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Due Process For Asylum Seekers?
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**DUE PROCESS RIGHTS FOR ASYLUM SEEKERS?**

I. Introduction

In *Jean v. Nelson*, the U.S. Supreme Court declined to decide the issue of whether asylum seekers are entitled to due process rights under the Fifth Amendment.\(^1\) Justice Thurgood Marshall dissented from this decision and argued that aliens seeking admission to the United States enjoy due process rights under the Fifth Amendment.\(^2\) Despite the fact that *Jean* was decided in 1985, the Court has not since addressed the argument put forth by Justice Marshall regarding the due process rights of asylum seekers. This term, however, the Court will decide the case of *Benitez v. Wallis*\(^3\) and will likely address whether the Due Process Clause of the Fifth Amendment guarantees certain rights to aliens who, like many asylum seekers, are detained at the border of the United States.\(^4\)

In the absence of any Supreme Court rulings specifically dealing with due process in the asylum context (the *Jean* majority avoided the constitutional question), it is difficult to assess what due process rights, if any, asylum seekers have under the Fifth Amendment. Therefore, this paper will examine the many Supreme Court decisions regarding the due process rights of aliens generally, and then apply these rights by analogy to the asylum seeker. Though asylum seekers

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1. 472 U.S. 846, 854-55 (1985) ("Because the current statutes and regulations provide petitioners with nondiscriminatory parole consideration – which is all they seek to obtain by virtue of their constitutional argument – there was no need to address the constitutional issue.").
2. *Id.* at 858-82 (Marshall, J., dissenting).
4. The Fifth Amendment, rather than the Fourteenth Amendment, is implicated in the immigration context because it applies to the federal government, which has exclusive jurisdiction over immigration. The Fourteenth Amendment applies to the states. The Due Process Clause of the Fifth Amendment states: "No person shall...be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.
are entitled to certain statutory rights other potential immigrants are not under the current immigration scheme, most, if not all, aliens (asylum seekers or otherwise) arriving at the borders of the United States have the same legal personality under the Due Process Clause of the Fifth Amendment: that of the "unadmitted" alien. Consequently, the Supreme Court decisions interpreting the Fifth Amendment due process rights of the unadmitted alien should apply with equal force to the unadmitted asylum seeker.

The first section examines the terminology of the Immigration and Naturalization Act ("INA") as it is used to classify the status and rights of aliens in deportation proceedings. This section explains the changes brought about by the Illegal Immigration and Immigrant Responsibility Act of 1996 ("IIRIRA"), which amended the INA by abandoning the old concept "entry," and replacing it with the terms "admission" and "admitted." This section also elaborates the current "double standard" of due process rights that exists between legal permanent residents and "unadmitted" aliens, as well as its historical analogue involving "deportable" and "excludable" aliens.

The second section addresses Justice Marshall's argument, from his dissent in Jean, that asylum seekers enjoy due process rights under the Fifth Amendment. It also examines how Justice Marshall's reasoning fares under the current IIRIRA scheme, which is based on the concept of "admission," as opposed to that of "entry," which existed under the pre-IIRIRA scheme in place at the time that Jean was decided.

The third section examines a dissonance between two lines of Supreme Court cases on the due process rights of aliens. One line of cases has engendered a double standard, under the guise of the "entry fiction," which accords aliens who have gained physical entry into the United

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5 The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer. 8 U.S.C. § 1101(a)(13)(A).
6 Pub. L. No. 104-208, Div. C.
States greater due process protections than those who have been detained at its borders. The entry fiction denies constitutional rights to individuals detained at the border based on the rationale that they have not entered the territory of the United States and are thus not entitled to the protections of the Constitution. A second line of decisions, dissonant with the former, and including many of the decisions supporting Justice Marshall's dissent in Jean, holds that Fifth Amendment due process rights are to be accorded to all individuals within the jurisdiction of the United States, whether they have entered the United States or are detained at the border.

The fourth and final section applies the learning of the previous three sections to analyze the due process issue before the Court in Benitez v. Wallis: whether the Due Process Clause of the Fifth Amendment applies to unadmitted aliens. This section also involves a discussion of Zadvydas v. Davis. This discussion is important to understanding the due process issue of Benitez because, in Zadvydas, the Court held that the Due Process Clause of the Fifth Amendment applies to admitted aliens and places a reasonable time limitation on their detention after removal proceedings. The fourth section concludes by considering Benitez as an opportunity for the Court to abandon the entry fiction doctrine and to elevate to law Justice Marshall's reasoning in Jean that the Constitution applies to all individuals within the reach of the sovereignty of the United States.

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7 The Eleventh Circuit framed the issue in the following manner:
This case, however, requires us to join the debate and determine whether unadmitted aliens, post-Zadvydas, may be detained indefinitely under § 1231(a)(6). To do so, we first discuss why Benitez remains an inadmissible alien and then whether inadmissible aliens have a constitutional right to be free from indefinite detention. We then examine whether the reasonableness component, as read into § 1231(a)(6) by the Supreme Court in Zadvydas, applies to inadmissible aliens.

Benitez v. Wallis, 337 F.3d 1289, 1296 (11th Cir. 2003).


9 Id. at 682. The detention statute under consideration in Zadvydas authorizes detention of an alien who has been ordered removed, but who the government has not yet expelled from the United States. 8 U.S.C. § 1231(a)(6).
II. The Classification of Aliens under the INA

Prior to 1996, cases decided by the Supreme Court regarding due process rights for aliens relied on a version of the Immigration and Naturalization Act that distinguished between “deportable” and “excludable” aliens. In 1996, Congress amended the INA by enacting the Illegal Immigration Reform and Immigrant Responsibility Act. Key classifications of the INA, such as “excludable” and “deportable,” were replaced by new statutory terms under IIRIRA. In order to place Supreme Court decisions regarding due process rights for aliens in context, it is necessary to understand both the pre-IIRIRA and post-IIRIRA terminology, as well to understand how the changes made by IIRIRA to the classification scheme have affected the status and rights of aliens in general, and asylum seekers in particular.

a. The pre-IIRIRA classification – Excludable v. Deportable

An alien was “deportable” under the pre-IIRIRA classification if he secured entry into the United States. This could be done either lawfully or illegally without detection by the INS. The alien’s physical presence within the United States elevated him to the status of “deportable,” a status which entitled the deportable alien to some form of deportation proceeding before he could be expelled from the country.

Under the pre-IIRIRA classification scheme, an “excludable” alien was an individual who had never actually entered the United States. Excludable aliens were often detained by the INS pending their removal in an exclusion proceeding. Under the “entry fiction” employed in

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11 Id. at 309. See Chi Tho Noy v. INS, 192 F.3d 390, 394 n.4 (3d Cir. 1999) (describing the changes in terminology brought by IIRIRA).
12 Id.
13 Id.
a number of Supreme Court decisions, excludable aliens were deemed not to have entered the
territory of the United States, and therefore not entitled to the due process protections of the
Constitution. Excludable aliens were entitled only to due process as authorized by statute:
“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied
entry is concerned.”14

b. The pre-IIRIRA double standard for due process

As one commentator noted, “[i]ronically, this [the pre-IIRIRA] dichotomy conferred
greater legal protection upon aliens who entered the U.S. illegally and secretly than those who
attempted to seek refuge by presenting themselves unsuccessfully to the officials at ports of
entry.”15 Underlying this dichotomy was the judicially created “entry fiction,” which justified
the disparate treatment accorded two groups of people who, though both on American soil, were
given different legal personalities under the Due Process Clause of the Fifth Amendment.16 The
dichotomy and its entry fiction rationale resulted in a double standard in the due process
protections afforded to aliens within the jurisdiction of the United States.

Lawfully residing aliens, as well as those aliens who had illegally entered the United
States undetected, were accorded due process protections under the Fifth Amendment. As the
Court stated in Shaughnessy v. United States ex rel. Mezei, “aliens who have once passed
through our gates, even illegally, may be expelled only after proceedings conforming to
traditional standards of fairness encompassed in due process of law.”17 The Court then described
the status of the excludable alien in the following manner: “an alien on the threshold of initial

537, 544 (1950)).
15 Coffey, supra note 10 at 309.
537 (1950).
17 Mezei, 345 U.S. at 212.
entry stands on a different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’” The double standard was thus that those aliens who made it into the United States (“deportables”) were accorded Fifth Amendment due process protections, while those who were detained at the border prior to entry (“excludables”) were not entitled to the protection of the Constitution, but only to the due process authorized by Congress in its immigration legislation.

c. The post-IIRIRA classification – Admitted v. Unadmitted

IIRIRA uses the term “unadmitted” to describe aliens who have not lawfully entered the United States.19 This term encompasses a broader category of individuals than “excludable,” because it includes immigrants detained at a port of entry, as well as those who succeeded in an illegal entry into United States territory. As one commentator describes the change, “aliens denied admission by immigration authorities ("excludables") are now equated with aliens who illegally gained physical entry ("deportables"), so that both groups are merged into the new classification of unadmitted aliens.”20 Admitted aliens, on the other hand, are those individuals who have lawfully entered the United States. One common example of an admitted alien is the legal permanent resident. Admitted aliens have status analogous to that of “deportables” under the pre-IIRIRA scheme.21 Therefore, certain due process guarantees are constitutionally required before an admitted alien can be expelled from the United States. For example, the Due Process Clause of the Fifth Amendment permits detention of admitted aliens only for a period reasonably necessary to bring about their removal from the United States.22 IIRIRA also eliminated the

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18 Id. (citing Knauff, 338 U.S. at 544).
20 Id. at 325.
21 Id.
former distinction between “exclusion” and “deportation” proceedings in favor of one procedure called “removal” proceedings.23

d. The post-IIRIRA double standard for due process

The entry fiction that historically operated to justify the double standard between the rights afforded to deportable and excludable aliens persists under the present statutory scheme.24 Under the post-IIRIRA scheme, however, the double standard has become even more lopsided because the class of aliens denied the due process protections of the Fifth Amendment has expanded to include those people who made an illegal, but undetected, entry into the United States. Whereas the former scheme of “deportable” and “excludable” aliens relied on the concept of “entry” into the country, the post-IIRIRA scheme relies on the concept of “admission.”

The principal change is that an alien who successfully, though illegally, enters the United States undetected is no longer entitled to Fifth Amendment due process protections when the United States seeks to expel him. This is because the status of “admitted” is only accorded to those aliens who have been lawfully admitted into the country.25 Consequently, the class of aliens entitled to due process is diminished as a result of IIRIRA and limited to those who have been legally admitted to the United States, such as legal permanent residents. Likewise, the class of asylum seekers formerly entitled to constitutional protections as excludable is diminished

23 8 U.S.C. § 1229(a). As one commentator has noted: “The IIRIRA’s expedited removal proceedings, intended to process and deport individuals who enter the United States without valid documents as quickly as possible, imperiled bona fide refugees and resulted in immigrants being detained in increasing numbers.” Coffey, supra note 14 at 338 n.213. A policy of expedited removal is troubling in light of the fact that, as the Court has noted, “[d]eportation is always a harsh measure. It is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country.” INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).
24 See Mezei, 345 U.S. at 212 (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’”).
under the IIRIRA scheme, since many asylum seekers are individuals who have not been legally admitted to the United States.


In Jean v. Nelson, Justice Thurgood Marshall dissented from the majority’s decision to avoid the constitutional question of whether aliens detained at the borders of the United States are entitled to due process protections under the Constitution. Justice Marshall articulated a powerful rationale for why all those within the sovereign reach of the United States are entitled to the protections of the Constitution. In doing so, Justice Marshall laid bare the feeble legal foundation of the “entry fiction” in Supreme Court jurisprudence, as well as decried as irrational the double standard it engendered in the treatment by the federal government of aliens seeking admission.26

The petitioners in Jean v. Nelson were a class of unadmitted aliens from Haiti who were detained at federal facilities pending the disposition of their asylum claims.27 The petitioners’ complaint made two claims. First, petitioners alleged that the Immigration and Naturalization Service’s policy of detaining undocumented aliens seeking admission to the United States did not comply with the rule-making procedures of the Administrative Procedure Act.28 Second, petitioners alleged that the INS’s parole policy violated the equal protection guarantee of the Fifth Amendment because it discriminated against petitioners on the basis of race and national origin.29 The Court refused to reach the constitutional issue and decided Jean on the non-

27 472 U.S. at 858 (Marshall, J., dissenting).
28 Id. at 849.
29 Id.
constitutional ground that INS parole regulations prohibit discrimination based on race or national origin.\textsuperscript{30}

Justice Marshall dissented from the Court's decision in \textit{Jean} because he believed that there was no way to avoid reaching the constitutional question presented by the case.\textsuperscript{31} Justice Marshall framed that constitutional question in the following way: "May the government discriminate on the basis of race or national origin in its decision whether to parole unadmitted aliens pending the determination of their admissibility?"

Justice Marshall concluded that the Constitution would not permit the government to so discriminate because "it cannot rationally be argued that the Constitution provides no protections to aliens in petitioners' position [asylum seeker]."\textsuperscript{32} This is because "our case law makes clear that excludable aliens do, in fact, enjoy Fifth Amendment protections."\textsuperscript{33}

Though the Supreme Court majority in \textit{Jean} did not reach the constitutional question, the en banc Eleventh Circuit of Appeals had reached that question in deciding \textit{Jean}.\textsuperscript{34} The en banc Eleventh Circuit had decided that the petitioners could not claim constitutional rights based on a line of cases that included \textit{United States ex rel. Knauff v. Shaughnessy},\textsuperscript{35} \textit{Kwong Hai Chew v. Colding},\textsuperscript{36} and \textit{Shaughnessy v. United States ex rel. Mezei}.\textsuperscript{37} This line of cases established the entry fiction that is the legal basis for denying constitutional rights to aliens who, though

\textsuperscript{30} Id. at 851-55. "The Court's decision rests entirely on the premise that the parole regulations promulgated during the course of this litigation preclude INS officials from considering race and national origin in making parole decisions." Id. at 858 (Marshall, J., dissenting).

\textsuperscript{31} Id.

\textsuperscript{32} Id. at 868 (Marshall, J., dissenting).

\textsuperscript{33} 472 U.S. at 875 (Marshall, J., dissenting).

\textsuperscript{34} Id. at 873 (Marshall, J., dissenting).

\textsuperscript{35} 727 F.2d 957, 970 (11th Cir. 1984).

\textsuperscript{36} 338 U.S. 537 (1950).

\textsuperscript{37} 344 U.S. 590 (1953).

\textsuperscript{38} 345 U.S. 206 (1953).
physically present in the United States and within the coercive authority of its government, are not considered to have entered the country.

In the first case, *Knauff*, an alien married to a United States citizen sought entry into the United States to be naturalized. She was detained at Ellis Island and then permanently excluded from the United States without a hearing. She filed a petition for habeas corpus to test the right of the Attorney General to exclude her without a hearing. The authority of the Attorney General to order the exclusion of aliens without a hearing came from the Act of June 21, 1941, 22 U.S.C. § 223. The Court, in a 4-3 decision, found that there was no constitutional right for an alien to a hearing prior to exclusion because "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." Following *Knauff*, the decision in *Chew* involved a legal permanent resident of the United States who was excluded after returning to the United States following a five month voyage as a crewman on an American merchant ship. The Attorney General entered an order permanently excluding Chew as an alien whose entry was deemed prejudicial to the public interest. Contrary to the government's characterization of Chew as alien seeking entry to the United States, the Court considered Chew to be a legal permanent resident. As a legal permanent resident, Chew was considered a "person" within the meaning of the Fifth Amendment, and, therefore, the government could not deprive him of his life, liberty, or property without due process of law. The rationale of the Court, however, suggested that an alien without the status of legal permanent resident would not be considered a "person" within the Fifth Amendment. In

\[^{39}\text{Id. at 539.}\]
\[^{40}\text{Id. at 539-40.}\]
\[^{41}\text{Id. at 540.}\]
\[^{42}\text{Id. at 544 (citing Nishimura Ekiu v. United States, 142 U.S. 651; Ludecke v. Watkins, 335 U.S. 160).}\]
\[^{43}\text{344 U.S. at 592-93.}\]
\[^{44}\text{Id. at 595.}\]
\[^{45}\text{Id. at 596.}\]
\[^{46}\text{Id.}\]
fact, the Court stated: “[t]he Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.”

Mezei involved an alien immigrant permanently excluded from the United States on security grounds, but who was stranded on Ellis Island because other countries would not take him back. The Court distinguished between aliens who have entered the United States, legally or illegally, and those aliens who have been detained at the border as they attempted to enter. The Court stated that “aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law,” but declined to afford the same protections to aliens detained at the border.

Citing the language of Knauff, the Court held that aliens detained at the border are due only that process which Congress has authorized.

In order to reach his conclusion that unadmitted aliens have due process rights under the Fifth Amendment, Justice Marshall rejected “the sweeping proposition articulated in the Knauff-Chew-Mezei dicta” that the procedure authorized by Congress for aliens detained at the border represents the sum total of process due to such individuals. Though the language in the Knauff-Chew-Mezei line of cases suggested that aliens detained at the border could claim no rights under the Constitution, Justice Marshall argued that the use of these decisions to stand for the proposition that an alien at the border does not enjoy any constitutional rights was improper.

47 Id. at 596 n.5 (citing Bridges v. Wixon, 326 U.S. 135, 161).
48 Mezei, 345 U.S. at 207.
49 Id. at 212.
50 Id.
51 Id.
52 Id.
53 Jean, 472 U.S. at 875 (Marshall, J., dissenting).
54 Id. at 871 (Marshall, J., dissenting).
because it relied on dicta. The narrow question decided in *Knauff* and *Mezei* was that the denial of a hearing in a case in which the Government raised national security concerns did not violate due process. The question decided in *Chew* was whether the due process rights of an alien who was a legal permanent resident had been violated.

As a counterpoint to the majority's reliance on *Knauff-Chew-Mezei*, Justice Marshall provided four different examples of constitutional protections afforded to unadmitted aliens. First, he noted that when an alien detained at the border is criminally prosecuted in the United States, he is accorded all of the constitutional protections given to criminal defendants.

Second, the Fifth Amendment protects an alien from deprivations of property by the federal government. Logically extending the holding of that case in favor of his position, Justice Marshall noted that it would be illogical to protect an alien from a deprivation of property, but not from deprivations of life or liberty. Third, he asserted that "the principle that unadmitted aliens have no constitutionally protected rights defies rationality." On this count, Justice Marshall suggested that detained aliens have the right to bring constitutional challenges to the most basic conditions of their confinement. Fourth, Justice Marshall argued that limitations on the applicability of the Constitution in the territorial jurisdiction of the United States "fly in the face of this Court's long-held and recently reaffirmed commitment to apply the Constitution's due process and equal protection guarantees to all individuals within the reach of our

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55 *Id.* Any suggestion in *Mezei* that an alien detained at the border does not enjoy any constitutional rights is dicta that could "withstand neither the weight of logic nor that of principle." *Jean*, 472 U.S. at 869 (Marshall, J., dissenting). Further, Justice Marshall argued that this *Mezei* dicta "has never been incorporated into the fabric of our constitutional jurisprudence." *Id.*

56 *Id.* at 872 (Marshall, J., dissenting).

57 *Id.* at 873 (Marshall, J., dissenting) (citing *Wong Wing v. United States*, 163 U.S. 228 (1896)).

58 *Id.* at 873-74 (Marshall, J., dissenting) (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931)).

59 *Id.* at 874 (Marshall, J., dissenting).

60 *Id.*

61 *Id.*
sovereignty." Justice Marshall concluded that the Constitution applies to all individuals within
the reach of the sovereignty of the United States.

Since Jean v. Nelson was decided in 1985, a number of changes have taken place to the
Immigration and Naturalization Act that could affect the strength of Justice Marshall's argument,
made in his Jean dissent, that aliens have due process rights under the Fifth Amendment.
Substantial amendments to the INA occurred in 1996, when Congress enacted the Illegal
Immigration Reform and Immigrant Responsibility Act of 1996. As noted above, IIRIRA limits
the class of aliens entitled to due process protections to those who have been legally admitted to
the United States, such as legal permanent residents. Justice Marshall's rationale in Jean,
however, is not weakened by the changes to the immigration scheme wrought by IIRIRA. This
is because he argued for universal application of the protections of the Constitution to all those
within the reach of the sovereignty of the United States. Consequently, the reasoning of Justice
Marshall's dissent in Jean is as vital and applicable today as it was in the pre-IIRIRA period
when he wrote it.

IV. The Supreme Court's Dissonant Approach to the Due Process Rights of Aliens

a. The First Line of Cases - the "entry fiction" cases

The first line of cases begins with Fong Yue Ting v. United States, reaches its fullest
expression in the Knauff-Chew-Mezei cases, and continues all the way through to the underlying
Eleventh Circuit decision in Benitez. This line of cases develops a significant disparity
between the rights afforded to aliens deemed to have legally entered the United States and those

62 Id. at 874-75 (Marshall, J., dissenting) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); Plyler v. Doe, 457 U.S.
202 (1982)).
63 Id. at 876 (Marshall, J., dissenting).
64 149 U.S. 698 (1893).
65 337 F.3d 1289 (11th Cir. 2003).
who have been detained at its border by the creation and subsequent affirmation of the “entry fiction.”

The genesis of the entry fiction is found in Fong Yue Ting, a decision in which the Court recognized that the power to exclude or expel aliens is a fundamental sovereign attribute that is vested in the political departments of the government.66 The Court reasoned that immigration has a unique character, owing to its relation to international relations, and thus is to be exercised by Congress and the Executive and largely immune from judicial control.67 Though Fong Yue Ting acknowledged that so long as aliens are permitted by the government of the United States to remain in the country, the safeguards of the constitution apply to them, it nonetheless found that these aliens “remain subject to the power of congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interest.” Fong Yue Ting thus established that Congress and the Executive have largely plenary power over immigration, owing to its unique relation to international relations.68

Knauff extended the reasoning of Fong Yue Ting to reach the proposition that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”69 By establishing the rule that Congress, rather than the Constitution, is the final authority for the scope of due process protections owed to aliens who have not entered the United States, Knauff laid the groundwork for the Court’s finding in Chew that aliens who have not entered the United States are not “persons” within the meaning of the Fifth Amendment.70

66 Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893).
67 Id. at 714.
68 Id. at 724.
70 Chew, 433 U.S. at 596-97.
After *Knauff*, the stage was set for the Court to write a fully articulated entry fiction into law. This occurred in *Mezei*, in which the Court famously declared that, though an alien who has entered the United States is entitled to due process protections, "an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'"\(^1\)

The entry fiction as articulated in *Mezei* retains both its character and its vitality to this day.\(^2\) In *Benitez*, the Eleventh Circuit based its holding that inadmissible aliens have no constitutional rights precluding indefinite detention on the entry fiction.\(^3\) The Supreme Court, in deciding *Benitez*, will face the issue of how to reconcile the entry fiction line of cases with a dissonant line of cases holding that due process rights are universally applied to all people within the territory of the United States.

b. *The Second Line of Cases – Universal Application of Due Process Rights Within the Territory of the United States*

The second line of cases, in a manner dissonant with the first line of cases, extends due process rights to all aliens, regardless of their status under the INA. The rationale of this line of cases is that aliens at the border are within the territory of the United States and therefore are under the protections of the Constitution.\(^4\)

The Supreme Court has recognized constitutional rights for aliens within the territory of the United States in numerous decisions. In *Yick Wo v. Hopkins*, decided in 1886, the Court declared that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were

\[^1\] *Mezei*, 345 U.S. at 212 (citing *Knauff*, 338 U.S. at 544).
\[^3\] *Benitez*, 337 F.3d 1298.
\[^4\] See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 359 (1886) (the Fourteenth Amendment's protections apply universally "to all persons within the territorial jurisdiction of the United States"); *Pyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.")
to be universally applied to all persons within the territorial jurisdiction of the United States, without regard to differences of race, color, or nationality. 75 In Matthews v. Diaz, the Court stated that the Fifth Amendment, as well as the Fourteenth Amendment, protects every alien within the jurisdiction of the United States from deprivation of life, liberty, or property without due process of law. 76 In Plyler v. Doe, the Court cited Matthews v. Diaz for the proposition that the Fifth Amendment protects aliens whose presence in the United States is unlawful from invidious discrimination by the Federal Government. 77 The Court in Plyler further stated that: "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments."

Furthermore, as mentioned by Justice Marshall in his Jean dissent, the Court has also recognized specific rights of aliens under the Fifth Amendment. An alien can invoke the Fifth Amendment to challenge an unlawful taking by the United States 79 and aliens have the right to the due process protections of the Fifth Amendment when they are criminally tried in the courts of the United States. 80 The Court must now consider, in deciding Benitez, how to reconcile this line of cases, which affords due process protections to all aliens, with that line of cases that denies constitutional rights to aliens on the threshold of entry into the United States. The Court’s decision in Benitez will certainly impact the due process protections afforded to the many asylum seekers detained at the nation’s borders.

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75 118 U.S. 356, 369 (1886).
78 Id. The Court flatly rejected an assertion by appellants in Plyler that aliens who arrive in the United States illegally are not “within the jurisdiction” of a State even if they are within its boundaries and subject to its laws. Id. at 211.
80 Wing Wong v. United States, 163 U.S. 228, 237 (1896).
V. Benitez v. Wallis: the future of due process rights for aliens?

The petitioner in Benitez, Daniel Benitez, is a native and citizen of Cuba who, along with 125,000 fellow Cubans, fled to the United States in 1980 as a part of the Mariel boat-lift. In his lawsuit, Benitez challenges the constitutionality of his lengthy detention by the INS, which has incarcerated Benitez pending his removal to Cuba and on the basis of its determination that he poses a danger to the community. Even though Benitez has been physically present in the United States for more than 20 years, he is classified as an inadmissible alien under the Immigration and Naturalization Act, and, consequently, is not considered to have entered the United States under the entry fiction that an alien on the threshold of entry into the United States stands on different footing from one who has passed through the nation's gates. Despite the fact that Benitez is not an asylum seeker, under the entry fiction he is similarly situated to one who is detained at the nation's boarder while seeking asylum; therefore, the Court's decision in Benitez regarding the continued vitality of the entry fiction as a limit on due process for aliens at the border will almost certainly have ramifications for whether, and to what degree, due process rights are accorded asylum seekers.

In its decision in Zadvydas v. Davis, the Supreme Court ruled that the Due Process Clause of the Fifth Amendment permits detention of admitted aliens only for a period reasonably necessary to bring about their removal from the United States. In Zadvydas, the Court noted that "the distinction between an alien who has effected an entry into the United States and one

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82 Benitez v. Wallis, 337 F.3d 1289, 1290 (11th Cir. 2003) (per curiam).
83 Id. Cuba is not willing to accept Benitez. For this reason, Benitez, like many "stateless" aliens stranded in INS detention with nowhere to go, is facing "indefinite" detention at the hands of the federal government.
who has never entered runs throughout immigration law,” and thus that its decision involved “aliens who were admitted to the United States but subsequently ordered removed.” The Court stated that aliens who have not yet gained initial admission to this country would present a very different question. In fact, this question is before the Court in Benitez.

In the underlying decision in Benitez, the Eleventh Circuit decided that the rule of Zadvydas does not extend to aliens who have not been admitted to the United States. The Eleventh Circuit concluded that “Benitez is excludable under the prior version of the INA, inadmissible under IIRIRA, and his immigration parole never constituted a formal admission or entry into the United States.” The Eleventh Circuit held that inadmissible aliens, like Benitez, have no constitutional rights precluding indefinite detention. Consequently, the “very different question” suggested in Zadvydas is precisely that question presented to the Supreme Court in Benitez: whether the rule announce in Zadvydas applies with equal strength to unadmitted aliens like Benitez.

VI. Conclusion

As in Jean v. Nelson, one issue before the Supreme Court in Benitez is whether those people who have arrived at our borders, but been denied admission, are entitled to the due process protections of the Fifth Amendment of the Constitution. Though Benitez is not an asylum seeker, as were the petitioners in Jean, under the post-IIRIRA classification scheme, Benitez shares the same status of “inadmissible” that most, if not all, asylum seekers are

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86 Id. at 693-94.
87 Id. at 682.
88 Benitez, 337 F.3d at 1299.
89 Id. at 1291 n.5.
90 Id. at 1298.
accorded under the INA. A decision to extend the Zadvydas rule, and thus the due process protections of the Fifth Amendment, to the class of inadmissible aliens would represent a triumph of the reasoning of Justice Marshall's dissent in Jean, where he announced that the Constitution applies to all individuals within the reach of the sovereignty of the United States.

91 For instance, the due process protections afforded to asylum seekers making a so-called "defensive" claim for asylum while they are detained at a point of entry to the United States will likely be controlled by the Supreme Court's decision of whether to extend Zadvydas to unadmitted aliens. It is fair to say that because such "defensive" claims constitute a significant proportion of all asylum claims, the disposition of the Benitez case will have profound consequences for the rights of asylum seekers in the United States.