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A “Brutal Need”:  
How the Application of Expedited Removal to Potential  
Refugees Violates the Fifth Amendment

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A “BRUTAL NEED”:  
HOW THE APPLICATION OF EXPEDITED REMOVAL TO POTENTIAL REFUGEES  
VIOLATES THE FIFTH AMENDMENT

*The few times in our history when we have turned our back on people who are persecuted . . .  
we have lived to regret it.*<sup>1</sup>

INTRODUCTION

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),<sup>2</sup> which amended the Immigration and Nationality Act (INA)<sup>3</sup> to mandate the summary deportation of certain classes of excludable noncitizens pursuant to a process called “expedited removal.”<sup>4</sup> This provision, allowing immigration officers to issue nonreviewable deportation orders, represented an abrupt departure from previously existing procedures, which required immigration judge review when immigration officials subjected any arriving alien to removal procedures – including, and most important in, cases where the arriving noncitizen indicated an intent to apply for asylum or a fear of persecution if returned to his or her country of origin.<sup>5</sup> Somewhat surprisingly, although agencies have employed expedited removal for seven years now, the Supreme Court has not addressed the constitutionality of these procedures as applied to arriving noncitizens seeking to establish refugee status and substantiate claims for

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<sup>1</sup> Senator Mike DeWine (R-OH), May 1, 1996, *quoted in* HUMAN RIGHTS FIRST, IS THIS AMERICA? THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN THE UNITED STATES (2000), *at* [http://www.humanrightsfirst.org/refugees/reports/due\\_process/due\\_process.htm](http://www.humanrightsfirst.org/refugees/reports/due_process/due_process.htm) (last visited Mar. 14, 2005).

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<sup>2</sup> Pub L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48, and 50 U.S.C.).

<sup>3</sup> Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in various sections of 8 U.S.C.).

<sup>4</sup> See Immigration and Nationality Act (INA) § 235(b), 8 U.S.C. § 1225(b) (2004). For useful summaries of IIRIRA’s expedited removal provisions, see generally Paul S. Jones, Note and Comment, *Immigration Reform: Congress Expedites Illegal Alien Removal and Eliminates Judicial Review from the Exclusion Process*, NOVA L. REV. 915, 919-25 (1997); Robert Pauw, *Plenary Power: An Outmoded Doctrine that Should Not Limit IIRIRA Reform*, 51 EMORY L.J. 1095, 1097-07 (2002); Ellen G. Yost, *Entry Issues*, in 30<sup>TH</sup> ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 359, 369-73 (Practising Law Institute Corporate Law and Practice Course Handbook Series No. B4-7200, 1997).

<sup>5</sup> See *Am. Immigr. Lawyers Ass’n (AILA) v. Reno*, 199 F.3d 1352, 1354-55 (D.C. Cir. 2000) (comparing pre- and post-IIRIRA procedures).

asylum pursuant to Section 208 of the INA.<sup>6</sup> This somewhat disturbing lack of review is likely attributable to the sharp limitations IIRIRA places on the scope and timing of judicial review.<sup>7</sup>

This Paper asserts that the application of expedited removal procedures to a noncitizen who indicates a fear of persecution in his or her country of origin violates the Due Process Clause, notwithstanding administrative concerns unique to the field of immigration. Part I explores the consequences and logistics of applying expedited removal procedures to potential refugees. Part II examines due process precedent and analysis, in both the immigration and non-immigration contexts. Part III considers whether expedited removal's credible fear interview provides a "fair hearing" before a potential refugee loses the precious right to apply for and substantiate her claim for asylum, concluding that it does not. The Paper finishes with a brief Conclusion.

## I. THE INS AND OUTS OF EXPEDITED REMOVAL

To adequately appreciate the considerable impact expedited removal procedures have upon arriving noncitizens who seek to establish refugee status, it is important to understand what legal rights are at stake when agency officials make initial determinations during expedited removal, how the procedures operate in practice, and what real-life consequences a potential refugee may face if forced to return to her country of origin without further opportunity to substantiate a claim for asylum. This Part considers each of these elements to prepare for the discussion of relevant due process standards in Part II.

### A. The Legal Significance of Refugee Status

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<sup>6</sup> INA Section 208 is the general asylum provision, which incorporates by reference the expedited removal "credible fear" procedures. See INA § 208(a)(1), 8 U.S.C. § 1158(a)(1).

<sup>7</sup> See, e.g., *AILA v. Reno*, 199 F.3d at 1358-60, 1364 (dismissing suit immigration lawyers brought on behalf of noncitizen-clients subject to expedited removal procedures, finding that, by passing IIRIRA, Congress intended to allow only a limited class of suits brought by aliens themselves).

In keeping with well-established and widely respected international legal norms,<sup>8</sup> the INA defines a “refugee” as a person who is outside the country of his or her nationality or last habitual residence and who is unable or unwilling to seek the protection of or return to that country due to “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>9</sup> Individuals in this category are eligible to receive asylum via a discretionary grant by the Attorney General,<sup>10</sup> which carries with it guarantees not to be returned to one’s country of origin and to work in the United States, as well as the privilege to travel with prior approval.<sup>11</sup>

Whereas the Attorney General’s power to grant asylum is discretionary, INA Section 241(b)(3) codifies the principle of *nonrefoulement*, whereby a sovereign may not return (*refouler*) any alien – refugee or not – to a country where his or her life or freedom would be threatened.<sup>12</sup> Accordingly, some refugees who ultimately fail to obtain the Attorney General’s discretionary stamp of approval for asylum may possess a statutory right not to be returned to their countries of origin. As such, these refugees would be eligible for withholding of deportation as an alternative to asylee status. Moreover, if the Attorney General denies asylum

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<sup>8</sup> See, e.g., Convention relating to the Status of Refugees, July 28, 1951, art.1 § A, ¶ 2, 189 U.N.T.S. 137 (defining refugee as a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it”).

<sup>9</sup> See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2004).

<sup>10</sup> See INA § 208(b)(1), 8 U.S.C. § 1158(b)(1).

<sup>11</sup> See INA § 208(c)(1), 8 U.S.C. § 1158(c)(1).

<sup>12</sup> See INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). Importantly, to apply for asylum, a noncitizen must simply establish his or her status as a refugee, including a reasonable fear of persecution. By contrast, a noncitizen who seeks mandatory withholding of deportation must meet an objective standard, i.e., that his or her life or freedom more likely than not would be threatened if returned to the country of origin. See *INS v. Stevic*, 467 U.S. 407, 430 (1984) (holding that alien must establish “clear probability of persecution” to warrant withholding of deportation).

solely as a matter of discretion and the noncitizen subsequently receives withholding of removal status, the Attorney General will reconsider his or her initial decision to deny asylum.<sup>13</sup>

The Refugee Act of 1980 established a statutory right to apply for asylum in the United States pursuant to set procedures.<sup>14</sup> This complies with international legal norms.<sup>15</sup> It is imperative to distinguish between the right *to apply for* asylum and the right *to obtain* asylum. The right created by the Refugee Act is the right to seek a privileged status at the discretion of the United States, as exercised by the Attorney General, pursuant to a uniform procedure.<sup>16</sup> Legislative history makes clear that the Refugee Act was intended “to provide a *permanent and systematic* procedure for the admission to [the United States] of refugees of special humanitarian concern to the United States.”<sup>17</sup> Thus, far from representing an unfixed privilege, wholly committed to the discretion of the Executive, the right to apply for asylum is an entitlement firmly and intentionally entrenched by a federal statute designed to give effect to the United States’ obligations under international human rights and humanitarian law.<sup>18</sup>

#### B. Knocking on the Golden Door:<sup>19</sup> Expedited Removal in Practice

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<sup>13</sup> See 8 C.F.R. §§ 208.16(e), 1208.16(e).

<sup>14</sup> See INA § 208(a), 8 U.S.C. § 1158(a).

<sup>15</sup> See Universal Declaration of Human Rights art. 14(1), G.A. Res. 217A, U.N. GAOR, 3<sup>rd</sup> Sess., Part I, at 71, U.N. Doc. A/810 (1948) (pronouncing that an individual “has the right *to seek* and enjoy asylum from persecution”) (emphasis added). Although a strong argument may be made in favor of the proposition that international law recognizes a right to seek asylum, it remains difficult to reconcile an individual right to seek “and enjoy” asylum with the sovereign right to grant – or not grant – asylum. In other words, international law cannot *require* a sovereign to grant asylum to even the most destitute refugee. See Davor Sopf, *Temporary Protection in Europe after 1990: The “Right to Remain” of Genuine Convention Refugees*, 6 WASH. U. J. L. & POL’Y 109, 132-33 (2001) (“While there is a right to apply for asylum, no state is required to grant it.”).

<sup>16</sup> See INA § 208(a)(1), 8 U.S.C. § 1158(a) (providing for asylum applications “in accordance with [that] section or, where applicable, [expedited removal]”).

<sup>17</sup> S. REP. NO. 96-256, at 141 (1980) (emphasis added).

<sup>18</sup> See *infra* Part III. This is an important proposition, because only life, liberty and property interests based in federal or state substantive law can give rise to due process claims. That is, the government must only afford baseline procedural protections when it seeks to substantially alter or take away a right previously protected by a provision of positive law. See II KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.4 (3d ed. 1994).

<sup>19</sup> This common reference to the U.S. port of entry as a “golden door” comes from Emma Lazarus’ evocative poem *The New Colossus*, which also provides the oft-quoted “huddled masses” imagery. See Emma Lazarus, *The New Colossus*, in EMMA LAZARUS: SELECTIONS FROM HER POETRY AND PROSE 40 (Morris U. Schappes ed., 1944).

## 1. *Applicable Provisions*

The general expedited removal provision appears at INA Section 235. It provides:

If an immigration officer determines that an alien arriving in the United States . . . is inadmissible [due to lack of proper documentation, possession of fraudulent documentation, or making fraudulent misrepresentations to a U.S. immigration officer] . . . the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution.<sup>20</sup>

Thus, through this provision, Congress has commanded that immigration officials must deny admission to and immediately remove *all* aliens excludable due to lack of documentation or fraudulent paperwork without further review, judicial or otherwise.<sup>21</sup>

As a result, once an immigration officer determines that an arriving noncitizen is inadmissible pursuant to INA Section 212(a)(6)(C) or Section 212(a)(7),<sup>22</sup> the only way a noncitizen may escape expedited removal is to express an intention to apply for asylum or a fear of persecution in the country of his or her nationality or last habitual residence.<sup>23</sup> This exception to the otherwise immediate, automatic, and sweeping application of expedited removal indicates Congress' recognition that more is at stake – and, thus, more process is due – when an undocumented noncitizen fears persecution in his or her home country.

## 2. *Step-by-Step*

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<sup>20</sup> INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i).

<sup>21</sup> Notably, Congress' mandate that an immigration officer "shall order" removed all aliens excludable under INA §§ 212(a)(6)(C) and 212(a)(7) is an unqualified one, removing any element of discretion from an immigration officer's decision to order expedited removal. *See* INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i). As mentioned above, this move to summary determinations and mandatory removal marks an abrupt departure from previous admission procedures. *See supra* note 5.

<sup>22</sup> These sections provide that arriving aliens who lack necessary documentation (INA § 212(a)(7)) and those who present fraudulent documentation (INA § 212(a)(6)(C)) are inadmissible.

<sup>23</sup> *See* INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A).

When an undocumented<sup>24</sup> noncitizen seeks admission into the United States,<sup>25</sup> the expedited removal process begins.<sup>26</sup> Initially, the arriving refugee will be directed to an immigration officer or customs inspector for primary inspection. During that inspection, the examining officer will review the noncitizen's documentation.<sup>27</sup> An undocumented noncitizen will be ushered on to the next step in the process, secondary inspection, for a "more thorough inquiry" into the noncitizen's travel documents or lack thereof.<sup>28</sup> During secondary inspection, if the noncitizen "indicates an intention to apply for asylum, or expresses a fear of persecution, a fear of torture, or a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the [noncitizen] . . . ."<sup>29</sup> Instead, the secondary inspector must refer such a noncitizen to an asylum officer for a "credible fear" interview<sup>30</sup> and provide him or her with Form M-444, Information about Credible Fear Interview in Expedited Removal Cases.<sup>31</sup> Before undergoing a credible fear interview, a noncitizen has the right to consult with any person(s) of his or her choosing.<sup>32</sup>

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<sup>24</sup> For ease of reading and analysis, this section will use the term "undocumented" to describe both potential refugees who arrive without any documentation and those who attempt to gain admission using fraudulent documents.

<sup>25</sup> To this point, agency officials have employed expedited removal procedures only at official ports of entry. However, DHS has recently announced its intent to expand the use of expedited removal to points within 100 miles of a U.S. land border. *See* 69 Fed. Reg. 48,877-01 (Aug. 11, 2004); *see also* Dep't of Homeland Security, Press Release, *DHS Announces Expanded Border Control Plans* (Aug. 10, 2004), at <http://www.dhs.gov/dhspublic/display?content=3930> (last visited Dec. 9, 2004).

<sup>26</sup> *See* INA § 235(b)(1), 8 U.S.C. § 1225(b)(1).

<sup>27</sup> *See* Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10,312, 10,318 (Mar. 6, 1997) (to be codified at scattered parts of 8 C.F.R.).

<sup>28</sup> *See id.*

<sup>29</sup> 8 C.F.R. § 235.3(b)(4).

<sup>30</sup> *See* INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii).

<sup>31</sup> *See* 8 C.F.R. § 235.3(b)(4)(i) (requiring that Form M-444 describe the credible fear interview process, the right to consult with other persons prior to the interview and subsequent review proceedings, the right to request appeal of an adverse determination, and the consequences of failing to establish a credible fear). The presentation of Form M-444 seeks to meet the statutory requirement that the Attorney General "provide information concerning the asylum interview . . . to aliens who may be eligible." *See* INA § 235(b)(1)(B)(iv), 8 U.S.C. § 1225(b)(1)(B)(iv). The form is available, in written and video formats, in 13 languages. *See* Gabrielle M. Buckley, *Immigration and Nationality*, at [http://www.abanet.org/intlaw/divisions/public/immigration\\_article1.html](http://www.abanet.org/intlaw/divisions/public/immigration_article1.html) (last visited Oct. 23, 2004).

<sup>32</sup> *See* 8 C.F.R. § 208.30(d)(4). However, this right to consult others, including an attorney, is largely illusory when considered in the context of the expedited removal process. Regulations governing expedited removal do not specifically require immigration officials to provide a list of pro bono attorneys to arriving noncitizens seeking to

During the credible fear interview, the asylum officer will determine whether the potential refugee has a credible fear of persecution in his or her home country.<sup>33</sup> In making such a determination, the INA requires an asylum officer to determine whether “there is a significant possibility, taking into account the credibility of the statements made by the alien . . . and such other facts as are known to the officer, *that the alien could establish eligibility for asylum.*”<sup>34</sup> In other words, an asylum officer conducting a credible fear interview essentially evaluates the likelihood that the potential refugee’s claim for asylum or withholding of removal will ultimately succeed, based upon only the noncitizen’s own statements and other (indeterminate) facts known to the asylum officer at the time of the credible fear interview.<sup>35</sup>

If the examining asylum officer finds that the noncitizen has a credible fear of persecution, the potential refugee will enter detention pending further consideration of his or her asylum claim.<sup>36</sup> However, if the asylum officer concludes that the noncitizen’s fear of persecution is not credible, “the officer shall order the [noncitizen] removed from the United

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establish a credible fear of persecution. *See* 8 C.F.R. § 235(d)(4). The provision that requires the Chief Immigration Judge to provide a current listing of pro bono lawyers applies generally to “aliens in immigration proceedings,” but it is unclear – and somewhat doubtful – that inadmissible aliens receive such a list before the credible fear interview. *See* 8 C.F.R. § 1003.61(a). In any case, it is difficult to imagine how a potential refugee who arrives without proper documentation can contact and secure representation within the first few hours after arriving and being detained by immigration officials. *See infra* Part III.

<sup>33</sup> *See* INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii); *see also* INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (“Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien’s status may apply for asylum . . .”). Section 208(a)(1), which incorporates by reference the corresponding Section 235 provisions, codifies the Refugee Act of 1980 and, as discussed below, arguably creates a statutory entitlement to seek asylum in the United States. *See infra* Part III.

<sup>34</sup> INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added).

<sup>35</sup> One may argue that the credible fear benchmark is a lower standard than the “well-founded fear” required to receive asylum. This may be true, comparing the subjective credible fear determination with the subjective-objective well-founded fear standard. But according to the regulations, an examining officer does not evaluate whether he or she believes the noncitizen actually possesses a genuine fear of being persecuted. Rather, according to the regulatory language, the officer must evaluate whether an immigration judge will ultimately grant the noncitizen’s claim for asylum. *See id.* In other words, the immigration official assesses the legal merit of the potential asylee’s claim.

<sup>36</sup> *See* INA § 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii).

States . . . .”<sup>37</sup> The INA requires the Attorney General to provide for the review of an unfavorable credible fear determination by an immigration judge.<sup>38</sup>

Under the regulations, a potential refugee who has suffered an adverse credible fear determination has the “opportunity . . . to be heard and questioned by [an] immigration judge, either in person or by telephonic or video connection.”<sup>39</sup> Before the review proceeding, the potential refugee has the right to consult with a person or persons of his or her choosing.<sup>40</sup> If practicable, review by an immigration judge will take place within 24 hours of the initial credible fear interview. In all cases, it must occur within seven days of the original determination.<sup>41</sup> In the course of such a proceeding the immigration judge will consider the record created by the asylum officer during the credible fear interview,<sup>42</sup> in addition to statements made by the potential refugee and his/her representative during the review proceeding itself.<sup>43</sup>

If the immigration judge concurs with the asylum officer’s conclusion that the potential refugee lacks a credible fear of persecution or torture, the noncitizen will be “returned to [DHS] for removal.”<sup>44</sup> The noncitizen may not appeal this decision further, either to the Board of Immigration Appeals or to a federal court.<sup>45</sup> However, if the immigration judge finds that the potential refugee has a credible fear of persecution or torture, the immigration judge will vacate

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<sup>37</sup> INA § 235(b)(1)(B)(iii)(I), 8 U.S.C. § 1225(b)(1)(B)(iii)(I).

<sup>38</sup> INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § (b)(1)(B)(iii)(III).

<sup>39</sup> *Id.*

<sup>40</sup> *See* 8 C.F.R. §§ 208.30(d)(4), 1208.30(d)(4).

<sup>41</sup> INA § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

<sup>42</sup> 8 C.F.R. § 208.30(g)(2)(ii) requires that the negative credible fear determination (Form I-863), the asylum officer’s notes, a summary of the material facts, and “other materials upon which the determination was based” be provided to the reviewing immigration judge. *See also* 8 C.F.R. § 1208.30(g)(2)(ii).

<sup>43</sup> *See id.*

<sup>44</sup> 8 C.F.R. §§ 208.30(g)(2)(iv)(A), 1208.30(g)(2)(iv)(A).

<sup>45</sup> *See id.* (“The immigration judge’s decision is final and cannot be appealed.”).

the asylum officer's removal order. The noncitizen may then file an application for asylum and withholding of removal.<sup>46</sup>

One important aspect of the foregoing discussion warrants particular emphasis: The point at which a potential refugee stands to suffer a constitutionally significant deprivation is when immigration officials determine the credibility of his or her fear of persecution. The outcome of that determination dictates whether the noncitizen who has expressed a fear of persecution may realize his or her statutorily guaranteed right to seek asylum.<sup>47</sup> Thus, the relevant proceedings for the purpose of the following due process analysis are those in which asylum officers and immigration judges assess the credibility of a potential refugee's fear or persecution, *i.e.*, the credible fear interview and subsequent immigration judge review hearing.

### C. What if? A Case Study in Expedited Removal

This Section applies the foregoing procedures and standards to the case of an actual refugee to demonstrate the potential for these procedures to cause serious, irreversible harm and injustice to asylum seekers subject to expedited removal. Although Fauziya Kasinga ultimately received asylum in the United States,<sup>48</sup> if she had arrived after the enactment of IIRIRA, immigration officials would likely have issued a nonreviewable removal order in her case.

Kasinga, a 19 year-old Togolese national, arrived at Newark International Airport on December 17, 1994.<sup>49</sup> Although she had obtained fraudulent documentation en route to the

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<sup>46</sup> See *id.* §§ 208.30(g)(2)(iv)(B), 1208.30(g)(2)(iv)(B).

<sup>47</sup> INA Section 208(a)(1), which codifies the Refugee Act of 1980, grants the right to apply for asylum to "any alien who is physically present in the United States or arrives in the United States." See also 8 U.S.C. § 1158(a)(1). Thus, because an adverse determination resulting from the credible fear interview (and/or subsequent immigration judge review) precludes a potential refugee's ability to file an asylum application altogether, the credible fear proceedings are subject to Fifth Amendment constraints. See generally Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 311-13 (2001) (discussing the Refugee Act's impact on constitutional analysis relating to the many "classes" of aliens subject to the jurisdiction of the United States).

<sup>48</sup> See *In re Kasinga*, 21 I. & N. Dec. 357, 368 (B.I.A. June 13, 1996).

<sup>49</sup> See *id.* at 359.

United States, she did not attempt to use it to gain entry. Instead, she presented no visa documentation and immediately requested asylum upon her arrival.<sup>50</sup> Thus, if expedited removal had been in practice in 1994, Kasinga would have fallen into the category of arriving noncitizens subject to its procedures.<sup>51</sup> Accordingly, when she expressed her fear of being returned to Togo, she would have been referred to an asylum officer for a credible fear interview.

Kasinga's fear of returning to Togo stemmed from her desire to avoid undergoing female genital mutilation ("FGM").<sup>52</sup> Until she fled Togo, Kasinga had escaped the practice due to her influential father's ability to shield her from it.<sup>53</sup> However, when her father died in 1993, the "primary authority figure" in Kasinga's life became her paternal aunt, who swiftly arranged for Kasinga, then 17, to marry a 45 year-old man who already had three wives.<sup>54</sup> Before the marriage was consummated, Kasinga's aunt and husband planned to force her to undergo FGM.<sup>55</sup> It was at this point, fearing imminent physical pain, mutilation, and continual bodily harm caused by disease and psychological trauma,<sup>56</sup> that Kasinga fled her homeland to seek asylum.<sup>57</sup>

In expedited removal, the standard an asylum officer – and subsequently, an immigration judge – would apply to evaluate the "credibility" of Kasinga's fear is not whether her fear was

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<sup>50</sup> *See id.*

<sup>51</sup> *See* INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i).

<sup>52</sup> *See id.* at 358.

<sup>53</sup> *See id.*

<sup>54</sup> *See Kasinga*, 21 I. & N. Dec. at 358.

<sup>55</sup> *See id.*

<sup>56</sup> *See id.* at 361. In deciding Kasinga's case, the BIA made several findings of fact concerning the precise nature of the FGM practiced by Kasinga's tribe in Togo. On the basis of Kasinga's testimony, the Board found that FGM in Togo "is of an extreme nature causing permanent damage, and not just a minor form of genital ritual." *See id.* The Board also considered expert affidavits Kasinga presented in support of her asylum application and informational circulars from the INS Resource Information Center to determine the precise nature of the physical and psychological damage FGM may cause. *See id.* This quality of evidence is not available to immigration officers conducting credible fear interviews in the expedited removal context.

<sup>57</sup> *See Kasinga*, 21 I. & N. at 358-59.

genuine or believable, consistent with the commonly understood meaning of “credible.”<sup>58</sup> Instead, pursuant to federal regulation, these agency officials must assess the likelihood that Kasinga’s claim for asylum would ultimately succeed.<sup>59</sup> When Kasinga came to the United States, however, FGM had yet to be identified as persecution, and asylum decisions had yet to recognize the social group to which Kasinga belonged.<sup>60</sup> More important, the BIA was only able to fairly evaluate the strength of Kasinga’s claim on the basis of more than a year’s worth of attorney-assisted evidence-gathering and submission.<sup>61</sup> It is unlikely that Kasinga arrived into Newark, having fled her homeland, with sufficient evidence to support the recognition of a new ground for establishing persecution and the identification of a previously unrecognized social group.

The Board’s decision in *Kasinga* was, and continues to be, controversial, because it seems to open the proverbial floodgates to millions of women who face “persecution” in patriarchal social structures across the globe.<sup>62</sup> Indeed, to counter this problem, the Board took great pains to carefully limit its definition of the persecuted social group to which Kasinga belonged.<sup>63</sup> Moreover, Kasinga feared “persecution” in Togo at the hands of members of her family and tribe, rather than at the hands of government or quasi-government actors, and many have criticized this aspect of the Board’s decision. Notwithstanding these departures from existing law, the Board granted Kasinga’s petition for asylum. However, if she had gone into expedited removal proceedings upon arriving at Newark Airport, a fair assessment of then-

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<sup>58</sup> See *supra* note 35 and accompanying text.

<sup>59</sup> See *id.*

<sup>60</sup> To meet the statutory definition of refugee, a petitioner must establish that he or she belongs to a “particular social group” and faces persecution on that basis. See INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

<sup>61</sup> See *Kasinga*, 21 I. & N. Dec. at 360-61.

<sup>62</sup> See Erin M. O’Callaghan, Note, *Expedited Removal and Discrimination in the Asylum Process: The Use of Humanitarian Aid as a Political Tool*, 43 WM. & MARY L. REV. 1747, 1755 n.55 (2002) (acknowledging floodgates argument and citing BIA decisions).

<sup>63</sup> See *Kasinga*, 21 I. & N. Dec. at 368; see also *id.* at 369-70 (Filippu, Bd. Member, concurring) (discussing parties’ definitions of the relevant social group).

existing standards would *not* reveal a “significant possibility. . . that [Kasinga] could establish eligibility for asylum.”<sup>64</sup> As a result, an immigration judge likely would have issued a final, nonreviewable removal order in Kasinga’s case, and the United States would have returned her to Togo to suffer imminent genital mutilation.<sup>65</sup>

## II. DUE PROCESS AND THE POTENTIAL REFUGEE

The Due Process Clause of the Fifth Amendment provides: “No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”<sup>66</sup> This seemingly straightforward provision has given rise to an immensely complex body of constitutional jurisprudence, particularly concerning the constraints it places on agencies’ decisionmaking processes. Courts have painstakingly avoided recognizing due process rights for unadmitted noncitizens, preserving the almost total independence the political branches enjoy in deciding whether to admit or exclude noncitizens.<sup>67</sup> Thus, although the Supreme Court has firmly established that the Due Process Clause requires agency decisionmakers to provide certain baseline procedural protections when an agency decision will result in a constitutionally significant deprivation (life, liberty, or property),<sup>68</sup> such protections have largely remained unavailable to noncitizens seeking admission to the United States, including potential refugees.

Accordingly, this Part examines the two lines of due process doctrine that have evolved – the one applied to citizens and the one applied to noncitizens – paying special attention to the considerations driving the constitutional analysis in each. These principles are important to the

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<sup>64</sup> INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v).

<sup>65</sup> Indeed, such was the fate of an Albanian woman who sought asylum in the United States after being gang-raped in retaliation for her husband’s refusal to fight for the government. *See* Celia W. Dugger, *In New Deportation Process, No Time, or Room, for Error*, N.Y. TIMES, Sept. 20, 1997, at A1. For a survey of several compelling—and disturbing—accounts of potential refugees who have been summarily deported pursuant to expedited removal procedures, see generally HUMAN RIGHTS FIRST, *supra* note 1.

<sup>66</sup> U.S. CONST. amend. V.

<sup>67</sup> *See, e.g.,* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (“[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.”).

<sup>68</sup> *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

analysis in Part III below, which contends that the Due Process Clause requires potential refugees to receive more process than the credible fear interview currently provides.

A. Due Process for Unadmitted Noncitizens

1. *No Rights at All?*<sup>69</sup> *Excludable Aliens in the Supreme Court*

Courts, including the Supreme Court, have been reluctant to recognize that unadmitted noncitizens hold rights guaranteed by the Constitution.<sup>70</sup> The Court has reasoned that noncitizens seeking admission are seeking a privilege to enter the United States, rather than exercising some vested right of entry.<sup>71</sup> According to this analysis, whereas an unadmitted noncitizen possesses no right of entry, the sovereign, whose power lies with the political branches of government, has the right to admit *or exclude* aliens.<sup>72</sup> Thus, where a noncitizen seeks entry into the territory of the United States, the situation becomes that of a non-rights-holding entity (the noncitizen) coming up against a rights-holding entity (the government). As a result, it is not surprising—particularly in light of the extreme deference courts routinely give to immigration decisions by the political branches<sup>73</sup>—that when a controversy is characterized in such a manner, the sovereign prevails.

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<sup>69</sup> The title of this section comes from Justice Jackson’s dissent in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 226 (1953). To underscore the unreasonableness of the majority’s assertion that the Executive’s power to exclude lies entirely beyond constitutional constraints, Justice Jackson asserted that “to eject [an alien] bodily into the sea or to set him adrift in a rowboat” would likely be condemned by the judiciary “as a deprivation of life without due process of law[.]” although it undoubtedly effectuates the sovereign’s power to exclude. *See id.* at 226-27.

<sup>70</sup> *See Coffey, supra* note 48, at 304 (noting the “significant reluctance of the courts and the Congress to displace executive responsibility”); *see also, e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (declaring that “it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien”) (internal citation omitted).

<sup>71</sup> *See Knauff*, 338 U.S. at 544 (“We reiterate that we are dealing here with a matter of *privilege*. Petitioner had no vested *right* of entry . . . .”) (emphasis in original).

<sup>72</sup> *See id.*

<sup>73</sup> *See id.* at 542 (remarking that the right to exclude aliens “is inherent in the executive power to control the foreign affairs of the nation”).

For example, in *United States ex rel. Knauff v. Shaughnessy*, Ms. Knauff was a German citizen who had fled Germany as a refugee.<sup>74</sup> During World War II, Ms. Knauff worked for the U.S. War Department and married a U.S. citizen.<sup>75</sup> Subsequently, she sought to enter the United States to join her husband.<sup>76</sup> However, she was excluded without a hearing when the Attorney General determined that “her admission would be prejudicial to the interests of the United States.”<sup>77</sup> To challenge her removal without a hearing, Ms. Knauff filed a writ of *habeas corpus* in the Southern District of New York. The District Court dismissed her case, and the Second Circuit affirmed.<sup>78</sup> The Supreme Court granted certiorari and held that the admission of aliens to the United States is a privilege granted by the sovereign. As such, it “must be exercised in accordance with the procedure which the United States provides. The Court proclaimed that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”<sup>79</sup>

*Knauff* highlights the ultimate status distinction among noncitizens, *i.e.*, between so-called removables and excludables. That is, many of the decisions denying due process rights to noncitizens strictly differentiate between noncitizens who have entered – or, under current law, have been admitted to – the United States and those who seek admission at the border or an

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<sup>74</sup> *Knauff*, 338 U.S. at 539.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 540.

<sup>78</sup> *Id.*

<sup>79</sup> *Knauff*, 338 U.S. at 544. The Court has repeated this declaration in subsequent modern cases. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001); *Jean v. Nelson*, 472 U.S. 846, 870 (1985). It borders on disingenuous to say that government institutions (*i.e.*, Congress and the Executive) created by the Constitution, which hold only such limited powers as that Constitution affords, can ever determine the content of what that “constituting” document requires. *See infra* Part III; *see also* *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1037 (5th Cir. 1982) (remarking that “the executive is subject to the constraints of due process in implementing and enforcing congressional immigration policy”). *See generally* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (considering how the proposition that Congress has unlimited power to establish, and therefore limit, the jurisdiction of federal courts may be squared with the basic principles of constitutional government).

official port of entry.<sup>80</sup> Very recently, in *Zadvydas v. Davis*, the Court articulated the underlying basis for this distinction: “Removable and excludable aliens are situated differently before an order of removal is entered; the removable alien, by virtue of his continued presence here, possesses an interest in remaining, while the excludable alien seeks only the privilege of entry.”<sup>81</sup> Again relying on a distinction between the “rights”<sup>82</sup> admitted noncitizens hold and the “privilege” unadmitted noncitizens seek, the Court has thus identified the admitted noncitizen as the holder of constitutionally protected interests, which the government cannot take away without affording the minimum procedural protections the Fifth Amendment requires.<sup>83</sup>

## 2. A “Right to Asylum” in the Circuit Courts

Several circuit court decisions<sup>84</sup> have distinguished between refugees wishing to seek asylum and other excludable noncitizens seeking the “privilege” of admission to the United States.<sup>85</sup> To arrive at this distinction, the courts have reasoned that, like admitted noncitizens, potential asylees have a constitutionally protected interest – *i.e.*, in petitioning the government

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<sup>80</sup> This mode of analysis relies on the “entry fiction.” According to this doctrine, a noncitizen who has not been legally admitted to the United States remains “outside of” U.S. territory. Therefore, the Constitution does not protect such a noncitizen, despite the fact that U.S. officials (agents of the sovereign) determine his or her rights while standing on U.S. soil in Queens, New York (JFK International Airport) or Los Angeles, California (LAX). For a useful overview of the historical development and current status of entry fiction doctrine, see generally Allison Wexler, *The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-Zadvydas*, 25 CARDOZO L. REV. 2029 (2004).

<sup>81</sup> *Zadvydas*, 533 U.S. at 721.

<sup>82</sup> The term “rights” is appropriate here, given the Court’s recognition that the liberty and property interests that deportation implicates for admitted noncitizens are justiciable ones. That is, the admitted noncitizen may assert a cause of action based upon the deprivation of these interests without proper procedural protections. *See id.* at 721.

<sup>83</sup> *See also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (proclaiming that the Fifth Amendment protects “every one” of the “millions of aliens within the jurisdiction of the United States”). Notably, in *Diaz*, the Court used the term “within the jurisdiction of,” rather than “admitted to,” the United States. Citing this language, a solid argument may be made that the Due Process Clause applies to aliens arriving at ports of entry on U.S. soil, subject to the authority of duly authorized agents of the United States, and therefore “within the jurisdiction of” the United States. *But see supra* note 80 and accompanying text.

<sup>84</sup> The Supreme Court has not yet squarely addressed this issue of whether and how the due process rights of refugees differ from those of other “excludable aliens.” *See Coffey, supra* note 48, at 314.

<sup>85</sup> *See generally id.* at 315-24 (detailing the current split among federal courts of appeals as to whether due process protections apply to potential asylees).

for a discretionary grant of asylum – that cannot be denied absent constitutionally adequate procedural safeguards.

For instance, in *Haitian Refugee Center v. Smith*, the Fifth Circuit considered due process claims asserted by allegedly excludable noncitizens who had illegally entered Florida intending to apply for asylum.<sup>86</sup> The circuit court reiterated the general rule that due process protects even those whose “presence in [the United States] is unlawful, involuntary, or transitory” from the arbitrary deprivation of life, liberty, or property.<sup>87</sup> However, the court warned, this right to procedural due process is “not itself an independent right.”<sup>88</sup> Rather, it comes into play only when the government seeks to deprive a person of a cognizable right to life, liberty, or property.<sup>89</sup> Accordingly, the Fifth Circuit found that federal regulations establishing asylum application procedures, considered in light of the United States’ commitment to “resolution of the refugee problem,” created a substantive entitlement held by potential refugees to petition the government for asylum.<sup>90</sup> Consequently, the procedures the government afforded the petitioning refugees to substantiate their asylum claims must be measured according to established due process doctrine.<sup>91</sup>

A few aspects of the *Haitian Refugee Center* decision warrant particular emphasis. First, the Fifth Circuit found a substantive entitlement triggering due process protections before Congress enacted the Refugee Act.<sup>92</sup> That is, even absent a positive legislative enactment, the court decided that existing federal law created a substantive entitlement to apply for asylum in

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<sup>86</sup> 676 F.2d 1023 (5th Cir. 1982).

<sup>87</sup> *See id.* at 1036 (citing *Mathews v. Diaz*, 426 U.S. at 77).

<sup>88</sup> *Id.* at 1037.

<sup>89</sup> *Id.*

<sup>90</sup> *See id.* at 1036.

<sup>91</sup> *Haitian Refugee Center*, 676 F.2d at 1038.

<sup>92</sup> *See id.* at 1039.

the United States.<sup>93</sup> Second, relying on *Mathews v. Diaz*,<sup>94</sup> the court determined that the Fifth Amendment protected these unlawful (excludable) aliens from arbitrary deprivation of a protected interest.<sup>95</sup> Finally, the expedited process at issue – which the court ultimately held insufficient under due process standards – provided for final disposition of the refugees’ claims within a 10 to 20 day period.<sup>96</sup>

*Augustin v. Sava*, a Second Circuit case decided after enactment of the Refugee Act, held that although there is no inherent constitutional right to present a claim for asylum or avoid return to a country where one will be persecuted, potential refugees “do have such statutory rights as Congress grants.”<sup>97</sup> As a result, the court held that the statutorily protected right to avoid return to a country where a noncitizen will be persecuted<sup>98</sup> “warrants a hearing where the likelihood of persecution can be *fairly* evaluated.”<sup>99</sup> Thus, the Fifth and Second Circuits have found that potential asylees deserve more vigorous due process protections than other unadmitted noncitizens, due to the statutory entitlement to petition for asylum created by INA Section 208(a)(1), corresponding federal regulations, and the United States’ commitment to ameliorating the plight of refugees.<sup>100</sup> Concededly, Congress limited the procedural scope of this entitlement

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<sup>93</sup> See *id.* (“Whether [the right to petition for asylum] be called a liberty or property interest, we think it is sufficient to invoke the guarantee of due process.”).

<sup>94</sup> See 426 U.S. at 77.

<sup>95</sup> Again, the court reached this decision before Congress passed the Refugee Act, which expressly eliminates status-based distinctions among classes of noncitizens wishing to seek asylum. See INA § 208(a)(1), 8 U.S.C. § 1158(a)(1).

<sup>96</sup> See *Haitian Refugee Center*, 676 F.2d at 1039-40 (“[I]t strains credulity to assert that these plaintiffs were given a hearing on their asylum claims at a meaningful time and in a meaningful manner.”).

<sup>97</sup> 735 F.2d 32, 37 (2d Cir. 1984). Cf. *Haitian Refugee Center*, 676 F.2d at 1039 (finding entitlement to petition for asylum absent express statutory grant).

<sup>98</sup> See INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (mandatory withholding of removal provision).

<sup>99</sup> *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) (emphasis added). Notably, the Second Circuit skirted whether due process protections apply in proceedings determining petitions for asylum to avoid squarely confronting the Eleventh Circuit’s then-recent decision in *Jean v. Nelson*, which the Supreme Court later affirmed on non-constitutional grounds. See 427 U.S. 846 (1985).

<sup>100</sup> See also *Maldonado-Perez v. INS*, 865 F.2d 328 (D.C. Cir. 1989) (employing Fifth Circuit’s analysis to find procedural due process right to apply for asylum). But see *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his [or her] application.”). Although this decision, contemporary with many of the

in passing IIRIRA's expedited removal provisions, but the substantive scope of the entitlement, i.e., the right to apply for asylum pursuant to uniform, *constitutionally sound* procedures, remains intact.<sup>101</sup> As a result, the truncated procedures are open to due process scrutiny.<sup>102</sup>

## B. The Modern Paradigm of Procedural Due Process

Before 1970, due process protected only against the arbitrary deprivation of "rights" recognized by the common law.<sup>103</sup> The operative distinction in constitutional deprivation analysis at that time was whether a petitioner sought to assert a right or merely to gain a privilege.<sup>104</sup> However, in *Goldberg v. Kelly*, the Supreme Court rejected this right-privilege distinction, holding that certain statutory entitlements deserve due process protection and that the likely value of each procedural safeguard must be considered.<sup>105</sup> Subsequently, in *Mathews v. Eldridge*, the Court set forth an analytical balancing framework for deciding how much process is due under the circumstances of a particular case.<sup>106</sup>

### 1. *Goldberg v. Kelly: A Fair Hearing Prior to "Grievous Loss"*<sup>107</sup>

In *Goldberg*, recipients of welfare benefits funded by the Aid to Families with Dependent Children (AFDC) program objected on due process grounds to the notice and hearing New York

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"right to asylum" cases, restates the position that unadmitted noncitizens seek merely a privilege, the *Plasencia* case had nothing to do with potential asylees, but instead addressed the due process rights of a former resident alien seeking readmission. Thus, the quoted passage is dicta.

<sup>101</sup> See DAVIS & PIERCE, *supra* note 18, at 35 (distinguishing between substantive and procedural limitations of statutory entitlements).

<sup>102</sup> See *id.* (noting danger that the legislature will create substantive rights that remain unenforceable due to a lack of procedural safeguards). As mentioned above, although expedited removal procedures are thus proper subjects for due process analysis, Congress has placed these procedures largely beyond the reach of the courts, so judicial review remains unlikely. See *supra* note 6 and accompanying text.

<sup>103</sup> See DAVIS & PIERCE, *supra* note 18, at § 9.3.

<sup>104</sup> See, e.g., McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (1892) (exemplifying the right versus privilege approach by flatly declaring that the plaintiff "has no constitutional right to be a policeman").

<sup>105</sup> See *Goldberg v. Kelly*, 397 U.S. 254 (1970); see also *Bd. of Regents v. Roth*, 408 U.S. 564, 571 (1972) (stating that the Court had "fully and finally rejected the wooden distinction between 'rights' and 'privileges'"). The ensuing scramble to determine which statutory entitlements created due process-protected rights after *Goldberg* and how much process was due after *Mathews v. Eldridge* may explain how the "right to asylum" analysis came about in the circuit courts during the late 1970s and early 1980s.

<sup>106</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>107</sup> See *Goldberg*, 397 U.S. at 263.

officials gave before terminating a recipient's benefits.<sup>108</sup> The challenged procedures provided: (1) an opportunity to discuss one's continued eligibility with a caseworker before the caseworker recommended termination;<sup>109</sup> (2) written notice and a statement of reasons by a caseworker recommending termination;<sup>110</sup> (3) the opportunity to request higher review by an agency official and present a written statement for that official to consider;<sup>111</sup> (4) written notice of a final ineligibility determination with a statement of reasons;<sup>112</sup> (5) the *post*-deprivation opportunity to present oral evidence before an independent state hearing officer, including entering a personal appearance and cross-examining witnesses;<sup>113</sup> and (6) judicial review in the event the agency ultimately decided not to restore the recipient's benefits.<sup>114</sup>

After establishing that the legislative funding scheme created a statutory entitlement to welfare benefits and, therefore, a property interest protected by the Due Process Clause, the Court considered whether the post-deprivation oral evidentiary hearing adequately protected recipients against the erroneous deprivation of their constitutionally protected interest.<sup>115</sup> To begin, the Court declared that “[t]he extent to which procedural due process must be afforded the [entitlement-holder] is influenced by the extent to which he may be condemned to suffer grievous loss.”<sup>116</sup> In other words, the Constitution requires the government to provide more pre-deprivation process where the consequences of an adverse agency determination will be

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<sup>108</sup> *See id.* at 255.

<sup>109</sup> *See id.* at 258.

<sup>110</sup> *See id.* at 259.

<sup>111</sup> *See id.*

<sup>112</sup> *See Goldberg*, 397 U.S. at 259.

<sup>113</sup> *See id.* at 259-60.

<sup>114</sup> *See id.* at 260.

<sup>115</sup> *See id.* at 261-62.

<sup>116</sup> *Id.* at 262-63 (internal citation omitted); *see also Mathews*, 424 U.S. at 333 (stating that the “fundamental requirement of due process” is this *meaningful* right to be heard).

especially dire, *e.g.*, will result in physical, as opposed to monetary, harm.<sup>117</sup> Thus, in light of the fact that the erroneous termination of AFDC benefits would place a beneficiary in an “immediately desperate” situation, depriving the beneficiary of “the very means by which to live,” the Court determined that the Constitution required a pre-deprivation oral hearing.<sup>118</sup>

In reaching this decision, the Court emphasized the individual’s right to be heard “at a meaningful time and in a meaningful manner.”<sup>119</sup> Because procedural due process is “not a technical conception with a fixed content unrelated to time, place and circumstances,”<sup>120</sup> the Fifth Amendment requires the government to provide “such procedural protections as the particular situation demands.”<sup>121</sup> The government must ensure that an individual’s right to be heard is meaningful, and due process therefore requires procedures that are “tailored to the capacities and circumstances of those who are to be heard.”<sup>122</sup> As a result, in *Goldberg*, the Court deemed written submissions “an unrealistic option” for many welfare recipients, who lack the education necessary to effectively communicate in writing.<sup>123</sup> In reaching this conclusion, the Court accepted the reality that such recipients will not be able to retain attorneys to compose written arguments for them.<sup>124</sup> Further, the Court found oral evidence and cross-examination

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<sup>117</sup> See *Ingraham v. Wright*, 430 U.S. 651, 674 n.44 (1977) (remarking that, absent the common law doctrine privileging corporal punishment by public schoolteachers, “it is doubtful whether any procedure short of a [criminal] trial . . . could satisfy the requirements of procedural due process” when physical harm under color of law is at stake); see also Zachary D. Krug, Note, *Due Process and the Problem of Public Contracts: A Critical Look at Current Doctrine*, 89 CORNELL L. REV. 1044, 1055 (2004) (noting courts’ tendency to minimize the importance of pre-deprivation process where a pecuniary interest is at stake, as opposed to physical deprivation). When the deprivation encompasses physical harm, the Fifth Amendment requires an exceedingly high amount of *pre-deprivation* process. Compare *Goldberg*, 397 U.S. at 264 (physical harm at stake if monetary payments lost) with *Eldridge*, 424 U.S. at 340-41 (disability payments unrelated to need; no physical harm if payments discontinued).

<sup>118</sup> See *Goldberg*, 397 U.S. at 264; see also *id.* at 261 (recounting the district court’s conclusion that “to cut off a welfare recipient in the face of . . . ‘brutal need’ without a prior hearing of some sort would be unconscionable . . .”) (internal citation omitted).

<sup>119</sup> *Id.* at 267 (internal citation omitted).

<sup>120</sup> See *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

<sup>121</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

<sup>122</sup> See *Goldberg*, 397 U.S. at 268-69.

<sup>123</sup> *Id.* at 269.

<sup>124</sup> See *id.*

particularly important where “credibility and veracity are at issue.”<sup>125</sup> Finally, observing that important eligibility decisions will almost certainly “turn on questions of fact,” the Court held that an individual must know upon what evidence the decisionmaker rests his or her decision.<sup>126</sup>

However, a full evidentiary hearing before deprivation is not always required. In fact, the *Goldberg* standard for how much pre-deprivation process is due represents the high watermark of required procedural protections, given the dire – and irreversible – consequences of an erroneous determination in the case of welfare recipients, who stand to lose the means by which to live.<sup>127</sup>

## 2. *Mathews v. Eldridge: What is a “Fair” Hearing?*

A court’s determination of what procedural protections the Constitution requires is a complex inquiry, governed by the framework the Supreme Court delineated in *Mathews v. Eldridge*.<sup>128</sup> According to this framework, the court must balance three 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.<sup>129</sup>

The first two elements, which represent an individual’s interest in avoiding erroneous deprivation by employing additional procedural safeguards, must be weighed against the third,

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<sup>125</sup> *Id.* at 269. Credible fear determinations likewise turn on issues of credibility and veracity. However, because the asylum officer rests his or her determination on only the potential refugee’s testimony and unidentified “facts” known to the asylum officer at the time of the interview, the potential refugee may not effectively confront the evidence against her.

<sup>126</sup> *See id.* at 269-70.

<sup>127</sup> *See* II DAVIS & PIERCE, *supra* note 18, at 14 (“Many of the Court’s post-*Goldberg* opinions can be explained as part of an effort to construct defensible limits on the scope of its holding in *Goldberg*.”).

<sup>128</sup> 424 U.S. 319, 335 (1976).

<sup>129</sup> *Id.* at 335. The Court used this mode of interest-balancing less explicitly in *Goldberg*, as well. *See* 397 U.S. at 263 (stating that whether procedural protections are sufficient “depends upon whether the recipient’s interest in avoiding [grievous loss] outweighs the governmental interest in summary adjudication” and that to properly evaluate a procedural due process claim, a court must “determine[e] the precise nature of the government function involved as well as of the private interest that has been affected”).

*i.e.*, the government’s interest in summary adjudication.<sup>130</sup> In sum, a situation requires the most process where the private interest affected is considerable,<sup>131</sup> the probable value of additional procedural safeguards is high,<sup>132</sup> and the government’s cost to employ those additional procedures is low.<sup>133</sup>

According to the *Mathews v. Eldridge* framework, a full trial-type hearing before deprivation is not always – and, in fact, rarely is – constitutionally required.<sup>134</sup> Thus, the intensely compelling nature of the private interest element drives the analysis in the welfare context.<sup>135</sup> As a result, leading commentators have contended that the generous degree of pre-deprivation process due welfare recipients faced with the termination of benefits as “unique to the welfare context.”<sup>136</sup> However, as the next Part asserts, the plight of the potential refugee erroneously deprived of the right to file and substantiate her claim for asylum is strikingly similar to the “brutal need” faced by erroneously deprived welfare recipients. Moreover, an individual who suffers deprivation in the welfare context may seek judicial review of an adverse

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<sup>130</sup> See Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 Conn. L. Rev. 1411, 1486 (1997) (describing due process analysis in immigration proceedings).

<sup>131</sup> See *supra* note 99 (citing authorities for proposition that most pre-deprivation process is due where physical deprivation at stake).

<sup>132</sup> See, e.g., *Goldberg*, 397 U.S. at 269 (discussing need for oral testimony, confrontation of witnesses where credibility and veracity will ultimately determine outcome).

<sup>133</sup> See, e.g., *id.* at 266 (concluding that added expense to government of employing additional safeguards does not control where such safeguards may be implemented efficiently).

<sup>134</sup> See II DAVIS & PIERCE, *supra* note 18, at 16. See also Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267 (1975) (delineating and examining the purpose of each component of a fair hearing). Judge Friendly’s lecture, later published as an article, has been widely influential in helping courts determine which elements of a fair hearing the Constitution requires in a given case. See Todd Rakoff, *In Memoriam: Henry J. Friendly*, 99 HARV L. REV. 1725, 1727 (1986) (“Judge Friendly’s famous lecture . . . is clearly treated by the courts, including the Supreme Court, as if it were more than merely persuasive.”).

<sup>135</sup> In *Goldberg*, the Court was primarily concerned with the devastating (i.e., physically harmful) effect an erroneous deprivation would have on a beneficiary of the statutory entitlement at issue. See *Goldberg*, 397 U.S. at 264 (identifying this as “the crucial factor”).

<sup>136</sup> See *id.* at 16.

decision,<sup>137</sup> whereas the doors to the courthouse remain firmly closed in the face of the potential asylum applicant in expedited removal proceedings.<sup>138</sup>

### III. WHY MORE PROCESS IS DUE TO POTENTIAL REFUGEES

Even allowing for the fundamental, yet nebulous, difference that exists between the content of the robust constitutional guarantees afforded citizens and the paltry protections unadmitted noncitizens may hope to receive,<sup>139</sup> the procedural protections contained in IIRIRA's expedited removal provisions are constitutionally insufficient to safeguard the important and statutory right to apply for asylum.<sup>140</sup> The "brutal need" potential refugees may face upon an adverse determination is remarkably reminiscent of the dire consequences welfare recipients – those individuals the Supreme Court has held deserve the most pre-deprivation process – may suffer upon benefits termination.<sup>141</sup>

This Part proceeds in two sections. Section A surveys which elements of a fair hearing are present in credible fear procedures, as well as which are absent, considering each element in

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<sup>137</sup> See *Goldberg*, 397 U.S. at 260 (“A recipient whose aid is not restored by a [final administrative hearing] may have judicial review.”). Notably, the Court includes judicial review in its listing of procedural protections, signifying the importance of judicial review as another opportunity for the government to “catch” an erroneous deprivation. See also *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967) (holding that all federal agency action is presumptively reviewable in the federal courts).

<sup>138</sup> See generally THOMAS ALEXANDER ALEINIKOFF, ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 750 (5th ed. 2003) (remarking that “[w]ith the growth of the modern administrative state, the federal courts, staffed with life-tenured judges, have come to be seen as the ultimate guarantors of administrative liability”). It is beyond the scope of this paper to fully discuss the many purposes judicial review serves to restrain and legitimate administrative action, which daily affects the rights of those subject to its authority. Nonetheless, it is imperative to acknowledge that modern due process analysis has evolved against a backdrop of *presumptive reviewability*. Thus, where judicial review is unavailable, the stakes of ensuring the fairness and accuracy of an administrative determination resulting in constitutionally significant deprivation rise quite sharply for noncitizen and government alike. In short, there is no room for error.

<sup>139</sup> See *supra* Section II.A.1.

<sup>140</sup> This Section presupposes that issuance of a final removal order curtailing a potential refugee's right to apply for asylum comprises a constitutionally significant deprivation. See *Haitian Refugee Center*, 676 F.2d at 1039; *supra* Section II.A.2. The source of this constitutionally protected interest is INA Section 208(a)(1), which provides that any alien physically present in or arriving to the United States, regardless of status, “may apply for asylum in accordance with [section 208] or, where applicable, section 235(b).” See INA § 208(a)(1), 8 U.S.C. § 1158(a)(1). Thus, although expedited removal limits the procedural scope of the right, the substance of the right derives from Section 208. See *supra* note 83 and accompanying text (distinguishing between substantive and procedural limitations).

<sup>141</sup> See *supra* Section II.B.1.

the expedited removal context. Section B briefly applies the *Mathews v. Eldridge* balancing framework to existing credible fear interview procedures.<sup>142</sup>

#### A. Elements of a Fair Hearing in Expedited Removal Procedures

This Section applies the eleven elements of a fair hearing to expedited removal-credible fear interview procedures.<sup>143</sup> First, an unbiased tribunal “is a necessary element in every case.”<sup>144</sup> Although prior participation by agency officials does not preclude the agency from acting as the required unbiased tribunal, “the further the tribunal is removed from the agency . . . the less may be the need for other procedural safeguards.”<sup>145</sup> Conversely, where the ultimate decisionmaker resides within the agency and is closely related to preliminary determinations, additional procedural safeguards become imperative. Thus, because the asylum officer is closely and inextricably linked to DHS and the immigration officers who initially interview arriving noncitizens, a “suspicion of bias” arises.<sup>146</sup> Due process therefore requires additional safeguards.<sup>147</sup>

Second, timely and adequate notice of the proposed action—here, immediate removal without an opportunity to file an application for asylum—is likewise fundamental.<sup>148</sup> The purpose of this element is to ensure that the individual may “marshal evidence and prepare his

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<sup>142</sup> It is worth reiterating here that—because expedited removal provisions prohibit judicial review of removal orders once they have been reviewed by an immigration judge—no court has measured the procedures’ sufficiency according to the dictates of due process. See 8 C.F.R. § 208.30(g)(iv)(A); *supra* note 6 and accompanying text. Thus, the elemental due process analysis in this Section is largely hypothetical.

<sup>143</sup> These eleven elements, as well as the purposes they serve, come from Judge Friendly’s seminal lecture, “Some Kind of Hearing.” See 123 U. PA. L. REV. 1267 (1975). Interestingly, Judge Friendly ranked the eleven elements in order of importance, beginning with the paramount importance of an unbiased tribunal.

<sup>144</sup> See *id.* at 1279.

<sup>145</sup> See *id.*

<sup>146</sup> *Id.*

<sup>147</sup> It may be argued that the right to appeal an asylum officer’s credible fear finding to an immigration judge—a DOJ employee—represents an adequate additional safeguard. Indeed, this may be the case if the immigration judge were more remote from the initial asylum officer’s determination. However, because DHS and DOJ agents are inextricably bound in the context of immigration and border control decisionmaking, merely shifting the appeal to another agency simply will not do. In other words, the underlying problem (wholly internal decisionmaking) remains, whether the ultimate decisionmaker works for DHS or the Justice Department.

<sup>148</sup> See *id.* at 1280.

case so as to benefit from any hearing . . . provided.”<sup>149</sup> Where the agency makes clear its grounds for seeking to deprive the individual of a statutory right and gives the individual a reasonable time to gather evidence to meet those grounds, its case for curtailing additional procedures becomes stronger.<sup>150</sup> Yet, in the credible fear interview, the asylum officer makes an immediate decision whether to seek the potential refugee’s expedited removal, and an immigration judge must review that decision within seven days. So, the agency provides no notice prior to the initial determination and, at most, seven days’ notice prior to final determination.<sup>151</sup> At no time does the noncitizen receive a statement of the agency’s reasons for taking adverse action.<sup>152</sup> In addition, the noncitizen will spend these seven days in detention and, therefore, essentially is unable to meaningfully prepare his case before final immigration judge review. Moreover, it is likely that the potential refugee cannot speak English,<sup>153</sup> which further brings the adequacy of the notice given into question.<sup>154</sup> Consequently, insufficiencies in this element tip the balance in favor of additional safeguards.

Three other elements of a fair hearing—the rights to call witnesses, know the evidence against one, and to have a decision based only upon the evidence presented—are closely related.<sup>155</sup> Although these rights are widely regarded as essential in the context of trial-type adjudicatory proceedings, their “utility” is more questionable in the context of informal agency

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<sup>149</sup> Friendly, *supra* note 143, at 1280-81.

<sup>150</sup> See Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. at 1281.

<sup>151</sup> See 8 C.F.R. § 208.30(g)(1) (in the event of negative credible fear finding, asylum officer shall provide alien with notice of decision and opportunity for review).

<sup>152</sup> Form M-444 is a general pamphlet concerning the credible fear interview process. It does not contain a specific statement of the asylum officer’s decision or reasons for so deciding.

<sup>153</sup> If an asylum officer determines that a potential refugee cannot proceed effectively in English and the officer cannot proceed in the applicant’s language, the agency must provide an interpreter. See 8 C.F.R. § 208.30(d)(5). However, factual accounts are replete with instances of inadequate interpretation. See HUMAN RIGHTS FIRST, *supra* note 1.

<sup>154</sup> Cf. *Goldberg*, 397 U.S. at 268 (“We are not prepared to say that the seven-day notice currently provided . . . is constitutionally insufficient per se, although there may be cases where fairness would require that a longer time be given.”). Here, the Court suggested that seven days may not be sufficient time for even an English-speaking, non-detained person to prepare and meet the government’s grounds for an adverse determination.

<sup>155</sup> See Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. at 1282.

decisionmaking, because they may lead to “the possible detriments . . . [of] harassment and delay.”<sup>156</sup> Thus, the fact that the right to call witnesses is wholly absent from the credible fear interview, an informal, threshold determination, does not render expedited removal’s procedural protections inadequate. However, the right to “know the evidence against one” is importantly related to the previous requirement that an individual have notice of the *grounds for* an adverse determination, particularly since the potential refugee stands to lose her statutory right to apply for asylum without any notice as to what the deficiencies in her “case” are. This failure to accommodate the right to know the evidence thus becomes more salient, because DHS fails to provide notice of even the types of evidence and considerations it deems important to the credible fear determination. In light of the absence of the two most fundamental principles—an unbiased tribunal and adequate notice—this failure to provide transparent decisionmaking becomes even more problematic.

The right to counsel is not necessarily required to render a proceeding fair, despite the oft-quoted proclamation that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”<sup>157</sup> Because credible fear interview procedures fail to effectively provide the two fundamental elements of a fair hearing, representation by counsel – at least in the context of final immigration judge review – becomes imperative. Indeed, the regulations allow a noncitizen to consult “persons of the alien’s choosing,” including a lawyer, prior to the credible fear interview, as well as to have such persons present at the credible fear interview.<sup>158</sup> Counsel may make a concluding statement at

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<sup>156</sup> See *id.* at 1283-84.

<sup>157</sup> See *Powell v. Alabama*, 287 U.S. 45 (1932); see also Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. at 1287.

<sup>158</sup> See 8 C.F.R. § 208.30(d)(4).

the close of the interview if the asylum officer permits it.<sup>159</sup> Thus, the procedures ostensibly recognize the importance of and provide for the presence of counsel in credible fear proceedings.

However, this “right” to counsel is illusory in the expedited removal context. As discussed above, a potential refugee will likely enter the credible fear interview within hours of arriving at a U.S. airport. Unless a lawyer is literally waiting at the airport, the potential refugee will not be able to exercise the right to counsel by seeking out and retaining appropriate counsel. Indeed, even if the lawyer is waiting at the airport, the arriving noncitizen may not speak English well enough or feel brave enough to ask the immigration officials ushering her through the inspection process how to find the lawyer.

Moreover, immigration judge review of an adverse credible fear determination must take place within seven days of the noncitizen’s arrival. It is doubtful that a potential refugee awaiting her final deprivation decision—while being detained—will possess the monetary means, language skills, and general wherewithal to successfully find, retain, and consult with counsel. An attorney’s lack of access to the detention center further exacerbates this insufficiency. Again, because the two most fundamental elements of a fair hearing are not present, the importance of the right to counsel exponentially increases.

Expedited removal procedures also do not provide for the right to public attendance<sup>160</sup> at credible fear interviews. Although the lack of fundamental safeguards points in favor of adding additional procedures, this particular procedure would not likely benefit potential refugees. Whereas the general idea behind requiring public attendance is the worthy desire to foster public accountability and transparent agency decisionmaking, a potential refugee describing the

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<sup>159</sup> *Id.*

<sup>160</sup> *See Friendly, Some Kind of Hearing*, 123 U. PA. L. REV. at 1293.

intimate, terrifying, and traumatic details of the persecution she has suffered in her home country is unlikely to feel comfortable relating such details in public.<sup>161</sup>

Finally, as discussed elsewhere,<sup>162</sup> the availability of judicial review<sup>163</sup> of adverse credible fear determinations is conspicuously absent from the expedited removal scheme. In light of the inadequacies of the “unbiased tribunal” element, judicial review of adverse determinations becomes an essential element of the fair hearing in this context. Nonetheless, if the final decisionmaker resided further from the agency’s internal processes (*e.g.*, the BIA), the potential refugee received meaningful notice of the grounds for the potential adverse action and adequate time to prepare her case, including the realizable right to seek out, retain, and consult with counsel, the right to judicial review would not be as essential to the fairness of the credible fear hearing.

B. *Mathews v. Eldridge* Balancing and the Credible Fear Interview Process

Having assessed the procedural safeguards present in and absent from expedited removal, a brief application of the three-part balancing framework from *Mathews v. Eldridge*<sup>164</sup> is in order. According to this analysis, the private interest affected, risk of erroneous deprivation, and likely added efficacy of additional procedural safeguards weigh against the governmental interest in the added expense and administrative burden of adding such safeguards. In the context of the credible fear interview process, it seems clear that the expedited removal process fails to comport with procedural due process. Moreover, the *Eldridge* analysis reveals that these proceedings

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<sup>161</sup> Indeed, potential refugees often hesitate to share such details due to the presence of interpreters and other agency officials. *See* HUMAN RIGHTS FIRST, *supra* note 1. This is particularly common among female refugees who suffered sexual trauma and persecution in their countries of origin. *Id.*

<sup>162</sup> *See supra* notes 134-35.

<sup>163</sup> *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. at 1294-95.

<sup>164</sup> *See supra* Section II.B.2.

may be made substantially more fair by adding modest procedural safeguards at little expense to the government.

1. *The Nature of the Private Interest Affected*

First, the private interest an adverse credible fear determination affects, i.e., the right to apply for asylum, is an important one. At first glance, one might conceive this interest to be “merely” procedural, but to those who hold it, this right is quite dear. Indeed, it may be the only hope a noncitizen has to avoid torture, political imprisonment, death, or physical mutilation. Although grants of asylum are discretionary and the United States cannot endeavor to protect all of the world’s refugees, an individual’s interest in attempting to establish a claim for asylum is a momentous one. From a practical standpoint, to deny a noncitizen’s right to apply for asylum may be to condemn her to suffer the most grievous loss—possibly her life—depending on the nature of the alleged persecution from which she has fled.<sup>165</sup> Thus, as in *Goldberg*, the weight of this element must influence the remainder of the analysis.

2. *The Risk of Error and Value of Additional Safeguards*

As discussed in the immediately foregoing section, the procedural protections that currently exist in credible fear interviews are minimal at best. Arriving noncitizens seeking to apply for asylum do not receive timely and effective notice of the grounds upon which the government seeks to take adverse action against them. Nor do current procedures provide the right to know the evidence upon which the decisionmaker bases an adverse determination until after the final, nonreviewable decision has been taken. Thus, the noncitizen does not have a

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<sup>165</sup> Concededly, there is an important distinction between deprivations where the United States directly inflicts or causes physical harm and those where the United States returns an individual to her home country, where others will inflict such harm. However, functionally, the result of the United States returning a noncitizen to a situation of torture, rape, or unlawful imprisonment in her home country is for the United States itself to “cause” that harm.

chance to meet the evidence against her, which renders the hearing inherently unfair, because the individual cannot participate or advocate effectively on her own behalf.

Possible additional safeguards that may bring credible fear interview procedures to a level of fairness sufficient to dispense with the need for judicial review include: (1) shifting the locus of decisionmaking “up” a level, so that an immigration judge makes the initial credible fear determination, which is finally reviewable by the Board of Immigration Appeals, or some specialized panel thereof created to review credible fear determinations; (2) pushing the timing of the credible fear interview and subsequent review back at least seven days, yet continuing to provide Form M-444<sup>166</sup> upon arrival to noncitizens who indicate fear of return; and (3) making an effective and appropriate interpreter available to every non-English-speaking noncitizen participating in credible fear interviews.

Each of these safeguards would serve an important purpose. Shifting decisionmaking “up” a level would actually be shifting “out” to allay concerns arising from the inextricable link between asylum officers deciding credible fear and DHS, which processes noncitizens as they arrive. Adding this procedure would likely counter the “suspicion of bias” that currently arises. Pushing the timing of interviews back and providing Form M-444 upon arrival would fulfill the timely and adequate notice requirement. Before undergoing the interview, the noncitizen would have an opportunity to consider and prepare for the hearing.<sup>167</sup> Effective and appropriate interpretation increases the likelihood that the noncitizen will be able to participate *meaningfully* in the proceedings against her. To be effective, an interpreter must be proficient not only in the language, but also in the dialect that the noncitizen speaks. To speak an West African dialect of French, for example, essentially may be to communicate in an entirely different language. To be

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<sup>166</sup> See *supra* note 36 and accompanying text.

<sup>167</sup> Concededly, detention would diminish the effectiveness of this notice period. However, the legality of detaining potential refugees is an issue beyond the scope of this Paper.

appropriate, the interpreter should be the same gender as the noncitizen. This will enhance the probability that the noncitizen will feel comfortable communicating gender-based or sexualized persecution and offset the interference of traditional gender roles with the credible fear process.

### 3. *The Government's Interest in Summary Adjudication*

Congress employed the expedited removal scheme to increase efficiency in immigration. However, where the private interest affected is so great, the probable value of additional safeguards so high, and the likely cost of implementing those safeguards seemingly so minimal, this government interest is vastly outweighed. Strikingly, the government itself has powerful institutional interests in constitutional and fair decisionmaking, as well as in affording aid to refugees. Thus, as in *Goldberg*, substantial governmental interests align with the individuals' interest in avoiding summary adjudication, which further weakens the "government interest" side of the balance.

### CONCLUSION

The fundamental requirement of procedural due process is the *meaningful* opportunity to be heard. Thus, where the government seeks to deprive an individual of a constitutionally significant liberty or property interest, the decisional scheme must ensure a "fair hearing" to pass due process scrutiny. Due process is not a fixed requirement and will require varying procedural protections depending on the nature of the private interest affected, the value additional protections are likely to add in a given context, as well as the practical exigencies and circumstances a particular factual situation presents. Indeed, in *Goldberg*, the Court tailored its analysis of what degree and *what types of* procedures due process required to ensure that welfare recipients enjoy a practically meaningful opportunity to contest the government's plan to take adverse action against them.

So, too, must fair hearing elements be tailored to the unique plight of potential refugees in expedited removal. As in the welfare context, potential refugees face a “brutal need” in the event of an adverse determination. The private interest at stake truly may be the difference between life and death, torture, or prolonged detention. Also as in the welfare context, those who stand to suffer such grievous loss do not stand on equal footing with the government decisionmaker. Nonetheless, current procedures lack even the most fundamental elements of a fair hearing, operate completely outside the reach of the courts, and provide largely illusory procedural protections. Consequently, Congress should take a hard look at the scheme it has created to ensure that the United States does not later regret turning its back on people who are persecuted by denying them a meaningful opportunity to be heard.