COMMENTS

¿*CÓMO SE DICE* 'DUE PROCESS'*?*: WEIGHING THE ADDED VALUE OF GUARANTEED INTERPRETIVE SERVICES FOR ASYLUM SEEKERS

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INTRODUCTION

Isaac Ramos first entered the United States without inspection approximately thirty years ago.[1] He was never formally admitted into the United States.[2] Despite his lack of immigration status, however, Mr. Ramos, like many undocumented immigrants, has forged ties to the United States[3]—he is married to a legal permanent resident[4] and has two U.S. citizen children, along with one U.S. citizen stepchild.[5]

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* University of Pennsylvania Carey Law School, J.D., 2020; University of Pittsburgh, B.A., 2015. Endless thanks to Professors Cary Coglianese, Fernando Chang-Muy, and Jonah Eaton for their advice and guidance throughout this process. Thank you also to the *Journal* staff for their revisions.

1 United States v. Ramos, 623 F.3d 672, 675 (9th Cir. 2010). "Entering without inspection" is a term of art in immigration law used to describe an entry into the United States that occurs without inspection by immigration officers. *See, e.g.*, 8 U.S.C. § 1255(i)(1) (2018) ("[A]n alien physically present in the United States who entered the United States without inspection . . . .").

2 8 U.S.C. § 1101(a)(13)(A) (2018) ("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.").

3 *Profile of the Unauthorized Population: United States*, MIGRATION POLICY INST., https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US (last visited Jan. 2, 2020).

4 A "legal permanent resident," also known as a "lawful permanent resident," "resident alien permit holder," "LPR," or "Green Card holder," is "any person not a citizen of the United States who is living in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant." *See Glossary*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/tools/glossary?topic_id=l#alpha-listing (last visited Jan. 2, 2020); *see also Lawful Permanent Residents (LPR)*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/lawful-permanent-residents (last visited Mar. 17, 2020).

5 *Ramos*, 623 F.3d at 675.

On May 11, 2006, the Department of Homeland Security ("DHS")[6] issued a warrant of arrest and a Notice to Appear,[7] charging Mr. Ramos with removability for commission of a crime involving moral turpitude, commission of a controlled substance violation, and presence in the United States without admission or parole.[8] On this same day, Mr. Ramos was transferred to a detention center that at the time of his arrival served as a transfer point for up to 1500 non-citizen detainees per day.[9]

At the detention center, deportation officers presented Mr. Ramos with a form entitled "Stipulated Request for Removal Order and Waiver of Hearing," containing statements of waiver written in both English and Spanish.[10] Paragraph 4 of the form concerned Mr. Ramos's right to an attorney: "I have been advised of my right to be represented by an attorney of my choice, at my own expense, during these proceedings. I waive this right. I will represent myself in these proceedings."[11] Paragraph 5 discussed a similar waiver of Mr. Ramos's right to a hearing: "I will be giving up the following legal rights that I would have in a hearing before an Immigration Judge: a) the right to question witnesses; b) the right to offer and to object to evidence; c) the right to require the government to prove my removability."[12]

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6 The Department of Homeland Security was created in 2002. Most functions previously held by the Immigration and Naturalization Service were transferred to three DHS components: U.S. Citizenship and Immigration Services ("USCIS"), U.S. Customs and Border Protection ("CBP"), and U.S. Immigration and Customs Enforcement ("ICE"). *See Did You Know?: The INS No Longer Exists*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/archive/blog/2011/04/did-you-know-ins-no-longer-exists (last visited Mar. 17, 2020).

7 *Ramos*, 623 F.3d at 675. A Notice to Appear ("NTA") is a document given to a non-citizen instructing him to appear before an immigration judge on a certain date. *See USCIS Updates Notice to Appear Policy Guidance to Support DHS Enforcement Priorities*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/news/news-releases/uscis-updates-notice-appear-policy-guidance-support-dhs-enforcement-priorities (last visited Mar. 17, 2020).

8 *Ramos*, 623 F.3d at 676–77. These charges under the Immigration and Nationality Act refer to 8 U.S.C. § 1182(a)(2)(A)(i)(I), (a)(2)(A)(i)(II), and (a)(6)(A)(i) respectively. *Id.*

9 *Id.* at 677.

10 *Id.* The stipulated removal regulation permits Immigration Judges ("IJs") to enter deportation, exclusion, and removal orders without hearings and in the absence of the parties. 8 C.F.R. § 3.25(b) (2019). For the argument that the stipulated removal program, as a whole, fails to comport with the requirements of due process, see generally JENNIFER LEE KOH, JAYASHRI SRIKANTIAH & KAREN C. TUMLIN, DEPORTATION WITHOUT DUE PROCESS (Richard Irwin ed., 2011), *available at* https://www.nilc.org/wp-content/uploads/2016/02/Deportation-Without-Due-Process-2011-09.pdf.

11 *Ramos*, 623 F.3d at 677.

12 *Id.* "Immigration Judges" are Article II administrative judges. The Attorney General appoints IJs to conduct specified proceedings within the Department of Justice Executive Office for Immigration

The form stipulated that in signing it, Mr. Ramos would be admitting to all of the factual allegations contained within the Notice to Appear.[13] The form also specified that Mr. Ramos's signature would indicate that the entire document had been read to him in a language that he understood, that he fully understood the consequences of submitting the form, and that he was submitting this request for removal voluntarily, knowingly, and intelligently.[14]

After distributing the form to Mr. Ramos and a group of other detainees, an immigration enforcement agent explained the consequences of signing it via a presentation delivered in Spanish.[15] The agent explained that Mr. Ramos and the other detainees had two options: first, they could accept the stipulated removal or, second, they could appear before an immigration judge and seek voluntary departure or permission to remain in the United States legally.[16] The agent also advised the group that, under the stipulated removal program, they could be removed that day, whereas waiting to appear before an immigration judge could take two to three weeks.[17] The agent then read the text of the form aloud, also in Spanish, before concluding the presentation.[18]

Following this group presentation, a deportation officer met individually with Mr. Ramos.[19] No transcriber, interpreter, or attorney was present at the meeting.[20] The officer conducting the meeting was not fluent in Spanish, and the extent of her Spanish-language education was limited to "several classes" she took as part of her training with the Bureau of Immigration and Customs Enforcement ("ICE").[21] Understanding that Mr. Ramos could not communicate in English, the officer asked in Spanish what she understood translated to: "Do you want to fight your case or want to sign?"[22] At a

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Review ("EOIR"), including removal proceedings. *See Glossary*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/tools/glossary?topic_id=i#alpha-listing (last visited Jan. 2, 2020).

13 *Ramos*, 623 F.3d at 677

14 *Id.*

15 *Id.* at 678.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

subsequent hearing attacking the validity of Mr. Ramos's deportation order, the court interpreter stated that the statement was "nonsensical in part" and that she would not know how to translate certain parts of the question.[23] Mr. Ramos signed the document and was removed to Mexico that day.[24] When he later challenged his deportation, the Ninth Circuit found his waiver to be invalid on due process grounds:

> Ramos's waiver of appeal and of the due process rights specified in the Stipulated Removal form was not 'considered or intelligent' because he did not receive a competent Spanish language translation of his right to appeal when he signed the form. 'It is long-settled that a competent translation is fundamental to a full and fair hearing. If an alien does not speak English, deportation proceedings must be translated into a language the alien understands.'[25]

Thus, despite having entered the United States unlawfully, Mr. Ramos was able to benefit from the procedural protections of the Due Process Clause.[26] Those protections guaranteed Mr. Ramos competent translation services as part of his deportation hearing.

In his case, Mr. Ramos succeeded in invalidating the waiver because of a settled maxim in immigration law: any persons located within the United States, whether their entries into the country were legal or illegal, are entitled to the procedural protections of the Due Process Clause.[27] The question of whether someone is "within" the United States in this area of law, however, does not turn on physical presence.[28] Rather, the law focuses on the manner in which the non-citizen entered the United States' borders.[29] Where a non-citizen, like Mr. Ramos, has come to be physically present in the United States by way of crossing a border, even unlawfully, that person is considered to be "within" the United States and, thus, eligible for procedural due-

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23 *Id.*

24 *Id.* at 679.

25 *Id.* at 680–81. Despite finding the waiver to be invalid, the Ninth Circuit held that Mr. Ramos could not prevail on a motion to dismiss the indictment because he did not suffer prejudice as a result of the due process violation. *See id.* at 683–84 ("INA § 212(h) does not provide relief for aliens removed for illegal presence in the United States without admission or parole in violation of 8 U.S.C. § 1182(a)(6)(A)(i) . . . . Whether Ramos would be eligible for a waiver of removal on the ground of his controlled substance violation is therefore immaterial.").

26 U.S. CONST. amend. V.

27 Mathews v. Diaz, 426 U.S. 67, 77 (1976).

28 Leng May Ma v. Barber, 357 U.S. 185, 192 (1958) (Douglas, J., dissenting).

29 *Id.* at 187 (majority opinion).

process protections.[30] By contrast, if Mr. Ramos had instead arrived at an entry point and, out of fear of returning to Mexico, asked if he could enter and remain in the United States, the same constitutional protections would not have applied to him.[31] This is because asylum seekers are subject to a legal fiction in which they are treated as if they are "on the threshold" of entry, even after they are permitted to physically enter the United States to adjudicate their claims.[32] This Comment evaluates the discrepancy between rights afforded to non-citizens located "within" the United States—that is, those who have "entered" the country—versus unadmitted non-citizens—those who are treated as remaining "on the threshold" of entry even if physically present in the United States.

Absent this "on the threshold" doctrine, it is clear that asylum applicants would have a liberty interest at stake that would qualify them for procedural due-process protections. It is settled that due-process protections do not apply whenever an administrative adjudication[33] takes place; rather, the Clause is triggered only when a protected life, liberty, or property interest is at stake.[34] The Court has stated that a deportee's right to due process stems from a liberty interest: "[D]eportation . . . visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom."[35] Once one accepts the reality that asylum seekers, like

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30 *Id.*

31 *See* United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

32 *Leng May Ma*, 357 U.S. at 187.

33 An administrative adjudication (as opposed to an administrative rulemaking) is an agency determination of "particular rather than general applicability that affects private rights or interests." JACOB A. STEIN & GLENN A. MITCHELL, 4 ADMINISTRATIVE LAW § 33.01 (2020). Because the decision of whether or not to grant asylum is particular to each applicant, it is clearly a form of administrative adjudication. *See* 8 U.S.C. § 1158(d)(3) (2018) (referring to the asylum determination process as an "adjudication").

34 *See* Carey v. Piphus, 435 U.S. 247, 259 (1978); Bd. of Regents v. Roth, 408 U.S. 564, 569–70 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount."). There are arguments that could be raised in support of the idea that asylum adjudications concern life and property interests, but those potential arguments are not addressed in this Comment.

35 Bridges v. Wixon, 326 U.S. 135, 154 (1945). In *Wilkinson v. Austin*, the Supreme Court identified two sources of qualifying liberty interests: (1) the Constitution, "by reason of guarantees implicit in the word 'liberty'"; and (2) an "expectation or interest created by state laws or policies." 545 U.S. 209, 221 (2005). Based on the language in *Bridges v. Wixon*, a deportee's right to due process stems from the first source. *Bridges*, 326 U.S. at 154. There is also a plausible argument under *Wilkinson*'s second prong that the asylum statutes create an "expectation or interest." Though the statutes

individuals in deportation proceedings, are physically present in, and thus, striving to *stay* in, the United States, it becomes difficult to understand why the same recognized liberty interest would not also be at stake in the context of asylum adjudications.[36]

Part I argues that the "on the threshold" doctrine should be invalidated so that asylum applicants, like deportees, can benefit from the protections of the Due Process Clause throughout the course of their adjudications. Sections A through C of Part II conduct a procedural due process balancing test and conclude that the risk of erroneous deprivation for asylum seekers, combined with the added value of comprehensive interpretative services, outweigh any relevant government interests. Finally, Section D of Part II explores Professor Lucie White's notion that procedural due-process principles comprise a commitment to fostering individual dignity. It argues that failing to provide guaranteed interpretative services to asylum seekers can deprive them of identity-driven choices that fall within the Court's definition of "dignity."

I. ANYONE PHYSICALLY PRESENT WITHIN THE UNITED STATES SHOULD BE ELIGIBLE FOR PROCEDURAL PROTECTIONS UNDER THE DUE PROCESS CLAUSE

A. Historical Development

The text of the Due Process Clause does not use the word "citizen"—rather, the Clause stipulates that "no *person* shall be . . . deprived of life, liberty, or property, without due process of law."[37] In 1889, however, in the Supreme Court's first immigration case, Justice Stephen Field drew a

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contain no provision providing a right to asylum for those who seek it, it seems reasonable for an asylum seeker to expect to be granted asylum where she fears returning to her country on account of persecution. Even the text of the Universal Declaration of Human Rights refers to asylum as a right for those in this situation. *See* G.A. Res. 217 (III)A, ¶ 14(1), Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to seek and to enjoy in other countries asylum from persecution.").

36 Although one might argue that the asylum seeker's interest in staying in the United States is not as weighty as that of the individual facing deportation, given the one-year deadline, this point is not relevant to the question of whether the Due Process Clause is triggered. In the first part of the due-process analysis, the concern is simply whether the interest is one that is protected at all. Erwin Chemerinsky, *Procedural Due Process Claims*, 16 TOURO L. REV. 871, 888 (2016).

37 U.S. CONST. amend. V (emphasis added); *see also* U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

distinction between American and foreign persons, holding that Chinese laborers' licenses to return to the United States could be revoked at any time at the Government's pleasure; in other words, Chinese laborers could be denied entry to the United States without notice or a hearing.[38] The Court largely grounded its conclusion in the United States' plenary power[39] and reasoned that the nation's power of exclusion over foreigners, being incident to its status as a sovereign state, could not be granted away or restrained on behalf of anyone.[40]

Several years later, in 1903, the Supreme Court was faced with a new but related question: Can an executive officer deport a non-citizen, alleged to be in the United States illegally, without providing notice or an opportunity to be heard?[41] The Court held that the political branches' power of discretion in the immigration context was not so unlimited that they could deport as easily as they could exclude.[42] Although the Court's opinion reaffirmed the Government's plenary power over those who remained "on the threshold,"[43] the Court stressed that the Government's discretionary authority is nonetheless subject to the constraints of due process.[44] The Court reasoned that non-citizens within the jurisdiction of the United States are persons

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38 The Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

39 While the contours of the doctrine have changed over time, the doctrine, in general, states that Congress and the executive branch have "broad and often exclusive authority" over immigration. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

40 *The Chinese Exclusion Case*, 130 U.S. at 609.

41 *See* The Japanese Immigrant Case, 189 U.S. 86, 99–100 (1903) ("It is contended . . . that in respect of an alien who has already landed it is consistent with the acts of Congress that he may be deported without previous notice of any purpose to deport him, and without any opportunity on his part to show by competent evidence before the executive officers charged with the executive of the acts of Congress, that he is not here in violation of law; that the deportation of an alien without provision for such a notice and for an opportunity to be heard was inconsistent with the due process of law required by the Fifth Amendment of the Constitution.").

42 *Id.* at 100–01.

43 This language was used to describe excludable non-citizens in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

44 *The Japanese Immigrant Case*, 189 U.S. at 100–01. This decision came several years after the Court held in *Wong Wing v. United States*, 163 U.S. 228, 237–38 (1896), that the government could not impose criminal penalties on undocumented non-citizens without first providing them with the opportunity for a judicial trial. *Wong Wing* concerned a provision of the Geary Act of 1892, which read: "That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be and remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States, as hereinbefore provided." Geary Act of 1892, ch. 60, § 4, 27 Stat. 25 (1892).

within the meaning of the Due Process Clause, and therefore, they cannot be deported without notice and an opportunity to be heard, at a minimum.[45]

Since these foundational cases, the Supreme Court has continued to expand the scope of non-citizens' constitutional rights in several contexts. In *Mathews v. Diaz*, the Court clarified that all non-citizens situated within the United States' borders are entitled to due-process protections, even where that presence is "unlawful, involuntary or transitory."[46] In *Plyler v. Doe*, the Supreme Court held that undocumented, school-aged children could not be denied access to a free public education,[47] citing the Equal Protection Clause of the Fourteenth Amendment.[48] In *Zadvydas v. Davis*, the Court construed 8 U.S.C. § 1231(a)(6) to include a "reasonable time" limitation on the Government's ability to detain non-citizens, reasoning that a statute permitting the indefinite detention of non-citizens would raise serious concerns under the Due Process Clause.[49]

Despite these developments for those situated within the United States' borders, the Supreme Court has continued to invoke the plenary power doctrine with regard to non-citizens who have yet to "enter" the nation: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[50] In *Trump v. Hawaii*, decided in 2018, Chief Justice Roberts echoed this sentiment on behalf of the majority: "For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised

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45 *The Japanese Immigrant Case*, 189 U.S. at 100–01.

46 Mathews v. Diaz, 426 U.S. 67, 77 (1976).

47 Plyler v. Doe, 457 U.S. 202, 214–29 (1982).

48 *Id.* The Court first held that the Equal Protection Clause applied to non-citizens in *Yick Wo v. Hopkins*. *See* 118 U.S. 356, 369 (1886) ("The [F]ourteenth [A]mendment to the [C]onstitution is not confined to the protection of citizens.").

49 Zadvydas v. Davis, 553 U.S. 678, 682, 690 (2001). The provision at issue reads: "An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period . . . ." 8 U.S.C. § 1231(a)(6) (2018). This provision applies to non-citizens within the United States' borders. The Court in *Zadvydas* noted that raising the same issue with regard to unadmitted non-citizens would present "a very different question." *Zadvydas*, 533 U.S. at 682. For a more recent development in this area, see the Supreme Court's 2018 decision, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018).

50 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953). In other words, courts are not permitted to review the Government's decisions in the exclusion context. *Id.* at 212–13.

by the Government's political departments largely immune from judicial control.'"[51]

Thus, the Court continues to hold steadfast onto the idea that a non-citizen "can be paroled 'into the United States'"—that is, be physically within the nation's borders—"and yet not be 'within the United States.'"[52]

B. Analysis and Criticism

After World War II, the newly formed United Nations issued a resolution declaring that all individuals have a right to seek refuge from persecution outside of their home countries.[53] The United States' Immigration and Nationality Act ("INA") defines "refugee" as:

> Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[54]

Under the INA, an "asylee" is someone who meets the definition of refugee but who is "already present in the United States or is seeking admission at a port of entry."[55]

Asylum seekers "already present" in the United States are entitled to due-process rights under current case law.[56] Those individuals "seeking admission at a port of entry," however, are not "persons" within the meaning

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51 Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952)).

52 Leng May Ma v. Barber, 357 U.S. 185, 192 (1958) (Douglas, J., dissenting).

53 *See* G.A. Res. 217 (III)A, ¶ 14(1) (Dec. 10, 1948) ("Everyone has the right to seek and to enjoy in other countries asylum from persecution.").

54 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101(a)(42)(A) (2018)). The INA leaves "particular social group" undefined. *See id.* Recently, *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), made headlines for overruling a previous Board of Immigration Appeals ("BIA") decision, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (B.I.A. 2014), wherein the Board had held that "married women in Guatemala who are unable to leave their relationship" constituted a particular social group. *Matter of A-R-C-G-*, 26 I&N Dec. at 388–89.

55 *Refugees and Asylees*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/refugees-asylees (last visited Mar. 17, 2020). Refugees who are not asylees are simply referred to as "refugees" under the INA. 8 U.S.C. § 1101(a)(42) (2018).

56 Mathews v. Diaz, 426 U.S. 67, 77 (1976); *Refugees and Asylees*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/refugees-asylees (last visited Mar. 17, 2020).

of the Due Process Clause and consequently do not benefit from these protections.[57] Although one might not expect American constitutional law to apply extraterritorially,[58] the reality is that the asylum evaluation process does not take place outside of the United States' jurisdiction.[59] Asylum interviews are not conducted via microphone and speaker with Officer and Applicant on opposing sides of a border wall. Rather, asylum seekers are most often either paroled into or detained in the United States for the purposes of establishing their claims.[60]

Asylum seekers who enter into the United States' without making official "entries"[61] are physically present in the United States but are treated, legally, but fictionally, as though they are still on the other side of a border wall.[62] The adjudications of their asylum claims are conducted on U.S. soil,[63] and applicants may even be permitted to work in the United States while their

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57 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210–12 (1953).

58 *Cf.* Boumediene v. Bush, 553 U.S. 723, 766 (2008) (examining the extraterritorial reach of the Suspension Clause).

59 *See Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states ("To obtain asylum through the affirmative asylum process you must be physically present in the United States . . . . [f]or asylum processing to be defensive, you must be in removal proceedings in immigration court with the Executive Office for Immigration Review . . . .) (last visited Mar. 17, 2020).

60 STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, 5 IMMIGRATION LAW AND PROCEDURE § 62.01 (Supp. 2011). Affirmative asylum applicants are "rarely" detained. *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states (last visited Mar. 17, 2020). DHS's new policy of returning asylum seekers to Mexico while they await their hearings in immigration court does not undermine this Comment's thesis, for those claims are still adjudicated within the United States with the asylum seeker physically present. Press Release, Dep't of Homeland Sec., Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018), *available at* https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration.

61 *See* 8 U.S.C. § 1101(a)(13) (2018) ("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 . . . [a]n alien who is paroled under section 1182(d)(5) . . . shall not be considered to have been admitted.").

62 *See* Rosales-Garcia v. Holland, 238 F.3d 704, 717 (6th Cir. 2001), *vacated on other grounds*, 534 U.S. 1063 (2001) ("Although exclusion proceedings usually occurred at the port of entry, the Supreme Court developed what has become known as the 'entry fiction' to govern the rights of those aliens who are deemed excludable but who have nonetheless been allowed to enter physically the United States for humanitarian, administrative, or other reasons . . . . ").

63 *See generally* RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 8.9 (2018–2019 ed. & Supp. 2018).

claims are pending.[64] Nonetheless, because of a line of immigration cases beginning with the *Chinese Exclusion Case*,[65] these asylum seekers remain, via a legal fiction, "on the threshold," and thus, are not entitled to procedural due-process rights under the U.S. Constitution.[66] Yet, for three reasons, this doctrine of denying due-process protections to asylum seekers who are physically present in the United States should be invalidated.

First, the Court's decision in *United States ex rel. Knauff v. Shaughnessy*[67]—which stated that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"[68]—was grounded in a distinction between rights and privileges. This distinction, however, is no longer relevant to the procedural due-process inquiry.[69] Distinguishing between "rights" and "privileges" was an exercise historically relevant to the question of whether due process should apply in a given case.[70] In the Supreme Court case *Hamilton v. Regents of University of California*, for example, a group of religiously motivated pacifists argued that their university's policy of mandating participation in a military training violated their due-process rights.[71] The Court rejected the argument, finding that "refusing to bear arms" was a privilege, as opposed to a constitutional right.[72] Only constitutional *rights*, the Court concluded, were covered under the Due Process Clause.[73] The Court later abandoned this rationale when it realized

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64 *See Asylum*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum (last visited Mar. 17, 2020). An asylum applicant may file for employment authorization if 150 days have passed since she submitted her completed asylum application (excluding any self-caused delays), and no decision has been made on her application.

65 The *Chinese Exclusion* decision has been heavily criticized in legal academia. *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 858 (1987) ("[T]he accretions to [the doctrine that Congress has the power to control immigration] – notably the notion that immigration controls are not subject to the constitutional limitations applicable to congressional acts generally – cry out for the sharpest criticism."); *see also, e.g.*, Robert S. Chang, *Whitewashing Precedent: From the* Chinese Exclusion Case *to* Korematsu *to the Muslim Travel Ban Cases*, 68 CASE W. RES. L. REV. 1183, 1190 (2018) (describing the *Chinese Exclusion Case* and *Korematsu* as products of "flawed jurisprudence").

66 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953).

67 United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

68 *Id.* at 544.

69 For further reading on the history of this development, see RONALD D. ROTUNDA & JOHN E. NOWAK, 3 ROTUNDA AND NOWAK'S TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.2(a) (5th ed. 2012).

70 *See, e.g.*, Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 264–65 (1934).

71 *Id*. at 262.

72 *Id.* at 263–64.

73 *Id.* at 264–65.

that "unless the government were required to accord fair treatment of individual interests that could not be termed 'rights,' there would be almost no check on the power of government to limit individual freedom in society."[74]

The Court's decision in *Goldberg v. Kelly*[75] ushered in a new era of due process in which a wider variety of interests became eligible for constitutional protection. The Court explicitly rejected the *Hamilton* rights-privileges distinction[76] and instead turned its attention to whether the complainant had some sort of property interest at stake. Concluding that the welfare benefits at issue in that case constituted a form of entitlement, the Court dedicated the remainder of its opinion in *Goldberg* to determining whether the existing procedures comported with the demands of due process.[77] In subsequent decisions, the Court settled on a modern due-process doctrine in which constitutional protections would be triggered wherever there was some cognizable life, liberty, or property interest at stake.[78]

Second, as discussed in the following three Subsections, the plenary power doctrine that animated the Court's decision in the *Chinese Exclusion Case*: (1) has been abrogated since that decision; (2) was created to be applied in the context of an invasion; and (3) serves no cognizable purpose where the foreigner is already physically present within the United States. In the *Chinese Exclusion Case*, the Supreme Court reasoned that it may not weigh in on the Government's power to exclude because:

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the [C]onstitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.[79]

The Court thus held that the judiciary has no authority whatsoever to restrain the United States when it is exercising its sovereign power of exclusion.

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74 *See* ROTUNDA & NOWAK, *supra* note 69, § 17.2(a).

75 397 U.S. 254 (1970).

76 *Goldberg*, 397 U.S. at 262 ("The constitutional challenge cannot be answered by an argument that public assistance benefits are a privilege and not a right.") (internal quotations omitted).

77 For a discussion on this aspect of the *Goldberg* decision, see *infra* Part III.A.

78 *See* ROTUNDA & NOWAK, *supra* note 69, § 17.2(b).

79 *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

1. The Plenary Power Doctrine Has Been Abrogated

Supreme Court decisions issued subsequent to the *Chinese Exclusion Case*, however, suggest that the Government's authority over excluding non-citizens can in fact be restrained. After the *Chinese Exclusion Case* was decided, the Court issued a series of decisions holding that certain classes of excluded individuals were entitled to due-process rights. In *Kwong Hai Chew v. Colding*,[80] for example, the Court held that a lawful permanent resident[81] returning to the United States from a four-month trip on a U.S. merchant vessel was entitled to procedural due-process protections.[82] Later, in *Landon v. Plasencia*, the Court expanded this principle to apply generally to lawful permanent residents' trips outside of the United States.[83] In *Chin Yow v. United States*, the Court held that individuals claiming to be citizens were entitled to due-process rights at their exclusion proceedings.[84] Even in the recent *Trump v. Hawaii* case, in which the exclusion policy at issue resembled the contested statute in the *Chinese Exclusion Case*, the Court did not defer absolutely to the President's judgment—rather, it asked whether the exclusion policy was "plausibly related to the Government's stated objective to protect the country and improve vetting processes."[85]

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80 Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).

81 A lawful permanent resident is a form of non-citizen. See *supra* note 4 for additional explanation of this immigration status.

82 *Kwong Hai Chew*, 344 U.S. at 600. Following this decision, the BIA held that lawful permanent residents arriving as stowaways would also be entitled to due process protections. *Matter of B-*, 5 I&N Dec. 712 (B.I.A. 1954).

83 *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982). It should be noted that these protections are not absolute. The Court mentioned in *Plasencia* that "extended" trips could result in a loss of this entitlement. *Id.* at 33.

84 Chin Yow v. United States, 208 U.S. 8, 12 (1908) ("If one alleging himself to be a citizen is not allowed a chance to establish his right in the mode provided by those statutes, although that mode is intended to be exclusive, the statutes cannot be taken to require him to be turned back without more. The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form."); *accord* Kwock Jan Fat v. White, 253 U.S. 454, 464 (1920) ("It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.").

85 Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018). Interestingly, the Court's decision did not cite *Mezei* or the *Chinese Exclusion Case*. *See generally id.* The Court also did not refer to the government's authority with regard to exclusion as a "plenary" power. *See generally id.* The citations explaining why deference was warranted state only that review on such matters should be "highly constrained." *Id.* at 2419–20 (citing Mathews v. Diaz, 426 U.S. 67, 81–82 (1976)).

2. The Plenary Power Doctrine was Created for Use in the Context of an Invasion

The policies animating legislative and executive deference in the context of exclusion largely stem from national security concerns[86] and are therefore inapposite to the case of the typical affirmative asylum seeker. When an asylum seeker enters (without, of course, "entering"),[87] that individual is either paroled into or detained in the country.[88] In the case of affirmative asylum seekers, most are granted parole.[89] The INA authorizes Attorneys General to use their discretion in determining whether an asylum applicant should be granted parole. Factors considered include evidence of "character," "criminal history," and "national security concerns."[90] The status granted to parolees, therefore, informs courts that the Government has already made at least one security determination and thus, such concerns are no longer salient, if relevant at all.[91]

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86 *See* The Chinese Exclusion Case, 130 U.S. 581, 606 (1889) ("To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.").

87 *See supra* note 59.

88 *See supra* note 60.

89 *See supra* note 60. Even DHS's new policy of returning asylum seekers to Mexico does not appear to stem from national security concerns but rather a desire to cut down on "illegal immigration and false asylum claims."

90 *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/humanitarian-or-significant-public-benefit-parole-individuals-outside-united-states (last visited Mar. 17, 2020).

91 *Cf.* Kwong Hai Chew v. Colding, 344 U.S. 590, 602 (1953) ("This preservation of petitioner's right to due process does not leave an unprotected spot in the Nation's armor. Before petitioner's admission to permanent residence, he was required to satisfy the Attorney General and Congress of his suitability for that status. Before receiving clearance for his foreign cruise, he was screened and approved by the Coast Guard. Before acceptance of his petition for naturalization, as well as before final action thereon, assurance is necessary that he is not a security risk.") (footnotes omitted). President Trump recently declared illegal immigration to be a "national emergency," describing it as an "invasion of drugs, invasion of gangs, [and an] invasion of people." Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 20, 2019); *see also* Maria Sacchetti, *When Trump Declared National Emergency, Most Detained Immigrants Were Not Criminals*, WASH. POST (Feb. 22, 2019), https://www.washingtonpost.com/national/when-trump-declared-national-emergency-most-detained-immigrants-were-not-criminals/2019/02/22/a332480e-36ad-11e9-a400-e481bf264fdc_story.html?noredirect=on&utm_term=.36e02b5aa7a1 (last visited Jan. 2, 2020). The question of whether it can fairly be said that those who unlawfully cross the Mexico-United States border are as dangerous as the President describes them to be is outside the scope of this Comment. Assuming the President is correct for the time-being, the affirmative asylum seekers who are the subject of this Comment are not the sort of covert border-crossers discussed in the Presidential Proclamation. Affirmative asylum seekers actively make their presence known to immigration officials with the goal of acquiring legal residency status. *See infra* note 131.

3. The Plenary Power Doctrine Serves No Cognizable Purpose Where the Foreigner is Already Within the United States' Borders

The theory of the plenary power doctrine in the immigration context rests in part on the idea that the Government must have free rein to exclude dangerous foreigners from its territory.[92] The reality, however, is that asylum seekers are physically present within the United States' territory for their adjudications.[93] Any stated governmental need to exclude—particularly, to exclude so rapidly that due-process protections cannot be afforded—is irrational in light of the reality that asylum seekers' claims are adjudicated in the very territory from which it is said that they must be kept from entering.[94]

Third and finally, denying due process to non-citizens on U.S. soil is inconsistent with the Supreme Court's decision in *Boumediene v. Bush*. In that case, the Government argued that the Suspension Clause's protections did not apply to non-citizens detained in Guantanamo Bay, Cuba because the United States did not officially claim sovereignty over that territory.[95] The Court, finding that the writ was available to the detainees, emphatically rejected the Government's formalist approach:

> [T]he Government's view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.
>
> Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and

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92 *See* The Chinese Exclusion Case, 130 U.S. 581, 606 (1889).

93 *See supra* note 59.

94 Justices Marshall and Jackson dissented in *Jean v. Nelson* and *Mezei*, respectively, to demonstrate the irrational consequences of adhering to the entry fiction. *See* Jean v. Nelson, 472 U.S. 846, 874 (1985) (Marshall, J., dissenting) ("[E]ven in the immigration context, the principle that unadmitted aliens have no constitutionally protected rights defies rationality. Under this view, the Attorney General, for example, could invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens. He might argue that scarce immigration resources could be better spent by hiring additional agents to patrol our borders than by providing food for detainees. Surely we would not condone mass starvation."); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 226–27 (Jackson, J., dissenting) ("Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate [a non-citizen's] exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law?").

95 Boumediene v. Bush, 553 U.S. 723, 753 (2008).

> govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution."[96]

The Court then engaged in a functional analysis in which it concluded that the United States' "absolute and indefinite" control over Guantanamo Bay signaled that, "[i]n every practical sense, Guantanamo is not abroad; it is within the constant jurisdiction of the United States."[97] The Court's language in *Boumediene* was not narrowly focused on the Suspension Clause but was rather a sweeping declaration that the United States cannot determine when the Constitution's protections apply; ultimately, the Court held, the Government is restricted by the Constitution wherever it is exercising sovereignty.[98]

In *Shaughnessy v. United States ex rel. Mezei*, the Court engaged in a formalist analysis similar to the one *Boumediene* expressly rejected. In *Mezei*, the Court held that a non-citizen who was detained in New York while seeking formal admission into the United States was not entitled to procedural due-process protections. The Court explained: "Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding . . . . In sum, harborage at Ellis Island is not an entry into the United States."[99] In other words, the Court reasoned that the Constitution's due-process protections did not extend beyond the sovereign's boundaries; the respondent, not having made an official entry into the United States under the INA, was, under the law, not within those boundaries.[100]

Post-*Boumediene*,[101] however, it is clear that the Government cannot decide (in the exclusion context, via legislation) when and where the Constitution applies. When INA § 101(a)(13)'s[102] legal fiction is out of the

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96 *Id.* at 765 (citing Murphy v. Ramsey, 114 U.S. 15, 44 (1885)).

97 *Id.* at 768–69.

98 *Id.* at 765–69.

99 *Mezei*, 345 U.S. at 213 (citations omitted).

100 Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407, 407 (2002).

101 Boumediene, 553 U.S. 723 (2008). *In re Ross* can in many ways be viewed as a preceding case to *Boumediene*. In *Ross*, the Court held that a British subject serving on an American vessel in Japanese waters who was being tried before an American tribunal had all of the rights of a similarly situated American citizen. *In re Ross*, 140 U.S. 453, 479–80 (1891).

102 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 101(a)(13), 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101(a)(13) (2018)).

picture, it becomes clear that parolees and detainees, being physically present within the United States for their hearings, are located within sovereign territory of the United States.[103] As such, the entirety of the Constitution, including the Due Process Clause, applies to them, and no formalist distinctions concocted by statute can function to exclude them from that protection.[104]

III. DUE PROCESS DEMANDS GUARANTEED INTERPRETATION SERVICES FOR ASYLUM SEEKERS

The procedural due process inquiry consists of two steps: first, courts must determine *if* process is due, and second, if that question is answered in the affirmative, *what* process is due.[105] If not for the "on the threshold" doctrine, asylum adjudications would trigger procedural due-process protections. Given the lack of justification for this doctrine, this Part proceeds to examine the sufficiency of the current procedures afforded to asylum applicants. It concludes that the current procedures do not meet the minimum requirements of due process. As long as asylum seekers are not guaranteed a hearing in their language of choice, they are not receiving an "opportunity to be heard at a meaningful time and in a meaningful manner."[106] To reach this conclusion, this Part conducts a *Eldridge* balancing test in Sections B through C and evaluates the current procedures' effect on asylum seekers' dignity in Section D.

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103 Unlike in *Boumediene*, these individuals are not located in areas where the United States Government denies sovereignty. Instead, the fiction denies that asylum applicants are actually located in areas where sovereignty is uncontested.

104 This position, of course, does not exist without criticism. Jon Feere, current Senior Advisor for ICE, argues that the plenary power doctrine should be retained to ensure that judges do not get into the business of making political decisions on behalf of the United States. JON FEERE, PLENARY POWER: SHOULD JUDGES CONTROL U.S. IMMIGRATION POLICY? 6 (2009). Quoting the Court's decision in *Mathews v. Diaz*, Feere argues that because immigration decisions "implicate [the United States'] relations with foreign powers" and because "classifications must be defined in the light of changing political and economic circumstances," they are inherently political and should be made without "judicial interference." *Id.* at 5, 7. Due-process protections, however, would not render the political branches powerless to control the nation's borders. Much to the contrary, the political branches would still be the sole bodies responsible for defining the statutory standards as to who constitutes a security threat and who is eligible for asylum in the first place. Requiring courts to provide due-process protections for non-citizens seeking entry would simply provide greater assurance that the decisions made under these politically created statutes are accurate.

105 *See* Chemerinsky, *supra* note 36, at 888.

106 Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotations omitted) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

A. Outlining the Eldridge *Inquiry*

As previously noted, the Court's decision in *Goldberg* widened the scope of interests available for due process protections,[107] but the decision was seminal for an additional reason. *Goldberg*, in combination with *Mathews v. Eldridge*, introduced a balancing test to determine what process is due in any given situation:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[108]

In both *Goldberg* and *Eldridge*, the same issue was before the Court: Was it constitutionally permissible to terminate the plaintiffs' government benefits without first providing them with an opportunity for a hearing?[109]

In *Goldberg*, plaintiffs argued that they were entitled to hearings before the Government could terminate their welfare benefits.[110] After the Court determined that due process of some sort was required—that is, that there existed a potential loss of property—it weighed the interests of the parties involved.[111] Although the Court in *Goldberg* did not define the balancing test with the same level of particularity as it did in *Eldridge*,[112] its reasoning nonetheless focused on the comparative weightiness of the same two competing interests: the Government's interest in preserving financial and

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107 *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

108 *Eldridge*, 424 U.S. at 334–35 (citing *Goldberg*, 397 U.S. at 263–71).

109 *Goldberg*, 397 U.S. at 255; *Eldridge*, 424 U.S. at 323. The minimum due process requirements are notice and an opportunity to be heard. *See* ROTUNDA & NOWAK, *supra* note 69, at § 17.8(i). However, the hearing need not always involve trial-type procedures to meet the minimum requirements. *See Eldridge*, 424 U.S. at 343 ("In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle . . . that something less than an evidentiary hearing is sufficient prior to adverse administrative action."). The focus of this Comment is on the affirmative asylum process. USCIS provides affirmative asylum applicants with notice of their scheduled interviews. *See Glossary*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process (last visited Mar. 17, 2020). As such, my focus is on the sufficiency of procedures provided at the application and interview stages.

110 *Goldberg*, 397 U.S. at 255–60.

111 *Id.* at 262–63.

112 The test was made explicit in *Eldridge*. *See supra* note 108.

administrative resources versus the beneficiaries' interest in not being erroneously deprived of financial assistance.[113] The *Goldberg* Court determined that the risk of erroneous deprivation without a pre-termination hearing outweighed the Government's interest, and thus, due process required the availability of a such a hearing.[114] Moreover, the Court, in examining the welfare recipients' specific needs, concluded that the pre-termination hearing would need to be an oral hearing because the average education levels of welfare recipients, combined with their inability to obtain professional assistance, would make written argument an unrealistic option.[115] The Court emphasized that procedures must be tailored to the "capacities and circumstances of those who are to be heard."[116]

In *Eldridge*, by contrast, the Court found that the existing procedures were sufficient.[117] In that case, a Social Security disability beneficiary argued that, as in *Goldberg*, due process required the Government to afford him an oral, judicial-type hearing before his benefits could be terminated.[118] The Court again conducted a balancing test, this time explicitly, to determine the weightiness of the interests involved.[119] The Court concluded that a Social Security disability recipient's risk of deprivation was lower than that of a welfare recipient because eligibility for Social Security disability was not based on financial need.[120] Moreover, unlike in *Goldberg*, the focus of any Social Security disability hearing would be on written medical documents—as such, the Court reasoned, recipients would not derive much added benefit from the opportunity to present their arguments orally.[121] Meanwhile, on the other side of the balance, the Court found that providing opportunities for oral hearings would impose additional costs on the Government.[122] The Court concluded that the Government's interests outweighed the plaintiff's

113 *Goldberg*, 397 U.S. at 264–65.

114 *Id.* at 264–66.

115 *Id.* at 269.

116 *Id.* at 268–69.

117 *Eldridge*, 424 U.S. at 349.

118 *See id.* at 323 ("The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing."); *see also Goldberg*, 397 U.S. at 260–61.

119 *Eldridge*, 424 U.S. at 334–35.

120 *Id.* at 342.

121 *Id.* at 343–45.

122 *Id.* at 347.

and, thus, unlike the welfare beneficiaries in *Goldberg*, the plaintiff was not entitled to a pre-termination hearing.[123]

When the *Eldridge* balancing test is applied to the asylum context—which is the purpose of Sections B and C of this Part—it becomes clear that the current procedures afforded to applicants are insufficient to satisfy due process and that the added value of guaranteeing interpretation services would outweigh the costs such a guarantee would impose on the Government.[124]

B. Existing Asylum Procedures

In the United States, there are two paths through which a non-citizen can obtain asylum: affirmative or defensive.[125] This Comment focuses on the experience of the affirmative asylum seeker.[126] To acquire asylum via the affirmative process, the asylum seeker must first submit to USCIS a completed Form I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL.[127] This form is submitted after the asylum

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123 *Id.* at 349.

124 *See* Part III.C, *infra*.

125 *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states (last visited Mar. 17, 2020).

126 Defensive asylum applications occur in the context of deportation proceedings. *Id.* As such, the Court has already found these individuals to be entitled to due-process protections. *See supra* note 41. In such cases, the non-citizen contests removability by arguing that she is eligible for asylee status. The IJ hears the case in a courtroom-like proceeding where the individual (with her attorney, if she is represented) argues against the U.S. Government, represented by an ICE attorney. At the culmination of the proceedings, the IJ renders a decision regarding the non-citizen's asylum eligibility. If the non-citizen is found to be eligible, the IJ orders the asylum granted. Immigration courts are required under Executive Order 13,166 to provide interpreters for applicants not proficient in English, though there is evidence to suggest that the EOIR's current interpretive services fail to meet the Order's (technically non-binding) stipulations. Exec. Order No. 13,166, 3 C.F.R. § 159 (Aug. 11, 2000); LAURA ABEL, LANGUAGE ACCESS IN IMMIGRATION COURTS 5 (2011).

127 *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process (last visited Mar. 17, 2020). Withholding of Removal is a legal process that is in many ways similar to Asylum. *See* 8 C.F.R. 208.16(b)(1)(i) (2019) ("If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country on the basis of the original claim."). A notable difference between the two processes is that a grant of asylum enables the asylee to adjust to resident status, while a grant of withholding does not. *See generally Green Card*

seeker has (unofficially) entered the United States as a detainee or a parolee.[128] Asylum seekers must submit the form within one year of their arrival.[129] The form and its accompanying instructions are only available in English.[130] The form asks applicants to describe the source of their fear "in detail," among other open-ended questions.[131] The form's instructions stipulate that "any document containing foreign language submitted to USCIS must be accompanied by a full English language translation."[132] Applicants are additionally required to submit "reasonably available" corroborative evidence of their claims.[133] The applicant submits the application by mailing it to the appropriate USCIS office.[134]

Once the application is complete and submitted, USCIS will schedule the applicant for an interview.[135] USCIS provides applicants with an interview notice stating the date, location, and time of their asylum interview.[136] An asylum officer conducts the interview.[137] The interview is not intended to be adversarial,[138] although the applicant has the right to have an attorney present "at no cost to the U.S. Government."[139] Applicants can

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Eligibility Categories, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/greencard/eligibility-categories (last visited Mar. 17, 2020).

128 *See* STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, 1 IMMIGRATION LAW AND PROCEDURE § 8.09 (Supp. 2019) (describing what procedures the government may choose to invoke when an asylum seeker first arrives to the United States).

129 *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process (last visited Mar. 17 2020). There are several exceptions to this rule. *See* 8 C.F.R. § 208.4(a)(3)–(5) (2019).

130 *Instructions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf (last visited Jan. 3, 2020). The form is available for download at https://www.uscis.gov/i-589.

131 *See generally I-589, Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/i-589 (last visited Mar. 17, 2020).

132 *Instructions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf (last visited Jan. 3, 2020).

133 *Id.*

134 *Id.*

135 *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process (last visited Mar. 17, 2020).

136 *Id.*

137 *Id.*

138 *Appendix 15-2 Non-Adversarial Interview Techniques*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26573/0-0-0-28729.html (last visited Mar. 17, 2020).

139 *Instructions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf (last visited Jan. 3, 2020). Applicants, in other words, are responsible

also bring witnesses to testify on their behalf.[140] The purpose of the interview is to establish the identity of those present at the interview, evaluate the applicant's credibility, and make a determination of the applicant's eligibility for asylum.[141]

In *Haitian Refugee Center v. Civiletti*, the Southern District of Florida observed the substantive significance of the asylum interview stage:

> While it is true that, if denied by the District Director, the asylum application may also be presented to an immigration judge . . . there was considerable evidence at trial that the immigration judge often bases his decision solely on the administrative record compiled by the District Director and will permit the applicant to be impeached on the basis of the prior administrative record if he seeks to bring additional evidence to the attention of the immigration judge. The evidence adduced at trial tended to show that the immigration judge's decision on an asylum application never differed from the local District Director's decision. Hence, although it is true that the alien may resurrect his asylum application before an immigration judge, he must have asylum from the District Director if he wants to avoid deportation.[142]

Despite this significance, however, applicants are solely responsible for providing their own interpreters. If the applicant is not proficient in English, USCIS requires that the applicant bring an interpreter to the interview.[143] Failure without good cause to bring an interpreter where one is needed is considered a failure to appear to the interview and may result in dismissal of the application or waiver of the right to an interview.[144] In other words, the existing procedures available to affirmative asylum seekers do not include guaranteed interpretation services.

C. Applying the Eldridge *Balancing Test to Interpretation Services*

This Section applies the *Eldridge* balancing test to determine if the current procedures available to asylum seekers meet the minimum requirements of

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for finding and paying for their own attorneys. This rule does not distinguish between detainees and parolees.

140 *Id.*

141 *Appendix 15-2 Non-Adversarial Interview Techniques*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26573/0-0-0-28729.html (last visited Mar. 17, 2020).

142 Haitian Refugee Ctr. v. Civiletti, 503 F.Supp. 442, 454 (S.D. Fla. 1980).

143 8 C.F.R. § 208.9(g) (2019). This *Code of Federal Regulations* provision governs affirmative asylum applications only. Defensive asylum applicants receive the benefit of 8 C.F.R. § 208.30 (2019).

144 *Id*. § 208.9(g) (2019); *Id.* § 208.10 (2019). Of course, applicants can only understand these regulations if they speak English or know someone who can translate.

due process. As noted earlier, the *Eldridge* test mandates the consideration of three factors: (1) the asylum seeker's interests; (2) the risk of erroneous deprivation and the probable value of the requested procedure; and (3) the Government's interest, including the interest in preserving fiscal and administrative resources.[145] Each factor will be addressed in turn.[146]

1. The Asylum Seeker's Interests

Asylum seekers' interests are in refuge from what they perceive to be persecution. Thus, much like the plaintiffs in *Goldberg*, asylum seekers believe that dire consequences will result if their claims are denied. The United States compiles statistics on asylum seekers' claims. In Fiscal Year 2017, the top countries from which asylum seekers sought refuge were China, El Salvador, Guatemala, Mexico, and Venezuela.[147] The most common bases for their claims were, respectively, persecution based on religious beliefs, membership in a particular social group, membership in a particular social group, "none,"[148] and political affiliations.[149] If an asylum seeker is unable to establish persecution on an accepted basis, the applicant will, in almost all cases, be returned to the country from which she sought refuge.[150]

Asylum seekers face serious consequences if forced to return to their home countries.[151] A variety of media sources have reported on the difficulties, and sometimes tragedies, that denied asylum applicants experience upon returning to the states from which they sought refuge. For example, one source stated:

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145 *See supra* note 108.

146 For related due-process-centered commentary on other aspects of asylum adjudications, see generally Richard F. Hahn, Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982) and Nimrod Pitsker, Note, *Due Process for All: Applying* Eldridge *to Require Appointed Counsel for Asylum Seekers*, 95 CALIF. L. REV. 169 (2007).

147 2018 USCIS ANN. REP., at 41, *available at* https://www.dhs.gov/sites/default/files/publications/cisomb/cisomb_2018-annual-report-to-congress.pdf.

148 "None" with regard to Mexico simply means that there was no single majority ground. The second and third most common grounds Mexican nationals invoked were "membership in a particular social group" and "political affiliation." *Id.*

149 *Id.*

150 8 U.S.C. § 1231(b)(1) (2018).

151 It is perhaps worth noting that it is technically possible under the INA to remove an individual to a third country, but, under the Act, the first attempt must always be to remove the denied applicant to the country from which she came. *See Id.* § 1231(b)(1)(C) ("If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the alien into that country's territory, removal shall be to any of the following countries . . . .").

> Immigrants' rights advocates say credible fear interviews can be a matter of life and death. "The consequences are dire for people who are turned around," says Eleanor Acer, senior director for refugee protection at Human Rights First. "These people will be returned to persecution without even having the chance to have their claims for asylum assessed in U.S. immigration courts."[152]

Published accounts from unsuccessful asylum seekers' families echo the idea that applying for asylum is, for many, a matter of life and death:

> The family believed that Acevedo could convince anyone, even the new president, that returning to El Salvador meant certain death. The country had the world's highest murder rate. Acevedo had already been stabbed once. "They already kill my friends, and they are going to do the same to me," he said, according to his asylum application. . . . He was deported to El Salvador on Nov. 29, 2017. He disappeared on Dec. 5, 2017, and his body was later found in the trunk of a car, wrapped in white sheets. An autopsy showed signs of torture.[153]

Acevedo's story is not unique. Another unsuccessful asylum seeker, Constantino Morales, was also murdered in his country of origin following his failed attempt to secure asylum in the United States:

> Constantino Morales was a cop in Guerrero, Mexico, until he tried to break up a drug cartel and became a target of violence. He escaped to the U.S. and worked at a Cheesecake Factory in Des Moines, Iowa, and then became a popular laborers'-rights advocate. As with Laura, a minor traffic stop led to his removal, which he initially fought. At a community meeting with Tom Latham, at that time a Republican congressman, Morales said, "If I am sent back, I will face more violence, and I could lose my life." Morales had applied for asylum a month earlier. He was denied. At the time, the U.S. State Department called Guerrero "the most violent state in Mexico." Seven months after Morales's deportation, he was shot and killed.[154]

The benefit sought in asylum cases—that is, the grant of asylum itself—is, like the welfare benefits that were at issue in *Goldberg*, granted in response

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152 Joel Rose & Marisa Peñaloza, *Denied Asylum, But Terrified to Return Home*, NPR (July 20, 2018, 5:17 PM), https://www.npr.org/2018/07/20/630877498/denied-asylum-but-terrified-to-return-home.

153 Kevin Sieff, *When Death Awaits Deported Asylum Seekers*, WASH. POST (Dec. 26, 2018), https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/?utm_term=.ead2fae486a1.

154 Sarah Stillman, *When Deportation is a Death Sentence*, NEW YORKER (Jan. 8, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence. Since the June 2018 issuance of *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), it will likely only become more difficult to establish eligibility for asylum based on gang violence. In *Matter of A-B-*, a woman sought asylum to escape her ex-husband's abuse. *Id.* at 321. After the BIA found the woman to be eligible for asylum, former Attorney General Jeff Sessions overruled the decision, stating that the abuse was a purely "private" crime and thus not a form of persecution. *Id.* at 317.

to a perceived dire need, to individuals in desperate circumstances. Upon denial, the individual faces a serious risk of hardship; in the case of the asylum seeker, that hardship may include abuse, torture, or even death.

2. Added Value of Additional Procedures and Risk of Erroneous Deprivation

The second *Eldridge* factor considers the "fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards."[155] Currently, as previously noted, asylum applicants are responsible for finding their own translators.[156] This is an ineffective procedural safeguard to ensure "meaningful"[157] hearings for several reasons. First, translating is difficult. Although the average applicant may be able to find a friend[158] who knows some English, simultaneous, and even consecutive, interpretation[159] are skills that require significant training to master.[160] Multilingual individuals not trained in the art of interpretation are often unaccustomed to processing a person's speech and then producing exact translations.[161] In fact, the process of generalizing people's speech is

155 Mathews v. Eldridge, 424 U.S. 319, 343 (1976).

156 *See supra* note 143.

157 *See Eldridge*, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

158 *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., PM-602-0125.1, THE ROLE AND USE OF INTERPRETERS IN DOMESTIC FIELD OFFICE INTERVIEWS (2017), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-17-1-RoleUseInterpreters-PM-602-0125-1.pdf (prohibiting legal representatives, witnesses, and minors from acting as interpreters without good cause and discouraging family members from doing so).

159 "Simultaneous" interpretation involves translating a person's speech into English as she is still speaking in her own language. *See Simultaneous Translation*, COLLINS DICTIONARY, *available at* https://www.collinsdictionary.com/us/dictionary/english/simultaneous-translation (last visited Jan. 3, 2020). By contrast, "consecutive" interpretation takes place when the translator waits until the individual has finished speaking to then translate what she has just said. *Consecutive and Simultaneous Interpreting*, LANGUAGE MARKETPLACE, https://www.conference-interpreters.ca/Differences-Consecutive-Simultaneous-Interpreters.html (last visited Mar. 18, 2020).

160 *See* DANIEL GILE, BASIC CONCEPTS AND MODELS FOR INTERPRETER AND TRANSLATOR TRAINING 8 (Rev. ed. 2009) ("At first sight, the ability to understand tests/speeches in the languages translators and interpreters work from seems an obvious and therefore trivial prerequisite. It is less clear to the layperson how good this passive knowledge must be. For the 'lowest' levels of interpreting and translation work . . . high-school knowledge of the foreign language can be enough, but as one moves up toward top-level translation and conference interpreting, requirements also increase."); *see also* LAURA ABEL, LANGUAGE ACCESS IN IMMIGRATION COURTS 6 (2011) ("In situations where [limited English proficiency] individuals face 'serious consequences'—such as deportation—not just any evaluation process will suffice; agencies must provide 'the highest quality language services.'").

161 *See* GILE, *supra* note 160, at 9–10 ("[T]he Translator's relevant procedural knowledge refers to 'technical skills' such as the ability to follow in one's decision-making the principles governing

encouraged in foreign language classes.[162] Those who become multilingual "naturally" via being raised in multilingual households adapt a similar approach as young children.[163] All of this is to say that translation is not necessarily a skill that develops concurrently with second language acquisition—a friend or legal assistant who is fluent in the target language but who is untrained in the art of translation likely will not make an effective interpreter.[164] The onus of communicating an asylum seeker's story should not fall on such individuals.

Thus, there are at least two ways in which failing to provide adequate translation services can result in the asylum seeker experiencing erroneous deprivation. First, the obvious case: where the applicant does not speak English and does not know anyone who does, USCIS will dismiss that individual's application for "failure to appear for the interview."[165] As a result, even the "prototypical asylum seeker"[166] who speaks only Quechua would have her application dismissed if she is unable to find someone to translate for her. Second, an applicant who is able to find a multilingual English speaker willing to act as her translator is still at risk if that speaker is not trained in the art of translation. Because untrained interpreters are unlikely to capture every word of the applicant's, or the interviewer's, speech, there is a significant risk that important details will be lost in translation. This is of special concern in the asylum context where applicants "must provide

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fidelity norms, to use techniques for ad hoc Knowledge Acquisition, for language enhancement and maintenance, for problem-solving, for decision-making, for note-taking in consecutive, for simultaneous interpreting, as well as, increasingly so, to mastery of modern translation technology or the specifics of public service interpreting, audiovisual translation and interpreting, signed-language interpreting and localization.").

162 *See, e.g.*, UNIV. OF PA. OFFICE OF LEARNING RES., IT'S ALL GREEK TO ME: LEARNING AND STUDYING IN A FOREIGN LANGUAGE 1, *available at* https://www.vpul.upenn.edu/lrc/lr/PDF/foreign%20language%20(W).pdf ("When listening, don't assume you have to understand every word. Try to guess the general meaning.").

163 *See* PETER SKEHAN, A COGNITIVE APPROACH TO LANGUAGE LEARNING 14 (1998) ("[L]isteners use a variety of means to maximize the chances that they will be able to recover the intended meaning of what is being said to them. They are not, in other words, using some linguistic model to retrieve meaning comprehensively and unambiguously.").

164 *See generally* ABEL, *supra* note 160.

165 8 C.F.R. § 208.9(g) (2019). The regulation provides an exception where the applicant is able to show "good cause."

166 *See Matter of A-B-*, 27 I&N Dec. 316, 318 (A.G. 2018) ("The prototypical refugee flees her home country because the government has persecuted her—either directly through its own actions or indirectly by being unwilling or unable to prevent the misconduct of non-government actors—based upon a statutorily protected ground.").

detailed information" and answer questions "as completely as possible,"[167] and where inconsistencies between information provided at the application and interview stages can prompt findings of incredibility.[168]

3. The Government's Interests

Eldridge instructs courts to balance the private interests involved against the Government's interests in preserving fiscal and administrative resources.[169] In the Fiscal Year 2017, DHS, which includes USCIS—the agency that reviews affirmative asylum applications, spent $3,371,007.54 on litigation-related costs.[170] DHS's overall budget in 2017 was $66,801,948,[171] which means litigation-related costs absorbed roughly 5% of DHS's funding that year. Thus, the burdens that litigation costs currently pose to DHS appear to be rather minimal.

Federal courts currently guarantee competent foreign language interpreters to "ensure that justice is carried out fairly for defendants and other stakeholders."[172] In that adjudicatory setting, for the highest quality interpreters, the fee is $226 for a half-day of work.[173] Asylum interviews generally last around one hour, which would fall comfortably within the four-

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167 *Instructions*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/sites/default/files/files/form/i-589instr.pdf (last visited Jan. 3, 2020).

168 *See* Sarah Filone & David DeMatteo, *Testimonial Inconsistencies, Adverse Credibility Determinations, and Asylum Adjudication in the United States*, 3 TRANSLATIONAL ISSUES PSYCHOL. SCI. 202, 204 (2017) ("[T]he REAL ID Act of 2005 expanded the rules of credibility determination to allow inconsistent testimony regarding peripheral details (e.g., dates, non-central aspects of the claim) to sustain adverse credibility findings."). Asylum applicants' testimony is a primary source of evidence for asylum adjudications. Credibility determinations are thus "central" to this process. Tania Galloni, *Keeping It Real: Judicial Review of Asylum Credibility Determinations in the Eleventh Circuit After the REAL ID Act*, 62 U. MIAMI L. REV. 1037, 1045 (2008).

169 Mathews v. Eldridge, 434 U.S. 319, 335 (1976).

170 U.S. DEP'T OF HOMELAND SEC., 2017 FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES AND THE DIRECTOR OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES (2018), *available at* https://www.dhs.gov/sites/default/files/publications/FY%202017%20DHS%20FOIA%20Annual%20Report.pdf (last visited Mar. 18, 2020).

171 U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FISCAL YEAR 2017 (2016), *available at* https://www.dhs.gov/sites/default/files/publications/FY2017BIB.pdf.

172 *Federal Court Interpreters*, ADMIN. OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/services-forms/federal-court-interpreters (last visited Mar. 18, 2020).

173 *Id.* For less-skilled interpreters, the fee is $111 for the same amount of time.

hour limit that constitutes a "half-day."[174] Thus, providing high quality translation services for the average asylum interview would likely cost USCIS, at most, around $226, assuming no discount for a work period that lasts fewer than four hours.[175]

In Fiscal Year 2018, asylum seekers filed a total of 48,862 affirmative applications with USCIS.[176] If the agency were forced to provide high quality interpretation services to each and every one of those applicants, the cost to the agency would have likely been $11,100,668. Thus, even at its maximum impact, the cost of providing translation services would increase DHS's litigation-related costs to $14,471,675.50, roughly 21% of the agency's overall budget. Under the next-highest "tier" of interpreter quality, the cost would be only $5,452,098. When added to DHS's other litigation costs, the total would be $8,823,105.54, or roughly 13% of the agency's budget. Under either measure, the actual costs would almost certainly be lower, as this analysis assumes that literally every asylum applicant would opt to use a translator, that every one-hour interpretation session would cost the "half-day" price, and that every asylum officer is fluent only in English. For comparison, in Fiscal Year 2018, the EOIR, which likewise guarantees interpretation services,[177] conducted 89.69% of its hearings in languages other than English.[178] Looking outward to the United States Government's full, annual spending, the highest estimated figure, $14,471,675.50, would have constituted roughly 0.0003% of the Government's total spending in 2018.[179]

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174 *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process (last visited Mar. 18, 2020); *see also* ADMIN. OFFICE OF THE U.S. COURTS, BLANKET PURCHASE AGREEMENT FOR COURT INTERPRETER SERVICES, *available at* https://www.uscourts.gov/sites/default/files/rateinfosheet.pdf (last accessed Mar. 18, 2020) (defining "half-day").

175 This rate is consistent throughout all federal courts regardless of their location. ADMIN. OFFICE OF THE U.S. COURTS, BLANKET PURCHASE AGREEMENT FOR COURT INTERPRETER SERVICES, *available at* https://www.uscourts.gov/sites/default/files/rateinfosheet.pdf (last accessed Mar. 18, 2020).

176 EXEC. OFFICE OF IMMIGRATION REV., U.S. DEP'T OF JUSTICE, ADJUDICATION STATISTICS: AFFIRMATIVE ASYLUM APPLICATIONS (2020), *available at* https://www.justice.gov/eoir/page/file/1106361/download.

177 EXEC. OFFICE OF IMMIGRATION REV., U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL (2016), *available at* https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf.

178 EXEC. OFFICE OF IMMIGRATION REV., U.S. DEP'T OF JUSTICE, ADJUDICATION STATISTICS (2020), https://www.justice.gov/eoir/page/file/1248496/download.

179 CONG. BUDGET OFFICE, THE FEDERAL BUDGET IN 2018 (2019), https://www.cbo.gov/system/files/2019-06/55342-2018-budget.pdf.

As for burdens on administrative staff, assuming DHS would contract with professional interpreters to meet the demands of due process, current staff would not be burdened with new responsibilities in addition to their current ones. If anything, guaranteeing interpretative services might take pressure off of multilingual asylum officers who may currently be conducting more interviews than their monolingual colleagues. Transaction costs are likewise likely to be minimal, since this is not the first deal of this kind the Government would be making, and the Government would be in a position to negotiate for a long-term contract, so as to minimize future term discussions. Moreover, if fewer asylum applications are erroneously denied at the interview stage, IJs could expect to review fewer decisions, reducing the overall size of their dockets.

D. Goldberg *and the Court's Commitment to Fostering Dignity*

The *Eldridge* balancing test explicitly identifies three factors to consider in determining what process is due.[180] Professor Lucie White argues that *Goldberg*, *Eldridge*'s predecessor, can be read to signify a fourth due-process consideration: the Court's interest in promoting a humanist vision of procedural justice.[181] Under this humanist vision, the Court's decision in *Goldberg* reflects "the Nation's basic commitment to both substantive equality and institutional innovation in participation opportunities, in order to foster the dignity and well-being of all persons within its borders."[182] Dignity is, of course, an elusive concept.[183] This Comment does not attempt to provide a comprehensive legal definition. For the purposes of examining the specific form of "dignity" associated with speaking one's language of choice, this Comment refers to the Court's declaration in *Obergefell v. Hodges*:

> Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of

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180 *See* Mathews v. Eldridge, 434 U.S. 319, 335 (1976).

181 Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 3 (1990).

182 *Id.* (internal quotations omitted) (citing Goldberg v. Kelly, 397 U.S. 254, 264–65).

183 *See* Jonathan Turley, Opinion, *The Trouble with the 'Dignity' of Same-Sex Marriage*, WASH. POST (July 2, 2015), https://www.washingtonpost.com/opinions/the-trouble-with-the-dignity-of-same-sex-marriage/2015/07/02/43bd8f70-1f4e-11e5-aeb9-a411a84c9d55_story.html?noredirect=on&utm_term=.85339ec7bdb0 ("Dignity is a rather elusive and malleable concept compared with more concrete qualities such as race and sex.").

> law." The fundamental liberties protected by this Clause . . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.[184]

The Supreme Court thus defined "dignity" in *Obergefell* as including "intimate choices that define personal identity and beliefs."[185]

In line with this definition, sociolinguistic studies demonstrate that individuals' linguistic choices stem from a desire to convey information about themselves and define their personal identities.[186] In a study of an English-Spanish bilingual fourth-grade classroom, for example, the researcher noted the following behaviors: (1) two girls whose best-friendship was grounded in their shared bilingualism—the trait that distinguished them from the rest of their friends—were more likely to engage in "code-switching"[187] between English and Spanish;[188] (2) when the girls and boys of the classroom, as groups, were involved in a disagreement, the girls spoke English to "separate" themselves from the boys, who were arguing in Spanish;[189] (3) a boy who took clear pride in his Mexican heritage preferred using Spanish over English as a means of expressing his Mexican identity;[190] and (4) one of the most studious children in the classroom would consistently use the language of instruction, whether English or Spanish, as part of constructing his identity of "good student."[191] Similar patterns have emerged in a range of other contexts: gay men adjusting their speech so as not to sound "too gay" when speaking to potentially homophobic audiences and instead invoking patterns that are associated with education and authority,[192] women lawyers "neutralizing" their speech to sound indistinguishable from their male colleagues,[193] and young people of all ethnic backgrounds adopting features

184 Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015).

185 *Id.*

186 The research in this area defines "social identity" as "the socially constructed membership in a social group or category." Janet M. Fuller, *Language Choice as a Means of Shaping Identity*, 17 J. LINGUISTIC ANTHROPOLOGY 105, 106 (2007); *see, e.g.*, *id.* at 117 ("[I]t is commonplace for bilinguals to use both of their languages with each other to index bilingual identity.").

187 "Code-switching," in this study, referred to "changes in language choice across speaker turns, for example, when speaker A speaks Spanish and speaker B responds in English." *Id.* at 105–06.

188 *Id.* at 117.

189 *Id.* at 118.

190 *Id.* at 120.

191 *Id.* at 124.

192 ROBERT J. PODESVA, SARAH J. ROBERTS & KATHRYN CAMPBELL-KIBLER, SHARING RESOURCES AND INDEXING MEANINGS IN THE PRODUCTION OF GAY STYLES 186–87 (2001).

193 Bryna Bogoch, *Gendered Lawyering: Difference and Dominance in Lawyer-Client Interaction*, 31 L. & SOC'Y REV. 677, 705 (1997).

of "African-American Vernacular English" to express their affiliations with "hip-hop culture,"[194] to name a few.

Individual choices relating to speech thus are identity-driven and fall within the ambit of "dignity" outlined in *Obergefell*. Consequently, when the Government mandates, in the absence of a translator, that an applicant must tell her story in English or not tell it at all, the United States is not acting in accordance with *Goldberg*'s promise of "foster[ing] the dignity . . . of all persons within its borders."[195] Much to the contrary, individuals who speak English with an accent—that is, those who speak with less than native/bilingual proficiency—actually perceive stigmatization.[196] Perceiving stigmatization in turn leads to more general concerns about their belonging in the United States.[197] In fact, perceived bias with regard to accent is such a pervasive source of insecurity among American immigrants that those who can afford it often seek help from speech pathologists—"they feel their choice is between speech lessons or exclusion."[198] Thus, failing to provide translation services to asylum seekers contradicts with the dignity interests central to *Goldberg*'s fourth consideration: applicants who are unable to speak in their language of choice are being deprived of an identity-driven choice—a choice that falls within *Obergefell*'s ambit of "dignity."[199]

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194 Cecelia Cutler, *Hip-Hop, White Immigrant Youth, and African American Vernacular English: Accommodation as an Identity Choice*, 38 J. ENG. LINGUISTICS 248, 251 (2010). African American Vernacular English, or "AAVE," is a linguistic term of art used to refer to "the range of variable patterns associated with the speech of African Americans in the United States." *Id.* at 265.

195 *See* White, *supra* note 182.

196 Agata Gluszek & John F. Dovidio, *Speaking with a Nonnative Accent: Perceptions of Bias, Communication Difficulties, and Belonging in the United States*, 29 J. LANGUAGE & SOC. PSYCHOL. 224, 227 (2010).

197 *Id.* at 228.

198 Raymond Hernandez, *When an Accent Becomes an Issue: Immigrants Turn to Speech Classes to Reduce Sting of Bias*, N.Y. TIMES, Mar. 2, 1993, at B1, *available at* https://www.nytimes.com/1993/03/02/nyregion/when-accent-becomes-issue-immigrants-turn-speech-classes-reduce-sting-bias.html.

199 It is worth noting that perceived stigmatization also correlates with conversational problems and difficulties in communicating. *See* Gluszek & Dovidio, *supra* note 196, at 227. When an asylum applicant is not given the opportunity to speak in the language of her choice, there is a risk that perceived bias will render her too uncomfortable to tell her story in full. *Cf.* White, *supra* note 182, at 44 ("The hearing appears to invite Mrs. G. to speak on equal terms with all other persons. Yet within the local landscape of her hearing, Mrs. G.'s voice is constrained by forces that procedural doctrine will neither acknowledge nor oppose. Each of these forces attaches a specific social cost to her gender and race identity. The caste system implements race and gender ideology in social arrangements. The 'fraud issue' revives misogynist and racist stereotypes that had been forced, at least partly, underground by the social movements of the 1960s and 1970s. And the welfare system responds to gender and race-based injustice in the economy by construing the poor as Woman—as an object of social control. Given the power amassed behind these forces, we might predict that

CONCLUSION

Asylum applicants possess a liberty interest that triggers due-process protections. When a *Goldberg-Eldridge* balancing analysis is conducted to analyze what process, exactly, is due, the additional costs to the Government of guaranteeing interpretative services to affirmative asylum seekers is minimal, while asylum seekers' interest in staying in this country is significant. With regard to the second *Eldridge* factor and the risks associated with erroneous deprivation, a denial of asylum can result in extreme hardship for the applicant. As for added value, professional interpreters are more effective than their untrained counterparts. Furthermore, where an applicant would otherwise be unable to find even an untrained translator, guaranteeing interpretive services could mean the difference between a grant of asylum and a pre-interview dismissal of the claim. On the other side of the balance, guaranteeing interpretation services to asylum applicants would result in only minimal additional costs to the Government. Moreover, guaranteeing interpretative services would preserve an identity-driven choice for asylum applicants, which would be in line with the Court's commitment to fostering dignity in administrative adjudications. As such, the Court should guarantee due-process protections to all non-citizens and guarantee that those protections include translation services for non-citizens with limited English proficiency.

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they should win the contest with Mrs. G. for her voice."). Thus, even individuals who are competent in English may fail to provide the detail necessary to have a successful asylum application. This risk strikes at due-process concerns presented in both the *Goldberg* and *Eldridge* decisions: *Goldberg*'s commitment to fostering dignity and *Eldridge*'s concern about erroneous deprivation of benefits. *See* White, *supra* note 182; *see also* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).