Artl.S8.C18.8.8.4 Federal Laws Relating to Aliens

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.*

The line of exclusion cases from *Kleindienst v. Mandel* to *Trump v. Hawaii* makes clear that claims brought by U.S. citizens against the exclusion of aliens abroad are governed by a narrow standard of review under which the government has never lost before the Supreme Court, not even when extrinsic evidence has suggested that the Executive may have acted for an unconstitutional purpose.[1] Yet even with respect to aliens *within* the United States—a group that, as noted above, enjoys more constitutional protections than aliens seeking entry—the Court has deferred to Congress's policy judgments. For example, in *Mathews v. Diaz*, the Supreme Court in 1976 upheld a federal statute that restricted eligibility for participation in a federal medical insurance program to U.S. citizens or lawful permanent residents (LPRs) who had continuous residence in the United States for five years.[2] In *Mathews*, a group of aliens who had been lawfully admitted to the United States, but failed to meet the federal statute's eligibility requirements, challenged the statute on equal protection grounds.[3] The Court observed that, "in the exercise of its broad power

over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," and that, based on that power, Congress could, as a matter of policy, decide which classes of aliens would be entitled to the benefits that are available to U.S. citizens.[4] Therefore, the Court determined, "it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence."[5]

On the other hand, in *Zadvydas v. Davis*, the Supreme Court in 2001 ruled that the indefinite detention of lawfully admitted aliens who had been ordered removed from the United States following formal removal proceedings "would raise a serious constitutional problem."[6] The Court reasoned that, although Congress has broad authority over immigration, "that power is subject to important constitutional limitations."[7] Noting that "[f]reedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects," the Court determined that the government failed to show a "sufficiently strong special justification" for the indefinite detention of aliens that outweighed their constitutionally protected liberty interest.[8] In addition, the Court emphasized the "critical distinction" between aliens who have entered the United States and those who have not entered the country, observing that "certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."[9] Accordingly, the Court held that the federal statute that authorized the detention of aliens in the United States pending their removal had to be construed as limiting the detention to "a period reasonably necessary to secure removal."[10]

But more recently, in *Department of Homeland Security v. Thuraissigiam*, the Supreme Court in 2020 held that an alien apprehended after entering the United States unlawfully, who was subject to an "expedited removal" process applicable to aliens apprehended at or near the border, could not raise a due process challenge to a federal statute limiting judicial review of those proceedings.[11] Although the alien was twenty-five yards inside the United States when apprehended, the Court reasoned that its "century-old" precedent holding that aliens seeking initial entry to the United States have no constitutional rights regarding their applications for admission "would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil."[12] The Court determined that the alien essentially remained "'on the threshold'" of entry and could be "'treated' for due process purposes 'as if stopped at the border.'"[13] To conclude otherwise, the Court declared, "would undermine the 'sovereign prerogative' of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location."[14]

Footnotes

1. ^ *See* Trump v. Hawaii, No. 17-965, slip op. at 3234 (U.S. June 26, 2018).
2. ^ Mathews v. Diaz, 426 U.S. 67, 77–84 (1976); *see* 42 U.S.C. § 1395o(2).
3. ^ *Mathews*, 426 U.S. at 69–71.
4. ^ *Id.* at 79–80.
5. ^ *Id.* at 82–83.
6. ^ Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

7. ^ *Id.* at 695.
8. ^ *Id.* at 690–92.
9. ^ *Id.* at 693–94.
10. ^ *Id.* at 699. But a few years later, in Demore v. Kim, the Supreme Court in 2003 considered a due process challenge to a federal statute that required the detention of criminal aliens during the pendency of their removal proceedings, and the Court held that "[d]etention during removal proceedings is a constitutionally permissible part of that process" because such detention is generally shorter in duration, and serves the purpose of preventing criminal aliens from absconding during their proceedings. 538 U.S. 510, 527–28, 531 (2003); *see also* Jennings v. Rodriguez, No. 15-1204, slip op. at 12–14, 19–24, 28 (U.S. Feb. 27, 2018) (holding that the Department of Homeland Security has statutory authority to indefinitely detain aliens during the pendency of their formal removal proceedings, but not deciding whether such prolonged detention is constitutional); Reno v. Flores, 507 U.S. 292, 315 (1993) (upholding regulation generally providing for the release of detained alien juveniles only to parents, close relatives, or legal guardians during pendency of deportation proceedings).
11. ^ Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161, slip op. at 34–36 (U.S. June 25, 2020).
12. ^ *Id.* at 34–35 (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892)).
13. ^ *Thuraissigiam*, slip op. at 34–36 (quoting *Mezei*, 345 U.S. at 212, 215).
14. ^ *Id.* at 35–36 (quoting *Plasencia*, 459 U.S. at 32). The Court indicated that aliens who "established connections" to the United States would have greater due process protections in the event that the government sought to remove them, but the Court did not go further to assess the nature of those "established connections." *Id.* at 2–4. Nevertheless, in describing the limited constitutional protections for aliens seeking entry into the United States, the Court cited its statement in Nishimura Ekiu that it is not within the province of the judiciary to order that "foreigners who have never been naturalized, nor acquired any

domicile or residence within the United States, nor even been admitted into the country pursuant to law," shall be permitted to enter, in opposition to the constitutional and lawful measures of the Legislative and Executive Branches of the National Government. *Id.* at 34–36; *see also Nishimura Ekiu*, 142 U.S. at 660. The Court's reference to this language suggests that the extent to which an alien establishes connections may turn, at least in part, on whether the alien has been lawfully admitted to the country. On the other hand, the language could suggest that an alien who entered the country unlawfully, but had "acquired . . . domicile or residence" within the country, could establish connections to be accorded due process protections in removal proceedings.