

Judicial Review in Immigration Law: A Graduated Approach

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Introduction

Every sovereign nation possesses the authority to determine who may enter its territory. Without that power, borders lose their legal meaning, and governments lose one of their most fundamental responsibilities. However, immigration law is unique because it concerns non-citizens who often possess the fewest political rights while facing some of the government's most severe exercises of power. A non-citizen denied entry may lose an opportunity, but when detained or deported, they may lose liberty, family, or even life. The law should recognize the constitutional difference and assign stricter judicial review to the latter.

For more than a century, American courts have struggled to define the relationship between national sovereignty and individual rights in immigration law. The political branches have traditionally received broad deference in deciding whether to admit or exclude someone, particularly when national security or foreign affairs are at stake. Simultaneously, the Constitution guarantees that no person, rather than no citizen, shall be deprived of liberty without due process of law. The challenge, therefore, is determining when one shall yield to the other.

This essay argues that courts should resolve this tension by calibrating judicial review according to the degree of coercive power exercised over the individual. Decisions concerning initial admission into a country deserve substantial deference because they lie at the core of national sovereignty. However, once the government begins excluding, removing, or deporting an individual subject to the country's legal authority, courts should accordingly ensure that the non-citizen receives meaningful procedural fairness,

especially during imprisonment. National security in grave instances may justify exceptional immigration measures only if they are supported by substantial evidence, proportionate to the threat, while still remaining subject to meaningful judicial review.

Sovereignty Justifies Deference at the Border

The authority to regulate immigration in the executive branch has long been recognized as an inherent attribute of sovereignty. Courts are institutionally ill-equipped to make diplomatic judgments or evaluate rapidly changing security threats. The Supreme Court, in *United States ex rel. Knauff v. Shaughnessy* (1950), entrusted the exclusion of non-citizens primarily to Congress and the executive, stating “whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned” (338 U.S. at 544). Additionally, the Court stated that decisions regarding admission often involve foreign policy and security considerations beyond judicial competence, better suited to accountable officials than unelected judges.

More recently, the Court reaffirmed this principle in *Trump v. Hawaii* (2018), where it upheld presidential restrictions on entry from several countries by concluding that the policy was justified by a facially legitimate national security threat. Such deference is mostly appropriate because admission decisions concern people who remain outside the nation’s constitutional community. Judicial restraint’s purpose is to preserve the executive branch’s democratic accountability while respecting its institutional expertise in foreign affairs. However, Hiroshi Motomura has argued that immigration law’s “plenary power” doctrine functions as a form of constitutional exceptionalism, with courts having quietly applied greater legal protections through statutory interpretation rather than open overruling (Motomura, “Immigration Law After a Century of Plenary Power,” 545).

Constitutional Protections Increase with Governmental Control

The constitutional balance changes when the government extends its authority over a non-citizen already present in the United States. Deportation, removal proceedings, and exclusion hearings have become legal actions directed at identifiable individuals whose lives, families, and futures are affected. As governmental power becomes increasingly coercive, greater risks of abuse and arbitrary violations in liberty prompt judicial review, in the form of due process, to become more demanding.

For instance, in *Landon v. Plasencia* (1982), the Supreme Court held that a lawful permanent resident returning from abroad was entitled to due process during exclusion proceedings because of preexisting developed ties to the United States. Firstly, it shows how “his constitutional status changes accordingly” (459 U.S. at 32) as ties to the country develop. Secondly, it highlights how, even though the government retained authority over admission decisions, they could not eliminate basic procedural fairness once an individual’s liberty interests were implicated.

This reasoning follows from the Fifth Amendment, which protects every “person” rather than only citizens. The Constitution extends certain protections to foreigners. Although non-citizens may not possess every constitutional right enjoyed by citizens, they remain persons entitled to fundamental fairness when the government exercises coercive authority over them.

The importance of procedural protections becomes even clearer because immigration proceedings often involve extraordinarily high stakes for the person. Removal may separate families, return refugees to persecution, or permanently sever individuals from their social communities. These significant consequences demand independent judicial review capable of identifying legal errors and preventing arbitrary decision-making.

Meaningful judicial review does not involve courts exerting their own political perspective by choosing the immigration policy. Rather, the only role of courts is to

ensure that the political branches exercise their lawful authority according to constitutional rules.

Physical Liberty Requires the Strongest Judicial Protection

No governmental action is more coercive than physical imprisonment. At that point, immigration status must not halt the judiciary's immediate responsibility to protect and uphold individual liberty. In *Zadvydas v. Davis* (2001), for example, two non-citizens Kestutis Zadvydas and Kim Ho Ma could not be deported due to the lack of countries accepting them. The government argued that it had authority to detain non-citizens indefinitely after removal orders because deportation still remained theoretically possible. The Court rejected it, holding that indefinite imprisonment without a realistic prospect of deportation "would raise a serious constitutional problem" (533 U.S. at 690). It interpreted federal immigration law to have reasonable limits because prolonged detention without realistic justification threatened the Due Process Clause.

Boumediene v. Bush (2008), although arising outside traditional immigration law, reinforces the same constitutional principle. After the September 11 attacks, the United States captured and imprisoned hundreds of suspected terrorists overseas at the Guantanamo Bay detention camp, arguing that because they were non-citizens and held outside the United States, they had no constitutional right to ask for a court review regarding the lawfulness of their detention. The Court held that non-citizens detained at Guantanamo Bay retained the constitutional privilege of habeas corpus and the political branches lack the power "to switch the Constitution on or off at will" (553 U.S. at 765), as Justice Anthony Kennedy warned. Judicial oversight still remains essential whenever the government exercises extraordinary coercive power, because imprisonment creates the greatest risk of irreversible injustice.

National Security Requires Evidence, rather than Blind Deference

Supporters of expansive executive authority such as Eric Posner and Adrian Vermeule contend that immigration decisions differ from ordinary constitutional disputes because national security requires speed, secrecy, and flexibility, in which courts are institutionally ill-suited to second-guess security judgements—thus, “the executive acts, Congress acquiesces, and courts defer” (Posner and Vermeule, *Terror in the Balance*, 3). Intelligence information may be classified, threats may evolve rapidly, and judges lack institutional expertise, so they should not second-guess every judgment made by national security officials.

However, deference cannot become abdication, as history demonstrates that governments often invoke national security during periods of fear only for later generations to recognize that constitutional protections were unnecessarily sacrificed. After Pearl Harbor, Executive Order 9066 authorized the relocation of Japanese Americans due to national security concerns; when Fred Korematsu refused to comply, his challenge reached the Court in 1944. The Supreme Court upheld the decision, later known as one of its worst decisions. Justice Robert Jackson warned that a decision granting unchecked emergency power “lies about like a loaded weapon ready for the hand of any authority” (323 U.S. at 246). Its acceptance of sweeping executive claims based on military necessity has now become synonymous with excessive judicial deference.

In modern day law, courts should require that extraordinary immigration measures satisfy three conditions. First, they must rest upon credible evidence rather than speculation or generalized suspicion. Second, they must be proportionate to the specific threat being addressed rather than sweeping broadly across entire populations. Third, they must remain subject to independent judicial review capable of testing the factual basis for governmental action. Such a framework would preserve national security and constitutional governance—recognizing that judges should respect executive expertise while, at the same time, refusing to abandon the responsibility for the judicial branch to enforce constitutional limits.

Conclusion

When officials determine who may enter the country, courts should generally defer to the political branches. When the government initiates removal proceedings or exclusion hearings against individuals already subject to its authority, courts should enforce meaningful procedural fairness. When the government detains a person or otherwise deprives them of liberty, courts should apply the highest constitutional scrutiny. National security may justify exceptional immigration measures, only when supported by evidence, tailored to genuine threats, and reviewed by an independent judiciary.

The Constitution was written to restrain governmental power during temptations to expand. Immigration law must not be exempt to that principle. A nation demonstrates the strength of its sovereignty by preserving constitutional principles when confronting security and immigration. Courts fulfill their role by ensuring that the exercise of sovereign power never escapes the rule of law.

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