resident seeking to return from brief visits abroad.[253] The rationale looked at the individual stakes which render the exclusion proceeding to be *de facto* deportation thereby triggering basic procedural protections.[254] For

---

251. Bosniak, *Membership, supra* note 26, at 1063. In *Matthews v. Diaz*, where the Supreme Court deferred to plenary power and upheld a statute denying Medicare benefits to foreign nationals unless admitted for permanent residence or lived in the U.S. at least five years; however, the Court did acknowledge the "aliens rights tradition," concluding that 'even one whose presence in this country is unlawful, involuntary, or transitory, is entitled to . . . constitutional protections under the Fifth and Fourteenth Amendments." 426 U.S. 67, 69 (1976). Despite this concession the court justifies its decision on the basis that "the business of the political branches of the Federal Government . . . [is] to regulate the conditions of entry and residence of foreign nationals." *Id.* at 84.

252. T. Alexander Aleinikoff, Aliens, Due Process and "Community Ties": A Response to Martin, 44 U. PITT. L. REV. 237, 238 (1983). (referring to *Alguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975), and a provision of counsel for indigent foreign national required by due process clause when necessary to ensure 'fundamental fairness' of deportation proceedings) [hereinafter Aleinikoff, *Aliens, Due Process*].

253. 459 U.S. 21, 32-37 (1982). The Court distinguished its decision from *Mezei* deciding that a lawful permanent resident "absent from the Country only a few days" can invoke due process protection in exclusion proceeding because the absence was not "extended" as in *Mezei*, 345 U.S. at 33-34.

254. The Court remanded the case and ordered that the *Mathews v. Eldridge* due process analysis be applied. 459 U.S. at 34. The *Mathew v. Eldridge* test requires the courts to consider the interest at stake for the individual, the risk that the procedure used will erroneously deprive the individual of the interest, and the interest of the government in using this

instance, a legal permanent resident would have entitlement to be admitted to the U.S. through not only the government's permission but also through her "membership connections" to our society.[255] Therefore, under *Landon,* a foreign national avoids being sent back to her point of departure if she can somehow demonstrate entitlement through a valid visa or "substantial connections" to the U.S.[256]The immigration judge uses these factors to determine whether the individual has more at stake and thus deserves more protection.[257]

Since *Landon* diminished the importance of location and based entitlement on something other than citizenship, it may be possible to conclude that foreign nationals considered to be located outside of U.S. jurisdiction, may nonetheless be considered "persons" protected by the Constitution whose "stakes" create a liberty interest.[258] Emphasis on the foreign national's status as *a person* lays the foundation for expanding due process protections to all foreign nationals located outside of US territory despite the plenary power doctrine.[259]

As was presented in the first half of this article, the "substantial connection" test should apply in the expedited removal system, but when INS officers fail to refer a foreign national to an INA §240 hearing, she never has the opportunity to demonstrate her entitlement to admission, consequently she is denied her due process rights. It can be argued that because every foreign national may potentially be able to prove "substantial connections," the procedural protections afforded all foreign nationals arriving

current procedure instead of additional or different procedures. 424 U.S. 319, 334-35 (1976).

255. *Id.* This notion was also established in a Fourth Amendment case where the Court declared that some "aliens receive Constitutional protections when they have come within our territory of the United States and developed substantial connections with this country." United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (responding to the Defendant's attempt to use cases from the "aliens rights tradition" as a basis for claiming constitutional protection regarding evidence seized in Mexico for a criminal trial). For a summary and discussion of scholarly writing on the concept of membership, see Liliana M. Garces, *Evolving Notions Of Membership: The Significance Of Communal Ties In Alienage Jurisprudence,* 71 S. CAL. L. REV. 1037 (1998).

256. Aleinikoff, *Aliens, Due Process, supra* note 252, at 9.

257. In *Landon,* the Court relied on *Johnson v. Eisentrager,* 339 U.S. 763, 769-70 (1950) to determine that "[o]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." 459 U.S. at 32. *See,* T. Alexander Aleinikoff, *Citizens, Aliens, supra* note 200 (special deference in immigration stems from belief that foreign nationals are not full members of society; at least lawful permanent resident foreign nationals should be treated as full members for purpose of constitutional review).

258. *See, e.g.,* United States v. Mendoza-Lopez, 481 U.S. 828 (1987); Plyler v. Doe, 457 U.S. 202; *Wong Wing,* 163 U.S. 228 (1896). For a more thorough analysis of a "personhood" analysis in relation to IIRIRA, see Grable, *Personhood, supra* note 52.

259. "It is not obvious why we should interpret the Constitution to accord different procedural protections to persons depending upon their immigration status and their location in the United States. The due process clause protects persons, a term that does not distinguish among citizens, resident foreign nationals, non-immigrant foreign nationals, parolees or applicants for asylum." Aleinikoff, *Aliens, Due Process, supra* note 252, at 239.

at U.S. ports of entry previous to IIRIRA[260] was not at the discretion of Congress but rather codification of existing and inherent due process protections.

In the legal challenge brought against the expedited removal system within the sixty-day jurisdiction limitation, the district court judge reached the merits of two claims after dismissing the others for jurisdictional reasons. However, the court eventually dismissed these two claims for failure to state a cause of action under Federal Rule of Civil Procedure(FRCP) 12(b)(6)).[261] In its opinion, the district court applies the "substantial connections" test and determines that neither of the two plaintiffs were lawful permanent residents or had substantial connections to the United States and thus could not "avail themselves of the protection of the Fifth Amendment."[262] One wonders what the outcome of the lawsuit would have been had the Immigration Lawyers Association had more time to locate a plaintiff with substantial connections. Moreover, it is evident that while these two plaintiffs at least had the opportunity to have their case reviewed in a full hearing before a judge, from now on, no other similarly situated foreign nationals will have the same opportunity.

D. Finding Our Way Back: Restoring the Rights of Foreign Nationals

This slow wearing away at the plenary power doctrine raises the question as to whether the doctrine ever rested on solid ground.[263] Justice Marshall and Justice Brennan supported this proposition by contending that excludable foreign nationals are protected by the Fifth Amendment.[264] This perspective allows the speculation that perhaps the recent trend in immigration law is merely bringing us back to a "balancing" approach that existed before the *Chinese Exclusion Cases*'s dramatic departure from that model. In fact, there is some indication that foreign nationals had due process rights at the time the plenary power doctrine came to life. Four justices dissented in the *Chinese Exclusion Cases*, asserting that the Bill of Rights restricted the immigration power at least in regards to procedural due process:

> Because the alien has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion

260. *See* discussion *supra* Part II.A.

261. 18 F.Supp. 2d at 46-47, 52-60.

262. *Id.* at 59.

263. Professor VanderMay demonstrates that the holding in the Chinese Exclusion Act never actually established the plenary power doctrine; instead, subsequent holdings misinterpreted and ignored the context of what should have been a narrow holding. VanderMay, *Misunderstood Origins*, *supra* note 29, at 152-166.

264. Jean v. Nelson, 472 U.S. 846, 854, 872 (1985) (Marshall, J., dissenting). (distinguishing the facts of *Knauff* and *Shaugnessy* as limiting due process of foreign nationals because the Government raised national security concerns and that characterizing as dicta the broad declaration that excludable foreign nationals are not within the protection of the Fifth Amendment.)

> may be continued or effectuated by any means that happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat.[265]

While this incredulous speculation foreshadowed a dismal reality, it also suggests an alternative reading that foreign nationals in exclusion hearings do deserve basic constitutional rights.

In *Mezei*, Justice Jackson presented a reverential view of due process that further supports this position:

> Procedural due process is more elemental and less flexible than substantive due process. It yields less to times, varies less with the conditions, and defers much less to legislative judgement. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law. . . Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied . . .[D]ue process of law is not for the sole benefit of an accused. It is the best assurance for the Government itself against those blunders which leave lasting stains on a system of justice.[266]

Moreover, in *INS v. Chadha*, the Court noted that plenary power must still be exercised in constitutionally permissible ways.[267] In *Fiallo v. Bell*, the Court held that a challenged provision was consistent with the due process clause, but still acknowledged an "acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens" unless "so essentially political in character as to be nonjusticiable."[268] One may even question whether the court when pronouncing in *Knauff* that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"[269] intended this standard to imply that a foreign

265. *Chinese Exclusion Cases*, 130 U.S. 581, 588 (1889).

266. *Mezei*, 345 U.S. at 224-25 (Jackson, J., dissenting).

267. *See* 462 U.S. 919, 940-41 (1983) (striking down legislative vetoes of administrative decisions to grant relief to foreign nationals subject to deportation).

268. 430 U.S. at 793 n. 5.

269. *Id.* at 544. This interpretation is supported by the *Japanese Immigration Case* in which the Court clarified that it had never held that executive officers, "when executing the provisions of a statute involving the liberty of person, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution." 189 U.S. 86, 100 (1903)

nationals enjoy no due process whatsoever, but instead viewed it as a matter to be balanced with the interest of the sovereignty.[270] At the start of a new millennium, it might be possible to harness this trend to shake the plenary power doctrine which may not be as solidly rooted as it once seemed.

VI.
PUTTING EXPEDITED REMOVAL TO THE TEST

If the bills introduced by Congress fail to pass, reforming the expedited removal system presents formidable challenges since Congress has enjoyed almost limitless freedom to regulate the admission and exclusion of foreign nationals at United States ports of entry, as discussed above. The Supreme Court has never used an Equal Protection or due process analysis to strike down a congressional statute whose substance regulated solely immigration law based on race or any other grounds.[271] Although in pre-IIRIRA days, INS exclusion practice could be attacked as denying due process and equal protection in practice,[272] the § 235 expedited removal provision needs to be challenged on its face since it does not even allow for judicial review of its application. Although never done, such an affront may not be completely unthinkable:

---

270. For a discussion on how this approach does not sacrifice national sovereignty or the government's right to regulate immigration, see Olafson, *Concept of Limited Sovereignty, supra* note 29, at 451.

271. Bosniak proposes that such a move will probably be a case brought on race discrimination grounds. Bosniak, *Membership, supra* note 26, at 1093. For general discussion on equal protection, see also, Chin, *Segregation's Last Stronghold, supra* note 29, at 53-54; Olafson, *Concept of Limited Sovereignty, supra* note 29. For a discussion of how a due process analysis of the expedited removal procedure might be done, see Grable, *Personhood, supra* note 52, at 850 (weighing the "stake" interest of the foreign national with the sovereignty interest of the government).

272. INA § 240 facially provides minimum due process protection, but in practice did not always get equally applied. Discriminatory application of facially neutral immigration regulations on sub constitutional grounds has been invalidated. *See, e.g.* Jean v. Nelson, 472 U.S. 846, 857 (1985) (holding that neutral regulations regarding detention do not permit discriminatory application on the basis of race or national origin). For more discussion on how courts have developed a procedural due process exception to the plenary power doctrine, see Hiroshi Motomura, *Procedural Surrogates, supra* note 26. Motomura illustrates how courts have interpreted statutes to put foreign nationals in the same position that they would enjoy if the statute were declared unconstitutional, while in fact, avoiding striking down the statute as unconstitutional. *See also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560 (1990) [hereinafter Motomura, *Phantom Constitutional Norms*] (arguing that "[t]he principal decisions that have contributed to [the] expansion of judicial review in immigration cases have not been decisions of sub constitutional immigration law"). Professor Benson points out that since expedited removal no longer contains explicit statutory due process, the courts can not even use this "phantom" approach. Benson, *Back to the Future, supra* note 10, at 1485-1486.

> despite the judiciary's substantial abdication in the immigration field, the government's immigration power is not entirely unconstrained. To begin with, courts have not absolutely foreclosed the possibility of judicial review of the government's substantive immigration decisions. In recent years, the Supreme Court has intimated that in the event of the particularly egregious misuse of government power in this area - what this might be has never been specified - the courts would not stand by.[273]

The greatest hurdle to judicial review requires the court to scrutinize a Congressional act that falls squarely within the plenary power doctrine, i.e. the admission/exclusion of foreign nationals. However, if the Court seriously evaluates the assumptions upon which the plenary power rests, and the changes in notions of individual rights of foreign nationals in light of changes in the concept of sovereignty, it may realize it is time to adjust immigration law to comport with the same standards by which the rest of American law must abide.

VII.
CONCLUSION

American lore rests on its romantic vision of immigrants crawling to its door in search of a better life. In fact, general values shaping immigration policy acknowledge the importance of family reunification, labor opportunities and refuge from political and religious tyranny.[274] However, aside from Native Americans, no person can claim to be an "original" American.[275] It is this commonality which is thought to bring us together as "one nation under God." Paradoxically, soon after our ancestors began laying the foundation for this house of immigrants, they also started building its fences. The door was conditionally opened.

Even the most generous commentator must concede that some control over the entrance of foreign nationals must exist and acknowledge that every nation may exercise such power.[276] It is the degree of this control

273. Bosniak, *Membership*, *supra* note 26, at 1092-1093 (1994) (referencing *Fiallo v. Bell*, 430 U.S. at 793, n.5, which acknowledges a "limited responsibility under the Constitution" to review immigration policy); Carlson v. Landon 342 U.S. 524, 537 (1952) (noting that "[t]he power to expel aliens is, of course, subject intervention under the "paramount law of the Constitution" (quoting *Fong Yue Ting*, 149 U.S. 698, 713 (1893)).).

274. UNITED STATES COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRATION POLICY (A REPORT TO CONGRESS) 17 (1997).

275. *See* TOMAS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA 19-22 (1994) (describing how California was conquered by whites who created a racial hierarchy that placed Native Americans at the bottom of the social scale).

276. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31, 34, 39 (1983) (discussing how boundries create a community based on a shared history and collective consciousness while also making it possible to create membership structures for distributive functions such as allocation of goods and services).

which raises issues, however, especially depending on its explicit or implicit rationale. Although some advocate the right of community members to determine membership requirements according to their own preferences, we must caution against human bias which shapes this process.[277] As discussed, the history of immigration policy in the United States illustrates how overtly racist policy excluded particular classes of foreigners. As we forge forward to form a more egalitarian approach, we must not lose sight of the underlying xenophobic motivation which formed the system of immigration policy we have adopted and must now reform.

Those most intimately involved with immigrants' issues have already witnessed the dire results of expedited removal, a "system designed to fail."[278] In light of tragedies that occur daily under this new legal regime, "expedited removal is a silent crisis occurring behind closed doors."[279] We must not ignore outrageous consequences of this new law and instead must confront it and the tradition of law which allowed it to come into being. As more citizens learn of the tragic results of expedited removal, they may begin to question the basic mores upon which our national heritage rests: "If the American people knew what was really happening along the borders, they would be shocked. . .I don't think this is what the American people want."[280]

After the Court of Appeals for the District of Columbia Circuit judgment this past January, any legal challenge to the expedited removal procedure can only be appealed to the Supreme Court. It may be a rare opportunity for the Court to revisit the plenary power doctrine and end its century long reign.[281] It may be impossible for them to deny that the expedited removal procedure presents the extreme case of how the plenary power leads to undeniable constitutional violations. If the Court fails to see this logic, the challenge remains with the citizenry to rise to the occasion and demand a more gentle national policy.[282] While legislators may claim to be adhering to notions of justice and fairness, it may be our task to hold them to their word.

---

277. *Id.*

278. *See* Jim Lobe, *Immigration Rules Putting Asylum-Seekers at Risk*, INTERPRESS SERV., Mar. 31, 1998 (quoting Michael Posner, director of the New York-based Lawyers Committee for Human Rights).

279. *See id.* (quoting Senator Edward Kennedy).

280. DePalma, *New Rules*, *supra* note 70, at A1 (quoting immigration lawyer, Anna Marie Gallagher).

281. The Court declined to take up the challenge in *Jean v. Nelson*, 472 U.S. 846 (1985). *See* Motomura, *Phantom Constitutional Norms*, *supra* note 272, at 547-48.

282. United States citizens must advocate on behalf of foreign nationals since they lack representation in the political branches, and, without court protection, "have no other avenue for recourse." Debora A. Gorman, *Indefinite Detention: The Supreme Court's Inaction Prolongs the Wait of Detained Aliens*, 8 GEO. IMMIGR. L. J. 47, 54 (1994).