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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

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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

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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

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[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]

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[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

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[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]

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[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

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[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]

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[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

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[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]

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[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

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[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 voluntary . . . .[118]

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

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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 Delgadillo 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 reaffirmed 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

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[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.

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[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

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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]

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[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]

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[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

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[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

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[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]

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[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

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[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 nonimmigrant 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 Act[227] and the Enhanced Border Security and Visa Entry

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[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 Act[228] 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

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

[229] ALEINIKOFF 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 noncitizens 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

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[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

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[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 nonimmigrant 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

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[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

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[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]

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[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

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[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 Sates 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 recurringly 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

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[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

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[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 rights[341] 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]

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[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 *Klieindienst* 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

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[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

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[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]

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[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).