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Recent Decisions

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RECENT DECISIONS

TREATY ON THE EXECUTION OF PENAL SENTENCES—FEDERAL COURT IS NOT PRECLUDED FROM USING MEXICAN CONVICTION AS EVIDENCE OF PRIOR CONDUCT IN ENHANCING SUBSEQUENT SENTENCE, *United States v. Fleishman,* 684 F.2d 1329 (9th Cir. 1982).

I. FACTS AND HOLDING

Defendants,[1] United States citizens convicted[2] in Mexico of cocaine-related offenses,[3] elected to invoke the Treaty on the Execution of Penal Sentences (TEPS),[4] which enabled them to serve the remainder of their Mexican sentences in the United States.[5] After their release from United States prisons, defendants were convicted in the United States of cocaine charges unrelated to the Mexican offenses.[6] At their sentencing hearing, two defendants[7]

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1. Defendants were Leslie Fleishman, Peter Combs, and Stephen Green. United States v. Fleishman, 684 F.2d 1329, 1329 (9th Cir. 1982).

2. Defendant Green alleged that he was convicted *in absentia. Id.* at 1345 n.21. The instant court was presented with no specific details about the convictions of the other defendants. The court assumed, however, that the evidence presented by defendant Combs concerning his treatment in Mexico was similar to that presented by defendant Green. *Id.; see infra* note 3.

3. The instant decision did not specify the exact charges brought by Mexican authorities against each defendant, but it is clear that the offenses related to cocaine. The district court enhanced defendants' sentences reasoning that "because . . . [defendants] had been involved in drug-related offenses . . . [c]onsideration of the [defendants'] prior involvement with cocaine is permissible." *Id.* at 1346. Defendant Green stated that he was arrested for possession of cocaine. *Id.* at 1345 n.21.

4. Nov. 25, 1976, United States-Mexico, 28 U.S.T. 7399, T.I.A.S. No. 8718. For a discussion regarding the treaty, see *infra* notes 21-22 and accompanying text.

5. *Fleishman,* 684 F.2d at 1344-45. Article IV of TEPS provides that an offender must expressly consent to a transfer under the treaty. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, United States-Mexico, 28 U.S.T. 7399, 7403, T.I.A.S. No. 8718.

6. Fleishman was convicted of possession of cocaine with intent to distribute and the distribution of cocaine in violation of 21 U.S.C. § 841(a)(1) (1976) and of conspiracy to commit these offenses in violation of 21 U.S.C. § 846 (1976).

contended that their prior Mexican convictions should be excluded from consideration because the defendants were without benefit of counsel and the convictions were obtained on the basis of evidence produced by torture and thus violated United States due process requirements.[8] The Government contended that by invoking TEPS the defendants waived all objections to judicial reliance upon their Mexican convictions in their subsequent sentencing on the unrelated charges in the United States.[9] The United States District Court for the Central District of California accepted the Government's argument[10] and used the Mexican convictions as evidence of prior conduct to enhance the defendants' United States sentences.[11] On appeal to the United States

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Fleishman, 684 F.2d at 1332. Combs and Green were convicted as coconspirators, for aiding and abetting the possession of cocaine with intent to distribute, and for the distribution of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1) (1976), and 18 U.S.C. § 2(a) (1976). *Fleishman*, 684 F.2d at 1332.

7. Defendants Green and Combs presented these contentions. At sentencing defendant Fleishman waived all objections to consideration of his prior Mexican conviction. On appeal, however, Fleishman contended that his waiver was " 'conditional' in reliance on the trial court's conclusion of law that the Mexican conviction was valid." *Fleishman*, 684 F.2d at 1344 n.17. The instant court was unimpressed by Fleishman's argument. *Id.*

8. In an affidavit summarizing his treatment by Mexican officials, defendant Green alleged that the authorities repeatedly beat him and applied electric cattle prods to his testicles and nipples. After many hours of this treatment he was forced to sign a Spanish-language document that he did not understand. He was later informed that the document was his confession. Green further alleged that he was imprisoned for 13 months under barbaric conditions and subjected to brutal and sustained torture. At the end of that time he was told that he had been convicted *in absentia* without benefit of judge, jury, or legal representation and that he had been sentenced to an additional six years of imprisonment. *Id.* at 1345 n.21. The instant court assumed that defendant Combs presented the trial court with similar evidence. *See id.* at 1344-45.

9. The Government relied upon article VI of TEPS, *id.* at 344, which provides that "[t]he Transferring State [Mexico] shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts." Treaty on the Execution of Penal Sentences, Nov. 26, 1976, United States-Mexico, 28 U.S.T. 7399, 7406, T.I.A.S. No. 8718.

10. *Fleishman*, 684 F.2d at 1344. The district court expressly relied on *Rosado v. Civiletti*, 621 F.2d 1179 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980). *See infra* notes 25-32 and accompanying text.

11. *See Fleishman*, 684 F.2d at 1346 n.25 (assumption of instant court). The instant court also assumed that the district court had credited defendant Green's evidence that his Mexican conviction was uncounseled. *Id.*

Defendants were sentenced to serve concurrent six year terms for each of the

Court of Appeals for the Ninth Circuit, *affirmed. Held:* Although a repatriated United States citizen who has elected to serve the remainder of his sentence in the United States under TEPS has a right to challenge the collateral consequences of an uncounseled conviction rendered after alleged torture, a federal court aware of the nature of the foreign proceeding is not precluded from using that conviction as evidence of prior conduct in enhancing subsequent sentences.[12]

II. LEGAL BACKGROUND

A. Enforcement and Scrutiny of Foreign Penal Judgments

The United States generally will not enforce the penal judgments of other nations.[13] In certain circumstances, however, United States officials have been permitted to consider foreign criminal convictions in cases concerning the detention of prisoners for extradition or transfer to foreign nations pursuant to treaty,[14] the exclusion or deportation of aliens convicted in a foreign court,[15] the denial of welfare benefits,[16] and the determina-

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three counts and were subject to the parole eligibility requirements of 18 U.S.C. § 4205(b)(2) (1976). Defendants were also "ordered to serve three-year minimum special parole terms on the counts not involving conspiracy." *Fleishman,* 684 F.2d at 1332.

12. In affirming the conviction and sentence of all three defendants, the instant court also rejected defendants' contentions that a warrantless search of defendant Combs' hotel room was involuntary, *see Fleishman,* 684 F.2d at 1334-35, that a government agent was improperly permitted to opine that Combs was a "lookout," *id.* at 1335-36, that the testimony of a handwriting expert should have been excluded as prejudicial, *id.* at 1336-37, that the evidence was insufficient, *id.* at 1340-41, that it was error for the court to have rejected proposed jury instructions regarding the burden of proof, *id.* at 1341-42, that an entrapment instruction should have been given, *id.* at 1342-43, and that the Government had made improper closing arguments. *Id.* at 1343-44.

13. *See* The Antelope, 23 U.S. (10 Wheat.) 66, 122-23 (1825) ("[t]he courts of no country execute the penal laws of another"); *see also* RESTATEMENT OF CONFLICT OF LAWS § 427 (1934) ("no state will punish a violation of the criminal laws of another state").

14. *E.g.,* Neely v. Henkel, 180 U.S. 109 (1901); Gallina v. Fraser, 278 F.2d 77 (2d Cir. 1960).

15. An alien convicted of a "crime involving moral turpitude" is ineligible to receive visas and is excluded from the United States. 8 U.S.C. § 1182(a)(9) (1976) (exception is available for juvenile offenses). *See* United States *ex rel.* Mylius v. Uhl, 203 F. 152, 152-53 (S.D.N.Y. 1913).

16. *See* Cooley v. Weinberger, 518 F.2d 1151 (10th Cir. 1975) (United States

tion of multiple offender status under multiple offender statutes.[17] If a foreign conviction does not result in criminal sanctions against the accused, United States courts usually will not question the fairness of the foreign proceeding.[18] United States courts have been especially reluctant to interfere with the operation of treaties.[19] If, however, a foreign conviction results in a denial of liberty in the United States, courts often require that the foreign conviction comply with United States due process standards.[20] The importance of the validity and the effect in the United States of foreign penal convictions has increased substantially since the ratification of TEPS[21] and other treaties[22] permitting United

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citizen convicted in Iran of willful homicide of husband was not entitled to Social Security benefits payable on his death).

17. United States *ex rel.* Read v. Martin, 263 F.2d 606 (2d Cir. 1959) (Hand, J.).

18. *E.g.*, Neely v. Henkel, 180 U.S. 109, 123 (1901) ("[W]hen an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the law of that country may prescribe."); *see also* Gallina v. Fraser, 278 F.2d 77, 78 (2d Cir. 1960) (in extradition proceedings, the courts will not "inquire into the procedures which await the relator upon extradition"). *Cf.* Cooley v. Weinberger, 518 F.2d 1151, 1155 (10th Cir. 1975) (Iranian conviction given effect in the United States because the "procedure followed in Iran was not 'so shocking to the forum community that it cannot be countenanced' "). Federal law, however, requires a showing of probable cause before extradition. *See* 18 U.S.C. § 3184 (1976).

19. *See, e.g.*, Holmes v. Laird, 459 F.2d 1211, 1215 (D.C. Cir. 1972) (many treaty questions nonjusticiable).

20. *E.g.*, United States *ex rel.* Foreman v. Fay, 184 F. Supp. 535 (S.D.N.Y. 1960); United States *ex rel.* Dennis v. Murphy, 265 F.2d 57 (2d Cir. 1958), *remanded* 184 F. Supp. 384 (N.D.N.Y. 1959); People v. Kearney, 45 Misc. 2d 1041, 258 N.Y.S.2d 769 (Sup. Ct. 1965). *See* Abramovsky & Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanction Treaty*, 64 IOWA L. REV. 275, 310 (1978); Pye, *The Effect of Foreign Criminal Judgments in the United States*, 32 UMKC L. REV. 114, 128 (1964).

21. Treaty on the Execution of Penal Sentences, Nov. 26, 1976, United States-Mexico, 28 U.S.T. 7399, T.I.A.S. No. 8718. The treaty was implemented by the Act of Oct. 28, 1977, Pub. L. No. 95-144, 91 Stat. 1212 (codified at 10 U.S.C. § 955 (Supp. III 1979); 18 U.S.C. §§ 3244, 4100-4115 (Supp. III 1979)).

The treaty was a response to concern in the United States about the treatment of United States nationals imprisoned in Mexico for drug offenses. *See* 123 CONG. REC. 24,273-74, July 21, 1977 (statement of Sen. Bentsen). In 1974 numerous media reports related allegations of outrageous conditions in Mexican prisons. *See, e.g., A Tragic Trail's End for the Yankee Mules*, TIME, Aug. 12, 1974, 36, 36; *U.S. and Canadian Prisoners End Hunger Strike in Mexico*, N.Y. Times, July 24, 1974, at 2, col. 5; *Escaped Prisoners Trace 14-Day Break*, N.Y. Times, Nov. 28, 1974, at 48, col. 1; VANDERBILT TELEVISION NEWS INDEX AND ABSTRACTS,

States nationals convicted abroad to serve the remainder of their foreign sentences in the United States.[23] These treaties generally require that any challenge to the validity of a foreign conviction be brought in the courts of the foreign nation that rendered the judgment.[24]

In *Rosado v. Civiletti*,[25] the leading decision[26] construing

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July 1974 at 1222 (summarizing ABC News report on United States hunger strikers in Mexican prisons). During congressional hearings conducted the next year, United States citizens formerly imprisoned in Mexico testified that they had been tortured, forced to sign Spanish-language confessions without an interpreter, held incommunicado, and subjected to extortion by Mexican officials. *See U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on Int'l Pol. and Mil. Affairs*, 94th Cong., 1st Sess. 5 (1975) (statement of Rep. Fortney H. Stark, Jr.) [hereinafter cited as *Hearings*]. After a careful review of the former prisoners' allegations, the State Department reported in 1976 that the accusations formed a "credible pattern." *Hearings, supra* pt. II at 48 (1976) (statement of Leonard F. Walentynowitz). *See generally Transfer of Offenders to or from Foreign Countries*, H.R. REP. No. 720, 95th Cong., 1st Sess. 1-2, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 3146, 3146-47 (transfer of offenders to or from foreign countries). Soon thereafter, the United States and Mexico entered into negotiations resulting in the signing of a 1976 treaty permitting citizens of either nation to serve their prison sentences in their home country. *See* Letter from Secretary Kissinger to President Ford (Jan. 17, 1977), *reprinted in* H.R. REP. No. 720, 95th Cong., 1st Sess. 17-18 (1977). The treaty was unanimously ratified by the Senate. 123 CONG. REC. 24,275 (July 21, 1977).

22. TEPS was the forerunner of similar prisoner exchange treaties with other nations. *See, e.g.*, Treaty on the Execution of Penal Sentences, Mar. 2, 1977, United States-Canada, 30 U.S.T. 6263, T.I.A.S. No. 9552 (entered into force July 19, 1978); Treaty on the Execution of Penal Sentences, Feb. 10, 1978, United States-Bolivia, 30 U.S.T. 796, T.I.A.S. No. 9219 (entered into force Aug. 17, 1978); Treaty on the Execution of Penal Sentences, Jan. 11, 1979, United States-Panama, ___ U.S.T. ___, T.I.A.S. No. 9787 (entered into force June 27, 1980) (official source unavailable); Treaty on the Enforcement of Penal Judgments, June 7, 1979, United States-Turkey, ___ U.S.T. ___, T.I.A.S. No. 9892 (entered into force Jan. 1, 1981) (official source unavailable); Treaty on the Execution of Penal Sentences, July 6, 1979, United States-Peru, ___ U.S.T. ___, T.I.A.S. No. 9784 (entered into force July 21, 1980) (official source unavailable).

23. Prior to TEPS, there had been few cases in which a state sought to give effect to a foreign penal judgment to enhance punishment. *See* Pye, *supra* note 20, at 128.

24. *See, e.g.*, Treaty on the Execution of Penal Sentences, Nov. 25, 1977, United States-Mexico, art. VI, 28 U.S.T. 7399, 7406, T.I.A.S. No. 8718; Treaty on the Execution of Penal Sentences, Mar. 2, 1977, United States-Canada, art. V, 30 U.S.T. 6263, 6270-71, T.I.A.S. No. 9552.

25. 621 F.2d 1179 (2d Cir. 1980), *rev'g* Velez v. Nelson, 475 F. Supp. 865 (D. Conn. 1980). *Rosado* was decided after the Mexican Government had threatened to withdraw its participation in TEPS if the *Velez* decision was not reversed.

TEPS, the Second Circuit Court of Appeals adopted a narrow view of the amount of due process protection a foreign court must offer a defendant before a United States court will give a foreign conviction penal effect.[27] The *Rosado* decision held that a prisoner incarcerated under United States authority pursuant to a foreign conviction could not be denied total access to the federal

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See N.Y. Times, Nov. 11, 1979, at 20, col. 1 (quoting Oscar Flores Sanchez, Attorney General of Mexico); Note, *The Impact of Rosado v. Civiletti on U.S. Prisoner Transfer Treaties*, 21 VA. J. INT'L L. 131, 151 (1980) (Mexican Government characterizing the *Velez* result as a violation of treaty).

26. The *Rosado v. Civiletti* decision has received wide comment. *See* Judicial Decision, *Jurisdiction—Whether Petitioners Voluntarily and Intelligently Consented to Transfer*, 74 AM. J. INT'L L. 679 (1980); Development, *Rosado v. Civiletti Tests the United States-Mexico Transfer Treaty*, 10 DEN. J. INT'L L. & POL'Y 161 (1981); Comment, *Constitutional Law—Due Process—Transfer of Prisoners from Foreign to American Prisons*, 26 N.Y.L. SCH. L. REV. 885 (1981); Note, *Constitutional Law—Voluntary and Intelligent Consent to Transfer Under Prisoner Exchange Treaty Estops Habeas Corpus Relief*, 54 TEMP. L. Q. 357 (1981); Recent Development, *Due Process—Prisoner Exchange Treaty—American Nationals Transferred from Mexican Prisons to Serve the Remainder of Their Sentences in Federal Penal Institutions May Raise Due Process Claims in Federal Courts, but They Are Estopped from Challenging Their Sentences in American Courts if They Consented to Abide by the Terms of the Treaty on the Execution of Penal Sentences*, 15 TEX. INT'L L.J. 565 (1980); Note, *The Impact of Rosado v. Civiletti on U.S. Prisoner Transfer Treaties*, 21 VA. J. INT'L L. 131 (1980). *See also Rights of United States Citizens Under the United States-Mexico Prisoner Transfer Treaty—Voluntariness of Consent to Transfer Agreements—Waiver of Prisoner's Right to Challenge Conviction—Balancing the Habeas Corpus Privilege Against the Threatened Viability of the Prisoner Transfer Treaty (1980 Survey of International Law in the Second Circuit)*, 8 SYR. J. INT'L L. & COM. 197 (1980); Kowalski, *Penal Transfer Treaties and the Application of "Unconstitutional Conditions" Analysis*, 12 U. TOL. L. REV. 1 (1980); Recent Development, *Treaties—Mexican-American Treaty on the Execution of Penal Sentences—Custody of a Prisoner Under the Mexican-American Treaty on the Execution of Penal Sentences Is Unlawful when Consent to the Transfer Is Coerced*, 3 FORDHAM INT'L L.F. 107 (1979) (analyzing *Velez v. Nelson*, 475 F. Supp. 865 (D. Conn. 1979)).

The Ninth Circuit reached the same result as was reached in *Rosado*. *Accord* Pfeifer v. United States Bureau of Prisons, 615 F.2d 873 (9th Cir.), *cert. denied*, 447 U.S. 908 (1980).

27. The court said that it "by no means [implies] . . . that each element of due process as known to American criminal law must be present in a foreign criminal proceeding before Congress may give a conviction rendered by a foreign tribunal binding effect." *Rosado*, 621 F.2d at 1197. The court added that it was "keenly sensitive to the historical and cultural limitations of our own constitutional heritage" and that it respected the "indigenous underpinnings of the process afforded criminal defendants abroad." *Id.* at 1198.

courts if "he presents a persuasive showing that his [foreign] conviction was obtained without benefit of any process whatsoever."[28] The *Rosado* court also effectively foreclosed the possibility of offering federal habeas corpus relief to United States citizens repatriated under TEPS to serve the remainder of a Mexican sentence in the United States.[29] The court reasoned that a prisoner who agrees to abide by the TEPS provision granting Mexico exclusive jurisdiction of challenges to a prisoner's Mexican court conviction has voluntarily and intelligently waived[30] his right of redress in United States federal courts.[31] A prisoner invoking TEPS is thus estopped from challenging his foreign conviction in United States courts. The Second Circuit Court of Appeals upheld the waiver of due process claims in the belief that the United States Government's interest in improved relations with Mexico and the "paramount" interest of those United States citizens still incarcerated in Mexico can be furthered only if prisoners repatriated under TEPS are bound to their agreement.[32] Until the instant case, however, it was unclear whether the *Rosado* court's limitation of federal court scrutiny of foreign penal convictions and its broad application of the estoppel principle would bar challenges to the broad use of foreign convictions by domestic courts.

B. Consideration at Sentencing of Convictions Allegedly Rendered After Torture

It has long been recognized that although a sentencing judge may exercise "wide discretion in [choosing] the sources and types of evidence used,"[33] a defendant's due process rights are violated if the trial court uses a nonexistent conviction to enhance a defendant's sentence.[34] In *United States v. Tucker*[35] this principle

28. *Id.*

29. *See infra* notes 30-32 and accompanying text.

30. The court said that the petitioners' decision to invoke TEPS, which confines review of their case to Mexican authorities, appeared to be an intelligent choice among available alternatives. *Rosado*, 621 F.2d at 1200 (citing North Carolina v. Alford, 400 U.S. 25 (1970)). The court said that the petitioners' choice was also "voluntary" within the meaning of United States v. Jackson, 390 U.S. 570 (1968). *See id.* at 1200.

31. *Id.* at 1198-201.

32. *Id.* at 1200-01.

33. Williams v. New York, 337 U.S. 241, 246 (1949).

34. *E.g.*, Townsend v. Burke, 334 U.S. 736 (1948) (defendant had been

was extended to prohibit consideration at sentencing hearings of prior convictions in which the defendant was not afforded the right to counsel recognized in *Gideon v. Wainwright.*[36] The Ninth Circuit Court of Appeals, however, has held that a defendant seeking resentencing under *Tucker* will prevail only if (1) the prior conviction was invalid under *Gideon;* (2) the sentencing judge acts under the mistaken belief that the prior conviction was valid; and (3) the defendant's sentence was enhanced because the court considered the invalid conviction.[37]

In *Filartiga v. Pena-Irala,*[38] the Second Circuit Court of Appeals declared that officially sanctioned torture violates the law of nations.[39] A series of recent decisions concerning issues of immigration law,[40] sovereign immunity,[41] and prison conditions[42] also

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acquitted).

35. 404 U.S. 443 (1972).

36. *Id.* at 447 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

37. *E.g.,* Owens v. Cardwell, 628 F.2d 546, 547 (9th Cir. 1980) (quoting Farrow v. United States, 580 F.2d 1339 (9th Cir. 1978)).

38. 630 F.2d 876 (2d Cir. 1980). In *Filartiga,* the Second Circuit Court of Appeals held that under 28 U.S.C. § 1350 (1976) (original district court jurisdiction over "all causes where an alien sues for a tort only [committed] in violation of the law of nations") federal courts had jurisdiction over an action brought by Paraguayan citizens against a state official for the wrongful death by torture of their son in Paraguay. 630 F.2d at 887. The *Filartiga* court said that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations." *Id.* at 880. *See generally Federal Jurisdiction, Human Rights and the Law of Nations: Essays on Filartiga v. Pena-Irala,* 11 GA. J. INT'L & COMP. L. 305 (1981).

39. *Filartiga,* 630 F.2d at 880.

40. *See, e.g.,* Rodriguez v. Wilkinson, 654 F.2d 1382, 1388, 1390 (10th Cir. 1981) (alien entitled to release in accordance with the international law principle that aliens are entitled to be free of arbitrary imprisonment); *see also* Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 453-54 (S.D. Fla. 1980) (United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, entered into force in United States Nov. 1, 1968, is applicable in determining whether immigrants are "refugees").

41. *See, e.g.,* Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980) ("discretionary function" exception to Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a) is inapplicable to alleged governmental action (assassination) which is clearly contrary to notions of humanity as recognized in international law).

42. *See, e.g.,* Lareau v. Manson, 507 F. Supp. 1177, 1187 n.9, 1192-93 (D. Conn. 1980), *modified,* 651 F.2d 96 (2d Cir. 1981) (international norms are relevant in the determination of "evolving standards of decency").

indicate a heightened judicial sensitivity to the human rights standards of international law and the growing inclination of federal courts to apply these standards when adjudicating individual rights under domestic law.[43] Until the instant case, however, no court had determined whether a sentencing judge aware of the defendant's allegation that his prior foreign conviction had been rendered after torture may consider the foreign conviction in an unrelated domestic action.

III. INSTANT OPINION

The instant court first addressed the Government's argument that by invoking TEPS the defendants waived any due process objections to the court's reliance upon the Mexican convictions as evidence of prior conduct in their subsequent sentencing of defendants on unrelated charges. The court of appeals rejected the Government's argument, distinguishing *Rosado* and other decisions giving effect to waivers of due process claims by prisoners repatriated under prisoner exchange treaties. The court found *Rosado* inapplicable to the case *sub judice* because TEPS does not prohibit challenges to the collateral effects of Mexican convictions in unrelated proceedings.[44] Moreover, the court determined that the exercise of judicial restraint[45] was unnecessary in the appeal because a criminal defendant's right to challenge the collat-

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43. *See* Note, *The Application of International Human Rights Arguments in United States Courts: Customary International Law Incorporated into American Domestic Law,* 8 BROOKLYN J. INT'L L. 207 (1982); Louden, *The Domestic Application of International Human Rights Law: Evolving the Species,* 5 HASTINGS INT'L & COMP. L. REV. 161, 167-69 (1981). *See, e.g.,* Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 541 (D.D.C. 1981). The weight of authority holds that treaties entered into by the United States are not self-executing and do not have independent force of law. *See, e.g.,* Pauling v. McElroy, 164 F. Supp. 390, 393 (D.D.C. 1958) (United Nations Charter and Trusteeship Agreement do not vest plaintiffs with individual rights). Thus, courts seeking to give effect to principles of international law have been confined to using treaties as interpretive instruments when defining standards of domestic law. *Cf.* Louden, *supra,* at 208.

44. United States v. Fleishman, 684 F.2d 1329, 1345 n.22 (9th Cir. 1982). "[T]he treaty is neutral with respect to the collateral consequences to be accorded the foreign conviction." *Id.* at 1346.

45. The Government, citing Romero v. International Terminal Operation Co., 358 U.S. 354, 383 (1958), suggested that judicial restraint was appropriate because defendants' challenge to the TEPS could have an unpredictable effect on United States-Mexico relations. *Fleishman,* 684 F.2d at 1345 n.22.

eral consequences of an uncounseled foreign conviction will not impair the ability of the United States to enter into future prisoner exchange treaties.[46] Thus, the court held that the defendants properly asserted their right under *Tucker* to challenge the sentencing court's consideration of their Mexican convictions in connection with the defendant's sentencing on the unrelated charges.[47] The instant court, however, found that resentencing under *Tucker* is required only when a defendant demonstrates that the sentencing judge was under a mistaken belief that the prior foreign conviction was valid.[48] Thus, *Tucker* did not require resentencing in the instant situation because the trial judge was not acting under the mistaken impression that defendant's Mexican convictions were constitutionally valid.[49] Recognizing that the trial court enhanced defendants' sentences because defendants had again been involved in drug-related offenses and had "not learned from their experiences,"[50] the court held that the sentencing court's consideration of defendants' prior involvement with cocaine was permissible and there was no basis for resentencing.[51] Thus, the Ninth Circuit Court of Appeals permitted United States citizens repatriated under the TEPS to challenge the collateral effects of Mexican convictions rendered after alleged torture but it declined to bar consideration of the foreign convictions by a sentencing judge aware of the alleged circumstances of the prior foreign proceeding.

IV. COMMENT

The instant decision examines for the first time two significant issues surrounding the repatriation of United States prisoners from Mexico under TEPS: the legality of prisoner challenges to the collateral effects of a Mexican conviction and the use of a Mexican conviction to enhance a subsequent sentence. By refusing to extend the *Rosado* holding to preclude "collateral effects"

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46. *Fleishman*, 684 F.2d at 1345.
47. *Id.* at 1346.
48. *See id.*
49. *Id.* The instant court said that defendants did not meet the second requirement for a successful *Tucker* challenge—that the sentencing judge mistakenly believe that the prior conviction was valid. *See supra* note 37 and accompanying text.
50. *Fleishman*, 684 F.2d at 1346.
51. *Id.*

challenges, the instant court wisely recognized the importance of preserving prisoner access to the United States federal courts,[52] at least in the absence of the compelling diplomatic and humanitarian considerations confronting the *Rosado* court.[53] A contrary holding would have weakened the federal courts' power to supervise the incarcertaion of federal prisoners by permitting a foreign tribunal to impose continuing disabilities upon a single class of convicted persons.[54] The court's refusal to apply the *Rosado* principles also enabled it to avoid both the troublesome legal issue of the waiver of due process rights by United States prisoners[55] and

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52. The *Rosado* court recognized the importance of access to the federal courts when it required the Government to advance "sufficiently important interests" before the court would close its doors to defendants' due process claims. Rosado v. Civiletti, 621 F.2d 1179, 1199-1200 (2d Cir. 1980). The governmental interests in the instant case, however, are not as strong as those in *Rosado* because TEPS does not prohibit challenges to the collateral effects of a Mexican conviction, and such challenges would not adversely affect United States relations with Mexico. *See supra* notes 44-45 and accompanying text.

53. The instant case, unlike *Rosado,* was not decided when the Mexican Government was threatening to abandon the prisoner exchange treaty altogether. *See supra* note 25.

54. Critics of TEPS have pointed out that sentencing and judgment are "component parts of the same judicial forum." *See* Abramovsky & Eagle, *supra* note 20, at 306-07 (quoting Sweet v. Taylor, 178 F. Supp. 456, 459 (D. Kan. 1959)); *see also* Berman v. United States, 302 U.S. 211, 212 (1937) ("[F]inal judgment in a criminal case means sentence. The sentence is the judgment."). Thus, they assert that courts enforcing penal sanctions must determine whether the underlying judgment was secured by a proceeding conducted consistently with due process requirements. Abramovsky & Eagle, *supra* note 20, at 307.

55. Commentators are sharply divided over the constitutionality of a repatriated prisoner's election not to seek redress in United States courts. The election raises two distinct issues: whether the waiver is an unconstitutional condition and whether the prisoner's choice is truly voluntary. Note, *The Impact of Rosado v. Civiletti on U.S. Prisoner Transfer Treaties,* 21 VA. J. INT'L L. 131, 144-46 (1980). On the permissibility of a waiver of redress, compare Bassiouni, *Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada,* 11 VAND. J. TRANSNAT'L L. 249, 265 (1978) (waiver valid if made in order to gain certain benefits not otherwise obtainable) with Paust, *The Unconstitutional Detention of United States and Canada Prisoners by United States Government,* 12 VAND. J. TRANSNAT'L L. 67, 69 (1979) (violation of human rights cannot be "waived" by an individual or by a government). On the issue of voluntariness, compare Vagts, *A Reply to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty,"* 64 IOWA L. REV. 325, 336 (1979) (case law does not provide analogies that "would undo the carefully obtained consents on which the transfer program is based") with Abramovsky & Eagle, *supra* note 20, at 302 ("courts should not accept con-

the accompanying implicit acceptance of the utilitarian notion that the constitutionally guaranteed rights of some individuals must be sacrificed for the "greater good."[56] Nevertheless, by affirming the proposition that a conviction rendered after alleged torture may be used as evidence of a defendant's prior conduct, the instant court inadequately considered the universally recognized prohibition against torture.[57] By declaring that due process requires the exclusion of evidence obtained by torture, the court could have followed the growing trend[58] toward judicial use of international human rights standards in determining whether constitutional rights have been violated. This result would have contributed materially to the fairness and humaneness of United States law. The instant holding, which allows the use of evidence allegedly obtained by torture, is especially disturbing in light of the growing number of prisoner exchange treaties[59] and the increased likelihood that the instant situation will recur. It is hoped that the instant decision is not an indication that United States courts are indifferent to allegations of gross violations of international law and human dignity.

Robert L. Morgan

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sents obtained under intolerable conditions as knowing and voluntary waivers").

56. The spirit of *Rosado* runs counter to Kant's famous precept that "one man ought never to be dealt with merely as a means subservient to the purposes of another." I. KANT, PHILOSOPHY OF LAW 195 (W. Hastie trans. 1887). *But cf.* United States v. Bergman, 416 F. Supp. 496, 499 (S.D.N.Y. 1976).

A commentator has asserted that a major purpose of most prisoner repatriation treaties, including TEPS, is "mutual collaboration in combatting international crime," rather than resocialization of offenders. *See* Jackson, *United States Treaties on the Execution of Penal Sentences: Acts of Humanity or Mechanism to Combat International Crime* 4 (unpublished manuscript 1982) (available at offices of the Vanderbilt Journal of Transnational Law). If this thesis is correct, substantial questions arise as to the justification for a denial of prisoner due process rights based upon public policy considerations unrelated to the welfare of incarcerated persons.

57. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 880, 883-84 (2d Cir. 1980); *see also supra* notes 38-39 and accompanying text.

58. *See supra* note 22.

59. *See supra* notes 39-43 and accompanying text.

DEPORTATION — ALIENS IN DEPORTATION PROCEEDINGS HAVE LIBERTY OR PROPERTY RIGHT TO SEEK POLITICAL ASYLUM WHICH IS PROTECTED BY DUE PROCESS, *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982)

I. FACTS AND HOLDING

Eight Haitian plaintiffs seeking political asylum in the United States filed a class action suit[1] against the Government[2] challenging the Immigration and Naturalization Service's (INS) special program to expedite deportation of Haitian nationals.[3] Plaintiffs' complaint challenged actions taken by immigration judges in deportation hearings, the scheduling and conduct of asylum inter-

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1. The plaintiffs brought a class action suit as representatives for over 4,000 Haitians within the south Florida area who had sought political asylum in the United States on or before May 9, 1979, under 8 C.F.R. § 108 (1980) and whose applications had already been or were likely to be denied by the Immigration and Naturalization Service (INS) District Director or his designee in INS District Office No. 6, Miami, Florida. Haitian Refugee Center v. Smith, 676 F.2d 1023, 1026 & n.1 (5th Cir. 1982).

2. The defendants were "the Attorney General, the Secretary of State, the Commissioner of the INS, and the District Director of Office No. 6 of the INS in Miami, Florida." *Haitian Refugee*, 676 F.2d at 1026.

3. *Id.* The "Haitian program" was instituted by the INS to remedy a backlog of between 6,000 and 7,000 unprocessed Haitian deportation cases which had accumulated in the Miami INS office by the summer of 1978. Pursuant to a memorandum sent by Deputy Commissioner Mario Noto to INS Commissioner Leonel J. Castillo on August 20, 1978, additional immigration judges were assigned to the Miami office and the judges were then instructed "to effect a three-fold increase in productivity" and issue blanket show cause orders in all pending Haitian deportation cases. Under intense pressure from the INS administration, Haitian cases were processed at an unprecedented rate. Whereas before the program one to ten deportation hearings were conducted each day, 55 were conducted each day during the program (approximately 18 hearings per judge per day). Deportation hearings were no longer suspended when an asylum claim was advanced. Asylum interviews were also carried on at an unprecedented rate. Only about 12 attorneys were available to represent thousands of Haitians and the concurrent scheduling of deportation hearings and asylum interviews often made it impossible for counsel to attend the hearings. None of the over 4,000 Haitians processed during the program were granted asylum. Thus, the instant court concluded that the "INS had knowingly made it impossible for Haitians and their attorneys to prepare and file asylum applications in a timely manner." *Id.* at 1029-32.

views, and the rendering of decisions on asylum claims.[4] Plaintiffs also alleged that the INS engaged in unlawful discrimination on the basis of national origin and that it had denied the class members their fifth amendment due process rights.[5] The district court held that it had jurisdiction and that the accelerated INS asylum procedures for Haitians "violated the Constitution, the immigration statutes, international agreements, INS regulations, and INS operating procedures."[6] The defendants thus were enjoined from deporting any member of the plaintiff class and from proceeding further with the deportation hearings and asylum applications of the class until the court had approved a new reprocessing plan.[7] On appeal to the Fifth Circuit Court of Appeals, *affirmed as modified. Held:* (1) the right of an alien to petition for political asylum invokes the guarantee of due process; and (2) the Government was required to submit a procedurally fair reprocessing plan to replace its accelerated processing program.

II. LEGAL BACKGROUND

A. Jurisdiction

Deportation proceedings brought under section 242(b) of the Immigration and Naturalization Act of 1952 (INA)[8] are initially reviewable by the Board of Immigration Appeals (BIA).[9] Following these administrative hearings, section 106(a) of the INA vests the federal circuit courts of appeals with exclusive jurisdiction to review all "final orders of deportation."[10] The Supreme Court held in *Foti v. Immigration and Naturalization Service*[11] that the court of appeals' jurisdiction was not limited solely to a review of deportation proceedings arising under section 242(b), but included the power to review other administrative proceedings that would result in deportation.[12] Two subsequent Supreme Court

4. *Id.* at 1026-27. For a detailed listing of the first 14 counts of the 16 count complaint, see *id.* at 1027 n.2.

5. *Id.* at 1027 & n.3.

6. *Id.* at 1027.

7. *Id.*

8. 8 U.S.C. § 1252(b) (1976).

9. 8 C.F.R. § 3.1(b)(2) (1976).

10. Procedure for judicial review is governed by 28 U.S.C. §§ 2341-2351 (1976).

11. 375 U.S. 217 (1963).

12. *Id.* at 227-29. The *Foti* Court based its decision on expressed congres-

cases have refined the holding in *Foti*. In *Giova v. Rosenberg*[13] the Court directed the Ninth Circuit to entertain a petition for review despite the court of appeals' earlier decision that it had no jurisdiction to hear an appeal based solely on the BIA's denial of a motion to reopen deportation proceedings.[14] Implicit in the Court's decision was the determination that petitioner's motion fell within section 1105a(a)'s "final orders of deportation." In *Chen Fan Kwok v. Immigration and Naturalization Service*,[15] however, the Supreme Court concluded that a district director's denial of a stay of deportation was not reviewable in the first instance by the court of appeals.[16] The Court distinguished *Foti* and *Giova* on the grounds that the deportation orders which had been questioned in those cases either followed a proceeding conducted by a special inquiry officer pursuant to section 242(b) or followed a motion to reopen such a proceeding.[17] The Court held that Congress clearly intended that section 1105a(a)'s grant of jurisdiction to courts of appeals should apply only to orders entered during section 242(b) proceedings or to cases directly challenging such deportation orders.[18] Because the order questioned in *Cheng Fan Kwok* resulted from proceedings other than those conducted under section 242(b), the Supreme Court found that the court of appeals had no jurisdiction to review the decision.[19] Despite the guidelines offered by these three Supreme Court decisions, whenever constitutional or due process questions have arisen regarding deportation proceedings, the lower courts have failed to agree on which court has jurisdiction under the *Kwok* analysis.[20]

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sional intent that § 1105a(a) was designed to expedite deportation of undesirable aliens and avoid bifurcated reviews. *Id.* at 236. The proceeding at issue in *Foti* was a review of an INS order denying the application of a deportable alien for suspension of his deportation. The Court found the suspension of deportation to be included within the court of appeals' jurisdiction over "final orders of deportation." *Id.*

13. 379 U.S. 18 (1964) (per curiam).

14. *Id.*

15. 392 U.S. 206 (1968).

16. *Id.* at 212.

17. *Id.* at 211-12.

18. *Id.* at 215.

19. *Id.* at 212-13.

20. The Sixth Circuit Court of Appeals found that only a district court would have federal question jurisdiction under 28 U.S.C. § 1331 to hear due process claims because the denial of petitioner's third preference visa revalidation was based on factual issues separate from the constitutional issues raised on

B. Due Process

Every sovereign nation possesses the inherent power to regulate the admission of foreigners into its territory.[21] The United States Constitution vests this power in the executive and legislative branches to the exclusion of the courts; it may be exercised either by the President and the Senate via treaty or by Congress, which may legislate or delegate the power further.[22] Early Supreme Court decisions note that whenever the executive or legislative branch possesses the power to exclude aliens, the judiciary may not question any factual determinations made by government officials, "unless expressly authorized by law to do so."[23] *Fong Yue Ting v. United States*[24] was the first deportation case in which the Court held that aliens, although subject to the Government's power to expel them, are also entitled to constitutional safeguards and to the protection of the law "in regard to their rights of person and of property, and to their civil and criminal responsibility."[25] The value of these constitutional protections proved insignificant, however, because the Court determined that deportation is not a punishment, but simply a means of enforcing the expulsion of an alien who has failed to comply with government regulation, at least when the Government acts within its constitutional authority.[26] Thus, no lawfully deported alien has been deprived of

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appeal. Andres v. INS, 460 F.2d 287, 288 (6th Cir. 1972). The Massachusetts District Court similarly held that a district court would have jurisdiction only where the constitutional issue was not raised in the form of a final order of deportation, but rather was in the form of a collateral attack on the proceedings. Haidar v. Coomey, 401 F. Supp. 717, 719 (D. Mass. 1974). A district court, however, found that the court of appeals has exclusive jurisdiction over a challenge to the constitutionality of section 212(c)(22) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(22) (1976) ("providing that aliens who have departed the United States in time of war or national emergency for the purpose of evading military training . . . shall be excluded from admission to the United States."). Riva v. Attorney Gen. of the United States, 377 F. Supp. 1286, 1287-88 (D.D.C. 1974).

21. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); *see also* The Chinese Exclusion Case, 130 U.S. 581, 603-04 (1889).

22. *Nishimura Ekiu,* 142 U.S. at 659.

23. The Japanese Immigrant Case, 189 U.S. 86, 98 (1903); *see* Fong Yue Ting v. United States, 149 U.S. 698, 731 (1893); *Nishimura Ekiu,* 142 U.S. at 660; *Chinese Exclusion,* 130 U.S. at 602.

24. 149 U.S. 698 (1893).

25. *Id.* at 724.

26. *Id.* at 730; *see id.* at 724.

life, liberty, or property without due process of law.[27]

The Supreme Court first extended meaningful due process rights to aliens in *The Japanese Immigrant Case.*[28] In that case the Court held that an alien whom the Government sought to deport was guaranteed a due process right to a hearing and that the Government could not arbitrarily exercise its power to exclude in violation of this right.[29] Because the Court recommended no specific procedure that would guarantee an alien the opportunity to be heard, the limits of this due process right remained vague.[30] Subsequent Supreme Court cases have agreed that deportation hearings necessarily involve issues which are basic to liberty and that the procedure by which an alien can be deprived of those liberties must meet the essential standard of fairness.[31] The

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27. *Id.* at 730. In *Nishimura Ekiu* the Court similarly noted that in exclusion cases "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Nishimura Ekiu,* 142 U.S. at 660; *see also Japanese Immigrant,* 189 U.S. at 98.

28. 189 U.S. 86 (1903). A Japanese woman who had illegally entered the United States was excluded because an immigration inspector found that she had entered in violation of law. The inspector found that she was a pauper and was likely to become a public charge—such aliens being excludable under an Act of March 3, 1891, ch. 551, 26 Stat. 1084. Ms. Yamataya argued that the investigation was a pretense and was inadequate, that she was unaware of its purpose to deport her, and that she was not given an opportunity to rebut the Government's case. *Japanese Immigrant,* 189 U.S. at 88.

29. *Japanese Immigrant,* 189 U.S. at 101.

30. The Court described the opportunity in the following terms:

> not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.

Id.

31. *See, e.g.,* Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950); Bridges v. Wixon, 326 U.S. 135, 154 (1945). Although its parameters remain unclear, the "fundamental fairness" test enunciated in these cases is almost universally applied in subsequent due process immigration cases. *See* Note, *Due Process and Deportation: A Critical Examination of Plenary Power and the Fundamental Fairness Doctrine,* 8 HASTINGS CONST. L.Q. 397, 411-13 (1981) [hereinafter cited as Note, *Due Process*].

It is interesting to note a shift in the Court's perception of due process rights for deportable aliens. In *Fong Yue Ting,* 149 U.S. 698, the Court found that a lawfully deported alien was not punished and could not experience a deprivation of life, liberty, or property without due process if the government acted within its constitutional authority. *See also Nishimura Ekiu,* 142 U.S. 651. Neverthe-

INA[32] was an attempt by Congress to codify the existing law;[33] the INA granted to those aliens involved in deportation proceedings notice of the charges made against them, the right to counsel, the right to assert a defense, and the right to a decision based on substantial and probative evidence.[34]

In 1968 the United States acceded to the United Nations Protocol Relating to the Status of Refugees (Protocol).[35] The Protocol's terms expressly prevent the Attorney General from returning to his homeland any person who qualifies as a "refugee," thus creating new due process rights for aliens claiming refugee status.[36] Preexisting federal law had given the Attorney General the *discretionary* power to grant asylum, and many courts were unwilling to recognize a refugee's right to asylum under the Protocol.[37] For example, the Fifth Circuit in *Pierre v. United*

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less, the Court in *Bridges* stated:

> though deportation is not technically a criminal proceeding, it visits great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty — at times a most serious one — cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Bridges, 326 U.S. at 154; *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976) (the Court, in a case testing the constitutionality of medicare provisions that discriminated against resident aliens, held all aliens within the United States are protected by the due process provisions in the fifth and fourteenth amendments.)

32. Pub. L. No. 414, ch. 477, 66 Stat. 163 (codified as amended in various sections of 8 U.S.C. (1976 & Supp. III 1979)).

33. *See* H.R. REP. No. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653.

34. 8 U.S.C. § 1252(b)(1)-(4) (1976).

35. 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150 (entered into force with respect to the United States Nov. 1, 1968) [hereinafter cited as Protocol].

36. The Protocol defines a "refugee" as a person having a "well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or opinion." Protocol, *supra* note 35, art. 1. It then prohibits the expulsion of a refugee except on grounds of "national security or public order," and then only after due process of law. *Id.*, art. 32.

Congress passed the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (Supp. IV 1980)), after the adoption of the Protocol by the United States, and after the entry of the Haitian plaintiffs.

37. Under federal law existing at the time the Protocol was adopted, the Attorney General was authorized to withhold deportation of any alien who would be subject to persecution on account of race, religion, or political opinion. 8 U.S.C. § 1253(h) (1976), *amended by* 8 U.S.C. § 1253(h) (Supp. IV 1980). Under his discretionary power, however, he had no obligation to withhold deportation

States[38] held that refugees were excludable under the Attorney General's discretionary power,[39] rejecting the plaintiff's argument that the Protocol had created a right of entry for bona fide refugees.[40] The court based its decision on a State Department policy statement before the Senate Foreign Relations Committee, which indicated that no change in the administration of immigration laws was envisioned upon the ratification of the Protocol.[41] INS regulations and the 1980 Refugee Act were adopted to bring United States immigration law into compliance with the Protocol.[42] Recent conflicts and changes in this area of the law have

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when an alien would be subject to such persecution. This provision has since been amended by the Refugee Act of 1980 to more closely conform with the Protocol. Section 1253(h) now reads in part: "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." 8 U.S.C. § 1253(h) (Supp. IV 1980). Arguably, this new provision "prohibits" the deportation of aliens by the Attorney General to countries where they would face persecution. Nunez v. Boldin, 537 F. Supp. 578, 583 (S.D. Tex. 1982). Providing for an asylum procedure, 8 U.S.C.A. § 1158(a) (West Supp. 1982) preserves the Attorney General's discretion over matters leading to a grant of asylum. Thus, in spite of the rights granted under 8 U.S.C. § 1253(h), the right to asylum is still subject to the Attorney General's review. *See* Orantes-Hernandez v. Smith, 541 F. Supp. 351, 378 n.33 (C.D. Cal. 1982). As a result, courts have been unwilling to find a right to asylum. *E.g., Nunez,* 537 F. Supp. at 584. Some courts have read the Refugee Act as changing the Attorney General's discretionary standard to a "well founded fear" or "substantial evidence test." *E.g.,* McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981) (adoption of "substantial evidence" test); Almirol v. INS, 550 F. Supp. 253, 255-56 (N.D. Cal. 1982) (adoption of "well founded fear" test).

Only deportation proceedings fall under 8 U.S.C. § 1253, whereas exclusion proceedings were affected by the Protocol. *See infra* note 40. The INS later promulgated rules allowing all aliens physically present in the United States to apply to the District Director for asylum. *See infra* note 42.

"Deportable aliens" are illegally within the borders of the United States, while "excludable aliens" are deemed to have been stopped at the borders, even though they are physically within the United States. *Compare* 8 U.S.C. §§ 1225-1226 *with* §§ 1251-1252.

38. 547 F.2d 1281 (5th Cir.), *vacated and remanded* 434 U.S. 962 (1977).

39. The Attorney General made a two step discretionary determination: (1) refugee status, and (2) use of parole power under 8 U.S.C. § 1182(d)(5) (Supp. IV 1981). *Pierre,* 547 F.2d at 1289.

40. *Pierre,* 547 F.2d at 1288-89. The court also found that alien refugees have no liberty right or expectation protected by the fifth amendment. *Id.*

41. *Id.* at 1287-88.

42. *See, e.g.,* 8 C.F.R. § 108 (1980), enacted by the Attorney General, which

created great uncertainty in the courts regarding the due process rights of aliens facing deportation or exclusion proceedings.[43] Although deportable aliens have been granted some specific due process rights under federal law,[44] the parameters of due process rights under INS regulations and the Protocol are less certain.[45]

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directed the District Director of INS to receive asylum applications and make final, nonreviewable determinations of refugee status. In Sannon v. United States, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated & remanded mem.*, 566 F.2d 104 (5th Cir. 1978), the court found that "Part 108 has either been misconstrued or is invalid, because there exists no justification either in the Act, in the Protocol, or in logic to deny excludable aliens the right to assert asylum claims at exclusion hearings." *Id.* at 1275.

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at scattered sections of 8 U.S.C. (Supp. IV 1980)) is inapposite to the instant case, because the plaintiff class only includes those Haitians arriving in the United States on or before May 9, 1979. *See supra* note 1. For a discussion of the 1980 Refugee Act, see Recent Development, *Aliens' Rights*, 14 VAND. J. TRANSNAT'L L. 561, 577 (1981).

43. *See* Note, *Due Process*, *supra* note 29; Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125, 1125 (1980).

44. *See supra* text accompanying note 34.

45. The Supreme Court in Accardi v. Shaughnessy, 347 U.S. 260 (1954) assumed that certain rights were guaranteed by INS regulations covering deportation, but did not explain how or when such rights are created. *Id.* at 265. Lower courts have differed on this point, but they generally deny that INS regulations create due process rights. The court in Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977) held that compliance with the regulations was necessary to ensure due process in deportation proceedings. *Id.* at 809. The Ninth Circuit in Nicholas v. INS, 590 F.2d 802 (9th Cir. 1979) held that the INS failure to mail petitioner a copy of the evidence presented at his hearing, a violation of 8 C.F.R. § 292.4, did not deny the petitioner a "meaningful opportunity to litigate the issues presented on appeal" and was thus not a violation of due process. *Id.* at 809-10. Failure to abide by a regulation, however, could be a violation of due process if the regulation in question affects substantive rights and fundamental fairness. *Id.* at 807. A more conservative view was taken by the court in United States v. Floulis, 457 F. Supp. 1350 (W.D. Pa. 1978), which held that due process rights existed, but could not be found to be delineated in the regulations, because what is "fundamentally fair" cannot vary each time the regulations are changed. *Id.* at 1354.

Before Congress passed the Refugee Act of 1980, *supra* note 42, aliens facing exclusion proceedings were less likely to receive due process under asylum law than were deportable aliens. *See* S. REP. No. 256, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141, 142. The court in *Pierre*, 547 F.2d at 1288, refused to acknowledge that the United States adoption of the Protocol granted excludable aliens the protection of the Constitution or any other rights under the Protocol because the State Department did not anticipate that the Protocol's adoption would change the administration of immigration

The instant decision upheld a challenge to a set of provisional INS rules governing the deportation of Haitians on the grounds that the rules failed to provide for the Constitution's "fundamental fairness" due process guarantee. As such, it represents a significant step in defining the due process rights of deportable aliens.[46]

III. INSTANT OPINION

The instant court first determined that subject matter jurisdiction existed for the district court to hear a constitutional challenge to INS special procedures for the deportation of Haitians.[47] This determination was based in part on case law indicating that the court of appeals' jurisdiction was exclusive only when the issue at bar evolved from an integral element of the proceeding that led to a final deportation order.[48] With this jurisdictional limitation in mind, the instant court noted that at least two of the complaint's assertions would probably not be reviewable as ap-

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policy. *Id.* at 1288. The court found no problem in allowing the Attorney General to retain his discretionary power to grant asylum, in spite of the Protocol's terms. *Id.* at 1289; *see supra* note 37.

A district court within the same circuit, however, held that excludable aliens had the same rights under the Protocol as those granted to deportable aliens in 8 C.F.R. § 108 (1976). Sannon v. United States, 427 F. Supp. 1270, 1277 (S.D. Fla. 1977). In *Sannon,* petitioning Haitian citizens were excluded from the United States under 8 U.S.C. § 1182(d)(5) for lack of proper documentation without having been afforded an opportunity to present their claims for asylum under the Protocol. Regulations in force at the time regarding asylum applications gave excludable aliens only one opportunity to establish refugee status under the Protocol and that determination was made in a nonevidentiary, summary interview before the District Director's examining officer. Deportable aliens, however, enjoyed greater procedural rights to the extent that they were permitted to present claims for asylum at a subsequent expulsion hearing. *See Sannon,* 427 F. Supp. at 1276 (considering 8 C.F.R. § 108). After new regulations in 1978 equalized the rights of deportable and excludable aliens, 8 C.F.R. § 236.3, the same court held that the method of adoption of these regulations did not comport with the Administrative Procedure Act, 5 U.S.C. § 553 (1976). That decision, however, did not decide whether the new regulations satisfied the requirements of the Protocol or the Constitution. *Sannon,* 460 F. Supp. at 458, 466.

46. Although the instant case relates only to deportation proceedings, the holding in *Sannon,* 427 F. Supp. at 1270, suggests that the instant case could also affect the due process rights of an excludable alien. *See supra* note 45.

47. *Haitian Refugee,* 676 F.2d at 1033.

48. *Id.* at 1032-33; *see supra* notes 12-19 and accompanying text.

peals from a deportation order.[49] In addition, the district court's federal question jurisdiction extended to the constitutional challenge of an entire deportation program as distinguished from the review of an individual deportation case.[50] In response to the Government's claim that plaintiffs must exhaust administrative remedies before approaching the courts, the instant court held that the exhaustion requirement is not a jurisdictional prerequisite, but a matter for the discretion of the trial court.[51] Having jurisdiction, the instant court proceeded to define the plaintiffs' procedural due process rights in light of the congressional power to regulate the entry of aliens into the United States.[52] Following a traditional due process analysis, the court first determined whether a life, liberty, or property interest existed, and then determined the degree of process due.[53] After acknowledging that prior courts had recognized that deportable aliens possess constitutionally protected interests,[54] the instant court examined those liberty or property interests created by rules of law.[55] The court then found that the INS regulations covering asylum applications,[56] in conjunction with the Protocol and the Attorney General's power under 8 U.S.C. section 1253(h), indicated a clear con-

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49. *Haitian Refugee,* 676 F.2d at 1032-33 & n.21.

50. *Id.* at 1033.

51. *Id.* at 1034. The instant court dismissed the defendants' claim after examining the policies advanced by allowing the administrative process to run and concluded that those policies would not be thwarted in this case. *Id.* at 1036. Because the constitutional questions raise legal rather than factual issues, the instant court intimated they would be better decided by the courts, which have greater expertise in constitutional analysis. Additionally, the court reasoned that in light of the defendants' judicial economy argument, it would be unrealistic to expect the INS or Board of Immigration Appeals (BIA) to substantially revise their own procedures. The court also noted that 8 C.F.R. § 3.1(b) (1978) lists the BIA's areas of appellate jurisdiction and that no provision exists therein for the review of procedural irregularities. *Haitian Refugee,* 676 F.2d at 1034-35. The court similarly rejected defendants' claim that the plaintiffs should have petitioned for a withholding of deportation under 8 U.S.C. § 1253(h). *Haitian Refugee,* 676 F.2d at 1035-36.

52. *Haitian Refugee,* 676 F.2d at 1036-37.

53. *Id.* at 1037.

54. *Id.; see supra* notes 28-31, 35-45 and accompanying text.

55. The instant court cited to various cases which hold that enacted laws can create due process interests. *Haitian Refugee,* 676 F.2d at 1038 n.31.

56. 8 C.F.R. §§ 108.1-.2 (1978). The instant court noted that these regulations were published by the INS to implement the Protocol's policy. *Haitian Refugee,* 676 F.2d at 1039; *see supra* note 37 and accompanying text.

gressional "intent to grant aliens the right to submit and . . . substantiate their claim for asylum."[57] In furtherance of this right "the alien is to be allowed the opportunity to seek political asylum, even if the grant of that benefit is discretionary."[58] The instant court was careful to distinguish between the right to apply for asylum and the right to asylum itself.[59] Although the court failed to dictate the precise content of the hearing procedures that would be constitutionally required,[60] it determined that the Haitian program created conditions which eliminated the possibility that a plaintiff's asylum hearing would be meaningful. Although the court balanced the competing private and governmental interests at stake,[61] the determination that no meaningful hearing was likely outweighed any countervailing interest.[62] Thus, the court concluded that the Government had effectively denied the aliens' right to petition for political asylum[63] and that there was sufficient legal justification under the fifth amendment for the district court to order the submission of a procedurally fair plan.[64] The instant court then limited the district court's injunction[65] to bar only those asylum and deportation proceedings applying the INS regulations effective after May 10, 1979.[66]

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57. *Haitian Refugee,* 676 F.2d at 1038.

58. *Id.* The court was here referring to the discretionary grant of power which the Attorney General had to withhold deportation under 8 U.S.C. § 1253(h) (1978).

59. *Haitian Refugee,* 676 F.2d at 1039.

60. *Id.* at 1039 n.41. The court found that the plaintiffs were at least entitled to present their claims "at a meaningful time and in a meaningful manner." *Id.* at 1039.

61. *Id.* at 1039-40 (citing Logan v. Zimmerman Brush Co., 102 S. Ct. 1148, 1157 (1982)). Under *Logan* and Mathews v. Eldridge, 424 U.S. 319, 335 (1976), the criteria to be considered in balancing include: the private interest to be affected by the official action; the likelihood of governmental error through the procedures used; the probable value of additional procedural safeguards; and the governmental interest at stake, including the fiscal and administrative burdens entailed by procedural safeguards.

62. *Haitian Refugee,* 676 F.2d at 1040.

63. *Id.*

64. *Id.* at 1041.

65. *See supra* text accompanying note 7.

66. *Haitian Refugee,* 676 F.2d at 1041. The district court's order enjoined all deportation and asylum proceedings involving the plaintiff class, including proceedings which applied regulatory procedures in effect prior to May 10, 1979. *Id.*

IV. COMMENT

Over time, the balance between the Government's power to regulate the entry of aliens and the due process rights accorded those aliens has increasingly shifted in favor of due process.[67] Historically, Congress sought to protect alien rights under United States immigration law through the passage of the INA, the adoption of the Protocol, and most recently with the incorporation of the 1980 Refugee Act into the INA. Despite these indications from Congress, however, the INS and its regulations have lagged behind the legislature in the recognition of these increased due process rights,[68] and this divergence has caused inconsistencies between the two government branches. The courts thus have been forced to decide which of the conflicting laws or regulations apply and the extent to which they create due process rights. In the face of federal immigration laws which contradicted the newly adopted Protocol, the court in *Pierre v. United States*[69] refused to acknowledge that the Protocol granted asylum rights to refugee aliens.[70] On the other hand, some courts have approached the conclusion that the INS regulations confer due process rights, but these courts have generally remained unwilling to grant them.[71] The instant court prudently acted within the framework of this latter case law, and avoided the controversial holding in *Pierre*.[72] This analysis allowed the instant court to recognize a due process right in every alien's application for asylum.[73] As such, the instant court not only acted to expand aliens' due process rights within a historical perspective, but also took a major step toward clarifying the United States position on alien rights to asylum in deportation proceedings.

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67. *See supra* notes 21-42 and accompanying text.
68. *See supra* notes 37, 42, 46 and text accompanying note 42.
69. 547 F.2d 1281.
70. *Id.* at 1288.
71. *See supra* note 45 and accompanying text.
72. *See* Roth, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539, 563 (1981).
73. *Haitian Refugee*, 676 F.2d at 1038 n.35.