

Constitutional Adjudication and Democracy: Constitutional Rights of “Aliens”

Jessica E. Slavin
Marquette University
Law School
United States

“It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law But an alien on the threshold of initial entry stands on different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’” *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953) (quoting *United States ex rel. Knauff v. Mezei*, 338 U.S. 537, 544 (1950))

The first time I read the above words from the United States Supreme Court’s decision in the *Shaughnessy* case (quoting *Knauff*), they hit me like a blow. I had to stop to reread them. (It was not the first time that happened to me as I read a Supreme Court decision, and it is always a good sign that something interesting is being discussed.)

Even at the time of their writing, those words struck some members of the Court, and many other people, as patently incorrect. To say that any procedure whatsoever, if authorized by Congress, therefore constitutes “due process,” simply because it applies to some particular group of people, is nonsensical. Stated more plainly, the words express the view that aliens have no due process rights whatsoever with regard to the means by which the United States denies them entry. Critics have said that, even if this were true as a matter of fact (which was not in itself clear), it was unwise and wrong to permit a government to act with impunity, ever.

Today, that famous sentence seems even more obviously incorrect, but not only because of its support for governmental impunity: also because of the fact that the concept of the “alien” is breaking down, or at least changing in a way that makes the point of entry seem less important.

To begin with, in the half century that has passed since the writing of those words in *Knauff* (as has become cliché to note) incredible changes in technology have transformed, and are in the process of transforming, global communications and travel. At the same time, perhaps correlated with these changes, the “horizontal” system of international law, founded upon the concept of nation states contracting with one another and then implementing those agreements within their own states, rather independently, has shown signs of strain. Social forces pull in both directions, some pushing to bolster the strength and insularity of the nation-state, others pushing the opposite way, toward outward-looking, globally-focused government.

Meanwhile, at the seams of this system, both at the places where the nation-state crumbles and at the places where nationalism takes hold, complex systems of conflict and instability have sprung up, with horrifying results that the international legal system seems incapable of resolving. We watch successive waves of the failure of state protections for large groups of human beings: starvation; exploitation and violence against the most vulnerable human beings, including so, so many children; persecution; genocide; wars; all seeming to go on for decades in unending cycles.

Finally, and thankfully, during this same period it has become a principle of international law that a state may not return a human being to persecution or torture. Treaty law recognizing the right to non-refoulement and related protections has developed and strengthened, so that now, though it is true that the right to non-refoulement is gutted right and left by limitations, exclusions, and arbitrary procedural systems, most nonetheless acknowledge in principle that non-refoulement is a norm *jus cogens*, for all human beings everywhere on the earth.

Against this backdrop, when I read that sentence from *Knauff* (especially when I read it in the context of *Shaughnessy*) it seems simply inaccurate to continue to call a refugee (whether at the border or already inside) an “alien.” As Stephen Gardbaum has written, “[t]he growth of the human rights system is a critical part of the case for those who argue that such fundamental changes have taken place in international law as to justify or require a shift in overall paradigm from a horizontal conception of sovereign equality to a more vertical, ‘constitutionalist’ conception.” *Human Rights as International Constitutional Rights*, 19 *European J. of Int’l Law* 749, 762 (2008). The refugee is one of the strongest arguments for this position, as she seeks to assert an individual right to safety in the face of the failure of state protection. Gardbaum further writes that “the contemporary human rights system is undoubtedly one of the strongest parts of this general constitutionalist claim,” *id.* at 762-63, and the refugee would seem to be the strongest candidate for citizenship in this new global constitutional order.

Why does this matter? Why reconceptualize non-refoulement as a global constitutional right at a time when its acceptance as *jus cogens* is nearly universal? For one thing, because doing so may provide a more solid ground for enforcing the right, or at least, for arguing for recognition of the need to make the right enforceable. Also, it could help form a legal basis for the improvement or replacement of the current system of humanitarian aid and refugee resettlement, by reframing the problems of detention and arbitrary decision-making as violations of fundamental due process rights belonging to all human beings on this earth.