# CLOSING THE BORDER

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*Terrorists. Narcotrafficking. Coronavirus. Refugees. There are many reasons—real or imaginary, compelling or contrived—for governments to want to restrict people's movement. In March 2019, President Trump hinted that he was considering closing the border with Mexico. He cited the vast numbers of migrants approaching the southern border as a justification for closure, then pivoted to concerns about drug trafficking. Possibly emboldened by a victory in the 2018 "travel ban" case of* Trump v. Hawaii*, the President asserted a unilateral power to close the border. The general consensus among political leaders and economists was that closing the border would be an economic and political catastrophe, disrupting billions of dollars' worth of goods while doing little to combat the asylum backlog or illegal narcotics trafficking. He soon backed off, with a one-year warning to Mexico that is fast approaching as of the publication of this Note. But the question remains: Can he do it? This Note considers the question and concludes that while very brief or geographically limited closures are authorized as a matter of statute and constitutional doctrine, any indefinite, long-term, and expansive border closure would be statutorily unauthorized and give rise to meritorious due process claims by some categories of noncitizens. In between these two extremes, the permissibility of a closure would depend on the temporal and geographical scope of it, tracking general separation-of-powers principles.*



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## INTRODUCTION

With COVID-19 officially a pandemic[1] and governments struggling to contain the spread,[2] limiting travel has become a major theme of 2020. Airlines are allowing passengers to change or cancel their flights,[3] the Army is hunkering down,[4] and officials are urging people to stay home.[5] Restricting movement across borders is not just a theme of global health in 2020, however; it is a feature of immigration law and policy, one that transcends time and has captured the attention of the President. This Note considers the timely question of the scope of executive power to close a border.[6]

Nearly a year ago, President Donald Trump issued a statement via

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1 Bill Chappell, *Coronavirus: COVID-19 Is Now Officially a Pandemic, WHO Says*, NPR (Mar. 11, 2020, 12:30 PM), https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officially-a-pandemic-who-says.

2 *See* Sarah Maslin Nir & Jesse McKinley, *'Containment Area' Is Ordered for New Rochelle Coronavirus Cluster*, N.Y. TIMES (Mar. 10, 2020), https://www.nytimes.com/2020/03/10/nyregion/coronavirus-new-rochelle-containment-area.html (describing restrictions applicable to a New York town); Emma Reynolds & Rob Picheta, *All of Italy Is in Lockdown as Coronavirus Cases Rise*, CNN (Mar. 10, 2020, 4:27 AM), https://www.cnn.com/2020/03/09/europe/coronavirus-italy-lockdown-intl/index.html (describing a "dramatic total lockdown" and "blanket travel restrictions" in Italy).

3 *See* Dia Adams, *Master List of U.S. Airline Coronavirus Change and Cancellation Policies (Includes European Airlines)*, FORBES (Mar. 11, 2020, 12:00 PM), https://www.forbes.com/sites/advisor/2020/03/11/master-list-of-airline-coronavirus-policies/#71cdc8ea6827 (detailing airline policies dealing with recent developments in coronavirus).

4 *See* David Welna, *U.S. Army Forces in South Korea and Italy Told to Stay Put as Coronavirus Spreads*, NPR (Mar. 9, 2020, 8:27 PM), https://www.npr.org/2020/03/09/813845222/u-s-forces-in-south-korea-and-italy-are-told-to-stay-put-as-coronavirus-spreads (describing some movement restrictions of Armed Forces stationed in certain countries).

5 *People at Risk for Serious Illness from COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html (last reviewed Mar. 10, 2020) (recommending that people "stay home as much as possible"); *see also* Rosie Perper, Ellen Cranley & Sarah Al-Arshani, *Almost All U.S. States Have Declared States of Emergency to Fight Coronavirus — Here's What It Means for Them*, BUS. INSIDER (Mar. 11, 2020), https://www.businessinsider.com/california-washington-state-of-emergency-coronavirus-what-it-means-2020-3 (documenting various governmental responses to the coronavirus).

6 This Note does not purport to answer questions about any existing or potential travel bans related to COVID-19, but the factors I put forth in Part I, *infra*—namely, to whom the directive applies, for how long, and of what geographic proportions—are nevertheless relevant to an analysis of their constitutionality.

Twitter: "If Mexico doesn't immediately stop ALL illegal immigration coming into the United States throug [sic] our Southern Border, I will be CLOSING . . . the Border, or large sections of the Border, next week."[7] The impetus for this closure threat was apparently the flow of drugs,[8] but, on other occasions, border closure threats seemed to be linked more to the flow of migration.[9] Eventually, the President declared his intention to give Mexico a "one year warning,"[10] which is rapidly approaching as of the publication of this Note. As recent stories uncovering the President's internal discussions about the border have noted, "his threat to seal off the country from a flood of immigrants remains active."[11]

Although the President has long been "adamant about the need for border security"[12] and has followed through on several campaign promises to limit the flow of migrants from Mexico and Central America,[13] the threat to close the southern border entirely is of a different character. Closing the border would have severe economic,[14] political,[15] and constitutional[16] consequences for citizens and noncitizens alike.

According to at least some experts, closing the border is both a realistic

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7 Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 29, 2019, 8:37 AM), https://twitter.com/realDonaldTrump/status/1111653530316746752; Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 29, 2019, 8:43 AM), https://twitter.com/realdonaldtrump/status/1111655194658508800.

8 Lauren Egan, *Trump Gives Mexico One Year Warning to Stop Drugs Before Tariffs, Border Closure*, NBC NEWS (Apr. 4, 2019, 1:29 PM), https://www.nbcnews.com/politics/donald-trump/trump-gives-mexico-one-year-warning-stop-drugs-tariffs-border-n991026.

9 Jim Tankersley & Ana Swanson, *Trump Vows to Close Border, Even if It Hurts the Economy*, N.Y. TIMES (Apr. 2, 2019), https://www.nytimes.com/2019/04/02/us/politics/trump-mexico-border-economy.html.

10 Egan, *supra* note 8.

11 Michael D. Shear & Julie Hirschfeld Davis, *Shoot Migrants' Legs, Build Alligator Moat: Behind Trump's Ideas for Border*, N.Y. TIMES: DECISION POINTS (Oct. 1, 2019), https://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html ("'I have absolute power to shut down the border,' [the President] said in an interview this summer with The New York Times.").

12 Ben Jacobs, *Trump Threatens to Close Border with Mexico*, GUARDIAN (Mar. 29, 2019, 4:08 PM), https://www.theguardian.com/us-news/2019/mar/29/donald-trump-threatens-close-mexico-border.

13 *See, e.g.*, CONG. RESEARCH SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY (2019), https://fas.org/sgp/crs/homesec/R45266.pdf (detailing the Administration's zero-tolerance prosecution policy); Matter of A-B-, 27 I. & N. Dec. 316 (Att'y Gen. 2018) (limiting the ability of domestic violence victims to receive asylum); Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border*, N.Y. TIMES (Apr. 20, 2018), https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html (discussing the Administration's family separation policy).

14 Tankersley & Swanson, *supra* note 9.

15 *Id.*

16 *See infra* Part II.

possibility and a legally permissible exercise of authority.[17] At least as to American citizens, government restrictions on travel may run afoul of the Fifth Amendment's guarantee of liberty to travel[18] or be viewed as motivated by discriminatory animus in violation of the Fourteenth Amendment's guarantee of equal protection.[19] More straightforwardly, a border closure of a particular kind might contradict the plain language of the statutes governing the President's authority to control the border.[20] As with all things, however, the contours of "closing the border"—for instance, whether the closure is total or partial, temporary or long-term, or applied to particular groups or to everyone—informs the extent of its permissibility.[21] Once that factual question is resolved, perhaps by the actual issuance of an order, there are two primary considerations regarding the President's legal ability to close the border: 1) the scope of the statutory grant to the President to limit entry, and 2) the due process rights of certain noncitizens.[22]

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17 *See* Alan Gomez, *Trump (Again) Threatens to Seal U.S.-Mexico Border. Can He Do It?*, USA TODAY (Oct. 18, 2018, 5:30 PM), https://www.usatoday.com/story/news/politics/2018/10/18/trump-threatens-seal-southern-border-over-migrant-caravan-can-he/1684534002 (quoting a former commissioner of U.S. Customs and Border Protection as saying, "You can certainly stop entries coming across the border, whether it's truck traffic or cars or pedestrians . . . . Logistically, that's possible. The gates are closed . . . ."); Holmes Lybrand, *Fact Check: Can Trump Close the Border?*, CNN (Apr. 1, 2019, 7:39 PM), https://cnn.com/2019/04/01/politics/fact-check-can-trump-close-the-border/index.html (presenting a Trump Administration official's legal justification for the President's authority to close the border); *WashU Expert: Trump's Border-Closing Threat Enters 'Murky' Legal Waters*, WASH. U. ST. LOUIS: THE SOURCE (Dec. 28, 2018) [hereinafter *Murky Legal Waters*], https://source.wustl.edu/2018/12/washu-expert-trumps-border-closing-threat-enters-murky-legal-waters (quoting noted immigration law expert Stephen Legomsky arguing that the President's authority to close the border is "a close legal question"). From a pragmatic point of view, the United States is already closed to the vast majority of the global population; immigration officials admit and deny thousands of people at ports of entry every day. *See On a Typical Day in Fiscal Year 2018, CBP…*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/newsroom/stats/typical-day-fy2018 (last updated Mar. 7, 2019) (noting 358,448 arrivals by air, 78,912 arrivals by sea, and 696,555 arrivals by land).

18 *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment.").

19 U.S. CONST. amend. XIV, § 1; *see, e.g.*, NAACP v. U.S. Dep't of Homeland Sec., 364 F. Supp. 3d 568, 577 (D. Md. 2019) (finding a plausible claim for relief under the Equal Protection Clause if the President's alleged animus influenced the decision to end an immigration benefit known as Temporary Protected Status for Haitian nationals).

20 *See infra* Part I.

21 Given that these factors are unknown, I have analyzed the problem of border closure in this Note as if the President had initiated 1) an indefinite closure of 2) the entirety of the southern border as applied to 3) all noncitizens. Because of the nature of the claimed bases of presidential authority—national security, emergencies, and foreign affairs—this type of closure probably represents the most likely scenario for a presidential proclamation.

22 For a short, informative summary of these considerations, see BEN HARRINGTON, CONG. RESEARCH SERV., LSB10283, CAN THE PRESIDENT CLOSE THE BORDER?: RELEVANT LAWS AND CONSIDERATIONS 3 (2019), https://fas.org/sgp/crs/homesec/LSB10283.pdf.

In this Note, I examine what a border closure might look like and the kinds of challenges it would face. In Part I, I argue that statutory grants of authority, although broad, are limited by countervailing statutory limitations and that the balance that must be struck by courts will ultimately track general separation-of-powers principles. In Part II, I argue that substantive and procedural due process would impose a restriction on border closures of extended duration if applied to noncitizens with sufficient ties to the United States, such as lawful permanent residents.

## I
## STATUTORY CONSIDERATIONS

This Part lays out the various statutes restricting the cross-border travel of noncitizens[23] that might be invoked in a potential border closure. Most of these statutes are housed in the Immigration and Nationality Act (INA),[24] the omnibus 1952 law that forms the basis of Title 8 of the U.S. Code. In these provisions, the legislature has given the Executive the authority to permit or deny border crossings—in essence, to determine when, where, and how people enter the United States. The question remains as to how far the permissions and denials can go without gainsaying congressional intent or violating the separation of powers. In this Part, I argue that each of these statutes would allow a limited or partial border closure but that a long-term or indefinite closure with respect to noncitizens would violate the text of the statutes and the separation of powers.

By slowing border inspections to a crawl and admitting only U.S. citizens, presidents *have* used these statutes essentially to "close" the border on several occasions.[25] These events were each about two decades apart,

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23 A border closure that affects U.S. citizens would present different issues for analysis and is beyond the scope of this Note. It is indisputably constitutional to place conditions even on citizens for travel outside and into the country, such as a passport requirement. *See* Immigration and Nationality Act (INA) § 215(b), 8 U.S.C. § 1185(b) (2018), *constitutionality upheld by* Zemel v. Rusk, 381 U.S. 1, 3 (1965). But it is probably not lawful to restrict international travel for citizens unreasonably, at least not without an explicit directive from Congress saying that is their intent. *See Kent*, 357 U.S. at 129 ("Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them."). It is also important to recognize that executive restrictions on *migration*, the subject of this Note, do not apply to citizens, both ontologically (because citizens can't migrate to their own country) and because no statute attempts to restrict cross-border "migration" of citizens. *See, e.g.*, INA § 103(a)(1), (a)(5) (authorizing the Secretary of Homeland Security to administer and enforce "the immigration and naturalization of *aliens*" and "control and guard the boundaries and borders of the United States against the *illegal* entry of *aliens*" (emphasis added)); INA § 212(f) (containing no language that would apply to citizens); INA § 215 (containing a single requirement for "Citizens"—the requirement to carry a passport).

24 Immigration and Nationality Act (INA), Pub. L. No. 82–414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

25 *See* Trish Long, *Assassination, Torture, Drug Smuggling Fuel History of US-Mexico Border Closing, Scrutiny*, EL PASO TIMES (Apr. 3, 2019, 3:28 PM),

fleetingly brief, and rather uncontroversial. President Johnson used section 215(a) to close the southern border after JFK's assassination in Texas in 1963;[26] President Reagan closed the southern border after the kidnapping and later assassination of a DEA agent in 1985;[27] and George W. Bush closed borders in the aftermath of September 11.[28] But no litigation ensued, whether because these closures were temporary—even after the "single deadliest terrorist attack in human history,"[29] international travel reopened within a few days[30]—and thus there may have been no opportunity to challenge them, or because they fit within the traditional conception of "emergencies" that presidents have pursuant to their Article II powers.[31]

### *A. Statutes Authorizing Executive Restrictions on Entry*

This Section lays out the various federal statutes that could potentially be read to authorize a border closure. These provisions include the INA's general grants of authority to executive officials, the border control

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https://www.elpasotimes.com/story/news/2019/04/03/border-closed-after-assassination-president-john-f-kennedy-enrique-kiki-camarena-drug-smuggling/3357101002; *see also* HARRINGTON, *supra* note 22, at 1 (collecting media articles regarding these previous closures).

26 *See Border Closed and Reopened*, N.Y. TIMES, Nov. 23, 1963, at 4.

27 *See* Richard J. Meislin, *Border Checks in Kidnapping Case Anger Mexico*, N.Y. TIMES, Feb. 22, 1985, at A8; Richard J. Meislin, *Killings in Mexico Bring U.S. Anger into the Open*, N.Y. TIMES, Mar. 10, 1985, at A5.

28 *See* Pam Belluck, *A Day of Terror: Transportation; Left to Fend for Themselves, a Nation of Travelers Scrambles for Transit Options*, N.Y. TIMES (Sept. 12, 2001), https://www.nytimes.com/2001/09/12/us/day-terror-transportation-left-fend-for-themselves-nation-travelers-scrambles.html; Robert Pear, *After the Attacks: The Northern Border; Tightened Inspections Mean Delays from Maine to West*, N.Y. TIMES (Sept. 14, 2001), https://www.nytimes.com/2001/09/14/us/after-attacks-northern-border-tightened-inspections-mean-delays-maine-west.html.

29 Patrick J. Kiger, *How 9/11 Became the Deadliest Day in History for U.S. Firefighters*, HISTORY.COM (May 20, 2019), https://www.history.com/news/9-11-world-trade-center-firefighters.

30 *See Flights Resume, but Situation Remains Tense*, CNN (Sept. 14, 2001), http://www.cnn.com/2001/TRAVEL/NEWS/09/13/faa.airports.

31 *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); National Emergencies Act, 50 U.S.C. §§ 1601–1651, 1621 (2018) ("With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–55 (1952) (Jackson, J., concurring) (discussing the power of the Executive to deal with emergencies as dependent in part on congressional approval, silence, or disapproval). These events—the assassination of a sitting President, the kidnapping of a government official by a terrorist group, and a terrorist attack—are marked by sudden violence and national attention implicating U.S. security responsibilities. For a critique of the framing of the DEA agent's kidnapping as a true emergency, see Benjamin Schenk, *Deconstructing the Camarena Affair and the Militarized United States-Mexico Border*, CORNELL INT'L AFF. REV., Spring 2012, at 62 ("The two week time lag between Camarena's kidnap and the subsequent shutdown of the border reveals the degree to which elites evaluated the likelihood that the American public would accept a depiction of Mexico, its government, citizens, and products, as dangerous.").

provisions in section 215, the suspension power in 212(f), general inadmissibility provisions in 212(a), and an emergency power statute codified in 19 U.S.C. § 1318.[32]

*1. General Grants of Authority*

The first potential authorization for border closure consists of general grants of authority to the executive branch—to the President, the Attorney General, and the Secretary of Homeland Security, in particular. The Secretary of Homeland Security is charged with establishing regulations to carry out the immigration laws.[33] She has the "power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens."[34] Meanwhile, the Attorney General may call into service state and local law enforcement if he "determines that an actual or imminent mass influx of aliens arriving . . . near a land border . . . presents urgent circumstances requiring an immediate Federal response."[35] The Commissioner of U.S. Customs and Border Protection, underneath the Secretary of Homeland Security, is allowed to close particular ports of entry or establish new ones, a task that is consistent with her duties and relatively uncontestable.[36] Thus, the Secretary could theoretically close all ports of entry that appear in the regulations;[37] however, such an act would require a lengthy rulemaking process that, I believe, would fail to pass muster under general administrative law principles. In any case, the regulations on establishing ports of entry cite only sections 103 and 215 for statutory authority,[38] making a complete and indefinite border closure contingent upon how broadly to read very general descriptions of travel control duties.

A couple of obstacles to a border closure are present in these general authority statutes. First, by their plain text, they are not limitless. The Secretary of Homeland Security is allowed to "administ[er] and enforce[]"[39] the immigration laws, including when she is "control[ling] and guard[ing]

32 19 U.S.C. § 1318(b)(2) (2018).

33 *See* INA § 103, 8 U.S.C. § 1103 (2018).

34 *Id.* § 103(a)(5).

35 *Id.* § 103(a)(10).

36 8 C.F.R. § 100.4 (2019); *Leadership*, U.S. DEP'T HOMELAND SECURITY, https://www.dhs.gov/leadership (last visited Jan. 27, 2020); *DHS Organizational Chart*, U.S. DEP'T HOMELAND SECURITY, https://www.dhs.gov/sites/default/files/publications/19_1205_dhs-organizational-chart.pdf (last visited Jan. 28, 2020). The establishment or elimination of ports of entry through regulations is commonplace. *Cf.* 8 C.F.R. § 100.4 (listing current ports of entry). *But see* HARRINGTON, *supra* note 22, at 1–2 (expressing skepticism about the scope of this ability).

37 8 C.F.R. § 100.4 ("The designation of . . . a Port-of-Entry may be withdrawn whenever, in the judgment of the Commissioner, such action is warranted.").

38 *Id.*

39 INA § 103(a)(1).

the boundaries and borders."[40] This could not possibly be a blanket authority for the Secretary to do whatever she wishes. Instead, this provision merely states a job description; absent a more specific legislative grant, the Secretary is not authorized to close the border when closing the border is not written into the statute as one of her duties.

Second, some who take a more expansive view of executive power would argue that general grants of authority to respond to "emergencies" are precisely what the Constitution and the Framers intended as part of the President's job.[41] Others, concerned about too much power in a single Executive, might agree only to the extent that an actual "emergency" exists,[42] or they would require a more specific delegation of responsibility in order for the Executive to carry out the legislative mandate.[43] This Note can by no means resolve the difficult problem of deciding where the legislature's power to delegate to the Executive ends, but the hazy line between the branches—the "zone of twilight," if you will[44]—suggests that general grants of authority will not be enough to permit a wholesale closure of the southern border, even with broad statutory authority, when other provisions identify particular modes of closing particular ports or restricting the entry of particular persons. Justice Frankfurter in *Youngstown* said as much in eloquent fashion:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.[45]

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40 *Id.* § 103(a)(5).

41 *Cf.* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 488, 497–98 (2002) (arguing that national security concerns justify such presidential action).

42 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring) ("[The forefathers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation."). *But see* Trump v. Hawaii, 138 S. Ct. 2392, 2409, 2412 (2018) (giving great deference to the Executive to determine what an "emergency" means).

43 *Youngstown*, 343 U.S. at 635–36 (Jackson, J., concurring) (discussing the division of power between the branches of government as partially dependent on the extent to which Congress has expressly authorized or expressly restricted executive power).

44 *Id.* at 637.

45 *Id.* at 609 (Frankfurter, J., concurring).

### *2. Customs and Border Control in INA Section 215*

A second potential source of authority to close the border is INA section 215, which provides baseline conditions of noncitizen entry, such as abidance with applicable rules and regulations and forthrightness in applications and travel documents.[46] Section 215 has a blanket authority that permits the President both to waive the requirements of the section[47] and to place further limitations on the baseline conditions of entry.[48] Section 215 has been invoked in Presidential orders forcing repatriation of Haitians in the 1990s[49] and limiting U.S. citizens' ability to travel to Cuba.[50] It was also invoked in litigation surrounding the travel ban, popularly known as the "Muslim ban," in which the President instituted a ban on travel from primarily majority-Muslim nations that was ultimately upheld by the Supreme Court in *Trump v. Hawaii*.[51] In that case, the Supreme Court declined to construe the breadth of section 215 because they found that it "substantially overlapped"[52] with section 212(f) (on the suspension power),[53] and did not "'need [to] . . . resolve . . . the precise relationship between the two statutes' in evaluating the validity of the Proclamation."[54]

The Court's upholding of the President's ability under section 215 to restrict travel to hostile foreign nations,[55] for instance, is both a correct reading of the statute and constitutionally sound; it is consistent with the President's substantial foreign affairs power and unitary voice in diplomacy.[56] The Court is also correct to decline to read section 215 more broadly than section 212(f), since section 215 is primarily a "border control statute[] regulating departure from and entry into the United States,"[57] while 212(f) is a more concrete grant of power to control migration[58] and arose in the post-War context with its attendant concerns about the entry of communists.[59]

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46 *See* 8 U.S.C. § 1185(a) (2018).

47 *See id.* (beginning the section with "[u]nless otherwise ordered by the President").

48 *See id.* § 215(a)(1) (making statutory conditions "subject to such limitations and exceptions as the President may prescribe").

49 *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 158–59, 164 n.13 (1993).

50 *See* Zemel v. Rusk, 381 U.S. 1, 3 (1965).

51 138 S. Ct. 2392 (2018).

52 *Id.* at 2407 n.1 (citing Brief for Petitioners at 32–33, *Hawaii*, 138 S. Ct. 2392 (No. 17-965)).

53 See *infra* Section I.A.3 for a more thorough discussion of this provision.

54 *Hawaii*, 138 S. Ct. at 2407 n.1 (citing Brief for Petitioners, *supra* note 52, at 32–33).

55 *Zemel*, 381 U.S. at 1.

56 *See, e.g.*, The President's Power in the Field of Foreign Relations, 1 Op. O.L.C. supp. 49 (1937).

57 *See* United States v. Laub, 385 U.S. 475, 480 (1967) (quoting Brief for the United States at 11, *Laub*, 385 U.S. 475 (No. 176)) (construing the predecessor provision of section 215 with respect to a criminal prosecution of a U.S. citizen).

58 *See infra* Section I.A.3.

59 *See* SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY

But these readings of 215 do not preclude the President from invoking it in the future to close the border entirely. Whereas 212(f) is concerned with preventing the entry of *people*, 215 can be conceptualized as a restriction on *places with respect to people*. Thus construed, section 215 would authorize a border closure only to the extent that the closure is meant to regulate the *manner* of people's entry. Section 215 is not an authorization to adopt isolationism or to substantively execute an administration's priorities regarding the entry of certain groups of people; instead, it is a procedural, "regulatory" device to control *how* noncitizens may enter. Section 215 can authorize the closure of a single point of entry, or of many points of entry for a brief period of time, because of some exigency; but it does not authorize the closure of many points of entry for an extended period.

In other words, the geographical and temporal scope of a closure—the physical mileage affected and the actual number of days the closure lasts—are inversely related to the President's ability to enact that closure. Closing a single port of entry, for a brief period of time, for legitimate reasons tied to border security, is consistent with both section 215 of the INA and with the separation of powers. For this reason, no President has seriously been challenged on actions taken pursuant to section 215; at the same time, no President until the current one has considered unilaterally extending a closure over both such an immensely broad area—nearly 2000 miles[60]—and over an indefinite period of time. The relevance and comparability of prior border closures—after moments of great import such as JFK's assassination and 9/11[61]—to the "flood[]"[62] of potential refugees or drug traffickers attempting to enter through the southern border is dubious at best. This conception of an inverse relationship between scope and duration of a closure, on one hand, and presidential authority, on the other, is also consistent with the Court's conception of section 215 power in *Zemel*,[63] *Sale*,[64] and *Laub*,[65] and not inconsistent with the Court's holding in *Trump v.*

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AND THE NATIONAL INTEREST: STAFF REPORT 201–03 (1981) [hereinafter COMM'N STAFF REPORT], *reprinted in* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 17–18 (8th ed. 2016).

60 *See* Treaty of Peace, Friendship, Limits and Settlement Between the United States of America and the Mexican Republic, Mex.–U.S., art. V, Feb. 2, 1848, T.S. No. 207 (marking the international boundary); *The International Boundary and Water Commission - Its Mission, Organization and Procedures for Solution of Boundary and Water Problems*, INT'L BOUNDARY & WATER COMMISSION, https://www.ibwc.gov/About_Us/About_Us.html (last visited Oct. 1, 2019) (describing the boundary).

61 *See supra* note 26–28 and accompanying text.

62 Tankersley & Swanson, *supra* note 9; Egan, *supra* note 8.

63 Zemel v. Rusk, 381 U.S. 1, 3 (1965) (upholding executive authority under section 215 to restrict travel to Cuba).

64 Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 159 (1993) (upholding the President's use of section 215 to interdict Haitian arrivals by sea).

65 United States v. Laub, 385 U.S. 475, 460 (1967) (upholding the dismissal of criminal

*Hawaii*.[66]

### *3. Suspension of Entry on "Classes" of Noncitizens in Section 212(f)*[67]

The strongest, most important immigration-related statute that might authorize a border closure of this character is section 212(f) of the INA, which allows the President to "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" if he finds that their entry "would be detrimental to the interests of the United States."[68] This provision has been the subject of intense scrutiny over the last several years, as it was the claimed authority for the travel ban.[69] Importantly, this provision specifically authorizes the President—not another executive branch official—to make the decision to suspend entry,[70] to limit not just individual noncitizens but "any class,"[71] and to "suspend" their entry,[72] which, despite an implied temporal limitation, was construed by the Supreme Court in *Trump v. Hawaii* not to encompass any meaningful temporal limitations.[73]

As alluded to earlier, section 212(f) applies with respect to certain kinds of *people* rather than *places*.[74] After *Hawaii*, we know that the President can invoke the power to ban certain foreign nationals, or groups of them, and that this ban can apply not just at a single port of entry but nationwide. The Court's reasoning in *Hawaii* is that, even in the face of overt declarations of discriminatory animus the President exhibited as a candidate for office,[75] deference to the Executive's determination of an "emergency" is deserved

indictments for violating section 215 by conspiring to assist others in traveling to Cuba).

66 138 S. Ct. 2392, 2423 (2018). For more discussion, see *infra* Section I.A.3.

67 Conceivably, the President could try to justify a border closure on the general inadmissibility criteria laid out in section 212(a) of the INA. This provision allows various executive officials, from the Secretary of Labor to the Secretary of Health and Human Services, to deny entry to noncitizens on a range of potential grounds, such as drug abuse, criminal convictions, terrorism offenses, or failure to meet the process known as labor certification. I have chosen to limit analysis of 212(a) because it applies primarily, if not only, on an individual, case-by-case basis, and thus would form a weak claim of entitlement to close the border on a geographically large scale.

68 INA § 212(f), 8 U.S.C. § 1182(f) (2018).

69 *Hawaii*, 138 S. Ct. at 2407 (2018).

70 INA § 212(f).

71 *Id.*

72 *Id.*

73 *Hawaii*, 138 S. Ct. at 2409–10 ("[T]he word 'suspend' often connotes a 'defer[ral] till later,' . . . [b]ut that does not mean that the President is required to prescribe in advance a fixed end date for the entry restrictions. . . . [A] President . . . may link the duration of those restrictions, implicitly or explicitly, to the resolution of the triggering condition.").

74 *See supra* text accompanying notes 59–60.

75 *See Hawaii*, 138 S. Ct. at 2433, 2435–40 (Sotomayor, J., dissenting) (discussing at great length the anti-Muslim statements and policies of the Trump campaign and Trump Administration before and after assuming office).

so long as there is a "facially neutral" justification for such a restriction.[76] This does not sit well with the Court's prior discussion of constitutional doctrine, which calls for strict scrutiny of government measures when certain kinds of discriminatory animus are present, and is also a rather awkward reading of the word "suspend," which suggests temporal limitations.[77] But in fairness to the Court, a suspension on entry of certain foreign nationals from a President without the background of having made anti-Muslim statements would fit comfortably within the broad grant of authority in section 212(f). The Court was also careful to remark in *Hawaii* that the exercise of the suspension power was not inconsistent with other immigration statutes: "We may assume that [section 212(f)] does not allow the President to expressly override particular provisions of the INA."[78] Because the immigration law statutes clearly intend for cross-border travel, with mere carveouts by the Executive for legitimate national security purposes, a blanket, indefinite closure of the southern border would contradict numerous provisions providing for open ports of entry.[79] In contrast to the travel ban, where ports of entry remained open except with respect to certain noncitizens—a restriction on *people*—a southern border closure would not effectuate a closure as to certain "classes" of noncitizens but to *all* noncitizens who happen to be presenting themselves for entry at the southern border but not at other ports of entry—a restriction on *place*. The closure of the southern border, therefore, would be a far more awkward fit with 212(f), which contemplates person-based restrictions, than the travel ban, which was *only* person-based. A Swede otherwise not subject to any 212(f) ban would be restricted from entering if traveling by land from Mexico to Texas, but not if flying from Stockholm to Texas. This anomalous result, while not constitutionally impermissible, is much less clearly authorized by section 212(f).

*4. Emergency Closure of Ports of Entry Under a Non-Immigration Statute*

Finally, the President might claim authority under 19 U.S.C. § 1318, a non-immigration statute that provides for "the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, . . . to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat" so long as she notifies a House

76 *Id.* at 2418, 2423 (majority opinion).

77 *See supra* notes 70–73 and accompanying text.

78 *Hawaii*, 138 S. Ct. at 2411.

79 *See infra* text accompanying notes 95–100 (concluding that there is no statutory authority for a blanket, indefinite closure of the southern border).

Committee within 72 hours.[80] This statute has not often been invoked, and "published federal court decisions that reference [it] . . . are from the 1950s and concern importation duties rather than border closures."[81]

Because the other provisions mentioned above more directly authorize a closure and are written more broadly, this statute is likely to be Plan B in any government order to close the border. Federal courts would have to embark on new territory of statutory interpretation regarding the words "temporarily," "necessary," and "specific threat."[82] Unlike section 212(f), which specifically allows "*the President* [to] find[]"[83] that some classes of aliens' entry would be "detrimental to the interests of the United States," and which was construed in *Trump v. Hawaii* as judicial deference to the Executive's judgment thereof,[84] § 1318 provides no such specific authority. Instead, the provision says, "when necessary to respond to a specific threat to human life or national interests."[85] This syntax at least suggests that a court could weigh in on whether there actually was a "specific threat."[86] Even if not, the statutory language provides less authority for a blanket closure when whatever "threat" invoked by the President does not appear in a specific physical location. A bomb threat made about a particular location, or President Reagan's closure of the southern border after the murder of a DEA agent,[87] for instance, are examples that hew more closely to the "specific threat" language than a diffuse suggestion that drug trafficking through the ports of entry is a problem or that mass refugee claim processing is no longer administratively feasible.

Additionally, § 1318 bears a similar relationship to section 215 of the INA in that it is primarily a procedural device to control borders, not a substantive limitation on migration specifically.[88] This means that a court's willingness to uphold a measure based on § 1318 may turn in part on whether the border closure is conceived of as a restriction on *people* or on *places*. If the President's argument is that drugs can simply not be stopped without a

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80 19 U.S.C. § 1318(b)(2)–(3) (2018).

81 HARRINGTON, *supra* note 22, at 3.

82 *See* § 1318(b)(2); HARRINGTON, *supra* note 22, at 3 (noting that courts have not "examined the bounds of the statute's authorization to close a port 'temporarily' and only for 'a specific threat to human life or national interests'").

83 INA § 212(f), 8 U.S.C. § 1182(f) (2018) (emphasis added).

84 *Id.*; Trump v. Hawaii, 138 S. Ct. 2392, 2418–19, 2422 (2018) (discussing this deference).

85 19 U.S.C. § 1318(b)(2).

86 I could find no federal cases construing statutes containing the phrase "specific threat" or any executive interpretations thereof, but specific threats come into play in other immigration proceedings. For instance, specific threats can form the basis for a well-founded fear of persecution, a ground for granting asylum. *See* INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (defining "refugee"). In that respect, courts weigh in on what constitutes a specific threat with great frequency. *See* 3A AM. JUR. 2D *Threats as Basis for Well-Founded Fear* § 991–95 (2019).

87 *See supra* note 27 and accompanying text.

88 *See supra* Section I.A.2 (describing the use and interpretation of section 215).

suspension of border crossing, § 1318 might have more weight, at least as a statutory matter; if his argument is that undocumented persons are overwhelming the system at the border, § 1318 is too narrow to encompass this situation.

### *B. Closure Not Authorized by These Statutes*

Having discussed the various statutory grants of authority that the President may invoke to close the border, I conclude that no statute directly authorizes the President to close the southern border, at least not in the manner the President seems to envision. Sections 103 and 215 of the INA and 19 U.S.C. § 1318 allow the President and other executive officials to control or restrict the flow of goods or people based on their particular location, and section 212 of the INA allows for the exclusion of individual noncitizens or the suspension of certain classes of noncitizens based on some trait of that class.[89] Presidents have on extreme occasions invoked one or more of these statutes and their inherent emergency powers to close national borders for a fleeting amount of time.[90] But there is no authority for a complete and long-term closure of the border.

Between these two extremes—large-scale, brief closures as applied to everyone[91] and incomplete, indefinite closures as applied to some[92]—there is a gray area. I argue that the ability of the President to close a border depends on the factors discussed in Section I.A and tracks separation-of-powers principles. The longer or broader a closure is, the weaker the President's power to do it, while the shorter its duration and narrower its scope, the stronger the argument becomes that it is an action wholly within the executive domain. Justice Jackson famously described statutory delegations of authority as inherently limited by the separation of powers in *Youngstown Sheet & Tube Co. v. Sawyer*,[93] and his framework supplies a helpful heuristic in this novel question about executive power and border closures.[94]

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89 *See supra* Section I.A.

90 *See supra* notes 25–31 and accompanying text.

91 *See supra* notes 25–31 and accompanying text.

92 Trump v. Hawaii, 138 S. Ct. 2392 (2018).

93 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–55 (1952) (Jackson, J., concurring) (articulating the division of power between the political branches as partially dependent on congressional approbation, disapprobation, or silence regarding executive action).

94 The *Youngstown* categories refer to those articulated in Justice Jackson's concurrence in the *Youngstown* case. The first category is where congressional approval of executive action is present, *id.* at 635–37, such as when Congress declares war on a country and the Executive sends troops. The second category describes a "zone of twilight" where Congress has authority to regulate and the President also has independent powers to act. *Id.* at 637. The third is when Congress has disapproved executive action, and the President's "power [to act] is at its lowest ebb." *Id.* at 637–38. *See generally* Kazi S. Ahmed, Comment, *The President vs. Some Old Goat: The Justiciability of War-Powers*, 123 PENN ST. L. REV. 191, 210–11 (2018) (providing an overview of the *Youngstown* framework).

Congress's intent since the first federal immigration statutes[95] has been to allow a procedure for entry and exit, with individual determinations to be made by the executors of the law. Separately, the Executive has been allowed limited authority to account for emergencies and unforeseen contingencies in national security.

To use a different metaphor, imagine that the flow of migrants and citizens across borders is like traveling on roads. Traffic control governs how a road may be used, and includes regulating driver qualifications, classes of licenses, vehicle inspections, signage, and patrol. A traffic control scheme may allow the Executive to ensure compliance with license and inspection requirements, set up a blockade to catch drunk drivers, issue penalties for violation of traffic laws, or monitor proper functioning of stoplights. But a traffic control scheme does not close roads; the precise reason a traffic control scheme is needed is for the roads to remain open and safe. In the event that an emergency—a snowstorm, an accident, a washout—warrants closure, the Executive may only authorize it only as long as the emergency actively persists.

The analog is substantive immigration law and procedure: visas in section 201 of the INA, inadmissibility in section 212, procedure for removal in section 240, and customs officers. The President has been given authority to regulate immigration traffic and to keep the roads safe through border checkpoints and visa approvals. If an unforeseen emergency causes the President to declare the border closed, it is presumptively within his domain for a brief and narrow period, just like a road closure. But he cannot close the border entirely, nor for very long, because Congress intended the border to stay open. An all-purpose declaration of an ongoing emergency for the substantive purpose of limiting immigration disregards Congress's clear intent to keep that border open except under very circumscribed conditions.

In enforcing traffic laws, the Executive operates under the first and second *Youngstown* categories; in causing traffic to cease to a halt for an extended period of time, he operates under the third category, and he may lack that power. By analogy, customs officers denying entry at the border for compliance failures or emergency threats operate in first and second *Youngstown* territory; presidentially-ordered border closures fall under the third *Youngstown* category. It is important to recognize that the principles governing certain noncitizens' rather weak claims to enter the United States[96]

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95 Page Act of 1875, ch. 141, 18 Stat. 477 (1875) (providing for the exclusion of some noncitizens on the federal scale for the first time).

96 This statement is uncontested at this stage in the doctrine. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (holding that the petitioner, "as an unadmitted and nonresident alien, ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise"); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("[A]n alien who seeks admission to this country may not do so under any claim of right.").

do not bear on the analysis of whether the President may close the border, because the latter question turns on whether there is a specific legislative grant to do so. Although the Supreme Court has upheld the executive branch's exclusion of valid visa holders standing at the border, even when the reasons for such exclusion are neither public nor well-founded, such exclusions are made after an assessment of the "threat," real or perceived, that the individual, the group, or the port's remaining open would present.[97] Ben Harrington cogently summarized the considerations in a recent Congressional Research Service report:

> [F]ederal law supplies the President and DHS with some power to restrict the legal entry of goods and people at the southern border, but how far that power goes remains unclear. If the Administration proffers a national security justification to close a limited number of ports of entry on the southern border or to bar specified categories of immigrant or nonimmigrant visa holders from applying for admission at the southern border, a reviewing court might defer to the national security justification under *Trump v. Hawaii* and hold that the executive action fits within statutory authority. Broader action to close the border to goods and people, however, could give rise to meritorious constitutional and statutory challenges.[98]

My stronger view is that "[b]roader action to close the border to goods and people"[99] *would* be unlawful because no statute authorizes it. To the extent the statute authorizes "some power to restrict the legal entry"[100] of noncitizens, the power of the President to do so is limited by general separation-of-powers concerns.

## II
## CONSTITUTIONAL CONSIDERATIONS

In Part I, I argued that no statute specifically grants the President the power to close the border outright and indefinitely and that any upholding of the border closure must be consistent with generally applicable separation-of-powers principles. Now, I analyze whether, even if a court found that an existing statute gives the President the authority to close the border, noncitizens may assert a valid constitutional claim against that closure. As detailed below, I argue that substantive and procedural due process would impose a restriction on border closures of extended duration if applied to two categories of noncitizens: 1) those with a sufficient level of ties, legal status,

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97 *See Knauff*, 338 U.S. at 544 (upholding the government's refusal to provide further explanation of their decision); ALEINIKOFF ET AL., *supra* note 59, at 534 (noting the "slender evidence" the government had relied upon to exclude Knauff).

98 HARRINGTON, *supra* note 22, at 4.

99 *Id.*

100 *Id.*

and/or physical presence in the United States—a kind of noncitizen that existing constitutional doctrine protects—and 2) those who are statutorily authorized to apply for asylum.

### *A. Does the Constitution Apply to Noncitizens?*

One question that must always be asked in immigration law is whether the individual rights protections of the Constitution even apply to noncitizen complainants. The question is notoriously complex; while the Supreme Court has held unambiguously that the Constitution protects some noncitizens in some cases, it does not protect noncitizens uniformly. *Yick Wo v. Hopkins*[101] holds that the equal protection guarantee of the Fourteenth Amendment applies to "any person,"[102] including noncitizens, suggesting that some noncitizens can prevent government abuses by invoking individual constitutional rights. Modern cases have reaffirmed the vitality of *Yick Wo* and have reverse-incorporated it against the federal government.[103]

An analysis of how the Equal Protection Clause applies to a border closure is beyond the scope of this Note; instead, the constitutional analysis in this Part focuses primarily on the Due Process Clause of the Fifth Amendment, which places constraints on the federal government's ability to deprive any "person" of life, liberty, or property.[104] My analysis centers here because immigration law doctrine has been grounded in due process jurisprudence at least since *Yamataya v. Fisher* in 1903.[105] While the so-called "plenary power" of the government to regulate immigration[106] imposes few substantive restraints on the United States's ability to exclude and deport,[107] even in violation of other Bill of Rights guarantees,[108] claims

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101 118 U.S. 356, 374 (1886) (holding that California could not purposefully discriminate against Chinese noncitizens in the issuance of licenses to operate laundry businesses).

102 *Id.* at 369 ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."); *see* U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

103 *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017) (holding that gender-based classifications violated the equal protection guarantee implicit in the Due Process Clause of the Fifth Amendment); *id.* at 1686 n.1 ("As this case involves federal, not state, legislation, the applicable equality guarantee is not the Fourteenth Amendment's explicit Equal Protection Clause, it is the guarantee implicit in the Fifth Amendment's Due Process Clause.").

104 U.S. CONST. amend. V.

105 189 U.S. 86, 100–01 (1903) (holding that a Japanese noncitizen was entitled to due process protections in her adverse immigration action).

106 *See generally* ALEINIKOFF ET AL., *supra* note 59, at 185–88 (discussing the plenary power doctrine in immigration law).

107 *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210–12 (1953) (upholding exclusion order against longtime resident); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners, who have not been naturalized . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.").

108 *See* Kleindienst v. Mandel, 408 U.S. 753, 769 (1972) (upholding the Executive's discretion

to due process under the Constitution are cognizable in some circumstances.

*1. Invocation of the Due Process Clause*

In order for a noncitizen to assert a limitation on the southern border closure, she must first identify her entitlement to invoke the Constitution at all. Immigration doctrine identifies a noncitizen's territorial presence, her status, and her ties to the United States as relevant factors in this inquiry.

Noncitizens outside the territory generally have less of a right to claim the protections of the Due Process Clause. In *United States ex rel. Knauff v. Shaughnessy*,[109] the Court acknowledged that Ellen Knauff, a first-time arriving noncitizen with a valid entry document was on American soil at Ellis Island as she waited for her case to be heard. But the Court adopted an "entry fiction" doctrine: Knauff had not yet actually entered the United States when stopped at the border.[110] In part relying on the rights–privileges distinction that was later jettisoned in twentieth-century jurisprudence generally,[111] the Court concluded that Knauff had no right to enter—notwithstanding the fact that, territorially speaking, she had.[112] Although Knauff had "lawful" status as a visa holder and had at least some claim to ties as the "bride" of a U.S. citizen, these were insufficient to allow a due process challenge; she was unable to even contest the evidence warranting her exclusion.[113] *Shaughnessy v. United States ex rel. Mezei*[114] doubled down on the assessment that a noncitizen often cannot invoke the Due Process Clause. There, the Court upheld the exclusion of Ignatz Mezei, a long-time permanent resident, from returning to the United States, in part because he had been "behind the Iron Curtain"[115] too long—a phrase that could be

to exclude a noncitizen because the reason it gave was "facially legitimate and bona fide"); Harisiades v. Shaughnessy, 342 U.S. 580, 587–88, 592 (1952) (rejecting First Amendment challenge to plenary power and remarking that noncitizens "vulnerab[ility] to expulsion after long residence is a practice that bristles with severities" while also characterizing it as "a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state").

109 338 U.S. 537 (1950).

110 *See id.* at 539 (noting the plaintiff's detention on U.S. soil at Ellis Island, but declining to construe her presence there as an entry); *see also* Chae Chan Ping v. United States, 130 U.S. 581, 581–82 (1889) (noting the noncitizen's detention aboard a steamship in San Francisco harbor). For a modern questioning of this premise, see Jennings v. Rodriguez, 138 S. Ct. 830, 862–63 (2018) (Breyer, J., dissenting) ("*Why* should we engage in this legal fiction here? The legal answer to this question is clear. We cannot . . . .").

111 *See generally* RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 7:15 (2019) (summarizing the Court's backing off of the rights–privileges distinction over time).

112 *See Knauff*, 338 U.S. at 544.

113 *Id.*; *see also* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 962–63 & n.153 (1995) (citing *In re* Ellen Raphael Knauff, No. A-6937471 (B.I.A. Aug. 29, 1951), *reprinted in* ELLEN RAPHAEL KNAUFF, THE ELLEN KNAUFF STORY 245 (1952)).

114 345 U.S. 206 (1953).

115 *Id.* at 214.

interpreted as a proxy for insufficient ties. Both Knauff's and Mezei's extra-territorial presence was deemed important to the constitutional inquiry.[116] In fact, *Mezei* could even be read to state that "clandestine entrants receive the full panoply of due process rights" that an excluded noncitizen does not.[117]

But *Kwong Hai Chew v. Colding*[118] shows that the Court is not so doctrinaire in the entry fiction as to preclude all noncitizens from asserting a due process right. Although Kwong Hai Chew had physically been outside of the United States territory, the Court felt comfortable "assimilat[ing]" his status to that of a continuously present noncitizen in part because of his status (a long-time permanent resident)[119] and his ties (working on a U.S.-flagged merchant ship).[120] More recently, the Court found in *Landon v. Plasencia* that a brief, casual trip abroad was insufficient to deny a Lawful Permanent Resident due process of law.[121] Although the Court did not identify *what* process is due and even though the noncitizen was outside the physical territory of the country, the Court acknowledged her ability to invoke the protections of the Fifth Amendment.[122]

Whether a noncitizen outside the territory of the United States may invoke the Due Process Clause regarding the southern border closure will, therefore, likely turn on the particular noncitizen's status and ties to the country. Because a border closure is necessarily one-size-fits-all, it may mean that a *single* noncitizen who has a claim to due process—someone like Ms. Plasencia—is enough to invalidate the entire order.[123] In other words, any activity that serves to distinguish between those who have a claim to enter through the southern border, on the one hand, and those who do not, on the other, necessarily means that the southern border is *not* closed to noncitizens. As part of the constitutional inquiry, we may therefore assume that at least some long-time, lawful permanent residents would be seeking to cross the southern border during the period of its closure and have a claim to bring against the President.

### *2. Identifying the Deprived Interest*

If a noncitizen can invoke the Due Process Clause, she must then

116 *See id.* at 208 (noting Mezei's nineteen-month absence from U.S. territory); *Knauff*, 338 U.S. at 543 (drawing a doctrinal distinction between exclusion and deportation).

117 ALEINIKOFF ET AL., *supra* note 59, at 534 (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1392–96 (1953)).

118 344 U.S. 590 (1953).

119 *Id.* at 596.

120 *Id.* at 593.

121 459 U.S. 21, 32–34 (1982).

122 *Id.*

123 *See infra* notes 155–59 and accompanying text.

identify a particular liberty or property interest that the government has deprived her of. For noncitizens seeking to reopen the southern border, this presents a number of obstacles.

First, strict formalists, including perhaps several Justices on the current Court, do not believe in substantive due process to protect beyond physical detention (liberty) or taking of real or personally owned property (property).[124] Even with deprivations of physical liberty in an acknowledged civil proceeding, the Court at this juncture seems loath to find a constitutional violation when noncitizens are involved.[125] A noncitizen seeking to block the closure of the border would thus have to make the difficult argument that she is 1) physically detained 2) by the U.S. government 3) in Mexico—a trifecta that probably does not logically coexist for those Justices with a narrow view of substantive liberty and property deprivations. Any case law favorable to the noncitizen, including *Zadvydas v. Davis*[126] and *Boumediene v. Bush*,[127] placed only narrow restrictions on de facto incarceration pursuant to deportation. More dishearteningly, plenty of case law exists contrary to the interests of the noncitizen.[128]

Second, the Court is quite skeptical of any liberty or property claims to *entry*, even if a credible argument may be made that the noncitizen's status and ties to the United States are strong.[129] Even as the Court backed off its formalistic due process approach in *Yamataya*, it determined that Kaoru Yamataya herself had no claim to enter because she had procedurally defaulted for failing to appeal.[130] The deficiencies we would recognize today in that procedure—determination by a single executive officer, cursoriness of the hearing, inability to present evidence, a hearing conducted in a foreign language—did not appear to matter to the *Yamataya* Court.[131] However, *Plasencia* on its merits at least raises the inference that noncitizens with

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124 *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2632 (2015) (Thomas, J., dissenting) ("[T]he doctrine of substantive due process [is not] defensible.").

125 *See, e.g.*, Demore v. Kim, 538 U.S. 510, 531 (2003) (holding that "[d]etention during removal proceedings is . . . constitutionally permissible"); *see also* Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (declining to address the constitutional merits of civilly detaining noncitizens for long periods of time).

126 533 U.S. 678, 689 (2001) (holding that indefinite civil detention is unauthorized by the immigration statutes).

127 553 U.S. 723, 771 (2008) (finding that the Suspension Clause of the Constitution applied to a detained prisoner at the Guantanamo Bay Naval Station).

128 *See supra* text accompanying notes 109–17.

129 *See, e.g.*, Kerry v. Din, 135 S. Ct. 2128, 2131 (2015) (plurality opinion) (remarking that "[t]here is no . . . constitutional right" to "live in the United States with [one's] spouse"); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 546–47 (1950) (upholding the denial of entry to a person married to a U.S. citizen holding a valid visa under the War Brides Act).

130 *See* Yamataya v. Fisher, 189 U.S. 86, 102 (1903) ("[A]s no appeal was taken to the Secretary from the decision of the Immigration Inspector, that decision was final and conclusive.").

131 *See id.* at 101–02 (describing the circumstances of the investigation).

strong ties have a liberty or property claim to entry after a brief trip abroad.[132] A reviewing court could find such an interest in a noncitizen at least for the first time she seeks entry across a closed border.

Third, even if there was a liberty or property interest, the government could argue that it has not actually deprived the person of that interest. If the government concedes that any noncitizen affected by the border closure could easily book a flight from Tijuana to San Diego and be permitted to enter on the same terms as they would crossing the land border prior to the closure, then the only thing the government has done is to make it more difficult to enter the country. There is no deprivation of liberty or property, they might argue, in creating an additional hurdle or foisting an additional expense on travelers.

However intuitively appealing this argument is, it is also an extremely narrow view of individual liberty. Thousands of noncitizens cross the border by land every day for work, study, or leisure; to be prevented from going about one's ordinary business *is* substantive deprivation of some liberty and property interest.[133] The government's deprivation of a legally residing noncitizen's interest in returning to their family and longtime home in Texas, say, is not qualitatively different than federal law enforcement officers setting up a barricade in front of one's physical house. Likewise, the right to cross a land border, while not absolute, cannot constitutionally be taken away indefinitely merely because the President perceives a threat.

Additionally, the lack of procedural steps in implementing the border closure—a Presidential proclamation does not go through notice-and-comment rulemaking—would probably allow a court to proceed to the next step of the due process inquiry.[134] *Plasencia* alone demands this result: Even assuming a deprivation of a protectable liberty or property interest, and even assuming that Ms. Plasencia committed an offense that would eventually result in the revocation of her legal status,[135] the Court found that the exclusion violated procedural due process. Similarly, a border closure that comes by presidential proclamation and which lasts more than a day or two *must* result in a judicial recognition that it violates procedural due process, regardless of whether a closure could take place through other avenues.

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132 *See* Landon v. Plasencia, 459 U.S. 21, 32–34 (1982); *see also supra* notes 121–22 and accompanying text (describing the *Plasencia* case).

133 *But see supra* note 124 (noting that Justice Thomas does not adhere to the Court's substantive due process jurisprudence).

134 As discussed earlier, we do not know in what manner the President might try to close the border. He has asserted an unqualified power to do so, which suggests a process outside the administrative state. If attempted through alternative procedures, this analysis might change. *See supra* notes 21–22 and accompanying text.

135 *See Plasencia*, 459 U.S. at 23 (noting Ms. Plasencia's alleged offense of abetting an illegal entry in violation of the predecessor statute to section 212(a)(6)(E)(i) of the INA).

*3. Determining the Contours of Due Process*

Finally, if a liberty or property interest is identified, we must determine what process is due. Here, the governing framework is the *Mathews v. Eldridge* test.[136] The factors in the *Mathews* balancing test include 1) the affected individual's interest, 2) the "risk of an erroneous deprivation," and 3) "the government's interest, including . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[137] The balancing of the factors in the *Mathews* test will vary according to each noncitizen subclass,[138] but any noncitizen who can invoke the Due Process Clause at all probably has a better claim of a violation of *procedural* due process than of *substantive* due process. The reason is that the "plenary power" in immigration regulation makes substantive due process challenges unlikely to succeed; exclusion for facially legitimate and bona fide reasons currently appear to be immune from judicial review.[139] Nevertheless, a complete and indefinite border closure enacted without specific congressional approval has more readily identifiable procedural deficiencies.[140]

*B. Due Process Analysis as Applied to Particular Groups of Noncitizens*

Having discussed the framework of due process challenges, I now apply it with respect to two classes of noncitizens: lawful permanent residents and asylum applicants.[141] In this Section, I analyze the constitutional challenges

136 *See* Mathews v. Eldridge, 424 U.S. 319, 334–45 (1976).

137 *Id.*

138 *See infra* Section II.B.

139 *See supra* note 108.

140 A legislative act is, of course, still capable of violating due process. However, legislative acts operate with the presumption of constitutionality. Federal legislation is frequently attended by subcommittee discussions, hearings, findings of fact, more direct pressures from constituencies and lobbying, and a presumption that Congress acts constitutionally. *See, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) ("It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."). *But see, e.g.*, F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447 (2010) (arguing that the judiciary should not defer to legislatures under the presumption of constitutionality). Moreover, given the various financial, family, and other interests that a border closure would affect, I believe a legislative act would contain at least some procedural safeguards to mitigate harsh consequences and potential executive abuse.

141 First-time arrivals without an asylum claim would almost certainly be unsuccessful in a due process challenge. First, a border closure that contemplates immediate removal for noncitizens who cross illegally would differ very little from the current setup. *See* INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2018) (providing that entry without permission makes a noncitizen inadmissible); INA § 237(a)(1)(A) (providing that anyone inadmissible at the time of entry is deportable). Second, cases like *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Kerry v. Din*, 135 S. Ct. 2128

and conclude that the first of these groups has a clearly meritorious challenge to a border closure, while asylum applicants present a closer case.

### *1. Returning Lawful Permanent Residents*

Returning lawful permanent residents are the noncitizen group with the strongest claim to blocking the border closure. Because they have the greatest "stakes"—lawful status, strong ties to the United States, and probably a short absence beyond its territorial boundaries—a court can more easily find a deprivation of a liberty interest. A considerable body of case law supports this view.[142]

The "stakes" possessed by lawful permanent residents can also serve as a rough proxy for the individual interest in a *Mathews v. Eldridge* balancing test. However, it is subject to some discretionary balancing by a reviewing court. Viewed broadly, the specific individual interest at issue in a border closure case is one's right to enter and exit the United States for legitimate purposes; viewed narrowly, the specific individual interest is traversing the southern border at will. This distinction makes all the difference. In *Plasencia*, the Court did not actually evaluate the noncitizen's individual interest and, indeed, appeared to question the premise that the interests of those outside the United States are equivalent to those continuously present: "The reasoning of [*Kwong Hai Chew*] was only that a resident alien returning from a brief trip has a right to due process just as would a continuously present resident alien. It does not create a right to identical treatment for these two differently situated groups of aliens."[143] Such subtleties of the level of process due exist in the very core of modern due process jurisprudence; it is what distinguishes welfare income replacement in *Goldberg v. Kelly* from Social Security income replacement in *Mathews*.[144] Thus, there is no

(2015), make this clear. Even if, as in *Knauff*, the noncitizen possesses a valid entry visa and a generally sympathetic situation, there is no protectable liberty or property interest to claim. Finally, sections 215(d) and 221(h)–(i) of the INA, enacted in 1952 (after *Knauff*, but before *Mezei*), essentially codify the dicta in *Knauff* that the issuance of a visa is not to be construed as engendering any reliance interests: "After the issuance of a visa, . . . the consular officer or the Secretary of State may *at any time* . . . revoke such visa or other documentation." INA § 221(i) (emphasis added). The same provision also forbids judicial review of a visa revocation. *Id.*

142 *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32 (1982) (finding that a longtime resident of the United States was not afforded due process when she was denied reentry after a short trip to Mexico); Rosenberg v. Fleuti, 374 U.S. 449, 461–62 (1963) (holding that an "innocent, casual, and brief" trip abroad is not "meaningfully interruptive" of residence and thus cannot fit within the statutory definition of "entry" existing at the time); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (assimilating a noncitizen's time on a U.S. merchant marine vessel as "continuous" residence); Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950) (collecting cases).

143 *Plasencia*, 459 U.S. at 31.

144 *Compare* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (finding that the termination of welfare benefits without a hearing violated procedural due process), *with* Mathews v. Eldridge, 424 U.S. 319, 325–26 (1976) (finding that the termination of Social Security disability benefits without

definitive answer to how the individual interest will be viewed and weighed in an unprecedented dispute about a border closure.

Next, the erroneous deprivation inquiry weighs heavily in the noncitizen's favor. Because *citizens* have an extremely strong statutory and constitutional claim to entry,[145] the risk of erroneous deprivation of *citizens'* protected interest also approaches one hundred percent if the government did not take measures to distinguish citizens from noncitizens at the border. Even assuming that this is not the case and that the border is open to citizens but closed for noncitizens, a person with *no* stakes is subject to the same exclusion as a person with *high* stakes. Treating these groups of noncitizens the same is inconsistent with the Court's immigration jurisprudence on multiple levels.[146] If the Court recognizes a liberty interest at all, it must necessarily determine that the risk of erroneous deprivation is high because determining "erroneousness" is inextricably linked to procedures that distinguish between correct deprivations and incorrect ones. Customs and Border Patrol agents stationed on the border would become nothing more than checkers of valid U.S. passports; they would not be engaging in a process that distinguishes between those with valid protectible liberty interests and those without, or between those whose interests may be deprived from those whose interests may not be deprived. The "probable value" of "[an] additional or substitute procedural safeguard[]"[147] of checking for green cards or valid entry permits is extraordinarily high. I would also add that allowing citizens, but not noncitizens, to cross is neither consistent with the historical use of border closures[148] nor would it rationally serve the purpose of combating drug trafficking or lowering refugee claim backlogs.[149]

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a hearing did not violate procedural due process).

145 *See supra* note 23.

146 *Compare Knauff*, 338 U.S. 537 (holding that a first-time arrival with a valid visa had no due process rights), *and Mezei*, 345 U.S. 206 (holding that a longtime permanent resident who had been abroad nineteen months had no due process rights), *with Plasencia*, 459 U.S. 21 (holding that a noncitizen did have due process rights after a brief trip abroad), *and Fleuti*, 374 U.S. 449, 461–62 (holding that an "innocent, casual, and brief" trip abroad is not "meaningfully interruptive" of residence and thus cannot fit within the statutory definition of "entry" existing at the time), *and Kwong Hai Chew*, 344 U.S. 590 (assimilating a noncitizen's time on a U.S. merchant marine vessel as "continuous" residence).

147 *Mathews*, 424 U.S. at 335 (1976).

148 *See supra* notes 25–28 and accompanying text.

149 For instance, the vast majority of drug traffickers are U.S. citizens. *See* David Bier, *77% of Drug Traffickers Are U.S. Citizens, Not Illegal Immigrants*, CATO INST.: AT LIBERTY (July 3, 2019, 4:14 PM), https://www.cato.org/blog/77-drug-traffickers-are-us-citizens-not-illegal-immigrants. As some recent reports indicate, even the physical barrier long touted by the President is no match for drug smugglers because of "enormous incentive to adapt . . . to new obstacles and enforcement methods." *See* Nick Miroff, *Smugglers Cut Through President's Border Wall*, WASH. POST, Nov. 3, 2019, at A1. As for refugee claim backlogs, these exist largely independently of border controls, because any refugee (not going through ordinary refugee resettlement channels) may apply for

At the third prong of the *Mathews* analysis, the government's interest is also subject to differing interpretations by a reviewing court. The government will argue that the interest in closing the border is compelling, even dispositively high. Indeed, *Trump v. Hawaii* puts wind in the sails of such an argument: The President can simply invoke a national security justification to quell a challenge to the legitimacy of the closure.[150] While *Trump v. Hawaii* does seem to make any meaningful balancing impossible, three distinctions can be made.

First, the reasoning of Chief Justice Roberts's opinion upholding the travel ban in *Trump v. Hawaii* relied heavily on the fact that a "worldwide review" by the Secretary of Homeland Security identifying security deficiencies in the named countries had accompanied the third iteration of the ban.[151] This report lent support to the determination that the ban was "expressly premised on legitimate purposes."[152] Of course, a factually accurate report detailing security problems at the southern border would be easy to drum up, but the government would probably have to show at least a sufficient nexus between a *complete, indefinite* border closure and a facially legitimate national security objective, which is not an easy task. This problem also harkens back to the discussion of presidential authority being inversely correlated with the scope of the closure, a correlation that would ultimately, I believe, track separation-of-powers principles.[153] It is not even clear if a land border closure—unlike a "temporary" ban on air travel from certain security-deficient countries—would accomplish anything other than frustrating the flow of commerce.[154]

Second, a complete border closure has a vastly different scope than a partial travel ban. *Trump v. Hawaii* purportedly overruled *Korematsu v. United States*,[155] which suggests that the application of an unexplained

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asylum regardless of lawful entry or lawful status. *See* INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (2018).

150 *See Murky Legal Waters*, *supra* note 17 ("Five of our current Supreme Court Justices have tended to roll over and play dead the moment the president mutters the phrase 'national security.'").

151 Trump v. Hawaii, 138 S. Ct. 2392, 2404 (2018).

152 *Id.* at 2421.

153 *See supra* Section I.B.

154 *See* Tankersley & Swanson, *supra* note 9 (noting the near-certain catastrophic impact a border closure would have on commerce).

155 *See Hawaii*, 138 S. Ct. at 2423 (overruling Korematsu v. United States, 323 U.S. 214 (1944)). As some renowned scholars have suggested, the overruling of *Korematsu* is utterly inconsistent with the logic that was the basis of *Hawaii*. How the Court managed to overrule a case that upheld a presidential directive based on legitimate national security concerns grounded in racial animus while at the same time upholding a similar directive grounded in religious animus is still unclear. *See* Aziz Huq, Opinion, *The Travel Ban Decision Echoes Some of the Worst Supreme Court Decisions in History*, VOX (June 26, 2018, 6:06 PM), https://www.vox.com/the-big-idea/2018/6/26/17507014/travel-ban-internment-camp-supreme-court-korematsu-muslim-history ("Under the Court's 'plausibly related' test, it is quite clear that the internment [of U.S. Citizens of Japanese descent during World War II] would have survived a constitutional challenge today . . . .

national security justification broadly affecting *citizens* as well as noncitizens may trigger *some* level of scrutiny. Application of a border closure to lawful permanent residents may also trigger that scrutiny, as some language from litigation on the first iteration of the travel ban suggests.[156]

The government may also argue, in a related third-prong argument, that a complete border closure ends the hefty administrative burdens that inhere in regulating migrant flow across the southern border. If a court were willing to give any true level of scrutiny to this assessment, however, at least a portion of this analysis would not stand. For one thing, the elimination of procedures may reduce administrative burdens, but the *Mathews* test does not operate to put procedural elimination on the government's side; it does the opposite when other factors remain the same.[157] That is, even though the government may have a compelling "interest . . . in conserving scarce fiscal and administrative resources,"[158] the elimination of a procedure causes the balance to shift in favor of the noncitizen who is adversely affected. Only if the initial procedure went above and beyond its duty would the elimination of a burden have minimal effect on the balancing. For another, the border closure does not actually reduce administrative burdens because the border must still be policed and the closure enforced and disrupting the flow across lawful points of entry will likely only make enforcement *more* difficult.

On balance, a court employing the *Mathews* test should enjoin the border closure; lawful permanent residents' constitutional status is sufficiently strong to assert at least a procedural due process claim to enter. The President cannot effectively close the border to them.[159]

### *2. Asylum Seekers*

Asylum seekers at the border present a different kind of due process inquiry. They may be first-time entrants, a group that ordinarily cannot

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When [Chief Justice John] Roberts says that *Korematsu* was 'gravely wrong the day it was decided,' . . . this is in stark tension with his own reasoning in [*Trump v. Hawaii*]." (quoting *Hawaii*, 138 S. Ct. at 2420, 2423)).

156 *See, e.g.*, Washington v. Trump, 847 F.3d 1151, 1165–67 (9th Cir. 2017). Note that lawful permanent residents were included initially, but, after injunctions in lower courts on this and a second iteration, the Trump Administration reissued a travel ban a third time. That third ban excluded lawful permanent residents from its scope.

157 *See Mathews*, 424 U.S. at 348 ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision.").

158 *Id.*

159 I am more skeptical of the remedy a court could implement. If, as a matter of doctrine, a court must defer to the Executive's determination of a national security emergency, then divining a solution that allows entry of *all* citizens but only *some* noncitizens would be to enter the quagmire meant for the political branches. As a result, the invalidation of the entire order would probably be required.

invoke constitutional protections,[160] but Congress's conferral of a statutory entitlement in sections 208 and 241(b)(3) of the INA give an asylum seeker a unique ability to invoke the Due Process Clause. These asylum and withholding of removal statutes confer an entitlement to *apply* for asylum *regardless of lawful entry*.[161] Forbidding an applicant from formally applying as a result of the border closure *is* a plausible deprivation of a liberty interest by the government. Moreover, as noted above, the Supreme Court in *Trump v. Hawaii* assumed that no other provision of law was contradicted by the travel ban.[162] This dicta matters for asylum seekers, because there are at least some situations in which denying a noncitizen's ability to properly assert her *statutory* entitlement to the asylum procedure can be violative of due process.[163]

The balancing begins with the asylum applicant's individual interest. The purpose of the asylum and withholding statutes was to prevent humanitarian catastrophes resulting from poor proto-refugee policies during World War II.[164] Asylum and withholding are, by nature, a remedy unlike other parts of the typical immigration admissions and exclusion system by virtue of the harrowing personal experiences and fear of unjustified governmental persecution that asylum seekers allege. The loss of the right to apply for asylum could result in substantial injury or death. A noncitizen's individual interest in submitting an application for asylum, in the *Mathews* balancing analysis, is therefore quite high.[165]

The erroneous deprivation inquiry, meanwhile, is different from the inquiry applicable to other noncitizens in a fascinating way. First, while there is a statutory entitlement to apply for asylum, there is no statutory entitlement

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160 *See supra* note 146.

161 *See* INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (2018) ("Any alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters), *irrespective of such alien's status, may apply for asylum* . . . ." (emphasis added)); *id.* § 241(b)(3)(A) ("[T]he Attorney General *may not remove* an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." (emphasis added)).

162 *See supra* note 78 and accompanying text.

163 *See* Jacinto v. INS, 208 F.3d 725, 727 (9th Cir. 2000) (finding that an asylum applicant had suffered a due process violation for lack of a full and fair hearing that was procedurally required under the statute); Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1038 (5th Cir. 1982) ("[C]onstitutionally protected liberty or property interests may have their source in positive rules of law, enacted by the state or federal government and creating a substantive entitlement to a particular governmental benefit.").

164 COMM'N STAFF REPORT, *supra* note 59, at 200.

165 *See, e.g.*, *Haitian Refugee Ctr.*, 676 F.2d at 1038 ("Congress and the executive have created, at a minimum, a constitutionally protected right to petition our government for political asylum. Specifically, we find . . . a clear intent to grant aliens the right to submit and the opportunity to substantiate their claim for asylum.").

to a *grant* of asylum.[166] The government could argue that because a noncitizen has no right to *receive* asylum, she cannot challenge the substantive end result; therefore, the risk of erroneously depriving someone of asylum is zero. It is not clear how a noncitizen could respond effectively to this contention except on procedural due process grounds.

Second, while the border closure could be attacked on procedural due process grounds as depriving a noncitizen of the ability to apply for asylum, it is unclear exactly how a complete border closure—which has the same difficulties in enforcement as when the border is "open"—disables or hinders a noncitizen from submitting an application, because those who enter illegally are still eligible to apply.[167] In this respect, whatever risk of erroneous deprivation there is remains unchanged: A border closure would make it extremely difficult to *legally* cross, but only marginally more difficult, if at all, to *illegally* cross.

Third, even if a complete border closure did hinder an asylum seeker from applying, the government would be authorized to prevent asylum applications as "an incident of sovereignty."[168] If the right to apply for asylum and withholding depends exclusively on one's physical presence in the territory, then the right never attaches while a person is on the other side of the border anyway. In this respect, any risk of erroneous deprivation is not

166 *See* INA § 208(b) (establishing conditions for a grant of asylum, including a burden of proof on the applicant and a scheme by which the Attorney General approves individual applications subject to her discretion, and exceptions based on the applicant's prior conduct); *Haitian Refugee Ctr.*, 676 F.2d at 1039 ("We concede that the right we find [to apply for asylum] is but a fragile one. There is no constitutionally protected right to political asylum itself.").

167 For instance, many noncitizens "illegally" enter only to flag down a CBP agent to apply for asylum legally. *See* Caitlin Dickerson, *Border at 'Breaking Point' as More than 76,000 Unauthorized Migrants Cross in a Month*, N.Y. TIMES (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/us/border-crossing-increase.html (breaking down border-crossing realities). Of course, a ruling by the Supreme Court on any of the Trump Administration's attempts to restrict noncitizens' eligibility for asylum may have a bearing on the border closure analysis. *See* E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 755 (9th Cir. 2018) (staying a rule and presidential proclamation to this effect); *see also* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (establishing a rule that would prohibit noncitizens from applying for asylum in the U.S. if they had not first applied for asylum in any third country through which they traveled); Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (establishing a rule that would prohibit noncitizens from applying for asylum if they had crossed anywhere but through a port of entry). Such a holding on the merits would, in my view, be incorrect in many ways, from distortive interpretation of the statute to obviating clear intent of a post-war Congress who saw states deny Holocaust victims relief on procedural entry grounds. *See, e.g.*, SUSAN F. MARTIN, A NATION OF IMMIGRANTS 162–63 (2011) (chronicling the story of the *M.S. St. Louis*, a ship carrying hundreds of Jewish refugees (half of whom later did not survive the Holocaust) after Cuban and U.S. authorities denied them entry). But because the Court has not yet opined on the merits of such rules, it is beyond the scope of this due process analysis.

168 Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

affected by a border closure.[169]

Finally, the government's interest in providing orderly access to the asylum system is unaffected by the border closure, while its interest in maintaining secure borders is so high as to perhaps prevent any judicial review.[170] Some insight into the Court's thinking can be ascertained by looking at their treatment of the Ninth Circuit case *East Bay Sanctuary Covenant v. Trump*.[171] There, the Supreme Court recently denied, four Justices dissenting, a stay of an injunction against a presidential proclamation that would have prevented illegal entrants from seeking asylum outside of a lawful port of entry.[172] Additionally, the Court recently signaled its willingness to read the protective element out of the asylum statute in *Barr v. East Bay Sanctuary Covenant*.[173] There, the Court did stay an injunction that had been issued against the government, who sought to restrict the availability of asylum relief to those who had first sought asylum in Mexico or another country if they traveled through that country on their way to the southern border. The stay of the injunction hints that the Court is untroubled by the potential due process deficiencies in this new regulation, though an evaluation of the merits on both of these cases is pending.

Nevertheless, I believe that the government's purported interest in national security is qualitatively different here than in *Trump v. Hawaii*. This is because a border closure would not actually appear to accomplish a reduction, but rather an increase, in illegal entries and, in fact, would have little practical effect on the current process for seeking asylum: "Often, migrants will cross the border illegally between ports of entry and turn themselves over to Border Patrol agents to make an asylum claim. Closing the border wouldn't prevent that from happening."[174] The government's actual processing of asylum claims may separate persons who pose national security threats from those who do not, but a border closure does not limit the number of supposed national security threats who would make it into that asylum-processing pipeline. The only thing the border closure would do, then, is make it more difficult for persons who have *better claims* and greater stakes (e.g., lawful permanent residents and U.S. citizens) to cross, in addition to hampering cross-border commerce. Conceived this way, closing the border in this manner might even be so irrational as to flunk the rational

169 This could change if the entire land border could be permanently and securely enforced, which is—at the moment—a factual impossibility.

170 *See supra* notes 150–56 and accompanying text.

171 932 F.3d 742

172 *See* Trump v. E. Bay Sanctuary Covenant, 139 S. Ct. 782 (2018).

173 140 S. Ct. 3 (2019) (order granting stay of preliminary injunction).

174 Philip Bump, *Trump's Close-the-Border Idea Is Full of Holes*, WASH. POST (Apr. 2, 2019, 3:49 PM), https://www.washingtonpost.com/politics/2019/04/02/trumps-close-the-border-idea-is-full-holes.

basis test.[175]

Because the only interest truly affected by the border closure as to asylum applicants is the noncitizen's, the *Mathews* balancing test might weigh in her favor. Whether the closure operates to subtract sufficiently from the individual's interest is a question of balancing for the court, and again there is a decent likelihood a court could identify a due process violation. My conclusion, nevertheless, is that the unique nature of the asylum process, which does not formally penalize an initially unlawful entry, would allow the government to win on a constitutional due process challenge.

## CONCLUSION

Closing the border could mean a lot of things. Closing the border in the manner I have laid out would not only be a disheartening development in the struggle to protect the rights of noncitizens but an economic and political catastrophe for U.S. citizens. The above analysis shows that there is a series of statutory and constitutional arguments to be made to block a potential border closure and that at least some are likely to be successful. In particular, noncitizens have a strong statutory claim that no language in the INA would authorize the President to completely and indefinitely close the border. Additionally, some classes of noncitizens—"high-stakes" noncitizens, such as lawful permanent residents and, possibly, asylum seekers—can assert a constitutional due process violation. In the application of the *Mathews v. Eldridge* test, the noncitizens' individual interests are so great and the government's purported interest so unconnected to a closure that, on balance, a reviewing court could block the border closure at least as applied to some noncitizens. Whether the Supreme Court would agree is far from clear.

175 *Trump v. Hawaii* casts some doubt on this assessment, because the judiciary should defer to the Executive's judgment of what is best, but the decision does not say that a lack of rationality could not be probative of the poor reasoning of the government's asserted interest for procedural due process purposes. Even if there were legitimate reasons to reduce procedure at the border—to combat drug smuggling, for instance—such reasons cannot support the abridgement of constitutional rights. *See also supra* note 149 (suggesting that drug smuggling concerns are not well-tethered to on-the-ground realities that would exist in the event of a border closure).