

ARTICLE

The Rights of Aliens under the United States Constitution: At the Border and Beyond

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The constitutional rights of aliens outside the United States make themselves known more by their absence than by their presence. Claims to such rights appear in judicial decisions usually to be denied and rarely to be granted. Only a few such rights exist at all for aliens outside U.S. territory, at least in the pure form of rights based entirely on the U.S. Constitution, independent of statutes and treaties. This otherwise disheartening conclusion still leaves open the protection of constitutional interests by other means—the protection of interests beyond the scope of particular constitutional provisions and by means other than judicial enforcement of constitutional rights. Rights and remedies derived from other sources of law constrain the power of government even when the Constitution does not do so itself or does so only to a very limited extent. Checks and balances between Congress and the President can significantly deter government action against aliens, but they do so primarily through the means of duly enacted law that, almost by definition, requires a basis in non-constitutional law. Individual constitutional rights play a similar role, by stimulating or checking political action, most likely through the adaptation of existing mechanisms of enforcement to counter novel threats to rights, whether of citizens or aliens. The article concludes by examining how even this limited role of constitutional rights might operate to check the immigration orders recently issued by President Trump.

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I. INTRODUCTION

The constitutional rights of aliens outside the United States make themselves known more by their absence than by their presence. Claims to such rights regularly appear in judicial decisions but are usually denied rather than granted. Only a few constitutional rights exist at all for aliens outside U.S. territory, at least in the pure form of rights based entirely on the U.S. Constitution, independent of statutes and treaties. This otherwise-disheartening conclusion still leaves open the protection of constitutional interests by other means—the protection of interests beyond the scope of particular constitutional provisions and by means other than judicial enforcement of constitutional rights. Rights and remedies derived from other sources of law constrain the power of government even when the Constitution does not do so itself or does so only to a very limited extent. Checks and balances between Congress and the President can significantly deter government action against aliens, but they do so primarily through the means of duly enacted law or executive action that, almost by definition, require a basis in non-constitutional law. Individual constitutional rights play a similar role by stimulating political action, most likely through the adaptation of existing mechanisms of enforcement to counter novel threats to rights, whether of citizens or aliens.

It would, in fact, be difficult to imagine an effective regime for protecting individual rights that did not depend on sources of law outside a constitution. The judiciary acting by itself cannot create the entire legal infrastructure for enforcing rights and creating remedies because its authority derives from legislation conferring jurisdiction on the courts, and courts will only recognize implied causes of action in exceptional cases. The courts can recognize rights, but they depend upon institutions created by the political branches to enforce those rights.¹ Judicial review of actions of the political branches of government, especially executive actions undertaken overseas, always presupposes a system of law that already authorizes and regulates executive action. If the bad news is that constitutional rights do not extend very far overseas, the good news is that the scattered and tentative recognition of such rights can lead political actors to identify and enforce individual rights that deserve protection. Litigation and adjudication should aspire to fostering cooperation with the political branches and avoiding political backlash. These aspirations can be disappointed as current events all too clearly reveal, but constitutional law should take the long view and not focus entirely on the short term.²

¹ These institutions are themselves constitutive of sovereignty in the national state as one sovereign among others in the international sphere. See Neil Walker, *The Double Significance of External Constitutionalism*, 57 VA. J. INT'L L. 799 (2018).

² See text accompanying notes 82–109 *infra*.

This essay analyzes the constitutional rights of aliens in three parts, all built around a series of contrasting ideal types, with much room for complexity and controversy in between. The first part takes the stylized case of constitutional rights of citizens within the United States and contrasts it with a similarly simplified account of the rights of aliens outside the United States. Between these two extremes, a range of intermediate cases concerns the rights of citizens overseas, the rights of aliens within the United States, and the rights of aliens at the border under immigration laws. These cases do not yield any simple generalization about the scope and force of constitutional rights. Questions about who possesses constitutional rights, and where they possess them, depend upon nationality and territory. These components interact with the terms in which the constitutional right is framed, the inherent nature of the right, and whether it can be extended by statute or treaty. The immigration laws reveal how individual rights can receive greater protection by statute than by the Constitution itself. So, for instance, aliens at the border have the right to a hearing on whether they fall in the limited classes of aliens entitled to admission, although no constitutional decision gives all aliens this right. As the length and complexity of the immigration laws also reveal, courts could not make the compromises or create the institutions necessary to safeguard even rudimentary rights of aliens at the border.

The second part of this essay takes up a second contrast: between constitutional rights that are textually or functionally restricted to U.S. territory and those of seemingly indefinite scope. The former present easy cases, while the latter constitute hard cases. Some constitutional rights are explicitly defined in territorial terms, such as the right to freedom from slavery under the Thirteenth Amendment, which by its terms applies only “within the United States, or any place subject to their jurisdiction.” Even if extended to locales like military bases, this phrase invokes territorial conceptions of power. Yet rights under the Thirteenth Amendment have been extended by other means through statutes and treaties to reach overseas. Other rights are inherently territorial and have not been extended by these means, such as “the right of the people to keep and bear Arms” under the Second Amendment. The government has not sought to protect U.S. citizens from gun control legislation in foreign countries and has, on the contrary, pervasively regulated the export of firearms. This legislation has never been seriously challenged in court under the Second Amendment.³ Nor is there any chance that an attempt by the United States to enforce gun rights overseas would be acceptable to other nations under

³ Only a single decision has addressed a claim that the Arms Export Control Act, 22 U.S.C. § 2778 (2012), violated the Second Amendment, and it held that the Act did not. *Defense Distributed v. U.S. Dep’t of State*, 121 F. Supp. 3d 680, 700 (W.D. Tex. 2015).

the prevailing conception of sovereignty as a monopoly on the use of force within a defined territory.

In contrast to both the Thirteenth and the Second Amendments, the Due Process Clause seemingly has indefinite scope. As framed in both the Fifth Amendment, which applies to the federal government, and the Fourteenth Amendment, which applies to the states, this clause protects any “person” from deprivation “of life, liberty, or property, without due process of law.” The constitutional language seemingly extends to anyone, anywhere in the world, and for that reason has frequently been invoked to challenge the actions of the federal government in the war on terror. These challenges raise difficult and controversial issues because of the magnitude of the opposing interests, with lives in the balance on both sides. As the individual interests become more fundamental, the argument for treating citizens and aliens alike becomes more compelling, but at the same time, the steps needed to counteract terrorist threats weigh strongly against judicial interference. Decisions from U.S. courts on the tactics used in the war on terror make this tension evident.

The last part of this essay takes up the contrast between constitutional adjudication in domestic and transnational cases. In purely domestic cases, involving citizens and government actions within the United States, courts determine the content and scope of constitutional rights principally along a single dimension: by assessing the arguments for protecting individual rights against the arguments for protecting government interests. This process need not take the form of an unconstrained “balancing test” because the courts must also decide whether to adopt stricter or more deferential standards for reviewing government action, from “rational basis” to “strict scrutiny,” as these terms are used in U.S. constitutional law. Regardless of the appropriate standard, however, the dispute before the court typically takes a binary form: either for the individual or for the government. In transnational cases, where the United States acts overseas with significant consequences for individuals there, the interests of sovereign nations come into play, so that arguments from three sources must be considered: from the individual, from the U.S. government, and from foreign governments. The multidimensional analysis of all three interests might, in the end, be no more complicated than the analysis in domestic cases, where interests of third parties also can come into play. But transnational cases regularly present multiple interests and do so on the crucial issue of translating constitutional principles—what Madison called “parchment barriers”—into effectively protected rights.⁴ Modern nation states have conceded to foreign governments the power to use force within their territory mainly by agreement and secondarily by international law. Therefore, any attempt to

⁴ THE FEDERALIST NO. 48 (James Madison).

expand the scope of constitutional rights to conduct and events taking place overseas must take account of the need for cooperation with other nations.

This need for effective enforcement has become all the more pressing because of the tendency of nations to enact sham constitutions and to make sham commitments to human rights. More so than in domestic cases, constitutional rights in transnational cases must be framed with an eye to effective mechanisms of enforcement. Judicial decisions in the United States, if only implicitly, have taken these problems into account, principally by deferring to the political branches of government and accepting the current regime of limited enforcement of constitutional rights overseas. Of course, that regime hardly remains fixed, and constitutional decisions have a role to play in prompting the political branches to enact needed reforms. But judges cannot make these reforms out of whole cloth. They need the assistance of Congress and the President. Without that assistance, judges are confined to a limited range of action based solely on the Constitution. We begin with those constitutional decisions.

II. ALIENS COMPARED TO CITIZENS

Because citizens have greater rights than aliens under the U.S. Constitution, as under most constitutions around the world, the extent of aliens' rights depends primarily upon how closely the aliens resemble citizens, particularly citizens within the United States. The gradations in status among aliens, from undocumented aliens to those admitted for permanent residence, blur the distinction between citizens and aliens.⁵ So also do the provisions in the Constitution that protect any "person" rather than just "citizens." The Due Process Clauses, as already noted, extend to any "person,"⁶ as does the Equal Protection Clause, which requires each state to give equal protection "to any person within its jurisdiction."⁷ The coverage of aliens carries over to other constitutional provisions that do not identify who holds the rights that they confer, such as the rights to freedom of expression and religion under the First Amendment, the rights of criminal defendants under the Fifth and Sixth Amendments, the right to jury trial in civil cases under the Seventh Amendment, and the right not to be subject

⁵ For a thorough analysis of this issue, see David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47. For an account of tendencies that support extension of constitutional rights to aliens overseas, see Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 286–90 (2009) (seeing promise for a "functional approach" to extraterritorial constitutional rights); Sarah H. Cleveland, *Essay, Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 270–86 (2010) (arguing for an evolutionary approach making constitutional rights depend upon "effective control").

⁶ U.S. CONST. amend. V, cl. 4; amend. XIV § 1, cl. 3.

⁷ U.S. CONST. amend. XIV § 1, cl. 4.

to cruel and unusual punishment under the Eighth Amendment. In contrast to these amendments, the clauses protecting privileges and immunities reach only to the rights of “citizens.”⁸

The similar protection afforded to citizens and aliens as persons under the Constitution becomes strongest when the government acts against an alien within the United States. What exactly constitutes an act within the United States raises complications of its own, blurring the distinction between extraterritorial and other government acts. In fact, simple reliance upon the terminology of “extraterritoriality” tends to flatten out such problems into the all-or-nothing distinction between what happens within a nation’s territorial boundaries and what happens outside them. In U.S. law, the constitutional rights of aliens often depend upon which level of government—state or federal—has acted to their detriment. The states cannot deny to aliens within the United States, even undocumented aliens, many benefits granted to citizens under state law.⁹ Aliens also are protected as “persons” under the Equal Protection Clause of the Fourteenth Amendment from other forms of discrimination by the states—for instance, on the basis of race and national origin.¹⁰ The same holds true under the Due Process Clause of the same amendment, which protects a variety of rights against the states, many of which were derived by “incorporation” from amendments that originally applied only to the federal government. As a matter of due process itself — what U.S. lawyers redundantly call “procedural due process” — aliens also are protected from the exorbitant assertion of personal jurisdiction by state courts and the application of state law in the absence of contacts with the state. Aliens who have little or nothing to do with a state are protected from the assertion of personal jurisdiction and the application of state law by the courts of that state. The denial of due process in such cases is characterized as occurring within the state where the court sits.

Similar territorial considerations apply to the federal government under the Due Process Clause of the Fifth Amendment, but with quite different consequences. Contacts with the entire country support personal jurisdiction of the federal courts when the assertion of jurisdiction is based entirely on federal rules or statutes, as such contacts also support application of federal law on the merits.¹¹ A person generally accumulates contacts with the entire nation much more quickly than with a particular state. As this example attests, the constitutional protection of aliens from actions by the federal government does not neatly fit any simple rule of territoriality, which

8 U.S. CONST. art. IV, § 2, cl. 1; amend. XIV, § 1, cl. 2.

9 *Plyler v. Doe*, 457 U.S. 202, 211–12 (1982).

10 *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886).

11 *See* *J. McIntyre Machinery, Ltd. v. Nicaastro*, 564 U.S. 873, 885–86 (2011) (Kennedy, J., plurality opinion).

sorts cases and protection by uniform indicia of geographical location. Just as absence of citizen status does not invariably deny aliens any constitutional protection, so too the fact that the government acts outside the borders of the United States does not invariably reduce their protection further. It is a general tendency, not a hard-and-fast rule.

To take another example, the federal government has very broad power over immigration and naturalization, which is exercised both within and outside of the United States. The federal government also has broad power to discriminate against aliens and to deny them benefits simply because they are noncitizens.¹² These powers all derive ultimately from the inherent power of a sovereign state to control its borders. In order to do so, the government can deny entry to some aliens and expel others. It has no similar power over citizens.¹³ As noted, the immigration laws have created a status hierarchy for different aliens: from those admitted for permanent residence, who most closely resemble citizens; to those admitted only as visitors, who have no prospect of permanent residence; to those who gained entry to the country without proper documents. Aliens can achieve permanent residence status by many different means, making the determination of status a complicated question that has spawned an intricate structure of administration, hearings, and judicial review. The substance and procedure of the U.S. immigration laws need not be discussed in detail to reveal how much it depends upon legislation, regulations, and administrative practice. All of these sources of law go well beyond what courts could construct by themselves.

The inability of courts to devise fully effective remedies for constitutional violations does not mean, however, that they lack the power to identify the rights that aliens have. Constitutional decisions have played a central role in prompting the political branches to protect aliens in the immigration system, in a process that has played out over a century and a half. These decisions focus on the right to petition for habeas corpus and the right to due process in “removal proceedings,” defined by statute to

¹² *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976). Discrimination against aliens on other grounds apart from their status as noncitizens raises different issues, both of constitutional and statutory law. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92–96 (1973) (discrimination against aliens is not necessarily discrimination on the basis of national origin). Although old decisions permitted explicit racial discrimination by the federal government under the “plenary power doctrine,” *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604–10 (1889) (upholding exclusion based on national origin in immigration), those precedents have eroded as discrimination on this ground has come under strict constitutional scrutiny and the immigration laws have been amended to eliminate racial classifications. *Adarand Contractors v. Pena*, 515 U.S. 200, 227 (1995) (applying strict scrutiny to racial classifications by the federal government). Congress amended the Immigration and Nationality Act (INA) to prohibit discrimination on the basis of race and nationality in 1965. INA § 202(a), 8 U.S.C. § 1152(a) (2012).

¹³ *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

include both denial of entry into the country and deportation from the country.¹⁴ The right to habeas corpus raises questions of jurisdiction and remedies. As a constitutional matter, it derives from limitations on the power of the political branches, which may suspend access to habeas corpus only “when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁵ The influence of this provision has been felt mainly in interpretation of statutes conferring jurisdiction on the federal courts. The Supreme Court of the United States has relied upon the clause to require a “clear statement” that Congress intended to suspend the writ of habeas corpus.¹⁶ Furthermore, even when Congress has made a clear statement by depriving the federal courts of jurisdiction, its action might still be held unconstitutional in certain circumstances.¹⁷

Granting the courts power to entertain the writ, however, does not guarantee that the writ itself will be issued. That requires a further right to relief on the merits, usually asserted under the Due Process Clause. All individuals subject to detention inside the United States, and all citizens outside the United States, have a right to a hearing to contest a deprivation of liberty through physical custody.¹⁸ Individuals with a colorable claim to citizenship have a right to a hearing whether they are at the border or inside the country.¹⁹ The same is true of aliens with a colorable claim to permanent resident status.²⁰ Some aliens have a constitutional right to a hearing only if they have gained lawful entry to the United States,²¹ but many others have a right to a hearing by statute. For example, if an alien had previously been granted preliminary screening for asylum status, granted asylum status itself, or granted admission as a refugee and the status or screening was later revoked, the alien may challenge the revocation through an administrative

14 INA §§ 235, 239; 8 U.S.C. §§ 1225, 1229 (2012).

15 U.S. CONST. art. I, § 9, cl. 2.

16 *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001); *INS v. St. Cyr*, 533 U.S. 289, 298–99 (2001); *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004). This form of judicial intervention represents one point on the continuum between weak and strong forms of judicial review. See Rosalind Dixon & Brigid McManes, *Detaining Non-Citizens: Political Competition and Weak v. Strong Judicial Review*, 57 VA. J. INT’L L. 591 (2018).

17 See *infra* Part II.

18 *Chin Yow v. United States*, 208 U.S. 8, 12 (1908). If their detention was without probable cause, they also have a claim for unreasonable seizure of their person under the Fourth Amendment.

19 *Ng Fung Ho v. White*, 259 U.S. 276, 282, 285 (1922) (claim of citizenship by person opposing deportation); *Kwock Jan Fat v. White*, 253 U.S. 454, 459 (1920) (claim of citizenship by person stopped at border).

20 *Landon v. Plasencia*, 459 U.S. 21, 327–28, 330 (1982) (claim of permanent residence status by alien stopped at the border). For a theory of why states might grant such protection to resident aliens, see Adam Chilton & Eric Posner, *Country-Specific Investments and the Rights of Non-Citizens*, 57 VA. J. INT’L L. 575 (2018); Lewis Kowalczyk & Mila Versteeg, *The Political Economy of the Constitutional Rights of Asylum* 102 *Cornell L. Rev.* 1219 (2017) (seeking to establish correlations between constitutional provisions granting a right to asylum and economic and legal features of a state).

21 *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 100–02 (1903).

hearing.²² As these last examples reveal, statutory rights overlap with and obscure the precise boundaries of constitutional rights. Immigration cases illustrate just how complicated and detailed the statutory infrastructure can become. It assures the same constitutional interests in liberty as the Due Process Clauses but embeds them in layers of legislation and regulation. All these non-constitutional sources of protection, however, depend on and reinforce the distinction between citizens and aliens, which is fundamental to immigration law.

This feature of immigration law has implications beyond the exact scope of the rights of aliens to enter into or remain in the United States. The same pattern of constitutional decisions deeply embedded in a complicated network of statutes and regulations carries over to the U.S. response to the war on terror, taken up in the next section. Actions of the legislative and executive branches hold out the promise of realistically protecting the same individual interests as constitutional decisions by the judiciary, and often beyond the constitutional minimum of protection. Actions by the political branches also carry the risk, of course, of infringing upon those interests. Cooperation of the political branches with the judiciary cannot necessarily be counted on. It nevertheless has to be taken into account. Immigration law in the United States evolved in a long process of legislative and executive responses to judicial decisions that gradually recognized expanded rights to a hearing under the Due Process Clause. Those responses were not always favorable to immigrants, but without some form of political support and implementation, the constitutional rights recognized by the judiciary had very little chance of being realized in practice.²³ Even a sustained campaign of litigation to recognize constitutional rights must focus its efforts on selected rights. This litigation strategy is far more likely to generate episodic rather than precipitous change, with lasting effects that depend upon the reaction of the political branches.²⁴ The next part of this essay examines how the back-and-forth among the branches of government has played out in other contexts, with particular attention to cases arising from the war on terror.

²² INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) (2012).

²³ An instructive example concerns the act of state decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Although not strictly a constitutional decision, *Sabbatino* relied on structural arguments from the separation of powers to recognize a defense based on the acts of state of the Republic of Cuba. Congress then immediately passed legislation superseding the decision out of antipathy for the communist regime there. Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d), 78 Stat. 1009, 1013 (1964), codified as amended at 22 U.S.C.A. § 2370(e)(2) (2012). In only one instance, however, has the President defied a judicial decision, in that case of a single justice finding no basis for suspending the writ of habeas corpus in the early days of the Civil War. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (Taney, C.J.).

²⁴ Constitutional adjudication is far more likely through its moral force and its entrenched effects to elicit a constructive response from the political branches of government than judicial review based solely on principles of administrative law. Adam Shinar, *Israel's External Constitution: Friends, Enemies and the Constitutional/Administrative Distinction*, 57 VA. J. INT'L L. 735 (2018) (reporting the minimal protections of Palestinians in the Occupied Territories under Israeli administrative law).

III. EASY CASES AND HARD CASES

Aliens possess fewer and fewer constitutional rights as the actions of the government take place further and further from U.S. territory: from the border, to the high seas, and then to territory controlled by another nation. The same holds true, but to a lesser extent, for citizens. Nationality and territoriality therefore provide the framework for adjusting the scope of constitutional rights, and these considerations yield fairly stable and determinate answers for rights that are widely accepted with established mechanisms for enforcement. Nevertheless, even easy cases can yield paradoxical results. To take two examples mentioned earlier, the prohibition against slavery in the Thirteenth Amendment effectively extends beyond the United States, while the right to bear arms under the Second Amendment does not. These equally uncontroversial but entirely opposite results have little to do with the text of the amendments. The Thirteenth Amendment contains an explicit territorial restriction to “the United States, or any place subject to their jurisdiction,” yet it effectively extends overseas through treaties and federal statutes that prohibit slavery and human trafficking. By contrast, the Second Amendment has less explicit restrictions on its scope, but it has never been enforced overseas. It does refer to domestic security in the form of “[a] well regulated Militia, being necessary to the security of a free State,” and also to the right “of the People,” provisions which arguably limit its protection to citizens in the United States.²⁵ Yet the dearth of cases on the application of the Second Amendment overseas suggests that it has little, if any, effect beyond the borders of the United States. Neither the states nor the federal government purport to protect the right to bear arms overseas, and as noted earlier, the pervasive federal regulation of the export of firearms has yet to meet a serious challenge.

What explains these sharply divergent results in these two easy cases? Apart from technical issues of U.S. law, the reason has to do with how many other nations recognize the right guaranteed by the amendment. Under the Thirteenth Amendment, the technical issues concerning the power of Congress and the President to extend abolition beyond territorial limits rest on control over commerce and treaties rather than the amendment itself.²⁶ The unanimity with which other nations have condemned slavery—although tragically not matched by their willingness to enforce abolition—makes this assertion of power by the United States nearly entirely

²⁵ As the Supreme Court reasoned in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–6 (1990). For further discussion of this case, see text accompanying notes 38–40 *infra*.

²⁶ George Rutherglen, *The Constitution and Slavery Overseas*, 39 SEATTLE U. L. REV. 695, 701–709 (2016).

unproblematic.²⁷ At the opposite extreme, no attempt has been made to enforce the Second Amendment overseas. Even an activist gun rights organization, the National Rifle Association, has professed to be satisfied with gun regulations insofar as they allow shipment of guns by travelers to foreign countries “subject to the laws of the destination countries.”²⁸ No other country has a constitutional provision similar to the Second Amendment.²⁹ The truly exceptional character of this amendment prevents its recognition overseas. In addition, recognition of a right to bear arms in another country would compromise the foreign state’s monopoly on the use of force within its boundaries, making the extraterritorial application of the Second Amendment all the more implausible.

Between the extremes marked out by these easy cases lie other constitutional rights. Consider, for instance, the right to free speech, which is widely recognized by other nations, but nowhere so strongly enforced as in the United States.³⁰ In a series of decisions, the Supreme Court has interpreted the First Amendment to modify the common law of libel to impose additional burdens of proof upon the plaintiff.³¹ English law has not done so, giving rise to complaints that it has become a center for “libel tourism.” In response to attempts to enforce English libel judgments in the United States, Congress enacted the SPEECH Act of 2010,³² which allows enforcement of foreign libel judgments only if they do not infringe upon federal and state constitutional rights to free speech. Congress no doubt disapproved of the English courts’ continued adherence to the common law, but it did not attempt to directly interfere with English proceedings. The legislation took the form, instead, of refusing to enforce foreign judgments that are contrary to state or federal public policy. This is a standard ground for refusing to enforce foreign judgments.³³ Moreover, in territorial terms, the refusal to enforce a foreign judgment occurs entirely within the United States, just like an assertion of personal jurisdiction by a

27 KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 26-27 (3d. ed. 2012). For another perspective on how to make newly recognized constitutional rights extend extraterritorially to protect human rights, see Heinz Klug, *The Constitution in the World: The External Dimensions of South Africa’s Post-Apartheid Constitution*, 57 VA. J. INT’L L. 657 (2018).

28 Chris Cox, *NRA Intervention Keeps The Trail Open For Overseas Travelers With Firearms*, NRA-ILA, June 1, 2015, <https://www.nraila.org/articles/20150601/nra-intervention-keeps-the-trail-open-for-overseas-travelers-with-firearms>.

29 See Mila Versteeg & David S. Law, *The Declining Influence of the U.S. Constitution*, 87 N.Y.U. L. REV. 762, 775, 779 (2012).

30 *Id.* at 773.

31 *E.g.*, *N.Y. Times v. Sullivan*, 376 U.S. 254, 283–84 (1964) (plaintiffs who are public officials must prove malice in the sense of reckless disregard of the truth); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (same proof required of plaintiffs who are public figures).

32 28 U.S.C. §§ 4101–4105 (2012). The acronym “SPEECH” stands for “Securing the Protection of our Enduring and Established Constitutional Heritage.”

33 See, e.g., *Telnikoff v. Matusevitch*, 347 Md. 561, 702 A.2d 230 (1997) (refusing to enforce an English libel judgment for this reason).

U.S. court. This characterization of the SPEECH Act, while it obscures the effect of the act in encouraging a change in English law, brings it within the traditional practice in recognizing foreign judgments. The act no doubt is less than fully agreeable to the English courts, since they do not recognize any constitutional limits on libel law, but it has not triggered tit-for-tat retaliation in refusing to enforce U.S. judgments.

Whatever the tolerance, both here and abroad, for extended protection of free speech, no similar consensus has greeted actions taken by the United States in the war on terror. These actions have largely been directed against aliens overseas or at the border. Targeted killings, extraordinary rendition, electronic surveillance, interrogation by harsh treatment, and exclusion of immigrants from suspect countries all raise pressing questions about the scope of constitutional rights, the limits on judicial review, and the response of the political branches to judicial decisions. Public opinion, both foreign and domestic, eventually led the Bush Administration to end enhanced interrogation and rendition of detainees to “black sites” run by the United States. The United States also stopped bringing detainees to Guantanamo Bay, and the Obama Administration tried to shut down the detention facilities there. Despite continuing controversy, targeted killings and electronic surveillance in the United States and in other countries have continued, with effects that extend also to American citizens, both here and abroad.³⁴ Neither of these issues has been addressed on the merits by the Supreme Court,³⁵ and the few decisions of the lower courts tend to defer, in one way or another, to Congress and the President.³⁶ But the absence of decisions on the merits, especially decisions in favor of aliens, strongly suggests the absence of rights.

The signposts for the precipitous fall in constitutional protection of aliens as they move away from the United States, as compared to aliens who stay within the United States, were established by the Court in two decisions: *Johnson v. Eisentrager*,³⁷ which denied claims under the Due Process Clause by enemy combatants apprehended and held overseas after the conclusion of World War II, and *United States v. Verdugo-Urquidez*,³⁸ which denied claims under the Fourth Amendment by a Mexican citizen over the search of his residences in Mexico. Both decisions depended on factors other than location, but the decisions would have come out differently if the government had acted solely within the United States. In *Eisentrager*,

34 See CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 758–806 (5th ed. 2014).

35 The Court did hold that U.S. citizens and organizations lacked standing to challenge surveillance of foreign nationals. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147–53 (2013).

36 See text accompanying notes 49–56 *infra*.

37 339 U.S. 763 (1950).

38 494 U.S. 259 (1990).

complications arose from the status of the petitioners as enemy aliens, but the crucial fact was that, at all times, they remained outside the United States.³⁹ In *Verdugo-Urquidez*, complications arose from the defendant's absence of ties with the United States, apart from being transported across the border by Mexican agents for prosecution in the United States. He was "an alien who has had no previous significant voluntary connection with the United States" and so was not among "the people" explicitly protected by the Fourth Amendment.⁴⁰ The tenuous contacts of the defendant with the United States underlined the significance of the fact that the search occurred in Mexico. Both considerations had a common territorial dimension, and neither decision attempted to characterize the cases as occurring in the United States because the litigation took place there.

Where characterizing the location of a case as within territory controlled by the United States becomes more plausible, the case for recognizing constitutional rights becomes stronger. Another pair of decisions, usually contrasted with *Eisenberger* and *Verdugo-Urquidez*, reveals the ambivalent implications of place and status. In *Reid v. Covert*,⁴¹ the Supreme Court held that two women, both U.S. citizens, were entitled to a trial that complied with the Fifth and Sixth Amendments, on charges that each of them had killed her husband on a United States military base in another country. The alternative procedure would have been a trial before a court martial, which did not afford the protection of trial by jury or by a judge with life tenure. Because of the citizenship of the defendants, the decision cannot stand for the general extension of the Constitution to aliens overseas. The decision does not even stand for the proposition, asserted by the plurality opinion, that citizens have the full protection of constitutional rights within the country when they venture outside it.⁴² Two justices concurred in the result, on the ground that the charges against the defendants carried the death penalty.⁴³ Despite these qualifications, *Reid* does extend constitutional rights beyond the boundaries of the United States.

As a precedent, the lesson that *Reid* offers is that the potential for extraterritorial recognition of constitutional rights largely remains unrealized. The same lesson can be drawn from the more recent decision in this line, *Boumediene v. Bush*.⁴⁴ That decision held that Congress could not deprive the federal courts of jurisdiction to issue a writ of habeas corpus on behalf of prisoners at Guantanamo Bay. The prisoners in *Boumediene* were all

39 339 U.S. at 777.

40 494 U.S. at 265–66, 271.

41 354 U.S. 1 (1957).

42 *Id.* at 5–10.

43 *Id.* at 49 (Frankfurter, J., concurring in the result); *Id.* at 65 (Harlan, J., concurring in the result).

44 553 U.S. 723 (2008).

aliens and were all taken into custody overseas. They alleged that Congress had unconstitutionally suspended their access to the writ of habeas corpus. The Court held that Guantanamo Bay, although “technically not part of the United States, is under the complete and total control of our Government.”⁴⁵ Accordingly, the government had to provide the prisoners with access to the writ of habeas corpus or to alternative procedures that allowed a full and fair hearing on whether they were properly designated as enemy combatants.⁴⁶ The latter reasoning comes close to a holding that the Due Process Clause entitled aliens imprisoned at Guantanamo Bay to a hearing on the lawfulness of their confinement.

Yet even if the opinion can be read this way, it creates only a procedural right, allied with the jurisdictional right to have a federal court consider a writ of habeas corpus on the merits. *Boumediene* specifically reserves the question of when the writ should issue, leaving that for consideration by the lower courts. The opinion “does not address the content of the law that governs petitioners’ detention.”⁴⁷ That law comes in the first instance from sources outside the Constitution: mainly the statutes authorizing the use of military force and the detention of terrorists after the attacks on September 11, 2001, supplemented by international law under the Geneva Conventions as incorporated in federal law in the Uniform Code of Military Justice.⁴⁸ Even with respect to procedural and jurisdictional rights, *Boumediene* hardly abandons territorial limits on the scope of the Constitution as it applies to aliens. The opinion just shifts those limits to include Guantanamo Bay. So far, it has not been extended to aliens detained elsewhere, for instance, at Bagram Airfield Military Base in Afghanistan.⁴⁹

It would nevertheless be wrong to be entirely pessimistic about the influence of *Boumediene*. A constant stream of petitions for habeas corpus induced Congress to define the substantive standards for detention and has led the lower courts to interpret those standards in ever more detailed opinions. The executive branch has already established procedures to determine if continued detention of any prisoner is warranted, subject to judicial review by the U.S. Court of Appeals for the D.C. Circuit.⁵⁰ The Supreme Court handed down *Boumediene*, and the lower courts have exercised jurisdiction over writs of habeas corpus and on direct review as

⁴⁵ *Id.* at 771.

⁴⁶ *Id.* at 779–87.

⁴⁷ *Id.* at 798.

⁴⁸ 10 U.S.C. § 801 et seq. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 613–35 (2006); *id.* at 638–53 (Breyer, J., concurring). For a more direct and more general incorporation of international law into domestic constitutional law, but in the distinctively French legal system, see George Bell, *The External Working of the French Constitution*, 57 VA. J. INT’L L. 493 (2018).

⁴⁹ *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

⁵⁰ Bradley & Goldsmith, *supra* note 34, at 720–26.

part of an ongoing process with the other branches of government to reconsider the legality of the detention of prisoners in the war on terror.⁵¹ This process led to changes in non-constitutional law and executive practice, a development broadly similar to what has happened with respect to the law on targeted killings and electronic surveillance.

The single reported decision to consider the lawfulness of targeted killings, *Al-Aulaqi v. Obama*,⁵² dismissed a claim to enjoin an attack in Yemen as raising “political questions” entrusted to the other branches of government. Unlike the vast majority of attacks, this one was directed at a U.S. citizen and probably became the focus of litigation for that reason. The target’s father brought the action with knowledge of his son’s adherence to Al Qaeda in the Arabian Peninsula.⁵³ The father’s apprehensions turned out to be fully justified when his son subsequently was killed in a targeted attack. The father, as the plaintiff in *Al-Aulaqi*, conceded that courts could not engage in “‘real-time judicial review’ of targeting decisions.”⁵⁴ The court added that review after the fact would amount to “‘second-guess[ing], with the benefit of hindsight, another branch’s determination that the interests of the United States call for military action.’”⁵⁵ U.S. courts have refused to engage in judicial review of targeted killings for reasons along these lines, increased by the doubtful protection of aliens overseas. They have not reached the merits of whether targeted killings violate the Constitution because they have yet to determine whether the Due Process Clause extends past our borders.⁵⁶

Some might regard the failure of the courts to face this question as a dereliction of the judicial duty to “say what the law is.”⁵⁷ It might exhibit the “subtle vices of the passive virtues” by postponing, perhaps indefinitely, any judicial check on executive or legislative overreaching.⁵⁸ Yet a failure of the courts to reach the merits does not relieve the other branches of their independent duty to abide by the Constitution. With respect to targeted

51 Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 841–48 (2013). For a general account of how litigation over human rights can prompt changes in policy, see BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 132–35 (2009).

52 727 F. Supp. 2d 1 (D.D.C. 2010).

53 The court also held that the plaintiff lacked standing. *Id.* at 14–36.

54 *Id.* at 48.

55 *Id.* (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (en banc)).

56 The same avoidance of the merits has marked decisions on claims involving destruction of property overseas by the federal government. Courts have acknowledged that the Takings Clause of the Fifth Amendment applies overseas, but they have denied relief because the plaintiff lacked standing. *E.g.*, *Atamirzayeva v. United States*, 77 Fed. Cl. 378, 379, 385, 387 (2007).

57 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

58 Gerald Gunther, *The Subtle Vices of the “Passive Virtues” – A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

killings, officials from the Obama Administration have represented that they have put in place elaborate procedures “to ensure that such operations are conducted in accordance with all applicable law.”⁵⁹ Former Attorney General Eric Holder has framed the issue in these terms: “The Constitution guarantees due process, not judicial process.”⁶⁰ The executive branch generally accepts the application of the Due Process Clause to its policies of targeted killing. Whatever skepticism might attend the administration’s defense of its own actions, it has less to do with the attempt to implement sound procedures than it has to do with the secrecy maintained by the government over the content and use of those procedures. Full disclosure would be the standard result of the public and adversary processes of ordinary litigation, but it is fundamentally incompatible with the secrecy essential in many military operations. Respect for the Due Process Clause nevertheless goes further than the limitations on the judicial process. The prospect of judicial enforcement, however remote, has resulted in the creation of a structure for decision making that imposes significant practical constraints on executive discretion.⁶¹ A policy of targeted killing cannot escape controversy, of course. The stakes are simply too high on both sides of the issue—in deprivation of life and in preservation of national security. Judicial review, even if it were possible, would not make the controversy go away. The question should not be whether to use judicial procedures, but how to design effective procedures to bring and to keep the policy under control.

Constitutional values have exercised similar influence over the constraints on electronic surveillance, again with continued controversy and mixed results. Privacy in electronic communications first received constitutional protection under the Fourth Amendment in *Katz v. United States*.⁶² After a congressional investigation revealed abuses of electronic surveillance by the National Security Agency and Federal Bureau of Investigation, Congress enacted the Foreign Intelligence Surveillance Act⁶³ in 1978. That act requires the Attorney General to obtain a warrant before engaging in specified kinds of surveillance outside the context of criminal

59 Harold Hongju Koh, State Department Legal Adviser, Speech at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), <https://www.state.gov/documents/organization/179305.pdf>. The Trump Administration has shown no inclination to abandon targeted killings and has loosened the rules on counterterrorism operations. See Charlie Savage & Eric Schmitt, *Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules*, N.Y. TIMES (March 12, 2017), https://www.nytimes.com/2017/03/12/us/politics/trump-loosen-counterterrorism-rules.html?_r=0.

60 Eric Holder, Attorney General, Speech at Northwestern University School of Law (Mar. 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

61 Deeks, *supra* note 51, at 720–26.

62 389 U.S. 347, 359 (1967).

63 50 U.S.C. § 1801 et seq.

prosecutions. Subsequent legislation expanded the scope of the surveillance program as part of the war on terror, eventually reaching business records related to antiterrorism and foreign intelligence and to bulk telephony records and metadata.⁶⁴ These sources compromised the privacy of communications by U.S. citizens and communications within the United States. Independently of this expanded statutory authority, the executive branch also found implied authority to engage in warrantless collection of information from communication into and out of the United States, in a program that has subsequently been abandoned.⁶⁵

Even when the executive branch has sought a warrant, it has had to go to a specially constituted court that conducts its proceedings almost entirely in secret, the Foreign Intelligence Surveillance Court (FISC). That court, and its high rate of approval of warrant requests, has been criticized extensively after the disclosures by Edward Snowden in 2013.⁶⁶ Yet the Supreme Court itself has recognized only minimal constitutional rights that protect metadata or protect against collection of foreign intelligence.⁶⁷ As a judge on the FISC has pointed out in one of its few published (and redacted) opinions, the protection against excessive surveillance comes not from the constitutional standards for probable cause and reasonable searches, but from statutory requirements intended to minimize the effect of mass data collection.⁶⁸ Even in purely domestic cases of ordinary law enforcement, the standard of probable cause is easily met, and courts almost routinely issue warrants requested by the police.⁶⁹ The ease with which the government satisfies the low threshold of sufficient evidence indicates just how limited judicial review is. In the domestic setting, the Fourth Amendment takes on significance for private individuals mainly by way of the exclusionary rule, which prevents the prosecution in a criminal case from using evidence gained from an illegal search. In the absence of a prosecution, an individual has no occasion to invoke the exclusionary rule, and the likelihood of redress by civil rights actions is minimal. A civil rights action must overcome various

64 USA Patriot Act of 2001, § 215, 50 U.S.C.A. § 1861 (2012); FISA Amendments Act, § 702.

65 Bradley & Goldsmith, *supra* note 34, at 778–82 (describing the Terrorist Surveillance Program initiated by the George W. Bush Administration).

66 For a summary of criticisms of the FISA court, see Charlie Savage & Laura Poitras, *How a Court Secretly Evolved, Extending U.S. Spies' Reach*, N.Y. TIMES (Mar. 11, 2014), https://www.nytimes.com/2014/03/12/us/how-a-courts-secret-evolution-extended-spies-reach.html?_r=0.

67 *See* Smith v. Maryland, 442 U.S. 735, 745–46 (1979) (no constitutional protection of telephone logs); United States v. U.S. District Court, 407 U.S. 297, 321–23 (1972) (reserving the question whether a warrant was required before surveillance of foreign powers and their agents).

68 In re Application of F.B.I. for an Order Requiring the Production of Tangible Things From [REDACTED], No. BR 13–109, 2013 WL 5460137 (FISA Ct. Aug. 29, 2013).

69 Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and Lost Cases: The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY, 1034, 1058 (1990–91) (one application for a search warrant denied out of 1,748).

defenses of immunity, amplified in the transnational setting by national security concerns.⁷⁰ All of this only emphasizes what should be obvious: the many criticisms of the existing surveillance procedure cannot be met simply by insisting on stronger constitutional rights and more judicial review. The frame of reference has to expand to consider the likelihood that any judicial decision will result in enhanced statutory and regulatory protection.

IV. THE CONSEQUENCES OF CONSTITUTIONAL RIGHTS

In defining constitutional rights in transnational cases, courts must move from considering primarily the opposed interests of individuals and the government to considering also the interests of foreign sovereigns.⁷¹ They must, in particular, take into account the superior capacity of Congress and the President to strike the right balance between domestic and foreign interests. Even in domestic cases, courts do well to consider the reaction of the political branches of government to judicial recognition of constitutional rights. In transnational cases, this optional precaution becomes a necessity, both descriptively as a matter of what courts have done and normatively as a matter of what they should do. The courts must either adapt domestic structures of enforcement to the international setting or wait for the political branches to approve wholly new international institutions, on the model of the International Criminal Court. Courts can unilaterally adapt domestic structures only with difficulty and cannot approve new institutions at all. In the absence of support from the political branches, litigation by private parties cannot create an efficient regime of deterrence and compensation for protecting individual rights. The enduring contribution of constitutional adjudication in this sphere lies in the rights and remedies created by non-constitutional law, which must be mediated through actions of the political branches of government. The goal should not be to establish freestanding judicial remedies for violation of constitutional rights, but to lead the political branches of government to establish mechanisms to protect constitutionally recognized interests.⁷² As noted earlier, this is what has

⁷⁰ See John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 131 (2009); Zachary D. Clopton, *Territoriality, Technology, and National Security*, 83 U. CHI. L. REV. 45, 60 (2016).

⁷¹ The actions of foreign governments have an analogous effect on other checks and balances established by the Constitution. See Ashley Deeks, *Checks and Balances from Abroad*, 83 U. CHI. L. REV. 65 (2016).

⁷² For a similar argument along these lines in the immigration context, see David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 55–56 (2015). For a contrasting perspective, arguing that the plenary power doctrine has begun to yield to constitutional rights based on family relations, see Kerry Abrams, *Family Reunification and the Security State*, 32 CONST. COMMENT. 247, 272 (2017).

happened with the enhanced procedural rights of aliens applying to enter the United States.⁷³

As the cases from the war on terror illustrate, definitive decisions on the scope of constitutional rights presuppose good evidence of what actually works to preserve national security and to safeguard individual rights.⁷⁴ In the absence of such knowledge, it is impossible for courts to strike the correct balance between preserving the safety of civil society and protecting individual rights. Other branches of government, as recent events all too clearly reveal, must also feel their way toward a solution. Problems arise less from the weight attached to competing values, both of which are fundamental to modern democracy, than from finding a mechanism to achieve a workable accommodation between them. It is a truism that the political branches, and especially the executive branch, have greater expertise than the judicial branch in matters of national security. Secrecy and dispatch often are essential to successful efforts to counter the many threats to national security in the modern world. The judiciary can rarely act quickly and quietly enough to participate in any immediate way in such matters.

It is also a truism, however, that national security can be invoked as an excuse for preventing the disclosure of embarrassing information and for engaging in questionable or illegal executive action. The courts have a role to play in checking the excesses of the other branches of government, particularly when they jeopardize the individual rights essential to liberal democracy. At this point, the rights of citizens become more important as a check on government abuse and more strongly supported by domestic concerns than the rights of aliens. Although the judicial process takes more time and requires more transparency than executive action, it performs an essential role over the long term in coaxing the government to strike the right balance between national security and individual rights. The publicity attendant on judicial proceedings can itself lead to political change. In the United States, recognition of constitutional rights has regularly lagged behind the threats to those rights in wartime or in other periods of perceived threats to national security, as in the McCarthy Era in the Cold War.⁷⁵ The judiciary might be dismissed as an ineffectual check upon the executive and legislative branches for that reason, but the rights eventually recognized in one crisis frame the debates over limits on the national security state in another. The long-term implications of judicial review have to be separated

⁷³ See *supra* text accompanying note 22.

⁷⁴ For an account of the dangers of a moralistic approach, rather than a pragmatic one, to foreign affairs, see David Golove, *The American Founding and Global Justice: Hamiltonian and Jeffersonian Approaches*, 57 VA. J. INT'L L. 621 (2018).

⁷⁵ GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 528–58 (2004) (judicial protection of civil liberties tends to be inadequate in the short term in crises of national security but cumulative and effective over the long term).

for assessment from the immediate consequences of accepting or denying a constitutional claim.

In cases with transnational implications, courts have additional reasons to look beyond the particular circumstances of a particular constitutional claim. A right, no matter how basic, which cannot be implemented, does no one any good. In fact, it might do harm by calling the whole enterprise of protecting individual rights into question. Proposals, like those occasionally made to give aliens essentially the same rights as citizens,⁷⁶ cannot feasibly be implemented solely by the judiciary and would risk a significant political backlash if they were. Ideally, judicial decisions should trigger established mechanisms for enforcement or the creation of new mechanisms. Foreseeing this need introduces a degree of instrumental reasoning more pronounced and important in transnational cases than in purely domestic litigation. The courts must look beyond the usual arguments for constitutional rights, based on the individual and government interests asserted in support of or in opposition to them, to how those rights are likely to be enforced. Announcing a purely symbolic right has little advantage over simply not recognizing the right and all the disadvantages of calling the influence of the judiciary into question. As a descriptive matter, courts often wait to determine which constitutional rights can be feasibly enforced overseas, and as a normative matter, they often are correct to do so. This is especially true if the constitutional interests at stake can be protected by other means, such as statutory interpretation.⁷⁷ Delaying a constitutional decision avoids a premature resolution of the issue — whether in favor of or opposed to the right — and therefore, the risk that the courts will have to reverse themselves or suffer continued opposition from the other branches of government.

Disagreement within and among the branches of government nevertheless provides necessary checks on the exercise of government power. It would be a mistake to leave the courts and the Constitution entirely out of the process of enforcement, one that should be conceived broadly as implementing constitutional values rather than narrowly as defining constitutional rights. The latter just set the minimum of tolerable government behavior. As Alexander Bickel observed, strictly speaking, “to call a statute constitutional is no more of a compliment than it is to say that

⁷⁶ *E.g.*, PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION 54 (2008) (arguing that citizenship should be equated with residence and that naturalization requirements should be eliminated altogether); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093 (1977) (making the case for the right of aliens to vote).

⁷⁷ As the Court apparently did in *INS v. St. Cyr*, 533 U.S. 289, 326 (2001), when it insisted that statutory restrictions on habeas corpus for aliens subject to deportation orders were not so clear that they could be applied retroactively.

it is not intolerable.”⁷⁸ However, as he also noted, in popular understanding, a holding to this effect confers a greater degree of legitimacy on the disputed measure. A holding about minimal standards, for instance, on the detention of terrorist suspects might be taken as judicial endorsement or approval of acts that are, in reality, only barely tolerable. If the courts set constitutional standards too low, they go on record as lending their prestige to practices that might soon be discredited as unnecessarily harsh.

Of course, if the courts set constitutional standards too high, they jeopardize the ability of the other branches of government to experiment on novel and difficult problems raised by the war on terror. The way out of this paradox is not to retreat from the recognition of constitutional rights, including the rights of aliens overseas, but to accept the need for incremental decisions that take account of instrumental concerns. It would be better, in other words, to build out from the rights of citizens in a domestic setting to the rights, minimal at present, of aliens overseas. Equating the rights of all individuals everywhere risks the erosion of the rights of citizens against their own government at home.⁷⁹ These rights remain crucial to democratic self-government in a way that the rights of aliens elsewhere do not. A gradual process of recognizing greater rights for aliens alleviates the risk of equating the rights of aliens and citizens and then discounting those rights for everyone. Leveling up as a formal matter would be futile if it resulted in leveling down in reality. Hence traditional distinctions between aliens and citizens and between government actions taken domestically and in foreign countries should be retained even as they are relaxed. The pattern and tendency of decisions under the U.S. Constitution certainly fits this description.⁸⁰ Fitful progress to recognition of the rights of aliens, under U.S. and international law, has much to be said for it.

The goal should not, in any event, be to establish a system of regulation through litigation. Lawsuits over a constitutional claim require the assistance of attorneys and often the support of an organization dedicated to law reform. The drawn-out processes of trial and appeal make litigation a better vehicle for generating a landmark case than for routine enforcement of legal rights, which the administrative process can more efficiently provide. Judges also lack the capability of the legislature and the executive to fashion specific rules and make necessary compromises to create an effective framework for enforcement. Unlike the political branches, the courts cannot readily adapt to changed circumstances, like those created by a successful terrorist attack.

⁷⁸ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 129 (1962) (quoting C.P. Curtis, *A Modern Supreme Court in a Modern World*, 4 VAND. L. REV. 427, 433 (1951)).

⁷⁹ For a vivid account of these dangers, see Ozan O. Varol, *Alien Citizens: Kurds and Citizenship in the Turkish Constitution*, 57 VA. J. INT'L L. 769 (2018).

⁸⁰ See notes 25–70 *supra* and accompanying text.

They cannot readily overrule a precedent that recognizes fundamental rights; nor can they easily acquiesce in the government's disregard of their decisions, even when the response to a terrorist attack seems to demand it.

An incremental approach that takes one step at a time need not forsake the judicial role of adamant insistence on protecting individual rights. The prospect that the courts will act when they see a pressing need to protect the rights of aliens generates deterrence of government misconduct all by itself. It is not enough, however, to stop there. The courts must also consider the likely reaction of the political branches of government to recognition of rights and how these branches can effectively be engaged in the process of enforcing individual rights.

V. CONCLUSION

This essay has sought to document the rights of aliens at or beyond the borders of the United States under the U.S. Constitution. These rights diminish rapidly as aliens become subject to the power of the federal government at the border, on the high seas, and within the territory of another nation. However, a simple static account of purely constitutional rights misses most of the influence of U.S. law on international human rights. That influence necessarily comes from the political branches of government, Congress and the President, and necessarily responds to the changing dynamics of international law and international relations. Statutes, treaties, regulations, and executive action all demonstrate a capacity for growth, sometimes in response to judicial decisions, but more often with an internal logic of their own. It is at this intersection of constitutional law and politics that progress is most likely to be made. Particularly in the international sphere, attention to the actions and reactions of the political branches of government remains more than a duty of the judicial branch. Like following precedent, it is simply a necessity.⁸¹

VI. POSTSCRIPT

How much of a necessity became all too clear with the arrival of President Trump in the White House. Fulfilling his campaign pledge to enact a "Muslim ban" and to engage in "extreme vetting" of immigrants, he promulgated an executive order, which denied admission to aliens from seven predominantly Muslim countries—Iraq, Iran, Libya, Somalia, Sudan,

⁸¹ The quoted phrase is from Justice Holmes, who said, "it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity." Oliver Wendell Jr. Holmes, *Learning and Science*, 30 MINN. L. REV. 409, 409 (1946).

Syria, and Yemen—prohibiting them from entering the United States for ninety days.⁸² The order took effect immediately on signing and applied to all aliens outside the country,⁸³ including those (like lawful permanent residents) already cleared for entry. Many found themselves in transit on airplanes back to the United States when the order took effect. The order also gave priority to refugees from countries in which they were in a religious minority, apparently with the purpose of favoring Christian refugees.⁸⁴ These terms of the order were ineptly framed and harshly implemented to comport with the anti-Muslim rhetoric employed by the Trump Administration.⁸⁵ These circumstances made the order appear worse than the law invalidated in *Yick Wo v. Hopkins*,⁸⁶ one of the first cases recognizing the rights of aliens:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.⁸⁷

Whether similar reasoning can be applied to invalidate the executive order, as subsequently revised, came before the Supreme Court, but only briefly, as subsequent changes in the executive order seemed to moot the issue.⁸⁸ The Court granted certiorari to review decisions from the U.S. Court of Appeals for the Fourth and Ninth Circuits largely upholding preliminary injunctions against the revised executive order. The Court also refused to stay those injunctions as to “foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.”⁸⁹ The

82 Exec. Order No. 13,769 § 3(c), 82 Fed. Reg. 8,977 (Jan. 27, 2017). For the sources for the quotations, see *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1126 (D. Haw. 2017).

83 *Id.* (suspension from “the date of the order”).

84 *Id.* § 5. For the quotations, see *Hawai'i*, 241 F. Supp. 3d at 1125.

85 For a line-by-line critique of the executive order, see David A. Martin, *Trump's “refugee ban” — annotated by a former top Department of Homeland Security lawyer*, VOX (Jan. 30, 2017, 8:50 AM), <http://www.vox.com/the-big-idea/2017/1/30/14429866/trump-refugee-ban-executive-order-annotated>.

86 118 U.S. 356 (1886).

87 *Id.* at 373–74.

88 *Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017), *cert. granted and stayed in part*, 137 S. Ct. 2080 (2017), *order to brief mootness*, No. 16-1540, 2017 WL 2734554 (S. Ct. Sept. 25, 2017); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 599–600, 606 (4th Cir. 2017) (en banc), *cert. granted and stayed in part*, 137 S. Ct. 2080 (2017), *vacated and remanded to dismiss as moot*, No. 15-1436, 2017 WL 4518553 (S. Ct. Oct. 10, 2017).

89 Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 599–600, 606 (4th Cir. 2017) (en banc), *cert. granted and stayed in part*, 137 S. Ct. 2080 (2017), *vacated and remanded to dismiss as moot*, 2017 WL 4518553 (Oct. 10, 2017); *Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017), *cert. granted and stayed in part*, 137 S. Ct. 2080 (2017), *order to brief mootness*, 2017 WL 2734554 (Sept. 25, 2017); Int'l Refugee

Court did stay the injunctions as to aliens without such ties to the United States, reasoning that “an unadmitted and nonresident alien . . . has no constitutional right of entry to this country.”⁹⁰ The seminal decision in *Yick Wo*, in other words, could simply be beside the point because it concerned municipal enforcement of an ordinance against aliens within the United States, rather than federal exclusion of aliens from the United States.

Nevertheless, the perceived unfairness of the executive order led to a series of lawsuits to enjoin its enforcement. The first case to result in a temporary restraining order was *Washington v. Trump*, a case filed by the states of Washington and Minnesota in the Western District of Washington. That order enjoined the exclusion of aliens from the seven identified countries and the priority given to refugees from religious minority groups. The government sought an emergency stay pending appeal, which was denied by a panel of the Ninth Circuit.⁹¹ The full Ninth Circuit refused to rehear that decision en banc, over the dissent of five judges.⁹² On the merits, the panel found that the government was not likely to succeed on two constitutional claims: first, that the order denied due process to aliens previously admitted to the United States; and second, that the order discriminated on the basis of religion, both in the exclusion of aliens from the seven countries and in the priority given to refugees from minority religions.⁹³

The Trump Administration responded to this decision by revoking the executive order and issuing a new one, which moderated some of the questionable features of the original order.⁹⁴ The new order did not apply to aliens already admitted for entry and did not give a preference to refugees from minority religions, and the countries from which aliens could not seek admission was narrowed from seven to six, eliminating Iraq from the list. The latter change responded to concerns over Iraqi immigrants who sought admission because they had assisted the United States in the armed conflict there. The new order nevertheless became subject to preliminary injunctions issued by federal courts in Hawai’i and in Maryland, blocking enforcement against aliens from the reduced list of six countries, and in the Hawai’i case,

Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017) (en banc), *cert. granted and stayed in part*, 137 S. Ct. 2080 (2017), *vacated and remanded to dismiss as moot*, 2017 WL 4518553 (Oct. 10, 2017). The newest order, Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) was enjoined by the United States Court for the District of Hawai’i on substantially the same grounds that it enjoined earlier versions of the executive order. *Hawai’i v. Trump*, 2017 WL 4639560 (Oct. 17, 2017). The validity of the executive order and its successors is obviously an ongoing matter.

⁹⁰ *Trump*, 137 S. Ct. at 2086 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)) (brackets from quoted passage omitted).

⁹¹ *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

⁹² *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Bybee, J., dissenting).

⁹³ 847 F.3d at 1164–68.

⁹⁴ Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

the priority also for refugees from religious minorities⁹⁵ (as noted, however, a new executive order seems to have mooted even this issue).

The basis for the exclusion from the six named countries came from section 212(f) of the Immigration and Naturalization Act, which grants very broad power to the President:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.⁹⁶

Historically, expansive grants of executive discretion over admission of aliens have been broadly interpreted, effectively transferring the “plenary power” that Congress has over immigration to the president.⁹⁷ The Ninth Circuit and the two district courts that have blocked the current executive order have treated the exclusion as if it expressly banned the entry of Muslims, relying on two grounds: the mainly Muslim population of the countries covered by the provision and the statements by the president and other members of his administration that the provision was a “Muslim ban.” The federal district courts also relied on statements from the administration that the second executive order was effectively the same as the first.⁹⁸ In litigation challenging the revised executive order, the Fourth Circuit relied on the same sources and reached essentially the same result.⁹⁹ The key move in all these decisions was to look behind the literal terms of the executive order and interpret in light of the statements by Trump and his associates—as a candidate, as president-elect, or as president.¹⁰⁰

The inference from discriminatory motive to illegal discrimination might be doubted, especially in light of statements in judicial opinions refusing to look behind the terms of denial of entry under section 212(f).

95 *Int'l Refugee Assistance Project v. Trump*, No. CV TDC-17-0361, 2017 WL 1018235 (D. Md. Mar. 16, 2017), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017) (en banc), *cert. granted and stayed in part*, 137 S. Ct. 2080 (2017), *vacated and remanded to dismiss as moot*, No. 16-1436, 2017 WL 4518553 (S. Ct. Oct. 10, 2017); *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1126 (D. Haw. 2017), *aff'd in part, vacated in part, and remanded*, 859 F.3d 741 (9th Cir. 2017), *cert. granted and stayed in part*, 137 S. Ct. 2080 (2017).

96 INA § 212(f), 8 U.S.C.A. § 1182(f).

97 *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (courts will not “look behind the exercise of that discretion”); *Kerry v. Din*, 135 S. Ct. 2128, 2140 (Kennedy, J., concurring in the judgment) (same).

98 *Hawai'i*, 241 F. Supp. 3d at 1126.

99 *Int'l Refugee Assistance Project*, 857 F.3d at 599–600, 606. (“And here, in this highly unique set of circumstances, there is a direct link between the President’s numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and EO-2, the ‘watered down’ version of that plan that ‘get[s] just about everything,’ and ‘in some ways, more.’”) (citation omitted).

100 *Id.* at 630 (Thacker, J., concurring) (relying only on statements as President).

The dissenting judges in the Fourth Circuit relied heavily on this limitation on judicial review.¹⁰¹ But as a factual matter, the Trump Administration left little doubt about the intentions behind the executive orders.¹⁰² The haste and ineptitude with which the first order was entered and the administration's statements that the second order was effectively equivalent to the first cast a pall over the attempts by the administration's lawyers to defend the orders in court. If judges needed any motive to limit the "plenary power" doctrine as applied to the president, his statements and those of his administration supplied it.¹⁰³

It remains possible that judges, in the final analysis, will give the same deference to the current order as a more measured exercise of presidential authority would receive. As discussed earlier in this article, the rights of aliens outside the United States who have not been admitted for entry are quite attenuated and the discretion of the political branches of government is correspondingly broad. Whether they have a right to be free of religious discrimination remains an open question.¹⁰⁴ Perhaps because of doubts along these lines, the Ninth Circuit did not reach the constitutional question in largely affirming a preliminary injunction against the operation of the revised executive order.¹⁰⁵ Instead, it held that the order lacked a sufficient factual basis to fall within the authority granted by Congress in section 212(f) to deny entry because it "would be detrimental to the interests of the United States."¹⁰⁶

As evidence of the durability of questions over alien rights, the celebrated constitutional scholar, Alexander Bickel, in collaboration with his colleague, Harry Wellington, analyzed a similar case of overreaching by the political branches in the 1950s.¹⁰⁷ They thought that the constitutional arguments made on behalf of an alien awaiting deportation in American territory might be nearly insubstantial.¹⁰⁸ Nevertheless, they approved of a decision narrowly interpreting a statute to avoid constitutional questions under the First Amendment. It was not the merits of the constitutional

101 *Id.* at 639 (Niemyer, J., dissenting); *id.* at 654 (Shedd, J., dissenting).

102 To make matters worse, President Trump criticized one of the decisions as by a "so-called judge." Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976?lang=en>.

103 Even the dissent from denial of rehearing en banc commented on Trump's remarks disparaging their colleagues in the judiciary. *Washington v. Trump*, 858 F.3d 1168, 1171 (9th Cir. 2017) (Kozinski, J., dissenting).

104 Martin, *supra* note 85, at 8.

105 *Hawai'i v. Trump*, 859 F.3d 741, 788–89 (9th Cir. 2017), *cert. granted*, 137 S.Ct. 2080 (2017).

106 *Id.* at 770.

107 Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 31–34 (1957).

108 They dismissed them as "at best shrubbery on the constitutional foothills." *Id.* at 32. The case was *United States v. Witkovich*, 353 U.S. 194 (1957).

argument that persuaded them, but the harshness towards aliens resulting from a literal interpretation of the statute and the fact that aliens were not represented in the political process. They thought that a “remand to Congress,” effectively accomplished by a narrow interpretation of the statute, would give the political branches an opportunity to ameliorate its harsh consequences.¹⁰⁹ Perhaps the course of decisions on the current executive order, which already is a little more lenient than the original order, might ultimately result in repeal of its worst features. If so, the constitutional rights of aliens, despite their limited force, might still demonstrate their capacity to protect aliens from the excesses of the political branches of government.

¹⁰⁹ *Id.* at 32–34.