

October 2017

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Repository Citation

Amy L. Moore, *Even When You Win, You Lose: Executive Order 13769 & the Depressing State of Procedural Due Process in the Context of Immigration*, 26 Wm. & Mary Bill Rts. J. 65 (2017), <https://scholarship.law.wm.edu/wmborj/vol26/iss1/3>

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EVEN WHEN YOU WIN, YOU LOSE: EXECUTIVE ORDER 13769 & THE DEPRESSING STATE OF PROCEDURAL DUE PROCESS IN THE CONTEXT OF IMMIGRATION

Amy L. Moore*

INTRODUCTION

On January 27, 2017, the new President signed an Executive Order imposing severe restrictions on immigration into the United States.¹ Overnight, nationals and refugees from seven countries could no longer enter into the United States even with documentation and vetting that had previously been approved.² The State of Washington filed a complaint in the United States District Court in the Western District of Washington seeking declaratory and injunctive relief against President Trump, the United States Department of Homeland Security and its Secretary, the Secretary of State, and the United States of America.³ On February 1, 2017, the State of Minnesota was added as a plaintiff.⁴ The States wanted the court to invalidate parts of the order and enjoin its enforcement.⁵ The States then sought a temporary restraining order (TRO) to prevent enforcement of the order while waiting for a hearing to determine if a preliminary injunction should be issued.⁶ The District Court granted the TRO nationwide.⁷ The government responded by filing an emergency motion to stay the order pending an appeal.⁸ This motion was quickly heard by the Ninth Circuit, which ruled against a stay and allowed the executive order to be enjoined.⁹ Ultimately, the Ninth Circuit denied reconsideration of the matter en banc and dismissed the case when a subsequent Executive Order was issued on March 6, 2017, that rendered the initial order moot.¹⁰

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¹ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

² See generally *Washington v. Trump* (*Washington I*), No. 2:17-cv-00141-JLR (W.D. Wash. Feb. 3, 2017) (temporary restraining order); Exec. Order No. 13769, 82 Fed. Reg. 8977.

³ *Washington I*, No. 2:17-cv-00141-JLR, at *2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at *5–6.

⁸ See generally *Emergency Motion Under Circuit Rule 27-3 for Administrative Stay & Motion for Stay Pending Appeal*, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105).

⁹ *Washington v. Trump* (*Washington II*), 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam) (order denying stay of District Court's TRO).

¹⁰ *Washington v. Trump* (*Washington III*), 858 F.3d 1168 (9th Cir. 2017) (order denying vacatur of stay order).

In ruling on the propriety of the TRO and the likelihood of the States' case regarding the merits, the Ninth Circuit, in its first order, held that the Executive Order might be invalidated for a lack of procedural due process.¹¹ This Article evaluates that claim via the storied history of procedural due process in the immigration context and concludes that even if procedural due process could be applied to all aliens implicated by the original Executive Order, it would not have been the victory expected by its advocates.

I. HISTORY OF PROCEDURAL DUE PROCESS IN IMMIGRATION LAW

When initially undertaking a study of immigration law in the United States, a primary principle that emerges is Congress's fundamental power over that area. Although it may be unclear from whence constitutionally Congress's power exactly materializes,¹² the Supreme Court as early as 1889 began its analysis in *Chae Chan Ping v. United States*¹³ by saying, "[t]hat the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think [is] open to controversy."¹⁴ This case involved the exclusion of Chinese laborers who had to prove they had been in the United States before the ban against Chinese immigration had been put into effect.¹⁵ To support this broad proclamation of existing power, the Court stated,

The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination[s], so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers.¹⁶

The power of exclusion was, somehow, merely incident to sovereignty and belonged clearly to the government of the United States.¹⁷ However, this power extended not

¹¹ *Washington II*, 847 F.3d at 1164–65.

¹² See THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 813–14 (7th ed. 2012) (discussing Congress's role in asylum applications); see also Anne E. Pettit, "One Manner of Law": *The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine*, 24 FORDHAM URB. L.J. 165, 169 (1996).

¹³ 130 U.S. 581 (1889).

¹⁴ *Id.* at 603. Alien migration into the United States was unrestricted until 1875, and the first general immigration statute was passed in 1882. *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972).

¹⁵ *Chae Chan Ping*, 130 U.S. at 582.

¹⁶ *Id.* at 606.

¹⁷ *Id.*

only to exclusion, but also to expulsion or deportation of “all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [as] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare.”¹⁸ In another case from 1893, the Court considered due process for a Chinese laborer who did not possess the proper documentation for entry.¹⁹ At the time, a residence certificate was required for entry to prove the alien had lived in the United States prior to an enactment banning Chinese immigration.²⁰ Such a certificate could not be obtained unless an alien found a non-Chinese witness to assert he met the qualifications.²¹ Holding that deportation was not a punishment and therefore not deserving of criminal protections, the Court further explained that the alien was not deprived of due process.²² In drawing an analogy to a contemporaneous case, the Court explained Congress’s role and its potential interaction with the executive branch, noting:

Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien’s right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to [re-examine] the evidence on which he acted, or to controvert its sufficiency.²³

Therefore, the larger questions both as to whether, and on what conditions, aliens would be permitted to remain in the United States were political, and the Court could not “properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress.”²⁴ Ten years later, in 1903, the Court would again confront the due process question in *Yamataya v. Fisher*.²⁵ Although the Court held firmly to the belief that Congress could exclude anyone from the United States, prescribe any terms and conditions for entry, establish regulations on deportation, and “commit the enforcement of such provisions, conditions and regulations *exclusively* to executive officers, without judicial intervention,” there was a slight shift in the Court’s willingness to analyze procedural due process.²⁶

¹⁸ *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

¹⁹ *Id.* at 703–04 (discussing an unnamed case in which a Chinese immigrant presented three Chinese witnesses and the Court did not accept them as “credible”).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 709.

²³ *Id.* at 713.

²⁴ *Id.* at 731.

²⁵ *See* 189 U.S. 86 (1903).

²⁶ *Id.* at 97 (emphasis added).

In that case, a Japanese came to America in violation of a statute because she was found to be a pauper and would likely become a public charge.²⁷ Kaoru Yamataya alleged that the investigation was procedurally inadequate.²⁸ Not only did she allege that she did not have any legal assistance, did not understand the English language, and did not grasp the gravity of the investigation itself, but also that she did not have an opportunity to prove she was not a pauper or likely to become a public charge.²⁹ The Court elected to leave to one side the issue of whether an alien who entered illegally could properly invoke due process.³⁰ However, *if a right to claim due process existed*, any alien who had properly entered this country, could not “be taken into custody and deported without giving him [any] opportunity to be heard upon the questions involving his right to be and remain in the United States.”³¹ When measuring the flex of this potential protection against executive power, the Court maintained that it had *never* held, and could not be understood to be declaring, that “administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ‘due process of law.’”³² Due process could not be ignored. However, the Court still found that Yamataya received all process that was constitutionally due to her—the Court concluded that she received both notice and an opportunity to be heard, the floor that due process required.³³ And although the Court recognized the problems with her proceedings, informal notice and her inability to understand the language or importance of the proceedings did not “justify the intervention of the courts,” and prevent her from receiving a meaningful opportunity to be heard.³⁴

How does this looming bastion of congressional and executive power interact with a constitutional protection of procedural due process, which requires the government to provide certain procedures before taking away protected rights? Due process is typically a two-stage inquiry: first, is the constitutional plank triggered by government action in an individualized decisionmaking process concerning a protected interest; and second, if due process is triggered, what process is constitutionally due? *Yamataya* seems to stand as proof that even in the earliest days of consideration, when an alien was assumed to have passed the first stage and be entitled to protection, she

²⁷ *Id.* at 87.

²⁸ *Id.* at 88.

²⁹ *Id.*

³⁰ *Id.* at 100. The Court said that answering this question was not necessary because the statute did not “necessarily exclude opportunity to the immigrant to be heard, when such opportunity is of right.” *Id.*

³¹ *Id.* at 101. In other words, due process, if granted, would require an opportunity to be heard. An alien that had properly entered the country could not be deported without due process, though the Court was hesitant to decide the due process fate of illegal aliens.

³² *Id.* at 100.

³³ *Id.* at 102.

³⁴ *Id.*

was given a pittance of process at the second.³⁵ In fact, over sixty years after *Chae Chan Ping*,³⁶ the Court would again summarize Congress's overwhelming power in the area of due process when it ominously intoned: "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."³⁷ In other words, there was no need to measure the process provided by Congress against a constitutional standard; aliens were fortunate to receive whatever process Congress was willing to give and deserved nothing more.

This notion that due process for aliens is whatever Congress designates was penned by Justice Minton, writing for the Court in the 1950 case, *United States ex rel. Knauff v. Shaughnessy*.³⁸ That case has never been explicitly overruled, but the Supreme Court has continued to struggle with the concept of procedural due process as it concerns aliens desiring entry. Before delving into Executive Order 13769 and the Ninth Circuit's denial of a stay regarding a temporary restraining order concerning that Executive Order, it is necessary to understand the history of Supreme Court jurisprudence in this area. The Ninth Circuit relied on several cases familiar to scholars that study procedural due process in the context of immigration,³⁹ but unpacking the Court's argument requires a baseline understanding of the case law.

Between 1889 and 1950, the fabric of America evolved and deepened, but the judicial recognition of Congressional dominance over immigration law remained the same.⁴⁰ In 1950, the Supreme Court considered *Knauff*.⁴¹ Ellen Knauff was born in Germany and ultimately married a naturalized citizen of the United States.⁴² In 1948, her husband sought to have her naturalized, but she was denied entry to the United States and detained at Ellis Island.⁴³ The Attorney General entered a final order of exclusion that did not allow a hearing on the grounds that her admission would be prejudicial to the interests of the United States.⁴⁴ She filed a writ of habeas corpus for her detention based mostly on provisions of the War Brides Act.⁴⁵ A section of that statute allowed the Attorney General to deny a hearing if he "determined that the alien was excludable under the regulations on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."⁴⁶

³⁵ See Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 18–22 (2006).

³⁶ See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

³⁷ *Id.* at 544.

³⁸ *Id.*

³⁹ See generally *Washington v. Trump (Washington II)*, 847 F.3d 1151 (9th Cir. 2017) (per curiam) (order denying stay of District Court's TRO).

⁴⁰ See *supra* notes 12–38 and accompanying text.

⁴¹ 338 U.S. at 539.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 539–40.

⁴⁵ *Id.* at 540.

⁴⁶ *Id.* at 541.

The Court began its decision with a reminder that aliens seeking admission do not do so under any claim of right.⁴⁷ To the contrary, “[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides.”⁴⁸ Congress can lawfully delegate this ability to make “the decision to admit or to exclude an alien . . . [to] the President . . . [and] [t]he action of the executive officer under such authority is final and conclusive.”⁴⁹ This decision of the political branches is not judicially reviewable unless there is an express provision authorizing review.⁵⁰ Here, Congress had prescribed a process which brokered no hearing if the Attorney General chose, and so Ellen Knauff did not have to receive one.⁵¹ Congress mandated the process due, and had the power to do so in whatever capacity it wished regarding entering aliens.⁵²

Just two years later, in 1952, the Immigration and Nationality Act (INA) was passed.⁵³ Until the addition of this comprehensive law, Congress had passed individual legislation for each new immigration regulation.⁵⁴ These requirements ranged from literacy laws to exclusions purely on the basis of race.⁵⁵ The new law consolidated and codified many existing provisions and organized immigration law into one place.⁵⁶ The INA remains today the main source of immigration law, although it has been amended many times.⁵⁷ This core statutory language would provide a congressional rubric for immigration.

In 1953, directly after the passage of the INA, the Supreme Court dealt with a pair of cases involving lawful permanent residents (LPRs) and their attempted re-entry

⁴⁷ *Id.* at 542.

⁴⁸ *Id.* Later the Court stressed, “[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.” *Id.* (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893)).

⁴⁹ *Id.* at 543.

⁵⁰ *Id.*

⁵¹ *See id.*

⁵² *See id.*

⁵³ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (for purposes of this Article, the INA will be cited as codified in Title 8 of the United States Code).

⁵⁴ *See generally* U. S. SELECT COMM’N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT AND RECOMMENDATIONS 161–216 (1981) (discussing the legislative process of enacting new legislation for every new regulation).

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *See, e.g., id.* at 248 (providing an explanation of an amendment to the INA while the Act remained in force).

into the United States.⁵⁸ An alien designated as a LPR is authorized to live and work in the United States on a permanent basis.⁵⁹ This is distinguishable from non-immigrant visa holders who may reside or work in the United States on a more temporary basis.⁶⁰ The card indicating that an alien is a LPR is commonly referred to as a “green card.”⁶¹

The first case in this pairing, *Kwong Hai Chew v. Colding*, involved a Chinese sailor who was properly admitted into the United States after marrying an American citizen.⁶² He applied for, and received, lawful permanent residence in 1945.⁶³ In 1950, he joined the Coast Guard and began serving on a merchant vessel visiting several ports of call.⁶⁴ When he returned to America via San Francisco he was denied entry as “an alien whose entry was deemed prejudicial to the public interest.”⁶⁵ Kwong sought a writ of habeas corpus, alleging that “his detention was arbitrary and capricious and a denial of due process of law.”⁶⁶ As in *Knauff*, the Attorney General denied him all information as to the nature and reason for the accusations against him and any opportunity to be heard.⁶⁷ Yet the Court held that the *Knauff* case was not on point because *Knauff* was an alien entrant and not a resident alien.⁶⁸ The Court determined it must consider first what Kwong’s right to a hearing would have been if he was continuously within the territorial boundaries of the United States.⁶⁹ It was “well established” to the Court that a LPR who remains physically inside the United States was entitled to due process.⁷⁰ This process meant that even though he could be deported, he was “entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal.”⁷¹ Congress’s power in this area was slightly limited, because “[a]lthough Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard.”⁷²

⁵⁸ See *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

⁵⁹ Nancy Morawetz, *The Invisible Border: Restrictions on Short-Term Travel by Non-citizens*, 21 GEO. IMMIGR. L.J. 201, 202 (2007).

⁶⁰ *Id.* at 223.

⁶¹ See Daniel Pines, *Overseas Lawful Permanent Resident Terrorists: The Novel Approach for Revoking Their LPR Status*, 51 SAN DIEGO L. REV. 209, 210 (2014).

⁶² 344 U.S. at 592.

⁶³ *Id.* at 592–93.

⁶⁴ *Id.* at 594.

⁶⁵ *Id.* at 595.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 596.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 597.

⁷² *Id.* at 597–98.

Therefore, Kwong would receive due process if he was “deportable” as a permanent resident but not if he was “excludable”⁷³ as an arriving alien.⁷⁴ The Court went on to analyze the specific regulations at issue, holding that a denial of a hearing was not unconstitutional if it was limited only to excludable aliens.⁷⁵ But which category properly classified Kwong? A mere voyage to foreign parts could not deprive Kwong of his constitutional right to procedural due process.⁷⁶ The Court held that “[w]here neither Congress, the President, the Secretary of State nor the Attorney General has inescapably said so, we are not ready to assume that any of them has attempted to deprive such a person of a fair hearing.”⁷⁷ Kwong remained a permanent resident of the United States even though he had left the country and attempted to return, and thus he was due whatever additional process a deportation hearing could offer over an exclusion hearing.⁷⁸

A little over a month later, the Court heard another case of exclusion regarding a permanent resident: *Shaughnessy v. United States ex rel. Mezei*.⁷⁹ Ignatz Mezei was born to either Hungarian or Romanian parents in Gibraltar and lived in the United States from 1923–48.⁸⁰ He left America ostensibly to visit his dying mother in Romania, but he was denied entry there.⁸¹ After troubles with traveling and obtaining the proper paperwork, Mezei eventually made his way back to New York in 1950, where he was detained as temporarily excluded.⁸² The Attorney General made the exclusion permanent without a hearing on the “basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.”⁸³ Mezei was found excludable for security reasons.⁸⁴ However, he remained on Ellis Island because no other country would take him in—France and Great Britain refused him permission to land, and Hungary and a dozen Latin American countries all turned him down as well.⁸⁵ Ultimately, Mezei “sat on Ellis Island because this country shut him out and others were unwilling to take him in.”⁸⁶

Detained indefinitely on Ellis Island, Mezei sought relief through a series of habeas corpus proceedings.⁸⁷ In analyzing his case, the Court reaffirmed the long recognized

⁷³ *Id.* at 599.

⁷⁴ *Id.* at 593.

⁷⁵ *Id.* at 600.

⁷⁶ *Id.* at 601.

⁷⁷ *Id.* at 601–02.

⁷⁸ *Id.*

⁷⁹ 345 U.S. 206 (1953).

⁸⁰ *Id.* at 208.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 209.

⁸⁶ *Id.*

⁸⁷ *Id.*

principle that “the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments [is] largely immune from judicial control.”⁸⁸ Congress had exercised these powers and “expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife.”⁸⁹ The due process inquiry concerning the exercise of this power rested on the distinction between “aliens who have once passed through our gates, even illegally” and “an alien on the threshold of initial entry.”⁹⁰ Aliens inside the United States were entitled to “proceedings conforming to traditional standards of fairness encompassed in due process of law,” but aliens outside the United States received whatever process authorized by Congress.⁹¹

The question remained of how to classify Mezei. The Court held that his geographical location at Ellis Island was “not an entry into the United States.”⁹² Even though Congress allowed him to be removed from ship to shore, this was “an act of legislative grace, [and] bestow[ed] no additional rights.”⁹³ Mezei must still be treated as though he was stopped at the border.⁹⁴ But how was his status as a permanent resident affected by his absence from the United States? Unlike Kwong’s “temporary absence,”⁹⁵ Mezei had a “protracted absence” that was deemed by statute to be a “clear break in an alien’s continuous residence.”⁹⁶ Drawing a factual distinction between the two facially similar cases, the Court explained that “[u]nlike [Kwong] who with full security clearance and documentation pursued his vocation for four months aboard an American ship, [Mezei], apparently without authorization or reentry papers, simply left the United States and remained behind the Iron Curtain for 19 months.”⁹⁷ The Court thus had “no difficulty” in holding Mezei to be an entering alien, deserving of an exclusion hearing.⁹⁸ Because an exclusion hearing was the proper choice, the executive’s decision to deny entry as a result of that hearing was final and conclusive, and the Court could not review it without express authorization.⁹⁹

Justice Jackson was joined by Justice Frankfurter in a dissenting opinion that argued Mezei’s refuge at Ellis Island only meant freedom if he were an amphibian.¹⁰⁰

⁸⁸ *Id.* at 210.

⁸⁹ *Id.*

⁹⁰ *Id.* at 212.

⁹¹ *Id.*

⁹² *Id.* at 213.

⁹³ *Id.* at 215.

⁹⁴ *Id.*

⁹⁵ *Id.* at 213 (“Only the other day we held that under some circumstances temporary absence from our shores cannot constitutionally deprive a returning lawfully resident alien of his right to be heard.”).

⁹⁶ *Id.* at 214.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 212.

¹⁰⁰ *Id.* at 220 (Jackson, J., dissenting).

In actuality it was a prison. Jackson noted the proper protocols that Mezei had completed, noting that after his visit

[t]o his aged and ailing mother that was prolonged by disturbed conditions of Eastern Europe, he obtained a visa for admission issued by our consul and returned to New York. There the Attorney General refused to honor his documents and turned him back as a menace to this Nation's security.¹⁰¹

As Mezei was clearly denied liberty, triggering a due process inquiry, Jackson turned to the issue of due process of law in both its substantive and procedural forms.¹⁰² Procedurally, he argued that due process should be more rigid and act as “a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law.”¹⁰³ Even though the law properly placed more restrictions on aliens than on citizens, the baseline of fairness “does not vary with the status of the accused. . . . If [procedures] would be unfair to citizens, [courts] cannot defend the fairness of them when applied to the more helpless and handicapped alien.”¹⁰⁴ The dissent grappled with the harsh logic that if the alien had no right to entry, he had no rights at all. After all, Jackson analogized, “[i]t would effectuate [an alien'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 the due process of law?”¹⁰⁵ However, the main issue for Jackson was the indefinite detention, as even he conceded that “[e]xclusion of an alien without judicial hearing, of course, does not deny due process when it can be accomplished merely by turning him back on land or returning him by sea.”¹⁰⁶ However, when confinement became the means for enforcing exclusion as opposed to simply turning Mezei away, he was owed more process.¹⁰⁷ Notice and an opportunity to be heard was “the more due him when he [was] entrapped into leaving the other shore by reliance on a visa which the Attorney General refuse[d] to honor.”¹⁰⁸

Ten years later, in the case of *Rosenberg v. Fleuti*,¹⁰⁹ the Court again considered the issue of how to classify a LPR who had left the country and attempted return.¹¹⁰ George Fleuti was a Swiss national who became a permanent resident in 1952 and

¹⁰¹ *Id.* at 219.

¹⁰² *Id.* at 222.

¹⁰³ *Id.* at 224.

¹⁰⁴ *Id.* at 225.

¹⁰⁵ *Id.* at 226–27.

¹⁰⁶ *Id.* at 227.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 374 U.S. 449 (1963).

¹¹⁰ *Id.*

was present continuously in the United States except for a visit to Mexico in 1956 that lasted a few hours.¹¹¹ In 1959, the government attempted to deport Fleuti for committing a crime involving moral turpitude, but the crime did not rise to the level required by statute.¹¹² The government again attempted to deport Fleuti on the grounds that he had been excludable at the time his 1956 re-entry to the United States under INA 212(a)(4).¹¹³ The language of the statute excluded aliens who suffered from a “psychopathic personality,” which was interpreted to apply to Fleuti as a homosexual.¹¹⁴ This statutory plank for removal had not been in effect in 1952 when Fleuti had first achieved permanent residence, but was in place when he returned from Mexico in 1956.¹¹⁵ Fleuti challenged the constitutionality of the provision, but the Supreme Court, invoking the canon of constitutional avoidance, chose not to answer the vagueness issue.¹¹⁶ The Court instead focused on whether Fleuti’s return from Mexico in 1956 could properly be classified as an “entry” under the statute.¹¹⁷ At the time, section 101(a)(13) defined entry:

The term “entry” means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary¹¹⁸

The real statutory interpretation question for the Court was thus whether Fleuti fit into the exception allowed for lawful permanent residents—that is, was his “short visit to Mexico . . . a ‘departure to a foreign port or place . . . [that] was not intended’?”¹¹⁹ After a discussion of developing case law and legislative history,¹²⁰ where the Court weighed “high and momentous” interests at stake for the alien,¹²¹ the Court concluded

¹¹¹ *Id.* at 450.

¹¹² *Id.*

¹¹³ *Id.* at 450–51.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 453.

¹¹⁶ *See id.* at 451.

¹¹⁷ *Id.* at 451–52.

¹¹⁸ *Id.* at 452 (citing 8 U.S.C. § 1101(a)(13) (1952)).

¹¹⁹ *Id.* (alteration in original) (citing 8 U.S.C. § 1101(a)(13) (1952)).

¹²⁰ *Id.* at 453–60.

¹²¹ *Id.* at 456 (quoting *Delgado v. Carmichael*, 332 U.S. 388, 391 (1947)).

that that statute should not be “woodenly construed.”¹²² Therefore the Court read the intent exception in the language “as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien’s permanent residence.”¹²³ Factors to consider when categorizing a trip included, but were not limited to, the length of time the alien was absent, the purpose of the visit, and whether the alien had to procure any travel documents to make the trip.¹²⁴ For example, “if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful.”¹²⁵ Fleuti’s Mexico trip was thus likely to be classified as “an innocent, casual, and brief excursion by a resident alien outside this country’s borders . . . [not] ‘intended’ as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an ‘entry’ into the country on his return.”¹²⁶ Thus, it seemed that triggering a due process analysis depended not only on whether an alien was arriving, but whether he or she was arriving for the first time or had already created ties with the United States.¹²⁷

Although not solely concerned with procedural due process, the Court applied the INA to determine an exclusion case almost ten years later that granted and re-affirmed the government’s broad power over immigration: *Kleindienst v. Mandel*.¹²⁸ Ernest Mandel was a Belgian citizen who was a self-described revolutionary Marxist who advocated the “economic, governmental, and international doctrines of world communism.”¹²⁹ He visited the United States temporarily in 1962 and 1968 to speak at universities.¹³⁰ When he applied for entry to the United States in 1969, his request was denied because he identified as a Communist, and he received no waiver.¹³¹ Of course it was clear that Mandel himself, “as an unadmitted and nonresident alien, had

¹²² *Id.* at 460.

¹²³ *Id.* at 462.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* As the record did not contain a detailed description or characterization of the trip to Mexico beyond the fact that Fleuti was gone for “about a couple of hours,” the Court chose to remand the case for consideration consistent with its interpretation of the statutory language. *Id.* at 463.

¹²⁷ *Id.* at 462.

¹²⁸ 408 U.S. 753 (1972).

¹²⁹ *Id.* at 756.

¹³⁰ *Id.*

¹³¹ *Id.* at 756–57. Previously he had received a waiver to speak. There was some issue concerning whether Mandel had been informed of previous restrictions to conform to his stated itinerary and purpose, and even though the Department of State did recommend to the Attorney General that Mandel receive a waiver for this trip, that waiver was denied. *Id.* at 759. The INA rendered aliens inadmissible who “write or publish . . . the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship.” See 8 U.S.C. § 1182(a)(28)(G) (1952).

no constitutional right of entry to this country as a nonimmigrant or otherwise.”¹³² However, those wishing to hear him speak claimed that not hearing from and meeting with Mandel in person was a denial of their First Amendment rights and procedural due process.¹³³

Although the Court conceded that First Amendment rights were implicated, that alone did not control the issue.¹³⁴ After all, the Government had “the power to exclude aliens . . . inherent in [its] sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government.”¹³⁵ The Court’s reaffirmations on that point had been “legion” and in fact, “[o]ver *no conceivable subject* is the legislative power of Congress more complete than it is over’ the admission of aliens.”¹³⁶ However, there was a demarcation between congressional power and executive power. The Court, quoting Justice Frankfurter from a previous case, stated:

As to the extent of the power of Congress under review, there is not merely ‘a page of history’ . . . but a whole volume. . . . In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.¹³⁷

Therefore, even though Congress might retain almost unlimited power in the area of crafting policies with regard to entry or exclusion, the executive branch must still apply due process in the policies’ implementation.¹³⁸ However, when, as here, Congress delegated its power to the executive, and the executive exercised that power “on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.”¹³⁹ The plenary power of Congress still casts a long, protective shadow.

¹³² *Kleindienst*, 408 U.S. at 762.

¹³³ *Id.* at 760. There were also claims of equal protection violation, unconstitutional delegation of legislative power to the Attorney General, and arbitrary and capricious application of the statute. *Id.*

¹³⁴ *Id.* at 765.

¹³⁵ *Id.* (citation omitted).

¹³⁶ *Id.* at 765–66 (emphasis added) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

¹³⁷ *Id.* at 766–67 (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954) (citation omitted)).

¹³⁸ *See id.*

¹³⁹ *Id.* at 770. The Court also noted that “[w]hat First Amendment or other grounds may

Though not an immigration case, *Mathews v. Eldridge*¹⁴⁰ intervened into this timeline, changed the way courts analyzed procedural due process, and provided a framework for consideration as to whether the standard was met.¹⁴¹ The Court took the opportunity to consolidate its procedural due process analysis, concluding that while “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner,’” what process is due in any given circumstance “generally requires consideration of three distinct factors.”¹⁴² These three factors included: first, the private interest that will be affected by the action; second, the governmental interest, including any monetary or administrative burdens that the additional or substitute procedural requirements would require; and third, the risk of an erroneous deprivation of an individual’s interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.¹⁴³ The way the factors are structured, particularly the third factor concerning the value of a piece of process, requires the aggrieved party to identify a piece of process that was missing in the underlying proceeding and argue for the merits of its inclusion.¹⁴⁴

This formula for considering appropriate process to be due was applied to the immigration context by the Supreme Court in 1982 in *Landon v. Plasencia*.¹⁴⁵ Maria Plasencia was a LPR from El Salvador who made a brief visit abroad and attempted to return to the United States.¹⁴⁶ She was returning from Mexico and was stopped at the border by an Immigration and Naturalization Service officer who found six nonresident aliens in her car.¹⁴⁷ Plasencia received a notice dated June 30, 1975, that told her an exclusion hearing would be held at 11:00 AM on June 30, 1975.¹⁴⁸ This afforded her with only a few hours of notice of the hearing and the charges.¹⁴⁹ She was charged with exclusion under 212(a)(31) of the INA, which excludes “any alien seeking admission ‘who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the

be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.” *Id.*

¹⁴⁰ 424 U.S. 319 (1976).

¹⁴¹ *Id.* At particular issue in that case was whether respondent was entitled to receive an evidentiary hearing before the termination of his social security benefits. *Id.* at 323; *see also* Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1312 (2012).

¹⁴² *Mathews*, 424 U.S. at 333, 335 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

¹⁴³ *Id.* at 335. While the Court lists them in a different order, separating the individual and governmental interest by putting erroneous deprivation in the middle, the weighing is the same and the comparison can be cleaner by analyzing the interests together in turn. *See generally id.* at 335–49 (discussing and applying the factors).

¹⁴⁴ *Id.* at 335, 343.

¹⁴⁵ 459 U.S. 21, 23 (1982).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 23–24.

¹⁴⁹ *Id.* at 35.

United States in violation of law.”¹⁵⁰ An immigration judge found her excludable, and held that her trip to Mexico was a “meaningful departure” from the United States, rendering her return to this country an entry.¹⁵¹ She eventually filed a writ of habeas corpus in a United States District Court, which found that she was entitled to a deportation hearing instead of an exclusion hearing because her departure was not meaningful.¹⁵² The government urged the Supreme Court to apply the *Fleuti* doctrine and find that Plasencia’s attempted crossing of the border to smuggle people across for profit rendered her departure meaningful, and thus she was an alien desiring entry as if for the first time.¹⁵³ But a threshold question for the Court was whether the issue of entry and the application of the *Fleuti* exception could be litigated properly in an exclusion hearing.¹⁵⁴ Did the choice of hearing, exclusion or deportation, make a difference?

The Supreme Court acknowledged that exclusion hearings and deportation hearings differed in several ways.¹⁵⁵ Not only was there an ostensible geographical distinction, but there was also a notice issue. Cases for deportation required by regulation at least seven days’ notice, but exclusion hearings only required that “the applicant is informed of the issues confronting him at some point in the hearing, and he is given a reasonable opportunity to meet them.”¹⁵⁶ The Court found that “[t]he statutory scheme [was] clear: Congress intended that the determinations of both ‘entry’ and the existence of grounds for exclusion could be made at an exclusion hearing.”¹⁵⁷ In other words, there was no prohibition in the statutory language or history for Plasencia to have an exclusion hearing merely because she was a LPR.

This conclusion did not resolve the procedural due process inquiry.¹⁵⁸ While the Court made no finding on “the contours of the process that [was] due or whether the process accorded Plasencia was insufficient,” it did hold that she could invoke the due process clause itself.¹⁵⁹ Therefore, even if Plasencia was *outside* the scope of the *Fleuti* doctrine (an issue to be decided at her hearing), she was still able to argue that the Due Process Clause applied to her. Potentially this due process invocation was only for LPRs whether they were being excluded or deported.¹⁶⁰

¹⁵⁰ *Id.* at 23 (citing 8 U.S.C. § 1182(a)(31) (1952)).

¹⁵¹ *Id.* at 24.

¹⁵² *Id.* at 25.

¹⁵³ *Id.* at 29–30.

¹⁵⁴ *Id.* at 32.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 26 (citing *In re Salazar*, 17 I. & N. Dec. 167, 169 (B.I.A. 1979)). Other differences included appellate procedures and substantive rights, such as being able to depart voluntarily or seeking other relief and choosing the destination of deportation. *Id.*

¹⁵⁷ *Id.* at 32.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

The Court began its analysis by reaffirming the concept that “an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.”¹⁶¹ However, the transition from entering alien to LPR makes a difference. The Court noted that an alien’s status changes after he or she gains admission into the United States “and begins to develop the ties that go with permanent residence.”¹⁶² The Court did not decide the full scope of *Mezei* or resolve its dissonance with *Kwong Hai Chew*, because the United States conceded that Plasencia had a right to due process.¹⁶³

To evaluate what process Plasencia was due, the Court invoked *Mathews v. Eldridge* to weigh “the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.”¹⁶⁴ Plasencia’s interest was “weighty” as she stood to lose “the right ‘to stay and live and work in this land of freedom’” and the “right to rejoin her immediate family.”¹⁶⁵ However, the government’s interest was also “weighty” and the Court recognized that “it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature.”¹⁶⁶ The role of the judiciary, the Court decided, was limited to a judgment about whether due process was met and could not extend to “imposing procedures that merely displace congressional choices of policy.”¹⁶⁷

Plasencia made three procedural arguments, thus allowing the Court the opportunity to utilize *Mathews* as designed and consider each procedural request in turn: (1) that the immigration judge had improperly placed the burden of proof on her instead of the state; (2) that her notice was inadequate; and (3) that she was allowed to waive her representation without an understanding of that right or the consequences of waiving it.¹⁶⁸ Although the Court did not rule on the sufficiency of the hearing,¹⁶⁹

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 34. *Mezei*, *Kwong Hai Chew*, and *Fleuti* were concerned with what type of entrance a LPR made into the United States, and *Plasencia* was determined with the process given to determine what type of entrance she made. *See supra* text accompanying notes 62–127.

¹⁶⁴ *Plasencia*, 459 U.S. at 34 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)).

¹⁶⁵ *Id.* (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 35. This was especially important to the Court as it had previously found that Congress did not intend for deportation procedures to be used in situations like Plasencia’s. *Id.*

¹⁶⁸ *Id.* at 35–36.

¹⁶⁹ *Id.* at 37. The Court determined that it could not properly assess whether the hearing was constitutionally adequate because it did not have enough information on “the risk of erroneous deprivation, the efficacy of additional procedural safeguards, and the Government’s interest in providing no further procedures.” *Id.*

it did note that “[i]f the exclusion hearing is to ensure fairness, it must provide Plasencia an opportunity to present her case effectively, though at the same time it cannot impose an undue burden on the Government.”¹⁷⁰ Therefore, it would seem after this case that a LPR, even one in an exclusion hearing, is entitled to the application of the due process calculus. However, if the majority of the Court could not even decide in this case that same-day notice of both the hearing and her charges was inappropriate, it seems impossible to discern what would qualify as too little notice. The notice requirements that existed were extremely lax under an exclusion standard, and there does not seem to be any question that the notice she received would suffice for an exclusion hearing even though she was a LPR.¹⁷¹ Therefore, she won the application of due process to her case, but it did not necessarily merit her any additional process.¹⁷²

Justice Marshall concurred in part and dissented in part.¹⁷³ While he agreed with the majority that Plasencia could be relegated to an exclusion hearing, he argued that the process offered to her was plainly insufficient for due process.¹⁷⁴ He argued that the notice she received was inadequate “to afford her a reasonable opportunity to demonstrate that she was not excludable.”¹⁷⁵ The decision to exclude her was given to Plasencia less than twenty-four hours after she was detained at the border, and the next day she was informed in English of her hearing that would take place at 11:00 AM the same day.¹⁷⁶ Only when the hearing started was she “given notice in her native language of the charges against her and of her right to retain counsel and to present evidence.”¹⁷⁷ Marshall argued that, “[w]hen a permanent resident alien’s substantial interest in remaining in this country is at stake, the Due Process Clause forbids the Government to stack the deck in this fashion.”¹⁷⁸

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).¹⁷⁹ Before this Act that amended the INA, there was a distinction between those who had physically entered into the country and those who had not.¹⁸⁰ Aliens who had physically entered the country, whether legally or

¹⁷⁰ *Id.* at 36.

¹⁷¹ *See id.* at 37.

¹⁷² *See id.*

¹⁷³ *Id.* (Marshall, J., concurring in part and dissenting in part).

¹⁷⁴ *Id.* at 38.

¹⁷⁵ *Id.* at 39. Marshall noted that because he found the notice to be constitutionally insufficient, it was unnecessary to consider her other procedural concerns. *Id.* at 38 n.2.

¹⁷⁶ *Id.* at 39.

¹⁷⁷ *Id.* Even at the hearing, Marshall contended that the charges were inadequately explained and thus, “deprived Plasencia of a fair opportunity to show that she was not excludable under the standards set forth in the Immigration and Nationality Act.” *Id.* at 40.

¹⁷⁸ *Id.* at 41.

¹⁷⁹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309, 110 Stat. 3009-546 (codified in Title 8, Chapter 12 of the United States Code).

¹⁸⁰ *See* 8 U.S.C. § 1101(a)(13) (1952).

illegally, were subject to deportation hearings.¹⁸¹ Aliens who had not yet entered were subject to exclusion hearings.¹⁸² This distinction had the effect of giving more process rights to those who had snuck across the border than those who were attempting to enter legally.¹⁸³ The 1996 IIRIRA changed this distinction, bringing the focus to whether an alien had been admitted or was seeking admission.¹⁸⁴ Admission was defined as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”¹⁸⁵ The statute further clarified that “[a]n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless” certain other conditions were met.¹⁸⁶ This change absolved courts from considering whether departures were meaningful in the abstract and provided a rubric that was concerned less with territorial gridlines and more with proper process.¹⁸⁷ The amendments also collapsed the two different types of hearings, exclusion and deportation, into one: removal.¹⁸⁸

Concerning removal, the INA provided that “[a]n alien present in the United States who has not been admitted or who arrives in the United States . . . shall be deemed for purposes of this [Act] an applicant for admission.”¹⁸⁹ If the immigration officer determines that an alien who is arriving is inadmissible because he or she has misrepresented information to obtain an entrance document or is not in possession of a valid entrance document, the alien may be removed “without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.”¹⁹⁰ This is what is known as expedited removal. Conversely, if the officer instead determines that an alien seeking admission is “not clearly and beyond a doubt entitled to be admitted,” the alien is detained for a regular removal

¹⁸¹ See *In re Pena*, 26 I. & N. Dec. 613, 617 n.5 (B.I.A. 2015) (explaining the “bifurcated” proceeding system in immigration before the passage of the IIRIRA).

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ See IIRIRA § 301(a). IIRIRA deleted the definition of entry in INA 101(a)(13) and substituted a definition of admission. See 8 U.S.C. 1101(a)(13)(A) (2012).

¹⁸⁵ 8 U.S.C. § 1101(a)(13)(A).

¹⁸⁶ 8 U.S.C. § 1101(a)(13)(C). These conditions include: “abandon[ing] or relinquish[ing] . . . status,” “be[ing] absent from the United States for a continuous period in excess of 180 days,” “engag[ing] in illegal activity after having departed the United States,” “depart[ing] from the United States while under legal process seeking removal,” “committ[ing] an offense identified in section 1182(a)(2)” unless relief was granted, “attempting to enter at a time or place other than as designated by immigration officers,” or simply “not be[ing] admitted to the United States after inspection and authorization by an immigration officer.” 8 U.S.C. § 1101(a)(13)(C)(i)–(vi).

¹⁸⁷ See 8 U.S.C. § 1101(a)(13)(C)(i)–(vi).

¹⁸⁸ See 8 U.S.C. § 1229a (2012).

¹⁸⁹ 8 U.S.C. § 1225(a)(1) (2012).

¹⁹⁰ 8 U.S.C. § 1225(b)(1)(A)(i) (citing 8 U.S.C. § 1182(a)(6)(C) (2012) and 8 U.S.C. § 1182(a)(7) (2012) for grounds of inadmissibility).

hearing.¹⁹¹ The only judicial review for expedited removal concerns whether the alien has a non-arriving status such as a United States citizen, LPR, or previously admitted asylee or refugee.¹⁹²

In 2001, the Court grappled with the new distinction over admission as opposed to entry in the context of detention in *Zadvydas v. Davis*.¹⁹³ Previously, the designation of being a LPR or merely an entering alien had made an analytical distinction for due process analysis. However, the Court seemed to reverse course on the issue of delineating between admitted and non-admitted aliens for the purposes of process, noting, “once an alien *enters* the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent.”¹⁹⁴ Combined with the Court’s holding in *Plasencia*, this statement might mean that while due process *applies* to both admitted and non-admitted aliens, the scope of that process will surely differ.¹⁹⁵ However, the Court still had to reconcile this concept with its holding in *Mezei*, which it did not overrule.¹⁹⁶

Kestutis Zadvydas was detained after his final order of removal was entered in order to effectuate his departure.¹⁹⁷ Zadvydas was born to Lithuanian parents in a displaced persons camp in Germany and moved to America when he was eight years old.¹⁹⁸ He had a history of flight and a long criminal record, and was finally ordered deported to Germany in 1994.¹⁹⁹ Much like Mezei before him, Zadvydas had trouble being deported because no country would take him in.²⁰⁰ Germany would not accept him because he was not a German citizen, and Lithuania would not accept him because he was not a Lithuanian citizen or permanent resident.²⁰¹ The United States appealed to the Dominican Republic as well, because Zadvydas’s wife was from there, but to no avail.²⁰² The INA allows for an alien to be in custody during a ninety day removal period following a final removal order.²⁰³ It also provides that certain aliens “may be detained beyond the removal period and, if released, shall be subject to [certain]

¹⁹¹ 8 U.S.C. § 1225(b)(2)(A). Removal hearings are generally governed by 8 U.S.C. § 1229a.

¹⁹² ALEINIKOFF ET AL., *supra* note 12, at 814; *see also* 8 U.S.C. § 1225(b)(1)(B)(iii).

¹⁹³ 533 U.S. 678 (2001).

¹⁹⁴ *Id.* at 693 (emphasis added) (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596–98 n.5 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *cf. Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)).

¹⁹⁵ *See Landon v. Plasencia*, 459 U.S. 21, 37 (1982).

¹⁹⁶ *See generally id.*

¹⁹⁷ *Zadvydas*, 533 U.S. at 684.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 682 (citing 8 U.S.C. § 1231(a)(6) (Supp. V 1994)).

terms of supervision.”²⁰⁴ When he could not be sent home, the ninety-day period expired and Zadvydas was still in custody.²⁰⁵ He filed a writ of habeas corpus protesting his indefinite detention as unconstitutional.²⁰⁶ The Court used a “‘cardinal principle’ of statutory interpretation” to interpret the statute as not posing a constitutional concern.²⁰⁷ Because it was true that “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem,”²⁰⁸ and the Court “found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention,”²⁰⁹ the Court was forced to hold that detention would be presumptively reasonable for six months, after which the Government must make a showing to continue the detention.²¹⁰

In a comparison to the *Mezei* case, the Court noted that Mezei was “‘treated,’ for constitutional purposes, ‘as if stopped at the border.’ And that made all the difference.”²¹¹ The Court acknowledged that “[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.”²¹² Even though Mezei had reached Ellis Island, the Court characterized its previous “rejection of Mezei’s challenge to the procedures by which he was deemed excludable and its rejection of his challenge to continued detention rested upon a basic territorial distinction.”²¹³ Because his presence on the island was not considered a landing, it did not impact his constitutional status.²¹⁴ The Court found this to be a “critical distinction between *Mezei* and the present case[.]” and that it did not need to further consider the comparison.²¹⁵ However, it seems impossible to reconcile the discussion about the *Mezei* case where territorial distinction (or today, the admission distinction) matters and the Court’s broad initial statement that due process applies for any alien within the United States.²¹⁶ In fact, Justice Scalia

²⁰⁴ *Id.* at 689 (quoting 8 U.S.C. § 1231(a)(6) (Supp. V 1994)). The categories of aliens subject to this potential additional detention are:

inadmissible aliens, criminal aliens, aliens who have violated their non-immigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any alien “who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.”

Id. at 688 (citing 8 U.S.C. § 1231(a)(6) (Supp. V 1994)).

²⁰⁵ *Id.* at 684.

²⁰⁶ *Id.* at 684–85.

²⁰⁷ *Id.* at 689 (quoting *Cromwell v. Benson*, 285 U.S. 22, 62 (1932)).

²⁰⁸ *Id.* at 690.

²⁰⁹ *Id.* at 699.

²¹⁰ *Id.* at 701.

²¹¹ *Id.* at 693 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953)).

²¹² *Id.*

²¹³ *Id.* at 694.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *See id.* at 690.

stated in his dissent that “*Mezei* thus stands unexplained and undistinguished by the Court’s opinion.”²¹⁷ The only possible explanation may be that although due process applies in both contexts, the swing of the barometer is so low for those merely denied entry and slightly higher for those properly admitted, but in all cases indefinite detention would be beyond the pale.

The Court also delved into the power structure behind immigration law, and although the Court conceded the broad power of the political branches, “that power is subject to important constitutional limitations.”²¹⁸ Crucially, the detention at issue in *Zadvydas* did not require the Court to “consider the political branches’ authority to control entry into the United States.”²¹⁹ Therefore the Court did not consider “terrorism or other special circumstances where special arguments might be made . . . for heightened deference to the judgments of the political branches with respect to matters of national security.”²²⁰ The Court did recognize several significant governmental factors: the expertise of the agency, executive branch primacy in foreign policy matters, the complexity of the statute, and “the Nation’s need to ‘speak with one voice’ in immigration matters.”²²¹ However, the Court believed that it could “take appropriate account of such matters without abdicating [its] legal responsibility to review the lawfulness of an alien’s continued detention.”²²²

In his dissent, Scalia noted that in the dissent from *Mezei*, Justice Jackson stated, with no contradiction from the Court, that “[d]ue process does not invest any alien with a right to enter the United States, *nor confer on those admitted the right to remain against the national will*. Nothing in the Constitution requires admission *or sufferance* of aliens hostile to our scheme of government.”²²³ This meant to Scalia that “an alien under final order of removal stands on equal footing with an inadmissible alien at the threshold of entry: He has no such right.”²²⁴ If the *Mezei* decision was not overturned, and it was not, Scalia felt that it controlled and gave no due process rights to *Zadvydas* or any other alien who had been validly ordered removed.²²⁵

Zadvydas was decided on June 28, 2001,²²⁶ and just a few months later America would endure the events of September 11, 2001. This tragedy would again change the face of immigration law and bring national security to the forefront. Congress passed the USA PATRIOT Act²²⁷ and the Enhanced Border Security and Visa Entry

²¹⁷ *Id.* at 704 (Scalia, J., dissenting).

²¹⁸ *Id.* at 695 (majority opinion).

²¹⁹ *Id.*

²²⁰ *Id.* at 696.

²²¹ *Id.* at 700 (citation omitted).

²²² *Id.*

²²³ *Id.* at 703 (Scalia, J., dissenting) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 222–23 (1953) (Jackson, J., dissenting)).

²²⁴ *Id.*

²²⁵ *Id.* at 705.

²²⁶ *See generally id.* (majority opinion).

²²⁷ USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

Reform Act²²⁸ in 2001 and 2002, respectively. These changes revised the definition of terrorist, tightened visa requirements and attempted to enhance intelligence sharing.²²⁹ In 2002, Congress also passed the Homeland Security Act which abolished the INS (Immigration and Naturalization Service) and split its functions among three different bureaus.²³⁰ The REAL ID Act in 2005 modified judicial review of immigration decisions, established new requirements for documents, and again broadened the definition of terrorist activities.²³¹

Most recently, in 2015, the Supreme Court decided *Kerry v. Din*,²³² which held for the Government that the process afforded the petitioner was sufficient.²³³ However, the Court was sharply divided on the issue of whether due process was even triggered in that case.²³⁴ The suit involved a citizen suing on her husband's behalf after he was denied a visa for entry.²³⁵ In announcing the judgment of the Court and delivering an opinion in which Chief Justice Roberts and Justice Thomas joined, Justice Scalia addressed the unusual procedure of the case, remarking that "[n]aturally, one would expect him . . . to bring this suit. But because Berashk is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission."²³⁶ Scalia asserted that there was no constitutional right, as Din alleged, to live in the United States with her spouse.²³⁷ This freedom was "nothing more than a deprivation of her spouse's freedom to immigrate into America."²³⁸ Scalia, Roberts, and Thomas contended that the due process inquiry as to whether process is sufficient is simply not relevant if there is no deprivation of a protected interest.²³⁹

Scalia traced the Due Process Clause back to the Magna Carta, advocating for a narrow but enduring view of the rights protected therein.²⁴⁰ Din and even Berashk were not denied liberty in the traditional sense and so could not have been denied due process.²⁴¹ Before the Court expanded the notion of liberty in an area where "guideposts for responsible decisionmaking . . . are scarce and open-ended,"²⁴² it had

²²⁸ Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543.

²²⁹ ALENIKOFF ET AL., *supra* note 12, at 180.

²³⁰ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

²³¹ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

²³² 135 S. Ct. 2128 (2015).

²³³ *Id.* at 2138.

²³⁴ *See id.* at 2139 (Kennedy, J., concurring); *see also id.* at 2142 (Breyer, J., dissenting).

²³⁵ *Id.* at 2131 (majority opinion).

²³⁶ *Id.* (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 2132.

²⁴⁰ *Id.* at 2132–33.

²⁴¹ *Id.* at 2133.

²⁴² *Id.* at 2134 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

traditionally required “‘a careful description of the asserted fundamental liberty interest,’ as well as a demonstration that the interest is ‘objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed.’”²⁴³ In the case of immigration, Scalia thought that history showed the intent of Congress to block this so-called liberty interest, because “[a]lthough immigration was effectively unregulated prior to 1875, as soon as Congress began legislating in this area it enacted a complicated web of regulations that erected serious impediments to a person’s ability to bring a spouse into the United States.”²⁴⁴ Even if Scalia were to concede that Din was denied something “important” by the inadmissibility of her husband, “if that is the criterion for . . . procedural due process, we are in for quite a ride.”²⁴⁵

Justice Kennedy and Justice Alito concurred in the judgment, but they refused to decide whether or not Din had a protected liberty interest.²⁴⁶ Instead, Kennedy wrote that, “even assuming she does, the notice she received regarding her husband’s visa denial satisfied due process.”²⁴⁷ Kennedy referred back to *Kleindienst v. Mandel*, a case “based upon due consideration of the congressional power to make rules for the exclusion of aliens, and the ensuing power to delegate authority to the Attorney General to exercise substantial discretion in that field.”²⁴⁸ The reasoning of *Mandel* had “particular force in the area of national security, for which Congress has provided specific statutory directions pertaining to visa applications by non-citizens who seek entry to this country.”²⁴⁹ In Din’s case there was a “bona fide factual basis for denying a visa to Berashk” and the Court determined that it should not “look behind” the government’s decision.²⁵⁰

Justice Breyer dissented, and was joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan.²⁵¹ The dissent stated that, “[Din] possesses the kind of ‘liberty’ interest to which the Due Process Clause grants procedural protection. And the Government has failed to provide her with the procedure that is constitutionally ‘due.’”²⁵² Breyer asserted that the case law was clear that procedural rights exist as long as,

(1) she seeks protection for a liberty interest sufficiently important for procedural protection to flow “implicit[ly]” from the

²⁴³ *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations and internal quotation marks omitted)).

²⁴⁴ *Id.* at 2135.

²⁴⁵ *Id.* at 2138.

²⁴⁶ *Id.* at 2139 (Kennedy, J., concurring).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 2140.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 2141 (Breyer, J., dissenting).

²⁵² *Id.* at 2142 (citation omitted).

design, object, and nature of the Due Process Clause, or (2) non-constitutional law (a statute, for example) creates “an expectation” that a person will not be deprived of that kind of liberty without fair procedures.²⁵³

When applied to Din’s case, the dissent reasoned that Din easily met this burden because the Court had long recognized marriage, including the right to live together and raise a family, as part of the orderly pursuit of happiness envisioned by cases like *Meyer v. Nebraska*.²⁵⁴ Breyer insisted that he was breaking “no new ground” in the concept of due process with regard to the existence of a protected interest.²⁵⁵

Reasoning that Din had a protected interest at stake, Breyer investigated the procedural protections, which “normally include notice of an adverse action, an opportunity to present relevant proofs and arguments, before a neutral decision-maker, and reasoned decisionmaking.”²⁵⁶ As Din asked only for a statement of reasons behind the denied visa, that was the only procedural request to consider.²⁵⁷ Running this request through the *Mathews* calculus, Breyer concluded that Din’s interests were important, the risk of an erroneous deprivation was high, and there was little administrative cost for the Government to simply provide reasoning.²⁵⁸

Breyer also took issue with Kennedy’s concurrence that said the “ordinary rules of due process must give way here to national security concerns.”²⁵⁹ Though Breyer did not “deny the importance of national security,” he noted that “protecting ordinary citizens from arbitrary government action is fundamental. Thus, the presence of security considerations does not suspend the Constitution. Rather, it requires us to take security needs into account when determining, for example, what ‘process’ is ‘due.’”²⁶⁰

II. EXECUTIVE ORDER 13769 AND JUDICIAL RESPONSE

On January 27, 2017, the President released an Executive Order with the subtitle “Protecting the Nation from Foreign Terrorist Entry into the United States.”²⁶¹ The thrust of this Order was to suspend visas and other immigration benefits to nationals

²⁵³ *Id.* (citing *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)).

²⁵⁴ *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)). Additionally, the dissent found that, as a citizen, Din had a right to live within the United States and that right should also receive due process protection. *Id.*

²⁵⁵ *Id.* at 2143.

²⁵⁶ *Id.* at 2144.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 2145.

²⁵⁹ *Id.* at 2146.

²⁶⁰ *Id.* at 2147 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 527–37 (2004) (plurality opinion)).

²⁶¹ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

of certain countries.²⁶² The Order required a multi-agency review to take place to determine what information was necessary from a country to make an appropriate adjudication about whether an individual alien from that country was a security risk.²⁶³ In addition to a mandate to issue particular reports and review the visa process more broadly, President Trump temporarily suspended entry into the United States for immigrants and nonimmigrants from countries referred to in Section 217(a)(12) of the INA.²⁶⁴

Section 217 of the INA authorizes the Secretary of Homeland Security and the Secretary of State to establish a program for visa waiver.²⁶⁵ This is a program that allows citizens of certain countries to travel to the United States for various reasons for up to ninety days without having to obtain a visa.²⁶⁶ Specifically, the statute allows waiver of Section 212(a)(7)(B)(i)(II) of the INA, which renders a non-immigrant inadmissible when not in possession of a valid visa at the time of application for admission.²⁶⁷ The statutory rubric for who may qualify for this program was changed in 2015 by the Visa Waiver Program Improvement and Terrorist Travel Prevention Act.²⁶⁸ This amendment to the INA added what is now subsection 12 under Section 217(c), discussing countries or areas of concern.²⁶⁹ According to 217(a)(12), the alien may not participate in the visa waiver program if he or she is a national of certain countries.²⁷⁰ In fact, the alien may not participate in the visa waiver program if he or she has even been present in Iraq, Syria, or any other country designated as a country where the government has repeatedly provided support of acts of international terrorism on or after March 1, 2011.²⁷¹ The Secretary of Homeland Security may waive the application of this bar if the Secretary determines that a waiver is in the national security interests of the United States.²⁷² Although the statute does provide criteria for the Secretary in making a determination of whether a country's government has provided support to acts of international

²⁶² *Id.* § 3.

²⁶³ *Id.*

²⁶⁴ *Id.* § 3(c). This order excluded “those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas.” *Id.*

²⁶⁵ 8 U.S.C. § 1187(a)(1) (2012).

²⁶⁶ *Id.*

²⁶⁷ 8 U.S.C. § 1187(a) (2012); 8 U.S.C. § 1182(a)(7)(B)(i)(II) (2012).

²⁶⁸ *See generally* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, 129 Stat. 2989 (codified at 8 U.S.C. § 1187(a)(12)); *see also* Press Release, U.S. Dep’t of Homeland Security, U.S. Begins Implementation of Changes to the Visa Waiver Program (Jan. 21, 2016), <https://www.dhs.gov/news/2016/01/21/united-states-begins-implementation-changes-visa-waiver-program> [<https://perma.cc/N746-Y53S>] [hereinafter Implementation of Changes].

²⁶⁹ 8 U.S.C. § 1187(a)(12).

²⁷⁰ 8 U.S.C. § 1187(a)(12)(A)(ii). This is just one requirement of many under this section of the INA.

²⁷¹ 8 U.S.C. § 1187(a)(12)(A)(i).

²⁷² 8 U.S.C. § 1187(a)(12)(C).

terrorism,²⁷³ countries may also be designated under “any other provision of law.”²⁷⁴ In the Executive Order, the President “proclaim[ed] that the immigrant and non-immigrant entry into the United States . . . from [these] countries . . . would be detrimental to the interests of the United States.”²⁷⁵ Whether this qualifies as a provision of law that gives the appropriate designation to these countries is irrelevant, as seven countries were already designated by the Department of Homeland Security (DHS) as countries of concern when the Executive Order was signed.²⁷⁶

While only Iraq and Syria are mentioned directly in the statute, DHS duly enlarged the list of affected countries. In a press release from January 21, 2016, DHS announced that in implementing changes under the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, nationals of visa waiver program countries who were also nationals or who had traveled to or were present in Iran, Iraq, Sudan, or Syria on or after March 1, 2011, had to go through “the regular immigration process.”²⁷⁷ The release indicated that waiver was possible and that categories of travelers who might be eligible for a waiver included those who traveled on behalf of certain organizations, for humanitarian reasons, for journalism, or for legitimate business-related purposes.²⁷⁸ This change did not ban travel to the United States or admission into the United States, it just meant that these travelers were no longer eligible to use the visa waiver program and were “required to appear for an interview and obtain a visa in their passports at a U.S. embassy or consulate before traveling to the United States.”²⁷⁹ Less than a month later, on February 18, 2016, DHS released another press release designating Libya, Somalia, and Yemen as three more countries of concern.²⁸⁰

After limiting the visa waiver program specifically for countries already designated as those of concern, the Executive Order went on to require a list of countries that are unwilling to provide required information on incoming aliens so that the

²⁷³ 8 U.S.C. § 1187(a)(12)(D). These criteria include considerations of: whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States; whether a foreign terrorist organization has a significant presence in the country or area; and whether the country or area is a safe haven for terrorists.

8 U.S.C. § 1187(a)(12)(D)(ii)(I)–(III). Any determinations made under this language must be reviewed annually. 8 U.S.C. § 1187(a)(12)(D)(iii).

²⁷⁴ 8 U.S.C. § 1187(a)(12)(A)(i)(II), (ii)(II).

²⁷⁵ Exec. Order No. 13769, 82 Fed. Reg. 8977 § 3(c) (Jan. 27, 2017).

²⁷⁶ Press Release, U.S. Dep’t of Homeland Security, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016), <http://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program> [<https://perma.cc/FQD2-BDYA>] [hereinafter DHS Announces Restrictions].

²⁷⁷ Implementation of Changes, *supra* note 268.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ DHS Announces Restrictions, *supra* note 276.

President may prohibit their entry and add any additional countries recommended for similar treatment.²⁸¹ The possibility for a waiver on a case-by-case basis still existed if such a waiver was “in the national interest.”²⁸²

The overall suspension was justified by the language of the Order so that the interim time period could be used “[t]o temporarily reduce investigative burdens on relevant agencies . . . to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to 212(f) of the INA.”²⁸³ Section 212(f) of the INA, most widely known for its detailing classes of admissibility, provides:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.²⁸⁴

The Executive Order also suspends the United States Refugee Admissions Program for 120 days.²⁸⁵ This suspension also allows for review of the “application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures.”²⁸⁶ After 120 days, the program may only be resumed for nationals for whom these additional procedures were adequate.²⁸⁷ As part of this suspension, the President again utilized Section 212(f) of the INA to “proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States.”²⁸⁸ Entry of Syrian nationals was suspended indefinitely.²⁸⁹

²⁸¹ Exec. Order No. 13769, 82 Fed. Reg. 8977 § 3(e)–(f) (Jan. 27, 2017).

²⁸² *Id.* § 3(g).

²⁸³ *Id.* § 3(c).

²⁸⁴ 8 U.S.C. § 1182(f) (2012). The Ninth Circuit would later hold that when issuing Executive Order 13780 under this same provision, President Trump invalidly invoked his authority. *Hawaii v. Trump*, 859 F.3d 741, 770 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (June 26, 2017).

²⁸⁵ Exec. Order No. 13769, 82 Fed. Reg. 8977 § 5.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* § 5(c). A case-by-case waiver was still applicable under section 5(e). *Id.* § 5(e).

²⁸⁹ *Id.* § 5(c).

Two states, Washington and Minnesota, challenged the Executive Order as unconstitutional and in violation of federal law, and a federal district court granted a TRO preventing enforcement of it.²⁹⁰ The government appealed to the Ninth Circuit, moving for an emergency stay of the TRO while also appealing the order directly.²⁹¹

After the court determined both that it had jurisdiction over the case and that there were no outcome determinative standing issues,²⁹² the court refuted the claim that the President's actions were simply unreviewable in this area of law.²⁹³ Finally, the Ninth Circuit began a review of the government's request for a stay overturning the TRO.²⁹⁴ The court said that it was guided by four questions when considering whether to issue a stay of the district court's order: likelihood of success on the merits, irreparable injury absent a stay, whether a stay would substantially injure the other parties, and the public interest.²⁹⁵

As to the due process issue, the court cited to the Fifth Amendment and explained that the government may not deprive a person of a protected interest without "notice and an opportunity to respond."²⁹⁶ The court interpreted notice and an opportunity to respond broadly, saying it meant "the opportunity to present reasons not to proceed with the deprivation and have them considered."²⁹⁷ The court cited back to the Supreme Court case of *Cleveland Board of Education v. Loudermill*²⁹⁸ for the assertion that due process requires, at base, notice and an opportunity to respond.²⁹⁹

This citation is potentially confusing given the broad nature of the court's interpretation, as an opportunity to respond may not include all the reasons one wishes the government not to proceed with the deprivation. In a case earlier than *Loudermill*, *Codd v. Velger*,³⁰⁰ the Supreme Court reasoned that "if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute."³⁰¹ That case concerned a dispute between an employer and a terminated employee.³⁰² The employee was terminated from a police department after putting a revolver to his head in a suicide attempt as a trainee.³⁰³ The Court found that because the employee did not claim the suicide attempt was false, there was no reason

²⁹⁰ *Washington v. Trump (Washington II)*, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam) (order denying stay of District Court's TRO).

²⁹¹ *Id.*

²⁹² *Id.* at 1158–59.

²⁹³ *Id.* at 1161–62.

²⁹⁴ *Id.* at 1164.

²⁹⁵ *Id.* (citing *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012)).

²⁹⁶ *Id.* (quoting *United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014)).

²⁹⁷ *Id.*

²⁹⁸ 470 U.S. 532 (1985).

²⁹⁹ *Washington II*, 847 F.3d at 1164 (citing *Raya-Vaca*, 771 F.3d at 1204 ("Due process always requires, at a minimum, notice and an opportunity to respond.")).

³⁰⁰ 429 U.S. 624 (1977).

³⁰¹ *Id.* at 627.

³⁰² *Id.* at 626.

³⁰³ *Id.*

to have a hearing to discuss the matter.³⁰⁴ The fact that the employee never alleged falsity was thus “fatal to [his] claim under the Due Process Clause that he should have been given a hearing.”³⁰⁵ Later, the Supreme Court went on to the similar case of *Loudermill*, which concerned a security guard’s termination based on dishonesty in his employment application.³⁰⁶ He stated on his application that he had never been convicted of a felony but the Board later found that he had previously been convicted of grand larceny.³⁰⁷ *Loudermill* rejoined that he thought the larceny conviction was a misdemeanor and not a felony.³⁰⁸ The Court noted that “some opportunity for the employee to present his side of the case is recurring of obvious value in reaching an accurate decision.”³⁰⁹ However, “[e]ven where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the *discretion* of the decisionmaker is likely to be before the termination takes effect.”³¹⁰ Reading these cases together, as *Loudermill* did not overrule *Codd*, even when the due process rubric is applied, the result may not be a hearing if discrepancy and discretion are not relevant elements.³¹¹

The Ninth Circuit argued that the “Government has not shown that the Executive Order provides what due process requires, such as notice and a hearing prior to restricting an individual’s ability to travel.”³¹² The court does not elaborate on how an individual’s ability to travel, standing alone, would trigger a due process consideration.³¹³ Nor does it identify any contours as to what might be constitutionally required to meet any procedural due process requirements.³¹⁴ It is important to note that nowhere in the relevant case law has the Supreme Court ever identified a “right to travel” as a liberty interest that triggers due process considerations.³¹⁵ The Ninth Circuit provides no citations for the proposition that this right exists when applied to aliens.³¹⁶

In evaluating the likelihood of success on the merits of the procedural due process claim, the court points to three violations that Washington and Minnesota

³⁰⁴ *Id.* at 626–27.

³⁰⁵ *Id.* at 624.

³⁰⁶ 470 U.S. 532, 535 (1985).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 543.

³¹⁰ *Id.* (emphasis added).

³¹¹ See *supra* notes 300–09 and accompanying text.

³¹² *Washington v. Trump (Washington II)*, 847 F.3d 1151, 1164 (9th Cir. 2017) (per curiam) (order denying stay of District Court’s TRO).

³¹³ *Id.* at 1163–64 (discussing, without detail, the power of court to adjudicate executive action challenges which allegedly encroach on individuals’ constitutional rights).

³¹⁴ *Id.* at 1165 (concluding “[t]he Government has provided no affirmative argument showing that the States’ procedural due process claims fail as to these categories of aliens”).

³¹⁵ See Sheldon Elliot Steinbach, *Constitutional Protection for Freedom of Movement: A Time for Decision*, 57 KY. L.J. 417, 434 (1969) (discussing the sparse history of the “Right to Travel” in Supreme Court jurisprudence).

³¹⁶ See generally *Washington II*, 847 F.3d 1151.

identified.³¹⁷ First, the Order denied re-entry to certain LPRs and non-immigrant visaholders without notice and an opportunity to respond.³¹⁸ Second, the Order prohibited certain LPRs and non-immigrant visaholders from exercising a constitutionally protected interest in traveling abroad and re-entering the United States.³¹⁹ Third, the Order did not allow for the statutory procedures already in place that allowed incoming aliens to request application for asylum and other related relief in the United States.³²⁰ The court acknowledged that the district court had held success on each of these claims was likely without “discussing or offering analysis as to any specific alleged violation.”³²¹

The first and second violations are conflated—to establish an appropriate procedural due process claim one must first identify an individualized decision from a government actor that is depriving a protected interest, *and then* contend for certain pieces of process to be constitutionally required. Therefore, first, the LPRs and non-immigrant visaholders would have to establish that they had a constitutionally protected interest, and second, that they were being denied process in protection of that interest.³²² The framing of the issues by the States and the court also collapses two groups (LPRs and non-immigrant visa holders) into one larger group, even though the Supreme Court has repeatedly held that these two groups receive different amounts of process.³²³ The third point is not linked to constitutional process, but rather the statutory process that is already embedded in admission.³²⁴ The INA provides that, “[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien’s status, may apply for asylum.”³²⁵ The Executive Order does not address what changes it makes to the statutory scheme.³²⁶

The Ninth Circuit asserts that procedural protections apply to all persons within the United States regardless of status, and to certain aliens attempting to reenter the United States after traveling abroad.³²⁷ The compounding of these two concepts

³¹⁷ *Id.* at 1165.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* The Executive Order suspends the United States Refugee Admission Program, but does not say anything about how arriving aliens from the countries of concern are supposed to request asylum, should they wish to do so. Even in cases of expedited removal with no hearing, the INA still allows a valve for asylum application. *See* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); 8 U.S.C. § 1225(b)(1)(A)(ii) (2012).

³²¹ *Washington II*, 847 F.3d at 1165.

³²² *Cf. id.* at 1165 (discussing the two separate issues in a conflated matter).

³²³ *See* Morawetz, *supra* note 59, at 202, 223.

³²⁴ *See* 8 U.S.C. § 1158(a)(1) (2012) (mandating a statutory right to apply for asylum).

³²⁵ *Id.* This subsection also implicates possible relief under INA § 235(b), the expedited removal section. Section 235 provides that an alien cannot be removed without further investigation if the alien wishes to apply for asylum or claims he will be persecuted if returned to his home country. 8 U.S.C. § 1225(b)(1)(A)(i). Other relief, such as non-refoulement and protection against torture is also found in the statute. *See* 8 U.S.C. § 1101(a)(42) (2012).

³²⁶ *See generally* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

³²⁷ *Washington II*, 847 F.3d at 1165 (per curiam) (order denying stay of District Court’s

together suggests again that the phrase “within the United States” mentioned in *Zadvydas* is perhaps a territorial demarcation that also revolves around whether an alien has properly entered (or been admitted to) the United States.³²⁸ Otherwise, it would be unnecessary to separate the citations and add extraneously that certain aliens reentering also received due process.³²⁹ Regarding LPRs, the court notes that the government makes no argument that they are not entitled to due process or that the Executive Order furnishes enough procedural protection to challenge a denial of reentry.³³⁰ Again the court is forgetting that even if procedural due process could be triggered for these aliens, fulfillment of that constitutional duty might amount to very little. In *Plasencia*, a case cited by the court for this argument, the lowest possible fulfillment of due process in same-day notice and hastily explained charges may have been sufficient to satisfy the constitutional call.³³¹ In addition, reading *Codd*³³² and *Loudermill*³³³ together, there may be no factual dispute or discretionary issue (beyond a waiver) that would require additional process.

The court stresses that aside from the LPR issue, other aliens might have proper due process claims, including “non-immigrant visaholders who have been in the United States but temporarily departed or wish to temporarily depart; refugees; and applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert.”³³⁴ This is an odd grouping of potential classes. While non-immigrant visaholders who have been properly admitted and are within the United States might arguably have access to due process, mere applicants who have not been admitted are on tenuous ground indeed. The court cited to *Kerry v. Din*, but a divided Court in that case could not agree that *marriage* was sufficient enough to trigger due process.³³⁵ Any alien who merely has a relationship with, for example an employer, would have no due process argument.³³⁶ Nevertheless, the Ninth Circuit asserts that the government has not shown Washington and Minnesota lack viable claims in these categories.³³⁷

TRO) (citing *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Landon v. Plasencia*, 459 U.S. 21, 33–34 (1982)).

³²⁸ *Zadvydas*, 533 U.S. at 693.

³²⁹ *Washington II*, 847 F.3d at 1165.

³³⁰ *Id.* Part of the argument here continues on mootness grounds, where the government claims that authoritative guidance restricted the application of the order to LPRs. *Id.* at 1162. However, the court was unconvinced that the wrongful behavior would not reasonably be expected to recur. *Id.* at 1166 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000)).

³³¹ *See Plasencia*, 459 U.S. at 22.

³³² 429 U.S. 624 (1977).

³³³ 470 U.S. 532 (1985).

³³⁴ *Washington II*, 847 F.3d at 1166 (internal citations omitted).

³³⁵ *Id.*

³³⁶ *See id.*

³³⁷ *Id.*

The court then moved on and discussed the breadth of the TRO and the government's contention that it was overbroad because it extended nationwide and covered more than LPRs.³³⁸ The court declined to limit the geographical scope of the order and chose not to "rewrite the Executive Order" even if doing so may have been desirable, given the "nation's multiple ports of entry and interconnected transit system."³³⁹ More importantly to the due process point, the court also refused to limit the scope of the Order to LPRs or even to previously admitted aliens.³⁴⁰ The court based its reasoning on two points: the assertion from the Supreme Court in *Zadvydas* that aliens unlawfully in the United States have due process rights³⁴¹ and the concurrence and dissent from *Din*, in which "six Justices declin[ed] to adopt a rule that would categorically bar U.S. citizens from asserting cognizable liberty interests in the receipt of visas by alien spouses."³⁴² The court arguably misrepresents *Din*, as the concurrence in that case found no need to decide the protected interest issue, partially for national security reasons and partially because due process was satisfied in that case.³⁴³ Although the court conceded that there might be persons covered by the TRO who did not have due process claims, the government's revision was in error because it left out some persons who did have such claims.³⁴⁴ Aside from the procedural due process inquiry, the court also addressed the likelihood of success on a religious discrimination claim,³⁴⁵ the balance of hardships,³⁴⁶ and the public interest at issue in the case in order to deny the stay of the TRO.³⁴⁷

Executive Order 13780 superseded Executive Order 13769 and the Ninth Circuit granted the government's unopposed motion to dismiss its underlying appeal.³⁴⁸ However, no party moved to vacate the Order, and a judge called for a vote to determine if the court should grant en banc reconsideration of the Order.³⁴⁹ This vote failed to receive support from a majority of Ninth Circuit judges, and the order denying the stay remained in place.³⁵⁰ Judge Bybee dissented from the denial of en banc reconsideration and was joined by Judges Kozinski, Callahan, Bea, and Ikuta.³⁵¹

³³⁸ *Id.*

³³⁹ *Id.* at 1167.

³⁴⁰ *Id.* at 1166.

³⁴¹ *Id.* at 1165.

³⁴² *Id.* at 1166.

³⁴³ *Kerry v. Din*, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring).

³⁴⁴ *Washington II*, 847 F.3d at 1166.

³⁴⁵ *Id.* at 1167–68.

³⁴⁶ *Id.* at 1168–69.

³⁴⁷ *Id.*

³⁴⁸ *Washington v. Trump (Washington IV)*, No. 17-35105, 2017 WL 3774041 (9th Cir. Mar. 8, 2017) (order granting Appellant's Motion to Dismiss).

³⁴⁹ *Washington v. Trump (Washington III)*, 858 F.3d 1168 (9th Cir. 2017) (order denying vacatur of stay order).

³⁵⁰ *Id.*

³⁵¹ *Id.* at 1174 (Bybee, J., dissenting).

The dissent focused not on the due process issue specifically, but rather on the “fundamental error” the court made in ignoring a mandate of deference to the judgment of the political branches.³⁵² Bybee contended that the Supreme Court had said, “plainly and often” that such deference was necessary in matters of immigration policy.³⁵³ He stressed the repeated use by other presidents of Section 1182(f) to bar the entry of broad classes of aliens from identified countries.³⁵⁴ The only way for the court to address the “knotty questions” of reviewing constitutional challenges to executive action in light of this deference was to “distinguish between two groups of aliens: those who are present within our borders and those who are seeking admission.”³⁵⁵ In his opinion, Bybee stated, “[t]he panel did not recognize that critical distinction and it led to manifest error.”³⁵⁶ The court should have followed the test set forth in *Kleindienst* and held that “[o]nce the executive makes a decision ‘on the basis of a facially legitimate and bona fide reason,’ the courts may ‘neither look behind the exercise of that discretion, nor test it by balancing its justification against’ the constitutional interests . . . [the] denial might implicate.”³⁵⁷ In fact, marshalling the case law of *Mandel*,³⁵⁸ *Fiallo*,³⁵⁹ and *Din*,³⁶⁰ and the history of this case law in application to the post-9/11 registration program, the dissent argued that these cases are “devastating to the panel’s conclusion that we can simply apply ordinary constitutional standards to immigration policy.”³⁶¹ Ordinary constitutional application simply would not do in a case where due process does not apply, but amplified deference does.³⁶²

Executive Order 13780, entitled “Executive Order Protecting the Nation From Foreign Terrorist Entry into the United States,” itself noted that Executive Order 13769 had been “delayed by litigation.”³⁶³ Therefore, the Order restated its purpose, citing from the Department of State’s Country Reports on Terrorism, to detail country conditions to “demonstrate why their nationals continue to present heightened risks to the security of the United States.”³⁶⁴ In light of the litigation, the President revoked Executive Order 13769 and replaced it with Executive Order 13780, which allegedly “expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or

³⁵² *Id.* at 1177.

³⁵³ *Id.* at 1178.

³⁵⁴ *Id.* at 1176 (internal citations omitted).

³⁵⁵ *Id.* at 1178.

³⁵⁶ *Id.* at 1179.

³⁵⁷ *Id.* at 1181 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

³⁵⁸ *Kleindienst*, 408 U.S. 753.

³⁵⁹ *Fiallo v. Bell*, 430 U.S. 787 (1977).

³⁶⁰ *Kerry v. Din*, 135 S. Ct. 2128 (2015).

³⁶¹ *Washington III*, 858 F.3d at 1182 (Bybee, J., dissenting).

³⁶² *Id.* at 1178, 1181.

³⁶³ Exec. Order No. 13780, 82 Fed. Reg. 13209 § 1(c) (Mar. 6, 2017).

³⁶⁴ *Id.* § 1(e).

categories of affected aliens.”³⁶⁵ The suspensions only applied to foreign nationals who were outside the United States on the effective date of the Order, did not have a valid visa on January 27, 2017, and who still did not have a valid visa on March 16, 2017.³⁶⁶ The Order also provided several categories of exemption, including LPRs and asylees already admitted to the United States.³⁶⁷ A severability section was also included to allow the Order to remain in place even if portions were held to be invalid.³⁶⁸

CONCLUSION

Was the Ninth Circuit right about the probability of success the States would have had regarding their due process claims? Although the statement in *Zadvydas* seems clear in that all aliens are entitled to due process, it did not overrule or reconcile conflicting pieces of case law which seem to suggest there are situations in which that is not the case.³⁶⁹ Certainly there is merit to the idea that LPRs have a continued interest in their status that may be protected, but non-immigrant visa holders and applicants for entry do not. Even if these aliens could establish something akin to a “right to travel” and convince the Supreme Court to recognize this right as a protected interest embedded in history and essential to the concept of ordered liberty, that may not be enough.³⁷⁰ To win the fight for due process to be applied to these aliens means only that the next phase of the formula is calculated. What due process requires is infinitely flexible, and at its core requires a base of only notice and an opportunity to be heard. *Mathews* requires the weighing of interests.³⁷¹ But the Department of Justice, in charge of removal hearings and their appeals, has even questioned “whether *Mathews* is the appropriate touchstone in light of the unique nature of the [Immigration & Nationality] Act as the tool for managing the intersection of foreign and domestic interests regarding aliens.”³⁷²

It remains to be seen whether aliens may even argue a concrete protected interest in this case, but any interest an alien can assert will be diminished the closer he or she is to being considered merely an arriving alien. The government’s interest in protecting national security is strong and the risk of erroneous deprivation seems slight—all a border official must do is determine whether an arriving alien hails from one of these countries or is entering as a refugee. The original Executive Order did not seem facially to allow for the asylum procedures required by the INA, or an

³⁶⁵ *Id.* § 1(i).

³⁶⁶ *Id.* § 3(a).

³⁶⁷ *Id.* § 3(b). Several waivers were also elucidated. *Id.* § 3(c).

³⁶⁸ *Id.* § 15.

³⁶⁹ *Zadvydas v. Davis*, 533 U.S. 678, 682, 690 (2001).

³⁷⁰ *See Steinbach, supra* note 315, at 417.

³⁷¹ *Mathews v. Eldridge*, 424 U.S. 319, 333–34 (1976).

³⁷² Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

appeal, if factually it was disputed from where an alien had arrived. But given the tendency of the Court to avoid unconstitutional interpretations, it is not unthinkable that the Court would “infer” these reasonable measures from the text of the order, much like the six month time period it invented for *Zadvydas*.³⁷³ Every analysis of process due to aliens begins and ends with a benediction of Congress’s authority that is helplessly entwined with Executive discretion and primacy.

What is perhaps most striking in the recount of power is how intermixed the legislative and executive branches are in this area.³⁷⁴ Where, as here, Congress has specifically delegated a large swath of its even larger power to admit aliens to the President,³⁷⁵ finding a restriction on due process grounds alone may be untenable. Congress has allowed the President to suspend the entry of *any* aliens or all aliens or impose whatever restrictions he wishes for whatever time period he wishes, as long as he finds that their entry would be “detrimental to the interests of the United States.”³⁷⁶ The language of the INA even suggests that these types of decisions may be committed to agency discretion by law and thus unreviewable beyond a constitutional lens.³⁷⁷ President Trump may be right, or right enough, in this case to overcome a constitutional challenge. The answer may never be articulated by the Supreme Court since the government has withdrawn its challenge of the TRO in favor of a new Executive Order on the matter.³⁷⁸ However, Executive Order 13769 and the Ninth Circuit’s response allows a scholarly review of procedural due process in the immigration context and a plea that the floor may be too low in this arena. National security and the natural and constitutionally enforced separation of powers must be considered, but procedure is still important. Justice Jackson, dissenting in the *Mezei* case, said, “[o]nly the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty. . . . [D]ifferences in the process of administration make all the difference between a reign of terror and one of law.”³⁷⁹

³⁷³ *Zadvydas*, 533 U.S. at 701.

³⁷⁴ *See, e.g.*, *Washington v. Trump (Washington II)*, 847 F.3d 1151, 1162 n.6 (9th Cir. 2017) (per curiam) (order denying stay of District Court’s TRO) (discussing the broad powers of both Congress and the President in the context of immigration law).

³⁷⁵ *See generally* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (discussing the delegation of enforcement—and interpretation—authorities to the Attorney General and the President) (as codified under Title 8 of the United States Code).

³⁷⁶ Proclamation No. 7750, 69 Fed. Reg. 2287 (Jan. 12, 2004) (statement by then-President George W. Bush).

³⁷⁷ *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 597 (1988).

³⁷⁸ Olivia Beavers, *Trump Admin Withdraws Appeal over First Travel Ban Order*, THE HILL (Mar. 7, 2017, 8:49 PM), <http://www.thehill.com/blogs/blog-briefing-room/news/322867-trump-admin-withdraws-appeal-over-first-travel-ban-order> [<https://perma.cc/5EYT-VNXC>].

³⁷⁹ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224–26 (1953) (Jackson, J., dissenting).