

## Artl.S8.C18.8.7.2 Aliens in the United States

Article I, Section 8, Clause 18:

*[The Congress shall have Power . . . ] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

In 1903, the Court in the *Japanese Immigrant Case* reviewed the legality of deporting an alien who had lawfully entered the United States, clarifying that “an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population” could not be deported without an “opportunity to be heard upon the questions involving his right to be and remain in the United States.”<sup>1</sup> In the decades that followed, the Supreme Court maintained the notion that “once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.”<sup>2</sup>




Eventually, the Supreme Court extended these constitutional protections to *all aliens* within the United States, including those who entered unlawfully, declaring that “aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”<sup>3</sup> The Court reasoned that aliens

physically present in the United States, regardless of their legal status, are recognized as “persons” guaranteed due process of law by the Fifth and Fourteenth Amendments.<sup>4</sup> Thus, the Court determined, “[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”<sup>5</sup> Accordingly, notwithstanding Congress’s indisputably broad power to regulate immigration, fundamental due process requirements notably constrained that power with respect to aliens within the territorial jurisdiction of the United States.<sup>6</sup>











Yet the Supreme Court has also suggested that the extent of due process protection “may vary depending upon [the alien’s] status and circumstance.”<sup>7</sup> In various opinions, the Court has suggested that at least some of the constitutional protections to which an alien is entitled may turn upon whether the alien has been admitted into the United States or developed substantial ties to this country.<sup>8</sup> Thus, while the Court has recognized that due process considerations may constrain the Federal Government’s exercise of its immigration power, there is some uncertainty regarding the extent to which these constraints apply with regard to aliens within the United States.

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### Footnotes

1. ^ Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903) ; see also *Low Wah Suey v. Backus*, 225 U.S. 460, 468 (1912)  (observing requirement of “fairly conducted” hearings in cases involving the expulsion of aliens from the United States); *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 132 (1924)  (recognizing admitted alien’s right to notice and opportunity to be heard); *United States ex rel. Vajtauer v. Comm’r of Immigration at Port of N.Y.*, 273 U.S. 103, 106 (1927) (“Deportation without a fair hearing or on charges unsupported by

any evidence is a denial of due process which may be corrected on habeas corpus.”).

2. ^ Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953)  (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945)  (Murphy, J., concurring)); see also Landon v. Plasencia, 459 U.S. 21, 32 (1982)  (“[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”); Johnson v. Eisentrager, 339 U.S. 763, 770 (1950)  (“The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.”).
3. ^ Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) ; see also Mathews v. Diaz, 426 U.S. 67, 77 (1976)  (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.”); Plyler v. Doe, 457 U.S. 202, 215 (1982)  (holding that unlawfully present aliens were entitled to both due process and equal protection under the Fourteenth Amendment).
4. ^ Plyler, 457 U.S. at 210 (citing Mezei, 345 U.S. at 212; Wong Wing v. United States, 163 U.S. 228, 238 (1896) ; Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ).
5. ^ Mathews, 426 U.S. at 77; see also Zadvydas v. Davis, 533 U.S. 678, 693 (2001)  (explaining that the Due Process Clause applies “to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”).
6. ^ See Kwong Hai Chew, 344 U.S. at 596–97 (explaining that a lawful permanent resident “may not be deprived of his life, liberty or property without due process of law,” and thus cannot be deported without “notice of the nature of the charge and a hearing at least before an executive or administrative tribunal”).

7. ^ See *Zadvydas*, 533 U.S. at 694.
8. ^ See Dep't of Homeland Sec. v. *Thuraissigiam*, No. 19-161, slip op. at 2 (U.S. June 25, 2020) (stating that "aliens who have established connections in this country have due process rights in deportation proceedings"); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) [↗](#) ("These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."); *Landon*, 459 U.S. at 32 ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); *Kwong Hai Chew*, 344 U.S. at 596 n.5 ("But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) [↗](#) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) [↗](#) ("[I]t is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.").