Brooklyn Law Review

Volume 88 | Issue 3 Article 1

4-23-2023

An Unreasonable Presumption: The National Security/Foreign Affairs Nexus in Immigration Law

Anthony J. DeMattee

Matthew J. Lindsay

Hallie Ludsin

An Unreasonable Presumption

THE NATIONAL SECURITY/FOREIGN AFFAIRS NEXUS IN IMMIGRATION LAW

Anthony J. DeMattee,[†] *Matthew J. Lindsay,*[††] *and Hallie Ludsin*[*]

INTRODUCTION

For well over a century, immigration governance has occupied a constitutionally unique niche within American public law, where it is subject to substantially weaker constitutional constraints than apply in virtually every other context. When the federal government banishes a noncitizen from the country or detains her for months or years at a time, that noncitizen does not enjoy the same right to due process of law to which constitutional "persons" otherwise are entitled.[1] This largely unbounded federal authority was a relatively late historical innovation. It was not until the 1889 *Chinese Exclusion Case* that the Supreme Court characterized the federal immigration power—until then, an instance of Congress's authority to regulate commerce with foreign nations—as an "incident of sovereignty belonging to the government of the United States."[2]

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† Data Scientist, Democracy Program, The Carter Center.

†† Associate Professor, University of Baltimore School of Law.

* Visiting Professor of Practice and Senior Fellow, Center for the Study of Law and Religion, Emory University.

We would like to thank Gracie Willis, Rebecca Cassler, Anwen Hughes, Mich Gonzales and the immigration practitioners who chose to remain anonymous, for so graciously answering our questions on immigration proceedings. Additional thanks go to Gracie Willis and Rebecca Cassler for reading a draft of our article. All mistakes are those of the authors.

[1] The Due Process and Equal Protection Clauses protect "person[s]" without regard to citizenship. *See* U.S. CONST. amends. V, XIV. The Supreme Court has long acknowledged as much when reviewing state laws discriminating on the basis of alienage. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (observing that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality").

[2] Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 595–99, 609 (1889).

With Congress's authority thus untethered from any enumerated power, and in light of what contemporaries characterized as the "Oriental invasion" then underway in the American West, the Court reasoned that Congress's efforts to secure the nation against "foreign aggression and encroachment" must be "conclusive upon the judiciary."[3]

Although the Court's immigration opinions have long since ceased referring to invading foreign "races," its underlying warrant for extraordinary judicial deference to Congress or the executive branch—the presumed nexus between immigration, on the one hand, and national security and foreign affairs, on the other—endures to this day.[4] As the Court explained in 2003, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."[5] Critically, the Court invokes this national security/foreign affairs (NS/FA) rationale for judicial deference regardless of whether the specific regulation or enforcement action under review has any plausible bearing on those interests. In the case just quoted, *Demore v. Kim,* for example, the removable noncitizen was a thrice-convicted

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[3] *Id*. at 595, 606.

[4] Immigration advocates, scholars, and more than a few Supreme Court Justices have long criticized immigration law's constitutional exceptionalism, decried the injustices that it produces, and called for more robust constitutional guarantees for noncitizens. For a small sample of the scholarly criticism, see, e.g., ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002); T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9 (1990); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 225 (1984); Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1 (2010); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 3, 82 (1992) (noting the "singularity" of immigration); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999) (defining "immigration exceptionalism as the view that immigration and alienage law should be exempt from the usual limits on government decisionmaking"); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 13 (describing the "immigration anomaly"); PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 19 (1998) (characterizing immigration as a legal "maverick" and "wild card"). On judicial criticism of "immigration exceptionalism," see *infra* notes 75–81 and accompanying text.

[5] Demore v. Kim, 538 U.S. 510, 522 (2003) (quoting Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976)); *see also* Galvan v. Press, 347 U.S. 522, 530 (1954) (citing the purportedly inextricable connection between immigration regulation and "basic aspects of national sovereignty, more particularly our foreign relations and . . . national security"). For further analysis of *Demore v. Kim*, see *infra* notes 111–123 and accompanying text. On the Court's indiscriminate deference in immigration cases based on the national security/foreign affairs rationale, see Matthew J. Lindsay, *Disaggregating "Immigration Law*,*"* 68 FLA. L. REV. 179, 187–93 (2016).

teenage petty criminal who, the government readily conceded, posed no threat to the public.[6] Unsurprisingly, presidential administrations from both parties routinely invoke the litany of sovereignty, security, and foreign affairs—policy arenas in which the prerogative of the Executive traditionally is at its maximum—as a warrant for broad judicial deference in immigration matters.[7]

This article is not the first to challenge the categorical presumption that immigration lawmaking and enforcement implicates national security or foreign affairs. Indeed, observers familiar with the American immigration system—from the issuance of visas to the review of asylum applications to the removal process—understand that most immigration cases do not touch on sensitive questions of national security or foreign policy.[8] If the presumed NS/FA nexus is misplaced, scholars and advocates have asked, why should a judicial posture adapted to exceptional circumstances apply to the great majority of immigration cases involving decidedly unexceptional issues such as unlawful entry and visa overstays?[9] Until now, however, the factual premise of that challenge has been largely conjectural, resting on a general impression, perhaps informed by experience

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[6] *Demore*, 538 U.S. at 541. In *Demore*, the Court upheld the mandatory six-month detention of Hyung Joon Kim, whose three criminal convictions when he was eighteen and nineteen years old—two for shoplifting, the third for breaking into a tool shed with some high school friends—made him an "aggravated felon[]" and thus removable under federal law. *Id.* at 510. Although the Due Process Clause ordinarily guarantees a bond hearing to persons detained by the government, that guarantee did not apply to Kim because he was a removable noncitizen. *Id.* at 511–12. Or consider *Mathews v. Diaz*, a touchstone of modern constitutional immigration law. There, the Court rejected an equal protection challenge to the denial of federal welfare benefits to three elderly noncitizens on the ground that they could not satisfy a five-year residency requirement. Mathews v. Diaz, 426 U.S. 67 (1976). Because "the relationship between the United States and our alien visitors . . . may implicate our relations with foreign powers," the Court explained, the regulation of immigration had been "committed to the political branches of the Federal Government," and "dictate[d] a narrow standard of [judicial] review." *Id.* at 81–82.

[7] *See, e.g.*, Brief for Respondent at 25, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071), 2000 WL 1868100, at *26 (arguing that judicial deference to the political branches in immigration matters "affords Congress the practical latitude it needs to fulfill its responsibilities for national security, foreign affairs, and nation-building"); Brief for Respondents at 17, Arizona v. United States, 567 U.S. 387 (2012) (No. 11-182) (arguing that the federal government possesses exclusive authority to regulate immigration because US "policy toward aliens is vitally and intricately interwoven with . . . the conduct of foreign relations" (internal quotation marks omitted) (omission in original) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952)).

[8] *See infra* Section I.B.

[9] *See, e.g.*, Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1832–65 (2007); Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Immigration*, 91 MINN. L. REV. 1369, 1396–1405 (2007); Lindsay, *supra* note 5, at 233–35.

as advocates, officials, or scholars, that most immigration cases do not implicate the kinds of governmental interests that warrant extraordinary judicial deference.

This article is the first to establish empirically that extraordinary judicial deference in immigration cases rests on a fiction. Using data available from the Executive Office of Immigration Review (EOIR), we analyzed the case files of 6.1 million removal cases adjudicated in immigration court between 1996 and 2021.[10] Our analysis of the approximately 9.7 million charging codes entered in those cases indicates that the government identified a national security or foreign affairs issue as a basis for removal in just .013 percent of cases.[11] That means that,

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[10] Because the EOIR makes available data from cases in which DHS has issued a formal charging document—the Notice to Appear (NTA) in immigration court—our data does not reflect certain "nonjudicial" or "administrative" removals in which DHS never files a formal charge. Nonjudicial removals fall into three primary categories. First, arriving noncitizens who seek entry into the United States by misrepresentation or who otherwise lack valid documentation are eligible for "expedited removal" by a Customs and Border Patrol (CBP) officer. Second, resident noncitizens who are not lawful permanent residents (LPRs) and are convicted of an aggravated felony are subject to administrative removal. Noncitizens in these first two categories do not receive an NTA containing formal removal charges and thus do not appear before an immigration judge (IJ). *See* 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(7); 8 U.S.C. § 1228(b). Third, noncitizens who reenter the United States unlawfully after having been removed under a prior removal order are subject to "reinstatement of removal," and thus removable by DHS without the involvement of an IJ. 8 U.S.C. § 1231(a)(5). Note, however, that our data will capture the prior removal order. Noncitizens subject to nonjudicial removal typically are detained until the removal order is executed. The INA provides narrow grounds for review by an IJ. Marc R. Rosenblum & Doris Meissner, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement*, MIGRATION POL'Y INST. 14 (2014). In recent years, nonjudicial removals have comprised a large majority or removals. In 2020, for example, expedited removals accounted for 41 percent of all removals, while reinstatement of removal accounted for 40 percent. Alan Moskowitz & James Lee, OFF. IMMIGR. STAT., U.S. DEP'T HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2020 5 (2022), https://www.dhs.gov/sites/default/files/2022-02/22_0131_plcy_immigration_enforcement_actions_fy2020.pdf [https://perma.cc/SSK2-EZTL]. On DHSs radically expanded use of nonjudicial "shadow proceedings," see Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017). Although our data thus necessarily omits most expedited removals and most administrative removals of certain aggravated felons, there is no reason to suspect that such removals contain a higher percentage of NS/FA issues than cases where DHS issues formal charges.

[11] The immigration court docket covers "removal, deportation, exclusions, asylum-only, and withholding- [of removal] only cases." EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS NEW CASES AND TOTAL COMPLETIONS 1 n.1 (2022), https://www.justice.gov/eoir/page/file/1060841/download [https://perma.cc/8JRA-GNCA]. "Removal" replaced "deportation" and "exclusion" as of April 1, 1997. EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., IMMIGRATION COURT PRACTICE MANUAL § 7.2 (2021), https://www.justice.gov/eoir/reference-materials/ic/chapter-7/2 [https://perma.cc/W9VX-Z4BB]. The vast majority (about 96 percent) of immigration court cases are removal cases. Because removal cases require DHS to charge a noncitizen as removable, they appear in our data. As a result, our data does not encompass the entire universe of cases adjudicated in immigration court. With that said, a significant portion of the remaining 4 percent of cases either lead to removal charges or are the result of a prior order of removal, and

by the government's own reckoning, only thirteen of every hundred thousand immigration cases, or one out of every 7,692, implicate national security or foreign affairs. In short, the basic warrant for extraordinary judicial deference in immigration cases, recited for generations with near-liturgical uniformity by Solicitors General and Supreme Court Justices, is demonstrably false.[12]

These empirical findings have important implications for the future of judicial review in immigration cases. If the proportion of cases that even purportedly implicates national security or foreign affairs is, as our data indicates, vanishingly small, it makes little sense for this exceedingly rare class of cases to dictate the standard of judicial review for the 99.987 percent of immigration cases that do not involve those exceptional governmental interests.[13] Instead, reviewing courts should approach immigration law for what it is: a miscellany of statutes, regulations, and enforcement actions concerning admissibility, civil violations of immigration law, the removal consequences of criminal convictions, labor, public health and welfare and—very infrequently—foreign affairs or national security. Under such an approach, the vast majority of immigration-enforcement actions would be governed by the same substantive, judicially enforceable norms that apply when the government interferes with an individual's liberty outside of the immigration context—for example, by seeking to detain a criminal suspect or mentally ill person. The government would retain broad latitude in immigration cases involving *bona fide* national security and foreign affairs interests, but it would no longer enjoy the categorical judicial deference that it currently receives as a matter of course.[14]

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therefore do appear in our data. *See infra* note 127 and accompanying text. For a fuller explanation of our methodology and its limits, see *infra* Part II.

[12] *See infra* Section I.C.2.

[13] *See infra* Table 1.

[14] For an elaboration of this framework, see Lindsay, *supra* note 5, at 239–59; David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 92–100, 137 (2001) (proposing a "clear and candid system of graduated [constitutional] protections" for noncitizens). Numerous Supreme Court justices, typically in dissent, have suggested their openness to such a framework. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 549–58 (2003) (Souter, J., dissenting) (advocating heightened constitutional scrutiny of the government's lengthy detention of removable noncitizens); Harisiades v. Shaughnessy, 342 U.S. 580, 598–99 (1952) (Douglas, J., dissenting) (arguing that because a noncitizen "who is assimilated in our society" is a "person" within the meaning of the Due Process Clause, he must be "treated as a citizen so far as his property and his liberty are concerned"); Shaughnessy v. Mezei, 345 U.S. 206, 225 (1953) (Jackson, J., dissenting) (arguing that if the procedures by which a person is detained indefinitely "would be unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien").

Part I of this article analyzes the NS/FA rationale for extraordinary judicial deference in immigration cases, including its origin in the anti-Chinese cases of the late-nineteenth century and the more sanitized form that it takes today. Part II presents empirical data demonstrating that over the past twenty-six years, the government has asserted a national security or foreign affairs interest in approximately .013 percent of immigration cases. Part III argues that, in light of our empirical findings, extraordinary judicial deference is unwarranted in the vast majority of immigration cases.

I. THE NS/FA RATIONALE FOR EXTRAORDINARY JUDICIAL DEFERENCE IN IMMIGRATION CASES

The US Constitution empowers Congress to "establish a[] uniform Rule of Naturalization" but otherwise is silent on the federal government's authority to regulate immigration.[15] At first blush, it may seem curious that a fledgling nation that actively encouraged foreign migration would neglect to address this critical aspect of national self-definition in a basic charter of government that is otherwise highly attentive to the allocation of power. The Constitution's silence is understandable, however, when we consider that, at the time of the Founding and for nearly a century thereafter, American lawmakers, executive officials, and judges did not conceive of immigration per se as a constitutionally discrete object of governance.[16] In fact, perhaps the most remarkable feature of early immigration lawmaking is how decidedly unexceptional it was. After briefly reviewing that early history, this Part describes the Supreme Court's creation of a constitutionally exceptional federal immigration power at the end of the nineteenth century.

A. Historical Origins of the NS/FA Nexus: The Anti-Chinese Cases

For the first century of the nation's history, Congress neither defined eligibility for admission nor governed noncitizens' manner of entry. Instead, the seaboard states, particularly New York, Massachusetts, California, Louisiana, and South Carolina, "administered the landing of immigrants [and] determined the rights and privileges of foreigners residing

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[15] U.S. CONST. art. I, § 8, cl. 4.

[16] *See infra* notes 17–19 and accompanying text.

within [their] territory."[17] Throughout this period, there was broad consensus that the regulatory challenges and policy interests implicated by the presence of foreigners—economic dependency, crime, the attraction of laborers and settlers, or the manner and timing of political incorporation—were fundamentally local ones that lay squarely within the states' traditional police powers.[18] Even after the Supreme Court, in 1849, began to tilt the balance of regulatory authority in favor of Congress, the states retained and continued to exercise broad authority over immigration, so long as state regulations did not "collide" with federal policy.[19]

Following the Civil War, many lawmakers and executive officials sought to imbue immigration policy with the same ethos of universal freedom and equality that guided Reconstruction-era Republicans' broader effort to remake American economic and political life.[20] Many championed a universal "right of expatriation" that included an attendant right to naturalize as US citizens.[21] In the weeks following the ratification of the Fourteenth Amendment, Congress enacted the Expatriation Act of 1868, its first formal affirmation of an inherent human right to dissolve the bonds of political allegiance to one's country of birth.[22] The Act proclaimed that:

> the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and . . . in the recognition of this principle this

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[17] Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 775 (2013); *see* Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, 99 J. AM. HIST. 1092 (2013); Anna O. Law, *Lunatics, Idiots, Paupers, and Negro Seamen—Immigration Federalism and the Early American State*, 28 STUD. AM. POL. DEV. 107, 108 (2014); Matthew J. Lindsay, *Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law*, 17 YALE J.L. & HUMAN. 181, 195–98 (2005); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRATION, BORDERS, AND FUNDAMENTAL LAW (1996); MICHAEL SCHOEPPNER, MORAL CONTAGION: BLACK ATLANTIC SAILORS, CITIZENSHIP, AND DIPLOMACY IN ANTEBELLUM AMERICA (2019).

[18] *See* Lindsay, *supra* note 17, at 775–76. Sectional conflict over slavery likewise weighed heavily in favor of subnational immigration law. Proslavery states' rights advocates denied that immigrants were properly understood as "articles of commerce" precisely because that label might imply that Congress had the authority to regulate other human articles of commerce, including enslaved people. *Id.* at 787–88; *see also* Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 793–818 (1996).

[19] Passenger Cases, 48 U.S. 283, 360, 464 (1849).

[20] LUCY E. SLAYER, UNDER THE STARRY FLAG: HOW A BAND OF IRISH AMERICANS JOINED THE FENIAN REVOLT AND SPARKED A CRISIS OVER CITIZENSHIP 68–69, 139 (2018).

[21] *Id.* at 6.

[22] Expatriation Act of July 27, 1868, ch. 249, 15 Stat. 223, 223.

> government has freely received emigrants from all nations, and invested them with the rights of citizenship.[23]

The day before Congress approved the Expatriation Act, the Senate ratified Burlingame Treaty between the United States and China.[24] Adopted with an eye toward transpacific commercial expansion, the Treaty recognized the "inherent and inalienable right of man to change his home and allegiance" and promised to extend to each other's citizens the same privileges and immunities as "citizens . . . of the most favored nation."[25] Over the next four years, the United States entered several such bilateral "naturalization treaties," in which the United States and its treaty partners affirmed an inalienable human right to migrate.[26]

That Reconstruction era ethos of universal mobility soon faded, as Congress began to stake out a broad federal domain of immigration policymaking and administration. Its purpose was not to promote migration, however, but to restrict certain "undesirable" classes of migrants. This trend was animated in large part by a ferocious anti-Chinese movement sweeping through American politics.[27]

The Supreme Court readily accommodated this federalization of American immigration law, striking down several existing state regulations and upholding the new national legislation.[28] As it cemented federal supremacy in immigration

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[23] *Id.*

[24] Burlingame Treaty, U.S.-China, July 28, 1868, 16 Stat. 739, 740.

[25] *Id.* Notwithstanding the ostensibly universal right to migrate and naturalize reflected in both the Act and the Treaty, under the Naturalization Act of 1790, which restricted eligibility for naturalization to "free white persons," Chinese and other nonwhite migrants remained ineligible for naturalized citizenship until 1952. Naturalization Act of 1790, ch. 3, 1 Stat. 103, 103 (repealed 1795); Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.). On the right of expatriation in the Reconstruction Era, see, e.g., Matthew J. Lindsay, *The Right to Migrate*, 27 LEWIS & CLARK L.R. (forthcoming 2023); SALYER, *supra* note 20, at 140–210.

[26] *See* SALYER, *supra* note 20, at 193–210.

[27] *See* Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974) (prohibiting the immigration of prostitutes, contract laborers, and convicts from "China, Japan, or any Oriental country"); Immigration Act of 1882, ch. 376, 22 Stat. 214 (transferring authority over the landing of immigrants from individual states to the United States Treasury Department); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1843) (prohibiting the entry of Chinese laborers into the United States for a period of ten years); Contract Labor Act of 1885, ch. 164, 23 Stat. 332 (repealed 1952) (prohibiting the immigration of any foreigner who had entered into an employment contract with an American employer prior to departing his country of origin); Immigration Act of 1891, ch. 551, § 7, 26 Stat. 1084 (now 8 U.S.C. § 1182) (transferring sole authority to administer immigration regulations to the federal government and creating the Office of the Commissioner of Immigration and Naturalization under the authority of the Secretary of the Treasury).

[28] *See* Henderson v. Mayor of New York, 92 U.S. 259, 274–75 (1875) (striking down state head taxes); Chy Lung v. Freeman, 92 U.S. 275, 278, 281 (striking down a California statute empowering a state immigration commissioner to require a bond for

matters, the Court relied entirely on Congress's constitutionally enumerated power "to regulate Commerce with foreign Nations."[29] European immigration to the United States had "become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home," the Court explained in 1875.[30] Recast as "the business of bringing foreigners to [the United States]," as the Court characterized it in 1884, immigration *qua* immigration became a branch of commerce with foreign nations and thus the exclusive province of Congress.[31]

In the 1889 *Chinese Exclusion Case*, however, the Court untethered immigration regulation from the Commerce Clause or any other enumerated power and endowed Congress and the Executive with a vast and unrestrained authority to exclude or expel noncitizens. Understanding the regulatory upheaval set in motion by the case requires a brief discussion of its political and legal background.

In December 1878, Congress sought to radically restrict Chinese immigration by limiting to fifteen the number of Chinese passengers that could be transported to a US port on any "one voyage."[32] President Hayes vetoed the bill on the ground that it violated the Burlingame Treaty, but promptly sent a commission to China to renegotiate that agreement.[33] The Senate ratified the revised Treaty in 1880.[34] It permitted the United States to "regulate, limit, or suspend," though "not absolutely prohibit" the entry of Chinese laborers into the United States.[35] In a provision that was critical to the *Chinese Exclusion Case*, however, it also affirmed that Chinese laborers already present in the country "shall be allowed to go and come of their own free will."[36] Less than two years later, Congress passed and the President signed the Chinese Exclusion Act of 1882 (the Exclusion Act), the first statute excluding a class of

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immigrant women determined to be "lewd and debauched"); Edye v. Robertson & Cunard S.S. Co. (*The Head Money Cases*), 112 U.S. 580, 599 (1884) (upholding the "head tax" provision of the federal Immigration Act of 1882).

[29] U.S. CONST. art. I, § 8, cl. 3.

[30] *Henderson*, 92 U.S. at 270.

[31] *Head Money Cases*, 112 U.S. at 595. Further, the foreign commerce rationale would enable the United States to act as a single, unified sovereign in relation to foreign governments. A state law that interfered with immigration, the Court explained, "concern[s] the exterior relation of this whole nation with other nations and governments," and thus "may properly be called international." *Henderson*, 92 U.S. at 273.

[32] Fifteen Passengers Bill of March 1, 1879, 45th Cong., 2d Sess., Cong. Rec. 2276.

[33] ANDREW GYORY, CLOSING THE GATE: RACE POLITICS, AND THE CHINESE EXCLUSION ACT 166–67 (1998).

[34] Immigration Treaty of 1880, U.S.-China, arts. II, Nov. 17, 1880, 22 Stat. 827.

[35] *Id.*

[36] *Id.*

migrants from the United States on the basis of race or national origin.[37] It barred the entry of Chinese laborers for a period of ten years and prohibited Chinese laborers present in the United States ninety days before the passage of the Exclusion Act from returning unless they obtained a certificate of identification prior to departure.[38] Congress amended the statute in 1884 to provide that the certificate was the "only evidence permissible to establish [a] right of re-entry."[39]

Initially, the federal courts sought to blunt some of the most severe injustices inflicted by the Exclusion Act. Most importantly, the Supreme Court rejected the government's policy of excluding Chinese laborers who had lived in the United States and then departed without a certificate *prior to* the Exclusion Act's adoption. Because the Burlingame Treaty guaranteed to such laborers "the right[] of free ingress and egress," the Court declined "to assume that Congress intended to violate the stipulations of a treaty, so recently made with the government of another country."[40] To hold otherwise, it declared, would compromise "the honor of the government and people of the United States."[41] In short, however extraordinary the Exclusion Act may have been as a question of national immigration policy, it was unexceptional as an object of judicial review, entitled to no more solicitude than an ordinary treaty.

Despite the Court's refusal in the case just discussed to assume that Congress intended to supersede the Burlingame Treaty, just five years later the *Chinese Exclusion Case* transformed immigration governance from an unremarkable instance of the commerce power to an extraconstitutional cousin

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[37] Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1843).

[38] *Id.*

[39] An Act to amend an act entitled "An act to execute certain treaty stipulations relating to Chinese approved May sixth eighteen hundred and eighty-two," ch. 220, 23 Stat. 115 (1884). "To amend an act entitled 'An act to execute certain treaty stipulations relating to Chinese,' approved May sixth eighteen hundred and eighty-two." An Act of July 5, 1884, Pub. L. No. 28-220. 23 Stat. 115, 116. The amendment was a response to the creation by federal judges in San Francisco of a broad set of exemptions to the certificate requirement. *See* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 18–20 (1995).

[40] Chew Heong v. United States, 112 U.S. 536, 539, 543 (1884).

[41] *Id.* at 540. Chew Heong, the petitioner, was a Chinese laborer who first arrived in San Francisco on November 17, 1880 and remained until June 18, 1881, when he departed for Honolulu. During his absence, Congress enacted the 1882 Exclusion Act and the 1884 amendment. When Chew Heong sought readmission to the United States in September of 1884, he was denied entry on the ground that he lacked the certificate required by laws adopted after he had departed the country. *Id.* at 539–40. The Court rejected the government's "supposition" that Congress had intended to make the "right to go from and come to the United States" guaranteed by the amended Treaty "depend upon the performance of conditions [that were] physically impossible to perform." *Id.* at 554–55 (internal citation omitted).

of the war power that operated unfettered by judicially enforceable constitutional constraints.[42] The petitioner, Chae Chan Ping, had lived in San Francisco for twelve years when, in June of 1887, he departed for an extended sojourn to China. Before leaving, he acquired the certificate of reentry required by the Exclusion Act. While he was abroad, Congress adopted the Scott Act, voiding all existing certificates and prohibiting any Chinese laborer who had resided in the United States and subsequently departed from ever returning. When Chae Chan Ping arrived at the port of San Francisco eight days later, he was denied entry on the ground that his certificate "had been annulled, and his right to land abrogated."[43] His legal challenge contended that his exclusion violated the Burlingame Treaty's "most favored nation" provision, including the right of Chinese subjects "to go and come of their own free will."[44] The Court ultimately disposed of that basic question in a single, apparently legally uncontroversial paragraph. Although Congress's nullification of the petitioner's certificate did, indeed, contravene terms of the Treaty, it reasoned, "the last expression of [Congress's] sovereign will must control."[45] In other words, to the extent that the petitioner's treaty-based right to "go and come" conflicted with Congress's nullification of his reentry certificate, that right had been abrogated by statute.[46] This was hardly a dispute that invited, let alone required, a wholesale reconstruction of the federal immigration power.

Yet that is exactly what the Court proceeded to do. Justice Stephen Field's unanimous opinion interwove then-familiar anti-Chinese tropes with the foreign affairs and national security themes that continue even today to justify immigration law's constitutional exceptionalism. Justice Field famously explained how Chinese immigrants' social insularity

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[42] *Chinese Exclusion Case*, 130 U.S. 581, 606 (1889).

[43] *Id.* at 582.

[44] *Id.* at 596–97 (quoting Burlingame Treaty, *supra* note 24, Art. II). Chae Chan Ping affirmed the nation's "inherent right [as] a sovereign power" to exclude noncitizens under its power to regulate commerce with foreign nations but insisted that such a right did not encompass the authority to revoke his "vested right to return." He argued, first, that the "invitations and guarantees" set forth in the Burlingame Treaty prevented Congress from denying him a residence in the United States. *Chinese Exclusion Case*, 130 U.S. at 585. Second, he maintained that the United States was contractually bound to readmit him. The certificate provisions of the 1882 and 1884 Acts constituted "an offer on the part of the United States . . . [that] if he should leave the country and comply with the conditions therein," he would be permitted to return. *Id.* at 586 (emphasis omitted).

[45] *Id.* at 600. That analysis reflected the Court's long-standing position, which it had reaffirmed the previous term. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that when a treaty and federal statute conflict, the more recent one controls).

[46] *Chinese Exclusion Case*, 130 U.S. at 597.

and uncivilized, servile habits of life and labor degraded American industry and the quality of American citizenship, thus making a mockery of the principle that every person had an "inherent and inalienable right . . . to change his home and allegiance."[47] "[C]ontent with the simplest fare, such as would not suffice for our laborers and artisans," he lamented, labor market "competition between them and our people was . . . altogether in their favor."[48] Notwithstanding the liberality of the Burlingame Treaty, moreover, Chinese "coolie" laborers "remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country"—a failure to assimilate that Justice Field ascribed to inexorable "differences of race."[49] Moreover, as their "numbers approach[ed] the character of an Oriental invasion," it had become clear that without "prompt action . . . to restrict their immigration," the American West would soon be "overrun."[50]

Justice Field's reference to an "Oriental invasion" may strike modern readers as but one instance of the anti-Chinese vitriol that infused Gilded Age American political culture.[51] It was certainly that, but to dismiss Justice Field's extended discourse on the "Chinese Question" as anachronistic racist hyperbole misses its importance to the Court's legal rationale.[52] In fact, Justice Field's opinion reflected conventional wisdom among late nineteenth-century lawmakers, reformers, and labor leaders that the ravages of cheap, servile Chinese labor threatened not only the "American standard of living"—a term that first came into wide use during this period—but also the quality of American citizenship and the nation's very future as a free, independent republic.[53] Critically, such an extraordinary threat demanded an

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[47] *Id.* at 592–96 (quoting the Burlingame Treaty, *supra* note 24, at art. V).

[48] *Id*. at 595.

[49] *Id*. In the nineteenth century, the word "coolie" was used loosely, typically as a term of derision, to refer to Asians who participated in cheap, allegedly less-than-free labor. "The distinction between a coolie and a free laborer was ideological," writes historian Elliott Young. "Coolie was not a legal term but rather a vague notion of cheap and easily exploitable labor that was almost inextricably linked to Asians, and particularly to Chinese and Indians." ELLIOTT YOUNG, ALIEN NATION, CHINESE MIGRATION IN THE AMERICA'S FROM THE COOLIE ERA THROUGH WORLD WAR II 46 (2014); The word itself, writes historian Mae Ngai, is "a European pidgin neologism referring to a common laborer and then to indentured Indian and Chinese workers in plantation colonies." Mae M. Ngai, *Chinese Gold Miners and the 'Chinese Question' in Nineteenth-Century California and Victoria*, 101 J. AM. HIST. 1082, 1084 n.3 (2015).

[50] *Chinese Exclusion Case*, 130 U.S. at 595.

[51] ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT (1998).

[52] Ngai, *supra* note 49, at 1084.

[53] *See* ROSANNE CURRARINO, THE LABOR QUESTION IN AMERICA: ECONOMIC DEMOCRACY IN THE GILDED AGE 9–56 (2011); *see also* Lindsay, *supra* note 17, at 793–801.

equally extraordinary power to repel—a power that Justice Field defined and justified in the language of national security. To "preserve its independence, and give security against foreign aggression and encroachment" from the "vast hordes" of unassimilable racial others "crowding in upon us," he wrote, it was essential that federal policymakers operate outside of judicially enforceable constitutional constraints.[54] If "the government of the United States . . . considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security," Field continued, "their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects."[55] That policy, moreover, was "conclusive upon the judiciary."[56]

Three years later, the Court confirmed that this extraordinary, constitutionally untethered authority extended beyond the exigencies of Chinese exclusion to the nation's general immigration laws. In *Nishimura Ekiu v. United States*, the Court held that a federal immigration inspector's decision to deny admission to a Japanese woman was not reviewable in federal court. The opinion defined the federal immigration power in language that would become the primary rhetorical touchstone for subsequent immigration cases:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.[57]

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[54] *Chinese Exclusion Case*, 130 U.S. at 606.

[55] *Id.* at 606.

[56] *Id.* It bears emphasis that for all of the Court's quasi-military imagery—of a nation subject to foreign "invasion," to "aggression and encroachment," of threats to its "peace and security"—and for all its effort to thus frame the decision as a security imperative, the petitioner had not challenged, and in fact explicitly affirmed, the United States' "inherent right [as] a sovereign power" to exclude foreigners from its territory. *Id.* at 585, 606. His claim was simply that, in its exercise of that sovereign right to exclude, the United States could not revoke his "vested right to return." *Id.* at 581.

[57] Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892). Federal immigration officials had denied entry to the petitioner under a provision of the Immigration Act of 1891, excluding from the United States "persons likely to become a public charge." Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084. The 1891 Act had further assigned to a national Superintendent of Immigration lodged within the US Treasury Department the exclusive authority to administer federal immigration laws, including the inspection of migrants, and made final the decisions of federal inspection officers "touching the right of any alien to land," subject to review only by the Superintendent and Treasury Secretary. *Id.* §§ 7–8.

It thus lay beyond "the province of the judiciary" to order the admission of noncitizens "who have never been naturalized, nor acquired any domicil[e] or residence within the United States."[58] At least with respect to nonresident foreigners, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."[59]

The following year, in *Fong Yue Ting v. United States*, the Court extended this principle from the exclusion of noncitizens to the expulsion of resident noncitizens.[60] At issue was a provision of the Geary Act of 1892, authorizing the arrest and deportation of any Chinese laborer legally present in the United States who failed either to obtain a special "certificate of residence" or, in the alternative, produce a "credible white witness" to attest that the laborer had been a resident of the United States before the adoption of the Exclusion Act.[61] A majority of six justices upheld the provision.[62] "The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace" was, the Court declared, an "inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare."[63] Accordingly, the right to due process or "trial by jury," as well as the Constitution's prohibition of "unreasonable searches and seizures, and cruel and unusual punishments, have no application."[64] As the next Section will discuss, the *Chinese Exclusion Case*, *Nishimura Ekiu*, and *Fong Yue Ting* still serve as the foundation of the federal immigration power, even as the Court has softened the unconditional tenor of the early decisions.[65]

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[58] *Ekiu*, 142 U.S. at 660.

[59] *Nishimura Ekiu*, 142 U.S. at 660. The Court did create a narrow opening for procedural review a decade later when it indicated that administrative officers could not "disregard the fundamental principles that inhere in 'due process of law.'" Yamataya v. Fisher (*Japanese Immigrant Case*), 189 U.S. 86, 100 (1903). Although noncitizens' procedural challenges virtually always failed, the *Japanese Immigrant Case* did establish a formal doctrinal foothold for procedural due process claims that, eight decades later, afforded meaningful, though still highly deferential, judicial review. *See* Landon v. Plasencia, 459 U.S. 21, 31–33 (1982) (holding that a returning noncitizen was entitled to "procedural due process" in her exclusion hearing).

[60] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[61] *Id.* at 727–28.

[62] *Id.* at 704.

[63] *Id.* at 711.

[64] *Id.* at 730. Three justices, including Justice Stephen Field, the author of the *Chinese Exclusion Case*, issued vigorous dissents. Field stressed the "wide and essential difference" between exclusion and expulsion. "Aliens from countries at peace with us," he explained, who were "domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property which are secured to native-born citizens." *Id.* at 746, 754.

[65] In the modern era, noncitizens in immigration proceedings enjoy somewhat more constitutional (as well as statutory) protection than the utterly constitution-free zone described in this statement. *See, e.g.*, *supra* note 59 and accompanying text.

B. The NS/FA Nexus in the Post-WWII Era

More than a century later, talk of invading foreign races has long since been purged from the Supreme Court's immigration lexicon, if not from mainstream political discourse. Yet in key respects, the jurisprudential legacy of the *Chinese Exclusion Case* and *Fong Yue Ting* is undiminished. How has an extraconstitutional regulatory authority borne of the Gilded Age anti-Chinese movement endured for over one hundred years? How, in particular, did it survive the liberalizing wave of reforms that washed over American immigration law in the mid-twentieth century, including Congress's repeal of the Exclusion Act, of racial restrictions on naturalization, and, finally, of national origins quotas?[66]

At least part of the explanation lies in a series of cases decided in the 1950s, which had the effect of laundering the immigration power—of stripping away the anti-Chinese racism and overwrought talk of foreign "invasion" and clothing it, instead, in the more modern garb of the Cold War. Consider

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[66] Congress repealed the Exclusion Act in 1943, but immigration from China remained extremely limited for another two decades due to the miniscule immigration quotas allocated to nations in the "Asia-Pacific triangle." *See* ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA 245–46 (2003); Act of Dec. 17, 1943, ch. 344, Pub. L. No. 78-199, 57 Stat. 601. Congress expanded eligibility for naturalization beyond "free white person[s]"—a restriction first adopted in the Naturalization Act of 1790—in the Immigration and Nationality Act of 1952, also known as the McCarran-Walter Act. Act of June 27, 1952, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.). But it was not until the Immigration Act of 1965 that the civil rights revolution finally came to immigration law. *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 301 (1996) (documenting that many of the Act's leading sponsors were motivated by a commitment to racial egalitarianism). The 1965 Act eliminated the near-total exclusion of the Chinese and other "racial" groups from the Asia-Pacific triangle and abandoned the National Origins Quota system, under which immigration from countries outside of western and northern Europe had been severely restricted since the 1920s. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911. *But see* Kevin R. Johnson, *The Beginning of the End: The Immigration Act of 1965 and the Emergence of Modern U.S.-Mexico Border Enforcement*, *in* THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA 116–70 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015) (arguing that the 1965 Act's "artificial" numerical cap on migration from the Western Hemisphere represents a quite deliberate, though more sophisticated and less visible, effort to restrict Latino immigration to the United States); Kevin R. Johnson, *A Case-Study of Color-Blindness: The Racially Disparate Impacts of Arizona's SB 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313, 315 (2012) (documenting various ways in which federal immigration law, as well as state laws such as Arizona SB 1070, "readily provide color-blind, facially neutral proxies" for race and, "allows for racial discrimination in the aggregate, without the need for the express (and delegitimizing) reliance on race on a massive scale"); Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goals*, 57 HOWARD L. REV. 899, 908–15 (2014) (discussing the "erosion of the 1965 Act's egalitarian goals" by the racially disparate impacts of workplace, national security, and criminal law enforcement).

Harisiades v. Shaughnessy, in which the Court upheld the deportation of a Greek national and longtime legal US resident on the ground that he had been a member of the Communist Party many years earlier, before such membership was grounds for deportation.[67] The Court acknowledged that the petitioner's expulsion from the United States "bristle[d] with severities" and that the statute under which he had been ordered deported—the Alien Registration Act of 1940—"[stood] out as an extreme application of the expulsion power."[68] Yet the Court nevertheless acceded to the government because, it explained, the power to expel was "a weapon of defense and reprisal . . . inherent in every sovereign state" that was "so exclusively entrusted to the political branches . . . as to be largely immune from judicial inquiry or interference."[69]

Or consider *Galvan v. Press*, upholding the expulsion of another former Communist Party member.[70] There, the Court similarly observed that Congress's "very broad" power over "the admission of aliens and their right to remain" rested on the close nexus between immigration and "basic aspects of . . . foreign relations and the national security."[71] These and other Cold War era cases retain the essential logic of the *Chinese Exclusion Case*, *Nishimura Ekiu*, and *Fong Yue Ting* that judicial deference in immigration matters hinged on a presumed NS/FA nexus, even as they omit the racism and xenophobia animating those foundational cases.[72]

As the Court repackaged the principle of extraordinary deference in the security imperatives of the Cold War, however, even justices in the majority sometimes expressed serious misgivings about the constitutional untethering of the federal immigration power and the attendant potential for abuse. As

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[67] Harisiades v. Shaughnessy, 342 U.S. 580, 581, 595–96 (1952).

[68] *Id.* at 587–88.

[69] *Id.* at 587–89.

[70] Galvan v. Press, 347 U.S. 522 (1954).

[71] *Id.* at 530. Juan Galvan was a US resident of thirty years with an American wife and four children born in the United States. *Id.* at 523. He had been ordered deported because of his brief membership in the Communist Party in the 1940s. *Id.* The Internal Security Act of 1950 had established as a matter of law that the Communist Party advocated the violent overthrow of the US government, thus relieving the government of the burden of proving as much. *Id.* at 529. Further, under the government's construction of the Act, Congress had also dispensed with need to prove that a particular noncitizen Party member subscribed to, or even was aware of, the Party's presumed violent purpose. *Id.*

[72] *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 521, 544 (1950) (declaring that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); Shaughnessy v. Mezei, 345 U.S. 206, 215 (1953) (affirming noncitizen's indefinite detention of noncitizen on Ellis Island without a hearing).

Justice Felix Frankfurter reflected in *Galvan*, to "deport an alien who legally became part of the American community" merely because he had briefly joined the Communist Party "strikes one with a sense of harsh incongruity."[73] Because "the essence of due process" was "fair play," he reasoned, "much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of [Congress's] political discretion" to remove noncitizens.[74] But alas, "the slate [was] not clean," and the entrustment of immigration "exclusively to Congress [had] become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."[75]

The same constitutional qualms that Justice Frankfurter voiced in *Galvan* produced a marked cleavage among the justices over immigration law's apparent exemption from ordinary constitutional norms. If Justice Frankfurter and other members of the majority sometimes appeared to acquiesce reluctantly in the consignment of immigration to the political branches, dissenting justices rejected outright the proposition that immigration lawmaking and enforcement should, as a categorical matter, be cordoned off from judicially enforceable constitutional constraints.[76] At stake was not only the due process rights of individual noncitizens, they argued, but the rule of law and the integrity of the constitutional system itself.

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[73] *Galvan*, 347 U.S. at 530.

[74] *Id.* at 530–31.

[75] *Id.* at 522. Frankfurter added that, "since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause . . . should be applied to deportation." *Id.* at 531.

[76] *See* Lindsay, *supra* note 5, at 219–25 (describing the division among the justices over the judicial enforcement of due process norms in immigration cases, including how Justices Jackson, Douglas, and Black argued explicitly against constitutional exceptionalism). In fact, judicial resistance to constitutionally unbounded federal authority over immigration is nearly as old as the principle itself. It is instructive that Justice Field, the primary architect of an extraconstitutional, judicially unreviewable federal power to *exclude* noncitizens "utterly dissent[ed]" from the Court's extension of that power to their expulsion. *Fong Yue Ting v. United States*, 149 U.S. 698, 755 (1893) (Field, J., dissenting); *see supra* note 64 and accompanying text. Justice David Brewer, who was appointed to the Court after the *Chinese Exclusion Case* was decided, echoed Justice Field's distinction between foreigners outside of US territory and resident noncitizens and added a withering condemnation of the very notion of unrestrained, extraconstitutional authority:

> This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within the legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? . . . The expulsion of a race may be within the inherent powers of a despotism . . . [The Framers] gave to this government no general power to banish.

Id. at 737 (Brewer, J., dissenting).

"Security is like liberty in that many are the crimes committed in its name," declared Justice Robert Jackson.[77] "The menace to the security of this country" posed by the admission of the noncitizen petitioner was "nothing compared to the menace to free institutions inherent in" the summary process by which she had been excluded.[78]

In a separate case, Justice Jackson drew an explicit parallel between the government's claimed authority to detain a noncitizen indefinitely without a hearing and the conduct of Europe's most infamous authoritarians. "[T]he Government's theory of custody for 'safekeeping,'" scolded the former Nuremberg prosecutor, carried "unmistakable overtones of the" Nazi system of "protective custody," under which "the concentration camps were populated with victims of summary executive detention for secret reasons."[79] Taken to its logical conclusion, the consignment of immigration regulation exclusively to the political departments defied the fundamental principle that the Constitution constrains Congress and the Executive. As Justice Jackson put it, "differences in the process of administration make all the difference between a reign of terror and one of law."[80] Justice Hugo Black lodged similar objections.[81] Such dissents should, at the very least, disabuse modern readers of any notion that judicial abnegation in immigration matters is an inevitable consequence of sovereign nationhood or exclusive citizenship.

Notwithstanding the ire of Justices Jackson, Black, and others, the Cold War cases only hardened the presumption that immigration per se implicates foreign affairs and national security. In one respect, this is understandable. After all, although the specific facts of the leading Cold War cases certainly cast doubt on their national security *bona fides*, the various *statutes* authorizing the president to exclude, detain, or

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[77] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 521, 551 (1950) (Jackson, J., dissenting).

[78] *Id.*

[79] Shaughnessy v. Mezei, 345 U.S. 206, 225–26 (1953) (second internal quotation marks omitted).

[80] *Id.* at 226.

[81] Black protested "the Court's holding that Mezei's liberty is completely at the mercy of the unreviewable discretion of the Attorney General." The Soviet People's Commissariat and Adolf Hitler's secret police claimed authority to imprison and banish based on undisclosed information, he scoffed. The American Bill of Rights, however, served as an essential bulwark against such practices and reflected the Founders' abhorrence of "arbitrary one-man imprisonments. Their belief was—our constitutional principles are—that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken 'without due process of law.'" *Id.* at 217–18 (Black, J., dissenting).

deport noncitizens undoubtedly were oriented toward national security.[82] Yet in the decades since, the Court has routinely applied that presumption to immigration cases lacking even a plausible nexus with national security or foreign affairs.

Consider *Mathews v. Diaz*, a staple of modern constitutional immigration law.[83] There, the Court rejected an equal protection challenge brought by three elderly noncitizens to a US Department of Health and Human Services rule that withheld Medicare benefits from noncitizens who had not been admitted for permanent residence and resided in the United States for at least five years.[84] Although the Court recently had applied strict scrutiny to a similar state residency requirement for welfare benefits and struck it down as a denial of equal protection,[85] it had little difficulty upholding the analogous federal statute. Relying on *Galvan* and *Harisiades*, among other precedents, the Court explained that, because "the relationship between the United States and our alien visitors . . . . may implicate our relations with foreign powers," the responsibility of regulating noncitizens had been "committed to the political branches of the Federal Government."[86] The same "reasons that preclude judicial review of political questions" therefore "dictate[d] a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."[87] Note the striking mismatch between the quintessentially domestic subject matter of the challenged statute—eligibility for federal Medicare benefits—and the Court's rationale for deferring to the political judgment of Congress—the asserted nexus with foreign affairs. Even today, generations after the specters of Chinese "coolies" and Communist subversives ceased to haunt the judicial imagination, the Court continues to recite the same rationale without regard to whether the challenged statute or

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[82] These included the Alien Registration Act of 1940, Pub. L. No. 76–670, 54 Stat. 670 (1940) (codified as amended in scattered section sof 8 and 18 U.S.C.) and the Internal Security Act of 1950, Pub. L. No. 81–831, 64 Stat. 987 (1950) (largely repealed).

[83] Mathews v. Diaz, 426 U.S. 67, 67 (1976).

[84] *Id.* at 70.

[85] Graham v. Richardson, 403 U.S. 365, 372, 376, 382–83 (1971) (holding that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny").

[86] *Diaz*, 426 U.S. at 67.

[87] *Id.* at 81–82; *see also* Fiallo v. Bell, 439 U.S. 787, 787–89, 792–96 (1977) (relying on the NS/FA nexus set forth in the Cold War cases, as well as on *Fong Yue Ting* and the *Chinese Exclusion Case*, to uphold a statutory provision granting immigration preference to "illegitimate" children of mothers were US citizens or legal permanent residents but denying the preference to the "illegitimate" children of similarly situated fathers).

enforcement action *in fact* bears a plausible connection to national security or foreign affairs.[88]

C. Detention and Due Process

In the modern era, immigration law's constitutional exceptionalism is nowhere more manifest than in the Court's approach to detention. This Section chronicles the sharp divergence between the Court's due process jurisprudence in the immigration and nonimmigration contexts. In short, the Court affords noncitizens in immigration proceedings far weaker due process protection against unlawful detention than detained persons in virtually any other legal setting, including persons detained as suspected terrorists or enemy combatants.

1. The Presumption of Liberty: Detention and Due Process Outside of Immigration

In nonimmigration settings, the Court calibrates the requirements of due process to the specific legal context—for example, whether the petitioner is in pretrial detention, mental health detention, or enemy combatant detention. Critically, however, all those legal settings carry a strong presumption of liberty.[89] In the mental health and pretrial contexts, mandatory detention or detention without an individualized hearing unconstitutionally deprives detained persons of liberty without due process of law. The Court rejected one state detention

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[88] *See, e.g.*, Demore v. Kim, 538 U.S. 510, 522 (2003) (internal quotation marks omitted) (quoting Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976)) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."); Kerry v. Din, 135 S. Ct. 2128, 2139–41 (2015) (Kennedy, J., concurring) (rejecting a due process challenge to a visa denial on the ground that, merely by citing the INA's "terrorism bar"—a complex provision containing dozens of distinct reasons for denying a visa application (8 U.S.C. § 1182(a)(3)(B) (2012))—the government had provided a "facially legitimate and bona fide reason" for a noncitizen's exclusion even though it had not cited any facts specific to the excluded noncitizen as the reason for the visa denial).

[89] As the Court explained in *Mathews v. Eldridge*, the requirements of due process are necessarily fact and context dependent, and may vary considerably depending on a balancing of key individual and governmental interests. It instructed reviewing courts to weigh the following three factors:

> First, 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.

Mathews v. Eldridge, 424 U.S. 319, 335 (1975).

statute, for example, because it placed the burden on the detained person to prove that he was *not* dangerous, rather than on the state to prove that he *was* dangerous. "[T]he state need prove nothing to justify continued detention," the Court objected.[90] In a separate case, the Court held that the state must prove by clear and convincing evidence that a person detained for mental health reasons was dangerous and that detention was thus necessary to protect the petitioner or the public.[91]

In the federal criminal context, detention likewise is a carefully limited exception to the presumption of liberty. By statute, the government bears the burden of proving that an individual is a flight risk or a threat to the community and that detention is therefore necessary.[92] The Court's decisions are in accord. In upholding the federal Bail Reform Act against a due process challenge, for example, the Court emphasized that the Act carefully limited the circumstances under which pretrial detention was permitted, requiring the government to prove by clear and convincing evidence that detention was necessary to protect the public.[93] So, too, has the Court sought to ensure that criminal defendants are not unnecessarily deprived of liberty by excessive bail.[94]

Notwithstanding variations in the requirements of due process, two related principles remain constant across the Court's nonimmigration detention jurisprudence: First, as the Court has repeatedly affirmed, "liberty is the norm" and detention "the carefully limited exception."[95] Second, the constitutional protection of liberty is highly individualized, in that denials of liberty must be justified by reasons that are

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[90] Foucha v. Louisiana, 504 U.S. 71, 81–82 (1992).

[91] Addington v. Texas, 441 U.S. 418, 433 (1979).

[92] *See* 18 U.S.C. § 3143(b)(1).

[93] United States v. Salerno, 481 U.S. 739, 747–51 (1987). Further, in stark contrast to the Court's approval of mandatory detention for noncitizens in removal proceedings, the Act applies even a rebuttable presumption of dangerousness only to a discrete class of especially serious criminal charges. 18 U.S.C. § 3142(e)(3). Federal courts have upheld the constitutionality of the rebuttable presumption. *See, e.g.*, United States v. Jessup, 757 F.2d 378, 387 (1983); United States v. Perry, 788 F.2d 100, 111–18 (1986); United States v. Moore, 607 F. Supp. 489, 493–500 (1985). For a survey of due process standards in nonimmigration detention, see Hallie Ludsin, *Frozen in Time: The Supreme Court's Outdated, Incoherent Jurisprudence on Congressional Plenary Power over Immigration*, 47 N.C. J. INT'L L. 433,440–55 (2022).

[94] "[W]hen the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more." *Salerno*, 481 U.S. at 754 (citing Stack v. Boyle, 342 U.S. 1 (1951)). The conditions of pretrial release, including the amount of bond, must be no more than what is necessary to provide "adequate assurance that [the defendant] will stand trial and submit to sentence if found guilty." Stack v. Boyle, 342 U.S. at 4 (1951).

[95] Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (quoting *Salerno*, 481 U.S. at 755 (1987)).

specific to the individual rights holder. Both stand in stark contrast to the Court's approach to immigration detention.

Incredibly, even persons detained in connection with war or insurrection, when the government's interest in defending the security of the nation is at its apex, enjoy greater protections against the unconstitutional deprivation of liberty than do many noncitizens involved in ordinary removal proceedings. The series of cases reviewing the detention of "enemy combatants" in the early 2000s well illustrates the extent to which the presumption of liberty permeates the Court's nonimmigration jurisprudence. Operating under the Authorization for Use of Military Force (AUMF) adopted by Congress following the September 11 terrorist attacks, the government claimed authority to detain suspected terrorists as enemy combatants and to deny detainees the right to petition for a writ of habeas corpus.[96] In short, the government asserted a detention power without judicial limits.

Yet in *Hamdi v. Rumsfeld*, the Court held that even in the context of a war on terrorism launched in response to a catastrophic terrorist attack on American soil, the government's detention authority must operate within judicially enforceable constitutional limits. Petitioners like Hamdi, an American citizen, possessed "the most elemental of liberty interests—the interest in being free from physical detention by one's own government," the Court reasoned.[97] Notwithstanding the government's weighty interest in protecting the nation's security and the "practical difficulties" of producing evidence and holding hearings during wartime, a US citizen designated as an enemy combatant was entitled to due process, which entailed an opportunity to challenge that designation.[98] This included informing the detained person of the factual basis of the designation and providing a fair hearing "before a neutral decisionmaker."[99] Even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," the Court declared.[100] The Constitution "most assuredly envision[ed] a role for all three branches when individual liberties [were] at stake."[101]

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[96] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541).

[97] *Hamdi*, 542 U.S. at 529.

[98] *Id.* at 531–32.

[99] *Id.* at 533. "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested," the Court declared, "and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Id.* at 532.

[100] *Id.* at 536.

[101] *Id.*

Four years later, in *Boumediene v. Bush*, the Court extended its holding in *Hamdi* to noncitizens detained as enemy combatants in Guantanamo Bay, Cuba.[102] The *Boumediene* Court readily acknowledged the government's weighty interest in "apprehend[ing] and detain[ing] those who pose a real danger to our security" and affirmed that "proper deference must be accorded to the political branches" to "prevent acts of terrorism."[103] Yet "[s]ecurity subsists, too, in fidelity to freedom's first principles," the Court declared, "[c]hief among [which] are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[104] "The laws and the Constitution are designed to survive, and remain in force, in extraordinary times," the Court concluded.[105] In sum, even when the government is acting unambiguously in the interest of the nation's security, there is no such thing as a constitution-free zone of operation when the denial of physical liberty is at issue.[106]

2. Generic Rules and Reasonable Presumptions: Due Process and Immigration Detention

That presumption of liberty evaporates, however, when the person whose liberty is restrained is a noncitizen in removal proceedings. The Immigration and Nationality Act (INA) is replete with provisions mandating detention for certain inadmissible or removable noncitizens, including those with pending asylum claims. For example, the Department of Homeland Security (DHS) *must* detain a noncitizen found inadmissible because she was convicted of a crime of moral turpitude, a drug offense, or involvement in terrorist activities.[107] Likewise, DHS *must* detain a resident noncitizen found deportable because she was convicted of a crime of moral turpitude that led to a prison sentence of a year or more, multiple crimes of moral turpitude, an aggravated felony, a drug crime, a firearms offense, espionage, or involvement in terrorist activities.[108] And DHS *must* detain a noncitizen who has been

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[102] Boumediene v. Bush, 553 U.S. 723, 732 (2008).

[103] *Id.* at 796–97.

[104] *Id.* at 797.

[105] *Id.* at 798.

[106] For an overview of the enemy combatant cases, see Ludsin, *supra* note 93, at 450–55.

[107] Immigration and Nationality Act, ch. 477, § 236, 66 Stat. 163, 200 (1952) (codified as amended in 8 U.S.C. § 1226(c)(1)).

[108] INA § 237; *see* 8 U.S.C. § 1227.

ordered removed from the United States.[109] In other circumstances, the INA grants DHS discretion to detain the noncitizen. Critically, mandatory detention carries a conclusive, irrebuttable presumption that the noncitizen is either dangerous or a serious flight risk.[110] These provisions dispense with the need for an individualized hearing, thus authorizing exactly the kind of judicially unchecked detention authority that the Court has disallowed for mental health, pretrial, and even terrorism-related detentions.

And in defiance of all that the justices have written outside of the immigration context—of the "elemental" interest in freedom from physical restraint, the powerful presumption of liberty, and of the importance of preserving "freedom's first principles" even in "extraordinary" times—the Court nevertheless has acquiesced. In doing so, it has affirmed that the standards of due process that safeguard individual liberty in every other legal setting simply do not apply to the detention of noncitizens in ordinary removal proceedings. Consider the Court's 2003 decision in *Demore v. Kim*, where it rejected a due process challenge to an INA provision requiring the detention of certain removable noncitizens. [111] The petitioner, Hyung Joon Kim, had become subject to removal after he was twice caught shoplifting and later convicted of burglary for breaking into a tool shed with some high school friends—all within a ten-month period when he was eighteen and nineteen years old.[112] Because section 1226(c) of the INA subjected all "aggravated felon[s]"—which Kim was, by virtue of his three convictions—to mandatory detention pending removal, at the time he petitioned for habeas corpus he had already been in federal custody for more than six months.[113]

Kim's challenge centered on the mandatory nature of section 1226(c).[114] He argued that, as a lawful permanent resident, his Fifth Amendment right to due process entitled him to an individualized bond hearing before the government could confine him at length.[115] In fact, the government had

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[109] INA § 241; *see* 8 U.S.C. § 1231(a)(2).

[110] *See* 8 U.S.C.A. § 1226(a) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—(1) may continue to detain the arrested alien; and (2) may release the alien on—(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole.").

[111] Demore v. Kim, 538 U.S. 510, 513 (2003).

[112] Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343 (David A. Martin & Peter H. Schuck eds., 2005).

[113] *Demore*, 538 U.S. at 515; *see* 8 U.S.C. § 1226(c)–(d).

[114] *Demore*, 538 U.S. at 513.

[115] *Id.* at 540 (Souter, J., concurring in part and dissenting in part).

acknowledged on the record that Kim posed neither a flight risk nor a threat to the community, essentially conceding that there was no individualized justification for detaining him.[116] In virtually any context other than immigration, this would have been a very easy case. After all, the Court had consistently affirmed that "[f]reedom from bodily restraint" lies "at the core of the liberty protected by the Due Process Clause" and had authorized the government to abridge that liberty only for compelling reasons that are specific to the individual.[117] Yet the government staked its defense of Kim's detention not on his alleged dangerousness or risk of flight, but on the singular nature of the federal immigration power.[118]

The Court essentially agreed that for constitutional purposes, immigration detention was fundamentally different from detention in any other legal setting, and that judicially enforceable norms of due process simply did not apply. Federal immigration lawmaking and enforcement warranted constitutional latitude, the majority explained, because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."[119] The Court never asked the government to explain exactly how Kim's detention bore on foreign relations, war, or republican government. But that, of course, is the entire point. The Court simply presumed as a categorical matter that there exists a vital nexus between a noncitizen involved in immigration proceedings and foreign affairs or national security, and that that presumed nexus justified blanket judicial deference to Congress or the President. The specific circumstances surrounding Kim's detention only underscore the speciousness of that presumption.

Yet the Court denied that the Constitution's guarantee of due process to all "persons" obliged the government to consider the particular circumstances of Kim's case—that is, to evaluate Kim as an individual rather than a member of a statutory

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[116] The Immigration and Naturalization Service had declared *sua sponte* during district court proceedings "that Kim 'would not be considered a threat' and that any risk of flight could be met by a bond of $5,000.'" *Id.* at 541 (Souter, J., concurring in part and dissenting in part).

[117] Foucha v. Louisiana, 504 U.S. 71, 80 (1992); *see supra* note 90 and accompanying text.

[118] *Demore*, 538 U.S. at 528.

[119] *Id.* at 522 (internal quotation marks omitted) (quoting Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976)). The Court went on to quote Justice Kennedy's dissenting opinion in Zadvydas v. Davis, 533 U.S. 678, 718 (2001), another due process challenge to long-term immigration detention, in support of the proposition that "[t]he liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens."

class.[120] As the Court declared, "reasonable presumptions and generic rules" were "not necessarily impermissible exercises of Congress'[s] traditional power to legislate with respect to aliens."[121] A "generic rule" denying an individualized bond hearing was thus permissible as long as Congress had evidence that *some* noncitizens released on bail would skip their removal hearings and "remain[] at large in the United States unlawfully."[122] For the majority, that truism was a sufficient answer to the acknowledged fact that this particular noncitizen did *not* pose a flight risk. "[W]hen the Government deals with deportable aliens," the Court declared, "the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."[123] Kim's due process right to freedom from confinement was thus trumped by the "generic rule" providing for mandatory detention, even though by the government's own admission, the rationale for that rule was irrelevant to this case. This, in a nutshell, is the constitutional anomaly of immigration law: Because the removal of a teenage petty criminal is presumed to implicate foreign affairs and national security, the government may detain him without an individualized reason. Yet it may not detain without a hearing an enemy combatant apprehended in a theater of war whose detention almost certainly implicates foreign affairs and national security.

As with *Mathews v. Diaz*, there is a striking mismatch in *Demore v. Kim* between the thoroughgoing ordinariness of the challenged governmental action and the Court's rationale for sanctioning Congress's denial of due process to a noncitizen petitioner. Some have argued that, because immigration cases by definition involve the rights of noncitizens to be present in US territory, they must also, perforce, implicate foreign affairs and national security. Alternatively, defenders of plenary federal power might claim that, even though Kim's detention had nothing to do with foreign relations or the war power, if a significant number of immigration cases did have a meaningful

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[120] *Demore*, 538 U.S. at 523–26 (discussing Carlson v. Landon, 342 U.S. 524 (1952), and Reno v. Flores, 507 U.S. 292 (1993)).

[121] *Id.* at 526 (internal quotation marks omitted) (quoting *Reno*, 507 U.S. at 313). Notably, a half century earlier, before immigration became entangled with criminal law to the extent that it later would, the Court suggested otherwise. Although some "aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings," the "purpose to injure could not be imputed generally to all aliens subject to deportation," the Court reasoned. Accordingly, the federal immigration statutes at issue had vested the federal courts with "discretion" to judge whether circumstances required the detention of a particular alien without bail. *Carlson*, 342 U.S. at 538.

[122] *Demore*, 538 U.S. at 528.

[123] *Id.*

connection to national security or foreign affairs, extraordinary judicial deference may, as a categorical matter, nevertheless be defensible. We tested exactly that empirical proposition. The following Part presents our results.

II. THE EMPIRICAL FALLACY OF IMMIGRATION LAW'S PRESUMED NS/FA NEXUS: METHODOLOGY AND EMPIRICAL FINDINGS

Scholars and advocates who support stronger constitutional protections for noncitizens in immigration proceedings have often observed that most cases do not implicate sensitive questions of foreign policy or national security. If the presumed NS/FA nexus is specious, they argue, and if the majority of immigration cases involve decidedly unexceptional issues such as unlawful entry, visa overstays, and removal for criminal convictions, then a judicial posture adapted to exceptional circumstances is misplaced.[124] Until now, however, the factual premise of that challenge has rested on an impressionistic hypothesis rather than empirical evidence. We tested that hypothesis using data from the EOIR at the Department of Justice.[125] This Part describes our methodology and presents our empirical findings.

A. Methodology

The EOIR posts a relational database as a large ZIP file containing 103 files that users must reassemble themselves. We used the EOIR Case Data Code Key and unique identifiers to reassemble the necessary case information. We observed immigration cases for the twenty-six years between January 1, 1996, and December 31, 2021.[126] We were particularly interested in the percentage of cases in which the government issued a national security or foreign affairs charge. If such cases were to compose a substantial percentage of the overall immigration caseload, it would tend to support the Court's long-standing position that NS/FA concerns justify broad judicial deference in immigration matters. A very low percentage, however, would tend to undermine that rationale and to support our hypothesis

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[124] *See supra* note 9 and accompanying text.

[125] *FOIA Library*, U.S. DEP'T OF JUST. (last updated Feb. 14, 2023), https://www.justice.gov/eoir/foia-library-0 [https://perma.cc/UK3H-RFER] (data retrieved Apr. 1, 2022).

[126] The data reflects cases in which the government has issued a formal charge as a basis for removal. These include a range of charges issued in removal proceedings. *See, e.g.*, *infra* Table 1.

that immigration cases do not, as a categorical matter, implicate the kinds of governmental interests that warrant extraordinary judicial deference.

We acknowledge that our methodology does not capture every NS/FA issue that can arise in an immigration case. As we noted above, our dataset consists of removal cases, which represent approximately 96 percent of the immigration court caseload.[127] In a small minority of cases, DHS may raise an NS/FA issue in immigration court that is not reflected in a formal charge. For example, when a noncitizen about whom DHS has a NS/FA concern is removable on a non-NS/FA ground, such as entering the United States without inspection or conviction of an aggravated felony,[128] DHS may conclude that the non-NS/FA ground is easier to prove, and hence issue a formal charge only for that ground.[129] And when a noncitizen has applied for asylum or withholding of removal, DHS may oppose that application based on an uncharged NS/FA concern.

In both asylum and withholding cases, the noncitizen essentially asks an immigration judge for special permission to

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[127] EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., STATISTICS YEARBOOK FISCAL YEAR 2018 12 tbl. 4 [hereinafter STATISTICS YEARBOOK] (2018), https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/2VVS-XFDV]. Importantly, many of the 4 percent of cases not designated removal cases nevertheless do appear in our data. In 2018, for example, credible fear cases made up 2 percent of all cases in the immigration docket. *Id.* Credible fear cases are those in which either (1) a CBP officer determined that a noncitizen failed to demonstrate a "credible fear of persecution," and the noncitizen then appealed that determination to immigration court; or (2) a CBP officer determined that the noncitizen did have a credible fear and issued an NTA before the immigration court to consider asylum as a defense to removal. *Questions and Answers: Credible Fear Screening,* U.S. CITIZENSHIP & IMMIGR. SERVS. (May 31, 2022), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening [https://perma.cc/FET5-3VYE]. That latter category of cases is captured in our data on removal proceedings. STATISTICS YEARBOOK, *supra.* Withholding-only cases make up an additional 1 percent of the immigration courts' docket. *Id.* Cases fall into this category only if the noncitizen is already subject to removal (either because there is a pending removal order or because their asylum-only claim failed) and thus are likewise captured in our data. *Id.*; Conversation with Gracie Willis, Senior Lead Att'y, Southeast Immigrant Freedom Initiative, S. Poverty L. Ctr. (Oct. 3, 2022). Asylum-only cases are a discrete and very narrow class of cases involving noncitizen crewmembers and stowaways who have claimed asylum before an immigration court. *See, e.g.*, Bao Tai Nian v. Holder, 683 F.3d 1227, 1228 (9th Cir. 2012) (explaining "asylum-only" cases). As asylum-only cases comprise just 0.2 percent of immigration cases in 2018, the bulk of the 1 percent of withholding-only cases are already captured in our data. STATISTICS YEARBOOK, *supra.* Reasonable fear cases in 2018 constituted an additional .86 percent of cases and involve individuals previously ordered removed from the United States. *Questions and Answers: Reasonable Fear Screenings*, *supra*. That means, again, that reasonable fear cases are already in our data.

[128] *See* INA § 212(a)(6)(A)(i) (removable for entry without inspection) and § 237(a)(2)(A)(iii) (removable for conviction of an aggravated felony).

[129] Email exchange with Anwen Hughes, Dir. of Legal Strategy for Refugee Programs at Human Rts. First, (Aug. 8, 2022) (on file with authors).

remain in the United States even though she is otherwise removable. If DHS were to oppose that application based on an uncharged NS/FA concern, that concern would not be reflected in our data. In neither case, however, is there reason to believe that there is a "shadow population" of uncharged NS/FA issues that is sufficiently large to skew our findings. In fact, most asylum cases before immigration courts require charges.[130] The only exception is "asylum-only" cases, which in 2018 comprised only 0.2 percent of cases in immigration court. Most "withholding-only" cases, which comprise only 1 percent of the immigration court docket, are in immigration court because an immigration judge has ordered the noncitizen removed based earlier immigration charges, which are captured in our data.[131] Further, as we discuss below, our proposal to abandon immigration law's presumed NS/FA nexus would not prevent courts from weighing the government's uncharged yet nevertheless bona fide foreign affairs or national security interests on their merits and, in cases where such an interest in fact exists, deferring to DHS.

We begin with EOIR's data on charges, which uses the *IDNPRCDCHG* variable to uniquely identify each of the more than 11.5 million records.[132] Each row in the Charges Table indicates a single charge. If one individual is charged with multiple grounds of removability, each of those charges is reflected in a separate row in the file. As we discuss shortly, the Charges Table contains two other identifiers—*IDNPROCEEDING* and *IDNCASE*—that we use to organize the data for analysis. The *charge code* represents the regulation or statutory section cited by DHS as the legal basis for the removal. The government's codebook shows 218 unique charge codes.[133]

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[130] An asylum seeker ends up in immigration court because she was served an NTA, which sets out grounds for removal (i.e., immigration charges); because an Asylum Officer determines that she has a credible fear of persecution; or because the noncitizen appeals the Officer's decision that she did not have a credible fear. If the IJ agrees with the Asylum Officer's initial negative credible fear determination, the noncitizen is likely to be placed in removal proceedings that include immigration charges. *See supra* note 127 and accompanying text.

[131] STATISTICS YEARBOOK, *supra* note 127, at 12 tbl. 4. With respect to the withholding-only cases, note that noncitizens find themselves in a withholding proceeding only because they have already received a removal order or are subject to the reinstatement of a removal order. As a result, many of these 1 percent of cases already appear in our data as an earlier case. *See Fact Sheet: Difference Between Asylum & Withholding Removal*, AM. IMMIGR. COUNCIL 2 (Oct. 2020), https://www.americanimmigrationcouncil.org/research/asylum-withholding-of-removal [https://perma.cc/49UG-8RRE].

[132] *EOIR Data on Charges* [hereinafter *Charges Table*] (on file with authors), *in FOIA Library*, *supra* note 125. The file contains five variables and 11,540,278 observations.

[133] *Id*.

We read the legal text for each charge and identified fifty-three charges that plausibly could be interpreted as having national security or foreign affairs implications. Those fifty-three charges are represented in Appendix A.[134] The variable *National Security / Foreign Affairs (NS/FA) Charges*, which encompasses all of those fifty-three identified charges, is binary. It equals "1" if the charge has national security or foreign affairs implications and "0" if it does not. We erred on the side of inclusion and coded a charge as "1" if any part of the charge conceivably was related to national security or foreign affairs. Note that this coding choice to be maximally inclusive biases the data against our hypothesis. Doing so increases the confidence in our results if the data support our hypothesis.

Table 1 shows the ten most frequently used charge codes from 1996 through 2021. An eleventh row shows a compilation of the fifty-three charge codes that have national security or foreign affairs implications.[135] The government issued 1,257 distinct NS/FA charges in 915 cases. If all of the NS/FA charges were aggregated under a single charge code, it would be the fifty-fourth most used charge code in the twenty-six-year period ending in 2021. By way of comparison, the government charged that a noncitizen was removable because of criminal conduct 1.3 million times.[136] In other words, for every NS/FA charge issued by the government, the government issued more than one thousand charges that a noncitizen was removable on criminal grounds.

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[134] Examples include alleged conduct that violates laws relating to Espionage/Sabotage, (§ 212(a)(3)(A)(i)(I)), participation in terrorist activities, (§ 237(a)(4)(B)), and potentially serious adverse foreign policy consequences of a person's presence in the U.S. (§ 237(a)(4)(C)(i)).

[135] *See* Appendix.

[136] For the purpose of comparison, we created a similar binary variable, *Criminal Charge*, for charges the government flags as criminal offenses in its codebook, including controlled substance violation, prostitution, failure to register as a sex offender, and any other unlawful activity.

Table 1: Most Frequently Charged Codes, Plus Aggregated NS/FA Charges

Freq. Rank	Charge	No. Charges (9,672,420 tot.)	% Total	NS/ FA?
1	212(a)(6)(A)(i) and 241(a)(1)(B)[137]: Inadmissible for Presence without Admission or Parole (Entry without Inspection)	51,322,286	53.1%	No
2	212(a)(7)(A)(i)(I): Inadmissible for Inadequate Entry Documentation	1,650,579	17.1%	No
3	237(a)(1)(B): Removable for Presence in Violation of INA	894,578	9.2%	No
4	237(a)(2)(A)(iii): Removable for Conviction of Aggravated Felony	350,256	3.6%	No
5	212(a)(2)(A)(i)(I): Inadmissible for Conviction of Crime of Moral Turpitude	212,273	2.2%	No
6	212(a)(2)(A)(i)(II): Inadmissible for Conviction Involving Controlled Substance	185,934	1.9%	No
7	237(a)(2)(B)(i): Removable for Conviction involving Controlled Substance	167,674	1.7%	No
8	237(a)(1)(C)(i): Removable for Noncompliance with Conditions of Nonimmigrant Status	131,616	1.4%	No
9	212(a)(6)(C)(i): Inadmissible for Fraud or Willful Misrepresentation of Material Fact	130,074	1.4%	No
10	237(a)(1)(A): Removable for Inadmissibility at Time of Entry	115,460	1.2%	No
11–53	…	…	…	No
54	Aggregation of 53 distinct NS/FA charges[138]	1,257	.013%	Yes

[137] INA § 241(a)(1)(B) became INA § 237(a)(1)(B) after an amendment that led to the renumbering of the provisions. Therefore, they are effectively the same provision despite the slightly different wording. INS GEN. COUNS. OFF., IMMIGRATION AND NATIONALITY ACT OF 1952 REFLECTING AMENDMENTS THROUGH DECEMBER 2, 1997 2 (1998).

[138] *See* Appendix.

The original EOIR Charges Table does not indicate when a person is charged. That data exists in the EOIR's proceedings data,[139] which uses the *IDNPROCEEDING* variable to uniquely identify each record. The charge date provides the year that DHS (or its pre-2003 predecessor, the Immigration and Naturalization Service (INS)) issued the charging document. We used *IDNPROCEEDING* to import the charge date from the Proceedings Table into the Charges Tables. Having imported the charge date, the Charges Table now contains data for the charge code, whether the charge has national security or foreign affairs implications, the year charged, and the case identifier (*IDNCASE*). Each row remains a single charge, so observations nest accordingly: multiple charges (*IDNPRCDCHG*) cluster within a single proceeding (*IDNPROCEEDING*), and multiple proceedings cluster under a single case (*IDNCASE*).[140] Before collapsing the Charges Table, we removed records that were missing a case identifier (twelve observations), and charges issued before 1996 (1,854,423 observations) and after 2021 (13,423 observations).

Collapsing the remaining 9,672,420 records into 6,129,652 cases creates four new variables. *Number of Charges* counts the specific grounds the government has cited for removal. Nearly 66 percent of all cases have only one charge, and more than 99 percent of cases have five or fewer charges. *NS/FA Charge* remains a binary variable. The value "1" now indicates that the case contains at least one charge with national security or foreign affairs implications; the value "0" indicates that it does not. As noted above, this coding choice biases the data against our hypothesis.

B. Empirical Findings

Of the 6,129,652 cases encompassing 9,672,420 charges, only 915 cases include a national security or foreign affairs charge. In sum, between 1996 and 2021, just thirteen out of every 100,000 immigration cases included an NS/FA charge. Figure 1 shows the number of immigration cases initiated by DHS each year from 1996 to 2021, a period that spans four presidential administrations. The government opens

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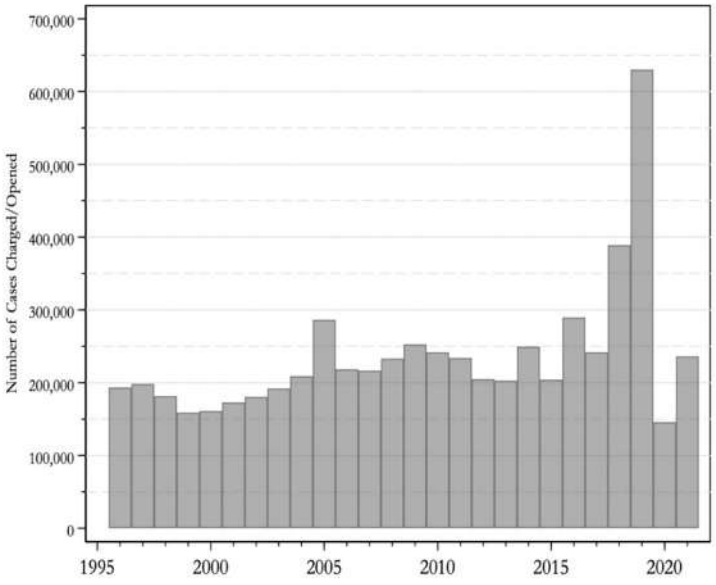
[139] *EOIR Proceedings Data* [hereinafter *Proceedings Table*] (on file with authors), *in FOIA Library*, *supra* note 125. The file contains 41 variables and 9,897,257 observations.

[140] A single individual can have multiple cases against them. However, EOIR deidentifies the data to protect each individual's privacy. It is therefore impossible to organize the data by person.

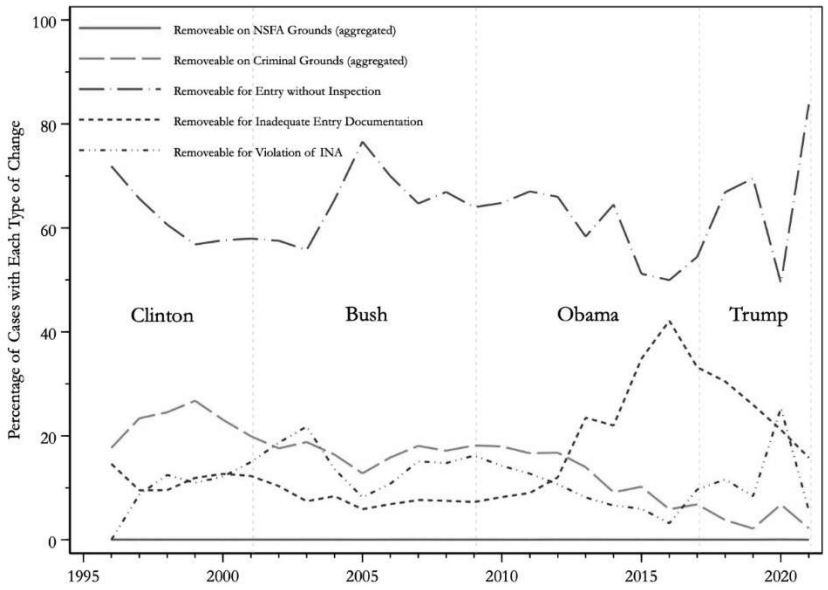
approximately 250,000 immigration cases each year.[141] Figure 2 illustrates the evolving composition of the charges issued in those cases. Specifically, the five lines represent the three most frequent charges (entry without inspection, inadequate documentation, and present in United States in violation of the INA), aggregated criminal charges, and aggregated NS/FA charges. Note that the percentage of new cases with national security charges is inconsequentially small throughout the period, never exceeding 0.06 percent (in 2020, fifty-seven out of 9,877) of new cases. By way of comparison, the percentage of cases in which the noncitizen was charged with being removable on criminal grounds peaked at roughly 27 percent during the Clinton administration, fell to below 20 percent during the Bush administration, and dropped below 10 percent in Obama's second term and throughout the Trump administration. This finding confirms our hypothesis that, by the government's own accounting, the vast majority of immigration cases do not implicate the kinds of governmental interests that warrant extraordinary judicial deference.

Figure 1: Number of New Immigration Cases, 1995–2021



[141] Note that the number of immigration cases opened annually remained relatively stable throughout this period, with the exception of a spike in 2018 and, especially, 2019.

Figure 2: Composition of Immigration Charges, 1995–2021[142]



III. NORMATIVE IMPLICATIONS OF EMPIRICAL FINDINGS

These empirical findings have important implications for the future of judicial review in immigration cases. If only thirteen out of every 100,000 cases genuinely implicate foreign affairs or national security, it is logically incoherent to allow that miniscule category of cases to dictate the standard of judicial review for the 999,987 out of every 100,000 cases that do not involve those exceptional governmental interests. Reviewing courts should abandon the unwarranted categorical presumption that immigration cases implicate national security and foreign affairs, and instead approach immigration law as an assortment of statutes, regulations, and enforcement actions involving civil violations of immigration law, the removal consequences of criminal convictions, labor, public health and welfare and, very infrequently, foreign affairs or national security. Under such an approach, the vast majority of

[142] The purpose of this chart is to illustrate the incidence of NS/FA charges (*see infra* Appendix A) relative to some of the most commonly charged grounds for removal. It does not represent 100 percent of removal charges. The lines labeled "Removable for Violation of INA," "Removable for Inadequate Entry Documentation," and "Removable for Entry without Inspection" correspond to the three most frequent removal charges. *See supra* Table 1. The line labeled "Removable because of Criminal Conviction" reflects an aggregation of multiple charge codes providing that a noncitizen is removable because of various types of criminal convictions. *See* STATISTICS YEARBOOK, *supra* note 127, at 35.

immigration-enforcement actions would be governed by the same substantive, judicially enforceable constitutional norms that apply when the government detains a criminal suspect or mentally ill person. The government should retain broad latitude in immigration cases that involve bona fide foreign affairs and national security interests, but it should no longer enjoy the categorical judicial deference that it currently receives as a matter of course.

A. Ushering Immigration Law into the Constitutional Mainstream: Due Process and Detention

To understand what the constitutional mainstreaming of immigration law would mean in practice, consider the issue of detention—the area of immigration lawmaking and enforcement where the consequences of the presumed NS/FA nexus are perhaps most manifest. As Part I.C explained, the Court affords noncitizens in immigration proceedings far weaker due process protection against unlawful detention than detained persons in virtually any other legal setting. The INA mandates detention for certain inadmissible or removable noncitizens, including those with pending asylum claims.[143] Mandatory detention provisions carry a conclusive, irrebuttable presumption that the noncitizen either poses a danger to the community or is a flight risk, thus dispensing with the need for an individualized hearing required in nonimmigration contexts.[144] And yet the Court has acquiesced, affirming that the standards of due process that safeguard individual liberty in every other legal setting simply do not apply to the detention of noncitizens in removal proceedings.[145] Recall *Demore v. Kim*, in which the Court held that government could detain the noncitizen petitioner at length without a hearing despite the government's concession that he posed neither a danger nor a flight risk.[146] Because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," the Court explained, immigration law occupies a singular realm of federal lawmaking that is insulated from judicially enforceable constitutional norms.[147] Although Kim's detention did not implicate such paramount governmental

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[143] *See supra* notes 98–100 and accompanying text.
[144] *See supra* notes 98–100 and accompanying text.
[145] *See supra* notes 105–123 and accompanying text.
[146] *See supra* notes 120–123 and accompanying text.
[147] *See Demore*, 538 U.S. at 522 (quoting Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976)).

interests, the Court observed, "reasonable presumptions and generic rules" nevertheless were permissible.[148]

Ushering immigration law into the constitutional mainstream would require that reviewing courts apply to Kim's detention and that of other noncitizens the same constitutional norms that the Court repeatedly has affirmed in *non*immigration legal settings, including pretrial detention, mental health detention, and even enemy combatant detention—specifically, that "'liberty is the norm,' and detention without trial is 'the carefully limited exception.'"[149] In those settings, the government bears the burden of proving that the person poses either a flight risk or is a danger to the community.[150] To extend the presumption of liberty to immigration law would place the burden on the government to justify the denial of physical liberty with reasons that are specific to the individual rights holder. As a result, INA provisions that either mandate detention for undifferentiated categories of noncitizens or place the burden on noncitizens themselves to prove that they are *not* dangerous or a flight risk would unconstitutionally deprive detainees of liberty without due process of law.[151]

In fact, the Court has at times gestured toward exactly the kind of constitutional mainstreaming that we advocate. In *Zadvydas v. Davis*, holding that the government lacked statutory authority to detain indefinitely a removable noncitizen subject to a final order or removal, the Court rejected the governments' argument that its "'plenary power' to create immigration law" requires "the Judicial Branch . . . [to] defer to Executive and Legislative Branch decisionmaking in that area."[152] At issue was a provision of the INA stating that when the government failed to remove a noncitizen during a statutory ninety-day removal period and the Attorney General determined that person was "a risk to the community or unlikely to comply with the order of removal," he "*may* be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision."[153] The petitioner, Kestutis Zadvydas, was a longtime permanent resident found to be removable after he

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[148] *Demore*, 538 U.S. at 526 (quoting Reno v. Flores, 507 U.S. 292, 313–14 (1993)).

[149] Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)).

[150] *See supra* Section I.C.1.

[151] *See supra* Section I.C.2.

[152] Zadvydas v. Davis, 533 U.S. 678, 695, 699 (2001).

[153] *Id*. at 682, 688–89 (alteration in original) (emphasis added) (internal quotation marks omitted) (quoting 8 U.S. C. § 1231(a)(6)).

was criminally convicted of possessing cocaine with the "intent to distribute," a deportable offense.[154] Because the government had been unable to locate a country that would accept Zadvydas, he remained in custody after the expiration of the ninety-day removal period, with no realistic prospect of release.[155] The question before the Court was whether the quoted language authorized the government to detain him indefinitely or, as Zadvydas contended, "only for a period reasonably necessary" to accomplish removal.[156] A five-justice majority read the statute "to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review," and ordered the petitioner released from federal custody and paroled in the United States.[157]

Justice Steven Breyer's majority opinion is notable for its insistent attention to the noncitizen rights holder rather than, as is typical in immigration cases, the nature of the authority claimed by the government. The government contended that "from a constitutional perspective, alien status itself can justify indefinite detention."[158] Yet the majority distinguished Zadvydas' constitutional status from that of a noncitizen "stopped at the border."[159] "[O]nce an alien enters the country, the legal circumstance changes," Justice Breyer instructed, "for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[160] Justice Breyer thus evaluated Zadvydas' detention under the same presumption of liberty that applied in the nonimmigration detention caselaw discussed above. Under that caselaw, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects."[161] In the pretrial and mental health contexts, he explained, the government bore the burden of overcoming the presumption of liberty by actually proving that confinement was necessary.[162] Preventive detention must be "limited to specially dangerous individuals and subject to strong procedural

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154 *Id.* at 684; *see* 8 U.S.C. § 1251(a)(2); *id.*

155 *Zadvydas*, 533 U.S. at 684–85.

156 *Id.* at 682.

157 *Id.*

158 *Id.* at 692.

159 The government had relied on *Shaughnessy v. United States ex rel.* Mezei, 345 U.S. 206 (1953), holding that the government's authority to detain indefinitely a noncitizen apprehended at the border was judicially unreviewable. *Zadvydas*, 533 U.S. at 692–93.

160 *Id.* at 693.

161 *Id.* at 690; *see supra* notes 89–95 and accompanying text.

162 *Id.* at 691.

protections," including a heightened standard of evidence and "stringent time limitations."[163]

Under these well-established standards of due process, "a statute that . . . permits an indefinite, perhaps permanent, deprivation of human liberty without any [judicial] protection" presented a "serious constitutional problem."[164] Notwithstanding such constitutional misgivings, Breyer reasoned that if Congress's intent to sanction indefinite detention had been clear, the Court would be obliged to defer to its judgment.[165] Because the statutory provision at issue was "ambiguous,"[166] however, Justice Breyer interpreted it to include an implicit time limitation of six months, thus avoiding the otherwise "obvious" denial to Zadvydas of due process.[167]

Not only does Justice Breyer's majority opinion apply conventional due process norms to immigration detention; it contravenes the presumption that immigration lawmaking and enforcement per se is part and parcel of foreign affairs and national security. Because the specific circumstances of the case did not "require us to consider the political branches' authority to control entry into the United States," Breyer declared, ordering Zadvydas' release would "leave no 'unprotected spot in the Nation's armor.'"[168] "Neither do we consider terrorism or other special circumstances" that might justify "heightened deference to the judgments of the political branches with respect to matters of national security."[169] Here, Justice Breyer sought to shift a key

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[163] *Zadvydas*, 533 U.S. at 690–91 (quoting *Salerno*, 481 U.S. at 750–52). Under that standard, Justice Breyer concluded, there was "no sufficiently strong special justification here for indefinite civil detention." *Zadvydas*, 533 U.S. at 690.

[164] *Id.* at 692.

[165] *Id.* at 696.

[166] *Id.* at 697.

[167] *Id.* at 692, 697–98. The canon of "constitutional avoidance," *id.* at 707 (Kennedy, J., dissenting) a "'cardinal principle' of statutory interpretation," obliged the Court to consider whether the constitutional difficulty could be averted through a reasonable construction of the statue. *Id.* at 689. Breyer squinted to find such a construction. *Id.* The statutory provision that a removable noncitizen "*may* be detained beyond the removal period," *id.* at 682 (emphasis added), he reasoned, did "not necessarily suggest unlimited discretion. In that respect, the word 'may' is ambiguous." *Id.* at 697. Accordingly, "read in light of the Constitution's demand's," the statute thus "limits an alien's post-removal-period detention to a period reasonably necessary to bring about . . . removal." *Id.* at 689. The majority adopted six months as the presumptive period of reasonableness. *Id.* at 701. In a tacit concession to the constitutional exceptionalism of the federal immigration power, however, the majority opinion acknowledged that a facial Fifth Amendment challenge to the mandatory detention provision would have failed. "Despite this constitutional problem," Breyer conceded, "if Congress ha[d] made [clear] its intent in the statute" to authorize indefinite detention, "we must give effect to that intent." *Id.* at 696 (internal quotation marks omitted) (quoting Miller v. French, 530 U.S. 327, 336 (2000)).

[168] *Id.* at 695–96 (quoting Kwong Hai Chew v. Colding, 344 U.S. 590, 602 (1953)).

[169] *Id.* at 696.

pillar of the federal immigration power, implying that extraordinary deference in immigration cases is not automatic or categorical, but instead requires an affirmative demonstration of "special" circumstances, such as terrorism. The mere fact that Zadvydas was a removable noncitizen did not make the government's asserted authority to detain him indefinitely any less extraordinary than it would be in a nonimmigration case. Just as in the pretrial or mental health contexts, such a wholesale denial of liberty had to be justified by "special arguments" rooted in the petitioner's individual circumstances.[170]

The majority likewise considered and rejected the government's asserted "foreign policy consideration"—specifically, the risk of interfering with "'sensitive' repatriation negotiations" with the Dominican Republic.[171] "[N]either the Government nor the dissents explain how a habeas court's efforts to determine the likelihood of repatriation . . . could make a significant difference in this respect," Justice Breyer observed.[172] In marked contrast to the *Demore* Court's reflexive capitulation to immigration law's asserted NS/FA nexus, the *Zadvydas* majority thus subjected the government's claimed interests to critical scrutiny, ultimately dismissing them as generic and meritless. In short, the NS/FA nexus must be proven rather than presumed. This is a long way from the "reasonable presumptions and generic rules" that the Court sanctioned just two years later, in *Demore v. Kim*.[173]

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[170] *Id.* at 696; *see supra* Section I.C.1.

[171] *Zadvydas*, 533 U.S. at 696.

[172] *Id.*

[173] Demore v. Kim, 538 U.S. 510, 526 (2003) (quoting Reno v. Flores, 507 U.S. 292, 313 (1993)). The *Demore* Court distinguished *Zadvydas* on two grounds. First, because Zadvydas' removal was "no longer practically attainable," his detention lacked a "reasonable relation" to the statutory purpose of preventing flight. *Id.* at 527 (quoting *Zadvydas*, 533 U.S. at 690). Second, Zadvydas' post-removal detention had "no obvious termination point" and was thus "potentially permanent," whereas Kim's detention pending a determination of removability was "of a much shorter duration." *Id.* at 528–29 (quoting *Zadvydas*, 533 U.S. at 697). Although *Kim* was decided by the same nine justices who had decided *Zadvydas* two years earlier, Justice O'Connor provided the fifth vote in each, apparently persuaded by those distinctions. Justice Souter's dissenting opinion in *Demore v. Kim* echoes Breyer's analysis in *Zadvydas*, likewise modeling the constitutional mainstreaming of immigration detention. The majority "forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty . . . lying at the heart of due process," Souter declared. *Id.* at 541 (Souter, J., concurring in part and dissenting in part). Especially when the detained noncitizen was, like Kim, a long-term permanent resident with deep familial and cultural attachments to the United States, he continued, "the Fifth Amendment permits detention only where 'heightened, substantive due process scrutiny' finds a 'sufficiently compelling' governmental need." *Id.* at 549 (quoting *Reno*, 507 U.S. at 316 (O'Connor, J., concurring)). Accordingly, Souter looked outside the immigration context, to pretrial detention and involuntary civil commitment, to evaluate what process Kim was due. Within that frame of reference, he concluded that "due process requires a 'special

B. Accounting for Genuine NS/FA Interests

Nothing in our proposal prevents courts from weighing a bona fide NS/FA interest on its merits and, in cases where such an interest in fact exists, deferring to Congress or the president. As the Court has long recognized, the "vast external realm" of foreign relations sometimes involves "important, complicated, delicate and manifold problems," the management of which resides with the president as the "representative of the nation."[174] Presidents have the benefit of superior information and the capacity, unique among the branches of government, for "secrecy and dispatch," and foreign affairs may sometimes require a greater "degree of discretion and freedom" than in cases involving "domestic affairs alone."[175] As with foreign affairs

justification' for physical detention that 'outweighs the individual's constitutionally protected interest in avoiding physical restraint' as well as 'adequate procedural protections.'" *Id.* at 557 (quoting *Zadvydas*, 533 U.S. at 690–91). When liberty is the rule and confinement the exception, "there must be a 'sufficiently compelling' governmental interest to justify" detention, and the "class of persons subject to confinement must be commensurately narrow and the duration of confinement limited." *Id.* (quoting *Reno*, 507 U.S. at 316) (citing *Zadvydas*, 533 U.S. at 690–91). The statute's fatal flaw was the denial to certain noncitizens of individualized consideration. Instead, the statute "select[ed] a class of people for confinement on a categorical basis and den[ied] members of that class any chance to dispute the necessity of putting them away." *Id.* at 551–52. Constitutional liberty "would mean nothing if citizens and comparable residents could be shorn of due process by this sort of categorical sleight of hand." *Id.* at 552.

[174] United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936).

[175] *Id.* at 319–20. As the often-recited passage from *Curtiss-Wright* suggests, it is a well-established principle of American law that courts owe the Executive some heightened measure of deference with respect to questions of foreign affairs and, especially, national security. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 132 (2d ed. 1996). The breadth of executive discretion suggested by such language has, of course, been subject to qualification and criticism. *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 20 (2015) (quoting *Curtiss-Wright Corp.*, 299 U.S. at 320) (declining to "acknowledge [the] unbounded power" implied by the *Curtiss-Wright* Court's description of the President as "the sole organ of the federal government in the field of international relations"); Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE L.J. 1, 32 (1973). And in actual judicial practice, such NS/FA deference is not governed by a single "coherent and unified interpretive framework." Elad D. Gil, *Rethinking Foreign Affairs Deference*, 63 B.C. L. REV. 1603, 1609 (2022). First, the Executive's interest in controlling the nation's foreign affairs arises across a diverse array of legal contexts, each of which may counsel its own distinctive equilibrium between executive discretion and judicial oversight. The President's interpretation of a foreign treaty, for example, may warrant more or less discretion than the interpretation of a statute or the indefinite detention of "enemy combatants." Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, YALE L.J. 1170, 1221 (2007). Moreover, judges and scholars often differ, sometimes radically, over the proper scope or strength of such deference. *See, e.g.*, Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000). The lack of consensus over the proper measure of judicial deference to the Executive in foreign affairs and national security matters is reflected in the divergence of views on the Supreme Court itself. Consider, for example, the range of opinions in leading cases such as *Hamdi v. Rumsfeld*, 548 U.S. 557 (2004), and *Boumediene v. Bush*, 553 U.S. 723 (2008). For the purpose this article, however, it is sufficient to state that the reasons set forth in *Curtiss-Wright* for deferring to the executive in matters of foreign affairs—the frequent need for

generally, ensuring the nation's security likewise may warrant the relaxation of judicially enforced constitutional norms that apply in other contexts. "Unlike the President and some designated Members of Congress," the Court has observed, "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people."[176] Accordingly, with respect to the "procedural and substantive standards used" to detain suspected terrorists, "proper deference must be accorded to the political branches."[177]

The constitutional mainstreaming of immigration law would not entail far-reaching judicial encroachment into the "vast external realm" of foreign affairs and national security,[178] the pursuance of which would continue to serve as a viable warrant for heightened deference. At the same time, however, bare, generic assertions of "foreign policy" or "national security" would, without more, be insufficient. Instead, the government would bear the burden of demonstrating that the challenged law or enforcement action served those interests in a meaningful way.

The Court has shown repeatedly that it is perfectly capable of making such judgements. Consider, for example, the Court's 2022 decision in *Biden v. Texas*, upholding DHS's rescission in June 2021 of the Migrant Protection Protocols (MPP) implemented during the Trump Administration.[179] MPP, also known as "Remain in Mexico," provided that non-Mexican migrants arriving in the United States from Mexico remain in Mexico while they awaited the resolution of their removal

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secrecy and dispatch, the president's superior access to information, the risk of sending conflicting signals to foreign actors—continue to inform the Court's thinking. *See, e.g.*, *Zivotofsky*, 576 U.S. at 14 (In key foreign affairs matters, including the "recognition" of foreign nations, the United States must "'speak . . . with one voice.' That voice must be the President's. Between the two political branches, only the Executive has the characteristic of unity at all times. And with unity comes the ability to exercise, to a greater degree, '[d]ecision, activity, secrecy, and dispatch.'") (internal quotations and citations omitted); Crosby v. National Foreign Trade Council, 530 U.S. 363, 381 (2000) (noting the importance of the president's unique capacity "to speak for the Nation with one voice in dealing with other governments").

[176] *Boumediene*, 553 U.S. at 797.

[177] *Id.* at 796; *see also* Holder v. Humanitarian L. Project, 561 U.S. 1, 34 (2010) (quoting Rotsker v. Goldberg, 453 U.S. 57, 65 (1981) ("[W]hen it comes to collecting evidence and drawing factual inferences [about suspected terrorist organizations], 'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate. One reason for that respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.").

[178] *Curtiss-Wright Corp.*, 299 U.S. at 319.

[179] Biden v. Texas, 142 S. Ct. 2528, 2534–35, 2548 (2022).

proceedings.[180] The Respondents—Texas and Missouri—had argued, and the lower courts had agreed, that the INA prohibited DHS from terminating MPP.[181] The Court disagreed, in an opinion by Chief Justice Roberts.[182] Because the INA provision authorizing MPP conferred "a *discretionary* authority to return aliens to Mexico,"[183] the authority to terminate the program was likewise discretionary. Moreover, the "foreign affairs consequences of mandating the exercise of contiguous-territory return" only underscored the lower courts' error.[184] The Court had long "declined to 'run interference in [the] delicate field of international relations,'"[185] Chief Justice Roberts explained, including "in the context of immigration law, where '[t]he dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy.'"[186] When the Court of Appeals prohibited the rescission of MMP and thus required DHS to continue returning non-Mexican migrants to Mexico, it had "imposed a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico."[187] In effect, the court had "authorized the District Court to force the Executive to the bargaining table with Mexico, over a policy that both countries wish to terminate, and to supervise its continuing negotiations with Mexico."[188]

The Court's opinion in *Biden v. Texas* illustrates that dispensing with the automatic presumption of an NS/FA nexus in immigration cases would not prevent courts from deferring to the foreign affairs or national security judgments of the political branches when the government has made a credible showing

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[180] *Id.* at 2535.

[181] *Id.* at 2536–37.

[182] *Id.* at 2534, 2548.

[183] *Id.* at 2532. The MPP were enacted under a provision of the INA providing that, in the case of a noncitizen "who is arriving on land . . . from a foreign territory contiguous to the United States, the [Secretary of DHS] *may* return the alien to that territory pending" the resolution of the noncitizen's removal proceeding. Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2)(C) (emphasis added). "[T]he word 'may'" in the preceding sentence, explained the Court, "clearly connotes discretion." *Biden*, 142 S. Ct. at 2532 (quoting Opati v. Republic of Sudan, 140 S. Ct. 1601, 1609 (2020) (emphasis removed)).

[184] *Biden*, 142 S. Ct. at 2543.

[185] *Id*. at 2543 (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115–16 (2013)).

[186] *Id*. (quoting Arizona v. U.S., 567 U.S. 387, 397 (2012)).

[187] *Id*. Roberts observed that the government had emphasized in its Petition for Certiorari "[e]fforts to implement MPP have played a particularly outsized role in diplomatic engagements with Mexico, diverting attention from more productive efforts to fight transnational criminal and smuggling networks and address the root causes of migration." *Id*. (internal quotations omitted) (quoting Petition for Writ of Certiorari at app., *Biden*, 142 S. Ct. 2528 (No. 21-954)).

[188] *Id*.

that such interests are at stake. Of course, what qualifies as a credible showing would necessarily remain open to debate, as the Court's 2018 decision in *Trump v. Hawaii* suggests.[189] Instead, it would merely bring immigration cases that implicate national security or foreign affairs into alignment with nonimmigration cases that implicate national security or foreign affairs, a few of which are discussed above.[190] Within that

[189] Trump v. Hawaii, 138 S. Ct. 2392 (2018). In *Trump v. Hawaii*, the Court rejected both statutory and Establishment Clause challenges to President Trump's Proclamation prohibiting residents of six Muslim-majority countries deemed a national security risk from entering the United States. *Id.* at 2415, 2420–23. Because the "admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control,'" the Court reasoned, it would uphold the Proclamation so long as the "Executive gave a 'facially legitimate and bona fide reason' for its action." *Id.* at 2418–19 (2018) (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977) and Kleindienst v. Mandel, 408 U.S. 753, 769 (1972)). Accordingly, the Court squinted past abundant evidence of discriminatory animus, including the president's repeated characterization of the order as a "Muslim ban," to the Proclamation's fig leaf of national security, ultimately concluding in a paean to extraordinary judicial deference that "[i]t cannot be said that it is impossible to discern a relationship to legitimate [security] interests or that the policy is inexplicable by anything but animus." *Id.* at 2417, 2420–21 (internal quotations omitted) (quoting Romer v. Evans, 517 U.S. 620, 632, 635 (1996)). As much as we might have wished for closer judicial scrutiny in this particular case, dispensing with the automatic presumption of a NS/FA nexus in immigration cases would not necessarily disturb it. The Court has employed the same highly deferential "facially legitimate and bona fide reason" standard to uphold other challenged actions with a minimally plausible relationship to national security. *See, e.g.*, Kerry v. Din, 576 U.S. 86 (2015) (internal quotations omitted) (quoting *Mandel*, 408 U.S. at 770 (1972)). In *Din*, a five-justice majority rejected U.S. citizen Fauzia Din's due process challenge to the exclusion of her noncitizen husband, Kanishka Berask, on unspecified "national security" grounds. *Id.* at 2139–41 (Kennedy, J., concurring). The opinion for the Court, which represented the views of only three justices, endorsed the government's claim of "consular nonreviewability"—the notion that there is no right to judicial review of a rejected visa application. Brief for Petitioners at 33–34, *Din*, 135 S. Ct. 2128 (No. 13-1402), 2014 WL 6706838; *see Din*, 576 U.S. at 92–95. Justice Kennedy's concurring opinion, which provided the fourth and fifth votes, rejected consular nonreviewability but nevertheless concluded that merely by citing the INA's so-called "terrorism bar"—a complex provision containing dozens of distinct reasons for denying a visa application—the Government had provided a facially legitimate bona fide reason for Berashk's exclusion and thereby satisfied the requirement of due process. *Id.* at 102–04. So long as the visa denial rested on a "facially legitimate and bona fide reason," Kennedy wrote, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justifications against the constitutional interests of citizens the visa denial might implicate"—an act of judicial deference that had "particular force in the area of national security." *Id.* at 104 (internal quotations omitted) (quoting *Mandel*, 408 U.S. at 770). For the statutory "terrorism bar," see 8 U.S.C. § 1182(a)(3)(B) (2012); *see also Mandel*, 408 U.S. 753. In *Mandel*, the Court rejected a constitutional challenge to the government's exclusion of Ernest Mandel, a Belgian journalist, scholar, and self-described "revolutionary Marxist," on the ground that, during a previous visit to the United States, Mandel had failed to "conform to his itinerary and limit his activities to the stated purposes of his trip." *Id.* at 757–58. The Court declined to inquire into his claim that the government's proffered basis for Mandel's exclusion was mere pretext for the real reason—namely, disapproval of his ideas. *Id.* at 769–70. It was enough that the government had offered a "facially legitimate and bona fide reason" for its action, and the Court would not "look behind the exercise of that discretion." *Id.* at 768–70.

[190] *See supra* note 95–106 and accompanying text.

framework, the government's assertion of national security serves not as an analytical talisman, before which courts must shrink in reverence, but rather as a particularly important *interest* to be accorded due regard even as it is weighed in the balance, along with the private interests of the detained individual and the burden to the government of additional procedural protections.[191] As the Court explained in *Hamdi*, the petitioner-detainee's liberty interest—"the most elemental of liberty interests[,] [that of] being free from physical detention by one's own government"—is not "offset by the circumstances of war or the accusation of treasonous behavior."[192] Accordingly, the Court's "starting point for the *Mathews v. Eldridge* analysis [was] unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated."[193] This is what it would mean to usher immigration law into the constitutional mainstream: to afford a noncitizen who is detained while her asylum claim is adjudicated or while she awaits removal the same judicially enforceable due process rights that already are afforded suspected terrorists.

CONCLUSION

This article supplies a critical empirical fact for future courts reviewing federal immigration laws and enforcement actions: Immigration law's presumed NS/FA nexus—the long-standing rationale for extraordinary judicial deference in immigration proceedings—is demonstrably false. The Supreme Court pronounced that nexus at the end of the nineteenth century, in a series of cases involving federal anti-Chinese legislation. If the nation was to "preserve its independence, and give security against foreign aggression and encroachment," it reasoned, it was essential that federal lawmakers operate outside of judicially enforceable constitutional constraints.[194]

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[191] *See Hamdi*, 524 U.S. at 528–33. The *Hamdi* Court insisted that, even when the challenged governmental action—here, the denial of habeas corpus rights to a US citizen detained as an "enemy combatant"—undeniably bore on the nation's security, the appropriate "mechanism . . . for balancing [the] serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,'" was the "ordinary" one set forth in *Mathews v. Eldridge*. That test "dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest . . . and the burdens the government would face in providing greater process." *Id.* at 529 (citing Mathews v. Eldridge, 424 U.S. 319 335 (1976)).

[192] *Id.* at 529–30.

[193] *Id.* at 531.

[194] *Chinese Exclusion Case*, 130 U.S. 581, 606 (1889); *see supra* note 54 and accompanying text.

Accordingly, it untethered federal immigration regulation from its traditional anchor in the Commerce Clause, and instead endowed Congress and the President with a vast, unrestrained, and extraconstitutional authority to exclude or expel noncitizens. When the Court further entrenched the NS/FA rationale in the 1940s and 1950s, it omitted the rationale's racist origins and recast it in the Cold War rubric of securing the nation against international Communism. Even today, generations after visions of racially menacing Chinese "invaders" or Communist subversives have faded from the judicial imagination, the Court continues to affirm the NS/FA nexus to justify extraordinary judicial deference in immigration matters, without regard to whether the specific immigration issue at hand bears even a plausible connection to national security or foreign affairs.

The stakes of such categorical judicial deference are well illustrated in the Court's approach to noncitizens detained by the government pursuant to a removal proceeding. As section I.C explained, the INA is replete with provisions either mandating detention or granting DHS discretion to detain certain removable noncitizens. Such provisions either dispense with an individualized hearing (in the case of mandatory detention) or place the burden on noncitizens to prove that they are *not* dangerous or a flight risk (in the case of discretionary detention). They thereby abandon the presumption of liberty and authorize exactly the kind of judicially unchecked detention authority that the Court has disallowed for mental health, pretrial, and even terrorism-related detentions. And in defiance of all that the justices have written outside of the immigration context—of the "elemental" interest in freedom from physical restraint, the powerful presumption of liberty, and the importance of preserving "freedom's first principles" even in "extraordinary" times—the Court nevertheless has acquiesced, essentially affirming that the standards of due process that safeguard individual liberty in every other legal setting simply do not apply to the detention of noncitizens in ordinary removal proceedings. Because of immigration law's presumed NS/FA nexus, a noncitizen whose detention has no plausible bearing on national security or foreign affairs may nevertheless be denied the essential physical liberty to which she, as a constitutional person, is otherwise entitled.

Yet when we subjected the presumed NS/FA nexus to empirical scrutiny, it crumbled. Using data available from the EOIR, we analyzed the case files of 6.1 million asylum and removal cases adjudicated between 1996 and 2021. Our analysis

of the approximately 9.7 million charging codes entered in those cases indicates that the government identified a national security or foreign affairs issue as a basis for removal in just .013 percent of the cases. In other words, by the government's own reckoning, foreign affairs or national security was meaningfully implicated in approximately thirteen of every one hundred thousand immigration cases. These empirical findings have important implications for judicial review in immigration cases. The .013 percent of such cases that may genuinely implicate foreign affairs or national security should not dictate the standard of judicial review for the 99.987 percent of cases that do not. If reviewing courts were to jettison the categorical presumption of an NS/FA nexus, the vast majority of immigration-enforcement actions would be governed by the same substantive, judicially enforceable constitutional norms that apply when the government interferes with an individual's liberty outside of the immigration context. The government would retain broad latitude in immigration cases that involve *bona fide* foreign affairs and national security interests, but it would no longer enjoy the categorical judicial deference that it currently receives as a matter of course.

In the context of detention, ushering immigration law into the constitutional mainstream would require that reviewing courts apply the same constitutional norms that the Court repeatedly has affirmed in *non*immigration legal settings, including pretrial detention, mental health detention, and even enemy combatant detention—specifically, that "liberty is the norm" and detention "the carefully limited exception."[195] In those settings, the government bears the burden of proving that the person it seeks to detain poses either a flight risk or a danger to the community. To extend the presumption of liberty to immigration law would mean that due process challenges to detention would place the burden on the government to justify the denial of physical liberty with reasons that are specific to the individual rights holder. As a result, INA provisions that either mandate detention for undifferentiated categories of noncitizens or afford DHS discretion to detain noncitizens without an individualized hearing would, as in the pretrial and mental health contexts, unconstitutionally deprive noncitizens of liberty without due process of law.

Finally, nothing in our proposal prevents courts from weighing an asserted foreign affairs or national security interest

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[195] Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)).

on its merits and, when a *bona fide* NS/FA interest in fact exists, deferring to Congress or the President. On the other hand, generic assertions of "foreign policy" or "national security" would, without more, be insufficient to trigger extraordinary judicial deference or diminished due process standards. Rather, the government's assertion of national security or foreign affairs would enter the analysis as a specific *interest* that the reviewing court would weigh in the balance, alongside the private interests of the detained individual and the burden to the government of additional procedural protections.

APPENDIX

OEIR CHARGE CODES RELATED TO NATIONAL SECURITY OR FOREIGN AFFAIRS

Charge Code	Charge
212(a)(3)	Security and Related Grounds
212(a)(3)(A)(i)	Security and Related Grounds. Any activity to violate any law relating to espionage or sabotage
212(a)(3)(A)(i)(I)	Any activity to violate any law relating to Espionage/Sabotage
212(a)(3)(A)(i)(II)	Export of Goods, Technology, or Sensitive Information
212(a)(3)(A)(ii)	Any other unlawful activity
212(a)(3)(A)(iii)	Any activity opposing, controlling, or overthrowing the U.S. Government by Violence or other unlawful means
212(a)(3)(B)(i)(I)	Engaged in Terrorist Activities
212(a)(3)(B)(i)(II)	Likely to Engage in any Terrorist Activity
212(a)(3)(B)(i)(III)	Show intention to cause death, serious bodily harm or incited terrorist activity
212(a)(3)(B)(i)(IV)	Representative of Foreign Terrorist Organization
212(a)(3)(B)(i)(V)	Member of Foreign Terrorist Organization IAW Sec. 219
212(a)(3)(B)(i)(VI)	Use of alien's position of prominence within any country to endorse or espouse terrorist activity
212(a)(3)(B)(i)(VII)	Alien is the spouse or child of an alien who is inadmissible under this section
212(a)(3)(C)(i)	Foreign Policy Considerations
212(a)(3)(D)(i)	Membership in Totalitarian Party
212(a)(3)(E)(i)	Commission of Acts of Torture or Extrajudicial Killings (title reads Participation in Nazi Persecutions)
212(a)(3)(E)(i)(I)	Participation in Nazi Persecutions of Genocide
212(a)(3)(E)(i)(II)	Participation with any government in any area occupied by the Military Forces of the Nazi government of Germany
212(a)(3)(E)(i)(III)	Participation with any government established with the assistance of the Nazi government
212(a)(3)(E)(i)(IV)	Participation with any government which was an ally of the Nazi Government
212(a)(3)(E)(ii)	Participation in Genocide

212(a)(3)(E)(iii)	Commission of Acts of Torture or Extrajudicial Killings
212(a)(3)(F)	Association with Terrorist Organizations
212(a)(17)	(repealed or amended) (1952—originally: arrested and deported, fallen into distress, removed as alien enemies or deported previously)
212(a)(27)	(repealed or amended) (1952—originally: prejudicial to public interest or endanger welfare, safety or security of the US)
212(a)(28)	(repealed or amended) (1952—originally: anarchists, member of Communist or totalitarian party or association or advocate for communism or dictatorship or are subversive)
212(a)(29)	(repealed or amended) (1952—originally: likely to engage in espionage, sabotage, public disorder, subversive activity, advocate or engage in overthrow of government)
237(a)(2)(D)(i)	Any conviction relating to Espionage, Sabotage, Treason or Sedition for which a term of 5 or more years of imprisonment may be imposed
237(a)(2)(D)(ii)	Any offense under Sec. 871/960 of Title 18 U.S.C.
237(a)(3)(B)(ii)	Violation of or Attempt or Conspiracy to Violate the Foreign Agents Registration Act
237(a)(4)(A)(i)	Any alien who has engaged, is engaged, or at any time after admission engages in Espionage, Sabotage, or tries to violate or evade any law of the United States relating to espionage or sabotage . . .
237(a)(4)(A)(ii)	Any other criminal activity which endangers public safety or national security
237(a)(4)(A)(iii)	Any activity, a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force . . .
237(a)(4)(B)	Terrorist Activities
237(a)(4)(C)(i)	Any alien who poses serious adverse foreign policy consequences for the United States
237(a)(4)(D)	Participation in Nazi Persecution, Genocide or Commission of any Act of Torture or Extrajudicial Killing
237(a)(4)(E)	Recipient of Military-Type Training
241(a)(2)(D)(i)	Miscellaneous Crimes relating to espionage, sabotage, treason, and sedition
241(a)(2)(D)(ii)	Any offense under section 871 (threatening

	the president) (expedition against friendly nation) or 960 of title 18, US Code
241(a)(2)(D)(iii)	A violation of the Military Service Act or Trading with Enemy Act
241(a)(B)(ii)	Alien convicted of a violation of the Foreign Agents Registration Act of 1938
241(a)(ii)	Criminal activity which endangers public safety or national security
241(a)(4(A)(i)(ii)	Any activity that has a purpose of opposition to, or the control or overthrow of the US government by force, violence, or other unlawful means
241(a)(4)(B)	Terrorist Activities
241(a)(4)(C)(i)	Any alien whose presence or activities in the United States would have potentially serious adverse foreign policy consequences for the United States
241(a)(4)(D)	Assisted in Nazi persecution or engaged in genocide
241(a)(6)	(1952—originally: anarchist or advocates anarchy, communism, totalitarianism or overthrow of US government)
241(a)(7)	(1952—originally: prejudicial to public interest or endanger welfare, safety or security of the US or likely to engage in espionage, sabotage, public disorder, subversive activity, advocate or engage in overthrow of government)
241(a)(15)	(1952—originally: violated Alien Registration Act (prohibited teaching or advocacy of overthrow of government))
241(a)(16)	(1952—originally: violated Alien Registration Act (prohibited teaching or advocacy of overthrow of government))
241(a)(17)	(1952—originally: interference with foreign affairs, neutrality or foreign commerce, espionage, etc.)
241(a)(19)	(1978 amendment: association with Nazi or Nazi allied government)
241(a)(4)(A)	(Security and related grounds) renumbered to section 237