Artl.S8.C18.8.7.3 Aliens Seeking to Enter 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.*

While the Supreme Court has generally recognized that due process considerations provide some constraint on the procedures employed to remove aliens from the United States, the Court has repeatedly affirmed the plenary nature of the immigration power with respect to aliens seeking *to enter* the country. In particular, the Court has reasoned that, while aliens who have entered the United States—even unlawfully—may not be deported without due process, an alien "on the threshold of initial entry stands on a different footing" because he or she is theoretically outside the United States and typically beyond the veil of constitutional protection.[1]

For example, in *United States ex rel. Knauff v. Shaughnessy*, the German wife of a U.S. citizen challenged her exclusion without a hearing under the War Brides Act.[2] The German national was detained at Ellis Island during her proceedings, and, therefore, technically within United States territory.[3] Nevertheless, the Supreme Court held that the government had the "inherent executive power" to

deny her admission, and that, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[4]

Similarly, in *Shaughnessy v. United States ex rel. Mezei*, an alien detained on Ellis Island argued that the government's decision to deny admission without a hearing violated due process.[5] Citing "the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments," the Court determined that the Executive was authorized to deny entry without a hearing, and that the decision was not subject to judicial review.[6] Further, the Court held, although the alien had "temporary harborage" inside the United States pending his exclusion proceedings, he had not effected an "entry" for purposes of immigration law, and could be indefinitely detained and "treated as if stopped at the border."[7]

The Supreme Court, however, has held that Congress's largely unencumbered power over the entry of aliens does not extend to lawful permanent residents (LPRs) who return from trips abroad.[8] In *Kwong Hai Chew v. Colding*, the Court ruled that an LPR returning from a five-month voyage as a crewman on a U.S. merchant ship was entitled to a hearing upon being detained by immigration officers because he retained the same constitutional rights that he had enjoyed prior to leaving the United States.[9] Subsequently, in *Rosenberg v. Fleuti*, the Court reaffirmed that an LPR "is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him, a holding which supports the general proposition that a resident alien who leaves this country is to be

regarded as retaining certain basic rights."[10] Thus, unlike aliens seeking initial admission into the United States, aliens who have resided in the United States as LPRs are fully vested with constitutional protections upon their return from trips abroad.[11]

Footnotes

1. ^ Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); *see also* Kaplan v. Tod, 267 U.S. 228, 230 (1925) (construing an alien seeking admission at the border as a person who "was still in theory of law at the boundary line and had gained no foothold in the United States") (citing Nishimura Ekiu v. United States, 142 U.S. 651, 661 (1892)). This distinction is known as the "entry fiction doctrine." Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. . . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").
2. ^ 338 U.S. 537, 539–40 (1950).
3. ^ *Id.* at 539.
4. ^ *Id.* at 544.
5. ^ *Mezei*, 345 U.S. at 207–09.
6. ^ *Id.* at 210–12.
7. ^ *Id.* at 212–15 (citations omitted).
8. ^ *See* Landon v. Plasencia, 459 U.S. 21, 33 (1982); Rosenberg v. Fleuti, 374 U.S. 449, 460 (1969); Kwong Hai Chew v. Colding, 344 U.S. 590, 600–02 (1953).
9. ^ *Kwong Hai Chew*, 344 U.S. at 596, 600–01. Specifically, the Court stated that "[f]or purposes of the constitutional right to due process, we assimilate [a

returning LPR's] status to that of an alien continuously residing and physically present in the United States." *Id.* at 596.

10. ^ *Fleuti*, 374 U.S. at 460; *see also Landon*, 459 U.S. at 33 ("Any doubts that Chew recognized constitutional rights in the resident alien returning from a brief trip abroad were dispelled by Rosenberg v. Fleuti."). Moreover, the Court in Fleuti held that an LPR cannot be construed as making an "entry" into the United States for immigration purposes following "an innocent, casual, and brief excursion" outside the country. *Fleuti*, 374 U.S. at 462. Eventually, Congress in 1996 amended the Immigration and Nationality Act (INA) to provide that a returning LPR is not considered an "applicant for admission" except in certain enumerated circumstances. 8 U.S.C. § 1101(a)(13)(C); Vartelas v. Holder, 566 U.S. 257, 261 (2012). But even in those circumstances, an LPR is entitled to a hearing with respect to his admissibility before he can be excluded from the United States. *See* 8 U.S.C. §§ 1225(b)(1)(C), 1252(e)(2)(C); 8 C.F.R. § 235.3(b)(5).
11. ^ *See Landon*, 459 U.S. at 32 (recognizing that LPR had the right to due process upon returning to the United States).