

MONDAY, JULY 20, 2020

PERSPECTIVE

Supreme Court quietly eliminates critical constitutional protections

By Joshua S. Lipshutz,
Warren Loegering and Zach Tan

The U.S. Constitution states, in no uncertain terms, that all “persons” within the United States are entitled to due process of law. For more than a century, the U.S. Supreme Court and the executive branch have interpreted this bedrock requirement as providing a constitutional due process right to every man, woman, and child found within the territorial limits of the United States.

Until now. In a cursory three-page analysis toward the back of its opinion in *Department of Homeland v. Thuraissigiam*, 2020 DJ-DAR 6213, a five-justice majority of the Supreme Court wiped away this clear and comforting rule of law — leaving it up to courts to determine, based on uncertain and vague standards, whether a person within the United States is entitled to due process *at all*. This constitutional backtracking is of great concern for all non-citizens who rely on the fairness of the American judicial system and the protections of the U.S. Constitution.

Due Process for All

In 1896, the Supreme Court declared in *Wong Wing v. United States* that the due process clause means what it says, guaranteeing constitutional protections to “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” See *Zadvydas v. Davis*, 533 U.S. 678, 693-94 (2001) (citing *Wong Wing v. U.S.*, 163 U.S. 228, 238 (1896)) (emphasis added). That bright-line rule became a foundational principle of constitutional law, ensur-

ing that anyone who crossed the nation’s borders would enjoy the fairness and procedural protections that are the hallmark of the American legal system.

In subsequent years, the Supreme Court reaffirmed this requirement many times. In the *Insular Cases* (a series of cases involving lands acquired during the Spanish-American war), it held that this territorial rule applied to persons within unincorporated territories. In *Mathews v. Diaz*, 426 U.S. 67 (1976), the court recognized that Cuban refugees in the country for less than five years are protected by due process. Even as recently as 2001, in *Zadvydas*, the court reiterated that “once an alien enters the country, the legal circumstance changes” and constitutional protections attach.

The only exception to this black-letter law concerned immigrants presenting themselves for arrival at the U.S. border, a doctrine known as the “entry fiction” that the Supreme Court developed in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Aliens arriving by boat or plane must, for practical reasons, be permitted to disembark from their vehicle while border patrol officials determine whether they have a right to enter the country — picture, for example, the immigration line at Los Angeles International Airport or Ellis Island. In those circumstances, the aliens are treated as if they have not yet crossed the border and are thus not entitled to constitutional protections. But the entry fiction had always been limited to those unique circumstances.

Due Process for Some

In *Thuraissigiam*, the Supreme Court wiped away the bright-line

territorial rule and expanded the “entry fiction” to strip constitutional protections from an undefined group of aliens already present in the United States. Vijayakumar Thuraissigiam, an asylum seeker from Sri Lanka, was apprehended by immigration agents after he had crossed the U.S.-Mexico border and traveled 25 yards into the country. In custody, he sought asylum, but immigration officials did not believe he had a “credible fear of persecution” and subjected him to expedited removal. An immigration judge summarily approved his removal, which, by statute, was not otherwise subject to judicial review. Thuraissigiam sought a writ of habeas corpus to challenge the limited review of his case, and the 9th Circuit Court of Appeals found his expedited removal process unconstitutional.

The Supreme Court reversed, focusing primarily on the suspension clause of the Constitution, while addressing the due process clause as almost an afterthought. In three pages of the majority opinion, Justice Samuel Alito found that Thuraissigiam, along with an untold number of other aliens physically present within the United States, have *no due process rights at all*. Rather than applying the century-old, bright-line rule required by the plain text of the U.S. Constitution, the Supreme Court withdrew from immigrants the protections of due process, unless the immigrants can show they “have established connections” to the United States — whatever that means. Worse, the Supreme Court seems to have linked that test to the statutory requirements for lawful admission, meaning it is now up to Congress to determine which aliens are entitled to constitutional protections

— turning the very nature of constitutional protections on its head.

The potential implications of this new vague standard are staggering. Think, for example, of Dreamers, who have never been declared by Congress to be worthy of lawful admission. Are they now excluded from the protections of the U.S. Constitution and subject to deportation without judicial review? What about other aliens who lack familial ties in the United States? Or recently arrived aliens who decide to live and work in the border region, rather than settling in the interior? The Department of Homeland Security last year claimed the legal power to expedite — without judicial review — the deportation of any undocumented immigrant found anywhere within the United States, if the immigrant could not prove presence here for the past two years. If all such immigrants now lack constitutional protections, there is no check on DHS’s ability to deport them without judicial oversight.

The majority provides no test as to where the protections of the due process clause now begin, leaving the constitutional rights of non-citizens in the United States to piecemeal adjudication by lower courts. For a Supreme Court that often demands adherence to plain text and bright-line rules, this result seems to contradict those lofty principles, while leaving countless aliens in an unsettling and untenable position. ■

Joshua S. Lipshutz is a partner and **Warren Loegering** and **Zach Tan** are associates at Gibson, Dunn & Crutcher LLP. They were counsel for amici immigration scholars in *Department of Homeland Security v. Thuraissigiam*.