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Halting A National Sacrilege: Aliens Should Be Given Notice Of Their Right To Apply For Political Asylum

I. INTRODUCTION*

It has been a time-honored policy of the United States to respond to the urgent need of persons subject to persecution in their homelands.1 Congress recognized this policy in 1952 when it passed the Immigration and Nationality Act (INA)2 which authorized the Attorney General to withhold the deportation of aliens who would be subject to "physical persecution" if deported.3 Subsequent amendments to the INA were periodically enacted to conform national policy to its humanitarian principles.4 The Refugee Act of 19805 is the culmina-
tion of this liberalization of United States' immigration law. This Act established, for the first time, a comprehensive refugee assistance and resettlement policy in response to a rapid increase in the number of asylum applications. In contrast to its predecessor provision, section 243(h) of the new law prohibits the Attorney General from deporting aliens to countries where they would face persecution on account of race, religion or political opinion. Furthermore, the measure directed the Attorney General to establish a uniform procedure to handle asylum claims. Pursuant to section 208(a), the Attorney General may, in his discretion, grant asylum upon a showing of a "well-founded fear" of persecution. By directing the establishment of a single asylum application procedure, new section 208 recognizes

7. Statistics indicate the number of asylum claims increased from 2,529 per year to over 63,000 in 1981. Moreover, while the number of yearly applicants processed reached 4,529 in 1981, the number of claims pending soared to 102,544. Orantes-Hernandez v. Smith, 541 F. Supp. 351, 379 n.34 (C.D. Cal. 1982). The increase in applications was due in large part to the Cuban Freedom Flotilla of 1980. In fiscal year 1981 alone, over 36,000 Cubans petitioned for asylum with District Directors pursuant to INA section 208. The number of aliens applying for asylum with District Directors has leveled off in recent years. INS figures indicate that in 1982 over 33,000 claims were filed though this number dipped to approximately 17,000 in 1985. The number of claims pending as of September, 1985, was 126,311.
9. S. REP., supra note 6, at 9. Prior to the Act, the government reacted to refugee crises on a piecemeal approach as they arose. The expansive Indochinese refugee program exposed the untenability of this reactionary policy. S. REP., supra note 6, at 3.
10. Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105 (adding § 208(a) to the INA) (codified at 8 U.S.C. § 1158(a) (1982)). This section directs the Attorney General to "establish a procedure for an alien physically present in the United States . . . to apply for asylum."
11. Controversy exists as to the standard of proof an alien must meet to demonstrate eligibility for asylum. The confusion focuses upon whether the "well-founded fear" of persecution standard necessary to establish eligibility for a grant of asylum differs from the harsh "clear probability" of persecution standard which prohibits deportation. The "clear probability" burden requires the alien to show that "it is more likely than not" that he will be persecuted. INS v. Stevic, 467 U.S. 407, 424 (1984). In Stevic, the Supreme Court assumed, without deciding, that the "well-founded fear" standard is "more generous" than the "clear probability" benchmark. Id. at 425. Following Stevic, the Ninth, Seventh, and Sixth circuits have all unequivocally held that the "well-founded fear" standard is, in fact, less stringent than the "clear probability" standard. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985). The mandatory prohibition against refoulement was deemed to justify a tougher standard of proof than the discretionary grant of asylum. Bolanos-Hernandez v. INS, 749 F.2d 1316, 1321-22 (9th Cir. 1984). The United States Supreme Court has recently agreed to determine the applicable asylum standard and resolve the lingering confusion. INS v. Cardoza-
asylum as a legal concept for the first time in United States law.12

Judicial awareness of the purposes and provisions of the Act has
led two federal district courts to conclude that aliens should be given
notice of the right to petition for asylum.13 These courts have been
persuaded that the United States has, by accession to the 1968 United
Nations Protocol Relating to the Status of Refugees and concomitant
enactment of a comprehensive asylum program, manifested its inten-
tion to hear refugee claims.14 In light of the capacities and character-
istics of most aliens, notice was viewed as essential to preserve the
substance and meaning of this right.15 Moreover, one court has de-
clared notice to be constitutionally prescribed by the due process
clause of the United States Constitution.16 A protectible interest was
found in the mandatory withholding of deportation language of sec-
tion 243(h) and the newly-enacted asylum adjudicatory scheme. 17

Utilizing the traditional interest-balancing formula to determine the

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12. S. REP., supra note 6, at 9. The word "asylum" did not appear in United States' immigration laws prior to the enactment of the Refugee Act of 1980. Note, supra note 3, at 902 n.10; see also Caribbean Migration: Oversight Hearing before the Subcomm. on Immigra-
tion, Refugees and International Law of the House Comm. on the Judiciary, 96th Cong., 2d
Sess. 279 (1980) [hereinafter Caribbean Migration] (statement from the American Council of
Voluntary Agencies for Former Service, Inc., noting that asylum was given a legislative basis
for the first time in the nation's history through the enactment of the 1980 Refugee Act).

ordered notice to all Salvadorans eligible to apply for political asylum in order to compensate
for alleged abuses by INS agents in obtaining voluntary departure consents.;) Nunez v. Boldin,
537 F. Supp. 578 (S.D. Tex.), appeal dismissed without published opinion, 692 F.2d 755 (5th
Cir. 1982) (In contrast to the expansive holding of Orantes-Hernandez, the Nunez court or-
dered notice to all Guatemalans and Salvadorans held at the INS detention center in Los
Fresnos, Texas.). Despite their broad language, these rulings did not mandate blanket notice
to all aliens but compelled notice to the affected class. The need for blanket notice was not an
issue before the courts.

14. Ramirez-Osorio v. INS, 745 F.2d 937, 942 (5th Cir. 1984); Orantes-Hernandez v.
Tex.), appeal dismissed without published opinion, 692 F.2d 755 (5th Cir. 1982).


lished opinion, 692 F.2d 755 (5th Cir. 1982).

17. The withholding of deportation mandate of section 243(h) does not technically confer
asylum though the courts have on occasion interpreted it as such. Comment, Political Asylum
and Withholding of Deportation: Defining the Appropriate Standard of Proof Under the Refu-
two forms of relief differ. For example, an alien who receives asylum has an automatic right
after one year to apply for adjustment of status to permanent resident alien. See 8 C.F.R.
§ 209.2 (1984); see also Korn, Hiding in the Open, Student Law., Jan. 1986, at 26 col. 2 (article
deals with the recent refugee sanctuary movement).
process necessary to safeguard this right, the court concluded that the alien’s interest in nonrefoulement outweighed the additional cost to the government.\textsuperscript{18}

Despite these district court pronouncements, no circuit court has found a congressionally or constitutionally based notice obligation.\textsuperscript{19} Deference has been given to current INS\textsuperscript{20} practice which alerts aliens of the available asylum procedures only if the alien acts to flag asylum claims.\textsuperscript{21} This policy ostensibly strikes the appropriate balance between a blanket notice requirement and the inevitable increase in nonmeritorious asylum requests which a notice obligation would entail.\textsuperscript{22} Though not overruling the lower court decisions, these circuit holdings limit the reach of the district court cases to their facts. Only through exercise of the broad equitable powers may a district court compel notice to remedy procedural abuses.\textsuperscript{23} The INS is thus left to its own devices in alerting aliens of their right to submit asylum claims.\textsuperscript{24}

\textsuperscript{18} Nunez, 537 F. Supp. at 586 (“It is true that giving such notice may result in unworthy claims being filed and in a longer than necessary detention for some aliens. The Court is of the opinion, however, that this possibility does not override the need for those with worthy claims to have them heard.”).

\textsuperscript{19} See Duran v. INS, 756 F.2d 1338, 1341 (9th Cir. 1984) (holding INS regulations do not require an immigration judge to notify an alien of his right to apply for asylum or withholding of deportation); Ramirez-Osorio v. INS, 745 F.2d 937 (5th Cir. 1984); cf. Minwalla v. INS, 706 F.2d 831, 834 (8th Cir. 1983) (court assumed, without deciding, that due process entitles an alien to notice of the right to apply for asylum).

\textsuperscript{20} The Attorney General has delegated his control over immigration procedures to the INS, a branch of the Department of Justice. 8 C.F.R. § 100.2 (1983).

\textsuperscript{21} Caribbean Migration, supra note 12, at 225. “[A]liens] are interviewed as to why they came here. If they have questions that would flag asylum claims such as fear of persecution upon being returned, they are identified. Those persons are told what their rights are . . . .” Id. (statements by David Crosland, Acting Commissioner for the INS).

\textsuperscript{22} Ramirez-Osorio v. INS, 745 F.2d 937, 946 (5th Cir. 1984) (“[W]e have no basis for discounting the INS judgment that [notice] would generate . . . large numbers of frivolous claims. . . .”); Note, supra note 3, at 903, 923.

\textsuperscript{23} See, e.g., Orantes-Hernandez v. Smith, 541 F. Supp. 351, 377 (C.D. Cal. 1982) (“In order to mitigate the coercive effect [of the interrogative] environment, the Court in the exercise of its broad remedial powers believes that a mandatory notice of rights is appropriate.”). The decision to leave notice to the discretion of the INS is of questionable utility to the alien. Chief Counsel for the INS admitted to the Orantes-Hernandez court that the INS and its agents are very reluctant to divulge any information regarding the asylum process. Orantes-Hernandez v. Smith, 541 F. Supp. 351, 361 (C.D. Cal. 1982). Along these lines, some aliens who have requested an opportunity to apply for asylum have been told that asylum is unavailable. And, some aliens who have expressed fear of persecution upon refoulement were similarly denied notice. Id. These abuses are clear violations of the Refugee Act and the INS' own notice procedures for which remedial action is justified. Jean v. Nelson, 727 F.2d 957, 983 n.35 (11th Cir. 1984). Despite this equitable relief, practical problems arise if the alien has signed a voluntary departure form and has already been deported before the violation is
This Comment argues that notice is mandated both by congressional intent and due process principles. Congressional silence is not dispositive of an implied acceptance to adhere to current INS procedures. The purposes and provisions of the 1980 Refugee Act evince Congress' desire to adhere to our national commitment to resolution of the refugee problem. Notice is consistent with compliance to this dedication. Moreover, due process requires blanket notice to all deportable aliens of their right to petition for asylum. Neither the fiscal nor administrative cost of notice justifies a foregoing of this procedural protection. Any appreciable increase in expenditures results primarily from the hearing process designed to accord the alien an opportunity to be heard before the final order of deportation. Constitutional principles likewise mandate that any waiver by the alien forsaking his right to a deportation proceeding must be knowingly, intelligently, and voluntarily executed to accord him all the process that is his due. With these thoughts in mind, a survey look to the evolution of United States' policy towards refugees crystallizes the congressional attitude behind the Refugee Act, thereby setting the backdrop for analysis of any notice obligation to be gleaned from the measure.


25. This Comment argues for notice to those aliens upon whom an order to show cause has been issued. This order notifies the alien that the process to deport him has begun. See 8 C.F.R. § 242.1 (1985). The class is further limited to deportable aliens and does not include excludable aliens who are presently accorded no constitutional rights. Landon v. Plasencia, 459 U.S. 21, 32 (1982). A deportable alien is an individual who has entered the United States whether legally or illegally. An excludable alien, by contrast, may have reached the border but has not affected an entry. Jean v. Nelson 727 F.2d 957, 961 n.1 (11th Cir. 1984) (holding excludable aliens have no congressional or constitutional right to notice of the right to apply for asylum). It is the deportable alien's presence within the Court's territorial jurisdiction that gives the Judiciary power to act and extend to them these constitutional rights. Johnson v. Eisentrager, 339 U.S. 763, 771 (1950). Though the excludable alien is accorded less rights than the deportable alien, see generally Landon, 459 U.S. at 25-26 for a comparison of the rights of these two alien classes, certain rights common to both classes blurs the distinction between the two. For instance under 8 C.F.R. § 208.3(b) (1985), asylum requests made after the initiation of exclusion proceedings are also considered as requests for withholding of deportation. See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise of Dialectic, 66 HARV. L. REV. 1362, 1391-96 (1953), for the view that excludable aliens should be accorded due process protections.
II. HISTORICAL BACKGROUND

A. National Policy Relating to Refugees

The story of United States' immigration law dealing with refugees unfolds with the onset of the twentieth century. From this time until 1980, the existing refugee programs were a patchwork of responses to emergency crises. The earliest of these measures recognized the plight of the political refugee by exempting them from exclusion as criminals. These acts reflected a desire to regulate the quality of aliens admitted to the country. At the conclusion of World War I, fear of inundation from aliens leaving war torn Europe coupled with a post-war isolationist mood created pressure for immigration reform. The result was the 1924 "national origins" quota system which placed numerical limitations on immigration but was silent regarding political refugee admissions. World War II and its aftermath motivated legislative relaxation of these existing quota restrictions. The Displaced Persons Act of 1948 and its Amend-


27. Refugees are individuals who are outside the United States seeking political asylum. Conversely, asylees are individuals who have entered the United States and are seeking political asylum. Comment, supra note 26, at 176 n.34.

28. Id. at 174 & n.22.

29. Anker & Posner, supra note 26, at 12. S. REP., supra note 6, at 4 (Emphasizing the need for permanent, and systematic refugee procedures, Ambassador Dick Clark noted "[u]ntil now, we have carried out our refugee programs through . . . a patchwork of different programs that evolved in response to specific crises.").

30. Evans, supra note 26, at 207-08 ("The Acts of 1875, 1882, and 1891 excepted a person convicted of a political offense from exclusion as a criminal."). Section 5, 18 Stat. 477 (1875); § 4, 22 Stat. 214 (1882); § 1, 26 Stat. 1084 (1891). "The political offender was also recognized in the [1917] Act which provided: 'That nothing in this Act shall exclude, if otherwise admissible, persons convicted, or who admit the commission, or who teach or advocate the commission, of an offense purely political.' " Evans, supra note 26, at 208 (quoting the 1917 Immigration Act § 3, 39 Stat. 877).


32. Id.

33. Id. ("The 1924 legislation [43 Stat. 153 (1924)] adopted a national origins formula which eventually based the quota for each nationality on the number of persons of their national origin in the United States in 1920 . . . . Quota immigrants were limited to approximately 150,000 per year."); see also Evans, supra note 26, at 208.

34. C. GORDON & H. ROSENFIELD, supra note 31, at § 1.2d.
ments, set highly selective standards for sanctuary and was primarily an aid to those individuals who fled Nazi or Soviet persecution. This legislation struck a balance between humanitarian concern for refugees and the existing cold war sentiment. Under this program, the United States welcomed some 400,000 persons to its shores in three and one-half years. Despite its breadth, the Act was not a permanent refugee policy, but a special legislative authorization to an international problem.

The Immigration and Nationality Act (INA) was enacted in 1952 to establish quotas for immigrants who wished to become permanent United States residents. Like its predecessors, this measure contained no specific refugee admission provision. The 1952 Act was primarily a reaction to the anti-communist attitudes of the time. The emphasis of the measure was less on humanitarian principles than on lending support and morale to anti-communists. In this

37. Anker & Posner, supra note 26, at 13; Comment, supra note 26, at 174.
38. Evans, supra note 26, at 213. The concern for national security prevalent in the post-war period is epitomized by a 1950 amendment to the 1918 Anarchist Act [40 Stat. 1012 (1918)] which read:

No visas shall be issued under the provisions of this Act, as amended, to any person who is or has been a member of the Communist Party, or to any person who adheres to, advocates, or follows, or who has adhered to, advocated, or followed, the principles of any political or economic system or philosophy directed toward the destruction of free competitive enterprise and the revolutionary overthrow of representative governments . . . .

Evans, supra note 26, at 213 (quoting Section 11, 64 Stat. 227, amending the 1918 Act).
39. C. GORDON & H. ROSENFIELD, supra note 31, at § 1.2d.
40. Comment, supra note 26, at 174.
41. Anker & Posner, supra note 26, at 12-13; Evans, supra note 26, at 211-12; C. GORDON & H. ROSENFIELD, supra note 31, § 2.2Aa at 2-185.
42. Comment, supra note 26, at 175. President Truman vetoed the 1952 Act because it maintained the "national origins" quota system established by the 1924 Act. The inherent discriminatory effect of the policy was thought anathema to American ideals. The President's veto, however, was overridden by Congress. C. GORDON & H. ROSENFIELD, supra note 31, at § 1.3a. Presidents Eisenhower, Kennedy, and Johnson all shared a similar abhorrence to the "national origins" system. 111 CONG. REC. H21768 (Aug. 25, 1965) (statement of Rep. Claussen). The 1965 Amendments to the INA finally dispensed with the "national origins" quota system and its emphasis upon race and nationality. C. GORDON & H. ROSENFIELD, supra note 31, § 1.4c at 1-26.
43. Anker & Posner, supra note 26, at 14 & n.18.
45. Anker & Posner, supra note 26, at 175; Comment, supra note 26, at 175.
respect, the Act extended the tone of the modifications to the 1948 Displaced Persons Act.46

In 1965 the INA was amended to provide the first permanent statutory basis for refugee admissions.47 Under new section 203 (a) (7), a quota was established for refugees fleeing Middle Eastern or communist-dominated Eastern European countries because of persecution or a fear of persecution on account of race, religion, or political opinion.48 Since it was assumed that most refugees came from these two geographic areas,49 only refugees from locations mentioned in section 203(a)(7) were allowed to apply for asylum until the Refugee Act of 1980 liberalized this geographic restriction.50

The 1965 Amendments also enhanced an asylee’s51 ability to qualify for discretionary relief under INA section 243(h).52 This provision was modified to expand the concept of “persecution” beyond the merely physical.53 Though still lacking the right to petition for asylum, the asylee’s opportunity to avoid deportation was increased.54

B. The United Nations Protocol

The United States became a signatory to the United Nations Pro-

46. See supra note 36.
48. Id. at § 203(a)(7), 79 Stat. 911, 913 (1965) (repealed in 1980). This quota was not to exceed six percent of the total number of immigrants admissible into the country each year (i.e., 10,200 out of 170,000). Id. See also Evans, supra note 26, at 220-21; Comment, supra note 26, at 175; Anker & Posner, supra note 26, at 17.
49. S. REP., supra note 6, at 4 (remarks of Ambassador Dick Clark); Note, supra note 44, at 123 (“While Cold War antagonisms were by then muted by the ideals of peaceful coexistence, American foreign policy continued to view persecution as the exclusive province of Communism.”) (footnote omitted).
50. Comment, supra note 26, at 175. One of the purposes of the Refugee Act was to eliminate the geographical and ideological restrictions applicable under section 203(a)(7). S. REP., supra note 6, at 4.
51. For the definition of asylee see supra note 27.
53. See supra note 3.
54. The Amendment to § 243(h) was proposed by Representative Poff of Virginia. The term “physical persecution” was thought too restrictive a standard. The word “persecution” standing alone was thought too broad and flexible. Hence a compromise between the two extremes resulted in the enacted language of the statute “persecution on account of race, religion, or political opinion.” 111 CONG. REC. H21803-04 (Aug. 25, 1965) (statement of Rep. Poff).
The Protocol was more liberal than existing United States law in several respects. First, the Attorney General was prevented from deporting any alien to his homeland if that alien qualified as a refugee. Under the 1965 Amendments to the INA, the Attorney General had discretion in such instances. Additionally, the term "persecution" was defined as a threat to one's life or freedom whereas the law of the United States defined it as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive." Finally, all geographic and ideological distinctions were eliminated in defining the word refugee in contrast to the restrictive requirements established in 1965 under section 203(a)(7) of the INA.

Ratification of the Protocol obligated the United States to uphold the treaty's provisions. Congress, however, did not modify the immigration laws to conform to the Protocol. The INS and the courts also refused to acknowledge the Protocol's impact on United States' law. Failure to implement the Treaty's sections was due to the belief that accession required no statutory changes which the INA could not accommodate through minor administrative modifications by the Attorney General. It was not until the Refugee Act of 1980

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57. Note, 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), 16 VAND. J. TRANSNAT'L L. 485, 490 (1983). Prior to the 1980 Act, only those persons falling within the parameters of section 203(a)(7) of the INA could petition for asylum as refugees. See supra notes 47-50 and accompanying text. Under the Refugee Act of 1980, Congress adopted the more expansive internationally adopted definition of refugee. See infra note 72 for this definition.

58. See supra note 3.

59. Protocol, supra note 55, art. 31 at 6275.

60. Comment, supra note 26, at 178 (quoting Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969)).


62. S. REP., supra note 6, at 4; Comment, supra note 26 at 178.

63. Comment, supra note 26, at 178.


65. See Pierre v. United States, 547 F.2d 1281 (5th Cir.), vacated and remanded, 434 U.S. 962 (1977) (holding the Attorney General had the discretionary authority to deport aliens despite the language of the Protocol).

66. INS v. Stevic, 467 U.S. 407, 417 (1984) (quoting legislative officials to indicate that "[t]he President and the Senate believed that the Protocol was largely consistent with existing
that Congress responded to the burgeoning refugee problem with a policy that would treat all refugees evenhandedly, thereby conforming with the spirit of the Protocol.

C. The Refugee Act of 1980

The Refugee Act of 1980 set forth a comprehensive system guiding refugee admission into the United States. The Congressional purpose behind the statute was to codify the national commitment to human rights through uniform, nondiscriminatory treatment of all refugees. To this end, the Act liberalized existing law by bringing it into conformity with the humanitarian principles embodied in the 1967 United Nations Protocol Relating to the Status of Refugees. For example, Congress substituted the restrictive conditions of section 203(a)(7) of the INA with the Protocol’s internationally accepted definition of refugee. Refugees from any country would now be able to apply for asylum in the United States. Moreover, those aliens present within the United States could also petition for asylum. The

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67. See supra note 7.
68. S. Rep., supra note 6, at 2 (statement by Senator Kennedy expressing the need for a refugee policy “which will treat all refugees fairly and ... equally.”); Comment, supra note 26, at 179.
69. S. Rep., supra note 6, at 1.
70. Id. at 3.
71. See the United Nations Protocol text section supra.
72. Under section 203(a)(7) only refugees from Middle-Eastern or communist-dominated Eastern Europe were eligible for a grant of asylum. See supra text accompanying notes 38-49. New section 201(a)(42) of the Refugee Act defines “refugee” as “any person who is outside any country of such person’s nationality ... and who is unable or unwilling to return to ... that country because of persecution on account of race, religion, nationality ... or political opinion.” Pub. L. No. 96-212, § 201(a)(42), 94 Stat. 102 (1980) (codified at 8 U.S.C. § 1101(a)(42) (1982)). The Protocol defines a “refugee” as a person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality ... or political opinion, is outside the country of his nationality.” Convention Relating to the Status of Refugees, Jan. 31, 1967, Art. 1, para. 2, 19 U.S.T. 6259, 6261, T.I.A.S. No. 6577, 189 U.N.T.S. 150, incorporated by reference, Protocol, Art. I, para. A(2).
73. Comment, supra note 26, at 179.
74. Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105 (adding § 208(a) to the INA) (codified at 8 U.S.C. § 1158(a) (1982)). This section reads: 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, irrespective 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.

Id.
Refugee Act thus implemented those modifications to United States immigration laws which Congress steadfastly refused to acknowledge in 1968. As a result, the 1980 measure established the first truly national policy of welcome to all refugees through creation of a permanent and systematic refugee admission program.

III. NOTICE OF THE RIGHT TO APPLY FOR ASYLUM

A. Congressional Intent Behind Refugee Act Regarding Notice

Congress' desire to help refugees is manifest throughout the Act. No limitations were placed on the number of persons who may be granted asylum in any given year. All asylum claims initiated in either deportation or exclusion proceedings are to be accorded complete consideration. Furthermore, the withholding of deportation provision of the Refugee Act was drafted to conform with Article 33 of the Protocol. The House Conference Report states that this section was patterned upon the Protocol and "is intended . . . [to] be construed consistent with the Protocol." This provision prohibits the Attorney General from returning any alien to a country where he would face persecution on account of race, religion, nationality, mem-

75. S. REP., supra note 6, at 3 (statement by Senator Kennedy). It has been contended that the asylum process has become excessively politicized thus undermining the integrity of the system. To substantiate this allegation, proponents point to statistics indicating that refugees from nations friendly to the United States are less likely to be granted asylum than those refugees from countries with less congenial relations with Washington. For example, in 1983, two percent of Salvadoran applicants were granted asylum according to figures compiled by the Center for Constitutional Rights. In 1984, this percentage increased to 2.5 percent according to the State Department. By contrast, 78 percent of the Soviet refugees and 12.5 percent of the Nicaraguan refugees received asylum in 1984. Korn, Hiding in the Open, Student Law., Jan. 1986, at 26, col. 2&3. Though some condemn the politicization of the process, others see this as a rational foreign policy tool. See, e.g., Caribbean Migration, supra note 12, at 133 (statements by Dr. Virginia Dominguez, Department of Anthropology, Duke University, who noted the logic of the politicization of the process but condemned it as adversely reflecting on the country's self respect).

76. S. REP., supra note 6, at 3.
78. Id.
79. Comment, supra note 26, at 180.
80. Article 33 states that "[n]o Contracting State shall expel or return a refugee in any matter whatsoever to . . . territories where his life or freedom would be threatened on account of . . . race, religion, nationality, membership of a particular social group or political opinion." Convention Relating to the Status of Refugees, Jan. 31, 1967, art. 33, 19 U.S.T. 6259, 6276, T.I.A.S. No. 6577, 189 U.N.T.S. 150.
bership in a particular social group, or political opinion. In contrast to its predecessor, the new proviso gives no discretion to withhold deportation if the alien fulfills the statutory criteria. Keying on the language of these sections and the express humanitarian principles of the Act, the courts in Orantes-Hernandez v. Smith and Nunez v. Boldin concluded that Congress intended to make asylum available to all aliens. And, they added, as the Act establishes the right to apply for asylum, this right would be meaningless without notice of its existence.

Despite this reasoning, the circuit courts remain unconvinced. In Ramirez-Osorio v. INS, the Fifth Circuit recently refused to find a congressionally mandated notice requirement. The court reasoned that the legislative history of the Refugee Act made clear that the amendments to section 243(h) were a recognition of Article 33, not a call to require notice. Emphasizing this point, the court noted that

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82. See supra note 8.
83. The former section provided as follows:
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.

Immigration and Nationality Act Amendments of 1965, § 243(h), Pub. L. No. 82-236, § 11(f), 79 Stat. 918 (1965) (emphasis added). The section currently reads:
The Attorney General shall not deport or return any alien...


84. 541 F. Supp. 351 (C.D. Cal. 1982).
85. 537 F. Supp. 578 (S.D. Tex.), appeal dismissed without published opinion, 692 F.2d 755 (5th Cir. 1982).
88. 745 F.2d 937, 943-44 (5th Cir. 1984). The reasoning of the 5th Circuit provides the most thorough analysis to date of the congressional and constitutional arguments against a notice requirement in the case of deportable aliens. As such, the rationale from that decision is drawn on extensively in formulating the arguments herein. Cf. Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc) (finding no notice obligation in the case of excludable aliens.) In Ramirez-Osorio, appellants were natives of El Salvador who admitted the illegality of their entry to the United States and requested to be returned to El Salvador. At no point did either appellant express any fear of persecution upon refoulement. The sole contention on appeal was that the immigration judges should have informed them of their right to seek asylum. Ramirez-Osorio, 745 F.2d at 938-39.
89. As authority for its position the court looked to the House report on § 243(h). That section read:

(2) Withholding of Deportation-Related to Article 33 is the implementation of section 243(h) of the Immigration and Nationality Act...
these alterations neither changed the alien’s measure of entitlement nor the ultimate administrative responsibility of the Attorney General.90 Moreover, the court disdained the notion that notice of the right to petition for asylum was necessary to make that right meaningful.91 Though not disputing Congress’ desire to hear the pleas of the persecuted, the court determined that blanket notice was not the best means to those ends.92 Instead, the court gave its approval to current INS procedure which furnishes an alien notice of the right to petition for asylum if it appears he may be persecuted upon return to his homeland.93 The court felt it reasonable to assume that persons who fear persecution upon refoulement would so indicate.94 Moreover, by providing notice to “likely” asylum beneficiaries, this selective practice would uphold the Refugee Act’s humanitarian purposes without the fiscal and administrative burden a blanket notice obligation would entail. In sum, the court believed present INS procedure satisfactorily balanced the competing concerns in any notice requirement.95

The court’s analysis is flawed in two respects. First, the means-ends discussion borders on the irrelevant. Despite acknowledging the Act’s professed purposes, the court disdained a blanket notice requirement as not necessarily the best means to accomplish the measure’s goal.96 This conclusion was based on an examination of the reasonableness of current INS notification procedures rather than an exacting scrutiny of Congress’ intent as discerned from the Act.97 In fact, ac-

Although this section has been held by court . . . decisions to accord to aliens the protection required under Article 33, the Committee feels it desirable, for the sake of clarity, to conform the language of that section to the Convention (emphasis in original).

Id. at 943 n.9 (quoting H.R. REP. NO. 608, 96th Cong., 1st Sess., 18 (1979)).
90. Ramirez-Osorio, 745 F.2d at 943.
91. Id.
92. The court stated that “while we recognize that among the purposes behind the Refugee Act was to give ‘statutory meaning to our national commitment to human rights and humanitarian concerns,’ . . . and to continue the ‘historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands,’ . . . blanket notice . . . may not necessarily be the means best suited to those ends.” Id. (quoting S. REP. 256, 96th Cong., 2d Sess. 1, reprinted in, 1980 U.S. CODE CONG. & ADMIN. NEWS 141 and Refugee Act of 1980 § 101, 8 U.S.C. § 1521 respectively).
93. Id. at 943-44. See supra note 21 and accompanying text.
94. Ramirez-Osorio, 745 F.2d at 944.
95. Id. at 943-44.
96. Id. at 943.
97. The court’s emphasis upon reasonableness and practicality in lieu of an exacting inquiry into Congress’ intent is manifested by its support of the government position that “this [current INS notification procedures] practice [is] a reasonable administrative response to the
knowledge of the cosmetic changes to section 243(h) constituted the sum and substance of the court’s probe for any notice requirement to be implied from the measure. The court, in effect, deferred to its own practical judgment instead of focusing its inquiry upon the provisions of the Act and their mandate, if any, as decreed by Congress.

Second and more importantly, the court’s assumption that aliens who fear persecution upon refoulement will so indicate belies reality. Inherent cultural, verbal and educational barriers heighten the interviewee’s sense of alienation and anxiety, thereby reducing the willingness to volunteer information.98 “These handicaps . . . result in [a] refugee’s misperception about whether, when or how to apply for asylum . . . .”99 Sociological impediments to optimal communication are further buttressed by the coercive nature of many field interviews.100 Taken together these factors exacerbate the fear and suspicion aliens frequently harbor towards all government officials.101 To the extent competing concerns inherent in any prescription for the time and manner of notice.” Id. at 943-44.

98. Note, supra note 3, at 912 & n.73. “It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties . . . in submitting his case to the authorities of a foreign country, often in a language not his own.” Aleinikoff, Aliens, Due Process and “Community Ties”: A Response to Martin, 44 U. PITT. L. REV. 237, 250-51 (1983) (citing Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 45, 47 (1979)). The following passage highlights the obstacle that language presents in the attorney-client context where the “coercive” nature of the refugee’s interaction with an “official” in this country is at its ebb:

Attorney Steven Mander testified that it was very difficult to extract information from his Haitian clients. In general, this was due to language difficulties and a certain reticence on their part. He described the gathering of information as follows:

“In understanding the actual process of putting together an application, it required an interview, re-interview, cross-examination, extracting details, and patience.”

Aleinikoff at 251 n.39 (quoting Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 522 (S.D. Fla. 1980), aff’d as modified sub nom. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982)).


100. See, e.g., Orantes-Hernandez v. Smith, 541 F. Supp. 351, 360 n.10 (C.D. Cal. 1982). The court heard testimony from Attorney Antonio Bueno who has represented hundreds of Salvadoran clients. Mr. Bueno stated that:

The first thing [INS agents] tell [Salvadoran detainees], of course, is that they’re not going to grant [political asylum] to them. It’s going to be denied. They always tell them that. And then the other things they tell them is [sic] that the bond is going to be very high and no way they could post it, and that it’s a waste of money. And they paint a pretty dim picture . . . .

Id. Mr. Bueno’s testimony was supported by the Chief Counsel for the INS who pointed out that “the interrogative atmosphere is . . . coercive.” Id. at 377.

101. Caribbean Migration, supra note 12, at 279 (statement by the Lawyers Committee for International Human Rights). Of course a fear of government officials is often bred in the
the foregoing elements stifle the voicing of valid claims, both the mandatory withholding of deportation language of section 243(h) and the Congressional desire to hear refugee concerns are undermined by present INS procedures.

The more salient argument against a notice requirement hinted at by the court is the lack of explicit mention of notice in the Refugee Act. Congress had the ability to include a notice provision in the Act but refused to do so. Moreover, they are aware of current INS procedures yet have failed to enact any bill compelling notice. The resulting silence must therefore be construed as an implied rejection of a blanket notice requirement.

Though persuasive on its face, the foregoing analysis focuses on the wrong actor's purpose to reach the conclusion. When discerning the intent behind any law, it is the enacting Congress' design which is critical. The views of a subsequent Congress are not appropriate to justify the sounds of silence. The changing legislative make-up poses a formidable hurdle when inferring the intent of a past Congress from the opinions of a subsequent one. Nonetheless, Congressional

alien's homeland which is a key reason many aliens risk life and limb to seek sanctuary in the United States. See, e.g., Caribbean Migration, supra note 12, at 148-57 and 163-66 (noting that many Haitians left Haiti in 1980 to escape the excesses of the Duvalier government). Ironically, it seems logical to conclude that those individuals most abused by their own government would harbor the greatest suspicion of American officials. As such, they are the most likely to suppress their claims and be denied the relief they so desperately need. Hence, given the court's assumptions, those aliens most in need of protection are the least likely to receive asylum.

102. Ramirez-Osorio v. INS, 745 F.2d 937, 943 (5th Cir. 1984). The contention that Congressional silence indicates Congress' desire to forsake a blanket notice requirement is fully developed by the government in Orantes-Hernandez v. Smith, 541 F. Supp. 351, 375 (C.D. Cal. 1982).


104. Id. Congressional awareness of current INS practice is evidenced by a 1982 Senate Report which approved present notice procedures. The report stated:

It is the intention of the Committee that this be a general inquiry and should not include advice of any right to claim asylum or leading questions with respect to persecution. Only if the alien's answers to such general inquiry provide evidence that the alien may have a well-founded fear of persecution . . . should the immigration officer specifically inquire about persecution and the alien's desire to claim asylum.

Note, supra note 3, at 907-08 (quoting S. REP. No. 485, 97th Cong. 2d Sess. 34 (1982)).

105. L. TRIBE, CONSTITUTIONAL LAW 41 (1985). Examination of prior or contemporaneous rejection of proposed amendments that would have given the statute the interpretation that a litigant claims the statute did enact is one way to "read" this Congressional silence. Id.

106. Id. ("[J]ustifying an interpretation of a prior enactment by pointing to what a subsequent Congress did not enact seems incompatible with our constitutional structure.") (emphasis in original); United States v. Price, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").
silence indicating tacit consent to existing decisional law that had construed the very language being reenacted is relevant to statutory interpretation.\textsuperscript{107} Though two legislatures are involved, the focus of inquiry remains on that body adopting the measure.

Applying these principles here renders inescapable the conclusion that Congressional failure to include a notice provision should not be deemed a prohibition against notice. Prior to the 1980 Refugee Act, there was no asylum provision in United States law.\textsuperscript{108} It is thus impossible to make any statutory comparison from which to lift Congress’ intent. Moreover, because of its recent enactment, the Refugee Act was neither subject to judicial interpretation nor amended as regards the notice requirement. Little relevant information exists to interpret Congress’ silence. Emphasis must then be placed on the interplay of the statute’s components to the purposes of the 1980 measure. As detailed, a notice obligation is consistent with the humanitarian designs of the Act which make clear that the nation has no interest in deporting aliens to areas where persecution reigns. Notice would not shield the unworthy but rather would protect eligible aliens from wrongful refoulement. By contrast, present procedures fail to extend notice to all aliens deserving this procedural safeguard. As a result, often only those aliens fortunate enough to be familiar with United States’ immigration policy are awarded notice of the right to petition for asylum.\textsuperscript{109} This undermines Congress’ desire to treat all refugees in a uniform, nondiscriminatory manner.\textsuperscript{110} Hence any ambiguity regarding Congress’ intent argues for implying a notice requirement.

**B. Due Process**

1. Notice at the Deportation Proceeding

Congressional intentions notwithstanding, fundamental principles of due process mandate a notice requirement.\textsuperscript{111} While Congress has almost unfettered power to set immigration policy,\textsuperscript{112} the execu-

\begin{itemize}
  \item \textsuperscript{107} L. TRIBE, supra note 105, at 41 (emphasis added).
  \item \textsuperscript{108} See supra note 12 and accompanying text.
  \item \textsuperscript{109} Orantes-Hernandez v. Smith, 541 F. Supp. 351, 375 (C.D. Cal. 1982).
  \item \textsuperscript{110} Id.
  \item \textsuperscript{111} But see Note, supra note 3, at 908-16 (arguing due process does not require notice to aliens of the right to apply for asylum).
  \item \textsuperscript{112} Fiallo v. Bell, 430 U.S. 787, 792 (1976) ("This court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over'
tive must comply with due process in implementing that policy. It is beyond dispute that an alien within the borders of the United States is accorded due process protections. Procedural due process is not an independent right, but merely a condition precedent to the deprivation of a life, liberty or property interest. Do the United States immigration laws create in the alien a liberty or property interest, the protection of which requires notification of the right to apply for asylum? In fact, the existence of an asylum adjudicatory procedure under section 208(a) and the mandatory withholding of deportation language of section 243(h) of the Refugee Act of 1980 have been deemed to create interests deserving of due process protection.

Greenholtz v. Nebraska Penal Inmates provides the reasoning upon which section 243(h) has been interpreted to create a protectible liberty interest in nonrefoulement. In Greenholtz, the Court found a protected liberty interest in the Nebraska parole-release statute's language which required the Board of Parole to release a parolee barring presence of specified criteria requiring deferment. The Court rejected any contention that the parole board's broad discretion in rendering the parole-release decision undermined an inmate's parole expectation. The Court felt the statute created a presumption of parole. Similarly, section 243(h), as amended in 1980, mandates the Attorney General to withhold deportation if an alien can establish

the admission of aliens.” (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

113. The Japanese Immigrant Case, 189 U.S. 86, 100 (1903) (“[T]his court has never held ... that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in due process of law ... ”); Note, supra note 3, at 908.

114. Shaughnessy v. Mezei, 345 U.S. 206, 212 (1942) (“[A]liens who have once passed through our [territorial] gates, even illegally, may be expelled only after proceedings conforming to traditional standards of ... due process of law.”); see also supra note 25.

115. Haitian Refugee Center v. Smith, 676 F.2d 1023, 1037 (5th Cir. 1982).

116. Protected interests may originate in the Constitution itself or they may emanate in state or federal statutes creating substantive entitlements to particular government benefits. Id. at 1037-38 and n. 31; Note, supra note 3, at 909.

117. Note, supra note 3, at 909.

118. See supra notes 9-12 and accompanying text.

119. See supra note 8.

120. 442 U.S. 1 (1979).

121. Ramirez-Osorio v. INS, 745 F.2d 937, 944 (5th Cir. 1984); Note, supra note 3, at 909.

122. Greenholtz, 442 U.S. at 11; Ramirez-Osorio v. INS, 745 F.2d 937, 944 (5th Cir. 1984); Note, supra note 3, at 909.

123. Greenholtz, 442 U.S. at 12; Note, supra note 3, at 910.

124. Greenholtz, 442 U.S. at 12; Note, supra note 3, at 910.
a clear probability of persecution.\textsuperscript{125} As in \textit{Greenholtz}, any subjectivity contained within the persecution evaluation is insufficient to overcome the statute's mandatory language creating a presumption of nonrefoulement.\textsuperscript{126}

The United States' embrace of the United Nations Protocol Relating to the Status of Refugees in 1968 bolsters the notion that section 243(h) creates a protectible liberty interest.\textsuperscript{127} By accession to the Protocol the United States agreed, as stated in Article 33 of the Convention, not to deport a refugee where his life or freedom would be threatened on account of political membership or opinion. The Refugee Act was designed to bring United States law into conformity with the Protocol, and along these lines, section 243(h) was modeled after Article 33.\textsuperscript{128} Accession to the Protocol via the 1980 measure thus created a justified expectation of nonrefoulement to countries where the alien would be persecuted.\textsuperscript{129} Effectuation of the humanitarian policy behind this international commitment lends support to a finding that an alien be allowed the opportunity to seek political asylum.\textsuperscript{130}

Regulations establishing an asylum procedure manifest a related national resolve to adhere to our international humanitarian obligation and hear the pleas of the persecuted. Aside from their underlying concern for human rights, these regulations have themselves been deemed to create a constitutionally protected right to petition for asylum.\textsuperscript{131} In \textit{Haitian Refugee Center v. Smith}, the court relied upon the Supreme Court's pronouncements in \textit{Logan v. Zimmerman Brush Co.}\textsuperscript{132} to conclude that the right to use federal administrative procedures was an interest protected by the due process clause.\textsuperscript{133} In conjunction with both our international commitments founded upon adherence to the 1968 Protocol and section 243(h), the court believed

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\item \textsuperscript{125} Ramirez-Osorio v. INS, 745 F.2d 937, 944 (5th Cir. 1984); Note, supra note 3, at 909.
\item \textsuperscript{126} Note, supra note 3, at 910.
\item \textsuperscript{127} See supra text accompanying notes 55-68.
\item \textsuperscript{128} H.R. REP. NO. 608, 96th Cong., 1st Sess. 18 (1979); Note, supra note 3, at 910.
\item \textsuperscript{129} Ramirez-Osorio v. INS, 745 F.2d 937, 944 (5th Cir. 1984).
\item \textsuperscript{130} See Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982) (holding that Congress created a constitutionally protected right to petition the government for political asylum).
\item \textsuperscript{131} Id. at 1038-39.
\item \textsuperscript{132} 455 U.S. 422 (1982) (right to use State Fair Employment Practices Act adjudicatory procedures was held to be a protectible property interest similar to a litigant's interest in seeking recourse to the courts).
\item \textsuperscript{133} Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038 (5th Cir. * 1982) (*Former Fifth Circuit Case, Section 9(1) of Public Law 96-452 - October 14, 1980).
\end{itemize}
these regulations established a clear intent to grant aliens the opportunity to forward asylum claims. Whether characterized as a liberty or property interest, this entitlement was deemed worthy of due process protections.

Once a protectible liberty interest is found, the critical question becomes what process is due to protect that right. "In particular, if the Refugee Act creates in every qualified alien the right to nonrefoulement or, alternatively, the right to apply for asylum, does due process require the INS to give aliens notice of the right to seek asylum?" In *Mathews v. Eldridge*, the Supreme Court articulated a flexible approach in deciding the process due in any given situation.

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134. *Id.*
135. *Id.* at 1039. The court noted that the constitutionally protected right was "a fragile one." *Id.* The court emphasized that "[t]here is no constitutionally protected right to political asylum itself." *Id.* Indeed, the grant of asylum is discretionary with the Attorney General. See 8 U.S.C. § 1158(a) (1982). The court, in essence, found that the alien has a constitutional right to submit and substantiate his qualifications for asylum.
136. Note, *supra* note 3, at 911. As noted by the Supreme Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), due process entails a two-part inquiry: whether the party was deprived of a protected interest, and, if so, what process was his due. The *Ramirez-Osorio* court assumed a right to petition for asylum existed for purposes of analysis. *Ramirez-Osorio v. INS*, 745 F.2d 937, 944 (5th Cir. 1984).
138. 424 U.S. 319 (1976) (The Court held that an evidentiary hearing was not required prior to the termination of Social Security benefits. Administrative procedures prescribing notice and an ability to review the decision to terminate benefits prior to the cut-off date comport with due process.).

Use of the *Mathews* framework to the present situation should not be deemed a foregone conclusion. The alien received notice of an impending deportation proceeding thus satisfying the traditional due process notice requirement. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). The issue herein focuses upon the content of the notice to be accorded the alien. Namely, must the alien receive notice of the right to apply for asylum which is in the nature of a substantive claim. *See infra* note 139 and text accompanying notes 174-75. Notwithstanding lower court decisions to the contrary, it is not at all clear that the *Mathews* test was designed to shape content of notice issues. The post-*Mathews* Supreme Court has never relied upon the *Mathews* analysis to define the contours of notice. *Cf.* *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (Decided one year before *Mathews*, the Court noted that the content of notice depends upon accommodation of the competing interests involved. This language, however, was dicta as the case focused on the form of the hearing to be given a suspended high school student.). Instead, *Mathews* and its progeny have dealt with the nature of the hearing to be accorded the affected party. Examination of the rationale underlying the due process clause justifies this line drawing.

Given that accuracy is one of the touchstones of the due process clause, see *supra* note 156, analysis of the government's fiscal burden in providing notice, one of the *Mathews* factors, deprecates this goal through consideration of an element designed solely to prevent notice. Truth and the right to a meaningful hearing are often the companion victims of a balance denying enhanced notice. By contrast, in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 n.15 (1978), the Supreme Court focused upon the individual characteristics of edu-
The Ramirez-Osorio court turned to this framework when deciding if notice was constitutionally mandated.\(^{139}\)

The Mathews decision teaches that "the dictates of [procedural] due process require consideration of three distinct factors: the individual interest at stake, the risk of mistake inherent in the procedure, and the potential for correction by changed procedures balanced against the additional burden they would present."\(^{140}\) While recognizing the alien's ignorance of the right to petition for asylum and the prophylactic result blanket notice would provide, the Ramirez-Osorio court felt the ultimate fiscal burden on the government outweighed the efficacy of notice.\(^{141}\) Blanket notice would encourage frivolous claims thereby "extend[ing] deportation proceedings for years" and adding significant and costly administrative burdens.\(^{142}\) When viewed in

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\(^{139}\) Ramirez-Osorio v. INS, 745 F.2d 937, 945 (5th Cir. 1984). The fact that the right to apply for asylum is substantive in nature is not determinative upon the issue of whether a notice obligation should attach. Notice of substantive rights has been demanded by at least two circuit courts. In Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981), the court held that a tenant class must receive notice of the right to retroactive housing assistance. And in Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980), the court mandated notice to garnishees of the social security exemption from garnishment.

\(^{140}\) Ramirez-Osorio v. INS, 745 F.2d 937, 945-46. The precise language of the Mathews test is as follows:

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

Mathews, 424 U.S. at 333-34.

\(^{141}\) Id. at 945-46. The precise language of the Mathews test is as follows:

\(^{142}\) Id. Statistics before the court indicated the number of asylum claims increased from 3,700 per year to 50,000 per year between 1978 and 1981. Id. at n.14. Facts before the Orantes-Hernandez court place the increase as more severe. Asylum claims were said to have jumped from 2,529 in 1977 to 63,202 in 1981. Orantes-Hernandez v. Smith, 541 F. Supp. 351,
light of Congress' near plenary power in the immigration field, the court felt the complexity of the balance counseled against "legislating judicial perceptions of the public good."143

It is difficult to dispute the court's weighing of the identified interests at stake. Concern for the public fisc has commanded increased attention in the due process arena.144 Tipping the scales to reflect that concern can hardly be deemed unreasonable or irrational. Moreover, any disagreement with the court's analysis follows a fortiori from the inherent subjectivity of the Mathews test.145 Judicial reliance on this balancing doctrine creates a sort of "situational ethic" which necessarily renders unpredictable which process is due in any particular case.146 A court is often placed in the difficult position of damage control through comparison of "incommensurables."147 Reliance upon personal values intuitively becomes the dominant fourth factor in decidedly close cases.148

Given this inherently subjective framework, issue is not taken with the court's conclusion as to the interests it analyzed.149 Instead

379 n.34 (C.D. Cal. 1982). Moreover while the number of yearly applicants processed reached 4,529 in 1981, the number of claims pending soared to 102,544. Id.

142. Ramirez-Osorio, 745 F.2d at 947.

143. The Supreme Court in Mathews emphasized its growing concern to preserve limited resources. The court noted:

Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action . . . may be outweighed by the cost. Mathews, 424 U.S. at 348; cf. Bell v. Burson, 402 U.S. 535, 540-41 (1971); Goldberg v. Kelly, 397 U.S. 254, 265-66 (1971) (according little weight to government arguments based on minimizing expense). See generally, Frug, The Judicial Power of the Purse, 126 U. Pa. L. Rev. 715, 773-84 (1978) (detailing the Supreme Court's willingness to recognize the government's interest in avoiding increased expenditures in the procedural due process and equal protection arenas); L. Tribe, American Constitutional Law 541 (1978) (noting the impact of economic pragmatics on the individual's traditional constitutional safeguards.)


146. Id. at n. 51. This "situational ethic" results because of the Supreme Court's refusal to strike the balance of general judgment as to the conflict between the competing private and public interests. Instead each case is examined as it arises with the trial court left to interject its value judgment on the process. Id.

147. Id. ("Since the function of the Court in applying the balancing test is to avoid the greater of . . . two misfortunes by letting the lesser occur, the Court has placed itself in a position where it must compare incommensurables.").

148. Id.

149. The flexibility of the Mathews test is elucidated through comparison of the Ramirez-Osorio v. INS, 745 F.2d 937 (5th Cir. 1984) and Nunez v. Boldin, 537 F. Supp. 578 (S.D. Tex.
the untenability of the court's reasoning emanates from its identification of the factors to be weighed in the Mathews balance. Specifically, the court neglected to consider the functional appropriateness of a notice requirement for resolving asylum claims. This inquiry is a component part of the government interest to be analyzed.\textsuperscript{150} Moreover, the court's focus upon the fiscal and administrative costs of notice to the government was overly inclusive. Interests properly reserved to an analysis of the adequacy of the alien's deportation hearing were incorporated in the court's balancing scheme thereby exaggerating the INS interest involved. A closer look to the logic on the scale is therefore appropriate.

The Mathews factors are designed to accommodate the flexible notions of due process allowing for "such procedural protections as the particular situation demands."\textsuperscript{151} The capacities and characteristics of those to be heard are important factors to be considered when determining the fairness of existing procedures.\textsuperscript{152} The alien's interest in this analysis is obvious. Deportation may result in persecution or even death to the detainee.\textsuperscript{153} Moreover, "[t]he present procedures do not sufficiently assure that all genuine asylum claims will be heard, nor do they assure that an alien . . . will not be returned to the country of his persecutors."\textsuperscript{154} The alien's ignorance of INS procedures and American law, the language barriers present, and the lack of appointed counsel only illuminate the likelihood that legitimate asylum claims will fall undetected under current practice.\textsuperscript{155} Notice of the right to petition for asylum would undoubtedly reduce the alien's fear

\textsuperscript{150} Analysis of the functional appropriateness of the requested procedures is frequently obscured or missing from many courts' interest-balancing analyses. Note, \textit{supra} note 145, at 1516.

\textsuperscript{151} \textit{Morrissey v. Brewer}, 408 U.S. 471, 481 (1972).


\textsuperscript{154} \textit{Id}.

\textsuperscript{155} \textit{Id}. ("The majority of detainees are completely uneducated as to INS procedures. They do not speak the English language, nor can they read the English language asylum applications required for consideration."); \textit{see also} \textit{Orantes-Hernandez v. INS}, 541 F. Supp. 351, 359 (1982) (noting that most aliens sign voluntary departure forms due to their unfamiliarity with their rights under United States' immigration law); \textit{see also supra}, notes 98-101 and accompanying text.
and lead to pressing of valid claims. In this way, notice promotes truth and fairness which are the principles underlying the due process clause.156

Functional considerations also urge a notice obligation. This analysis asks whether "the proposed procedure is necessary to achieve accuracy in fact-finding."157 In the asylum context, this factor takes on a compelling magnitude when it is recalled that the alien's entitlement to relief rests upon substantiating a claim of persecution.158 Subjective evidence of widespread unrest engulfing a country is insufficient to sustain the required burden of proof.159 Documented evidence or credible, subjective testimony is necessary to establish the legitimacy of any assertion that the alien is being singled out for persecution on one of the specified grounds in section 208(a).160 In reality, this evidence is difficult to obtain. The hurried and embattled conditions which characterize the flight of most persons from their homeland renders highly unlikely their ability to obtain the necessary evidence and documents to support a claim of persecution.161 The applicant therefore is typically the only individual available to support an asylum request.162 Notice ensures the integrity of the deportation proceeding by focusing the fact-finding process on the one and often

156. The two dominant perceptions as to the primary purpose of procedural due process are the intrinsic and instrumental approaches. The former approach sees an intrinsic value in allowing the individual to participate in decisions fundamental to his being. This view emphasizes participation as a means of preserving the individual's dignity. The instrumental approach, by contrast, sees procedural due process as necessary to minimize mistaken deprivations. Accuracy is a touchstone of this view. See L. Tribe, American Constitutional Law 501-03 (1978).


158. See supra notes 10, 11, & 83.

159. See, e.g., Zepeda-Melendez v. INS, 741 F.2d 285, 289-90 (9th Cir. 1984) ("Recent Ninth Circuit decisions repeatedly have rejected applications for relief under section 243(h) based on generalized allegations of persecution resulting from the political climate of a nation."); see also Martinez-Romero v. INS, 692 F.2d 595, 595-96 (9th Cir. 1982) (rejecting eligibility for asylum based upon a showing of widespread political violence.)

160. See, e.g., Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984) (stating that the applicant must allege specific facts indicating he or she will be singled out for persecution); Cardoza-Fonseca v. INS, 767 F.2d 1448 (9th Cir. 1985) (following 7th Circuit's lead in establishing the amount and type of evidence necessary to show a "well-founded" fear of persecution).

161. See Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984); Bolanos-Hernandez v. INS, 749 F.2d 1316, 1324 (9th Cir. 1984) ("Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.").

162. See Bolanos-Hernandez v. INS, 749 F.2d 1316, 1324 (9th Cir. 1984); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984).
only person capable of exposing the truth. Additionally, blanket notice serves the desired function of eroding barriers inhibiting optimal communication in the initial interview process. Had the Ramirez-Osorio court channeled this factor into the equation, it may indeed have mandated notice in light of the severe deprivation facing the alien.

This oversight aside, the court found the fiscal burden to the government sufficiently weighty to deny notice. The court was concerned that blanket notice would encourage the filing of frivolous claims thereby adding to already burgeoning administrative costs. The court, however, misapplied this third Mathews factor. The cost to be examined is the cost of the specific procedure involved. Here that procedure is notice. This cost is admittedly de minimus. The real expense to the government stems from those consequences resulting from a notice obligation, namely, the filing of increased claims, both unworthy and meritorious, which will demand hearings. This cost stems from the administrative procedures which accord an alien the opportunity to present his case. Congress, however, is free to step in and prevent fiscal and administrative havoc by its ability to modify present procedures regulating the form of asylum hearing. While

163. An appropriately heavy emphasis should be placed upon notice as a functional consideration in the asylum arena. Few claims to relief rely so heavily upon the testimony of the affected individual. In most civil cases, the truth may be ascertained through objectively verifiable evidence. The number of competent witnesses often extends beyond the litigants themselves. Even in criminal cases where the defendant may be the only available defense witness, objective circumstantial evidence may be relied upon to attack the prosecution's charges. By contrast, in the asylum contest, objective evidence is normally difficult to obtain and insufficient to sustain the alien's standard of proof. Notice is the only way to accurately assure that aliens deserving of relief are not being deported. This comports with the language, if not the spirit, of sections 208(a) and 243(h) of the 1980 Refugee Act.

164. See supra notes 141-43 and accompanying text.


166. Nunez v. Boldin, 537 F. Supp. 578, 586 (S.D. Tex.), appeal dismissed without published opinion, 692 F.2d 755 (5th Cir. 1982) ("The burden on the Government as a result of this [notice] requirement is not the giving of the notice, but the likelihood of persons without valid claims of asylum applying for that relief, thereby causing the time and expense of needless hearings . . . ").

167. Note, supra note 3, at 925. To the extent the effects of a notice requirement should be included within the interest-balancing notice formula, these effects deserve minimal merit. The agencies involved in the application process have the ability to minimize any cost increases. For example, the State Department currently reviews every asylum claim. This practice has been on-going since 1963 although it is not mandated by the Refugee Act. See 8 C.F.R. § 208.7 (1985). In 1982, only three full-time State Department employees and four consultants were handling the entire application load. More federal employees or a reduction of claims for
any new program must comport with due process, Congress nonetheless retains wide discretion in fashioning a procedure to reflect pragmatic economic conditions. The Supreme Court has repeatedly stressed that any number of hearings may yield the truth. A judicial-type proceeding with its concomitant cost is not an indispensible prerequisite to attainment of a meaningful hearing prior to many final orders. The constitutionality of the hearing to be accorded the alien remains to be determined wholly apart from the cost emanating from any notice obligation. Any challenge to the hearing procedures can adequately address the cost of frivolous claims. For while the traditional due process principles of notice and opportunity to be heard work jointly to guarantee fairness and promote truth-seeking, they constitute distinct means in search of a common end.

2. The Voluntary Departure Form and Principles of Waiver

As the preceding analysis notes, due process principles guarantee the alien's right to be heard in a deportation hearing prior to refoulement. Many aliens, however, never go through this formal process but instead opt for voluntary departure. Because an alien's decision

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State Department review, i.e. those considered politically sensitive, are two examples of ways to minimize any expected backlog a notice obligation might produce. Orantes-Hernandez v. Smith, 541 F. Supp. 351, 379 n.35 (C.D. Cal. 1982). Another way to save expenses and increase efficiency in the larger districts is to assign exclusive asylum claim review to a specific group of employees. Caribbean Migration, supra note 12, at 279; see also Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (rejecting the government's contention that fiscal and administrative concerns warrant delay of an evidentiary hearing on disqualification of welfare assistance until after discontinuance of the grants based in part on the State's ability to utilize "weapons to minimize . . . increased costs"). See generally Kurzban, Restructuring the Asylum Process, 19 San Diego L. Rev. 91 (1981).


169. Judge Friendly has noted the symbiotic yet distinct roles of notice and a hearing. He feels that the more formal and informative the notice procedures, "the stronger should be [the government's] position in asking curtailment of other procedures." Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1281 (1975); see also Gray Panthers v. Schweiker, 652 F.2d 146, 172 n.55 (1980) (finding that enhanced notice of termination of Medicare benefits may obviate need and/or formality of oral hearing where "paper hearing" in place). This conclusion reflects the reasonable belief that an informed person can present his case in the most informal of hearing processes. This reasoning is particularly compelling in the asylum sphere where the alien is typically the only person available to substantiate a claim of persecution. See supra notes 157-172 and accompanying text.

170. Note, supra note 3, at 916. There are advantages to both the INS and the alien when a voluntary departure form is executed. The INS is spared the expense of providing deportation hearings. The alien benefits primarily because no deportation order will appear on his record and thus he retains eligibility to enter the country legally at a future time. Nunez v.
to depart voluntarily necessarily constitutes a waiver of protected rights, two questions arise. First, must a waiver of the alien's procedural due process rights be both knowing and voluntary? If so, is notice of the right to apply for asylum essential to ensure a knowing and voluntary waiver? An affirmative response to both questions would compel notice of the right to apply for asylum to effectuate a valid waiver.

a. Knowing and Intelligent Waiver

In *Orantes-Hernandez v. Smith* the court, relying on the traditional definition of waiver, held that signing a voluntary departure form was "tantamount to a waiver to the right to apply for asylum as well as the right to a deportation hearing."

The court determined that lack of notice of the right to apply for asylum and the resulting speed with which the voluntary departure was effectuated amounted to "a summary departure process." Recognizing both the alien's right to a deportation hearing because of the life or liberty interest at stake and the Refugee Act's grant of the right to apply for asylum to all aliens, the court concluded that notice was necessary "in order to execute valid and informed waivers."

The *Ramirez-Osorio* Court refused to apply the *Orantes-Hernandez* waiver standard to deportation proceedings. The court felt that the right to apply for asylum was analogous to an affirmative defense. At a deportation hearing, the alien has the burden of showing cause why he should not be deported and asylum is a claim assertable to stay the proceedings. However, neither civil nor criminal law supports the precedent that an individual be given a laundry list of his rights before waiver is effective. Viewed in this vein, the court noted that the language of *Schneckloth v. Bustamonte* was

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172. *Id.* The court noted that "Salvadorans are frequently arrested, deposited in waiting rooms, interrogated, put onto buses, and flown back to El Salvador all in a matter of hours."

*Id.* at 361.

173. *Id.* at 377.


controlling.\textsuperscript{178} Simply put, "the requirement of a knowing and intelligent waiver has been applied [almost without exception] only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial."\textsuperscript{179}

Despite that seemingly unequivocal statement coming from Schneckloth, scrutiny of the Supreme Court's analysis indicates no black-letter rule guiding the application of knowing and intelligent waivers. Indeed the letter, if not the spirit, of Schneckloth mandates a flexible approach when determining the need for "an intentional relinquishment of a known right."\textsuperscript{180} Analysis of the purposes of a knowing and intelligent waiver and the practical application of such a requirement in relation to the right asserted\textsuperscript{181} constitute the proper focus for deciding when this strict standard attaches.

The Supreme Court articulated the knowing and intelligent waiver standard in a case involving the validity of a criminal defendant's decision to forego counsel.\textsuperscript{182} Keeping in mind the Sixth Amendment's safeguards, the Court felt that the grave consequences which a criminal defendant faced required a strict waiver standard to protect a \textit{fair} trial and the reliability of the \textit{truth-determining} process.\textsuperscript{183} Recognizing the impact that pre-trial procedures have on the adjudicatory proceeding, the Court in subsequent decisions applied the Johnson criteria to assure the affirmative waiver of other rights such as the right to confrontation, to a jury trial, to a speedy trial, and the right against double jeopardy.\textsuperscript{184} The Court erected this "appropriately heavy" \textsuperscript{185} waiver standard to maintain the integrity of the criminal trial process and its concomitant search for truth.

In Schneckloth, the Court employed the Johnson concerns to hold that the subject of a consent search need not know of his right to refuse consent because the individual's right to be let alone, which is grounded in the Fourth Amendment, has little bearing on the fairness or truth-seeking of the trial process.\textsuperscript{186} In noting that the Fourth Amendment "is not an adjunct of truth" the Court was clearly ex-

\textsuperscript{178} Ramirez-Osorio, 745 F.2d at 945.
\textsuperscript{179} \textit{Id.} (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973)).
\textsuperscript{180} Schneckloth, 412 U.S. at 238.
\textsuperscript{181} \textit{Id.} at 241.
\textsuperscript{182} Johnson v. Zerbst, 304 U.S. 458 (1938).
\textsuperscript{183} Schneckloth, 412 U.S. at 236 (emphasis added).
\textsuperscript{184} \textit{Id.} at 237-38.
\textsuperscript{185} \textit{Id.} at 236.
\textsuperscript{186} \textit{Id.} at 242; Note, supra note 3, at 917.
pressing its view that the purposes of fairness and truth-determining underlying the knowing and intelligent mandate were not in play here. The Court also dismissed as impractical the requirement that police notify individuals of their right to refuse consent. In the hectic, unstructured context of a consent search, the Court felt an officer "could [not] make the detailed type of examination" necessary to determine if there was an intelligent and competent waiver. An examination into the knowing and understanding nature of the waiver was thought best left to the formalities of a structured atmosphere.

Schneckloth clearly implies then that if the purpose behind the knowing and intelligent standard is served by the right asserted, and implementation of the standard is practical, the principle of an intentional waiver will attach. Application of this dual test to an alien's right to apply for asylum and his right to a deportation hearing indicates the need for a knowledgeable waiver prior to signing the voluntary departure form.

As its name implies, due process serves, inter alia, to insure fairness and promote accuracy in the adjudicatory process. Due process flexibility reflects the inherent realism that fairness must be determined on a case by case basis. The principles of due process

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187. The Court emphasized its point by noting that "[t]he protections of the Fourth Amendment are of a wholly different order [then the basic protections thought indispensable to a fair trial], and have nothing whatever to do with promoting the fair ascertainment of truth." Schneckloth, 412 U.S. at 242.

188. Id. at 245.

189. Id. at 244.

190. The Schneckloth court's analysis buttresses this reasoning. The Court concluded that "[n]othing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures." Id. at 241.

191. The civil character of deportation proceedings is of no consequence for purposes of this analysis. Orantes-Hernandez v. Smith, 541 F. Supp. 351, 377 n.31 (C.D. Cal. 1982). While the alien is due less protection than the criminal defendant, Ramirez-Osorio v. INS, 745 F.2d 937, 944 (5th Cir. 1984), nevertheless "in the civil no less than the criminal area, 'Courts indulge every reasonable presumption against waiver.'" Fuentes v. Shevin, 407 U.S. 67, 94 n.31 (1972) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1938)). Schneckloth principles would thus apply because the alien is due no more due process protection than the criminal defendant. Note, supra note 3, at 918.

192. See supra note 156. As Justice Frankfurter noted in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951), "[n]o better instrument has been devised for arriving at [the] truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

necessarily stand, like the Sixth Amendment principles recognized in *Schneckloth*, as an "adjunct to the ascertainment of truth."\textsuperscript{194} The due process mandate to provide notice cuts not only to the integrity of the fact-finding process, but even more fundamentally, it preserves the defendant's ability to invoke the adjudicatory system designed to safeguard life, liberty and property.\textsuperscript{195} In short, the purposes behind a knowing and intelligent waiver are identical to the underlying purposes of the due process clause and its requirement of notice and opportunity to be heard.

Furthermore, denial of notice rings of injustice considered in light of the alien's limited resources and knowledge of this country and its laws.\textsuperscript{196} Lack of notice inhibits truth-seeking to the extent valid asylum claims are not pressed.\textsuperscript{197} Because an alien's loss of life and liberty is closely akin to the loss of the criminal defendant's life and liberty,\textsuperscript{198} every reasonable presumption ought to be indulged against voluntary relinquishment.\textsuperscript{199} The fact that many aliens have displaced themselves at considerable risk illustrates that aliens faced with deportation would not lightly sign away the one avenue through which their hope may be fulfilled.

underscored by the holding in *Memphis Light*. There the Court required a utility company to notify its customers not only of the intent to terminate services for nonpayment but also of a procedure to dispute bills. The Court believed the "various levels of education, experience, and resources" of the many customers compelled this enhanced notice. *Memphis Light*, 426 U.S. at 14 n.15.

\textsuperscript{194} Schneckloth v. Bustamonte, 412 U.S. 218, 242 (1973). As Mr. Justice Black noted: "The Sixth Amendment stands as constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" *Id.* at 236 (quoting from *Johnson v. Zerbst*, 304 U.S. 458, 462 (1968)).

\textsuperscript{195} Strictly speaking, waiver of the rights to apply for political asylum and to a deportation hearing does not affect an adjudicatory process which was the backdrop of the *Schneckloth* principles. Note, *supra* note 3, at 917. In fact, a voluntary departure form signed prior to the hearing obviates the need for a hearing. *Id.* However, use of a procedure designed to eliminate the necessity for an adjudicatory proceeding would appear to call for notice of known rights to preserve fundamental fairness. Notice here is a logical extension of the pretrial guarantees which the Supreme Court viewed as necessary to maintain the integrity of the trial process. *Schneckloth*, 412 U.S. at 238-39.

\textsuperscript{196} In *Orantes-Hernandez*, the Court noted that "the widespread acceptance of voluntary departure is due in large part to the . . . unfamiliarity of most Salvadorans with their rights under the immigration laws." *Orantes-Hernandez* v. Smith, 541 F. Supp. 351, 359 (C.D. Cal. 1982); see also *supra* notes 98-99 and accompanying text.

\textsuperscript{197} Note, *supra* note 3, at 918.

\textsuperscript{198} Orantes-Hernandez v. Smith, 541 F. Supp. 351, 377 (C.D. Cal. 1982) ("Although deportation proceedings are civil in nature, the stakes for a Salvadoran at the pre-hearing stage are more akin to those in the criminal process — the alien who voluntarily departs to El Salvador faces very real threats to life and liberty.") (footnote omitted).

\textsuperscript{199} *Id.* at 377 n.31.
As a practical matter, notification would also not pose difficulties in implementation. Unlike the burden placed upon an officer to determine the validity of a knowing and intelligent waiver in the informal, spontaneous context of police investigation, the INS operates with formal procedures in a structured environment capable of ascertaining with reasonable certainty the validity of any waiver.\textsuperscript{200}

The dual-prong test of \textit{Schneckloth} would thus appear to require, at a minimum, a knowledgeable waiver of the right to a deportation hearing. This procedure serves as the alien's constitutionally protected opportunity to be heard.\textsuperscript{201} Unlike the right to apply for asylum, notice of the alien's right to a deportation hearing does not involve notification of an affirmative defense. A requirement of a knowing and intelligent waiver in this limited context is but a logical extension of the \textit{Schneckloth} principles to the due process arena.\textsuperscript{202} In short, preservation of the \textit{fairness} of the deportation process requires an "appropriately heavy burden" on the government before a valid waiver can be found.\textsuperscript{203}

Despite this minimum notice extension, the more sharply drawn question is whether \textit{Schneckloth} requires notice of the right to apply for asylum which is in the nature of an affirmative defense. Certainly in the civil context, current precedent does not support a conclusion that the government must inform individuals of substantive rights before a waiver is effective.\textsuperscript{204} In the criminal field, "[a] catechism of the constitutional rights that are waived by entry of a guilty plea is not compelled . . . by the Constitution."\textsuperscript{205} Even construed as an affirmative claim, however, \textit{Schneckloth} and existing due process principles mandate notice of the right to apply for asylum to effectuate a valid waiver.

Due process has traditionally required notice and an opportunity

\begin{itemize}
  \item \textsuperscript{200} Note, \textit{supra} note 3, at 918.
  \item \textsuperscript{201} Landon v. Plasencia, 459 U.S. 321, 332 (1982).
  \item \textsuperscript{202} At the present moment, the Supreme Court has left open the question of whether a knowing and intelligent waiver is necessary in the field of procedural due process. \textit{Schneckloth}, 412 U.S. at 235.
  \item \textsuperscript{203} \textit{Id.} at 236-37. Application of the knowing and intelligent waiver standard to the alien's right to a deportation avoids the "domino theory of Constitutional litigation." The Supreme Court felt that too often explanatory statements in its opinions were made the basis for extension to a wholly different situation. Hence the term "domino theory" to describe this practice. \textit{Id.} at 246. The similarities in fact and purpose between the \textit{Schneckloth} principles and the alien facing deportation circumvent any unwarranted extension of this strict waiver standard.
  \item \textsuperscript{204} Note, \textit{supra} note 3, at 919.
  \item \textsuperscript{205} \textit{Id.} (quoting Wade v. Coiner, 468 F.2d 1059, 1081 (4th Cir. 1972)).
\end{itemize}
to be heard "at a meaningful time and in a meaningful manner." Notice serves to apprise the affected individual of, and permit adequate preparation for, an impending hearing. Adequacy of preparation is a hollow concept, however, if the alien has no recognition of the purpose for the hearing. As the Orantes-Hernandez Court noted, "[E]ven if the alien realizes that a deportation hearing is available, that realization alone does not suggest that there are any grounds for avoiding deportation. The alien whose status is clearly illegal may well believe that nothing is to be gained from a deportation hearing." Notice of the right to apply for asylum renders meaningful the alien's right to a deportation hearing. This promotes fairness and truth-seeking which are the foundational principles behind the knowing and intelligent standard. Notification of the right to petition for asylum is then a procedural device which is accorded protection by flexible due process principles to preserve the alien's right to a meaningful deportation proceeding. The validity of any voluntary departure form should therefore be contingent upon an intentional relinquishment of the right to a deportation hearing and the right to apply for asylum.

b. Voluntary Waiver

Even if the alien need not know of the right to petition for asylum to effectuate a valid waiver, any effective waiver must be voluntary in nature. The inquiry thus becomes whether notice is necessary to assure a voluntary waiver. Voluntariness has not been literally construed to mean a "knowing" choice. "Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all . . . statements . . . are 'voluntary' in the sense of representing a choice of alternatives." Strictly speaking then, any choice between alternatives involves an element of voluntariness, even if it constitutes nothing more than a choice between evils. Recog-

209. See supra notes 156 and 192.
211. Note, supra note 3, at 920.
214. Note, supra note 3, at 920. "When for example threats are used, the situation is one
nizing this linguistic quandry, the Court has wisely fashioned a practical policy of defining "voluntary" as a question of fact to be determined from the totality of circumstances. Factors taken into account in this determination include, inter alia, the defendant's lack of education, low intelligence, and lack of advice as to his constitutional rights.

While the presence of voluntariness must be made on a case by case basis, most aliens share two factors pointing to a presumptive finding of coercion. First, the alien signs the departure form in custody, and custody inherently implies coercion. "As the Court concluded in Miranda v. Arizona, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.'" Schneckloth also recognized the coerciveness of custody when it found the voluntary waiver by the accused of his right against unreasonable search and seizure because the waiver occurred "on [the] person's familiar territory."

Secondly, aliens are often ignorant of American law and not well versed in English. These legal "handicaps" would appear instrumental in encouraging aliens to sign voluntary departure forms, particularly when considered in conjunction with the custodial environment in which the voluntary departure form is executed. Similarly, the alien's lack of education only enhances the already favorable balance enjoyed by the INS. Due to the coerciveness involved in these instances, a remedy in the form of a notice of rights seems necessary. At a minimum, notice of the right to a deporta-

216. Schneckloth, 412 U.S. at 226. The Court noted that "the state of the accused's mind" and the lack of an express notice of rights are important factors to be evaluated in assessing the "voluntariness" of any waiver. Id. at 227.
217. Note, supra note 3, at 920.
218. Id.; see also supra note 100.
221. Note, supra note 3, at 920 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 247 (1972)).
222. Note, supra note 3, at 920.
223. In Orantes-Hernandez, the court noted that "the widespread acceptance of voluntary
tion hearing would appear mandatory as it constitutes the alien's constitutionally protected opportunity to be heard. As noticed earlier, however, notice of the right to a deportation hearing is meaningless without notice of the right to petition for asylum. The same factors of low intelligence, lack of education, and ignorance of American law which guide the "voluntary" waiver determination also mandate notice of the right to apply for asylum to enable the alien to "free[ly] and rational[ly]" decide whether to voluntarily waive his right to a deportation proceeding. Without notice to the alien of these complimentary rights, most "voluntary" waivers would undercut the purpose behind the alien's due process right to notice and an opportunity to be heard by rendering suspect the independent judgment behind the waiver.

It has been argued that blanket notice of the right to petition for asylum would be both burdensome to the INS and less than optimally effective for determining refugee status among aliens. Notice would encourage both the meritorious and frivolous asylum claims thereby increasing INS processing costs due to the necessity of holding more hearings. Ironically, the argument concludes, the INS will have fewer resources to delegate to the meritorious claims thereby "imperil[ing] the identification of non-frivolous claims."


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224. The alien is given such notice as the voluntary departure form states that the signer retains the right to ask for a deportation hearing at any time prior to departure. Id. at 376 n.30. The efficacy of this notice is drawn into question when, as in Orantes-Hernandez, aliens are not given a copy of the form listing this right to a hearing. Id.

225. See supra text accompanying note 209.


227. See Ramirez-Osorio v. INS, 745 F.2d 937, 946 (5th Cir. 1984); Jean v. Nelson, 727 F.2d 957, 983 (11th Cir. 1984); Note, supra note 3, at 921.

228. See supra notes 7 and 142. Prior to the Orantes-Hernandez decision which obligated the INS to give Salvadorans notice of their right to apply for political asylum, Salvadorans elected voluntary departure by a six to one ratio. After the court's ruling, this ratio was nearly reversed. Note, supra note 3, at 923 & n.147.

229. Ramirez-Osorio v. INS, 745 F.2d 937, 946 (5th Cir. 1984); Jean v. Nelson, 727 F.2d 957, 983 (11th Cir. 1984); Note, supra note 3, at 924. These courts and commentators fear that if the number of asylum claims rises significantly, group profiles will replace individual scrutiny as the ultimate determinant for asylum eligibility. The shorthand response to this argument is that group profiles utterly fail to uphold the language and spirit of the asylum provision of the 1980 Refugee Act. See 8 U.S.C. § 1158(a). This proviso contemplates analysis of each applicant's credibility and eligibility on an individual basis. The statute's emphasis upon the singular noun "alien" indicates as much. Reliance on group profiles leads to sweeping generalizations which would thwart Congress' express desire to maintain uniform, nondiscriminatory treatment of all aliens.
This argument finds support in the dissenters’ opinions in *Miranda*.\(^{230}\) In *Miranda*, the Court mandated that the law enforcement officers inform a person of his right to remain silent and his right to an attorney prior to commencement of custodial interrogation.\(^{231}\) The Court felt notice was not only the most effective device to reduce the coercion inherent in custody but also “enhanc[ed] the integrity of the fact-finding processes.”\(^{232}\) Like other rights designed to secure a defendant’s right to a fair trial, these rights must be affirmatively waived. The dissenters, however, were very concerned “over the costs and risks of [the majority’s] experiment.” Moreover, they noted that “[t]here can be little doubt that the Court’s new Code would markedly decrease the number of confessions.”\(^{233}\) Simply put, the dissenters’ argument appears to be that the notice requirement will reduce the number of confessions obtained thereby necessitating more trials with their increased expense. Similarly in the deportation context, aliens who are given notice will forsake the voluntary departure route and press their claims in more costly deportation hearings.

Despite the seeming persuasiveness of the argument, it is without merit. There is reason to believe the number of nonmeritorious claims will actually decrease if fair asylum procedures are implemented.\(^{234}\) Once satisfied that the asylum process is reliable, courts will no longer feel compelled to halt proceedings pending development of adequate procedures.\(^{235}\) Aliens who do not fulfill the requisite burden of proof will be deported.\(^{236}\) “The message to the world will be that the mere filing of an asylum claim is no longer a one-way ticket to the United States.”\(^{237}\)

Even more fundamentally, the underlying premise of the “cost of notice” logic is flawed. Notice is linked by this argument to the government’s chances of “winning.”\(^{238}\) Such linkage is on its face patently unfair. Taken to its logical conclusion, notice would never be required for it would always serve to enlighten the defendant at the expense of the government. Due process under this reading would


\(^{232}\) *Id.* at 466.

\(^{233}\) *Id.* at 516 (Harlan, J. dissenting) and *id.* at 541-42 (White, J. dissenting).

\(^{234}\) Aleinikoff, *supra* note 98, at 256-57.

\(^{235}\) *Id.* at 257.

\(^{236}\) *Id.* at 255, 257.

\(^{237}\) *Id.* at 257.

\(^{238}\) In the criminal context the result would be more confessions whereas in the deportation sphere, more voluntary departure forms would be executed.
become a concept devoid of content with form elevated over substance. Due process principles have never taken into account the government's chances of victory when expanding its procedural protection. Any resulting expense is therefore an unavoidable by-product of the rights to be preserved.

IV. CONCLUSION

United States immigration law has steadily evolved to reflect a heightened awareness of the plight of the refugee. Gone, arguably, are those days when refugee policy was viewed as less an aid to the persecuted than a tool to stem the spread of Communism. Congress expressly rejected linking refugee admission standards to foreign policy objectives when it enacted the 1980 Refugee Act. As the culmination of the liberalization of American immigration policy, this measure codified our international obligation to shoulder a fair burden of the burgeoning refugee problem. Now, all asylum claims are to be handled in a uniform nondiscriminatory manner. More importantly, the Act reaffirmed the nation's immigrant heritage which so many Americans had come to fear. In this respect, the legislation bolstered the very principles and moral precepts upon which this country was founded.

Despite Congress' efforts, the courts have been slow to recognize the increased rights of aliens. Specifically, no circuit court has found a congressionally or constitutionally based obligation to give aliens notice of their right to apply for asylum. Concern for the public fisc underscores the courts' reluctance to accord aliens this procedural protection. Deference has been extended to current INS notification procedures which avoid providing blanket notice to aliens but not to decline to give any notice at all. This practice has woven an asylum safety net where often only the informed assert their rights.

239. The Mathews framework for determining the dictates of procedural due process does not remotely weigh the government's likelihood of winning into the balance. See supra note 140 and accompanying text.

240. See supra notes 164-69 and accompanying text which indicate that any substantial expense emanating from a notice obligation lies not in the notice itself, but the procedures designed to accord the alien a hearing.


243. Note, supra note 57, at 496.

244. Ramirez-Osorio v. INS, 745 F.2d 937, 944 (5th Cir. 1984).
The express Congressional desire to treat all refugees evenhandedly is thus undermined.

Reliance upon present INS procedure also flouts due process principles. The cost of providing notice does not outweigh the alien’s interest in nonrefoulement. Any appreciable increase in expense results from the consequences of notice, namely, the hearing to be accorded the alien. Congress may, however, modify the deportation proceeding in any manner that comports with due process. This provides a significant check on any fiscal or administrative burden that may result from a notice requirement.

Refugees will continue to migrate to our shores in the hopes of attaining asylum. Our historical pledge to aid the persecuted welcomes this call of the needy. Undoubtedly, some unworthy refugees will seek to take advantage of this beneficence. Nonetheless, a notice mandate would not provide asylum to any unworthy applicants. Rather, legitimate claimants would be given an opportunity to present their fears in an asylum proceeding. The Refugee Act and due process demand as much. To provide less opportunity amounts to a “sacrilege” of those principles upon which the Constitution was founded.245

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