

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF WASHINGTON; STATE OF MINNESOTA,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States; U.S.
DEPARTMENT OF HOMELAND SECURITY; REX W.
TILLERSON, Secretary of State; JOHN F. KELLY,
Secretary of the Department of Homeland Security; UNITED
STATES OF AMERICA,
Defendants-Appellants

No. 17-35105 D.C. No. 2:17-cv-00141 ORDER

[Edited]

Reviewability of the Executive Order

The Government contends that the district court lacked authority to enjoin enforcement of the Executive Order because the President has “unreviewable authority to suspend the admission of any class of aliens.” The Government does not merely argue that courts owe substantial deference to the immigration and national security policy determinations of the political branches—an uncontroversial principle that is well-grounded in our jurisprudence. *See, e.g., Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (recognizing that “the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control” (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977))); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010) (explaining that courts should defer to the political branches with respect to national security and foreign relations). Instead, the Government has taken the position that the

President’s decisions about immigration policy, particularly when motivated by national security concerns, are unreviewable, even if those actions potentially contravene constitutional rights and protections. The Government indeed asserts that it violates separation of powers for the judiciary to entertain a constitutional challenge to executive actions such as this one.

There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy. *See Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (rejecting the idea that, even by congressional statute, Congress and the Executive could eliminate federal court habeas jurisdiction over enemy combatants, because the “political branches” lack “the power to switch the Constitution on or off at will”). **Within our system, it is the role of the judiciary to interpret the law, a duty that will sometimes require the “[r]esolution of litigation challenging the constitutional authority of one of the three branches.”** *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)). We are called upon to perform that duty in this case.

Although our jurisprudence has long counseled deference to the political branches on matters of immigration and national security, neither the Supreme Court nor our court has ever held that courts lack the authority to review executive action in those arenas for compliance with the Constitution. To the contrary, the Supreme Court has repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over immigration or are not subject to the Constitution when policymaking in that context. *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (emphasizing that the power of the political branches over immigration “is subject to important constitutional limitations”); *Chadha*, 462 U.S. at 940-41 (rejecting the argument that Congress has “unreviewable authority over the regulation of aliens,” and affirming that courts can review “whether Congress has chosen a constitutionally application of a congressionally enumerated standard to the particular facts presented by that visa application.

The present case, by contrast, is not about the application of a specifically enumerated congressional policy to the particular facts presented in an individual visa application. Rather, the States are challenging the President’s *promulgation* of sweeping immigration policy. Such exercises of policymaking authority at the highest levels of the political branches are plainly not subject to the *Mandel* standard; as cases like *Zadvydas* and *Chadha* make clear, courts can and do review constitutional challenges to the substance and

implementation of immigration policy. *See Zadvydas*, 533 U.S. at 695; *Chadha*, 462 U.S. at 940-41.

This is no less true when the challenged immigration action implicates national security concerns. *See Ex parte Quirin*, 317 U.S. 1, 19 (1942) (stating that courts have a duty, “in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty”); *Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) (“The Constitution of the United States is a law for rulers and people, equally in war and in peace . . . under all circumstances.”). We are mindful that deference to the political branches is particularly appropriate with respect to national security and foreign affairs, given the relative institutional capacity, informational access, and expertise of the courts. *See Humanitarian Law Project*, 561 U.S. at 33-34.

Nonetheless, “courts are not powerless to review the political branches’ actions” with respect to matters of national security. *Alperin v. Vatican Bank*, 410 F.3d 532, 559 n.17 (9th Cir. 2005). To the contrary, while counseling deference to the national security determinations of the political branches, the Supreme Court has made clear that the Government’s “authority and expertise in [such] matters do not automatically trump the Court’s own obligation to secure the protection that the Constitution grants to individuals,” even in times of war. *Humanitarian Law Project*, 561 U.S. at 34 (quoting *id.* at 61 (Breyer, J., dissenting)); *see also United States v. Robel*, 389 U.S. 258, 264 (1967) (“[N]ational defense’ cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“[S]imply because a statute deals with foreign relations [does not mean that] it can grant the Executive totally unrestricted freedom of choice.”).

Indeed, federal courts routinely review the constitutionality of—and even invalidate—actions taken by the executive to promote national security, and have done so even in times of conflict. *See, e.g., Boumediene*, 553 U.S. 723 (striking down a federal statute purporting to deprive federal courts of jurisdiction over habeas petitions filed by non-citizens being held as “enemy combatants” after being captured in Afghanistan or elsewhere and accused of authorizing, planning, committing, or aiding the terrorist attacks perpetrated on September 11, 2001); *Aptheker v. Sec’y of State*, 378 U.S. 500 (1964) (holding unconstitutional a statute denying passports to American members of the

Communist Party despite national security concerns); *Ex parte Endo*, 323 U.S. 283 (1944) (holding unconstitutional the detention of a law-abiding and loyal American of Japanese ancestry during World War II and affirming federal court jurisdiction over habeas petitions by such individuals). As a plurality of the Supreme Court cautioned in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” *Id.* at 536 (plurality opinion).

In short, although courts owe considerable deference to the President’s policy determinations with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action.

Conclusion

For the foregoing reasons, the emergency motion for a stay pending appeal is DENIED.