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Due Process and the Non-Citizen: A Revolution Reconsidered

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In the pantheon of the Supreme Court's procedural due process jurisprudence, commentators typically describe Mathews v. Eldridge*—the canonical case balancing governmental interests and individual rights—as a low point for individual liberty and a retreat from the high-water mark of* Goldberg v. Kelly*. But the due process* revolution, and Mathews *in particular, has dramatically affected the status of non-citizens in a number of immigration and national security cases.* Mathews*' transplantation to these areas has produced a body of decisions that are ushering in new rights protections and weakening doctrines of exceptionalism, for two reasons. First,* Mathews *requires an individuated inquiry into private interests that, when applied to cases involving the deportation, detention, and trials of foreign nationals, undermines the categorical inquiries into sovereignty, citizenship, and territoriality that defined more than a century of immigration and national security law. Second,* Mathews *often requires a judicial assessment of the merits of underlying policy, putting courts in the unique position of evaluating—and, at times, rejecting—congressional and administrative decisions that deny protections to foreign nationals. Courts engaging in due process balancing have begun to assert their own comparative expertise, and while the judiciary still frequently yields to government interests in these cases, the "*Mathews*ization" of immigration and national security has changed the judicial role with payoff for individual rights. Moreover, this payoff extends beyond the courts, for the coordinate branches, too, are experiencing a* Mathews*ization of sorts. In a world defined by fractious institutional power grabs,* Mathews *provides an unexpected mechanism for dialogue among coordinate institutions and a basis for inter-branch coordination.*

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JOSEPH LANDAU*

I. INTRODUCTION

In the pantheon of the Supreme Court's procedural due process jurisprudence, commentators typically describe *Mathews v. Eldridge*[1]—the canonical case balancing governmental interests and individual rights—as a low point for individual liberty and a retreat from the high-water mark of *Goldberg v. Kelly*.[2] On the conventional view, *Mathews* represents an ill-fated and restrained turn in the articulation of a new doctrine of due process in which the Court prioritized utilitarian calculations and cost-benefit analyses at the expense of deeper citizenship values such as dignity and equal participation.[3]

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[1] 424 U.S. 319 (1976).

[2] 397 U.S. 254 (1970). *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 58 (1976) (describing the *Mathews* court as "[r]etreating from" the Court's stance in *Goldberg*); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 674 (2d ed. 1988); Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 197–98 (1991) (describing *Goldberg* as "the beginning of a brave new world" for due process rights); Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 803 (1990) (arguing that *Goldberg* jurisprudence be "protected from" *Mathews*); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 3 (1990) (arguing that *Goldberg* represents a "'stronger,' more meaningful opportunit[y]" to participate in the judicial process); Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 9, 12 (1997) ("[I]n the subsequent case of *Mathews v. Eldridge*, the Court appeared to put aside the egalitarian, communitarian rationale of *Goldberg*. . . ."); *cf.* Richard J. Pierce, Jr., Essay, *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1981 (1996) (noting a "recognition [within *Mathews*] of the need to create pragmatically based limits on the scope of the new rights the Court had created").

[3] *See* Mashaw, *supra* note 2, at 58 (arguing that "the absence in [*Mathews*] of traditionalist, dignitary, or egalitarian considerations . . . permitted the court to overlook questions of both fact and value," providing "an inadequate guide for analysis because its neutrality leaves it empty of suggestive value perspectives"); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 155 (1978) (rejecting *Mathews*' "utilitarianism [a]s hostile to any theory of due process that treats individual dignity as a serious, operative societal value"); Zietlow, *supra* note 2, at 11–12 (asserting that *Mathews* undermined

However, *Mathews* has activist features when applied to cases regarding the admission, expulsion, detention, and trial of foreign nationals.[4] Courts applying *Mathews* to immigration and national security have produced surprisingly rights-affirming outcomes and a show of judicial confidence absent from conventional immigration and national security rulings, which traditionally accord extreme deference to the political branches.[5] While the domestic-law due process cases of the 1970s seem an unlikely vehicle for a change in the constitutional rights of non-citizens, the "*Mathews*ization" of immigration and national security is laying a new foundation of constitutional due process that has produced, and will likely continue to produce, greater and more concrete protections for foreign nationals.

There are two basic reasons why *Mathews* is reshaping immigration and national security law. First, *Mathews* explicitly calls for a determination of the private interests at stake in a given case or context. As a result, courts applying the *Mathews* test have shifted their inquiries from group-based assessments of sovereignty, citizenship, and territoriality to more particularized interpretations of the circumstances of discrete cases. Second, *Mathews* requires that courts examine the costs and benefits of additional procedures, which invites—if not requires—a far more involved and active judicial role in assessing the merits of policies. Courts engaging in this balancing inquiry have begun to assert unexpected levels of comparative expertise greatly at odds with the exceptionalism defining more than a century of immigration and national security decisions.[6]

These twin by-products of the due process revolution—an individuated inquiry on the one hand and an increased judicial independence on the other—have numerous implications for judicial review and the rule of law in matters regarding the admission, deportation, detention, and military

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Goldberg's "communitarian promise of participation to all citizens" guaranteed by the Fifth Amendment's Due Process Clause).

[4] Foreign nationals are not precluded from seeking a range of statutory benefits under state and federal law, and they receive the same due process protections as citizens when accessing those benefits. Graham v. Richardson, 403 U.S. 365, 376 (1971) (invalidating state laws conditioning receipt of welfare benefits on possession of U.S. citizenship or durational residence within the United States).

[5] For purposes of this discussion, I will use the term "immigration law" to describe the cases governing the admission and the expulsion of foreign nationals, see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256, and Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990), and I will use "national security law" to refer to the body of law concerning the detention and trial of foreign non-state actors at Guantánamo Bay and elsewhere. These cases, for now, provide the most relevant context for the transplantation of due process norms to cases involving enemy foreign nationals.

[6] *See, e.g.*, STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 178 (1987); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1392–94 (1999); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1981–89 (2013).

trials of non-citizens. While scholars of immigration and national security have previously noted ways that procedural devices can provide important mechanisms for the judicial recognition of foreign nationals' substantive rights,[7] this Article focuses on *Mathews* in general, and the intersection of immigration and national security in particular, to highlight a number of legal developments that span both fields. The complementarity of these developments yields substantial descriptive and normative implications for judicial review, tempering the harshness of the plenary power doctrine and providing a roadmap for the judiciary's continued involvement in these sensitive areas of law.

The unlikely payoff for individual rights occasioned by *Mathews* extends beyond the courts, for the coordinate branches, too, are experiencing a *Mathews*ization of sorts. The political branches have imported *Mathews* directly into policy considerations surrounding the use of force, and *Mathews*-style analysis finds its way into decisions regarding indefinite detention and deportation. While the judicial and political branches have invoked these analyses in different ways and to different ends, their shared reliance on *Mathews* highlights possibilities of dialogue and coordination that have yet to be explored in the literature.[8] This collective branch convergence also tempers the critique, popular among some scholars, that open-textured frameworks such as *Mathews* undermine meaningful judicial review in exceptional areas of the law.[9] In a world defined by fractious power grabs among the coordinate branches—especially where immigration and national security are concerned[10]—the

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[7] Immigration scholars in particular have noted how procedural due process can serve as a mechanism "for avoiding the harshness of the plenary power doctrine." Legomsky, *supra* note 5, at 298. As Hiroshi Motomura has explained, procedural devices have functioned as "surrogate[s]" for substantive constitutional protections where foreign nationals are concerned. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1628 (1992). In addition, Motomura argues that constitutional doctrines from "mainstream" constitutional law have exerted a "gravitational force" that is revealed through procedural innovations in immigration. Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 5, at 564.

[8] *Cf.* Boumediene v. Bush, 553 U.S. 723, 738 (2008) (describing the need for an "interpretive rule [that] facilitates a dialogue between Congress and the Court").

[9] *See* Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 508–09 (2011) (arguing that "foreign affairs legalism"—the idea that "courts should impose more restrictions on the executive than they have in the past . . . rests on unproven and inaccurate assumptions about the capacities and motivations of courts and the executive, and it reflects confusion about the nature of international law"); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1097 (2009) (calling "[t]he aspiration to extend legality everywhere" misguided and "hopelessly utopian").

[10] *See, e.g.*, Mara Liasson, Republicans Criticize Obama's Immigration Actions Ahead of Unveiling, NPR (Nov. 19, 2014), http://www.npr.org/2014/11/19/365271500/republicans-criticize-obamas-immigration-actions-ahead-of-unveiling; Samuel Smith, Obama ISIS Strategy Heavily Criticized by GOP, Senate Dems, Pentagon Official, CHRISTIAN POST (Sept. 13, 2014),

shared gravitation toward *Mathews* has produced convergence and even some harmony in laws regarding the rights of foreign nationals.

This Article proceeds in four Parts. Part II outlines the basic features of the due process revolution and its transplantation into the national security and immigration arenas. Part III describes how *Mathews*' individuated inquiry has produced stronger constitutional protections that undermine conventional categorical approaches to immigration and national security decision-making. Part IV builds on that analysis by explaining how the courts' increased role in balancing government and individual interests has resulted in renewed institutional checks on both legislative and executive branch policies. Part V considers the broader implications of these changes, the limitations of the *Mathews* revolution, and the role courts can continue to play in future cases at the intersection of individual liberty and executive power.

II. FROM CATEGORICALISM TO INDIVIDUATION

A. *A Century of Judicial Exceptionalism*

For more than a century, the Supreme Court routinely relied on constitutional structure and political design—including the Constitution's vesting of powers related to national security[11] and immigration[12] solely within the political branches—to reject the individual liberty claims of foreign nationals.[13] The Court applied a categorical, group-based analysis grounded in status, territoriality, and sovereignty that generally resulted in the denial of the claims of foreign nationals challenging their detention, deportation, or military trial.

The Supreme Court predicated its categorical inquiry on the belief that

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http://www.christianpost.com/news/obama-isis-strategy-heavily-criticized-by-gop-senate-dems-pentagon-official-126334/.

[11] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (celebrating the President's "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations"); Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 488 (2002) ("[T]he Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the nation in its foreign relations, to use military force abroad, especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States.").

[12] *See* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (noting the federal government's inherent power and authority to exclude those it finds "dangerous to its peace and security"—and that such a "determination is conclusive upon the judiciary"); Anne Y. Lee, *The Unfettered Executive: Is There an Inherent Presidential Power to Exclude Aliens?*, 39 COLUM. J.L. & SOC. PROBS. 223, 231 (2005) (noting "a stand-alone, inherent federal power that granted Congress the power to control the nation's borders and exclude particular aliens from entering the country," which the Court derived from "the broad and largely undefined principles of national sovereignty").

[13] *See infra* Parts III.A, III.B.

the political branches maintained expertise in immigration and national security and that courts should therefore not interfere with sensitive political branch judgments regarding national and border security. Courts believed the executive to be "institutionally best suited to initiate government action" on matters of national security, with the president uniquely situated to "take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match."[14] The Court's self-imposed plenary power doctrine reduced (if not eliminated) any role in interpreting substantive immigration policy. Within immigration, no less than national security, "[t]he rhetoric of judicial deference . . . was striking in that courts almost invariably meant what they said."[15]

Recently, however, courts have substituted the categorical, group-based analysis with a more individuated framework that requires a more involved judicial role in assessing both the government's claimed need for border control and national security and the foreign national's unique liberty interests and overall circumstances. These twin developments—an individuated inquiry on the one hand and enhanced role for judicial consideration of policy on the other—have occurred in the wake of the Supreme Court's application of *Mathews v. Eldridge* to core national security and immigration matters. The *Mathews*ization of immigration and national security constitutes a striking development and arguably a new phase in the due process revolution. The Supreme Court's application of *Mathews* and subsequent developments have undermined much of the exceptionalism that defined more than a century of prior immigration and national security rulings.[16]

The doctrinal shifts wrought by *Mathews* are apparent within a growing number of recent Court decisions in which the Supreme Court has narrowly interpreted congressional statutes stripping the federal courts of jurisdiction;[17] imposed limits on the amount of time that foreign nationals

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[14] HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 118–19 (1990); *see also* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1176 (2007) (making the claim that "courts should generally defer to the executive on the ground that resolving ambiguities requires judgments of policy and principle, and the foreign policy expertise of the executive places it in the best position to make those judgments").

[15] Peter J. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 15–16 (1984).

[16] For an analysis of how the Supreme Court's recent immigration decisions have departed from the concept of immigration exceptionalism, *see* Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 67 OKLA. L. REV. (forthcoming Summer 2015) (on file with author); *id.* at 12 (noting that "the Court in effect has to a large extent continued to bring U.S. immigration law into the legal mainstream" and "has slowly but surely moved away from anything that might reasonably be characterized as immigration exceptionalism").

[17] *See, e.g.*, Nken v. Holder, 556 U.S. 418, 418 (2009) (holding that a statutory provision sharply restricting injunctive relief did not apply to stays of removal pending judicial review); Boumediene v. Bush, 553 U.S. 723, 724–25, 728 (2008) (applying the Constitution's Suspension Clause to Guantánamo Bay and striking down a congressional statute that stripped federal courts of statutory

can be detained;[18] narrowed the meaning and scope of *Chevron*[19] deference in agency interpretations of Supreme Court doctrine[20] or ignored *Chevron* altogether;[21] and rejected or narrowed agency-created procedures that, with Congress's blessing, limited or foreclosed procedural rights of foreign-nationals.[22] The Court has applied *Mathews* in some of these cases and built upon that due process foundation in others. Accordingly, while the transplantation of *Mathews* has served different ends on different occasions, the cases have generally led the way to more substantial protections for individuals who otherwise lack well-established claims to constitutional rights.

Because these emerging constitutional protections remain inchoate and poorly defined,[23] scholars often remark in the same breath that the Court's recent rulings exemplify both the vanguard *and* rearguard of legal change. In the national security context, for example, David Cole sees the recent Supreme Court cases as both "quite limited" *and* an indication that the "rule of law . . . proved far more resilient than many would have

habeas jurisdiction at Guantánamo); Rasul v. Bush, 542 U.S. 466, 466 (2004) (interpreting the federal habeas corpus statute to apply to suits by foreign nationals at Guantánamo Bay); INS v. St. Cyr, 533 U.S. 289, 309–10 (2001) (narrowly interpreting jurisdiction-limiting provisions of immigration statutes and permitting suit by foreign nationals to proceed in habeas corpus).

[18] *See* Zadvydas v. Davis, 533 U.S. 678, 679 (2001) (interpreting an immigration statute to incorporate "reasonabl[e]" limits on post-removal-order detention); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (upholding the executive's "authority to detain for the duration of the relevant conflict" but noting that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel").

[19] 467 U.S. 837 (1984).

[20] Negusie v. Holder, 555 U.S. 511, 522–23 (2009) (rejecting an agency's interpretation of an immigration statute that would preclude asylum relief to those who persecuted others under duress).

[21] *See* Vermeule, *supra* note 9, at 1128–29 (finding it "significant" that courts deciding national security cases after 9/11 "often do not so much as advert to *Chevron*"); *id.* at 1128 (stating that the Supreme Court decided "issues of statutory authorization (in *Hamdi* [*v. Rumsfeld*, 542 U.S. 507 (2004),]) and statutory prohibition (in *Hamdan* [*v. Rumsfeld*, 548 U.S. 557 (2006),]) without offering direct instruction on the relevance of *Chevron*").

[22] Kucana v. Holder, 558 U.S. 233, 233, 235 (2010) (drawing a distinction between discretion to grant or deny motions to reopen as conferred by a regulation versus by statute, and holding that Board of Immigration Appeals denials of motions to reopen are still subject to judicial review); Dada v. Mukasey, 554 U.S. 1, 2 (2008) (allowing foreign nationals to unilaterally withdraw a petition for voluntary departure, prior to the expiration of the departure period, to protect the right to pursue a motion to reopen); *cf. Boumediene*, 553 U.S. at 788–89 (holding that even if the D.C. Circuit had a broad mandate to consider relevant exculpatory evidence under the Detainee Treatment Act, DTA § 1005(e)(2)(B)(i), 119 Stat. 2742, the Act's judicial review provisions still presented an inadequate substitute for habeas corpus).

[23] *See* Legomsky, *supra* note 5 (calling for the Court to abandon the plenary power doctrine in immigration); *see also* Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 COLUM. L. REV. 1013, 1029, 1092 (lamenting that the Supreme Court's post-9/11 decisions leave "the final, substantive outcome of the cases at bar uncertain" and "resulted in a great deal of process, and not much justice").

predicted."[24] Jenny Martinez points out that while the post-9/11 national security decisions "resulted in a great deal of process, and not much justice,"[25] they *also* demonstrated "in some sense [that] the system 'worked.'"[26] Discussing recent immigration cases, Kevin Johnson reports both the "good news . . . that the Court is engaging in meaningful review of agency decisions and . . . not blindly deferring to the Board of Immigration Appeals" *and* the bad news that courts have failed to "engage in more exacting judicial review of agency removal decisions."[27]

These varied responses reflect a deeper tension within both national security and immigration jurisprudence that is still working its way through the courts. On the one hand, recent Supreme Court cases have not explicitly undermined the basic structural model of constitutional decision-making in these areas or the doctrine of plenary political-branch power. Nonetheless, the Court has not stood by these precedents either. Instead, the law inside the federal courts appears to be more open-textured, with the courts often citing *Mathews* as mandating a multi-factored test that, when applied to individual cases, creates more rights-affirming outcomes. Across these cases, one finds sharper judicial inquiries of actual policy combined with waning levels of adherence to the exceptionalism that previously defined national security and immigration. In both contexts, *Mathews* is a critical part of that shift.

B. *The Due Process Revolution from* Goldberg *to* Mathews

The due process revolution is commonly attributed to *Goldberg v. Kelly*,[28] which established as a threshold matter that constitutional due process protections apply to a range of entitlements that had previously seemed beyond the reach of constitutional protections to "life, liberty, or property."[29] The Supreme Court had traditionally reserved due process protections to "the fruits of an individual's labor, such as money, a house, or a license to practice law, as well as forms of liberty recognized in the Bill of Rights."[30] Rejecting the sharp distinction between protected "rights"

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[24] David Cole, *After September 11: What We Still Don't Know*, N.Y. REV. BOOKS, Sept. 29, 2011, at 27, 28.

[25] Martinez, *supra* note 23, at 1092.

[26] *See id.* at 1038 (noting that, after *Padilla v. Rumsfeld*, 542 U.S. 426 (2004), Padilla eventually received a lawyer and a jury trial).

[27] Kevin Johnson, *The Supreme Court's Immigration Decisions in the 2011 Term (Sans* Arizona v. United States*)*, IMMIGRATIONPROF BLOG (May 23, 2012), http://lawprofessors.typepad.com/immigration/2012/05/the-supreme-courts-immigration-decisions-in-the-2011-term-sans-arizona-v-united-states.html.

[28] 397 U.S. 254 (1970). Charles Reich is credited as the forerunner to this movement through the publication of two seminal articles in the *Yale Law Journal*, both of which were cited by the Court in *Goldberg*. *See id.* at 262 n.8; *see also* Pierce, *supra* note 2, at 1974–76.

[29] U.S. CONST. amend. XIV, § 1; *Goldberg*, 397 U.S. at 267–71.

[30] Pierce, *supra* note 2, at 1974.

and unprotected "privileges,"[31] the *Goldberg* Court extended due process protections to statutory welfare benefits, broadening the constitutional framework to require that the government provide welfare recipients with an evidentiary hearing prior to termination.[32]

Commentators understand *Goldberg* to have unleashed "a due process explosion in which the Court . . . carried the hearing requirement from one new area of government action to another."[33] As Judge Friendly noted a few years after *Goldberg*, "[t]he trend in one area after another [was] to say, 'If there, why not here?'"[34] Indeed, after *Goldberg*, the Supreme Court extended the new due process framework to numerous contexts—including government employment,[35] public schools,[36] prisons,[37] utilities,[38] and the consumption of alcohol[39]—while refusing to do so in a smaller number of cases.[40] While *Goldberg* required the agency to provide a welfare recipient with a pre-termination hearing before terminating benefits,[41] subsequent case results restricted the amount of process due. As courts became "inundated . . . with claims of procedural deprivation,"[42] the required procedures became less demanding. Critics assailed these restrained

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[31] *See* Bd. of Regents v. Roth, 408 U.S. 564, 571, 584 (1972) (noting that *Goldberg* and its progeny "reject[ed] the wooden distinction between 'rights' and 'privileges'").

[32] *Goldberg*, 397 U.S. at 262, 267–68.

[33] Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1268 (1975).

[34] *Id.* at 1300.

[35] *See* Perry v. Sindermann, 408 U.S. 593, 598, 602–03 (1972) (extending due process rights to a non-tenured college professor who, upon being fired from a junior college, alleged that the decision was based upon the exercise of his First Amendment rights).

[36] *See* Goss v. Lopez, 419 U.S. 565, 581 (1975) (extending constitutional due process protections to students facing temporary suspension from public school).

[37] *See* Wolff v. McDonnell, 418 U.S. 539, 596, 600–01 (1974) (applying due process to prison inmates challenging procedures used in imposing a loss of their good-time credits).

[38] *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19–22 (1978) (finding that a company violated a customer's due process rights by not providing the customer notice and opportunity to appeal billing errors).

[39] *See* Wisconsin v. Constantineau, 400 U.S. 433, 435, 437, 439 (1971) (holding unconstitutional a Wisconsin statute that authorized liquor stores to post, without prior notice or hearing, the names of individuals to whom alcoholic beverages should not be sold).

[40] In *Arnett v. Kennedy*, the Court refused to expand constitutional due process protections to the for-cause firing of a tenured government employee, upholding the sufficiency of procedures already in place. 416 U.S. 134, 157–58 (1974); *see also* Ingraham v. Wright, 430 U.S. 651, 682 (1977) (ruling that the due process clause did not require notice and a hearing prior to the imposition of corporal punishment under Florida statute); Paul v. Davis, 424 U.S. 693, 697, 711–12 (1976) (ruling that a reputational injury suffered by an individual identified as an "active shoplifter" did not, in and of itself, amount to a violation of procedural due process); Bd. of Regents v. Roth, 408 U.S. 564, 578–79 (1972) (refusing to extend due process to a non-tenured university professor at a state university who challenged his employer's decision not to rehire him for a second term).

[41] *Goldberg*, 397 U.S. at 264. *Goldberg* required timely and specific notice, opportunity to make an oral presentation of evidence and cross-examine the government's witnesses, the assistance of counsel, and a neutral fact-finder that provides the reasons for his decision and points to the evidence that led to that ruling. *Id.* at 267–71.

[42] *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 9 (1985).

procedures as an erosion of *Goldberg*'s safeguarding of Article III norms.[43]

Mathews v. Eldridge, decided only five years after *Goldberg*, became the embodiment of the Court's more relaxed stance toward procedural regularity. *Mathews* held that the Social Security agency's truncated procedures for terminating benefits[44]—including a pre-deprivation written hearing but no trial until after benefits were terminated—satisfied due process.[45] To support that outcome, *Mathews* adduced a three-part balancing test, weighing (1) the individual's interest at stake; (2) a cost-benefit analysis of additional procedures; and (3) the government's interest.[46] While this multi-pronged test was consistent with the language in a number of pre-*Mathews* cases—including *Goldberg*[47]—the two cases seemed to posit two very different due process inquiries. *Goldberg* considered the threshold question whether due process applied at all;[48] *Mathews*, by contrast, accepted the premise that due process protections obtained and asked instead how courts should balance private interests in light of the government's needs.[49] While *Mathews* drew criticism from scholars who viewed the decision as insufficiently protective of procedural rights,[50] it accepted *Goldberg*'s basic premise that some kind of process

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[43] *See, e.g.*, Zietlow, *supra* note 2, at 12 (arguing that the Court's approach after *Goldberg* "limited the ability of the due process revolution to better the lives of the poor").

[44] Mathews v. Eldridge, 424 U.S. 319, 340, 343 (1976).

[45] *Id.* at 345–46, 349 (holding that the administrative procedures for "disability-benefits-entitlement assessment" were adequate and "fully comport[ed] with due process"). That process afforded the beneficiary a medical examination, access to reports of examining physicians, and an opportunity to provide a written statement in response to a doctor's determination that benefits were no longer appropriate. *Id.*

[46] The test considers,

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

[47] *See* Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (noting that the scope of procedural due process "depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication"); *id.* (noting that the "due process [inquiry] may require under any given set of circumstances . . . a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action").

[48] *Id.* at 260 ("The constitutional issue to be decided . . . is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits.").

[49] *See Mathews*, 424 U.S. at 348 ("At some point the benefit of [a particular procedural safeguard] . . . may be outweighed by the cost.").

[50] *See* TRIBE, *supra* note 2, at 674 (explaining that the *Mathews* approach "not only overlooks the unquantifiable human interest in receiving decent treatment, but also provides the Court a facile means to justify the most cursory procedures by altering the relative weights to be accorded each of the three

was required—a rule that, if extended to immigration and national security, could have dramatic effects in those cases. Thus, even as commentators contrasted *Goldberg* and *Mathews*, hailing the former's "promise of substantive justice and equality" while lamenting the latter's elimination of an "egalitarian, communitarian rationale,"[51] the transplantation of constitutional procedure to cases involving the rights of non-citizens would expand the due process revolution in critical ways.

C. Mathews*' Transplantation to Immigration and National Security*

While the due process revolution applied to a range of different domestic contexts, its constitutional foundations and protections seemingly had no application to immigration or national security. The judicially created plenary power doctrine undermined the idea of meaningful due process protections for foreign nationals in immigration exclusion proceedings as well as virtually all national security matters.[52] The prevailing doctrines of exceptionalism—couched in formal considerations of status, territoriality, or sovereignty—were largely indifferent to the equities of the individual cases at hand. A foreign national's connections to the United States or citizen family members, military service, or overall good moral character were irrelevant in many cases because foreign nationals held beyond U.S. shores lacked access to U.S. courts, preventing them from challenging their confinement, exclusion, or the process by which they were convicted overseas.[53] As the Supreme Court would famously declare, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[54]

A decade after *Goldberg*, however, the Supreme Court transplanted

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factors"); Farina, *supra* note 2, at 189 (calling the Supreme Court's due process cases "a pathological combination of ineffectualness and destructiveness"); Fiss, *supra* note 2, at 793–94 (contrasting *Goldberg*'s "commit[ment] to procedural fairness" with *Mathews*' "purely instrumental" approach that undermined important societal values); White, *supra* note 2, at 2–3 & n.3 (recounting the scholarly debate regarding the different visions of procedural justice as found in *Goldberg* and *Mathews*); Zietlow, *supra* note 2, at 12 (describing *Mathews* as part of a series of "significant limitation[s]" placed on the idea of due process articulated in *Goldberg*).

[51] *See, e.g.*, Zietlow, *supra* note 2, at 12 (comparing the strides of *Goldberg* to the retreat of *Mathews* away from a communitarian view of due process).

[52] *Compare* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 162 (2002) ("[T]he United States regularly maintains, and the courts frequently agree, that federal immigration laws should be subject to little or no judicial review . . . ."), *with id.* at 5, 7 (explaining that the Supreme Court has generally endorsed the idea that the government's "external powers [were] largely isolated from judicial review" and that the government enjoys "relatively unlimited federal authority over foreign affairs"). The Plenary Power doctrine is discussed in the context of immigration, *infra* Part III. A, and national security, *infra* Part III.B.

[53] *See* Johnson v. Eisentrager, 339 U.S. 763, 765–66, 781 (1950) (holding that foreign nationals held and tried overseas had no right to seek a writ of habeas corpus).

[54] United States *ex rel* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

Mathews' core balancing test to cases of removal[55] and, two decades after that, to the question of habeas access for Guantánamo detainees and the judicial review of their status hearings.[56] Across all of these cases, the importation of *Mathews* required a level of judicial involvement that generally produced more—not less—process for foreign nationals challenging executive action. Moreover, *Mathews* appeared to take for granted the threshold *Goldberg* inquiry of whether constitutional due process applied in the first place. The Supreme Court held—sometimes explicitly, though usually implicitly—that the Constitution applied (at least to some degree) in cases challenging the government's effort to deport, detain, or try non-citizens.[57] By invoking *Mathews*, the Court sidestepped the threshold analysis of territoriality, sovereignty, and citizenship that had defined prior cases and instead outlined a broad range of factors, including the non-citizen's stake in the process and a particularized inquiry into his or her circumstances. Through this balancing inquiry, courts began to sweep in a number of enhanced liberty protections that seemed impossible under the plenary power doctrine. In short, *Mathews* unleashed the possibility of a more serious rights doctrine for foreign nationals than the Court had previously recognized.

While immigration and national security scholars have noted how courts have placed procedural devices in the service of constitutional protections that the plenary power doctrine seems to prohibit, less attention has been paid to *Mathews* and its unique effects on immigration and national security law. In the immigration context, Stephen Legomsky has discussed how procedural due process doctrine has at times been "fundamentally inconsistent with the actual results of the Supreme Court's plenary power decisions."[58] Although the due process doctrine has not been applied consistently across all cases,[59] it nonetheless reveals the judiciary's "uneas[iness] over the concept of plenary Congressional power."[60] Hiroshi Motomura also has explored how courts use procedural law as a replacement for constitutional protections that the plenary power doctrine otherwise prohibits.[61] In the realm of immigration law, constitutional values have exerted a special kind of gravitational force,[62] revealing "phantom norms" that link mainstream constitutional law with

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[55] *See infra* Part III.C (discussing Landon v. Plasencia, 459 U.S. 21 (1982)).

[56] *See infra* Part III.D (discussing Hamdi v. Rumsfeld, 542 U.S. 507 (2004) and *Boumediene v. Bush*, 553 U.S. 723 (2008)).

[57] *See infra* Parts III.C, III.D.

[58] *See* Legomsky, *supra* note 5, at 298.

[59] *Id.*

[60] *Id.* at 296.

[61] Motomura, *The Curious Evolution of Immigration Law*, *supra* note 7, at 1656.

[62] Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 5, at 564 (internal quotation marks omitted).

statutory and regulatory interpretations of immigration law.[63] In that sense, procedural rulings have been a surrogate for substantive rulings that the classical doctrines would not allow.[64]

In the national security context, Richard Fallon has noted how courts after 9/11 ruled on procedural fairness questions, an arena in which they naturally feel they have greater competence and expertise compared to substantive rulings.[65] As he observes, "on a deeply divided Court, some of the Justices appear to have believed that the domain within which they can most confidently displace executive with judicial judgment is that of procedural fairness."[66] Other scholars have discussed the post-9/11 judicial landscape as one defined by procedural interpretations in which "[i]ncremental and marginal change through judicial review [was] best-suited to protect the constitutional order."[67]

Yet there remain a number of connections between immigration and national security—including the *Mathews*ization of both fields—that warrant exploring them in tandem. The Supreme Court has routinely noted the national security underpinnings of its immigration-law doctrines,[68] often citing the Court's "general reluctance to interfere with the conduct of foreign relations."[69] Moreover, both fields frequently operate through

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[63] *Id*. at 567–75.

[64] Motomura, *The Curious Evolution of Immigration Law*, *supra* note 7, at 1628.

[65] Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 392 (2010). Fallon argues that "the Court's War on Terror habeas decisions manifest a far greater willingness to rule for petitioners on grounds of procedure than of substance. . . ." *Id.* at 395. *See generally* Martinez, *supra* note 23. I have also argued that the post-9/11 decisions put procedural devices to "surprisingly 'muscular' uses" and that post-9/11 decisions "illustrate a rare but critical assertion of procedural law where the political branches fail to legislate or properly implement substantive law." *See* Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 663 (2009).

[66] Fallon, *supra* note 65, at 395.

[67] Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433, 447 (2011).

[68] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 705–06 (1893) (quoting Chae Chan Ping v. United States, 130 U.S. 581, 604, 606 (1889)) (internal quotation marks omitted) (noting that the United States is invested with powers which can be "invoked for the maintenance of its absolute independence and security throughout its entire territory," and that "preserv[ing] its independence, and giv[ing] security against foreign aggression and encroachment, is the highest duty of every nation"); Cleveland, *supra* note 52, at 157–58 ("The foreign affairs and national security implications of immigration were a primary justification for the Court's abdication of ordinary constitutional analysis in this area. The Court repeatedly portrayed Congress's control over admission and expulsion of aliens as so exclusive as to completely prohibit review by the courts."); Legomsky, *supra* note 5, at 281 (noting that substantive immigration policy questions often implicate values such as the balance between national security and civil rights).

[69] Legomsky, *supra* note 5, at 261. Legomsky also criticizes how "[t]he Court's blanket technique of mechanically labeling immigration decisions as so ensconced in foreign policy that constitutional review is improper has precluded consideration of whether foreign affairs were actually affected" and favors an approach that would "reserve the judicial deference for the special case in which the court concludes, after a realistic appraisal, that applying the normal standards of review would interfere with the conduct of foreign policy." *Id.* at 262–63.

exceptional court processes—immigration courts or military tribunals—that create peculiar conditions for judicial review of the particular decisions, especially in the wake of repeated congressional efforts to constrain federal court jurisdiction in these areas.[70] Finally, both fields test institutional allocations of authority in the context of individual due process claims, with *Mathews* producing surprisingly rights-affirming outcomes in a number of cases.[71]

Before turning to *Mathews* and its effects on immigration and national security, a few caveats are in order. First, while *Mathews* has led to a more serious engagement with the rights of foreign nationals in a number of contexts, its effects should not be overstated. To be clear, the Supreme Court has not articulated bright-line constitutional protections for foreign nationals in its recent decisions and on some occasions has supported policies and procedures that sharply limit a foreign national's procedural and substantive rights.[72] Thus, numerous immigration and national security policies remain formally and functionally unreviewable,[73] and, notwithstanding *Mathews*' important innovations, courts continue to apply—or at least pay lip service to—many of its ordinary deference doctrines. *Mathews* should therefore be understood as merely one step, albeit a critical one, in a longer progression of the vindication of the rights of foreign nationals.

Mathews' role in the collapse of categorical distinctions between citizens and non-citizens has also produced a diminishment of protections

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[70] *See infra* Parts IV.A–B (noting that in the context of national security, due process analyses have been a qualitative institutional check and that, in the immigration context, due process has been used as a check against congressional overreach and to limit the authority of immigration judges and the Board of Immigration Appeals); *see also* Robert M. Chesney, *Panel Report: Beyond Article III Courts: Military Tribunals, Status Review Tribunals, and Immigration Courts*, 5 CARDOZO PUB. L., POL'Y, & ETHICS J. 27, 27 (2006) (discussing the tension between national security and procedural fairness in the context of military tribunals, status review tribunals, and immigration courts).

[71] *See infra* Part IV.C (discussing how individuated analyses in immigration have promoted foreign nationals' rights).

[72] *See* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489–92 (1999) (citing Wayte v. United States, 470 U.S. 598, 607–08 (1985)) (upholding broad executive branch enforcement discretion despite claims that prosecutorial discretion was used in a discriminatory manner); Mathews v. Diaz, 426 U.S. 67, 69, 78, 87 (1976) (upholding restrictive federal residency classifications that denied certain non-citizens supplemental medical insurance benefits based on a "legitimate distinction" between citizens and non-citizens); Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 364 (2014) (citing Demore v. Kim, 538 U.S. 510, 517, 530–531 (2003); Zadvydas v. Davis, 533 U.S. 678, 701 (2001)) ("In the 2001 decision *Zadvydas v. Davis*, the Court avoided a due process problem by construing the statute governing detention of individuals with final orders of removal to permit detention only so long as removal was reasonably foreseeable, presumptively for no longer than six months. Two years later, in . . . *Demore v. Kim*, the Court found no due process violation where a lawful permanent resident in removal proceedings . . . was mandatorily detained for six months without a bond hearing.").

[73] *See, e.g.*, KEVIN R. JOHNSON & BERNARD TRUJILLO, IMMIGRATION LAW AND THE U.S.-MEXICO BORDER 97 (2011) (noting the non-reviewability of consular officer decisions).

in at least some cases. For example, when the Court applied *Mathews* to the case of U.S. citizens suspected of ties to terrorism in *Hamdi v. Rumsfeld*,[74] it rejected the more rights-affirming, bright-line test requiring that Hamdi receive ordinary criminal procedure protections.[75] Commentators have thus criticized the *Hamdi* plurality for ushering in a reduction of procedural protections, at least where U.S. citizens are concerned. As Philip Hamburger has argued, *Hamdi* exemplifies how "the Supreme Court's expansive vision of access to rights has costs not only for safety but also for civil liberty."[76] By "assum[ing] that a wide array of prisoners of war might have rights to judicial process . . . [t]he very breadth of access to the right thus seemed to require that its definition be diminished."[77] The convergence of national security doctrines for citizens and non-citizens thus poses a threat to civil liberties if the *Mathews* balancing test winds up supplanting formal rights regimes.[78] Still, the Court's expansion of the *Mathews* framework to immigration and national security has produced important checks against political branch overreach. Across both fields, the Court has applied individuated and multi-pronged frameworks (including but not limited to *Mathews*) as a mechanism for dialogue with the political branches—not so much to overrule them, but rather to mark the boundaries in which all three branches can operate most effectively.

III. THE *MATHEWS*IZATION OF IMMIGRATION AND NATIONAL SECURITY

For some time, judicial review of core immigration and national security decisions occurred within a formal, group-based account of the relationship between foreign nationals and the federal government. Court rulings emphasized categorical questions of territoriality, citizenship, and sovereignty to resolve whether non-citizens could claim the law's

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[74] 542 U.S. 507 (2004).

[75] *See id.* at 528–29, 535 (2004) (applying the test for balancing the competing interests of the government and a citizen's due process rights articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and finding it "inappropriate in the enemy-combatant setting" to provide Hamdi with "the full protections that accompany challenges to detentions in other settings"); *cf. id.* at 541 (Souter, J., concurring in part, dissenting in part, and concurring in judgment) (agreeing that due process protections must be afforded to Hamdi to challenge his detention and designation as an enemy combatant but disagreeing that Hamdi's detention was authorized under a congressional joint resolution to use force against those responsible for the 9/11 terrorist attacks).

[76] Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1831 (2009).

[77] *Id.*

[78] Andrew Kent has noted other ways in which national security doctrines applicable to citizens and non-citizens have converged. *See* Andrew Kent, *The Past and Future of Individual Rights Protection in National Security: Disappearing Legal Black Holes and Converging Domains*, 115 COLUM. L. REV. (forthcoming) (on file with author) (observing that, in the wake of 9/11, the U.S. government has applied to citizens rules regarding the blocking and seizing of property that it previously applied to non-citizens).

protection. Under this traditional analysis, the Court's self-imposed plenary power doctrine generally displaced meaningful judicial review with broad political branch power over immigration and national security.[79] While the Constitution afforded some protection to foreign nationals who had entered the United States,[80] the plenary power doctrine left the contours of those protections limited and uncertain.[81]

A. *Categorical Approaches in Immigration*

1. *Early Cases*

The plenary power doctrine is frequently attributed to *Chae Chan Ping*

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[79] In some decisions, the Court invoked logic and language reminiscent of the political question doctrine. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring) ("Though . . . this country has traditionally welcomed aliens to come to its shores, it has done so exclusively as a matter of political outlook . . . . This policy has been a political policy, belonging to the political branch of the Government wholly outside the concern and the competence of the Judiciary."); Fong Yue Ting v. United States, 149 U.S. 698, 712 (1893) ("[I]t behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the constitution to the other departments of the government."). However, whereas the political question doctrine categorizes some conflicts as non-justiciable because of Article III limitations, the plenary power doctrine has left at least some room for judicial review. The analogy is thus incomplete without clearer boundaries for plenary powers.

The Court has also pointed to a tradition of judicial deference to the political branches on matters with sensitive foreign policy implications to justify immigration plenary powers. *See, e.g.*, *Harisiades*, 342 U.S. at 596–97 (Frankfurter, J., concurring) ("[T]he determination of a selective and exclusionary immigration policy was . . . solely for the responsibility of the Congress and wholly outside the power of this Court to control."). That approach is consonant with a conception of plenary power that grants the political branches very broad discretion, but ultimately does allow for some constitutional limitations and judicial review. Finally, in its most expansive conception of plenary powers, the Court has described the political branches' power over immigration as extra-constitutional and inherent in sovereignty. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so . . . is inherent in the executive power to control the foreign affairs of the nation."); *see also* Chae Chan Ping v. United States, 130 U.S. 581, 603–04 (1889) ("Jurisdiction over its own territory to that extent is an incident of every independent nation. . . . If it could not exclude aliens it would be to that extent subject to the control of another power."). This account admits no power for judicial review at all.

[80] *See, e.g.*, Yamataya v. Fisher, 189 U.S. 86, 101 (1903) ("[A]n 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 [cannot] be taken into custody and deported without [receiving] all opportunity to be heard upon the questions involving his right to be and remain in the United States.").

[81] *See, e.g.*, Legomsky, *supra* note 5, at 257 ("In the typical case, the governmental organ whose power over immigration is held to be plenary is Congress. Occasionally, however, the doctrine has effectively been extended to cover action of the Immigration and Naturalization Service (INS) as well." (citation omitted)); *see also* Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 5, at 547 ("[I]n general the [plenary power] doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions."); *cf.* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 462 (2009) (arguing that a number of examples throughout history of back-end immigration screening by the President "provide[] provocative evidence that the possibility of inherent executive authority over migration has existed in practice and is not limited to a few old Supreme Court opinions").

v. United States,[82] in which the Court announced an inherent sovereign power to regulate immigration and upheld the power of Congress to exclude foreign nationals.[83] The case concerned the exclusion of a Chinese immigrant returning to the United States after a trip abroad.[84] The petitioner had been a lawful U.S. resident for over a decade and, upon leaving the country, obtained a certificate for reentry pursuant to then-valid law.[85] Before he returned, however, Congress declared all such certificates void and barred all Chinese migrants from entry.[86] The petitioner challenged that law, but the Court ultimately upheld it.[87] The case was set against the backdrop of decades of growing anti-Chinese sentiment throughout the United States,[88] and the decision was typical of the times.[89] In upholding the law, the unanimous Court cited the government's sovereign power to exclude foreigners.[90] The Court found the government's "power of exclusion of foreigners . . . as a part of those sovereign powers delegated by the constitution [to be exercised] at any time when, in the judgment of the government, the interests of the country require it."[91] Those powers "cannot be granted away or restrained on behalf of any one."[92]

If *Chae Chan Ping* was limited to exclusion, *Fong Yue Ting v. United States*[93] was its companion case for deportation, affirming that the structural relationships among the branches limited the rights of foreign nationals to challenge their expulsion.[94] The law at issue in *Fong Yue Ting* required resident aliens to acquire a certificate of residence to remain in the United States.[95] To obtain that certificate, the non-citizen needed to produce at least one white witness to attest to the foreign national's good

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[82] 130 U.S. 581 (1889).

[83] *Id.* at 603, 609. However, as immigration scholars have pointed out, the foundations of the plenary power doctrine trace back to earlier cases in which the Court invalidated state immigration legislation, and may have evolved partly out of a misplaced reliance on those precedents. *See* LEGOMSKY, *supra* note 6, at 180–82.

[84] *Chae Chan Ping*, 130 U.S. at 581–82.

[85] *Id.* at 582.

[86] *Id.*

[87] *Id.* at 581, 599.

[88] *See* Cleveland, *supra* note 52, at 112–30 (describing, inter alia, the history of anti-Chinese legislation and public sentiment in the United States from the mid-nineteenth century to *Chae Chan Ping*).

[89] *See, e.g.*, *Chae Chan Ping*, 130 U.S. at 595 (describing how even after the treaty of 1868 was enacted to give Chinese immigrants the same rights as U.S. citizens, Asian immigration was still viewed as an "invasion" and "menace" to the entire country).

[90] *Id.* at 609, 611 (upholding the law with no dissenting opinions).

[91] *Id.*

[92] *Id.*

[93] 149 U.S. 698 (1893).

[94] *Id.* at 698.

[95] *Id.* at 726. For a discussion of the passage and details of the Geary Act, see Cleveland, *supra* note 52, at 137–38.

character and past residence.[96] Two of the three plaintiffs did not attempt to register or acquire a certificate; the third had attempted to register using a Chinese witness.[97] All three were ordered deported, and the suit was their challenge to not only those orders, but also to the law authorizing those orders—a piece of the larger movement by the Chinese community against the increasingly onerous laws targeting them.[98] The Court upheld the law, quoting extensively from *Chae Chan Ping* for the proposition that the exclusion of foreigners is a power "incident of every independent nation."[99] The Court concluded that the sovereign's power to deport is no different.[100]

To the extent that the decisions at the turn of the twentieth century recognized any limitations on the plenary powers, they were limited to procedural rights. In *Yamataya v. Fisher*,[101] the Court prevented the government from deporting a foreign national allegedly in the United States illegally.[102] The Court specifically recognized judicial review of executive action for arbitrariness, and required that the foreign national receive an adequate opportunity to contest her status.[103] Yet despite this very minor glimmer of individual-rights protection, the precise formulation of that due process framework was generally hard to identify. Of course, owing to the categorical conception of territoriality, any decisions recognizing the due process rights of foreign nationals would have been limited to cases in which the individual was already on U.S. soil. In cases involving exclusion (where a foreign national was seeking entry), plaintiffs—even those with long periods of residency in the United States who took brief trips abroad—received only the procedures the executive provided, and that often meant no process at all.

2. *Modern Cases*

Decades after its early plenary power cases, the Supreme Court continued to take a group-based, categorical approach to immigration. The Court produced a host of opinions that, despite expressing a growing sympathy surrounding the "drastic measure"[104] of deportation and its effect

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[96] *Fong Yue Ting*, 149 U.S. at 726; *see also* Cleveland, *supra* note 52, at 137.

[97] *Fong Yue Ting*, 149 U.S. at 702–04; Cleveland, *supra* note 52, at 138.

[98] Cleveland, *supra* note 52, at 138.

[99] *Fong Yue Ting*, 149 U.S. at 705 (quoting Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889)).

[100] *Id.* at 707 ("The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.").

[101] 189 U.S. 86 (1903).

[102] *Id*. at 86.

[103] *Id.* at 101.

[104] Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

on non-citizens, only confirmed the harshness of the early rule.[105] Those cases—*U.S. ex rel. Knauff v. Shaughnessy*,[106] *Shaughnessy v. United States ex rel. Mezei*,[107] and *Harisiades v. Shaughnessy*[108]—confirmed the basic, group-based structure of immigration law: prior to entry, foreigners had essentially no rights, but once inside the territorial United States, they had limited procedural rights (but, owing to the plenary power doctrine, no substantive rights).[109] In *Knauff*, the Court invoked the plenary power doctrine to allow the exclusion, on undisclosed grounds, of an alien who was married to a U.S. citizen.[110] The Court's now-famous formulation held that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[111]

Mezei authorized the indefinite detention at Ellis Island of a lawful permanent resident who was denied reentry to the U.S. after an extended trip abroad.[112] There, the Court led its analysis with citations to *Che Chan Ping* and *Fong Yue Ting*.[113] The Court reasoned that the respondent's time abroad had extinguished any rights to due process that he might have carried with him.[114] The Court further reasoned that, as he had not been

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[105] *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 216 (1953) ("Whatever our individual estimate of . . . [Congress's exclusion] policy and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."); Harisiades v. Shaughnessy, 342 U.S. 580, 587–88 (1952) ("That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it."); *see also id.* at 590 ("We, in our private opinions, need not concur in Congress' policies to hold its enactments constitutional. Judicially we must tolerate what personally we may regard as a legislative mistake.").

Even as more modern courts expressed growing sympathy surrounding the "drastic measure" of deportation and its effect on non-citizens, stare decisis proved to be a bulwark to judicial review—at least where substantive claims were at issue. *See, e.g.*, Galvan v. Press, 347 U.S. 522, 531 (1954) ("[T]he slate is not clean. . . . But that the formulation of these [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.").

[106] 338 U.S. 537 (1950).

[107] 345 U.S. 206 (1953).

[108] 342 U.S. 580 (1952).

[109] *See* Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 5, at 560 ("Taken together, *Knauff*, *Mezei*, and *Harisiades* confirmed the modern importance of the two basic lines of inquiry in the early plenary power decisions: the alien's location and the type of constitutional challenge. . . . [A]liens 'outside' the United States would continue to find it very difficult to raise any constitutional challenge to immigration decisions. Those 'inside' the United States could have some success with procedural claims but would be likely to have none with substantive claims.").

[110] *Knauff*, 338 U.S. at 539–40, 546–47.

[111] *Id.* at 544.

[112] *Mezei*, 345 U.S. at 215–16.

[113] *Id.* at 210 (citing Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893)).

[114] *See id.* at 214 (noting that respondent's departure from the U.S. and subsequent nineteenth month stay "behind the Iron Curtain," without apparent authorization or reentry papers, amounted to a

allowed reentry at Ellis Island, he should still be treated formally as if outside the United States.[115] Moreover, because no other country would allow him entry, the U.S. government could detain him indefinitely in order to effectuate physical exclusion.[116]

Finally, *Harisiades* demonstrated the limitations on judicial review for lawful permanent residents in the United States.[117] The *Harisiades* Court upheld the deportation of three foreign nationals because of their prior membership in the Communist Party—even though each had subsequently disavowed his membership.[118] The Court cited *Fong Yue Ting* for the proposition that the government retains the power to revoke an immigrant's status at will,[119] a power that inheres in sovereignty.[120]

While the outcomes of these cases seem unusually harsh, they flowed logically from the basic structure of plenary power. Provided that judicial review relied on categorical distinctions of sovereignty and territoriality, buttressed by a binary, group-based conception of one's status as either a citizen or non-citizen, due process protections appeared to be a matter of legislative (and at times, executive[121]) decision-making and not a matter for judicial protection.

B. *Categorical Approaches in National Security*

The same categorical approach underlying the plenary power doctrine in immigration also defined more than a century of national security doctrine.[122] Courts tended to apply categorical distinctions based on status

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"protracted absence" and was thus a "clear break in an alien's continuous residence [in the U.S.]" (citations omitted)).

[115] *See id.* at 213 ("Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding. . . . [H]arborage at Ellis Island is not an entry into the United States. . . . He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws." (citations omitted)).

[116] *See id.* at 215–16 (rejecting the premise that "respondent's continued exclusion deprives him of any statutory or constitutional right").

[117] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 591, 596 (1952) (expressing that the "world-wide amelioration of the lot of aliens . . . should not be initiated by judicial decision" but rather is a field in which "[r]eform . . . must be entrusted to the branches of the Government in control of our international relations and treaty-making powers").

[118] *Id.* at 581–83, 596.

[119] *Id.* at 586–88 ("Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose." (citing Fong Yue Ting v. United States, 149 U.S. 698, 707, 711–14, 730 (1893))).

[120] *Id.* at 587–88.

[121] *See supra* note 81 and accompanying text.

[122] *See, e.g.*, JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 13 (2005) ("Congress has allowed the executive branch to assume the leadership and initiative in war, and has chosen for itself the role of approving military actions after the fact by declarations of support and by appropriations. At the same time, the courts have invoked the political question doctrine to avoid interfering in war powers questions."); Curtis A. Bradley, Chevron

or location to disclaim a role that might otherwise interfere with the government's policies during times of war. The traditional protection framework in the national security context was predicated upon "distinctions between domestic and foreign, enemy and friend, peace and war, citizen and noncitizen . . . ."[123] As Andrew Kent has noted:

> At common law and during the American Founding period, a very strict rule was applied barring all alien enemies—wherever domiciled, and no matter whether civilians or enemy fighters—from access to the courts during wartime. In the first decades of the nineteenth century, the rule softened so that civilian enemy aliens who were peacefully present in the United States could access the courts. The categorical bar remained, however, for nonresident alien enemies and enemy fighters, no matter where located.[124]

The categorical, group-based approach is epitomized by *Johnson v. Eisentrager*,[125] in which the Court rejected habeas corpus rights for foreign nationals captured, tried, and detained on foreign soil.[126] The petitioners in *Eisentrager* were German citizens who were tried and convicted in overseas military commissions for continuing to wage war against the United States after the close of World War II.[127] The Court rested its holding on a number of categorical distinctions along the axes of citizenship, location, and status.[128] Justice Jackson's majority opinion noted the presence of "inherent distinctions recognized throughout the civilized world between citizens and aliens . . . between aliens of friendly and of enemy allegiance . . . [and] between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments."[129] Taking "the alien's presence within its territorial jurisdiction" as a necessary condition for the alien to be subject to judicial power,[130] Jackson concluded that the Court was powerless to resolve the claims of "nonresident enemy alien[s]" who lacked even a "qualified access to our courts."[131]

Eisentrager came to stand for the idea that foreign nationals held

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Deference and Foreign Affairs, 86 VA. L. REV. 649, 673 (2000) (arguing that foreign affairs law is characterized "by exceedingly broad executive branch power and sweeping deference by the courts").

[123] Kent, *supra* note 78, at 17.

[124] *Id.*

[125] 339 U.S. 763 (1950).

[126] *Id.* at 765–67, 781, 791.

[127] *Id.* at 765–67.

[128] *Id.* at 769–71.

[129] *Id.* at 769.

[130] *Id.* at 771 (noting that a foreign national's presence inside the U.S. "gave the Judiciary power to act").

[131] *Id.* at 776.

beyond U.S. shores have no access to habeas corpus to challenge their confinement or the process by which they are convicted in an overseas tribunal. The Supreme Court reiterated that rule in *United States v. Verdugo-Urquidez*[132] when it rejected a Fourth Amendment challenge by a Mexican national who was charged in a U.S. court on the basis of evidence procured through an apartment search in Mexico by U.S. officials that violated the Fourth Amendment.[133] *Verdugo-Urquidez* interpreted *Eisentrager* expansively, further establishing that foreign nationals without any "significant voluntary connection with the United States" lacked presumptive access to protection afforded by the Constitution.[134] The *Eisentrager* and *Verdugo-Urquidez* line of cases thus provided the executive with an effective argument which it had "held in its back pocket for many years" against judicial review of national security policy.[135]

These categorical rejections of due process for non-citizens required near-total deference by the judiciary in matters of foreign affairs—a "foreign affairs exceptionalism"[136] that had been epitomized by Justice Sutherland's majority opinion in *United States v. Curtiss-Wright*,[137] which celebrated the president's "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations."[138] *Ex Parte Quirin*,[139] decided six years after *Curtiss-Wright*, also reflected national security exceptionalism by rejecting habeas petitions by eight German saboteurs (including two U.S. citizens) who had been tried and convicted by a military commission for violations of the laws of war.[140] The *Quirin* Court rejected the Fifth and Sixth Amendment challenges to the government's authority to try the petitioners with war crimes by military commissions.[141]

Dames & Moore v. Regan,[142] decided thirty years after *Eisentrager*, also justified broad executive powers in light of Congress's inability to "anticipate and legislate with regard to every possible action the President

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[132] 494 U.S. 259 (1990).

[133] *Id.* at 274–75.

[134] *See id.* at 267, 271 ("There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters.").

[135] Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2004 CATO SUP. CT. REV. 49, 54–55.

[136] Curtis Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096 (1999); *see also* Louis Henkin, *The Constitution for Its Third Century: Foreign Affairs*, 83 AM. J. INT'L L. 713, 716 (1989) (noting that matters touching on foreign affairs are "special" under U.S. law).

[137] 299 U.S. 304 (1936).

[138] *Id.* at 320.

[139] 317 U.S. 1 (1942).

[140] *Id.* at 48.

[141] *Id.* at 45. The Court also held that United States citizenship did not insulate the two citizen-enemy combatants from the consequences of committing war crimes. *Id.* at 37.

[142] 453 U.S. 654 (1981).

may find it necessary to take or every possible situation in which he might act."[143] Although the Court disclaimed some of the more expansive rhetoric associated with *Curtiss-Wright*,[144] scholars generally see *Dames & Moore* as supporting the basic principle of national security exceptionalism that "the President [is] the primary governmental authority over matters of foreign policy."[145]

C. *Individuated Approaches in Immigration*

After nearly a century of categorical frameworks predicated on sovereignty, citizenship, and territory, the Court slowly began to usher in an individuated framework in immigration and national security. While that shift occurred mainly in the wake of the due process revolution of the 1970s, the seeds of change began to emerge prior to that period. In a string of exclusion cases decided in the 1950s and 1960s, the Supreme Court issued unexpected interpretations of *Eisentrager*, eventually supporting a direct constitutional link between domestic due process protections and the immigration context more generally. Interestingly, the Court would later apply those same immigration law precedents to national security—constitutionalizing court access for post-9/11 foreign-national detainees at Guantánamo Bay.[146] While these developing due process norms led to both victories and defeats for foreign nationals, courts would no longer simply ignore their due process rights as the prior categorical approach had often required. The more often that courts applied the new due process protections to immigration and national security, the more the old approaches diminished in importance.

The first such case, *Kwong Hai Chew v. Colding*,[147] involved a lawful permanent resident of Chinese descent who signed on as chief steward of an American merchant ship scheduled to travel to several foreign ports before docking back in New York.[148] Chew was technically excludable when he returned from his voyage abroad, meaning he was not entitled to

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[143] *Id.* at 678.

[144] *See id.* at 688 ("Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities.").

[145] MARTIN S. SHEFFER, THE JUDICIAL DEVELOPMENT OF PRESIDENTIAL WAR POWERS 136 (1999); *see also* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 947 (1993) ("Justice Rehnquist's opinion makes more sense under *Curtiss-Wright* than it does under the Steel Seizure opinion."); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1310–11 (1988) (arguing that *Dames & Moore* approximates *Curtiss-Wright* by giving the President an expanded national security power during times of emergency).

[146] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 798 (2008) (holding that foreign nationals detained at Guantánamo Bay can access the Constitution's Suspension Clause).

[147] 344 U.S. 590 (1953).

[148] *Id.* at 592–94.

due process benefits upon reentry, but the Court distinguished Chew's *constitutional* status (as a lawful permanent resident) from his *immigration* status and found that, regardless of whether Chew should be treated as an entrant alien for immigration purposes, Chew's sea voyage did not terminate his constitutional status as a lawful permanent resident entitled to Fifth Amendment due process protections.[149] The Court then "assimilate[d]" Chew's "status to that of an alien continuously residing and physically present in the United States,"[150] granting him the same rights he would have enjoyed "had he not undertaken his voyage to foreign ports but had remained continuously within the territorial boundaries of the United States."[151] Based on that reasoning, the Court accorded Chew the full due process protections of the Fifth Amendment.[152]

To support its conclusion, the Court invoked dicta from *Eisentrager* that gave the case a highly individualistic gloss.[153] While *Eisentrager* generally appeared to stand for the proposition that foreign nationals located outside the United States could not invoke constitutional protections,[154] Justice Jackson also wrote that "[t]he 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."[155] By relying on that dicta and applying it to the individual circumstances of the case at hand, *Chew* recast *Eisentrager* in a way that would eventually pry open due process protections in additional immigration and—later—national security cases. After *Chew*, the Court began to focus more intently on the individual equities and circumstances of particular cases. In one ruling after another, the Court sidestepped the implications of the plenary power doctrine and required due process hearings that existing laws did not provide.

In *Rosenberg v. Fleuti*,[156] the Court again evaded a provision requiring

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[149] *Id.* at 600 (noting that the Court "do[es] not regard the constitutional status which petitioner indisputably enjoyed prior to his voyage as terminated by that voyage" and that "[f]rom a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien").

[150] *Id.* at 596.

[151] *Id*.

[152] *Id.* at 601.

[153] *Id*. at 596–97 n.5 (quoting Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950)).

[154] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (citing *Eisentrager* for the proposition that "aliens . . . outside the sovereign territory of the United States" are not entitled to constitutional protections); *id.* at 274–75 (1990) (noting that the respondent had "no voluntary attachment to the United States" and thus "the Fourth Amendment ha[d] no application").

[155] *Chew*, 344 U.S. at 596 n.5 (quoting *Eisentrager*, 339 U.S. at 770 (1950)); *see also* Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 5, at 570–75 ("The Court favored a constitutional norm of procedural due process for returning permanent residents like Chew, even if the statute and regulations, by applying the reentry doctrine to a temporary departure, treated them no better than first-time entrants." (citation omitted)).

[156] 374 U.S. 449 (1963).

the exclusion of a lawful permanent resident who, despite four years of continuous presence in the United States, was technically barred from reentering after spending just a few hours across the Mexican border.[157] Under then-extant provisions of immigration law,[158] Fleuti could not reenter because he was deemed "afflicted with psychopathic personality," a circumlocution for homosexuality.[159] The Court sidestepped that outcome by extrapolating from Fleuti's circumstances a set of considerations, including "the length of time the alien is absent . . . the purpose of the visit . . . [and] whether the alien has to procure any travel documents in order to make his trip."[160] The Court refused to place a limit on the number of relevant considerations, and it refused to make any single factor decisive to the outcome. Based on those criteria, the Court deemed Fleuti's "innocent, casual, and brief excursion . . . outside this country's borders" as not "disruptive of his resident alien status."[161] Accordingly, the Court did not subject Fleuti "to the consequences of an 'entry' into the country on his return"[162]—namely, a denial of entry based on homosexuality. Using constitutional-sounding language (but not constitutional doctrine), the Court held that:

> when an alien like Fleuti who has entered the country lawfully and has acquired a residence here steps across a border and, in effect, steps right back, subjecting him to exclusion for a condition for which he could not have been deported had he remained in the country . . . [he] would seldom be aware that he was possibly walking into a trap, for the insignificance of a brief trip to Mexico or Canada bears little rational relation to the punitive consequence of subsequent excludability.[163]

Fleuti described *Chew* as a case holding "that the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him."[164] As it had done in *Chew*, *Fleuti* framed that inquiry in regulatory, not constitutional, language by assimilating the foreign national's status to that of a continually present immigrant[165] for departures that were "innocent, casual, and brief."[166] Still,

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[157] *Id*. at 450.

[158] 8 U.S.C. § 1182(a)(4) (1952); *Rosenberg*, 374 U.S. at 450–51 (stating that a "new charge was lodged against respondent" on the basis that he was an alien "afflicted with psychopathic personality").

[159] *Fleuti*, 374 U.S. at 451.

[160] *Id.* at 462.

[161] *Id.*

[162] *Id.*

[163] *Id.* at 460–61.

[164] *Id.* at 460.

[165] Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953).

[166] *Rosenberg*, 374 U.S. at 461.

the Court's individualistic inquiries in *Chew* and *Fleuti*, which centered on a foreign national's broader ties to the United States and his or her stake in the overall process, was reflective of an emerging constitutional doctrine protecting individual rights. *Chew* and *Fleuti* thus placed immigration doctrine on a collision course with the categorical rules underlying earlier decisions. Although *Chew* and *Fleuti* sidestepped direct constitutional language, the Court appeared to undermine cases such as *Knauff* and *Mezei* that relied on categorical, plenary-power-style reasoning. Eventually, twenty years after *Fleuti*, the Supreme Court made those constitutional implications explicit by applying *Mathews* directly to the context of immigration exclusion. In *Landon v. Plasencia*,[167] the Court held that the *Mathews* due process framework would apply to cases of excludable foreign nationals, undermining, and likely invalidating, the categorical approach that the plenary power doctrine seemed to require.[168]

Plasencia was a lawful permanent resident who, similar to Chew and Fleuti, was formally treated as if she were entering the country for the first time after a brief departure from the United States. Justice O'Connor's majority opinion noted candidly that the Court's recent immigrant-friendly decisions, while resting on "regulatory interpretation," were in fact grounded in "constitutional law"[169] and thus applied *Mathews* directly to the exclusion context. In applying that framework, Justice O'Connor placed great weight on the private interests involved. Plasencia risked "los[ing] the right 'to stay and live and work in this land of freedom'"[170] as well as "the right to rejoin her immediate family, a right that ranks high among the interests of the individual,"[171] and those interests counted greatly in the overall calculus. The foreign national's interest was "a weighty one,"[172] and given "the gravity of Plasencia's interest,"[173] the Court remanded the case to the lower courts to determine whether Plasencia had received adequate process.[174]

In addition to re-reading prior cases "of regulatory interpretation" as decisions "of constitutional law,"[175] the *Plasencia* Court re-interpreted language from *Eisentrager*, *Chew*, and *Fleuti* as requiring a more

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[167] 459 U.S. 21 (1982).

[168] The Court took pains to point out that its ruling did not undermine *Mezei*, and that if the "permanent resident alien's absence is extended" the foreign national "may lose his entitlement to assimilation of his status." *Id.* at 33 (alterations and citations omitted). Because "Plasencia was absent from the country only a few days," the Court did not reach the question of whether due process would apply in cases, such as *Mezei*, in which the foreign national was absent for a longer period. *Id*. at 34.

[169] *Id.* at 33.

[170] *Id.* at 34.

[171] *Id.*

[172] *Id.*

[173] *Id.* at 37.

[174] *Id.*

[175] *Id.* at 33.

straightforward application of constitutional norms to the removal context.[176] Despite Justice O'Connor's disclaimer in *Plasencia* that the Court would not opine specifically on "the *contours* of the process" that was due to Plasencia[177]—ostensibly leaving to lower courts the responsibility for determining the end result of "whether the process accorded Plasencia was insufficient"[178]—the Court's transplantation of *Mathews* began to reshape its approach to immigration law. Roughly twenty years later, the Court would apply, and expand, due process protections to national security in a nearly identical fashion.

D. *Individuated Approaches in National Security*

Prior to the terrorist attacks of 9/11, the relevant national security doctrines lacked any due process content. The analysis remained categorical—turning on the status of the foreign national (enemy or friendly), the location of capture or trial, and whether the United States was at war or at peace. Cases such as *Quirin* and *Eisentrager* limited or ruled out the possibility that enemy combatants would receive constitutional protections of any kind, and that rule included both citizen and non-citizen combatants.[179] In the early post-9/11 litigation, the government relied on that categorical analysis to reject due process rights for terror suspects held at Guantánamo Bay and elsewhere.[180] However, the legal landscape changed dramatically when the Supreme Court extended the same individuated analyses developed in the immigration context to the war on terrorism.

In the wake of 9/11, the Supreme Court issued a string of rulings applying individuated analyses to clashes between individual rights and the government's claimed security need, with surprisingly rights-affirming outcomes. In 2004, the Court held in *Rasul v. Bush*[181] that enemy combatant detainees at Guantánamo Bay could challenge their detention through habeas corpus petitions[182] in federal district court.[183] That same

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[176] *Id.* 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." (citing Johnson v. Eisentrager, 339 U.S. 763, 770 (1950))).

[177] *Id.* (emphasis added).

[178] *Id.*

[179] *See supra* text accompanying notes 125–45.

[180] *See, e.g.*, Brief for the Respondent at 35, 37, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 425739 (arguing that "[t]he 'enemy' status of aliens captured and detained during war is a quintessential political question on which the courts respect the actions of the political branches," and that with respect to these matters, "courts have . . . no judicially-manageable standards . . . to evaluate or second-guess the conduct of the President or the military"); *id.* at 43 (exercising jurisdiction "would thrust the federal courts into the extraordinary role of reviewing the military's conduct of hostilities overseas").

[181] 542 U.S. 466 (2004).

[182] 28 U.S.C. § 2241 (2006).

day, the Court held in *Hamdi v. Rumsfeld*[184] that U.S. citizen detainees were entitled to a meaningful opportunity to challenge their confinement in executive detention.[185] Two years later, in *Hamdan v. Rumsfeld*,[186] the Court held that the military tribunals convened by the president at Guantánamo Bay were unlawful without congressional authorization.[187] In 2008, the Court held in *Boumediene v. Bush*[188] that Congress violated the constitutional rights of Guantánamo detainees when it substituted habeas review with an inadequate alternative process.[189]

Many of the Court's post-9/11 national security decisions are predicated on the same interpretations of *Eisentrager* and *Mathews* that dominated immigration law. *Rasul* rejected the formalistic reading of *Eisentrager* that had prevailed in prior Supreme Court and lower court opinions[190] and held that "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts."[191] Justice Kennedy's concurrence in *Rasul* relied on—and extended—the same "ascending scale of rights" language that *Chew* and *Plasencia* unearthed from *Eisentrager*.[192] Building on that interpretation, Justice Kennedy advanced an expansive reading of *Eisentrager*, engaging a broad spectrum of considerations relevant to the government's war-on-terror policies, including the level of control exerted over the locality in question,[193] what

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[183] *Rasul*, 542 U.S. at 466.

[184] 542 U.S. 507 (2004).

[185] *Id.* at 537–38.

[186] 548 U.S. 557 (2006).

[187] *Id.* at 634–35.

[188] 533 U.S. 723 (2008).

[189] *Id.* at 797–98.

[190] *See supra* notes 132–34 and accompanying text (discussing how the Court in *Verdugo-Urquidez* interpreted *Eisentrager* to categorically reject constitutional rights for foreign nationals located outside the United States); *see also* Al Odah v. United States, 321 F.3d 1134, 1144 (D.C. Cir. 2003) (quoting Johnson v. Eisentrager, 339 U.S. 763, 777–78 (1950)) (interpreting *Eisentrager* to hold that "'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign'"); Rasul v. Bush, 215 F. Supp. 2d 55, 68 (D.D.C. 2002) (citing *Eisentrager*, 339 U.S. at 777–78) (relying on *Eisentrager*'s holding that "aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus"), *rev'd*, 542 U.S. 466 (2004).

[191] *Rasul*, 542 U.S. at 484 (internal quotation marks omitted). The Court also distinguished the Guantánamo detainees from those in *Eisentrager* in numerous respects. The Guantánamo inmates were "not nationals of countries at war with the United States." *Id.* at 467. Further, the Court noted they "den[ied] that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." *Id.*

[192] *Id.* at 486 (Kennedy, J., concurring) (quoting *Eisentrager*, 339 U.S. at 770).

[193] *Id.* at 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . .").

(if any) national security interests would be affected by an exercise of jurisdiction,[194] and the distance between the place where the detainees were held and the actual theater of war from which they were purportedly captured.[195] He asked: How do we know the individual is an enemy?[196] How much process did he receive in that determination? How long has the individual been detained?[197] Justice Kennedy's analysis not only sidestepped prior, categorical approaches, but also expanded the inquiry to give judges far more flexibility to handle sensitive national security cases than what the Court's prior, exceptionalist doctrines allowed.

When Justice Kennedy's view captured a Court majority four years later in *Boumediene v. Bush*, his reading of *Eisentrager* converged with *Mathews* in a way that would formally retire the "formalistic, sovereignty-based test for determining the reach of the Suspension Clause."[198] In place of its prior categorical test, the Court applied a multi-pronged analysis based on

> *at least* three factors . . . (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[199]

The transplantation of *Mathews* into the national security context began four years prior to *Boumediene*, when Justice O'Connor, writing for a Court plurality in *Hamdi*, outlined an individuated process that eventually became the centerpiece for hearings at Guantánamo. The government argued that the judicial branch should defer out of "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict,"[200] but the Court—noting prior immigration law precedents—recognized "that an individual challenging his detention may not be held at

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[194] *Id.* at 486 (Kennedy, J., concurring) (noting that one of the inquiries in *Eisentrager* was whether "the existence of jurisdiction would have had a clear harmful effect on the Nation's military affairs").

[195] *Id.* at 487 (Kennedy, J., concurring) ("Guantanamo Bay . . . is one far removed from any hostilities.").

[196] *Id.* at 487–88 (Kennedy, J., concurring) ("[T]he detainees at Guantanamo Bay are being held . . . without benefit of any legal proceeding to determine their status.").

[197] *Id.* at 487 (Kennedy, J., concurring) ("[T]he detainees at Guantanamo Bay are being held indefinitely . . . .").

[198] Boumediene v. Bush, 553 U.S. 723, 762 (2008); *see also id*. (rejecting the idea that the oft-cited claim linking *Eisentrager* with the absence of constitutional protections for non-citizens detained beyond U.S. borders is "the only authoritative language in the opinion and that all the rest is dicta").

[199] *Id.* at 766 (emphasis added).

[200] *Hamdi*, 542 U.S. at 527 (2004) (internal quotation marks omitted).

the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law."[201] Framing the issue through the lens of due process,[202] the Court turned to *Mathews* as the "*ordinary* mechanism that we use for balancing such serious competing interests."[203]

Had *Hamdi* been a case involving the petitioner's access to welfare or Social Security benefits, *Mathews* would have undoubtedly been the proper analytical tool. Applied to the indefinite detention context, however, *Mathews* was hardly "ordinary." Without fanfare, the Court replaced its prior, categorical framework with an individualistic approach requiring significant court involvement, including an assessment of "the function involved" and "a judicious balancing of" various interests.[204]

Having applied *Mathews* to the enemy-combatant context, the Court was in a position to take Hamdi's specific circumstances and private interests much more seriously. Hamdi surely had an interest—"the most elemental of liberty interests"—to be "free from physical detention by [his] own government."[205] That interest could not so easily be "offset by the circumstances of war or the accusation of treasonous behavior, for '[i]t is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection.'"[206] This meant that further hearings and fact-finding would be necessary. While Hamdi could be tried under government-friendly procedures allowing the use of hearsay and a shifting of the ordinary burdens of proof in the government's favor,[207] Hamdi was entitled to notice and a fair opportunity to contest the government's charges before a neutral arbiter.[208] The Court noted that "in

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[201] *Id.* at 528 (citing, inter alia, Zadvydas v. Davis, 533 U.S. 678, 690 (2001)).

[202] The Court described the conflict at hand as a "tension . . . between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due." *Id.*

[203] *Id.* at 528–29 (emphasis added).

[204] *Id.* at 529.

[205] *Id.*

[206] *Id.* at 530 (citation omitted) (quoting Jones v. United States, 463 U.S. 354, 361 (1983)).

[207] *Id.* at 533–34.

[208] *Id.* at 533. Recognizing that *Mathews* does not specify particular procedures, the Court deferred to the executive on the precise content of those procedures. It noted that national security exigencies might require vastly curtained procedural rights: the tribunals might have to accept hearsay evidence introduced by the Government and accord that evidence a rebuttable presumption of reliability. *See id.* at 533–34 ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided."). The government would also be permitted to use military tribunals in lieu of standard civilian courts. *See id.* at 538 (noting that the collateral process could be provided "by an appropriately authorized and properly constituted

the words of *Mathews*, process of this sort would sufficiently address the 'risk of an erroneous deprivation' of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government."[209]

The novelty of the Court's application of *Mathews* is sharpened by the dissents that the opinion provoked. Justice Scalia mocked the Court's claimed "authority to engage in this sort of 'judicious balancing' from *Mathews* . . . a case involving . . . *the withdrawal of disability benefits*!"[210] Justice Scalia would have resolved Hamdi's case under the core constitutional and common law protections owed to all citizens[211]: either the government should prosecute him for treason, or Congress should suspend the writ of habeas corpus.[212] Justice Thomas, in his dissent, also invoked a categorical approach, but for the contrary conclusion that the Court should have deferred completely to the government's claimed security need—something the Court "lack[ed] the expertise and capacity to second-guess."[213]

The Supreme Court's decision in *Boumediene v. Bush*—applying the Suspension Clause to Guantánamo Bay and invalidating the jurisdiction-stripping provision in the Military Commissions Act—expands the *Mathews* analysis even further.[214] After the Court found that there was no conclusive historical answer to the question of whether the habeas writ would run to foreigners held off U.S. shores,[215] it again used a due process methodology to resolve the question of whether the Suspension Clause reached claims by "enemy" foreign-nationals held at Guantánamo Bay. The Court began by pointing out the centrality of *Mathews* in its prior enemy-combatant case law, noting that "there are places in the *Hamdi* plurality opinion where it is difficult to tell where its extrapolation of [the habeas statute] ends and its analysis of the petitioner's due process rights begins."[216] Again relying on due process methodology, the Court goes on

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military tribunal"). Such modifications to standard procedural and substantive protections were necessary during "a time of ongoing military conflict." *Id.* at 533.

[209] *Id.* at 534 (quoting Mathews v. Eldridge, 424 U.S. 319, 355 (1976)).

[210] *Id.* at 575 (Scalia, J., dissenting).

[211] Justice Scalia made clear that his opinion would not apply to foreign nationals. *See id.* at 558–59.

[212] *Id.* at 554 ("Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause.").

[213] *Id.* at 579 (Thomas, J., dissenting).

[214] Boumediene v. Bush, 553 U.S. 723, 781 (2008).

[215] *Id.* at 739, 752.

[216] *Id.* at 784.

to state that "the necessary scope of habeas review in part depends upon the *rigor* of any earlier proceedings," a point that "accords with our test for procedural adequacy" in *Mathews* and its progeny.[217]

As *Boumediene* indicates, *Mathews* essentially became the standard for reviewing executive detention—"enemy" or "friendly," citizen or non-citizen, on or off U.S. shores. In that sense, *Hamdi* and *Boumediene* are a piece of a group of Supreme Court decisions after 9/11 affirming a stronger judicial hand in deciding national security questions regarding the detentions and trials of enemy-combatant detainees. These decisions are marked by the absence of bright-line categorical considerations and an increase in individuated analyses of particular circumstances. But they also highlight a more self-confident judiciary that, over time, began to assert comparative levels of expertise on sensitive immigration and national security matters. As courts became increasingly comfortable using balancing approaches in cases pitting the rights of foreign nationals against the government, they necessarily began to focus on the merits of the underlying policies as well. While the Court has stopped short of claiming a role in deciding all matters of immigration and national security policy, it has become far more enmeshed in national security decision-making than what the early categorical doctrines seemed to allow.

IV. *MATHEWS* AND JUDICIAL SELF-CONFIDENCE

While the application of *Mathews* to immigration and national security has ushered in an important shift in the relationship between the Court and the political branches, the changes should not be overstated. First, the Court began to signal a renewed approach to judicial review in a string of pre-*Mathews* immigration cases interpreting *Eisentrager*.[218] Second, the application of *Mathews* to certain national security cases involving U.S. citizens appears to reduce constitutional protections.[219] In the immigration context, moreover, federal courts have occasionally relied on *Mathews* to vindicate policies that drastically reduce due process rights for foreign nationals in removal proceedings.

For example, the lower federal courts have relied on *Mathews* to uphold agency reforms that eliminated appellate rights in removal hearings. In the wake of policy changes that dramatically enhanced the use of summary appellate dispositions of immigration judge decisions and

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[217] *Id.* at 781 (emphasis added); *see also id.* at 804 (Roberts, C.J., dissenting) (lamenting the Court's decision to require that judicial review procedures over Guantánamo "meet the minimal due process requirements outlined in *Hamdi*," a case involving a U.S. citizen).

[218] *See supra* notes 153–78 and accompanying text.

[219] *See, e.g.*, *supra* notes 74–78, 210–12 and accompanying text (discussing the diminishment of protections for U.S. citizens under a *Mathews*-style regime).

virtually eliminating panel review by the Board of Immigration Appeals,[220] the federal courts unanimously upheld those changes—despite their harsh consequences—often by relying on *Mathews*.[221] Indeed, in the wake of those reforms, judges have issued scathing decisions denouncing immigration judges and Board of Immigration Appeals opinions, often condemning the lack of integrity to the proceedings.[222] Even though the Supreme Court has increasingly expressed concerns with unreviewable executive branch determinations in the context of immigration removal and detention,[223] courts, for now, have upheld agency streamlining reforms under the *Mathews* framework.

The D.C. Circuit has equally applied formal, categorical analyses to a number of different cases involving the due process rights of Guantánamo

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[220] Those reforms were instituted in 2002 to reduce delays in immigration proceedings by essentially eliminating the appellate process within the immigration agency. Under the new regulations, Attorney General John Ashcroft ordered that most immigration decisions be decided by a single Board member and without a written opinion. *See* Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878, 54,878 (Aug. 26, 2002) (stating that the procedures are intended to reduce delays in the review process); *see also* 8 C.F.R. § 1003.1 (2009) (stating the standards for summary dismissal of appeals). Single-member decisions had been permitted beginning in 1999. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed.Reg. 54,878, 54,878–79 (Aug. 26, 2002); Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,135–42 (Oct. 18, 1999) (describing the streamlined process). Ashcroft also fired twelve of the twenty-three Board members, leaving an eleven-member Board, and ordered the Board of Immigration Appeals to clear its 55,000 case backlog in six months. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed.Reg. at 54,893–94, 54,903; *see also* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 350–51 (2007) (discussing how the Ashcroft proposal "made single member decision making the 'dominant method of adjudication for the large majority of cases'").

[221] Zhang v. U.S. Dep't of Justice, 362 F.3d 155, 159 (2d Cir. 2004) (applying *Mathews* to uphold the affirmance-without-opinion procedure); Dia v. Ashcroft, 353 F.3d 228, 239–42 (3d Cir. 2003) (en banc) (same); Denko v. I.N.S., 351 F.3d 717, 730 n.10 (6th Cir. 2003) (same); Falcon Carriche v. Ashcroft, 350 F.3d 845, 851–52 (9th Cir. 2003) (same). However, courts did point out that they might change course if it turned out that the agency failed to implement its regulations with integrity. For example, one circuit court noted that its review of the streamlining procedures might look quite different if the petitioners could produce "evidence of systemic violation by the BIA of its regulations." Albathani v. I.N.S., 318 F.3d 365, 378 (1st Cir. 2003). Other circuits signaled a similar view. *See, e.g.*, Yuk v. Ashcroft, 355 F.3d 1222, 1231–32 (10th Cir. 2004) (discussing and agreeing with the analysis in *Albathani*); *Denko*, 351 F.3d at 728 (same).

[222] *See, e.g.*, Toure v. Att'y Gen., 443 F.3d 310, 320 (3d Cir. 2006) ("[T]here is no logical or evidentiary basis for the [Immigration Judge's] conclusion that [the petitioner] was not persecuted on account of one of the statutorily-enumerated grounds."); Wang v. Att'y Gen., 423 F.3d 260, 270 (3d Cir. 2005) (criticizing the Immigration Judge for "unduly harsh character judgments"); Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 420 (2007) ("[T]he courts of appeals' recent comments on the quality of immigration judge and BIA opinions and the professional behavior of a few particular immigration judges have been prolific and scathing.").

[223] *See, e.g.*, I.N.S. v. St. Cyr, 533 U.S. 289, 300 (2001) (stating that precluding judicial review of a question of pure law would raise constitutional questions); Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (noting that Congress has the "plenary power to create immigration law" but that this power is subject to constitutional limitations).

detainees. First, the court rejected a rule requiring the government to give detainees notice and a hearing thirty days prior to their transfer from Guantánamo to a third country, even in cases where detainees fear mistreatment or torture upon return.[224] The court also ruled that Guantánamo detainees could not be released into the United States[225] under any circumstances, indicating "that the Guantánamo detainees had no due process rights,"[226] and it issued a sweeping ruling that international law had no bearing on the scope of the government's detention authority.[227] These rulings show skepticism of the type of judicial interventions epitomized by the prior Supreme Court rulings in *Hamdi* and *Boumediene*.[228] Thus, in both national security and immigration, the increased use of individuated analyses has not ruled out the possibility of formal, categorical rulings or even invocations of *Mathews* that reduce, if not eliminate, the due process rights of foreign nationals challenging executive action.

Although courts have not applied *Mathews* to expand the due process rights of foreign nationals in all cases,[229] they have placed the individuated frameworks from *Mathews* and related cases to a number of important ends. In national security, for example, courts have highlighted due process norms as a safeguard against lapses in the integrity and procedural regularity of executive courts. This *qualitative* institutional check actually has roots in the original *Goldberg*/*Mathews* debate itself.[230] In immigration, by contrast, the Court has used due process analysis to limit the severity of numerous statutory reforms, to place limits on the executive, and to announce an emerging, if inchoate, individual rights doctrine for foreign nationals. Across multiple cases, the due process analysis provides insights into questions of institutional design, administrative regularity, and the substantive quality of decision-making by non-Article III courts.

A. *Quantitative Versus Qualitative Review in National Security*

Within national security, the due process inquiry, and *Mathews* in

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[224] Kiyemba v. Obama, 561 F.3d 509, 511 (D.C. Cir. 2009).

[225] Kiyemba v. Obama, 555 F.3d 1022, 1024, 1032 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046, 1046 (D.C. Cir. 2010) (per curiam).

[226] Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 971 (2011) (reviewing PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010)).

[227] Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010).

[228] *See* Vladeck, *supra* note 225, at 977; *see also id.* at 976 (noting *Al-Bihani*'s "thinly veiled hostility to the very process of common law judicial decisionmaking that has characterized the post-*Boumediene* habeas jurisprudence in the D.C. district court").

[229] *Cf.* Kent, *supra* note 78, at 27 ("The constitutional right to access the courts is not yet fully universal—extraterritorially, the right might only apply to habeas corpus, and there might be some places or persons where it does not reach—but it is getting there.").

[230] *See infra* notes 250–54 and accompanying text.

particular, has functioned as a way of testing administrative integrity. In *Hamdi*, for instance, Justice O'Connor expressed concern not so much with the *amount* of procedures afforded *Hamdi* but rather with the quality of those procedures.[231] The difference is subtle, but it helps explain how, in *Hamdi* and subsequent cases, even minimal procedural protections for foreign nationals have proved to be quite constraining for the federal government.[232] Justice O'Connor, citing *Mathews*, tried not to subject the government to onerous procedural requirements in the executive detention context.[233] Rather, she noted that the "ongoing military conflict" might require vastly curtailed procedures,[234] including the use of hearsay testimony,[235] a rebuttable presumption favoring the government's evidence,[236] and/or military tribunals in place of civilian courts.[237] Without taking a firm position on the precise baseline of guaranteed procedures, the Court instead required a modicum of integrity—something only the *Court* could evaluate.[238] Turning to the actual evidence supplied by the government—a two-page declaration by an army officer with remote knowledge of the circumstances of Hamdi's capture—the Court held that it could not, consistent with due process, allow the government to detain Hamdi without giving him the opportunity to rebut the proffered evidence.[239] The Court noted that "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."[240]

Given the *Hamdi* plurality's willingness to allow for abbreviated procedural review, its invocation of *Mathews* is less about guaranteeing a certain quantity of procedures and more about ensuring their quality. In *Boumediene*, the Court similarly rejected the adequacy of the review mechanisms put in place by Congress to evaluate the legitimacy of the executive's detention hearings at Guantánamo.[241] Justice Kennedy's majority opinion recognized that "the necessary scope of habeas review in

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[231] Hamdi v. Rumsfeld, 542 U.S. 507, 530–31 (2004).

[232] Notably, the government chose to release Hamdi rather than provide the type of hearing the Court required. *See* Jerry Markon, *Hamdi Returned to Saudi Arabia: U.S. Citizen's Detention as Enemy Combatant Sparked Fierce Debate*, WASH. POST, Oct. 12, 2004, at A2.

[233] *See Hamdi*, 542 U.S. at 533 (noting the increased burdens that more elaborate procedural safeguards could have on the government during a time of ongoing military conflict).

[234] *Id.*

[235] *Id*. at 533–34.

[236] *Id*. at 534.

[237] *Id.* at 538.

[238] *Id.* at 530 (noting a concern with the "interest of the *erroneously* detained individual").

[239] *Id*. at 537–38.

[240] *Id.* at 537.

[241] *See* Boumediene v. Bush, 553 U.S. 723, 787–92 (2008) (holding that the review mechanisms of the Detainee Treatment Act were an inadequate substitute for habeas corpus).

part depends upon the *rigor* of any earlier proceedings,"[242] suggesting a greater concern with the quality of review than the quantity of procedures. Rather than mandate a tribunal system at Guantánamo approximating Article III trials, the Court required that the government's court system satisfy basic features of procedural regularity.[243] Yet the flaws in the detainee review process undermined the Court's faith in the executive's "process of ascertaining [the] facts"[244]: the review panels had failed to obtain and consider all available evidence, develop the factual record to support an ultimate decision on the merits, and apply consistent legal principles across the spectrum of similar cases on review.[245] Unlike criminal proceedings, which include "a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence[, those] dynamics [were] not inherent in executive detention orders or executive review procedures" at Guantánamo.[246] Whether the tribunals, "as currently constituted, satisf[ied] due process standards"[247] as a quantitative matter was secondary to the Court's qualitative analysis and the Court's concern with a "considerable risk of error in the tribunal's findings of fact."[248] Thus, *Boumediene*, like *Hamdi*, appears to be about quality as much as quantity. On this account, it is understandable why the government's effort to avoid a constitutional ruling in *Boumediene* by simply interpreting then-extant review mechanisms more generously was no solution at all.[249]

This idea of qualitative review finds support in the original *Goldberg*/*Mathews* debate. The *Goldberg* Court cited "the welfare bureaucracy's difficulties in reaching correct decisions on eligibility" as a reason to require greater procedural protections at the pre-termination stage.[250] *Mathews*, by contrast, pointed to the underlying reliability of agency determinations based on "medical sources, such as the treating physician," whose assessments could be "supported by X-rays and the

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[242] *Id.* at 781 (emphasis added).

[243] *Id.* at 781–82.

[244] *Id.* at 782 (internal quotation marks omitted) (citing Brown v. Allen, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.)).

[245] *See* Mark Denbeaux & Joshua W. Denbeaux, *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?* 2–3 (Seton Hall Law Sch., Pub. Law & Legal Research Paper No. 951245, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951245.

[246] *Boumediene*, 553 U.S. at 783.

[247] *Id.* at 785.

[248] *Id.*

[249] *Cf. id.* at 787–88 (noting that the Solicitor General, in an effort to save the statute, urged the Court to construe the statute to "empower the Court of Appeals to order the applicant . . . released" and "to allow petitioners to assert most, if not all, of the legal claims they seek to advance" through that process).

[250] Goldberg v. Kelly, 397 U.S. 254, 264 n.12 (1970).

results of clinical or laboratory tests."[251] Skepticism of the integrity of welfare bureaucracy rulings, contrasted with optimism in the Social Security Agency,[252] seemed to lend credence to *Mathews*' rejection of a pre-termination hearing for recipients of Social Security disability benefits.[253] Nearly thirty years later, *Hamdi* and *Boumediene* similarly suggested that the judiciary would stay its hand if it could assume the accuracy, trustworthiness, and integrity of administrative decisions. However, if that ordinary trustworthiness were to break down, the Court would have to use its own superior competence in resetting the proper institutional relationships. While the Court has yet to consciously establish any particular relationship between the scaling of judicial review and a belief in agency competence,[254] the concern about the quality of procedural review is evident in these recent cases.

B. *Due Process as a Mechanism of Political Branch Control*

Whereas the national security cases have used due process to require a modicum of administrative integrity, immigration decisions have invoked due process concerns to place constraints more generally on the political branches, especially in response to Congress's increased efforts in the Antiterrorism and Effective Death Penalty Act[255] and the Illegal

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[251] Mathews v. Eldridge, 424 U.S. 319, 345 (1976).

[252] *Id.* at 349 ("[S]ubstantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs . . . .").

[253] *Id.* According to Richard Pierce,

> [p]olitically accountable legislatures are far better than courts at determining the relative social value of the myriad benefits they choose to make available by statute, and agencies are far better than courts at performing the difficult empirical work required to estimate the costs and benefits of alternative decisionmaking procedures. Thus, legislatures and agencies are likely to do a better job of choosing appropriate procedures through application of the *Eldridge* test than courts have done.

Pierce, *supra* note 2, at 1999.

[254] Notably, the Court has discussed a relationship between procedural due process and agency quality in other post-*Mathews* domestic-law decisions. For example, in *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), the Court upheld a statutory ten-dollar limitation on attorney fees for cases brought before the United States Veterans Administration, noting that the statutory cap did not appear to be an impediment to good decision-making by administrative adjudicators. Without evidence indicating that lifting the cap on fees "would reduce the likelihood of error in the run-of-the-mine case," the Court refused to invalidate it. *Id.* at 330. In *Schweiker v. McClure*, 456 U.S. 188 (1982), the Court upheld the appointment of hearing officers by insurance carriers who resolved disputes between claimants and those carriers over certain supplemental medical costs. The Court noted that there was no evidence of bias or a lack of qualifications by hearing examiners. *Id.* at 196. Evidence of such bias, incompetence or frequent mistakes by agency adjudicators might warrant additional procedures, but assuming there was no reason to doubt agency competence, the procedures in place were deemed legitimate. *Id.* at 199–200.

[255] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Immigration Reform and Immigrant Responsibility Act[256] (IIRIRA) to strip judicial review in a number of different immigration cases. The Supreme Court has rejected these congressional measures broadening the range of deportable offenses,[257] narrowing (or eliminating) judicial review of numerous deportation matters,[258] and eliminating the availability of discretionary relief from deportation for several classes of foreign nationals.[259]

For example, in *INS v. St. Cyr*,[260] the Supreme Court narrowly interpreted Section 340(b) of IIRIRA, a provision that eliminated a form of relief from deportation for foreign nationals who were found guilty of committing certain offenses—aggravated felonies, drug offenses, certain weapons or national security violations, or multiple crimes of moral turpitude.[261] The respondent, a lawful permanent resident, pleaded guilty to sale of a controlled substance—an aggravated felony—prior to the effective date of IIRIRA.[262] However, the agency did not initiate deportation proceedings until after the law took effect, at which time St. Cyr, owing to his plea, apparently was no longer eligible for a discretionary wavier of deportation.[263]

The Supreme Court's ruling contained both substantive and procedural elements. As a substantive matter, the Court focused on what it believed to be St. Cyr's likely expectation that he would remain eligible for immigration relief at the time he agreed to a plea. Because the government had "received the benefit of the[] plea agreements,"[264] which had "likely [been] facilitated by the aliens' belief in their continued eligibility for . . . relief,"[265] the Court refused to interpret IIRIRA in a way that would upset those expectations. As the Court explained, doing so would be "contrary to

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[256] Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

[257] *See* 1 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE §§ 2.04[14][b][vi], [14][c] (2012).

[258] STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 22 (5th ed. 2009).

[259] Section 440(d) of Antiterrorism and Effective Death Penalty Act identified a broad set of offenses for which convictions make a foreign national ineligible for discretionary waiver of deportation. 110 Stat. at 1277 (amending 8 U.S.C. § 1182(c)). Section 304-240B(b) of IIRIRA, 110 Stat. at 3009-597, repealed Section 212(c) of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. § 1182(c) (1994), which bestowed broad discretion upon the Attorney General to grant deportation waivers. Section 304(b) also replaced this relief with a more narrow cancellation of removal provision, 110 Stat. at 3009-594 (creating 8 U.S.C. § 1229(b)). This provision gives the Attorney General discretion to cancel removal for only a narrow class of foreign nationals. *Id.* A foreign national convicted of any aggravated felony is ineligible for cancellation of removal. *Id.*

[260] 533 U.S. 289 (2001)

[261] IIRIRA § 304-240A(a), 110 Stat. at 3009-594; *St. Cyr*, 553 U.S. at 326.

[262] *St. Cyr*, 533 U.S. at 293.

[263] *Id.*

[264] *Id*. at 323.

[265] *Id*.

'familiar considerations of fair notice, reasonable reliance, and settled expectations[.]'"[266] Attributing those same reliance interests to the case of St. Cyr,[267] the Court construed the provision of IIRIRA narrowly and refused to apply it to pre-IIRIRA plea agreements.[268]

To reach this substantive outcome regarding the petitioner's expectations for immigration relief, the Supreme Court first had to issue a procedural ruling regarding a jurisdiction-stripping provision that appeared to block habeas access.[269] In protecting court access under the general habeas corpus statute, the Court noted institutional concerns—in particular, a judicial worry regarding Congress's broader effort to curtail judicial review.[270] The Court applied both a presumption in favor of judicial review in administrative action and a clear statement requirement for habeas repeal.[271] These more rigorous interpretations of the statute were necessary because the legislature's habeas repeal provision tested "the outer limits of Congress' power"[272] and "raise[d] serious constitutional problems."[273] The Court ended on the particularly self-confident note that even within immigration law, "'judicial *intervention* in deportation cases' is unquestionably 'required by the Constitution.'"[274] Congress could not so easily eliminate habeas review; to do so would, at the very least, raise constitutional questions—a matter that the Court saw itself in a more expert position to resolve.[275]

Three years after the *St. Cyr* Court expressed a greater confidence to assert a check on Congress, the Supreme Court raised institutional concerns about the executive when it considered the maximum length of time a foreign national could spend in detention after a final order of

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[266] *Id*. at 323 (quoting Landgraf v. USI Film Products, 511 U.S. 244, 270 (1994)).

[267] *Id.* at 325 ("Prior to AEDPA and IIRIRA, aliens like St. Cyr had a significant likelihood of receiving . . . relief . . . [and] respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to a trial . . . .").

[268] *Id.* at 325–26. The Court rejected the opinions of the Board of Immigration Appeals, the legacy Immigration and Naturalization Service, and the Attorney General, all of whom interpreted IIRIRA to eliminate discretionary waivers of deportation for those who pled guilty prior to the law's taking effect. *Id.* at 293, 303.

[269] *Id.* at 298, 314 (rejecting the Immigration and Naturalization Service's argument that jurisdiction to hear St. Cyr's habeas petition was repealed by the Antiterrorism and Effective Death Penalty Act and IIRIRA).

[270] *Id.* at 298–300, 304–05, 314.

[271] *Id.* at 298–99 (citing *Ex Parte* Yerger, 75 U.S. (6 Wall.) 85, 102 (1868); Felker v. Turpin, 518 U.S. 651, 660–61 (1996)).

[272] *Id.* at 298–99 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), for the proposition that the Court should not construe a statute to test the limits of congressional power unless a clear statement demands that interpretation).

[273] *Id.* at 299–300 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932), for the proposition that a Court should avoid an interpretation of a statute that raises constitutional questions if another, less-problematic interpretation is "fairly possible").

[274] *Id.* at 300 (emphasis added) (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)).

[275] *Id.*

removal. In *Zadvydas v. Davis*,[276] the Court imposed a presumptive six-month limit on the period during which non-citizens could be held while the government effectuated their deportations.[277] Relevant statutes authorized the federal government to hold a foreign national in detention for up to ninety days upon entry of a final order of removal[278] and permitted additional time for the agency to detain "beyond the removal period" in certain specified cases.[279] Denying that the "statute means what it literally says,"[280] the Court offered a direct rebuke to the idea of indefinite detention.

Zadvydas turned specifically on a judicial anxiety with unlimited executive discretion. While the Court recognized Congress's broad powers to "remove aliens, to subject them to supervision with conditions . . . or to incarcerate them where appropriate for violations of those conditions,"[281] it prevented the executive from construing the statute in ways that would allow for indefinite detention.[282] The concern was not about the propriety of the exercise of plenary power by one of the political branches; rather, it was about the boundaries of those powers altogether.[283] Because authorizing indefinite detention seemed to exceed those boundaries, the Court invoked the constitutional avoidance canon to construe the statute's grant of detention authority as ceasing once removal of the detainee would no longer be "reasonably foreseeable."[284]

But the *Zadvydas* Court was not finished. It also established that habeas courts have some power to review executive decisions about whether these constitutionally mandated limits have been satisfied.[285] Although the Court recognized that the judiciary ordinarily defers to executive judgments in the immigration arena,[286] it placed a presumptive

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[276] 533 U.S. 678 (2001).

[277] *Id.* at 701.

[278] 8 U.S.C. § 1231(a)(1)(A) (2000).

[279] *Id.* § 1231(a)(6).

[280] *Zadvydas*, 533 U.S. at 689.

[281] *Id.* at 695.

[282] *Id.* at 682 ("Based on our conclusion that indefinite detention . . . would raise serious constitutional concerns, we construe the statute to contain an implicit 'reasonable time' limitation . . . .").

[283] *See id.* at 696 ("[W]e believe that an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, *irrespective of the procedures used*, the Constitution permits detention that is indefinite and potentially permanent." (emphasis added) (citation omitted)).

[284] *Id.* at 699.

[285] *See id.* ("[T]he habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal.").

[286] *See id.* at 700 ("Ordinary principles of judicial review in this area recognize primary Executive Branch responsibility. They counsel judges to give expert agencies decisionmaking leeway in matters that invoke their expertise." (citing Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651–52 (1990))).

six-month limit on detention.[287] It also prescribed procedures once the six months elapse,[288] thus further cabining executive discretion.[289]

In 2009, the Court again rebuffed the political branches by refusing to let them displace the judicial criteria for granting stays of removal with a more demanding rule. In *Nken v. Holder*,[290] the Court interpreted a provision of IIRIRA that limited the availability of injunctive relief, which the government argued applied to stays of removal as well.[291] While the case concerned immigration deportation, the Court's opinion situated the remedy at issue within the *judicial* structure. Rather than defer to Congress's efforts "to allow for more prompt removal,"[292] the Court recognized judicial stays as a fundamental "part of [the] traditional equipment for the administration of justice"[293] that is "inherent" to judicial power.[294] While an injunction acts on a party outside the judiciary, a stay "operates upon the judicial proceeding itself."[295] And for the purposes of a stay, the Court refused to accord greater deference to an administrative ruling, treating the latter just like any lower federal court order.[296]

It is against that background that the Court interpreted the statutory provision at issue, 8 U.S.C. § 1252(f)(2).[297] Although its analysis included standard textual tools of interpretation,[298] the Court also devoted much time to describing how a contrary result would impinge on judicial power. Applying the statutory standard to stays would subvert the judiciary's very

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[287] *Id.* at 701.

[288] *See id.* at 701 ("After [the] 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut the showing.").

[289] However, only two years later in *Demore v. Kim*, 538 U.S. 510 (2003), the Court rejected a due process challenge to a six-month mandatory detention without the opportunity for a bond hearing. 538 U.S. 510, 513, 528, 530–31 (2003). It would be an understatement to say that *Demore* greatly complicates *Zadvydas*, leaving it to lower courts to work out ways of resolving the obvious tensions between the two cases. *See generally* Anello, *supra* note 72, at 376–83, 390–93 (discussing and reconciling tensions between *Demore* and *Zadvydas*).

[290] 556 U.S. 418 (2009).

[291] *Id.* at 423, 425, 426.

[292] *Id.* at 424.

[293] *Id.* at 421 (quoting Scripps–Howard Radio, Inc. v. FCC, 316 U.S. 4, 9–10 (1942)).

[294] *Id.* at 426.

[295] *Id.* at 428.

[296] *See id.* at 429 n.* ("[T]he relief sought . . . would simply suspend *administrative* alteration of the status quo, and we have long recognized that such temporary relief from an administrative order—just like temporary relief from a court order—is considered a stay.").

[297] The specific statutory language in dispute reads, "Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U.S.C. § 1252(f)(2) (2012).

[298] *See, e.g.*, *Nken*, 556 U.S. at 430 (noting that section 1252(f)(2) did not use the word "stay" but Congress did use the term elsewhere in the statute, and "it is generally presumed that Congress acts intentionally and purposely in [such] disparate inclusion or exclusion" (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987))).

purpose by requiring an accelerated decision on the merits.[299] It would likewise prevent courts from taking into consideration potential harm, which is one of the animating purposes for which stays are granted.[300]

Nken is consistent with a court cognizant of its greater institutional competence. Article III courts are well suited to review the exercise of discretion by an immigration judge on procedural matters such as motions to reopen, and the Court expressed confidence in its own, long-established test for stays of removal pending judicial review.[301] Indeed, the Court adopted a presumption against congressional displacement of those factors,[302] an approach that is hardly consonant with the broad deference characteristic of prior plenary power decisions. Instead of recognizing immigration decisions as completely of the political branches, the Court treated the immigration agency as it would virtually any other administrative body.

Much of what the Court stated about Congress in *Nken* it extended to the executive two years later in *Kucana v. Holder*[303] when it again restricted the immigration agency's ability to insulate itself from judicial scrutiny.[304] In *Kucana*, the Court interpreted a provision of IIRIRA that eliminated judicial review of certain immigration decisions.[305] The statute, 8 U.S.C. § 1252(a)(2)(B)(ii), barred review of any action by the attorney general or her delegate that was committed to the attorney general's discretion under "this subchapter."[306] *Kucana* asked whether the bar on judicial review also applied to decisions committed to the attorney general's discretion, not by statute, but rather by the executive's own regulations.[307] In deciding that the attorney general could not so shield agency decisions from judicial review, the Court explicitly cast its decision as one of ordinary administrative law.[308] It drew on administrative canons of construction and expressly cited separation of powers concerns in justifying its holding.[309] Even aside from the extensive textual and

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[299] *Id.* at 432.
[300] *Id.* at 432–33.
[301] *Id.* at 433.
[302] *Id.*
[303] 558 U.S. 233 (2010).
[304] *Id.* at 252–53.
[305] *Id.* at 237.
[306] 8 U.S.C. § 1252(a)(2)(B)(ii) (2012).
[307] *Kucana*, 558 U.S. at 237.
[308] *Id.* (noting the Court's "longstanding exercise of judicial review of administrative rulings on reopening motions," the "presumption favoring interpretations of statutes [to] allow judicial review of administrative action[,]" and a presumption "against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain").
[309] *Id.*

structural analysis of the statute,[310] the Court's invocation of administrative law principles to cabin agency deference is important. The Court drew its conclusion at least in part from the "basic principle" that "executive determinations generally are subject to judicial review,"[311] a principle that extends to immigration, especially in the context of Article III jurisdiction-stripping legislation.[312]

Though the Court considers these principles well settled, and contends that they can only be overcome by a clear legislative statement,[313] they are not easily reconcilable with a plenary power doctrine that gives the political branches unfettered authority to make removal decisions.[314] Rather than casting immigration decisions as exclusively within the realm of the political branches, the Court seems to treat them as routine administrative law—perhaps with more discretion for the agency than it would have under the Administrative Procedure Act's arbitrary and capricious review[315]—but with hardly the deference one would expect under the plenary power doctrine.

C. *Due Process as a General Rights Doctrine*

While the preceding cases reflect more of an institutional check on the coordinate branches, other recent cases appear squarely concerned with advancing the rights of foreign nationals as such. In 2008, for example, the Court in *Dada v. Mukasey*[316] again cabined the reach of IIRIRA while stressing the importance of protecting the "rights" of foreign nationals.[317] Upon being ordered removed, Dada was granted voluntary departure[318]—a

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[310] *See id.* at 243–51 (discussing the applicable principles of statutory construction and textual analysis).

[311] *Id.* at 251 (quoting Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 434 (1995)).

[312] *Id.*

[313] *Id.* at 251–52.

[314] *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States . . . cannot be granted away or restrained . . . . Nor can their exercise be hampered . . . by any considerations of private interest."); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1128 (1995) ("At the heart of the plenary power doctrine lies the belief that Congress and the executive branch must have unfettered authority to admit, exclude, or deport aliens.").

[315] *See* 5 U.S.C. § 706 (2012) ("The reviewing court shall . . . hold unlawful and set aside agency action, finding and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . . ."); FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) (The Administrative Procedure Act . . . permits the setting aside of agency action that is 'arbitrary' or 'capricious.'" (internal citations omitted)).

[316] 554 U.S. 1 (2008)

[317] *Id.*

[318] *Id.* at 6. Voluntary departure is a discretionary form of relief that allows certain foreign nationals to avoid some of the consequences of an order of deportation by departing the country willingly. *Id.* at 8. Section 240B of the Immigration and Nationality Act provides for two types of

last-ditch remedy for certain deportable foreign nationals who agree to leave on their own accord within a specified period of time.[319] Two days before expiration of the thirty-day departure period, Dada moved to reopen his case so that he could seek an adjustment of status based on evidence that he was married to a U.S. citizen.[320] The difficulty, however, was that if Dada stayed in the United States beyond the thirty-day limit for voluntary departures, he would become statutorily ineligible to seek an adjustment of status for a period of ten years.[321] On the other hand, if he departed the United States as required under the voluntary departure provision, he would then become ineligible to seek a motion to reopen; under existing regulatory interpretation, foreign nationals were ineligible to litigate motions to reopen from abroad.[322] Thus, according to the Court, Dada was left with "two poor choices" in the conflict created by the time limits of the voluntary departure provision and the regulation directing the termination of motions to reopen upon the foreign national's departure from the United States.[323]

The Court stressed the need to preserve the Immigration and Nationality Act's guarantee that "every alien ordered removed from the United States has a right to file one motion to reopen his or her removal proceedings"[324] and that this "right" not "be qualified by the voluntary departure process."[325] In an effort to "preserve the alien's right to pursue

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voluntary departure: (1) voluntary departure before removal proceedings are completed, § 240B(a); and (2) voluntary departure after removal proceedings have concluded, § 240B(b). 8 U.S.C. §§ 1229c(a)–(b) (2012). When voluntary departure is requested before removal proceedings are completed, a foreign national must concede removability and waive appeal of all issues. 8 C.F.R. § 1003.2(d) (2014). Foreign nationals convicted of an aggravated felony or subject to deportation on national security grounds are not eligible for voluntary departure under Section 240B(a). LEGOMSKY & RODRIGUEZ, *supra* note 258, at 633. If voluntary departure is granted under Section 240B(a), a foreign national may receive up to 120 days to depart. *Id.* When voluntary departure is requested after the conclusion of removal proceedings, a foreign national must meet several requirements: (1) he must have been physically present in the United States for at least one year immediately prior to the date of his Notice to Appear; (2) he must show good moral character for at least five years prior to his application for voluntary departure; and (3) he must show by clear and convincing evidence that he has the means to depart and intends to do so. 8 U.S.C. § 1229c(b)(1). If voluntary departure is granted under § 240B(b), the foreign national may receive up to 60 days to depart. LEGOMSKY & RODRIGUEZ, *supra* note 258, at 633.

[319] Dada received a thirty-day departure period. *Dada*, 554 U.S. at 6.

[320] *Id.* at 6–7.

[321] 8 U.S.C. § 1229c(d)(1)(B) (2012); *see also Dada*, 554 U.S. at 5 ("The alien can remain in the United States to ensure the motion to reopen remains pending, while incurring statutory penalties for overstaying the voluntary departure date; or the alien can avoid penalties by prompt departure but abandon the motion to reopen.").

[322] 8 C.F.R. § 1003.2(d) (2007) (modified by Kucana v. Holder, 558 U.S. 233, 237, 249 (2010)).

[323] *Dada*, 554 U.S. at 5.

[324] *Id*. at 4–5.

[325] *Id.* at 5.

reopening,"[326] the Court held that foreign nationals must be permitted to unilaterally withdraw a petition for voluntary departure before the departure period expires, regardless of the merits of the underlying motion to reopen.[327] Hence, the Court rejected the agency's argument that Dada, by obtaining permission to voluntarily depart, knowingly forfeited the right to pursue a motion to reopen removal proceedings.[328] Instead, the Court repeatedly referred to the motion to reopen as a "right" that had to be read in conjunction with other parts of the Immigration and Nationality Act.[329] It cited prior precedent that recognized "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[330]

In *Negusie v. Holder*,[331] the Court preserved the availability of asylum relief, professing to offer deference to the agency by remanding the matter for its reconsideration[332] but in effect prioritizing individual fairness over agency deference. The Court held that, despite the agency's contrary holding, certain asylum seekers who had persecuted others under duress were not necessarily subject to the "persecutor bar" depriving them of eligibility for asylum relief. The Board of Immigration Appeals had denied Negusie's application for asylum and withholding of removal because he had persecuted others on the basis of their national origin and found no "duress exception" in cases where the persecution was extracted through coercion.[333] The agency reached its conclusion by applying *Fedorenko v. United States*,[334] a Supreme Court interpretation of the Displaced Persons Act of 1948, which also contained a clause denying relief to those who engaged in the persecution of others.[335] But the *Negusie* Court rejected the

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[326] *Id.* at 19.

[327] *Id.* at 21.

[328] *See id.* at 16 ("[T]he Government's position that the alien is not entitled to pursue a motion to reopen if the alien agrees to voluntarily depart is unsustainable.").

[329] *Id.* at 16 ("In reading a statute we must not 'look merely to a particular clause,' but consider 'in connection with it the whole statute.'") (quoting Kokoszka v. Belford, 417 U.S. 642, 650 (1986))); *see also* Nken v. Holder, 556 U.S. 418, 426 (2009) ("[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole' . . . ." (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997))); Negusie v. Holder, 555 U.S. 511, 519 (2009) ("[W]e 'look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" (quoting *Dada*, 554 U.S. at 16)); INS v. St. Cyr, 533 U.S. 289, 319–20 (2001) (interpreting the retroactivity of section 304(b) in light of the treatment of retroactivity in other sections of IIRIRA).

[330] *Dada*, 554 U.S. at 19 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987)).

[331] 555 U.S. 511 (2009).

[332] *Id*. at 523–24.

[333] *Negusie*, 555 U.S. at 525. Negusie was granted a limited form of relief under the Convention Against Torture, which does not bar to relief for those who have engaged in the persecution or torture of others. *Id.* at 536 n.6 (Stevens, J., concurring in part and dissenting in part); *id.* at 541–42 (Thomas, J., dissenting).

[334] *Id.* at 542; Fedorenko v. United States, 449 U.S. 490 (1981).

[335] *Fedorenko*, 449 U.S. at 512.

Board's analysis and refused to accord *Chevron* deference to its statutory construction.[336] The Court remanded the case to the agency to reconsider the legal question whether the persecutor bar in the asylum statute contained an exception in cases of duress.[337] While the Court did not explicitly reject the Board of Immigration Appeal's conclusion as a substantive matter, it seemed concerned that the agency's interpretation would prevent bona fide asylum seekers from obtaining relief, undermining the Court's own notion of fairness.[338]

Negusie is unusual because the Court's remand order was based not on an unreasonable agency interpretation at *Chevron* Step Two[339] but rather on a misapplication of a prior Supreme Court case that "prevented . . . a full consideration of the statutory question."[340] Thus, the decision left open the possibility that the agency might permissibly re-adopt the very same interpretation of the statute—and the Court might reject that one, too.[341] *Negusie*'s logic seems at odds with ordinary judicial review of agency decisions—unless of course the Court is exercising greater control over an area of law traditionally governed by plenary powers. As Justice Scalia observed in his separate concurrence: "It is to agency officials, not to the Members of this Court, that Congress has given discretion to choose among permissible interpretations of the statute. They deserve to be told clearly whether we are serious about allowing them to exercise that discretion, or are rather firing a warning shot across the bow."[342] The *Negusie* majority, rather than adhere strictly to traditional deference norms, ensured that the Court would have the final say on whether the agency's interpretation was permissible.

V. A MINI-REVOLUTION FOR NON-CITIZENS?

While it is incontrovertible that the Court's recent rulings involving national security and immigration touch on matters of procedure, they are

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[336] *Negusie*, 555 U.S. at 512.

[337] *Id.* at 514.

[338] *Id.* at 517–20 (discussing the problems that lead to enacting the persecutor bar in the Displaced Persons Act (at dispute in *Fedorenko*) and how that differed from the persecutor bar to asylum relief, which was enacted under a different statute).

[339] Where statutory meaning is ambiguous, a court at *Chevron* Step Two considers whether the agency's interpretation of the statute is a "permissible construction of the statute." Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[340] *Id.* at 521; *see also id.* ("Whether such an interpretation would be reasonable, and thus owed *Chevron* deference, is a legitimate question; but it is not now before us.").

[341] *See id.* at 525 (Scalia, J., concurring) (noting that the "majority appears to leave [the] question undecided" but that on his view, "the agency is free to retain that rule *so long as the choice to do so is soundly reasoned*") (emphasis added).

[342] *Id.* at 528.

hardly decisions of mere housekeeping or internal court operating rules.[343] *Boumediene* "declared unconstitutional a law enacted by Congress and signed by the president on an issue of military policy in a time of armed conflict."[344] *Hamdi* placed limits on presidential powers that it found Congress had authorized by restricting the conditions under which the President could detain a U.S. citizen enemy combatant.[345] *St. Cyr* and *Zadvydas* set aside congressional statutes meant to drastically reduce the procedural and substantive rights of deportable foreign nationals.[346] These recent Supreme Court rulings within national security and immigration engage in deeply substantive interpretations of the Constitution[347] as well as a host of statutes[348] and regulations.[349] The cases reveal a Court that is increasingly concerned with the individual interests at stake and especially willing to intervene to ensure that executive and legislative action not go unchecked.

The cases demonstrate a new unfolding of a legal process regarding which branch can appropriately rule on one type of matter or another, and they reflect a judicial confidence that is sharply different from the Court's historical role in immigration[350] and national security decision-making.[351]

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[343] Martinez, *supra* note 23, at 1029–32 (describing the Court's 9/11 decisions as illustrations of procedural decision-making in which "little seems to have been decided" because the Court "left the final, substantive outcome of the cases at bar uncertain" and that, in the end, the decisions were "less like landmarks and more like small signposts directing the traveler to continue toward an eventual, more significant fork in the road").

[344] David Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, CATO SUP. CT. REV., 2007–2008, at 47, 47–48; *see also* Boumediene v. Bush, 553 U.S. 723, 795 (2008).

[345] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 521, 533–34 (2004) ("We . . . hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.").

[346] INS v. St. Cyr, 533 U.S. 289, 293–94, 326 (2001); Zadvydas v. Davis, 533 U.S. 678, 682, 688 (2001).

[347] *See generally* Boumediene v. Bush, 553 U.S. 723 (2008) (engaging a substantive analysis of the Constitution's Suspension Clause, including its history, doctrinal interpretations, and application at Guantánamo Bay).

[348] *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 473–83 (2004) (engaging in a detailed analysis of the habeas corpus statute, its doctrinal formulations, and its application to Guantánamo Bay).

[349] *See, e.g.*, Kucana v. Holder, 558 U.S. 233, 237 (2010) (holding that a jurisdiction-stripping provision of IIRIRA that applied to determinations made discretionary by statute did not limit judicial review of determinations made discretionary to the Attorney General through administrative regulation).

[350] In the immigration context, Kevin Johnson has noted that the Supreme Court has recently issued a string of surprisingly moderate rulings that undermine the core of the plenary power doctrine. *See* Johnson, *supra* note 16 at 9 (noting, "[w]ith appropriate caution necessitated by the lessons of recent history . . . that the Supreme Court's contemporary immigration decisions suggest that the plenary power doctrine, the foundation of immigration exceptionalism, is again headed toward its ultimate demise.").

[351] In the national security context, Samuel Issacharoff and Richard Pildes have demonstrated how courts have used a process-oriented approach that defers to executive action endorsed by Congress.

In the wake of the transplantation of the due process revolution to cases involving the deportation, detention, and the trial of foreign nationals, courts are increasingly willing to evaluate the institutional choices made by the coordinate branches. Standard procedural accounts and explanations cannot adequately reflect that shift, and efforts to describe these recent cases as merely procedural come up short.

A. Mathews *and the Political Branches*

While the past two decades have generally witnessed incremental changes in judicial review, the Supreme Court has placed an individuated and multi-pronged framework in the service of a shared expertise among the branches where the rights of foreign nationals are concerned. The Court has promoted "a dialogue between Congress and the Court"[352] and a consensus-oriented approach among all three branches—if not a "trilateral" endorsement framework.[353] Having re-envisioned the possibility of judicial competence and an enhanced judicial expertise, the Court is indicating that collective decision-making will yield more balanced, coherent, and durable national security and immigration policies.

The shift toward individuated frameworks extends beyond the courts, for the coordinate branches, too, are experiencing a *Mathews*ization of sorts. The executive branch has looked to *Mathews* as the foundational framework for assessing policies regarding detention and the use of force. A number of recent congressional statutes, while not citing *Mathews*, also adopt a more individuated approach toward immigration policy.

1. *Individuating National Security: Drones and Detention*

A number of recent executive branch policies reflect a similar trend toward applying highly individuated approaches to national security decision-making. As Samuel Issacharoff and Richard H. Pildes have noted,

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Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 5 (2004) ("[C]ourts have sought to shift the responsibility . . . toward the joint action of the most democratic branches of the government."); *see also id*. at 9–19; Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2350 (2006) ("[C]ourts typically have sought to tie the constitutionality of presidential action to the requirement of congressional authorization. When there is sufficiently broad political agreement that both the legislature and the Executive endorse a particular liberty-security tradeoff, the courts have generally accepted that judgment. When the Executive has acted without legislative approval, however, the courts have applied close scrutiny and, even during wartime, have sometimes invalidated those actions. This process-oriented jurisprudential framework, which finds its most eloquent expression in Justice Jackson's famous concurring opinion in *Youngstown*, dates back at least to the Civil War.").

[352] *Boumediene*, 553 U.S. at 738.

[353] *Cf.* Issacharoff & Pildes, *Between Civil Libertarianism and Executive Unilateralism*, *supra* note 351, at 27, 33, 35 (discussing collective action between executive and legislative branches—or "bilateral endorsement"—as a necessary predicate to judicial validation).

government decisions regarding the use of force are undergoing a change from an analysis of a person's status or affiliation with certain groups to an individuated inquiry into that particular person's personal history and likely future.[354] Where targeted killing and indefinite detention are concerned, the military is engaging in quasi-adjudicative decision-making processes to determine whether force against an individual is justifiable. Given the emergence of stateless enemies without any fixed territorial presence, state affiliation, or even physical identifiers (such as wearing uniforms or carrying weaponry), it is far more difficult—if not impossible—to determine one's status as an enemy exclusively by virtue of group membership. "Attributions of status through group membership alone are . . . extremely difficult to establish," and terrorist suspects are now identified by their specific activities.[355] Whether and how to use force against a potentially hostile person depends less on the individual's categorical membership in, for example, al Qaida, and more on facts establishing the individual's specific guilt.

Relatedly, the government has internalized *Mathews*' individuated approach by citing that case as the governing framework for making decisions about the limits of using lethal force against U.S. citizen members of al Qaida in countries not at war with the United States.[356] According to one DOJ report:

> Were the target of a lethal operation a U.S. citizen who may have rights under the Due Process Clause and the Fourth Amendment, that individual's citizenship would not immunize him from a lethal operation. Under the traditional due process balancing analysis of *Mathews v. Eldridge*, we recognize that there is no private interest more weighty than a

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[354] *See* Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1522–23 (2013) ("Whereas the traditional practices and laws of war defined 'the enemy' in terms of categorical, group-based judgments that turned on *status*—a person was an enemy not because of any specific actions he himself engaged in, but because he was a member of an opposing army—we are now moving to a world that implicitly or explicitly requires the *individuation of enemy responsibility* of specific enemy persons before the use of military force is considered justified, at least as a moral and political matter."); *see also* Gabriella Blum, *The Individualization of War: From War to Policing in the Regulation of Armed Conflicts*, *in* LAW AND WAR 49 (Austin Sarat et al. eds., 2014), *available at* http://ssrn.com/abstract=2231168 ("[W]artime regulation is increasingly aspiring to make war look more like a policing operation, in which people are expected to be treated according to their individual actions rather than as representatives of a collective.").

[355] Issacharoff & Pildes, *Targeted Warfare*, *supra* note 354, at 1527.

[356] *E.g.*, DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 2, 5–6 (June 1, 2012), *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf. It should be noted that the White Paper concludes that while U.S. citizen targets such as Anwar al-Awlaki may enjoy Fourth and Fifth Amendment protections, the use of lethal force is ultimately warranted. *Id.* at 2.

> person's interest in his life. But that interest must be balanced against the United States' interest in forestalling the threat of violence and death to other Americans that arises from an individual who is a senior operational leader of al-Q'aida or an associated force of al-Q'aida and who is engaged in plotting against the United States.[357]

The DOJ, citing *Mathews*, ultimately balances the inquiry against the individual's interest, laying bare a weakness reflective of the *Hamdi* plurality's application of *Mathews* to a case of indefinite detention of a U.S. citizen.[358] On the other hand, the executive's recognition that drone targets enjoy some constitutional protections means that "the executive believes that the Constitution places important limitations on its ability to target U.S. citizens, even when they are enemy fighters in hostile or ungoverned territory."[359]

Moreover, just as *Boumediene* applied the *Mathews*/*Hamdi* framework to foreign-national enemy combatants, the same executive branch policies derived from *Mathews* appear to apply to *non-citizen* targets.[360] In the case of both citizen and non-citizen enemies, "institutional design and operating rules of the national security state [have] relax[ed] their traditional distinctions between foreign and domestic, enemy and friend, U.S. person and not."[361] In that sense, *Mathews* appears to be forming a new baseline for constitutional rights within both the executive and judicial branches, where both citizens and non-citizens are concerned.[362]

2. *Individuating Immigration*

Individuated assessments are also found within a number of different federal immigration statutes that grant relief according to particularized

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[357] *Id.* at 2.

[358] *See supra* notes 74–78 and accompanying text.

[359] Kent, *supra* note 78, at 19.

[360] *See id.* ("[T]he executive has suggested that it will follow with regard to noncitizen targets the same or similar procedural rules that it says the Constitution requires for U.S. citizens"); *see also* Barack Obama, President of the U.S., Remarks by the President at National Defense University (May 23, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university ("Beyond the Afghan theater, we only target al Qaeda and its associated forces. And even then, the use of drones is heavily constrained. America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute. America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty. . . . [W]e act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set.").

[361] Kent, *supra* note 78, at 14.

[362] *See* Boumediene v. Bush, 553 U.S. 723, 733, 771 (2008) (applying the *Hamdi* standard (including its reliance on *Mathews*) to cases brought by foreign-national terrorist suspects at Guantánamo Bay).

assessments of individual merit and a balancing of the equities. The Immigration and Naturalization Act provides a number of such provisions. Perhaps the most well known example occurs in the case of cancellation-of-removal relief for non-lawful permanent residents, who must demonstrate that their removal from the United States would cause an "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a U.S. citizen or lawful permanent resident.[363] Immigration statutes also call for individualized analyses in the context of waivers of inadmissibility for unlawful presence,[364] criminal activity,[365] or prior misrepresentations.[366]

Some scholars have argued that prosecutorial discretion in immigration further illustrates the use of individuated approaches in policymaking.[367] Prosecutorial discretion has received great attention in the wake of the Obama Administration's decision to make enhanced use of this important tool.[368] In a series of memoranda, the immigration agencies have directed lower-level agency officials to consider granting favorable exercises of discretion in a host of cases that raise positive equities.[369] These policy memoranda, which apply and expand prosecutorial discretion policies

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[363] 8 U.S.C. § 1229b(b)(1)(D) (2012). Upon making such a showing, the individual is granted an adjustment of status to that of a lawful permanent resident. *Id.* § 1229b(b)(1).

[364] *E.g.*, 8 U.S.C. § 1182(a)(9)(B)(v) (2012) (providing a waiver of inadmissibility due to unlawful presence in the United States to prevent "extreme hardship" to the U.S. citizen or lawful permanent resident spouse or parent of the foreign national).

[365] *E.g.*, 8 U.S.C. § 1182(h) (2012) (providing, subject to a few exceptions, a waiver of inadmissibility due to various types of criminal activity to prevent "extreme hardship" to the qualifying U.S. citizen or lawful permanent resident relative of the foreign national).

[366] *E.g.*, 8 U.S.C. § 1182(i) (2012) (providing a waiver of inadmissibility due to misrepresentation to prevent "extreme hardship" to the U.S. citizen or lawful permanent resident spouse of the foreign national).

[367] Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 132 (2012) ("[I]mmigration policies in recent decades have generally promoted collective anonymity and depersonalization of undocumented immigrants, but recent policy changes encouraging prosecutorial discretion represent a shift towards greater individuation and a first step towards decategorization.").

[368] Prosecutorial discretion concerns decisions by immigration officials not to assert the full scope of their enforcement powers in an individual case or category of cases. Memorandum from John Morton, Dir., Immigration and Customs Enforcement, Dep't of Homeland Sec., to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel, ICE, Dep't of Homeland Sec., on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 2 (June 17, 2011) [hereinafter Morton Memo], *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (defining prosecutorial discretion as the decision "not to assert the full scope of the enforcement authority available to the agency in a given case").

[369] On June 17, 2011, Immigration and Customs Enforcement Director John Morton issued a memorandum that specifically authorized immigration field officers to use prosecutorial discretion and provided them with several criteria to guide their decision of whether to grant a favorable exercise of discretion in a particular case. *Id.* at 1. These included, inter alia, a foreign national's "ties and contributions to the community, including family relationships," and "whether the person has a U.S. citizen or permanent resident spouse, child, or parent." *Id.* at 4.

under previous presidential administrations,[370] recognize that many foreign nationals within the country illegally are otherwise law-abiding individuals with significant ties to family members, civic and religious organizations, corporations, and other institutions within the United States.[371] In that regard, immigration scholars have discussed how these policies treat "membership in U.S. society [as] a matter of degree, rather than an in/out dichotomy" and "blur[] rather than brighten[] the line between 'legal' and 'illegal' status."[372] Although a favorable exercise of discretion does not actually confer a change in one's status, it reflects a sense that some kinds of immigration violations (such as civil infractions) should be distinguished from others (such as criminal conduct). Regardless, prosecutorial discretion policies "demand[] personalization of the process through consideration of individual equities."[373]

On the other hand, the Obama Administration's renewed attention to prosecutorial discretion—in particular, its Deferred Action for Parental Accountability[374] and Deferred Action for Childhood Arrivals[375] policies,

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[370] *E.g.*, U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., FACT SHEET ON PROSECUTORIAL DISCRETION GUIDELINES (2000), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/c_6-27DOJ2000ProsDiscretionGuideOVW3-31-09.pdf; Memorandum from Doris Meissner, Comm'r of Immigration & Naturalization Serv., U.S. Dep't of Justice, to Reg'l Dirs., District Dirs., Chief Patrol Agents, Reg'l and Dist. Counsel (Nov. 17, 2000), *available at* http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/at_download/file; *see also* Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 107 (2014) (suggesting that the Deferred Action for Childhood Arrivals policy is consistent with presidential power to aid intending Americans threatened with harm by nonfederal sovereigns, such as states with restrictive immigration laws).

[371] *See* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244–45 (2010) (discussing the two-fold purpose of using prosecutorial discretion to conserve resources and promote humanitarian concerns); Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 12–13 (2012) (listing the humanitarian factors considered when officials grant favorable exercises of discretion).

[372] Marouf, *supra* note 367, at 153.

[373] *Id.*

[374] This program, announced on November 20, 2014, allows parents of U.S. citizens and lawful permanent residents who have been present in the country since January 1, 2010, and who meet certain criteria, to request deferred action and employment authorization for three years. *See Executive Actions on Immigration*, U.S. CITIZENSHIP AND IMMIG. SERVICES (Nov. 20, 2014), http://www.uscis.gov/immigrationaction.

[375] This program, announced on June 15, 2012 and expanded on November 22, 2014, defers action for certain young people who came to the United States as children. Memorandum from Janet Napolitano, Sec'y Homeland Sec., to the Acting Comm'r of U.S. Customs & Border Prot., the Dir. Of U.S. Citizenship & Immigration Serv., and Dir. ICE 1 (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. Under the first iteration of this policy, young foreign nationals who meet certain requirements could seek a renewable deferred action status for two years. *Id.* at 2–3. On November 20,

which provide agency-wide, albeit temporary, relief for many undocumented foreign nationals—arguably tacks away from an individuated analysis toward a categorical approach. These deferred action policies, not unlike other forms of across-the-board uses of administrative discretion, declare entire categories of foreign nationals to be prima facie eligible for deferred action. Of course, eligible foreign nationals must still apply for and be approved under the specified criteria for each respective deferred action program;[376] thus, these policies arguably require some form of individuated analysis as well.[377]

B. *Individuation and Inter-Branch Coordination*

As courts have examined not just procedural fairness questions but also issues of agency and quasi-agency integrity and regularity, they have placed multi-pronged and open-textured frameworks such as *Mathews* in the service of more rule-of-law and human-rights-oriented outcomes. This assertion of institutional expertise appears unexpected because *Mathews*, to most scholars, reflects judicial restraint—not activism.[378] However, the transplantation of *Mathews* to immigration and national security, and the case law decided subsequently, reveals a different style of judicial reasoning on sensitive matters of policy. Recent cases demonstrate the idea of a legal process centered on institutional competence within certain limits while extending the boundaries of judicial competence to new areas.[379] Unlike earlier models of legal process couched in limited judicial expertise,[380] recent invocations of *Mathews* reveal a body of cases

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2014, the Obama Administration expanded the population eligible for DACA and extended the deferred action and work authorization period from two years to three years.

[376] *See Executive Actions on Immigration*, *supra* note 374 (noting that applicants for deferred action are considered on a case-by-case basis and that successful applicants must not be an enforcement priority, which includes posing a threat to national security or public safety).

[377] Morton Memo, *supra* note 368, at 4 ("ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.").

[378] *E.g.*, Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1314 (1986) (arguing that *Mathews v. Eldridge* "provides further evidence of a wide-ranging shift towards greater judicial restraint"); *see also supra* notes 2, 3, and 50 and accompanying text.

[379] *See* Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1396 (1996) (discussing the concept of institutional competence and judicial review).

[380] Legal Process has historically focused on procedural institutional discretion—something that was derived from the competence of an institution within its own domain—and thus has claimed allegiance to a theory based in "neutral principles" without reference to substantive law—satisfying realist complaints about political influence on judicial decision-making. Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 170–71 (2006) ("[P]roceduralism became the favored response to what some considered the 'nihilism' of legal realism."). For Legal Process theorists, "the particular result in a given case was far less important than the analytical tools used to justify the result." Ronald J. Krotoszynsk, Jr., *The New Legal Process:*

reflecting a more involved judiciary. Immigration and national security decisions emphasize, perhaps unexpectedly, a deeper relationship between concepts such as due process and the values of reason, justice, and procedural regularity that are common to the rule of law.

Moreover, *Mathews* appears part of a larger dialogue among the coordinate branches that avoids the types of fractious power grabs often associated with decision-making in these complex arenas. Rather than simply overruling the political branches outright, the judiciary has used due process as part of a broader incrementalist strategy and a mechanism for conversation regarding policy decisions. In that sense, one can understand the judiciary's use of *Mathews* as consistent with its application of *Chevron* and *Youngstown*[381]—as well as other procedural devices[382]—to bring the coordinate branches to some kind of agreement where the border and national security are concerned.

While a full account of the relationship between open-textured frameworks, judicial review, and legal process will be saved for future work, it is important to highlight how the judiciary's application of individuated approaches to immigration and national security cuts against the grain of realist accounts of judicial review over exceptional areas of law. Adrian Vermeule, for example, rejects the idea that open-textured tests of administrative law can enhance the rule of law, at least where national security is concerned.[383] He argues that administrative-law frameworks tend to be at best a weak form of protection for the rights of foreign nationals.[384] Because of institutional realities, such as the size and scope of the administrative state[385] and lawmakers' inability to perfectly

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Games People Play and the Quest for Legitimate Judicial Decision Making, 77 WASH. U. L.Q. 993, 993 (1999). On the legal process account, the judiciary could legislate through the grant of power inherent in the common law and the Constitution, but otherwise only decide discrete cases through reasoned argument. *Id.*

[381] *See* Joseph Landau, Chevron *Meets* Youngstown*: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1977 (2012) (noting that "recent national security decisions have been catalytic rather than preclusive, promoting clash, conversation, and dialogue within the political branches" and that "[t]hose decisions are remarkably consistent with the development of deference doctrines in the ordinary administrative law context, pointing to a vital interplay between the national security and domestic cases that highlights the vitality of inter-branch solutions to questions in both legal domains").

[382] *See* Landau, *Muscular Procedure*, *supra* note 65, at 700 (noting how judicial invocation of procedural law has sparked a "dialogue in the service of prompting substantive reform where the political branches already appear to have agreed on an untenable course of action").

[383] *See generally* Vermeule, *supra* note 9, at 1112–13 (discussing national security and military exceptions to the Administrative Procedure Act's coverage).

[384] *See* Vermeule, *supra* note 9, at 1112–13 (discussing examples of how the application of the Administrative Procedure Act has provided weak protections for foreign nationals).

[385] *Id.* at 1134 ("[A]djustable parameters . . . are the lawmakers' pragmatic response to the sheer size of the administrative state, the heterogeneity of the bodies covered by the APA, the complexity and diversity of the problems that agencies face . . . .").

predict when future emergencies will arise and what those emergencies will be,[386] statutes and legal standards must be flexible. But that flexibility will inevitably preclude review altogether in certain situations and, in others, allow courts to make judicial review a mere façade.[387] According to Vermeule, courts interpret these "adjustable parameters" by "dialing down" review—at least in national security cases—such that judicial review becomes more apparent than real. Vermeule flat-out rejects the possibility "that executive action arising from war or emergency should be governed by 'ordinary' administrative law, as opposed to some extraordinary law applicable during emergencies."[388]

Unlike the new and invigorated form of legal process reflective of current Supreme Court decisions,[389] Vermeule's argument appears to follow a realist methodology[390] by posing a testable hypothesis regarding the open-ended parameters of administrative law and then demonstrating the truth of that hypothesis.[391] And it reflects the realist sensibility that any appearance of reasoning apolitically and deductively from abstract principles to concrete rules is illusory[392] and that the personality of the judge, rather, must play some role in the outcome.[393]

National security law post-9/11 has been a fertile area for this type of neo-realist investigation. The Supreme Court has long held that courts ought to generally defer to the executive on matters of national security,[394]

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[386] *Id.*

[387] *Id.* at 1136.

[388] *Id.* at 1102.

[389] *Cf.* Abebe & Posner, *supra* note 9, at 508 ("The conflict with al Qaeda has generated . . . some cases that reflect a new legalist sensibility in tension with the old commitment to executive primacy.").

[390] A number of commentators have associated Vermeule's work with legal realism. *See, e.g.*, Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 103 (2009) ("Vermeule provides a highly sophisticated version of formalism, which gestures toward new realism. . . ."); *see also* Benjamin Kleinerman, *Book Review, The Executive Unbound: After the Madisonian Republic*, 90 TEX. L. REV. 943, 946 (2012) ("In a certain sense, Posner and Vermeule exemplify an endemic feature of the school of legal realism from which they emerge.").

[391] Legal Realists rejected the idea that law could be separated from politics and disputed the formalist aspiration toward "an autonomous and self-executing system of legal discourse." *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 193 (1992); *see also* Akhil Reed Amar, *Law Story: Hart and Wechsler's The Federal Courts and the Federal System*, 102 HARV. L. REV. 688, 693 (1989) ("According to the legal realists, adjudication was not, and could never be, wholly mechanical and apolitical.").

[392] *See* HORWITZ, *supra* note 391, at 200; *see also* Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 832 (2008) ("[Realists] believed that, much of the time, existing law did not compel particular outcomes, in the sense that the available sources would not require a rational and fair-minded judge to reach only one result.").

[393] *See* Miles & Sunstein, *supra* note 392, at 832 (discussing the impact of the personalities of judges on case outcomes).

[394] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (finding some "plenary" executive powers in foreign relations).

and scholars have sought to quantify whether, when, and to what extent courts have in fact adopted a regime of deference to the executive post-9/11. These investigations have looked at, inter alia, invalidation rates, party affiliation, panel effects,[395] the long-term impact of wartime jurisprudence on rights protections,[396] and the types of remedies courts have issued in the national security context.[397] Despite this attention, empirical, data-driven accounts of judicial behavior in the modern national security context have been rare; discussion has largely centered on normative questions.[398] Applied to national security, the realist inquiry tends to take the position that courts should increase their deference to executive decision-making during crises.[399]

Yet the Supreme Court's twenty-first century decisions—from *St. Cyr* through *Kucana* and from *Rasul* through *Boumediene*—provide an important counterweight to the realist thesis. Across all of these cases, the Court refused to dial down its review, despite the government's protestations,[400] and asserted a larger role in resolving questions regarding the rights of foreign nationals in the immigration and national security contexts. The Court's habeas rulings strike at the very heart of plenary political branch powers doctrine by construing the reach of the habeas writ very broadly, even if the scope of their review is arguably narrow. In both the national security and immigration contexts, courts have engaged in a creative process of interpretation to bring statutory provisions in line with broader notions of rationality and justice.[401] Cases such as *St. Cyr*, *Zadvydas*, *Hamdan*, and *Boumediene* speak of a conversation with the political branches in which coordinate institutions have overlapping areas of expertise relevant to national security and immigration matters. This

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[395] Cass Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269, 269.

[396] Lee Epstein et al., *The Supreme Court During Crisis*, 80 N.Y.U. L. REV. 1, 1 (2005).

[397] Aziz. Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 234–35.

[398] *Id.* at 225. *See generally* Abebe & Posner, *supra* note 9 (laying out the normative case for executive primary in foreign affairs).

[399] *See* Abebe & Posner, *supra* note 9, at 547–48.

[400] The government's brief in both cases urged deference to the executive branch prerogative. In *St. Cyr*, the government rejected the premise that "the Great Writ requires a judicial forum for an alien to present the claim that he has a 'right' to be considered for an exercise of a power that Congress has placed in the discretion of the Attorney General to dispense with the deportation of an alien." *See* Brief for Petitioner at 27, INS v. St. Cyr, 533 U.S. 289 (2001) (No. 00-767). The government argued that its discretion in such cases was "unfettered," precluding the judiciary from exercising any role. *Id.* at 28. The government argued similarly in *Rasul* that Guantánamo Bay was a veritable legal black hole beyond the Court's power. Brief for Respondents at 13–14, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

[401] *Cf.* William N. Eskridge, Jr., *Interpretation of Statutes*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 200, 206 (Dennis Patterson ed., 1996) (discussing, in the context of legislation theory, a version of "process progressivism" defined by "creative law-making by courts and agencies . . . to ensure rationality and justice in law").

reflects a vision more akin to legal process, which stresses "the importance of dialogue or conversation as the means by which innovative lawmaking can be validated in a democratic polity and by which the rule of law can best be defended against charges of unfairness or illegitimacy."[402] While the unfolding of that process is still taking shape, the convergence toward individuated analyses highlights the possibility of a shared approach among the collective branches that could pave the way toward more durable immigration and national security policies in the future.

VI. CONCLUSION

The *Mathews*ization of immigration and national security may be a way station between the constraining exceptionalist doctrines of the past and the law of the future. Nevertheless, *Mathews*' transplantation has brought important changes to the formal inquiries that generally made it impossible to take the rights of foreign nationals seriously. The judiciary's individuated approach, and its enhanced competence vis-à-vis the political branches, arguably exemplifies a new phase in the due process revolution and the start of a renewed intersection among the collective branches, leading to stronger interbranch partnerships in the collective shaping of subsequent policies.

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[402] *Id.*