Vanderbilt Journal of Transnational Law

Volume 22
Issue 1 *Issue 1 - 1989*

Article 3

1989

Aliens' Right to Seek Asylum: The Attorney General's Power to Exclude "Security Threats" and the Role of the Courts

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NOTE

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I. INTRODUCTION

In 1952, Congress adopted the Immigration and Nationality Act (Immigration Act),[1] which, in section 235(c),[2] gives the Attorney General the power to exclude aliens whom the Attorney General[3] deems to pose a threat to national security.[4] Twenty-eight years later, Congress, amending the Immigration Act, enacted the Refugee Act of 1980.[5] The Refugee Act creates "for the first time a provision in Federal law specifically relating to asylum" for the purpose of ensuring "a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law."[6] The Refugee Act, amending the Immigration Act, states:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, *irrespec-*

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1. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

2. Section 235(c) would appear to have roots in the Passport Act of 1918, ch. 81, § 1, 40 Stat. 559, *repealed by* Act of June 27, 1952, Pub. L. No. 82-414, § 403(a)(15), 66 Stat. 163, 279. That Act empowered the President to restrict the departure or entry of aliens during time of war when the public safety so required.

3. Although section 235(c) refers specifically to the Attorney General, regulations delegate exclusion authority to the Immigration and Naturalization Service Regional Commissioner. 8 C.F.R. § 235.8(b) (1988).

4. Section 235(c) provides in relevant part:

> If the Attorney General is satisfied that the alien is excludable . . . on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be *prejudicial to the public interest, safety, or security,* he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer.

Immigration and Nationality Act, Pub. L. No. 82-414, § 235(c), 66 Stat. 163, 199-200 (1952) (codified at 8 U.S.C. § 1225(c) (1982)) (emphasis added). The Attorney General's decision is not judicially scrutinized. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953). In *Mezei*, the Court upheld the exclusion of an alien who had lived in the United States for some twenty-five years before spending nineteen months in Rumania visiting his dying mother. *Id.* at 208. The Court did not examine the basis for the Attorney General's exclusion decision. *See id.* at 210-12.

5. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.).

6. H.R. REP. No. 608, 96th Cong., 1st Sess. 17-18 (1979).

> *tive of such alien's status*, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee . . . .[7]

In addition, the Refugee Act, amending section 243(h) of the Immigration Act, provides that an alien cannot be deported to a country where the alien's "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion."[8]

The United States Court of Appeals for the Second Circuit is the only circuit court to analyze the relationship between section 235(c) and section 243(h), as amended by the Refugee Act. In *Azzouka v. Sava*,[9] the court resolved the apparent conflict between the two acts by holding that if the Attorney General determines that an alien is a security threat, that alien may be excluded without a hearing before an immigration judge despite the fact that the alien has requested political asylum.[10]

This Note examines the interrelationship between sections 235(c) and 243(h) by analyzing the legislative, judicial, and administrative interpretations of the two provisions. The Note then attempts to reconcile the two provisions through a reading of the language of the provisions, an examination of the relevant case law and a particular focus on the analysis and the holding in *Azzouka*. The Note proposes a balancing of the alien's right to seek asylum and the Attorney General's summary exclusion power. This balancing of interests would allow a judicial determination on the merits of the alien's asylum claim notwithstanding any allegations that the alien is a security threat.

II. LEGISLATIVE AND JUDICIAL BACKGROUND OF SECTIONS 235(c) AND 243(h)

A. *Legislative, Judicial, and Administrative Interpretations of Section 235(c)*

1. Procedure Under Section 235(c)

Section 235(c) of the Immigration Act allows the Attorney General to exclude aliens who pose a threat to United States national security.[11]

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7. Refugee Act § 201(b), 8 U.S.C. § 1158(a) (1982) (amending Immigration and Nationality Act, § 208(a), 8 U.S.C. § 1158(a) (1982)) (emphasis added).

8. *Id.* § 203(e), 8 U.S.C. § 1253(h)(1) (1982) (amending Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h) (1982)).

9. 777 F.2d 68 (2d Cir. 1985), *cert. denied*, 479 U.S. 830 (1986).

10. *Id.* at 75.

11. *See supra* note 4; Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210

Aliens are deemed to be excludable if they have not yet effected official "entry" into the United States, even if they are physically present in the country.[12] The term "entry" refers generally to "any coming of an alien into the United States, . . . whether voluntarily or otherwise."[13] Aliens may, however, still be considered excludable when they are temporarily paroled in the United States to await a final determination of their status.[14]

Under section 235(c) and its accompanying regulation,[15] once an Immigration and Naturalization Service (INS) official determines that an alien may be excludable under paragraphs (27), (28) or (29) of section 212(a) of the Immigration Act,[16] the official reports the case to the Regional Commissioner along with any statements of information that the alien wishes to submit; exclusion proceedings are held after that time.[17] Section 212(a) of the Immigration Act lists the classes of excludable aliens. Paragraph (27) describes one class of excludable aliens as

> [a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.[18]

Paragraphs (28) and (29) allow the exclusion of aliens who are members of or affiliated with "subversive" organizations and who are involved in espionage.[19] If the Regional Commissioner's conclusion that the alien is excludable under any of the provisions in section 212(a) is based on confidential information "the disclosure of which would be prejudicial to the public interest, safety, or security, [the Regional Commissioner] 'may in his discretion order such alien to be excluded and deported without any

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(1953).

12. Sannon v. United States, 427 F. Supp. 1270, 1273 (S.D. Fla. 1977), *vacated and remanded mem.*, 566 F.2d 104 (5th Cir. 1978).

13. Immigration and Nationality Act, § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1982). For a discussion of the term "entry," see Rosenberg v. Fleuti, 374 U.S. 449 (1963).

14. Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125, 1128 n.21 (1980) ("Aliens subject to exclusion are generally those intercepted at the border while trying to enter the country, but also include those physically present after parole admission.").

15. 8 C.F.R. § 235.8 (1988).

16. 8 U.S.C. § 1182(a)(27)-(29) (1982).

17. *See* Azzouka v. Sava, 777 F.2d 68, 72 (2d Cir. 1985), *cert. denied*, 479 U.S. 830 (1986).

18. 8 U.S.C. § 1182(a)(27) (1982).

19. *Id.* § 1182(a)(28), (29).

inquiry or further inquiry by a special inquiry officer.' "[20] On the other hand, the Regional Commissioner has the discretion to grant the alien a full exclusion hearing.[21]

Thus, the Attorney General and his or her designated agents have a great deal of discretion in determining which aliens are subject to exclusion. Section 235(c) of the Immigration Act appears to authorize the Attorney General to exclude any alien who he or she decides is a security threat. Once the INS Regional Commissioner has determined that an alien poses a threat to national security, it appears that the alien may be summarily excluded without a hearing. Moreover, section 235(c) seems to provide that while the determination of whether an alien is a security threat may be based on confidential information, there is no corresponding duty to disclose the nature of that information to the alien who is threatened with exclusion.[22] Although the alien is allowed to submit information to the Regional Commissioner who will determine the alien's status,[23] the alien is not entitled to the confidential information on which the Commissioner will base the final determination. Thus the alien gets no real opportunity to counter any unfavorable information. Moreover, while paragraph (28) of section 212(a) lists aliens involved with subversive organizations as an excludable class, the Immigration Act does not define which organizations are "subversive." It appears that the determination of what constitutes "subversive" will vary depending on the Regional Commissioner. One thing is clear: Section 235(c) provides that a full exclusion hearing is purely discretionary and that aliens may be summarily excluded without a hearing.[24]

2. Judicial and Administrative Interpretations of the Standard for Exclusion of "Security Threats" Under Section 235(c)

Courts traditionally defer to executive and legislative action regarding the exclusion of aliens.[25] The power to control the national border has

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20. *Azzouka*, 777 F.2d at 72 (quoting Immigration and Nationalty Act, § 235(c), 8 U.S.C. § 1125(c) (1982)).

21. *Id.*

22. *See, e.g., id.* at 71. After the Regional Commissioner determined, based on confidential information, that Azzouka was a security threat, "pursuant to section 235(c), Azzouka was excluded without a hearing before an immigration judge." *Id.* Presumably, Azzouka never learned the nature of the confidential information, or if he did, he received no hearing at which he could attempt to counter the information.

23. *See supra* note 17 and accompanying text.

24. *See supra* note 19.

25. *See generally* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

long been considered to be part of Congress's plenary powers.[26] Thus, Congress has extensive power regarding immigration issues. The United States Supreme Court has never accepted the government contention that alien admission and exclusion decisions are totally unreviewable;[27] however, the Court has noted that, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[28]

For nearly a century, the Court has been virtually unwavering in its insistence that the Government is subject to few, if any, constitutional limits on the power to exclude aliens.[29] The Court, however, has been rather eclectic in its theories, relying variously on the rights-privileges doctrine,[30] the inherent powers theory,[31] and the theory that aliens outside the territorial jurisdiction of the United States possess no constitutional rights.[32]

The concept that aliens have few, if any, constitutional rights may bring about harsh results. This was demonstrated in *United States ex rel. Knauff v. Shaughnessy*,[33] a 1950 case in which an American husband and his German wife were separated from each other after a determination by the Attorney General that the wife's admission to the United States "would be prejudicial to the interests of the United States."[34] The wife was permanently excluded without a hearing even

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26. *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 604, 606 (1889). For a discussion of the historical and philosophical background of the role of sovereignty in immigration law, see Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 5-14 (1984).

27. Fiallo v. Bell, 430 U.S. 787, 793 n.5 (1977).

28. Matthews v. Diaz, 426 U.S. 67, 79-80 (1976); *see also The Chinese Exclusion Case*, 130 U.S. at 606 (aliens may be excluded on the basis of race).

29. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950).

30. *See id.* at 542; *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 277-78 (1978); Note, *From* Mezzi *to* Jean: *Toward the Exit of the Entry Doctrine*, 22 SAN DIEGO L. REV. 1143, 1146 (1985).

31. *See Knauff*, 338 U.S. at 542 (citing United States v. Curtiss-Wright Export Corp., 229 U.S. 304 (1936)); *see also* Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U. L. REV. 1137, 1144-47 (1977).

32. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). *But see* Landon v. Plasenia, 459 U.S. 21 (1982) (some due process rights do attach to nonentrant aliens); *see also* Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 775 (1971).

33. 338 U.S. 537 (1950).

34. *Id.* at 539-40.

though she had complied fully with the terms of the War Brides Act.[35] The Court wrote, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[36]

The *Knauff* case seems to illustrate that the power to exclude aliens is inherent in both the legislative and the executive branches. In *Knauff*, the Supreme Court linked exclusion power to the inherent power of the executive to control foreign affairs.[37] According to the Court, when Congress outlines procedures for the admission or exclusion of aliens, it utilizes not only legislative power, but also an inherent executive power.[38] It should be noted, however, that *Knauff* was decided prior to the genesis of the modern concept of separation of powers, which deals generally with the allocation of powers between the executive and legislative branches of government and with the role of the courts in determining whether the executive branch has acted beyond its constitutional powers.[39] Thus, despite the fact that the Supreme Court continues to cite *Knauff* as being authoriative,[40] the result in *Knauff* and its premises actually may be questionable in light of the modern separation of powers doctrine.[41]

While the power to exclude aliens is very broad, courts do have limited authority to review on habeas corpus the exclusion of aliens pursuant to the Immigration Act. Nevertheless, the Supreme Court held in *Kleindienst v. Mandel*[42] that such review is limited to an inquiry as to whether there was "a facially legitimate and bona fide reason" for the exclusion.[43] Once the court makes that determination, its inquiry is complete.[44]

In summary, Congress's power to make rules and to formulate policies regarding the exclusion of aliens is part of its long-established plenary power. Congress may delegate that power conditionally to a member of

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35. *Id.* at 545-47.

36. *Id.* at 544.

37. *Id.* at 542 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)).

38. *Id.* at 542.

39. *See infra* notes 164-80 and accompanying text.

40. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32 (1982).

41. *See infra* notes 163-81 and accompanying text.

42. 408 U.S. 753 (1972).

43. *Id.* at 770.

44. *Id. Kleindienst* involved a section 212(a) exclusion, but in El-Werfalli v. Smith, 547 F. Supp. 152 (S.D.N.Y. 1982), the court applied *Kleindienst* to section 235(c) exclusion actions, reasoning that the "governing standard permits the Court to inquire as to the Government's reasons, but proscribes its probing into their wisdom or basis." *Id.* at 153.

the executive branch such as the Attorney General. When the Attorney General acts to exclude an alien, courts have limited authority to review the decision—that review extends only to a general inquiry as to whether there was "a facially legitimate and bona fide reason" for the exclusion.[45] When the court completes that inquiry, its section 235(c) review is complete.

B. *Legislative, Judicial, and Administrative Interpretations of Section 243(h)*

1. The United Nations Protocol and its Effect on Asylum

In 1968, the United States ratified the United Nations Protocol Relating to the Status of Refugees.[46] The Protocol was intended to be an extension and reaffirmation of the Convention Relating to the Status of Refugees,[47] a 1951 United Nations Convention to which the United States never adhered. The Convention was adopted to protect those people who had become refugees prior to 1951. The Protocol contains all of the substantive provisions of the Convention, but the Protocol has no time limitation.[48] Since the Protocol affirms the Convention's provisions, the Protocol extends protection to all refugees. Under the terms of the Convention and the Protocol, a refugee is anyone who,

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . .[49]

Several categories of people are specifically excluded from protection. The Convention does not cover persons who have committed a crime under international law[50] or a "serious nonpolitical crime" in a country other than the country where the person sought refuge prior to admission to that country,[51] persons voluntarily resettled in their homelands,[52]

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45. *Kleindienst*, 408 U.S. at 769-70.

46. Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force for the United States Nov. 1, 1968) [hereinafter Protocol].

47. July 28, 1951, 189 U.N.T.S. 150 [hereinafter Convention].

48. *See* Note, *supra* note 14, at 1126.

49. Convention, *supra* note 47, art. § A(2); Protocol, *supra* note 46, art. I.

50. Convention, *supra* note 47, art. 1 §§ F(a), (c). Crimes under international law include crimes against peace, crimes against humanity, and acts contrary to United Nations precepts.

51. *Id.* § F(b).

52. *Id.* §§ C(1),(2),(4).

persons voluntarily resettled in a country other than their homeland or the original country of refuge,[53] and persons under protection of the United Nations High Commissioner for Refugees.[54]

Those persons deemed to be refugees are allowed to rely on the Convention's basic asylum provision, article 33. That provision states as follows:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[55]

Article 33 does not apply when there are "reasonable grounds" to determine that the alien would threaten national security[56] or would pose a danger to the community.[57]

It is important to note that article 33 does not create an absolute right to stay in the country in which the alien has sought refuge; rather, article 33 creates a right of "nonrefoulment"—that is, a right not to be returned to the persecuting country. Therefore, a country does not have to accept an alien if another country is willing and able to grant asylum; however, if no other country will take the alien, that person does have the right to remain as long as the persecution in the alien's home country continues.[58]

The Protocol appears to have a mandatory application—that is, the Protocol is nondiscretionary in that once a person establishes refugee status, he or she is entitled to asylum as a matter of right. Indeed, testimony before the Senate Foreign Relations Committee, during its consideration of the Protocol, pointed out the nondiscretionary nature of the Protocol.[59] Even President Johnson noted as he transferred the Protocol to the Senate for its advice and consent, that the Protocol would prohibit the return

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53. *Id.* § C(3).

54. *Id.* § D.

55. Protocol, *supra* note 46, art. 33 § 1. Article 32 also addresses asylum. It prevents expulsion of any alien lawfully in the country of refuge unless that alien threatens national security or public order. *Id.* art. 32.

56. *Id.* art. 33 § (2).

57. *Id.* An alien is deemed to be a potentially dangerous member of the community if he or she has been convicted of a "particularly serious crime." *Id.*

58. *See* Note, *supra* note 14, at 1126.

59. S. EXEC. REP. NO. 14, 90th Cong., 2d Sess. 9 (1968) (testimony of Lawrence Dawson, Acting Deputy Director, Office of Refugee and Migration Affairs, United States Department of State). Mr. Dawson noted that the United States had not followed the 1951 Convention because the article 33 asylum provisions were nondiscretionary. *Id.*

of a refugee to any country where that refugee would be persecuted.[60]

2. The Refugee Act of 1980 and the Standard for Section 243(h) Asylum

Prior to the 1968 ratification of the Protocol, the only federal statutory provision specifically related to providing refuge for aliens who were physically within the borders of this country was section 243(h)[61] of the Immigration Act of 1952.[62] Section 243(h) was originally limited in application to the potential victims of physical persecution, but it was amended in 1965 to state:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for that reason.[63]

This version of section 243(h) was similar to article 33 of the Protocol,[64] but there were two major exceptions. First, section 243(h) applied only to "deportable" aliens—that is, those aliens who had entered the United States illegally and were already within its borders.[65] Section 243(h) did not apply to "excludable" aliens, or aliens who were deemed to have been stopped at the border—even if the alien was physically within the United States at the time he or she sought to invoke section 243(h).[66] In contrast, the Protocol makes no distinction between deportable and excludable aliens.[67] Second, while article 33 is mandatory in its applica-

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60. Sen. Exec. Doc. X, 90th Cong., 2d Sess. III (1968) (letter of transmittal of President Johnson).

61. 8 U.S.C. § 1253(h) (1964).

62. Pub. L. No. 82-414, 66 Stat. 163, 214 (1952).

63. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918. In 1978, the statute was amended again to forbid withholding the deportation of aliens who aided Nazi persecution. Act of Oct. 30, 1978, Pub. L. No. 95-549, tit. 1, § 104, 92 Stat. 2065, 2066 (current version at 8 U.S.C. § 1253(h) (1982)).

64. The original version of section 243(h) varied from article 33 of the Protocol; the Refugee Act modified existing statutory law, including section 243(h), to reflect the United States obligations under the Protocol. *See infra* notes 70-80 and accompanying text.

65. *See* 8 U.S.C. § 1251 (1976).

66. *See* 8 U.S.C. §§ 1221-27 (1976). Traditionally excludable aliens are considered not to have entered the country; therefore they are deemed to have a lesser legal status than deportable aliens. *See* Maldonado-Sandoval v. INS, 518 F.2d 278, 280 n.3 (9th Cir. 1975).

67. *See* 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL

tion, section 243(h) was discretionary, allowing immigration judges and the Board of Immigration Appeals (BIA), the administrative body which hears appeals from immigration judges' decisions, to deny asylum even to qualified aliens.[68]

The Refugee Act of 1980[69] modified prior statutory law to bring it into general accord with the United States obligation under the Protocol.[70] The Refugee Act amends section 243(h) to conform to the Protocol's provisions by removing the discretionary language in section 243(h) and adopting language that conforms substantially with article 33 of the Protocol.[71] The language of section 243(h) is now essentially mandatory. Section 243(h)(1) states:

> The Attorney General *shall not* deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[72]

LAW at I 30, 343 (1972).

68. *See* text accompanying note 62. The language of section 243(h) is that the Attorney General is "authorized," not that he or she is "required" to deny asylum.

69. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.).

70. *See* INS v. Stevic, 467 U.S. 407, 421 (1984).

71. *Compare* Pub. L. No. 96-212, tit. II, § 203(e) *with* Protocol, *supra* note 46, art. 33.

72. 8 U.S.C. § 1253(h)(l) (1982) (emphasis added). Section 243(h) reads in full:

> Withholding of deportation or return
>
> (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.
>
> (2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—
>
> (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
>
> (B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
>
> (C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or
>
> (D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

Id. § 1253(h).

Moreover, section 243(h) is available to aliens at both exclusion and deportation hearings.[73] The Refugee Act defines a "refugee" as, in pertinent part, a person who has a "well-founded fear of persecution" in his or her homeland;[74] section 243(h) seems to prescribe that persons qualifying as refugees may not be forced to return to a country where persecution is likely.[75] At the same time, however, the mandatory prohibition against deportation or exclusion provided in the Refugee Act has some limitations. Section 243(h) does not apply if the Attorney General determines that that alien assisted in persecution of others,[76] was convicted of a crime serious enough to cause the alien to pose a threat "to the community of the United States,"[77] "committed a serious nonpolitical crime outside the United States,"[78] or that the alien may pose a danger to the security of the United States.[79] These limitations are essentially the same as those set out in the Protocol.[80]

As early as 1935, the Attorney General formulated procedural regulations concerning asylum.[81] These regulations are still in force even after the adoption of the Protocol and the passage of the Refugee Act. The

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73. *See* S. REP. No. 256, 96th Cong., 2nd Sess. 17 (1979), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 147, 157.

74. 8 U.S.C. § 1101(a)(42) (1982). The definition reads in full:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id.

75. 8 U.S.C. § 1253(h)(1) (1982).

76. *Id.* § 1253(h)(2)(A).

77. *Id.* § 1253(h)(2)(B).

78. *Id.* § 1253(h)(2)(C).

79. *Id.* § 1253(h)(2)(D); *see supra* note 72 for the full text of section 243(h).

80. *See supra* notes 46-54 and accompanying text. Indeed, the definitions and substantive provisions in the statute are almost identical to those of the Protocol.

81. 8 C.F.R. § 208 (1935).

regulations provide that aliens must first apply for asylum with the INS District Director.[82] If the District Director denies the request, "the applicant may renew his/her request for asylum before an immigration judge in exclusion or deportation proceedings," where the alien may seek to invoke section 243(h).[83] In summation, section 243(h) corresponds almost completely with the Protocol and brings the United States into line with its promises under the Protocol. Because it is a treaty, the Protocol is part of the supreme law of the United States.[84]

Like the language of the Protocol, the language of the asylum provisions of the Refugee Act of 1980 is essentially mandatory; there are, however, limitations to the mandatory application of the asylum provisions. The Attorney General has promulgated a series of regulations in an attempt to administer asylum proceedings in an orderly way. These regulations specifically provide that if the District Director denies the alien's request for asylum because of any of the reasons outlined in section 243(h), the alien may appeal directly to an immigration judge who may examine the merits of the alien's asylum claim.[85]

III. The Alien's Right to Seek Asylum and the Attorney General's Summary Exclusion Power: Reconciling Conflicting Concepts

A. *The Refugee Act, Excludable Aliens, and the Right to Asylum*

From the foregoing discussion, it seems apparent that the exclusion provisions of section 235(c)[86] and the asylum provisions of section 243(h)[87] are in some conflict. On the one hand, Congress has delegated virtually unlimited power to the Attorney General to exclude aliens who the Attorney General determines may be "prejudicial to the interests" of the United States.[88] On the other hand, section 243(h) contains nondiscretionary language which guarantees that aliens who seek asylum out of a reasonable fear of persecution in their home countries will not be returned to these countries.[89] The Refugee Act of 1980 reflects the idea

82. *Id.* at § 208 (1988).

83. *Id.* § 208.9.

84. Together with the Constitution and the laws of the United States, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI.

85. *See supra* note 83 and accompanying text.

86. *See supra* Part II, A.

87. *See supra* Part II, B.

88. *See supra* notes 11-21 and accompanying text.

89. *Supra* notes 49-57 and accompanying text.

that "the United States has committed itself not to send back aliens who establish a 'well-founded fear of persecution' . . . no matter how many ordinary provisions of our immigration laws were transgressed in the course of their arrival here."[90] While Congress was considering the Refugee Act, Senator Kennedy sent letters to various government officials in which he stated: "[T]here is an urgent need for the United States to begin to take the steps necessary to establish a long range refugee policy—a policy which will treat all refugees fairly and assist all refugees equally."[91] The Judiciary Committee reported to the Senate that "[t]he conferees direct the Attorney General to establish a new uniform asylum procedure under the provisions of this legislation."[92] Indeed, the Refugee Act itself provides that "[t]he objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States."[93]

Given the clear Congressional intent to establish a uniform and humanitarian administration of admission of aliens to the United States, it is crucial to harmonize the asylum provisions and the exclusion provisions because "[t]he intrinsic value of legislation depends not on perfection but on its suitability and adaptability to the promptings and agitation of changing civilization."[94]

B. *Cases Balancing the Alien's Right to Asylum and the Executive's Power to Exclude*

In *Yiu Sing Chun v. Sava*,[95] the United States Court of Appeals for the Second Circuit addressed the apparent conflicts between the statutory exclusion provisions relating to stowaways and the asylum provision of the Refugee Act. In *Chun*, two young men from the People's Republic of China swam from Canton to Hong Kong, then stowed away on a United States vessel bound for the United States.[96] Once the ship was underway,

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90. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 184 (1983).

91. S. REP. No. 256, 96th Cong., 2d Sess. 2 (1979), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 141, 142.

92. H.R. CONF. REP. No. 781, 96th Cong., 2d Ses. 20 (1979), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 160, 161.

93. Pub. L. No. 96-212, § 101 (b), 94 Stat. 102, 102 (1980).

94. *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings on S.8716, H.R. 2379, and H.R. 2816 Before the Subcomms. of the Comms. on the Judiciary*, 82d Cong., lst Sess. 657 (1951) (Statement of Filindo R. Masino, Vice President, Association of Immigration and Nationality Lawyers).

95. 708 F.2d 869 (2d Cir. 1983).

96. *Id.* at 870.

the two men presented themselves to the crew and expressed their intention to seek asylum in the United States.[97] The INS District Director in San Francisco denied the request for asylum, and the applicants for asylum, Chun and Shan, were served with the District Director's decision on the docked ship where they were still confined pending the consideration of their asylum applications.[98] When the ship arrived in New York, Chun and Shan updated their petitions and filed them in New York; the District Director in New York denied their second application for asylum and the District Court upheld the decision.[99] Chun and Shan then brought a contempt motion to require the INS to provide an exclusion hearing at which the two could apply for asylum before an immigration judge.[100] The court found that statutory exclusion provisions specifically deny a hearing to stowaways.[101] Chun and Shan appealed to the Court of Appeals for the Second Circuit asking the court to reconcile the exclusion and asylum provisions.[102]

While the Refugee Act instructs the Attorney General to establish an orderly system with uniform application for all aliens who wish to seek political asylum,[103] the Immigration Act seems by its plain meaning to exclude stowaways from the benefits of the asylum provisions. Indeed, section 273(d) of the Act specifically prohibits stowaways from appearing before an immigration judge;[104] thus, it appears that stowaways do not have the right to be heard on the merits of an asylum claim. The Second Circuit, however, harmonized the conflicting statutes by ruling that the Refugee Act takes precedence over section 1323(d) because, in enacting the Refugee Act, Congress intended to " 'establish a uniform procedure for passing upon an asylum application'."[105] Because the Refugee Act was intended to establish uniform treatment of aliens seeking asylum, the court reasoned that the INS decision to preclude Shan and Chun from an exclusion hearing before an immigration judge frustrated

97. *Id.*

98. *Id.* at 871.

99. *Id.* at 871-72.

100. *Id.* at 872.

101. *Id.*

102. *Id.*; *see* Note, *Due Process Rights of Asylum Applicants Expanded to Include Stowaways*, 50 BROOKLYN L. REV. 751, 767 (1984).

103. *See supra* notes 69-85 and accompanying text.

104. 8 U.S.C. § 1323(d) (1982).

105. *Yiu Sing Chun v. Sava*, 708 F.2d 869, 874 (2d Cir. 1983) (*quoting* S. REP. NO. 256, 96th Cong., 1st Sess. 16, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 141, 156).

the underlying policy of the Refugee Act.[106] The court stated that "[d]espite the fact that Chun and Shan are stowaways, their procedural rights as *asylum applicants* derive from the Refugee Act of 1980."[107] The court explained that the Refugee Act does not implicitly overrule the stowaway provisions,[108] but that the court had a duty "to give harmonious operation and effect to all statutory provisions if possible, absent some explicit indication of legislative intent derived from either the words of the statute or its legislative history."[109] In order to fulfill this duty to harmonize the statutes, the court held that the limitations imposed on stowaways "are not applicable in the asylum context to the extent . . . that an asylum determination is involved."[110] The court determined that the Refugee Act and section 1323(d) "can be harmonized by reading the refugee regulations—particularly 8 C.F.R. 208.9(f)(3) [sic]—to require a hearing before an immigration judge limited to the asylum issue for stowaways seeking admission as refugees."[111] Thus, if a stowaway seeks admission to the United States but not asylum, the alien has no right to an exclusion hearing.

In short, the court employed a two-tier analysis, treating Shan and Chun not only as stowaways, but also as applicants for asylum.[112] More significantly, the court determined that some procedural due process rights attach to applicants for asylum.[113] The court noted that "a refugee who has a 'well-founded fear of persecution' in his homeland has a protectable interest recognized by both treaty and statute, and his interest in not being returned may well enjoy some due process protection not available to an alien claiming only admission."[114] The court applied the *Ma-*

106. *Id.* at 874.

107. *Id.*

108. *Id.* at 876. "Because the hearing we require will be limited solely to the issue of asylum eligibility, we preserve the basic thrust of § 1323(d)'s command that stowaways are not entitled to exclusion hearings." *Id.*

109. *Id.* at 874.

110. *Id.* at 874-75.

111. *Id.* at 874. The court refers erroneously to 8 C.F.R. § 208.9(f)(3), intending 8 C.F.R. § 208.8(f)(3) (1983), which reads, "If an asylum request by an applicant for admission is denied, he/she shall be expeditiously placed under exclusion proceedings, unless the applicant elects to withdraw the application for admission."

112. *See* Note, *supra* note 102, at 766.

113. *Yiu Sing Chun,* 708 F.2d at 876. The court noted that its decision was based in part on procedural due process despite the fact "that the alien seeking initial admission is requesting a privilege and has very limited rights regarding his application." *Id.* (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

114. *Id.* at 877 (footnotes omitted).

thews v. Eldridge balancing test[115] to determine whether an alien claiming asylum is entitled to a hearing. The court held:

> Because the severity of harm to the erroneously excluded asylee outweighs the administrative burden of providing an asylum hearing, if the regulations did not do so already the INS arguably would be required to provide a hearing before an immigration judge to determine whether applicants for asylum are, in fact, refugees within the meaning of the Act.[116]

Thus, Chun and Shan were entitled to a hearing before an immigration judge and the case was remanded for futher administrative proceedings.[117]

The United States Supreme Court has also used the *Mathews* balancing test in the context of immigration, albeit in the context of a returning resident alien, not an excludable alien who has never been admitted to the United States.[118] Various other courts have also held that aliens enjoy certain limited constitutional rights. In *Haitian Refugee Center v. Smith*,[119] the United States Court of Appeals for the Fifth Circuit held that aliens have a right to petition for asylum and to be heard on that petition.[120] The court explicitly stated that the INS "accelerated program of processing Haitian asylum and deportation cases deprived the plaintiffs of due process of law."[121] In *Nunez v. Boldin*,[122] a Texas district court held that due process requires that detainees be given notice of their right to apply for asylum.[123] The court noted that while all aliens may not have the asylum privilege, all have the right to be heard on their pleas for that privilege.[124]

In *Augustin v. Sava*,[125] the United States Court of Appeals for the Second Circuit stated that while aliens seeking admission have no constitutional rights regarding their applications, they possess all statutory

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115. 424 U.S. 319, 334-35 (1976); *see infra* notes 184-90 and accompanying text.

116. *Yiu Sing Chun* 708 F.2d at 877 (footnote omitted).

117. *Id.*

118. *See* Landon v. Plasencia, 459 U.S. 21, 30 (1982).

119. 676 F.2d 1023 (5th Cir. Unit B 1982). *Haitian Refugee Center* is still controlling in the Fifth Circuit. The United States Court of Appeals for the Eleventh Circuit, which encompasses a portion of what was formerly the Fifth Circuit, has adopted a different rule. That court held that asylum applicants do not possess due process rights. Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984).

120. *Id.* at 1037-39.

121. *Id.* at 1041.

122. 537 F. Supp. 578 (S.D. Tex. 1982).

123. *Id.* at 584-87.

124. *Id.* at 584.

125. 735 F.2d 32 (2d Cir. 1984).

rights that Congress has granted them.[126] Thus, the court reasoned, since the Refugee Act and the regulation promulgated under the Refugee Act provide "certain procedural and substantive entitlements to excludable aliens"[127] who seek asylum, "it appears likely that some due process protection surrounds the determination of whether an alien has sufficiently shown that return to a particular country will jeopardize his life or freedom so as to invoke the mandatory prohibition against his return to that country."[128] The court declined explicitly to define what process is due aliens,[129] but stated that "the protected right to avoid deportation or return to a country where the alien will be persecuted warrants a hearing where the likelihood of persecution can be fairly evaluated."[130] Thus, the circuits are split as to whether aliens have due process rights.[131]

The United States Supreme Court has never squarely addressed the subject of whether excludable aliens seeking asylum possess any due process rights, but the Court has held in other contexts that aliens possess some limited constitutional rights.[132] While the Supreme Court has held that aliens seeking initial admission to the United States have no constitutional rights regarding their applications,[133] the Court has never determined whether an alien's preadmission claim of asylum may cause certain constitutional rights, such as the right to a hearing on refugee status, to attach.[134] In *Jean v. Nelson*,[135] the Supreme Court refused to address

126. *Id.* at 36.

127. *Id.*

128. *Id.* at 37.

129. *Id.* The court noted that "[t]he requirements of the due process clause are flexible and dependent on the circumstances of the particular situation examined." *Id.* (citation omitted).

130. *Id.*

131. *Compare* Yiu Sing Chun v. Sava, 708 F.2d 869 (2d Cir. 1983) (aliens seeking asylum possess due process rights) *with* Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985) (aliens cannot challenge administrative decisions on the basis of rights guaranteed by the constitution); *see also* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. Unit B 1982) (government's "Haitian Program" violative of due process clause).

132. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (granting aliens fourth amendment protection in criminal trials); Graham v. Richardson, 403 U.S. 365 (1971) (aliens are "persons" under fourteenth amendment and are thereby protected); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (government prevented from taking alien's property without just compensation); The Japanese Immigrant Case, 189 U.S. 86 (1903) (property hearing required before deportation); Wong Wing v. United States, 163 U.S. 228 (1896) (aliens may not be committed to imprisonment at hard labor without judicial trial).

133. *See* Landon v. Plasencia, 459 U.S. 21 (1982).

134. *See, e.g.*, Yiu Sing Chun v. Sava, 708 F.2d 869 (2d Cir. 1983) (the United

the constitutional issues involved in a claim by Haitian detainees that INS officials had denied them parole on the basis of race and national origin.[136] Justice Rehnquist, writing for the majority, held that it was unnecessary to rule on the constitutional question because "the INS's parole discretion [under the Immigration Act and accompanying regulations], while exceedingly broad, does not extend to consideration of race or national origin." The Court, therefore, remanded the case to the district court for a determination as to whether INS officials "are observing this limit upon their broad statutory discretion to deny parole to class members in detention."[137] Justice Rehnquist stated that the "nonconstitutional remedy" was the result of "the obligation of all federal courts to avoid constitutional adjudication except where necessary."[138] The dissenters, however, would have reached the constitutional questions. Justice Marshall wrote, "I would hold that petitioners have a Fifth Amendment right to parole decisions free from invidious discrimination based on race or national origin."[139]

It appears from the foregoing discussion that aliens seeking asylum may enjoy some constitutional rights that aliens merely seeking admission do not possess. Indeed, a number of courts have held that in some contexts aliens do possess certain constitutional rights.[140]

C. *Treatment by the Courts of Aliens Deemed Security Threats*

While some courts have afforded due process rights to aliens seeking asylum,[141] no court has extended such rights to an alien deemed to be a security threat. Indeed the United States Court of Appeals for the Second Circuit, the same court that decided *Yiu Sing Chun*, specifically held in *Azzouka v. Sava*[142] that aliens deemed to be security threats may be summarily excluded without a hearing on their asylum petitions.[143]

In *Azzouka*, the court was asked to harmonize section 235(c), which authorizes exclusion of aliens whom the Attorney General determines to

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States Court of Appeals for the Second Circuit did discuss the attachment of limited due process rights to aliens seeking asylum); *see also supra* notes 95-131 and accompanying text.

135. 472 U.S. 846 (1985).
136. *Id.* at 848.
137. *Id.* at 855-57.
138. *Id.* at 857.
139. *Id.* at 858 (Marshall, J., dissenting).
140. *See supra* notes 95-134 and accompanying text.
141. *See supra* notes 95-131 and accompanying text.
142. 777 F.2d 68 (2d Cir. 1985), *cert. denied*, 479 U.S. 830 (1986).
143. *Id.* at 76.

be a security threat,[144] and section 243(h), which mandates that aliens who are threatened with persecution in their home country shall not be returned to that country.[145] The court refused to harmonize the exclusion and the asylum provisions in Azzouka's favor, noting that while it would be possible for the court to rule in favor of Azzouka, such a ruling "would require straining the statutes through too fine a mesh."[146] The court held that if the INS Regional Commissioner[147] has reasonable grounds for determining that the alien is a security threat, the alien is not entitled to a hearing and may be excluded.[148]

The Government argued that section 212(a)(27) of the Immigration Act,[149] to which the exclusion provisions of section 235(c) refer, should guide the court's interpretation of the statutes.[150] Section 235(c) incorporates the provisions of section 212(a)(27) and allows exclusion of aliens who "enter the United States solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States."[151] The asylum provision allows for the exclusion of aliens who are "a danger to the security of the United States."[152] The Government conceded that section 212(a)(27) is broader than section 243(h)(2)(D), but the court decided that the two sections may be read in tandem without making the more narrow provisions of section 243(h)(D) mere "surplusage."[153]

For three reasons, the court concluded that the Regional Commissioner rather than the immigration judge may make the initial security threat determination.[154] First, the asylum hearing mandated by *Chun* should be limited only to a determination of whether the alien is a refugee and therefore is qualified for asylum; the determination of whether

144. 8 U.S.C. § 1225(2) (1982); *see also supra* notes 1-4 and accompanying text.

145. 8 U.S.C. § 1253(h)(1) (1982); *see supra* notes 5-8 and accompanying text.

146. *Azzouka*, 777 F.2d at 75.

147. Immigration and Nationality Act, § 235(c), 8 U.S.C. § 1225(i) (1982); *see also* Immigration and Nationality Act, § 212(a)(12), 8 U.S.C. § 1182(a)(27) (1982). While the language of the Acts involved confers exclusive power upon the Attorney General, not the INS Regional Commissioner or District Director, the Attorney General is deemed to have delegated exclusion authority to those individuals. 8 C.F.R. § 235.8(b) (1988); *see supra* note 3.

148. *Azzouka*, 777 F.2d at 75.

149. 8 U.S.C. § 1182(a) (1982).

150. *Azzouka*, 777 F.2d at 75.

151. 8 U.S.C. § 1225(c) (1982) (incorporating by reference 8 U.S.C. § 1182(a)(27) (1982)); *see supra* notes 16-19 and accompanying text.

152. 8 U.S.C. § 1253(h)(2)(D) (1982); *see supra* note 79 and accompanying text.

153. *Azzouka*, 777 F.2d at 75.

154. *Id.*

the alien falls into one of the exclusion categories is, in the court's view, out of the ambit of the hearing.[155] Second, the court determined that Congress intended summarily to exclude aliens who could pose security threats and that a hearing on the merits of asylum claims could frustrate that aim.[156] Third, the court was persuaded by the fact that both the exclusion and the asylum provisions authorize the Attorney General to determine which aliens may pose security threats.[157] Thus, in the court's view, the language of the statutes calls for a single determination by the Regional Commissioner regarding the alien's status as to excludability.[158] The court then concluded that once the Regional Commissioner determines that alien is a threat to national security, that an alien "is disentitled to the substantive right of asylum [and] is not entitled to the asylum hearing."[159]

D. *Conclusion*

It is clear that the exclusion power is very broad. It is equally clear that the Refugee Act establishes a right to asylum, or at least a right not to be returned to a land where one may be persecuted. In some areas, the statutes governing asylum for aliens and exclusion of aliens conflict. When statutes collide, it is the province of the courts to harmonize the statutes and to reconcile conflicts justly and within the realm of Congressional intent. As Judge Learned Hand wrote "[judges] must put [themselves] in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final."[160]

As discussed above, the United States Court of Appeals for the Second Circuit harmonized a conflict between immigration statues in *Chun* by holding that stowaways, while otherwise excludable, are entitled to a hearing before an immigration judge on the merits of an asylum request.[161] In *Azzouka*, the same court resolved a conflict between the same two statutes by holding that aliens deemed to be security threats

155. *Id.*
156. *Id.*
157. *Id.* at 76.
158. *Id.*
159. *Id.*
160. Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring), *aff'd sub nom.* Gemsco, Inc. v. Walling, 324 U.S. 244 (1945), *quoted in* Reid v. INS, 492 F.2d 251, 253 (2d Cir. 1974), *aff'd*, 420 U.S. 619 (1975).
161. Yiu Sing Chun v. Sava, 708 F.2d 869, 874-75 (2d Cir. 1983).

are summarily excludable and thus not entitled to a hearing on the merits of an asylum petition.[162]

IV. PROPOSAL: A BALANCING OF INTERESTS

While the Supreme Court has never embraced the claim that it has no power to review Government decisions regarding the admission or exclusion of aliens, the Court has yet to scrutinize carefully the roles of the three branches of government in formulating policies governing the admission or exclusion of aliens.[163]

In *United States ex rel. Knauff v. Shaughnessy*,[164] the Supreme Court held that the executive branch possesses inherent exclusion power[165] derived from the President's powers over foreign affairs.[166] Thus, the executive branch was allowed summarily to exclude an alien, the wife of a United States citizen, even though she and her husband had complied fully with the provisions of the War Brides Act. As the dissent noted, this arbitrary exclusion by the executive branch clearly frustrated legislative intent to provide a generous means of allowing members of the armed services to return home with their alien spouses after World War II.[167] Moreover, the Court implied that the judicial branch has virtually no authority over immigration.

Two years later, the Supreme Court outlined the modern doctrine of separation of powers in the *Steel Seizure Case*.[168] The *Steel Seizure Case* arose as a challenge to President Truman's claim that executive power was broad enough to allow the seizure of domestic factories. President Truman asserted that his action was justified because labor unrest in various factories could adversely affect the "police action" in Korea and that such unrest would directly affect foreign policy.[169] The Supreme Court rejected the President's claim and laid the foundation for the modern concept of separation of powers. The case is noted particularly for Justice Jackson's concurrence. Interestingly, Justice Jackson wrote a stinging dissent two years earlier in *Knauff*, in which he decried what he

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162. Azzouka v. Sava, 777 F.2d 68, 76 (2d Cir. 1985).

163. The Supreme Court has not reassessed Congress's plenary power to determine the fate of aliens. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21 (1982).

164. 338 U.S. 537 (1950).

165. *Id.* at 542.

166. *Id.* (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)) (President has power to control foreign affairs).

167. *Id.* at 550-52 (Jackson, J., dissenting).

168. Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).

169. *Id.* at 583.

saw as a usurpation of legislative authority by the executive branch.[170]

Justice Jackson argued in the *Steel Seizure Case* that presidential power is not fixed but rather fluctuates depending on the situation and the interrelationship with congressional power.[171] Jackson developed a framework for analyzing Presidential power in three different contexts. (1) The President acts pursuant to congressional authorization. In this situation, Presidential authority is at its maximum because the President acts with all of the President's powers plus all of Congress's delegated authority.[172] (2) The President acts with neither congressional delegation nor denial of authority. The President acts with independent authority, but in this situation, there is a "zone of twilight" in which the President and Congress "may have concurrent authority, or in which its distribution is uncertain."[173] (3) The President acts in direct contradiction of Congress's will. Presidential power is at its lowest in this situation and a court may sustain exclusive Presidential control only if the court finds that Congress is totally without authority as to the subject matter in question.[174]

In recent years, the Supreme Court has somewhat refined Justice Jackson's separation of powers analysis. Writing for the majority in *Dames & Moore v. Regan*,[175] Justice Rehnquist noted that while "Justice Jackson's classification of executive actions into three general categories [is] analytically useful,"[176] courts should remember that " '[t]he great ordinances of the Constitution do not establish and divide fields of black and white.' "[177] In Justice Rehnquist's view, executive action cannot always be pigeonholed neatly into one of three broad categories, "but rather at some point along a spectrum running from explicit congressional authorization to explict congressional prohibition."[178]

Arguably, *Knauff* falls within either the second or the third of Justice Jackson's categories or, using Justice Rehnquist's analysis, somewhere along the spectrum between those two categories. Although *Knauff* is still considered authoritative, its premises may be questionable in light of the *Steel Seizure Case* despite the fact that courts still cite *Knauff* with

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170. *Knauff*, 338 U.S. at 550-52 (Jackson, J., dissenting).
171. 343 U.S. at 635 (Jackson, J., concurring).
172. *Id.* at 635-36.
173. *Id.* at 637.
174. *Id.* at 637-38.
175. 453 U.S. 654 (1980).
176. *Id.* at 669.
177. *Id.* (quoting Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting)).
178. *Id.* at 669.

approval.[179] The majority in *Knauff* rejected the idea that congressional intent to allow veterans and their foreign spouses to return to the United States was controlling.[180] Nonetheless, applying *Knauff* to the separation of power model in the *Steel Seizure Case*, it is clear that Congress did not expressly delegate authority to the executive branch regarding the War Brides Act. Thus, *Knauff* probably falls within one of the latter two categories in the Jackson model.

Courts should analyze immigration cases with a keen eye to the doctrine of separation of powers; this is especially true when Congress has acted decisively, for example in cases which arise under the asylum provisions. In such cases, courts should carefully determine whether the executive branch and legislative branch are operating concurrently and, if so, the roles of each; or, if the executive is acting contrary to the will of Congress.

The separation of powers determination is quite important in the immigration sphere. A definitive analysis of the scope of authority that Congress has delegated to the executive branch could shape the boundaries of immigration law for years to come and will determine what, if any, rights aliens have in seeking admission to this country. As the United States Court of Appeals for the District of Columbia Circuit aptly stated:

> The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.[181]

If the executive has inherent substantive powers to decide whether an alien is to be admitted to or excluded from this country, then the executive is not limited to powers delegated by Congress. It follows, then, that the executive could act arbitrarily and could undermine any due process guarantees that an alien might claim. If, however, the executive is properly limited to powers conferred on it by Congress because Congress occupies the immigration field, then the executive may not make arbitrary decisions. Aliens then, may be deemed to possess some due process rights, at least to the extent that they have the right to be free of arbitrary treatment by the executive.

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179. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32 (1982).

180. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 546-47 (1950).

181. Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd per curiam by equally divided Court*, 108 S. Ct. 252 (1987).

As the Supreme Court noted, due process is a flexible concept and each situation calls for varying procedural protections.[182] It is difficult, then, to define with precision the boundaries of procedural due process for aliens. The most reasonable approach, however, seems to be that of Professors Alexander and Horton, who argue that procedural due process has some substantive dimensions. As Professors Alexander and Horton note:

> Procedural due process is a necessary component when government has limited plenary discretion or has judgmental discretion. That is so because these forms of discretion have substantive limits—the criteria within which discretion must be exercised if it is not to be abused—and there must be some way by which those limits can be enforced against government's decisionmakers.[183]

If there are substantive limits even to plenary discretion over immigration, then even nonentrant aliens must possess some limited rights to due process—especially in those instances in which Congress has clearly acted to establish some orderly, just procedure for admitting or excluding aliens—and the alien must be protected from arbitrary executive decisions.

In determining whether an alien who is otherwise excludable should be given a hearing on the merits of an asylum petition, perhaps the best approach is the *Mathews v. Eldridge*[184] balancing test to determine when, and what process is due. *Mathews* mandates the consideration of three factors: First, the individual interest affected by the Government's action; second, the risk of erroneous deprivation of that individual interest due to the procedures the Government uses and the value of heightened procedural safeguards; and third, the Government's interest including the Government's function in this area and the potential burden of implementing heightened procedural safeguards.[185] The *Mathews* approach would provide a balance between the Government's interests in excluding undesirable aliens and the individual's interest in being protected against a miscarriage of justice.

As described above, in *Azzouka v. Sava*,[186] an alien was deemed to be a security threat and because of this determination, was denied a hearing

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

183. Alexander & Horton, Ingraham v. Wright: *A Primer for Cruel and Unusual Jurisprudence*, 52 S. CAL. L. REV. 1305, 1367-68 (1979).

184. 424 U.S. 319 (1976).

185. *Id.* at 335.

186. 777 F.2d 68 (1985).

before an immigration judge on the merits of his asylum claim.[187] Had the court applied the *Mathews* test, the analysis would have been as follows. First, Azzouka's life and liberty would be seriously affected by summary exclusion. Azzouka feared incarceration or execution if he was returned to Yemen.[188] Second, because Azzouka claimed that he would likely be executed if he were returned to his home country,[189] the summary exclusion on the grounds that Azzouka posed a security risk[190] carried with it an enormous risk that Azzouka would be erroneously deprived of his life. Moreover, heightened procedure in the form of an impartial hearing by the immigration judge on the merits of his asylum claim would be of great value in protecting Azzouka's interest. Finally, the Government has a great and undisputed interest in protecting the United States and its citizens against potential security threats, and there would be an added burden in providing a hearing before an immigration judge. In weighing the three factors, it appears that both Azzouka's and the Government's interests would be protected by providing a hearing, and that the administrative burden of providing this hearing would be outweighed by the alien's compelling interest in remaining alive.

It is by no means a foregone conclusion that Azzouka would have been granted asylum in this country had the United States Court of Appeals for the Second Circuit allowed him a hearing. The immigration judge might have determined that the asylum claim was unfounded or that Azzouka had not demonstrated "a clear probability of persecution" as required by section 243(h).[191] The Government might have established that Azzouka truly posed a threat to national security and that even if Azzouka's asylum claim was valid, that he could not remain in this country. The Government's concerns that use of confidential information would compromise national security could be alleviated while still protecting Azzouka's interests; the immigration judge could simply examine the information in camera.[192] Even if the court refused Azzouka's re-

187. *See supra* notes 141-59 and accompanying text.

188. 777 F.2d at 70.

189. *Id.*

190. *Id.* at 71.

191. *See* INS v. Stevic, 467 U.S. 407, 430 (1984).

192. In Abourezk v. Reagan, 592 F. Supp. 880 (D.D.C. 1984), *vacated and remanded*, 795 F.2d 1043 (D.C. Cir. 1986), *aff'd per curiam by an equally divided Court*, 108 S. Ct. 252 (1987), the court noted that in camera inspections of classified materials are not unusual. 592 F. Supp. at 887 n.25; *see also* Hayden v. National Security Agency, 608 F.2d 1381 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1979).

It seems absolutely contrary to our system of justice that an alien who would otherwise

quest for asylum, the immigration judge could have withheld deportation and ordered Azzouka detained until a third country that would accept Azzouka could be found.[193]

While section 235(c) designates aliens who are excludable, section 243(h) contemplates a nondiscretionary means of assuring that aliens who claim asylum will have a reasonable chance to be heard. If courts are sensitive to the separation of powers doctrine and acknowledge that some due process rights attach when Congress outlines procedures for admitting aliens, persons like Mr. Azzouka will not be the victims of arbitrary executive determinations.

The court should have extended its analysis in *Yiu Sing Chun v. Sava* to *Azzouka v. Sava*. *Yiu Sing Chun* established that aliens who seek asylum are entitled to a hearing on the merits of their asylum request even if they are otherwise subject to summary exclusion.[194] The court in *Yiu Sing Chun* noted that while "Congress . . . has instructed the INS to deny asylum in certain circumstances," the section 243(h) "limitation on the Attorney General's discretion requires careful fact-finding."[195] Moreover, the *Yiu Sing Chun* court correctly held that the due process claims under the fifth amendment require that aliens who seek asylum be afforded an exclusion hearing. Yet the same court refused to extend the rights it had guaranteed stowaways to alleged security risks.[196]

The United States Court of Appeals for the Fifth Circuit held that the right to petition for asylum is sufficient to invoke a guarantee of due process.[197] The Supreme Court has recognized that the procedures due

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be entitled to asylum, should be excluded on the basis of confidential information to which neither he, nor even a judge, had access. It should be noted that in *Azzouka*, the alien was excluded on the basis of information he had never seen and therefore could not counter. *See supra* note 22 and accompanying text.

In Molerio v. FBI, 749 F.2d 815 (D.C. Cir. 1984), the Court of Appeals for the District of Columbia allowed a district court to review in camera information involving national security, but the court noted that the main rule is that all parties are to have access to all information; thus, the Government could request in camera proceedings only on a showing of compelling national security concerns, and after public disclosure of as much material as possible without compromising security. *Id.* at 819. As a general axiom, our legal system "does not tolerate *ex parte* determinations on the merits of a civil code." *In re* Eisenberg, 654 F.2d 1107, 1112 (5th Cir. 1981). It thus seems especially unjust that an alien seeking asylum could be excluded on the basis of confidential information without even the benefit of an ex parte, in camera proceeding.

193. *See supra* note 58 and accompanying text.

194. Yiu Sing Chun v. Sava, 708 F.2d 869, 874 (2d Cir. 1983).

195. *Id.* at 876; *accord* McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981).

196. *Yiu Sing Chun*, 708 F.2d at 877.

197. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

an alien may vary depending on the cirumstances.[198] The appropriate standard of review for a claim of asylum must reflect the particular interests at stake in each case, and the focus should be on the nature of the alien's claim and the procedural requirements necessary to protect the alien's rights as one claiming refugee status.[199] Because of the mandatory application of the asylum provisions of section 243(h), the foregoing is true even if the Attorney General believes that an alien may pose a risk to national security. The substantial evidence standard is the appropriate standard of review for a determination that an alien seeking asylum should be excluded.[200] In order for a judge to determine whether there is substantial evidence to support the alien's exclusion, the alien must be able to present evidence to counter the Government's position.[201]

A careful analysis based on separation of powers and due process should resolve the conflict between sections 235(c) and 243(h) in a just way. A balancing of interests will likely conclude that an immigration judge should be allowed to hear an alien's asylum request and should be allowed to review a Government finding that the alien is a security threat.

V. CONCLUSION

The United States is, with the exception of our Native Americans, a nation of immigrants, many of whom fled to the United States to escape oppression in their homelands. The United States has thus been a nation historically committed to protecting victims of persecution. As Ronald Reagan noted as he accepted his party's nomination for President in 1980: "Can we doubt that only a Divine Providence placed this land,

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198. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 34 (1982), in which the Court stated that

> [i]n evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures. (citing Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976)).

199. Augustin v. Sava, 735 F.2d 32 (2d Cir. 1984).

200. *See Yiu Sing Chun*, 708 F.2d at 876; Sarkis v. Nelson, 585 F. Supp. 235, 237 (E.D.N.Y. 1984); *accord* Carvial-Munoz v. INS, 743 F.2d 562, 567 (7th Cir. 1984); Chavarria v. United States Dep't of Justice, 722 F.2d 666, 670 (11th Cir. 1984); Reyes v. INS, 693 F.2d 597, 600 (6th Cir. 1982), *vacated on rehearing*, 747 F.2d 1045 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985); McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981).

201. 8 C.F.R. § 208.10(b)-(c) (1988).

this island of freedom here as a refuge for all those people in the world who yearn to breathe free?"[202] Although our leaders extol the virtues of granting refuge to those who face persecution, the Supreme Court has repeatedly asserted that the legislative and the executive branches have virtually absolute exclusion power.[203] Modifying this nearly unbridled exclusion power is the 1968 ratification of the United Nations Protocol,[204] which creates a *right* of asylum to qualified applicants. The Protocol makes asylum no longer a matter of legislative grace or executive discretion but rather a matter of right.[205]

Although the Protocol appears on its face to be mandatory in its application, the Government still maintains that it has virtually unlimited power to exclude aliens who are alleged to be security threats—even those who seek asylum out of a reasonable fear of persecution in their homelands.[206] While there is a merit to the Government's assertion that it has a legitimate interest in maintaining national security, surely the alien who faces persecution has a compelling reason to seek refuge in this country. A just means of observing our obligations under the Protocol while still protecting this country and its citizens from aliens who may pose security threats would be to allow the alien who seeks asylum to have a hearing on the merits of the asylum request despite any Government claims that the alien poses a threat to national security. Summary exclusion without a hearing, perhaps on the basis of confidential information that the alien can neither explain nor contest, seems an especially cruel way to treat human beings who may face persecution or death if returned to their homelands. As Justice Frankfurter aptly noted: "Security is like liberty in that many are the crimes committed in its name."[207]

Mary Scott Miller

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202. Ronald Reagan Speech Accepting the Republican Nomination for President (July 17, 1980), *reprinted in* N.Y. Times, July 18, 1980, at 148, col. 1.

203. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (" '[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)); *accord* Fiallo v. Bell, 430 U.S. 787, 792 (1977).

204. Protocol, *supra* note 46.

205. *See supra* notes 58-60 and accompanying text.

206. *See, e.g.*, Azzouka v. Sava, 777 F.2d 68 (2d Cir. 1985), *cert. denied*, 479 U.S. 830 (1986).

207. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Frankfurter, J., dissenting).