Deporting to Danger: A Process-Based Framework for Reviewing Third-Country Removals

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When the government removes a noncitizen with a final deportation order to a third country—one they may never have visited and to which they have no ties—it currently does so based on diplomatic assurances that an immigration officer deems credible. Individuals receive no notice of their destination, no opportunity to present evidence of feared persecution or torture, and no explanation of the government's safety determination. The Trump administration claims that these decisions are entirely unreviewable by courts, invoking broad executive authority over removal and foreign affairs.

This Comment argues that complete unreviewability cannot stand on two independent grounds. Section 1231(b)(3) of the Immigration and Nationality Act creates a categorical, mandatory prohibition on removal to danger—and settled statutory entitlement doctrine requires courts to have power to enforce mandatory congressional commands rather than construe them as nullities. The plenary power doctrine, however broad, does not eliminate that review. Applying the Mathews v. Eldridge *balancing test confirms that the constitutional floor lies above zero: The severity of potential harm, the near-total absence of documented process, and the minimal burden that documentation would impose all demand, at minimum, notice and a meaningful opportunity to present evidence.*

Having established that some review is required, this Comment draws on the Convention Against Torture (CAT) extradition framework—the closest legal analogy to third-country removal—to supply its content. Courts should apply process-based review, asking whether the government (1) identified the destination country; (2) consulted relevant country-conditions evidence; (3) assessed whether the alien's protected characteristics create heightened risk there; and (4) explained the basis for its safety determination. This framework asks whether the government engaged in reasoned decision-making, not whether it reached the right conclusion—respecting executive authority over foreign affairs while ensuring that § 1231(b)(3)'s prohibition retains operative force. D.V.D. v. Department of Homeland Security, *now on appeal before the First Circuit, presents the vehicle for adopting this approach.*

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INTRODUCTION

In the summer of 2025, Justice Sonia Sotomayor issued a stark warning: Without judicial intervention, the Trump administration's third-country removal practices would cause "thousands [to] suffer violence in farflung locales."[1] The district court's injunction in *D.V.D. v. U.S. Department of Homeland Security*,[2] then before the Supreme Court based on the government's application for a stay, had imposed minimal but essential procedural protections on a government policy of deporting individuals to third countries—countries other than the United States or the individual's country of origin, where they claimed to face persecution or torture—with no process at all.[3] The Court's unsigned stay order, issued without explanation, left these individuals and the lower courts in legal limbo.

The stakes could hardly be higher. Under current practices, formalized in then–Secretary of Homeland Security Kristi Noem's March 2025 guidance (Noem Guidance), the executive branch can remove aliens[4] with final orders of deportation to virtually any country willing to accept them, based solely on diplomatic assurances the government deems "credible."[5] Individuals receive no notice of their destination, no opportunity to present evidence about dangers they face there, and no explanation of the government's safety determination. An immigration officer's unreviewable credibility assessment of a country's "diplomatic assurances" becomes dispositive. An LGBTQ individual could be removed to Uganda—where homosexuality is criminalized and anti-LGBTQ

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1 Dep't of Homeland Sec. v. D.V.D., 145 S. Ct. 2153, 2163 (2025) (Sotomayor, J., dissenting).

2 778 F. Supp. 3d 355 (D. Mass. Apr. 18, 2025), *opinion clarified*, 2025 WL 1323697 (D. Mass. May 7, 2025), *and opinion clarified*, 2025 WL 1453640 (D. Mass. May 21, 2025).

3 *Id.* at 387–88, 392–93.

4 Throughout this Comment, the term "alien" is used as defined in the Immigration and Nationality Act, to mean "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). While other terms such as "noncitizen" are sometimes preferred, this Comment uses the statutory term for precision and consistency with legal authorities.

5 Memorandum from Kristi Noem, Sec'y of Homeland Sec., to Kika Scott, Senior Off. Performing the Duties of the Dir. U.S. Citizenship & Immigr. Servs., Pete R. Flores, Senior Off. Performing the Duties of the Comm'r U.S. Customs & Border Prot., and Todd Lyons, Acting Dir. U.S. Immigr. & Customs Enf't, at 1 (Mar. 30, 2025) [hereinafter Noem Guidance]. Acting Immigration and Customs Enforcement (ICE) Director Todd Lyons issued a July 9, 2025, memo largely reiterating the March 30 guidance and adding specific procedures for cases lacking diplomatic assurances. *See* Letter from Todd Lyons, Acting Dir., U.S. Immigr. & Customs Enf't, to All ICE Emps. (July 9, 2025) [hereinafter Lyons Letter].

violence is rampant[6]—based solely on an officer's determination that Uganda's diplomatic assurances are credible, with no assessment of whether the individual's sexual orientation places them at particular risk there. If the officer rejects the individual's fears as not meeting this standard, removal proceeds immediately, sending an alien to a country where they may face torture or death.

This Comment addresses a fundamental tension in immigration law. The executive branch possesses broad discretion over immigration enforcement and foreign affairs—areas in which courts traditionally defer to executive judgment. Yet Congress enacted explicit statutory protections in 8 U.S.C. § 1231(b)(3), prohibiting removal to countries where an individual's "life or freedom would be threatened" because of race, religion, nationality, membership in a particular social group, or political opinion.[7] Further, the United States has binding obligations under the Convention Against Torture (CAT)—an international treaty prohibiting the use of torture and extradition of an individual to a state where there are "substantial grounds" to think that that person will be tortured.[8] Can the government render these protections nugatory simply by declaring—without explanation, evidence, or review—that any country is "safe," even when reports say otherwise?

The answer must be no. Complete unreviewability would violate basic principles and canons of statutory construction. Courts must give effect to congressional enactments rather than construe them as nullities.[9] Unreviewability would also raise serious constitutional concerns, as individuals face potential deprivation of life and liberty without meaningful process[10]—courts also must interpret statutes to be constitutional if possible.[11] Allowing unreviewability would place the United States in violation of its international obligations under the 1967 Protocol Relating to the Status

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6 Abdi Latif Dahir, *Ugandan Court Upholds Draconian Anti-Gay Law*, N.Y. TIMES (Apr. 10, 2024), https://www.nytimes.com/2024/04/03/world/africa/uganda-anti-gay-law.html.

7 8 U.S.C. § 1231(b)(3)(A).

8 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, ¶ 1, Dec. 10, 1984, 1465 U.N.T.S. 85, 114 [hereinafter Convention Against Torture].

9 *See, e.g.*, TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (citing Duncan v. Walker, 533 U.S. 167, 174 (2001)).

10 *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976); Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

11 *See, e.g.*, United States v. Del. & Hudson Co., 213 U.S. 366, 407–08 (1909).

of Refugees[12] (Refugee Protocol) and CAT, both of which Congress implemented through domestic statutes.[13] Reading § 1231(b)(3) to permit unreviewable removals to danger would create precisely such a conflict.

Yet Article III courts typically do not engage in searching, de novo review of country conditions and foreign policy judgments, and for good reason. Such review would intrude on core executive functions,[14] require courts to develop expertise they lack,[15] and potentially interfere with diplomatic negotiations.[16] As the Supreme Court has emphasized, courts are "not suited to . . . pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice" in foreign affairs.[17]

This Comment proposes a framework for judicial review that balances these competing concerns, drawing primarily on the CAT extradition cases—the closest legal analogy to third-country removals.[18] Courts should conduct process-based review, examining whether the government engaged in reasoned decision-making before designating a third country as safe. Specifically, courts should ask whether the government (1) identified the destination country, (2) consulted relevant country-conditions evidence, (3) assessed whether the alien's protected characteristics create heightened risk in that country, and (4) provided a written explanation for its safety determination. This framework permits

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12 *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223.

13 *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (implementing the non-refoulement obligations of the Refugee Protocol); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822 to -823 (implementing CAT).

14 *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (recognizing in dicta that the President is "the sole organ of the federal government in the field of international relations").

15 *See* Dep't of the Navy v. Egan, 484 U.S. 518, 529 (1988) (noting that courts have neither the "necessary expertise" nor the information to second-guess the Executive on foreign relations matters).

16 *See* Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (noting that while "courts have the authority to construe treaties and executive agreements," the judiciary is "ill suited" to make policy decisions).

17 Munaf v. Geren, 553 U.S. 674, 702 (2008).

18 *See* Sarah Sherman-Stokes, *Third Country Deportation*, 53 IND. L. REV. 333, 357 (2020) (arguing that third-country removals violate domestic and international legal obligations and require notice, burden shifting, and a full evidentiary hearing). This Comment proposes a more limited, process-based framework that better accommodates executive authority over foreign affairs while ensuring compliance with § 1231(b)(3)'s mandatory prohibition on removal to certain countries where an alien faces a threat to their life or freedom.

courts to assess whether the government made a determination at all and whether that determination considered relevant factors, without second-guessing the ultimate foreign policy judgment.

Additionally, the statutory text of § 1231(b)(3) should be interpreted to require category-based assessments. The statute prohibits removal when an individual's "life or freedom *would* be threatened" based on protected characteristics.[19] The future tense invites predictive assessment of likely harm. The focus on five enumerated grounds—race, religion, nationality, membership in a particular social group, and political opinion—also invites category-based analysis. When a country systematically persecutes people based on one of these grounds, individuals possessing the targeted characteristic face threats to life or freedom within the statute's meaning. The Supreme Court has endorsed this interpretive approach in asylum cases,[20] and the Board of Immigration Appeals (BIA) has recognized that showing systematic persecution of one's group can establish eligibility for protection.[21]

Part I provides background on the statutory framework and establishes the stakes: § 1231(b)(3) creates a categorical prohibition on removal to danger, third-country removals have expanded dramatically without any accompanying procedural framework,[22] and present litigation has exposed the consequences of that gap. Part II explains why the government's assertion of complete unreviewability cannot be squared with statutory entitlement doctrine or plenary power limits. Part III applies *Mathews v. Eldridge*[23] to show that the private interests and risk of error at stake require additional procedures. In Part IV, having established that some review is required, this Comment draws on CAT extradition cases to supply the framework: process-based review of whether the government engaged in reasoned decision-making, operationalized through the four factors identified above. Finally, Part V answers the government's objections on foreign affairs, political question, and administrative burden grounds, and explains why none justify the categorical absence of process. Together, these five parts construct a framework grounded in statutory interpretation, constitutional law, and practical necessity—one that

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19 8 U.S.C. § 1231(b)(3)(A) (emphasis added).

20 *See, e.g.*, Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

21 Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

22 *See infra* Part I.B; *see also infra* note 250 and accompanying text.

23 424 U.S. 319 (1976).

respects executive authority while ensuring that statutory prohibitions retain operative force.

I. BACKGROUND

Third-country removals present a fundamental challenge to the immigration law framework: how to reconcile the Executive's broad discretion over removal destinations with Congress's explicit prohibition on removal to danger. This Part provides essential background on the legal and practical dimensions of this challenge. Part I.A explains the statutory scheme governing removal destinations and the crucial prohibition in § 1231(b)(3). Part I.B traces the historical rarity of third-country removals and the Trump administration's dramatic expansion of the practice. Part I.C examines the current procedural framework established by the Department of Homeland Security (DHS) under former Secretary Noem and its assertion of complete unreviewability. Finally, Part I.D discusses the *D.V.D.* litigation, which brought these issues to the Supreme Court and left critical questions unresolved.

A. The Statutory Scheme

Before examining the statutory details, a brief roadmap clarifies how different protective provisions interact. The Immigration and Nationality Act[24] (INA) provides multiple forms of protection from removal. Asylum, governed by 8 U.S.C. § 1158, protects aliens who demonstrate a well-founded fear of persecution based on five enumerated grounds—race, religion, nationality, membership in a particular social group, and political opinion—and, if granted, confers permanent resident status. Withholding of removal under § 1231(b)(3)(A) is mandatory: If an alien's life or freedom would be threatened in a country based on those same five grounds, the government may not remove them there.

Outside the INA, CAT, implemented domestically through the Foreign Affairs Reform and Restructuring Act of 1998[25] (FARRA) and accompanying regulations,[26] provides a third, broader protection by prohibiting removal to any country where the alien would more likely than not face torture, regardless of

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[24] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

[25] Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822.

[26] 8 C.F.R. §§ 208.16–208.18, 208.31 (2025).

the reason. Together, these three forms of relief constitute the primary protections against removal to danger.

The key distinction for third-country removals is that § 1231(b)(3) withholding restricts removal only to the specific country where the individual would face threats, while asylum provides more comprehensive relief. This structural difference matters because the government's third-country removal authority under § 1231(b)(2) intersects with the mandatory prohibition in § 1231(b)(3), creating the tension this Comment addresses.

The INA establishes a framework for removing aliens from the United States that balances executive discretion with statutory protections. Under 8 U.S.C. § 1231(b)(2), aliens ordered removed are typically deported first to a preferred country to which the alien has ties—such as the country designated by the alien or the alien's country of citizenship—or, if an alien is not removed to such a country to any of a series of alternative countries the Attorney General may direct.[27]

However, the statute provides an important limitation in subsection (b)(2)(E)(vii). It authorizes the Attorney General to remove an alien to any country willing to accept them, but only when removal to the preferred countries is "impracticable, inadvisable, or impossible."[28] This alternative removal authority—what this Comment terms "third-country removal"—operates as a fallback when preferred removal options are unavailable. The statute thus establishes a hierarchy: Preferred countries come first, and third countries serve as alternatives only when necessary.

Critically, subsection (b)(3) also imposes a categorical prohibition: "[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."[29] This provision implements the United States' obligations under the Refugee Protocol and establishes a mandatory, nonwaivable prohibition on removal to danger.

The statute uses mandatory language—"may not"—to prohibit removal to danger, rather than discretionary language like "may consider" or "should evaluate."[30] This textual choice matters. When Congress wants to grant discretion, it knows how to

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27 8 U.S.C. § 1231(b)(2).

28 *Id.* § 1231(b)(2)(E)(vii).

29 *Id.* § 1231(b)(3)(A) (emphasis added).

30 *Id.*

do so.[31] For example, in subsection (b)(2), it authorized removal to third countries when "impracticable, inadvisable, or impossible" to use preferred countries, embedding executive discretion to make those determinations. Moreover, when it wants to impose categorical prohibitions, Congress uses mandatory language[32]—as it did in subsection (b)(3) with "may not." The contrast in statutory language suggests that Congress intended subsection (b)(3) to operate as a hard constraint, not a discretionary consideration.[33]

Section 1231(b)(3) contains narrow exceptions for aliens who have persecuted others, have committed serious nonpolitical crimes, or pose dangers to U.S. security.[34] But these enumerated exceptions reinforce that the prohibition is otherwise absolute: If Congress intended the Executive to have general discretion to override the prohibition based on foreign policy, diplomatic relations, or administrative convenience, enumerated exceptions would be unnecessary.

The statutory structure thus creates two tiers within § 1231(b)(2): preferred removal destinations in (b)(2)(A)–(E) with fallback third-country removal authority in (b)(2)(E)(vii) when preferred options are exhausted, and a categorical prohibition on removal to danger in (b)(3). The tension at the heart of this Comment arises from the interaction between (b)(3)'s mandatory prohibition and (b)(2)'s grant of executive determination.

Additionally, regulations implementing CAT establish procedures for "reasonable fear" screenings when aliens subject to expedited removal express fear of return to their country of removal.[35] These procedures recognize that the United States has

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[31] *See* Texas v. United States, 86 F. Supp. 3d 591, 659 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court sub nom.*, 579 U.S. 547 (2016) ("A tour of the INA's provisions reveals that Congress clearly knows how to delegate discretionary authority because in certain instances it has explicitly done so.").

[32] *See, e.g.*, Board of Pardons v. Allen, 482 U.S. 369, 377–78 (1987) (holding that the mandatory language "shall" creates binding presumptions); *cf.* Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 429 n.9 (distinguishing mandatory from discretionary treaty provisions).

[33] *See* 8 U.S.C. § 1231(b)(3)(A); *see also* Umude-Louis v. Holder, 368 F. App'x 544, 546–47 (5th Cir. 2010):

> [T]he alien is not barred from non-discretionary relief, such as withholding of removal pursuant to INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), under which the Attorney General may not remove an alien from the United States if the alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

[34] *See* 8 U.S.C. § 1231(b)(3)(B).

[35] 8 C.F.R. § 208.31.

binding treaty obligations not to return individuals to countries where they are likely to face torture. Yet no comparable procedures exist for third-country removals under § 1231(b)(2), creating a gap in protection. Aliens facing removal to their home countries receive procedures to raise CAT claims, but aliens facing removal to third countries receive no such procedures. This gap likely reflects a legislative oversight rather than a deliberate policy choice: CAT's implementing regulations, promulgated before third-country removals became routine,[36] contemplate removal to a designated country and provide no procedures for aliens to raise CAT claims before removal to a surprise third country, leaving individuals without any mechanism to invoke protections they are legally entitled to assert.[37]

Withholding of removal under § 1231(b)(3) is closely related to, but distinct from, asylum under 8 U.S.C. § 1158. Both provide protection from return to persecution based on the same five enumerated grounds, but they differ in three important ways. First, asylum is discretionary even when statutory criteria are met: Immigration judges[38] may deny relief based on adverse discretionary factors such as criminal history, prior immigration violations, or fraud, even if the applicant has established a well-founded fear of persecution.[39] Withholding of removal, by contrast, is mandatory when the statutory standard is satisfied—if an alien's life or freedom would be threatened, the government

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[36] CAT was implemented through FARRA in 1998. Third-country removals have increased under the second Trump administration. *See What Are Third-Country Removals? Understanding Their Use in U.S. Immigration Policy*, AM. IMMIGR. COUNCIL (Dec. 5, 2025), https://perma.cc/S8VC-UN26 (explaining that "[h]istorically, the U.S. government rarely conducts third-country deportations. . . . Under the second Trump administration, however, third-country removals have become key . . .").

[37] *See* 8 C.F.R. §§ 208.16–208.18.

[38] Asylum adjudications are conducted by immigration judges (IJs) under 8 U.S.C § 1229a(a)(1) and (b)(1). Per 8 C.F.R § 1003.1(b), an IJ's decision may be appealed to the BIA, and a BIA decision may be reviewed in an Article III court of appeals via a petition for review under 8 U.S.C § 1252(a)(1). By contrast, third-country removal determinations under § 1231(b)(2) are made by DHS officers—not IJs—and are not embedded in any equivalent appellate structure, which is part of why the government claims they are unreviewable.

[39] Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 606 (2012) (noting that "[a]sylum was understood from its inception to be a non-mandatory form of relief. In fact, INA section 208 as enacted in 1980 was explicitly discretionary"). *Compare* 8 U.S.C. § 1158(b)(1)(A) ("[T]he Secretary of Homeland Security or the Attorney General *may* grant asylum . . . ." (emphasis added)), *with* 8 U.S.C. § 1231(b)(3)(A) ("[T]he Attorney General *may not* remove an alien . . . ." (emphasis added)).

"may not"[40] remove them regardless of other considerations.[41] Second, the standards of proof differ. Asylum requires showing a "well-founded fear" of persecution, typically understood as a "reasonable possibility,"[42] whereas withholding of removal requires showing that persecution is "more likely than not."[43] Third, the consequences differ: Asylum confers permanent resident status and a path to citizenship,[44] while withholding provides protection only from removal to the specific country.[45]

Despite these differences, the two provisions share core features relevant to third-country removals. Both protect individuals from return to persecution based on protected characteristics.[46] Both require forward-looking assessment of risks in destination countries.[47] Both implement U.S. obligations under the Refugee Protocol.[48] And both have been interpreted to permit category-based claims: Showing systematic persecution of one's group supports both asylum and withholding claims.[49]

The asylum statute explicitly permits denial of claims for those who can be removed to safe third countries, but only when the alien's life or freedom would not be threatened and the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection in the receiving country.[50] Withholding of removal contains no comparable safe third-country exception. The significance lies in what that omission requires: Under the asylum safe third-country bar, Congress conditioned executive flexibility on a bilateral guarantee that the alien

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40 8 U.S.C. § 1231(b)(3)(A).

41 Aschenbrenner, *supra* note 39, at 604 ("The Refugee Act of 1980, intended to bring United States law into compliance with our obligations under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, made withholding of removal mandatory.").

42 *Cardoza-Fonseca*, 480 U.S. at 440 (quoting Immigr. & Naturalization Serv. v. Stevic, 467 U.S. 407, 424–25 (1984)).

43 *Stevic*, 467 U.S. at 429–30.

44 8 U.S.C. § 1159 (describing asylum status adjustment).

45 *See id.* § 1231(b)(3) (lacking any conferral of status).

46 *Compare id.* § 1158(b)(1)(B)(i) (granting asylum protection based on five grounds: race, religion, nationality, membership in particular social group, or political opinion), *with id.* § 1231(b)(3)(A) (granting withholding protection based on the same five grounds).

47 Both require assessing whether the alien "would be" persecuted or threatened, demanding forward-looking predictions. *Compare id.* § 1158(b)(1)(B)(i) (granting asylum based on fear of persecution), *with* 8 U.S.C. § 1231(b)(3)(A) (withholding removal based on whether "life or freedom would be threatened").

48 *See Cardoza-Fonseca*, 480 U.S. at 424 (explaining that both the asylum and withholding provisions implement the United States' obligations under the Refugee Protocol).

49 *See supra* note 46 and accompanying text.

50 *See* 8 U.S.C. § 1158(a)(2)(A).

would have access to protection proceedings. Congress created no such mechanism for § 1231(b)(3), meaning that the executive branch has no statutory authority to substitute its own credibility assessment of diplomatic assurances for the prohibition. The Noem Guidance's reliance on unilateral diplomatic assurances is therefore not a permissible analogue to the asylum safe third-country framework. Where Congress authorized executive flexibility in the asylum context, it conditioned that flexibility on statutory criteria protecting the individual; where it did not authorize such flexibility—as in § 1231(b)(3)—no amount of diplomatic arrangement can supply the missing authority.[51] If the government could remove individuals to any third country without regard to danger, the withholding statute would be rendered null.

B. Historical Practice and the Trump Administration's Expansion

For decades, third-country removal remained a rare practice,[52] primarily used when individuals could not be removed to their countries of origin due to a lack of diplomatic relations. President Donald Trump's first administration fundamentally changed this dynamic by negotiating bilateral[53] "Asylum Cooperative Agreements" with Guatemala, Honduras, and El Salvador, which allowed the United States to send asylum seekers to those countries to seek protection rather than adjudicating their claims domestically.[54] Although the Biden administration terminated these agreements upon taking office in 2021,[55] the Trump administration's return to power in 2025 brought aggressive expansion of

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[51] *See id.* § 1231(b)(3)(A) (containing no safe third-country exception); *cf.* Russello v. United States, 464 U.S. 16, 23 (1983) (applying the expressio unius canon by concluding that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (quotation marks omitted) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

[52] Sammy Westfall, *Trump Expands "Third Country" Deportation Policy to Ghana*, WASH. POST (Sept. 11, 2025), https://www.washingtonpost.com/world/2025/07/15/trump-third-countries-migrants-deportation/.

[53] For example, reporting indicates that El Salvador has received substantial payments in exchange for accepting deportees, as have several African nations. *See* Tobi Raji & Sammy Westfall, *These Countries Are Taking Millions from Trump to Accept U.S. Deportees*, WASH. POST (Nov. 25, 2025), https://www.washingtonpost.com/world/2025/11/25/deportation-third-country-removals-trump/.

[54] John Ruwitch, *Biden Moves to End Trump-Era Asylum Agreements with Central American Countries*, NPR (Feb. 6, 2021), https://perma.cc/JEA6-JTXB.

[55] *Id.*

third-country removal arrangements through a different and broader tool:[56] acceptance agreements. The acceptance agreements, with countries including Uganda, South Sudan, Palau, Eswatini, and Ukraine,[57] allow removal of any alien with a final removal order—not just asylum seekers—to any third country willing to accept them, in some cases, reportedly, in exchange for foreign aid, trade benefits, or other diplomatic considerations. This expansion represents a fundamental shift from removing asylum seekers to third countries where they might seek protection to removing any deportees to any countries willing to accept them.[58]

Human rights organizations have documented serious concerns about conditions in receiving countries.[59] Uganda, for instance, has criminalized homosexuality with penalties including death.[60] State Department country reports detail attacks on LGBTQ individuals, police refusal to investigate such attacks, and societal discrimination.[61] Similarly, South Sudan faces ongoing civil conflict, severe human rights abuses, and extremely limited capacity to provide basic services.[62] State Department reports on South Sudan also document extrajudicial killings, torture, arbitrary detention, and complete impunity for government forces.[63] Ukraine, a recipient country despite its active armed conflict with Russia since February 2022,[64] presents a different category of risk: State Department travel advisories have maintained a Level 4 "Do Not Travel" warning for Ukraine,[65] citing the ongoing war, as

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56 Edward Wong, Zolan Kanno-Youngs, Hamed Aleaziz & Minho Kim, *Inside the Global Deal-Making Behind Trump's Mass Deportations*, N.Y. TIMES (June 26, 2025), https://www.nytimes.com/2025/06/25/us/politics/trump-immigrants-deportations.html.

57 *See* Camilo Montoya-Galvez, *U.S. Broadens Search for Deportation Agreements, Striking Deals with Honduras and Uganda, Documents Show*, CBS NEWS (Aug. 21, 2025), https://perma.cc/DQ5N-NLMC; Wong et al., *supra* note 56.

58 Rachel Ryu, *Behind the Brief: The Danger of Institutionalizing Third Country Returns*, U.S. COMM. FOR REFUGEES & IMMIGRANTS (Dec. 9, 2025), https://perma.cc/GLP2-NE4Q.

59 *See* HUM. RTS. WATCH, WORLD REPORT 2025: EVENTS OF 2024 3–5 (2025); AMNESTY INT'L, THE STATE OF THE WORLD'S HUMAN RIGHTS 16–25 (2025).

60 Dahir, *supra* note 6.

61 *See* U.S. DEP'T OF STATE, UGANDA 2023 HUMAN RIGHTS REPORT 5 (2024) [hereinafter U.S. DEP'T OF STATE, UGANDA].

62 *See* U.S. DEP'T OF STATE, SOUTH SUDAN 2024 HUMAN RIGHTS REPORT 1–2 (2025).

63 *Id.* at 2–3, 15–16.

64 *See* Ximena Bustillo & Polina Lytvynova, *U.S. Deports Dozens of Migrants to Ukraine amid War*, NPR (Nov. 18, 2025), https://perma.cc/E3X7-H7JL.

65 *Ukraine Travel Advisory*, U.S. DEP'T OF STATE (Nov. 14, 2024), https://perma.cc/3SCR-SABW.

large portions of the country remain under Russian occupation or active bombardment.[66]

The expansion has proceeded rapidly and with minimal transparency. Countries have been added to the list of receiving nations through diplomatic negotiations that have remained largely secret.[67] The State Department has not published the text of most of these agreements, and the criteria for selecting destination countries is not publicly disclosed. As the numbers have grown, the procedures have remained unchanged: no notice, no opportunity to present evidence, no written explanations.

The administration has framed third-country removals as a tool for addressing irregular migration and reducing backlogs in immigration courts.[68] But efficiency cannot override statutory protections, and § 1231(b)(3) prohibits removal to danger regardless of administrative convenience.[69]

C. The Noem Guidance and Current Procedural Framework

In March 2025, then–DHS Secretary Noem issued guidance establishing procedures for third-country removal.[70] The guidance operates on two tracks. When the receiving country has provided diplomatic assurances that deportees will not be persecuted or tortured, and the State Department deems those assurances credible, the alien "may be removed without the need for further procedures"—no notice of destination and no opportunity to raise fear of harm.[71] When no credible assurances exist, DHS must inform the alien of the destination country, but officers are instructed not to ask whether the alien fears removal; the alien

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66 *Id.* (noting Russian occupation of Crimea and the Donetsk, Luhansk, Kherson, and Zaporizhzhia oblasts, and ongoing missile and drone strikes on civilian infrastructure throughout the country).

67 *See* Wong et al., *supra* note 56 (reporting that the administration approached at least fifty-eight foreign governments about accepting deportees through back-channel negotiations); SENATE FOREIGN RELS. COMM., AT WHAT COST? INSIDE THE TRUMP ADMINISTRATION'S SECRET DEPORTATION DEALS 22–26 (Feb. 2026) (documenting that the administration's deportation agreements were secretive and lacked congressional oversight) (Minority Rep.).

68 *See* Myah Ward & Eric Bazail-Eimil, *The Trump Administration's Plan to Close a "Huge Loophole" in Legal Immigration*, POLITICO (Dec. 29, 2025), https://www.politico.com/news/2025/12/29/trump-tells-asylum-seekers-to-apply-for-refuge-elsewhere-00706165.

69 *See* What Are Third-Country Removals? Understanding Their Use in U.S. Immigration Policy, *supra* note 36.

70 *See generally* Noem Guidance, *supra* note 5.

71 *Id.* at 2.

must volunteer that fear unprompted.[72] If the alien volunteers fear, U.S. Citizenship and Immigration Services screens the claim within twenty-four hours using a "more likely than not" standard.[73] If the alien does not volunteer fear, removal proceeds. The guidance says nothing about judicial review of any of these determinations, a silence the government has filled in litigation by asserting complete unreviewability.[74]

The guidance provides that, when the receiving country has offered diplomatic assurances that deportees will not be persecuted or tortured, and the State Department deems those assurances credible, an alien may be removed to that country without further procedures.[75] But it provides no standards for evaluating the reliability of such assurances, no requirement to consider whether the receiving country has a record of honoring previous commitments, and no mechanism for monitoring compliance after removal occurs. Critically, the guidance does not define "credible" or require documentation of the credibility determination, leaving open the possibility that the standard is satisfied by the mere existence of assurances on file rather than any substantive evaluation of their reliability or individualized applicability.

The Noem Guidance ignores three critical facts that undermine the protections it purports to provide. First, it ignores that individuals most likely do not possess detailed knowledge about countries selected by the government moments before removal—yet the guidance places the burden entirely on the alien to volunteer fear of a country they may never have visited, without any obligation on the government to assess that country's conditions.[76] Second, and most importantly for this Comment's argument, the

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[72] *Id.*

[73] *Id.*; *see also* Lyons Letter, *supra* note 5, at 2.

[74] *See D.V.D.*, 778 F. Supp. 3d at 387–88 (describing the government's assertion of unreviewability).

[75] Noem Guidance, *supra* note 5, at 1–2:

> Prior to the alien's removal to a country that had not previously been designated as the country of removal, DHS must determine whether that country has provided diplomatic assurances that aliens removed from the United States will not be persecuted or tortured. If the United States has received such assurances, and if the Department of State believes those assurances to be credible, the alien may be removed without the need for further procedures. If the United States has not received those assurances, or if the Department of State does not believe them to be credible, DHS must follow [additional procedures].

[76] *Id.* (establishing that aliens on the assurances track receive no notice of destination and no opportunity to raise fear, and that on the no-assurances track, officers are instructed not to ask about fear).

guidance takes no account of whether the alien's protected characteristics create heightened risk in the destination country. The guidance's diplomatic-assurances mechanism substitutes a country-level promise for any individualized assessment.[77] Lastly, it ignores that individuals facing removal typically lack access to State Department country reports, legal counsel, or any means to identify country conditions relevant to their circumstances.[78] Together, these gaps render the guidance's protections largely illusory and § 1231(b)(3)'s prohibition effectively unenforceable. The *D.V.D.* litigation brought these procedural deficiencies to a head, exposing the consequences of a removal framework that operates without notice, individualized assessment, or any mechanism for judicial oversight.

D. The *D.V.D.* Litigation and Its Significance

In March 2025, four aliens subject to third-country removal filed a class action in the United States District Court for the District of Massachusetts, challenging DHS's third-country removal policy on the grounds that it violated § 1231(b)(3), CAT, and the Due Process Clause.[79] Finding the plaintiffs likely to succeed on their statutory and constitutional claims, the district court issued a preliminary injunction on April 18, 2025, mandating four procedural safeguards before any third-country removal: written notice of the destination, a meaningful opportunity to raise a fear of return, reopening upon a showing of reasonable fear, and, failing such a showing, at least fifteen days to seek reopening.[80]

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[77] *Id.* (permitting removal "without the need for further procedures" upon receipt of country-level diplomatic assurances).

[78] *See* Sherman-Stokes, *supra* note 18, at 355–56 (documenting that individuals facing third-country removal typically lack counsel).

[79] Class Action Complaint at 1–2, *D.V.D.*, 778 F. Supp. 3d 355 (No. 25-10676). Because the suit challenged the policy itself rather than any particular removal order, the case was filed directly in federal district court.

[80] *D.V.D.*, 778 F. Supp. 3d at 365. Specifically, the court ordered that:

> [P]rior to removing any alien to a third country, . . . [the government] must: (1) provide written notice to the alien—and the alien's immigration counsel, if any—of the third country to which the alien may be removed, in a language the alien can understand; (2) provide meaningful opportunity for the alien to raise a fear of return for eligibility for CAT protections; (3) move to reopen the proceedings if the alien demonstrates "reasonable fear"; and (4) if the alien is not found to have demonstrated "reasonable fear," provide meaningful opportunity, and a minimum of 15 days, for that alien to seek to move to reopen immigration proceedings to challenge the potential third-country removal.

Id. at 392–93.

The district court's analysis emphasized the profound interests at stake and the minimal nature of current procedures. The court noted that the government had presented no evidence that it conducts any assessment before removing individuals, relying entirely on diplomatic assurances and officer credibility determinations.[81]

After the government sought emergency relief from the Supreme Court, the Court issued an unsigned order on June 23, 2025, staying the preliminary injunction pending appeal.[82] Three Justices—Elena Kagan, Sonia Sotomayor, and Ketanji Brown Jackson—publicly dissented, arguing that the government had presented no evidence that destination countries were safe and that the lack of any procedures created risks of irreparable harm.[83] The dissent documented instances in which the government removed class members to countries the State Department itself deemed unsafe without ever making a safety determination.[84] It argued that accepting diplomatic assurances without any independent verification renders the remaining statutory scheme "void [ ] or insignificant."[85] The dissent characterized the majority's action as "so gross an abuse of the Court's equitable discretion" that they could not join it,[86] emphasizing that the government's no-notice removal policy left class members without any opportunity to raise claims under CAT before being deported.[87] Importantly, the Court's stay did not settle the argument about judicial review. A stay resolves whether a preliminary injunction should be paused pending appeal; it does not address whether the government's statutory analysis is correct or if a permanent injunction can be issued.

With the Supreme Court's stay leaving the underlying merits unresolved, the case proceeded on the merits in the district court. On February 25, 2026, Judge Brian Murphy issued his final merits ruling, granting summary judgment for the plaintiffs.[88] On the statutory merits, the court held that § 1231(b) requires the government to first attempt removal to the country designated on the

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81 *Id.* at 389–90.

82 Dep't of Homeland Sec. v. D.V.D., 145 S. Ct. 2153, 2153 (2025).

83 *Id.* at 2159–60, 2163 (Sotomayor, J., dissenting).

84 *See id.* at 2156–57.

85 *Id.* at 2162 (quotation marks omitted) (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)).

86 *Id.* at 2153.

87 *D.V.D.*, 145 S. Ct. at 2158–60 (Sotomayor, J., dissenting).

88 D.V.D. v. U.S. Dep't of Homeland Sec., 821 F. Supp. 3d 102, 119 (D. Mass. 2026), *appeal docketed*, No. 26-1212 (1st Cir. Feb. 28, 2026).

individual's removal order, following the sequential commands of § 1231(b)(2), before resorting to a third country.[89] It further held that § 1231(b)(3)'s mandatory prohibition requires a preremoval determination of persecution risk—one that cannot be made "absent" individual input, since risk depends on personal characteristics that change over time.[90] On the constitutional merits, applying *Mathews*, the court held that the Noem Guidance's reliance on blanket, country-wide diplomatic assurances violates both the applicable regulation—which requires assurances specific to the individual alien, not all aliens in a country—and the Due Process Clause, because noncitizens must have at least the opportunity to verify that assurances exist, that they are individualized, and that they satisfy Article 3 of CAT.[91] The court vacated the guidance as "not in accordance with law" and stayed its judgment for fifteen days to permit the First Circuit to rule on any motion for a further stay.[92]

Three days later, DHS appealed the merits ruling to the First Circuit,[93] where its principal arguments reprised those that Judge Murphy rejected: that 8 U.S.C. § 1252(g) and FARRA § 2242(d) strip the district court of jurisdiction over policy challenges; that § 1231(b)(2)'s sequential removal commands permit streamlined resort to third-country removal; and that blanket diplomatic assurances satisfy § 1231(b) and the requirements of due process. This Comment's process-based framework does not depend on whether those arguments succeed; it depends on whether § 1231(b)(3)'s mandatory prohibition on removal to danger creates a judicially enforceable floor. Parts II and III demonstrate that it does.

The litigation has revealed the tragic stakes of these removals. Plaintiffs' declarations describe individuals removed to countries where they had never been, where they did not speak the language, and where their protected characteristics made them targets. One plaintiff, a gay man who was granted withholding of removal after an immigration judge found persecution in Guatemala was more likely than not based on his sexuality, was then deported without notice to Mexico—where he had

89 *Id.* at 143–47.

90 *Id.*

91 *Id.* at 155–62.

92 *Id.* at 165–67 (quotation marks omitted) (quoting 5 U.S.C. § 706(2)(A)).

93 Notice of Appeal, *D.V.D.*, 821 F. Supp. 3d 102 (No. 25-10676).

previously been raped, held hostage, and extorted.[94] Another plaintiff, granted withholding after her husband beat her and threw her out of a second-floor window, feared third-country removal to countries where her husband's family connections would enable him to locate and kill her.[95] A third plaintiff, granted CAT protection after being beaten and threatened with death by police demanding that he transport drugs, faced removal back to countries with drug trafficking networks that would target him.[96]

Without any requirement to assess whether a proposed third country is safe for people with particular characteristics, the practice of a third-country removal inevitably risks removing protected individuals to danger. When thousands of removals occur with no procedural assessments of specific groups' safety in the third country, the law of averages ensures that some removals will involve individuals facing persecution. The question is not whether errors will occur, but how many and how serious they will be. The *D.V.D.* litigation emphasizes that concern, and the district court's opinion represents an attempt to preserve the statutory limits and address this systematic risk through procedural protections. This Comment argues that the process-based framework Judge Murphy applied in 2025—requiring the government to follow the statutory sequencing for third-country designation and provide a meaningful opportunity to contest removal before it occurs[97]—is not only *permissible* under existing law, but *statutorily required*. Parts II and III explain why complete judicial deference to third-country removal determinations is untenable and identify the mechanisms courts can deploy to ensure statutory compliance without intruding on legitimate executive authority over foreign affairs.

II. WHY COMPLETE JUDICIAL DEFERENCE IS UNTENABLE

The government's assertion that third-country removal determinations are entirely unreviewable fails on two independent grounds. First, Part II.A demonstrates that § 1231(b)(3) creates a statutory entitlement to protection from removal to danger, and settled administrative law principles require judicial review of whether the government complied with this mandatory

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94 Class Action Complaint, *supra* note 79, at 24–26.

95 *Id.* at 22–23.

96 *Id.* at 23–24.

97 *See D.V.D.*, 778 F. Supp. 3d at 392–93.

prohibition. Second, Part II.B explains that even the plenary power doctrine—which grants broad deference to executive immigration decisions—is not absolute and does not eliminate all judicial review. Together, these principles establish that Article III courts must have some role in ensuring that the Executive follows statutory commands.

A. Statutory Entitlements Create Judicially Enforceable Rights

As discussed, § 1231(b)(3) creates a statutory entitlement. The Supreme Court has consistently held that statutory entitlements trigger due process protections and judicial review.[98] This holds true in the immigration context as well.[99] In *Immigration & Naturalization Service v. St. Cyr*,[100] the Court confronted whether Congress could eliminate judicial review of discretionary relief from deportation. The respondent had pleaded guilty to a crime on his attorney's advice that he would remain eligible for discretionary relief from deportation, but Congress subsequently eliminated that relief and applied the change retroactively. Facing deportation he had specifically tried to avoid, he sought judicial review.

The government argued that courts had no power to review the change. The Court disagreed, observing that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention."[101] The Court emphasized that where constitutional concerns arise, statutes must be construed to preserve judicial review: "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation is 'fairly possible,' we are obligated to construe the statute to avoid such problems."[102]

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98 *See, e.g.*, Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (holding that due process rights attach when a statute creates a legitimate claim of entitlement); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (holding that statutory welfare benefits are a protected entitlement requiring procedural safeguards before termination); *Mathews*, 424 U.S. at 332 (applying the same principle to disability benefits).

99 *See* Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 307–08 (2001) (holding that statutory eligibility for relief from deportation creates an entitlement that courts must have the power to protect); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954) (holding that courts may enforce mandatory statutory procedures against the executive branch in immigration proceedings).

100 533 U.S. 289 (2001).

101 *Id.* at 301.

102 *Id.* at 299–300 (citation omitted) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

Section 1231(b)(3) fits squarely within this framework. While the executive branch has discretion to select among permissible removal destinations, that discretion is constrained by the categorical prohibition against removal to danger. The government must decide whether the statutory condition is met—whether the alien's life or freedom would be threatened. This is a determination of statutory compliance, not a pure policy judgment.

The distinction matters for purposes of judicial review. The government's argument for complete unreviewability collapses the distinction between reviewing *what* the executive branch decided and reviewing *whether* the executive branch complied with statutory mandates. Courts regularly review whether agencies acted within statutory bounds, even when the underlying decisions involve foreign affairs or require technical expertise.[103] Asking whether the government considered evidence and explained its determination is not second-guessing policy judgments—it is ensuring compliance with basic statutory requirements.

The parallel to third-country removals is direct. Like the respondent in *St. Cyr* who faced deportation after Congress eliminated relief, aliens facing third-country removal possess a statutory protection—§ 1231(b)(3)'s prohibition on removal to danger. If the government can eliminate review of that protection through unreviewable assertions, Congress's statutory enactment becomes mere aspiration, subject to executive nullification. Just as *St. Cyr* required preserving some judicial review to make discretionary relief meaningful, § 1231(b)(3) requires judicial review to make its prohibition enforceable.

This conclusion flows from bedrock administrative law principles. Courts regularly review whether agencies acted within statutory bounds through arbitrary and capricious review under the Administrative Procedure Act[104] (APA),[105] even when decisions involve foreign affairs or technical expertise.[106] This principle applies with particular force when the consequences of unreviewability

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[103] *See* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1903–04, 1919–35, 1966 (2015) (documenting the integration of ordinary administrative law principles into foreign affairs adjudication and arguing that courts no longer treat foreign relations as categorically exempt from judicial review).

[104] Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[105] 5 U.S.C. § 706(2)(A).

[106] *See* Landon v. Plasencia, 459 U.S. 21, 32, 34 (1982) (applying the APA in the immigration context).

are so severe.[107] The *Chenery* doctrine requires agencies to articulate the grounds for their decisions,[108] ensuring "the orderly functioning of the process of review [by] requir[ing] that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."[109] Courts cannot review agency action simply on the basis of "what the [agency] might have done," but must consider "what the [agency] did."[110] The reasoned-explanation requirement ensures that agencies engage in actual decision-making rather than post hoc rationalization.[111] The *Charming Betsy* canon, which requires courts to construe statutes to avoid conflict with international law where a reasonable alternative reading exists,[112] reinforces this conclusion: § 1231(b)(3) must be construed to avoid conflict with the United States' Refugee Protocol and CAT obligations, both of which require that statutory prohibitions on removal to danger be given operative force. Reading § 1231(b)(3) to permit unreviewable removals would place the United States in violation of those obligations, a result that courts must avoid if a reasonable alternative interpretation is available—and one is.

Beyond requiring actual decision-making, arbitrary and capricious review also requires decisions to have convincing explanations. Under *Motor Vehicles Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*,[113] courts must ensure that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[114] This standard applies even to agency actions that involve substantial discretion or technical expertise.[115] The government's position would exempt third-country removals from this fundamental requirement of administrative law: Agencies could

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107 *Mathews*, 424 U.S. at 335 (calibrating procedural requirements to the magnitude of the private interest at stake).

108 SEC v. Chenery Corp., 318 U.S. 80, 87 (1943).

109 *Id.* at 94.

110 *Id.* at 93–94.

111 *Id.* at 95 (holding that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained").

112 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

113 463 U.S. 29 (1983).

114 *Id.* at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

115 Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983).

remove individuals to danger without examining country conditions, explaining their reasoning, or creating any reviewable record.

Under the government's theory, for example, an individual could be removed to a country that targets LGBTQ individuals despite that individual being LGBTQ, removed to a country ruled by a regime that the individual publicly opposed, or removed to a country where their religion is persecuted—all without any judicial forum to present evidence of danger. Section 1231(b)(3) would provide no protection whatsoever. Such a reading cannot be squared with the statutory text, structure, or purpose, nor with administrative law's basic requirement of reasoned decision-making from a record.

B. Plenary Power Is Not Absolute

The government's fallback position invokes the plenary power doctrine—the principle that Congress and the Executive possess broad authority over immigration matters, largely insulated from judicial review.[116] But even accepting that plenary power is at its apex in exclusion and deportation decisions, the doctrine is not absolute and does not preclude all judicial review.

The government's version of this argument is not a fringe position. The plenary power doctrine has deep roots. Since *Ping v. United States*[117] (the *Chinese Exclusion Case*), courts have recognized that the political branches possess near-absolute authority over the admission and removal of noncitizens, grounded in national sovereignty and foreign affairs concerns.[118] The executive branch has invoked this tradition explicitly in litigation,

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[116] In its application to the Supreme Court for a stay of the district court's injunction, the government argued that immigration decisions touching on foreign relations are beyond judicial review: "The INA reflects a comprehensive effort by Congress to restrict judicial review to 'protect[ ] the Executive's discretion from the courts.' The injunction below intrudes upon the core executive functions Congress sought to shield." Application for a Stay of the Injunction Issued by the United States District Court for the District of Massachusetts and Request for an Immediate Administrative Stay at 6–7, *D.V.D.*, 145 S. Ct. 2153 (No. 24A1153) [hereinafter Application for a Stay] (alteration in original) (citation omitted) (quoting Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 486 (1999)).

[117] 130 U.S. 581 (1889).

[118] *Id.* at 606 (noting that the political branches' determination about exclusion of noncitizens "is conclusive upon the judiciary"); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) (holding that immigration decisions are "intricately interwoven" with foreign relations and thus "largely immune from judicial inquiry"); *see also* Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 83 (2017) (describing the classical era of immigration law in which the Supreme Court "routinely sustained government decisions that would plainly violate constitutional rights had they occurred outside of the immigration context").

asserting that third-country removal determinations are committed to agency discretion.[119] The government's logic has a certain coherence: If Congress can exclude aliens on grounds that would be unconstitutional as applied to citizens, and if the executive branch can deport lawful residents without full constitutional protections, then surely the selection of removal destinations—a decision entangled with diplomatic relations, national security, and foreign policy—falls within that same insulated sphere.

But the government's invocation of plenary power proves too much because it conflates two different questions. Plenary power insulates *what* the executive branch decides—the choice to deport, the selection of removal policy, the negotiation of diplomatic agreements. It does not insulate *whether* the executive branch complied with statutory mandates Congress imposed as conditions on those decisions.[120] The distinction matters because § 1231(b)(3) does not ask courts to evaluate foreign policy; it asks courts to enforce a categorical prohibition Congress wrote into the law.[121]

The Supreme Court has repeatedly rejected claims of unreviewability in immigration cases. In *Zadvydas v. Davis*,[122] the Court addressed a statute authorizing potentially indefinite detention of aliens subject to final removal orders. The government argued that these detention decisions were unreviewable exercises of plenary power. The Court disagreed, holding that even aliens facing removal possess due process rights and rejecting the government's argument that "alien status itself can justify indefinite detention."[123] The Court emphasized that "the Due Process Clause applies to all 'persons' within the United States, including

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[119] *D.V.D.*, 778 F. Supp. 3d at 384 ("THE COURT: . . . [D]oes the person who's going to be deported have a right to be informed and be given an opportunity to be heard as to the dangerousness of that third country designation? [GOVERNMENT LAWYER]: DHS's position is no." (quotation marks omitted) (quoting Oral Argument at 10:17–11:01, *D.V.D.*, 778 F. Supp. 3d 355 (No. 25-10676))).

[120] *See* Kim, *supra* note 118, at 115 (arguing that courts have retreated from plenary power not by rejecting it outright, but by concluding that such power "is not freely delegable to unelected agency officials"—the same DHS officers making third-country removal determinations here); *see also* Sitaraman & Wuerth, *supra* note 103, at 1929 (noting that "[i]mmigration cases have generally moved toward normalization and away from the plenary power doctrine and other exceptionalist analysis, but outliers remain").

[121] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (noting that executive action must operate within congressional mandates even at the apex of constitutional authority); *St. Cyr*, 533 U.S. at 308–14.

[122] 533 U.S. 678 (2001).

[123] *Id.* at 692.

aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[124]

The *Zadvydas* Court was explicit: "[Plenary] power is subject to important constitutional limitations."[125] If plenary power does not permit indefinite detention, it surely does not permit removal to torture or death, a more severe deprivation, without any procedural protection. Detention, however prolonged, leaves open the possibility of release and return to safety, while removal to a country where an alien faces persecution or death is irreversible and forecloses all future recourse.

National security concerns likewise do not exempt government action from constitutional scrutiny. In *Boumediene v. Bush*,[126] the Court held that even Guantánamo detainees held as enemy combatants possess habeas rights, rejecting the government's argument that judicial review would interfere with the war effort.[127] If detainees held in wartime as enemy combatants possess constitutional rights, surely aliens within the United States facing removal to danger possess some procedural protections.

Recent precedent confirm that immigration statutes remain subject to constitutional constraints. In *Sessions v. Dimaya*,[128] the Court struck down an immigration statute as unconstitutionally vague, rejecting the argument that plenary power exempts immigration laws from constitutional scrutiny.[129] Even in *Trump v. Hawaii*,[130] in which the Court upheld a presidential proclamation restricting entry of nationals from several Muslim-majority countries on national security grounds, it engaged in judicial review of the Executive's stated rationale and examined whether the policy had a legitimate basis in immigration and national security concerns.[131] The Court did not hold that the President's immigration decisions were unreviewable; rather, it applied rational basis review.[132] Complete unreviewability would go far beyond even *Hawaii*'s deferential standard.

Even highly deferential review is still review and thus provides some protections. The government's insistence on complete

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124 *Id.* at 693.
125 *Id.* at 695.
126 553 U.S. 723 (2008).
127 *Id.* at 771, 795–98.
128 584 U.S. 148 (2018).
129 *Id.* at 156–57.
130 585 U.S. 667 (2018).
131 *Id.* at 684–88.
132 *Id.* at 705–10.

unreviewability would create an extraordinary gap in judicial review. If safety determinations are completely unreviewable, then statutory and treaty protections become unenforceable. This result cannot be squared with constitutional structure or statutory text. Plenary power permits broad executive discretion within statutory bounds, but it does not permit the executive branch to nullify statutory protections through unreviewable assertions.

Having established that complete judicial deference is untenable—both because statutory entitlements create enforceable rights and because plenary power has limits—the question becomes: What process is constitutionally required? The answer lies in the framework the Supreme Court established for determining procedural due process protections in any context.

III. DUE PROCESS REQUIREMENTS: THE *MATHEWS V. ELDRIDGE* FRAMEWORK

This Part applies the *Mathews v. Eldridge* due process framework to third-country removals. Part III.A introduces the *Mathews* test and its established role in immigration law. Part III.B examines the private interest at stake—the risk of removal to persecution, torture, or death. Part III.C analyzes the risk of erroneous deprivations under current procedures and the value of additional safeguards. Part III.D considers the government's interest and administrative burden, demonstrating that minimal procedural protections impose negligible costs while ensuring compliance with statutory mandates.

A. The *Mathews* Test

Even if no statutory entitlement existed—an unlikely proposition given § 1231(b)(3)'s categorical prohibition—constitutional due process would require some procedural protections before removing individuals to countries where they face danger.[133]

Mathews v. Eldridge established a three-factor test for determining what process is due in any given context, weighing the private interest affected by government action; the risk of erroneous deprivation of that interest through current procedures and the probable value of additional safeguards; and the government's

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[133] U.S. CONST. amend. V. Note that Fifth Amendment protections apply to "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693.

interest, including the fiscal and administrative burdens of additional procedures.[134]

Federal courts have repeatedly applied the *Mathews* framework to determine the scope of procedural due process protections in immigration cases.[135] In *Landon v. Plasencia*,[136] the Supreme Court held that a lawful permanent resident returning from abroad remained entitled to due process protections and applied *Mathews* balancing to determine what process was due.[137] The Court recognized that even in the immigration context—in which executive discretion is traditionally broad—constitutional protections require meaningful procedural safeguards before the government deprives individuals of liberty interests.[138] Lower federal courts have consistently followed this approach, applying *Mathews* to evaluate procedural protections in removal proceedings.[139] This established framework provides the appropriate lens for analyzing third-country removal procedures. Applying this framework demonstrates that the procedures proposed in this Comment, discussed further in Part IV, are constitutionally required.

B. The Private Interest

The first *Mathews* factor—the private interest affected—weighs as heavily as possible in favor of procedural protections. Individuals facing third-country removal may face persecution or death. When such extreme consequences are at stake, procedural

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134 *Mathews*, 424 U.S. at 334–35.

135 *See infra* note 145.

136 459 U.S. 21 (1982).

137 *Id.* at 32, 34.

138 *Id.* at 34–35:

> Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature. The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause.

(citations omitted).

139 *See, e.g.*, Velasco Lopez v. Decker, 978 F.3d 842, 851 (2d Cir. 2020) (evaluating a noncitizen's deprivation of liberty under the *Mathews* factors); Hernandez-Lara v. Lyons, 10 F.4th 19, 27 (1st Cir. 2021) ("Our inquiry is guided by the three-part balancing test articulated in *Mathews v. Eldridge*."); Singh v. Holder, 638 F.3d 1196, 1208 (9th Cir. 2011) (applying *Mathews* to determine the sufficiency of immigration court records); Abdulai v. Ashcroft, 239 F.3d 542, 549 (3d Cir. 2001) (applying *Mathews* to assess the BIA's failure to address the petitioner's arguments); Serrano-Alberto v. Att'y Gen. U.S., 859 F.3d 208, 213 (3d Cir. 2017) (using *Mathews* to assess the petitioner's due process violation claims in a deportation proceeding).

protections must be correspondingly substantial.[140] Freedom from physical restraint, protection from torture, and preservation of life itself represent core liberty interests that trigger heightened procedural protections.[141]

The government minimizes this interest by framing it as affecting only *where* an alien may be removed, not *whether* removal occurs.[142] This characterization is both inaccurate and misses the point. As Part I demonstrates, § 1231(b)(3) operates as a categorical prohibition on removal to danger, not a preference mechanism for selecting among equivalent destinations. The interest is not in choosing where to go but in not being sent to a country where one will face severe harm.

An analogy to criminal sentencing illustrates why this distinction matters: A convicted criminal has no right to avoid punishment, but procedural due process requires that the punishment be determined through fair procedures and be proportionate to the offense. Similarly, an alien with a final removal order has no right to remain in the United States, but statutory and constitutional law prohibit sending that person to face persecution or death.

The qualitative difference between removal to one's home country and removal to a third country amplifies the private interest. Removal to a home country, while itself potentially dangerous and often the very reason an individual sought protection, at least sends someone to a place where they may have family connections, speak the language, understand the culture, and possess some resources or networks. Third-country removal may eliminate all of these mitigating factors by sending an individual to a completely unfamiliar country with no connections, no resources, and potentially no means of survival; and, if that country also presents dangers based on protected characteristics, the combination creates an exceptionally high risk of severe harm.[143]

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[140] The Supreme Court has recognized that interests in personal liberty and physical integrity rank among the most significant private interests protected by the Due Process Clause. *See, e.g.*, *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects."); Ibarra-Perez v. United States, 154 F.4th 989, 1017 ("Because deportation deprives persons of the rights 'to stay and live and work in this land of freedom,' due process attaches to removal proceedings." (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945))).

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

[142] Application for a Stay, *supra* note 116, at 8, 11.

[143] *See supra* Part I.D (describing the plaintiffs in the *D.V.D.* litigation).

C. Risk of Error and Value of Safeguards

Because current third-country removal procedures under the Noem Guidance create a substantial risk of erroneous removal, the second *Mathews* factor also weighs heavily in favor of additional procedures. The current framework creates substantial risk of error through several mechanisms: The State Department makes blanket determinations about country safety based on diplomatic assurances, with no individualized assessment, no requirement to document reasoning, no administrative record, and no standards governing what makes assurances credible.[144] Diplomatic assurances as the primary basis for safety determinations present three main problems. First, such assurances are notoriously unreliable.[145] Foreign governments may provide assurances without genuine commitment, betting that monitoring and enforcement will be minimal.[146] Second, even well-intentioned assurances may prove impossible to honor due to limited governmental capacity, regional violence beyond government control, or persecution by private actors rather than state actors.[147] Lastly, assurances address only government-sponsored torture, not persecution by private parties or societal violence.[148]

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[144] *See Mathews*, 424 U.S. at 343–44 (explaining that risk of erroneous deprivation is assessed by examining whether current procedures provide adequate safeguards); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (plurality opinion) (requiring "meaningful opportunity to contest the factual basis" for detention to reduce the risk of erroneous deprivation).

[145] *See* Khouzam v. Att'y Gen. of the U.S., 549 F.3d 235, 259 (3d Cir. 2008) (holding that due process requires notice and an opportunity to test the reliability of diplomatic assurances prior to removal, including an individualized determination before a neutral decision-maker based on a record disclosed to the alien); *see also* Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004) (questioning the reliability of Egyptian diplomatic assurances given evidence of torture); Isaac A. Linnartz, *The Siren Song of Interrogational Torture: Evaluating the U.S. Implementation of the U.N. Convention Against Torture*, 57 DUKE L.J. 1485, 1500 (2008) (noting that "a need to procure such assurances to comply with Article 3 indicates that the receiving country may already have a questionable human rights record").

[146] Linnartz, *supra* note 145, at 1500 ("[M]onitoring compliance with such assurances is difficult, if not impossible.").

[147] Jeffrey H. Fisher, *Detainee Transfers After* Munaf*: Executive Deference and the Convention Against Torture*, 43 GA. L. REV. 953, 984 (2009) (explaining that well-intentioned assurances may prove impossible to honor because "high-level negotiations will probably not dissuade lower-level interrogators or security forces from using regularly practiced torture techniques").

[148] *See* Convention Against Torture, supra note 8, 1465 U.N.T.S. at 113–14 (defining torture as acts "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"); Linnartz, *supra* note 145, at 1492 ("[T]he Convention Against Torture focuses specifically on state-sponsored torture.").

Additionally, the risk of error abounds, and the absence of any procedural safeguards compounds the risk. Determinations are made with no defined criteria, no requirement to consult evidence, no written decisions, and no review.[149] Aliens receive no advance notice of their destination country, no opportunity to present contrary evidence, and no avenue to challenge determinations before removal occurs. Without process, an alien has no opportunity to disclose information about the risk they would face in that country, and the government makes its removal decision lacking critical information.

Requiring advance notice of the designated country and a meaningful opportunity to present fear-based evidence would significantly reduce error risk without imposing substantial burdens.[150] Having advance notice of the designated country allows aliens time to research conditions, consult with attorneys, and gather evidence. More importantly, the opportunity to present evidence through written submissions can correct government oversights and leverages an alien's own knowledge about their situation.[151]

Documented decision-making forces government officials to articulate their reasoning and evaluate whether their determinations comply with statutory requirements, fostering discipline that is reinforced by the knowledge that their reasoning will be subject to review.[152] These procedures work synergistically to reduce error risk: Each component addresses a different source of

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[149] *See D.V.D.*, 778 F. Supp. 3d at 389–90 (noting that DHS "repeatedly argued that they have no obligation to provide any process whatsoever when newly designating a third country for removal" and that "[t]he [Noem] Guidance provides no process whatsoever to individuals whom DHS plans to remove to a country from which the United States has received blanket diplomatic assurances").

[150] *Cf. Mathews*, 424 U.S. at 343–45 (evaluating how additional procedural safeguards reduce the risk of error); Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970) (explaining that the opportunity to be heard and present evidence significantly reduces erroneous deprivations).

[151] *See, e.g.*, Peter Margulies, *The Boundaries of Habeas: Due Process, the Suspension Clause, and Judicial Review of Expedited Removal Under the Immigration and Nationality Act*, 34 GEO. IMMIGR. L.J. 405, 440–41 (2020) (describing how consideration of an individual's interest in remaining in the country prevents erroneous deportation that may result in death).

[152] *See* Donald J. Kochan, *Constituencies and Contemporaneousness in Reason-Giving: Thoughts and Direction After* T-Mobile, 37 CARDOZO L. REV. 1, 35–42 (2015) (discussing how reason-giving requirements in administrative law improve the quality of agency decisions by requiring contemporaneous production of reasons); *see also* Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 180 (arguing that requiring decision-makers to articulate reasons promotes careful deliberation that would not occur under unreviewable discretion).

potential error, and together they create a system in which errors are less likely to occur and more likely to be caught if they do occur.

D. Government Interest and Administrative Burden

The government's interest in efficient removal operations and limited administrative burden is legitimate, but procedural requirements are not categorically at odds with that interest. The government must make determinations under § 1231(b)(3) regardless of whether any process attaches.[153] If the government complies with this statutory requirement, then documenting the determination imposes little additional burden because the government would be consulting State Department country reports, receiving diplomatic assurances, and making judgments about safety anyway. Requiring this process to be documented and explained does impose real costs—assembling materials, articulating reasoning, and maintaining a record subject to potential review––but those costs are proportionate to what is at stake. The statute already contemplates a substantive decision; documentation ensures that that decision is genuine. Where an erroneous determination may result in persecution or death, the administrative burden of a written record does not outweigh the procedural interest.

The government already possesses the infrastructure and expertise needed for these assessments. The State Department produces detailed annual country reports on human rights conditions.[154] These reports systematically document treatment of religious minorities, ethnic groups, LGBTQ individuals, political dissidents, and other vulnerable populations.[155] Immigration judges regularly make similar assessments in asylum, withholding of removal, and CAT cases.[156] The proposed procedures in

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[153] Recall that the statute requires the Attorney General to "decide[ ]" whether removal would threaten the alien. *See supra* Part I.A.

[154] *Country Reports on Human Rights Practices*, U.S. DEP'T OF STATE, https://perma.cc/SW6W-9VH7.

[155] The State Department is statutorily required to transmit to Congress its annual country reports each year under the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended in scattered sections of 22 U.S.C.). The statute mandates reporting on topics including but not limited to torture, prolonged detention, and denial of the right of life, liberty, and security of person. 22 U.S.C. §§ 2151n, 2304.

[156] *See* 8 C.F.R. § 1208.16(c) (outlining procedures for CAT determinations); *id.* § 1240.11(c) (outlining procedures for asylum and withholding of removal determinations); *see also* C-I-G-M- & L-V-S-G-, 29 I. & N. Dec. 291, 296 (B.I.A. 2025) (discussing immigration judge assessments of persecution and torture risk in third countries).

Part IV do not require creating new institutional capacity; they merely require documenting the use of preexisting capacity.

Moreover, the procedures proposed in Part IV are modest in scope. They require no hearings and no immigration judge involvement, and simply ensure that removal decisions comply with statutory requirements and constitutional minima. Furthermore, third-country removals are discretionary.[157] If procedural requirements make removal to a particular third country more cumbersome, DHS retains full discretion to designate a different third country willing to accept the alien—one for which no withholding or CAT claim could be established—or to maintain the alien under an order of supervision rather than execute removal at all. The government faces no constitutional obligation to use third-country removal; it is simply one tool among several.

The government argues that any procedural requirements will hamper flexibility in diplomatic negotiations and foreign relations.[158] As established above, this argument proves too much. Courts routinely review decisions with foreign policy dimensions,[159] and plenary power insulates executive choices about *what* to decide, not whether the executive branch complied with statutory mandates.[160] Asylum determinations require assessing whether foreign governments persecute individuals. CAT relief evaluates whether governments will torture deportees. Withholding of removal requires country-conditions assessments. If these routine reviews do not impermissibly intrude on foreign policy, neither do the minimal procedures proposed here.

The balance of *Mathews* factors decisively favors procedural protections. The extraordinarily high private interest, combined with substantial risk of error under current procedures and minimal government burden of basic protections, compels the conclusion that due process demands the framework proposed below. This is not a close case. When individuals face potential

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157 *See supra* Part I.A (explaining that third-country removal is discretionary and operates as a fallback when preferred removal options are unavailable).

158 Application for a Stay, *supra* note 116, at 3 ("Those judicially created procedures [from the district court] are currently wreaking havoc on the third-country removal process. . . . [T]he injunction disrupts sensitive diplomatic, foreign-policy, and national-security efforts.").

159 *See, e.g.*, *Hamdi*, 542 U.S. at 516–17 (reviewing enemy combatant designations despite wartime national security implications); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582–84 (1952) (reviewing a presidential steel seizure affecting wartime production); Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 5 (2015) (reviewing a passport policy involving recognition of foreign sovereigns).

160 *See supra* Part II.B.

persecution or death, the Constitution demands more than the government's unreviewed assertion that everything will be fine.

IV. A FRAMEWORK FOR JUDICIAL REVIEW: THE CAT EXTRADITION MODEL

Mathews establishes that some procedural protections are constitutionally required, but courts need a practical framework for implementing those protections. As I explain, the strongest legal analogy to third-country removal comes not from domestic immigration law, but from extradition proceedings involving CAT. When the United States extradites individuals to foreign countries pursuant to treaty obligations, courts have developed frameworks for assessing whether extradition would violate CAT's prohibition on returning individuals to torture. These frameworks provide the template for reviewing third-country removal determinations.

The parallel between CAT extradition and third-country removal is striking. Both involve sending individuals from the United States to foreign countries where they claim to face danger. Both implicate treaty obligations prohibiting return to harm. Both require executive assessment of safety in destination countries. Both involve foreign relations considerations. And both raise questions about the appropriate scope of judicial review. The CAT extradition framework therefore provides the appropriate template for reviewing third-country removal determinations.

This Part develops the proposed framework for judicial review. Part IV.A examines CAT extradition cases—particularly *Trinidad y Garcia v. Thomas*[161] and *Kapoor v. DeMarco*[162]—which provide the strongest legal analogy for process-based review of removal-to-danger determinations. Part IV.B explains how courts should apply process-based review to third-country removals, focusing on whether the government engaged in reasoned decision-making. Part IV.C illustrates the framework through concrete examples, demonstrating when determinations would survive or fail judicial review. Part IV.D explains how category-based determinations operationalize the statutory standard, allowing courts to assess compliance without second-guessing foreign policy judgments, before Part IV.E concludes with appropriate remedies in this context.

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[161] 683 F.3d 952 (9th Cir. 2012) (en banc).

[162] 132 F.4th 595 (2d Cir. 2025).

A. The CAT Extradition Framework: *Trinidad y Garcia* and *Kapoor*

Two circuit court decisions define the poles of the debate over judicial review of CAT-related removal-to-danger determinations. The Ninth Circuit permits limited process-based review; the Second Circuit bars it entirely. Examining both decisions clarifies why the Ninth Circuit's approach is correct and how it translates to third-country removals.

In *Trinidad y Garcia*, the Ninth Circuit sitting en banc addressed whether courts may review extradition decisions when the extraditee claims that they will face torture in the receiving country. The case involved a Filipino national facing extradition to the Philippines who presented evidence that he would be tortured based on the nature of his alleged crimes, implicating FARRA's prohibition on removal to countries where torture is more likely than not.[163]

The factual background in *Trinidad y Garcia* illustrates the stakes. Petitioner Hedelito Trinidad y Garcia was wanted in the Philippines for kidnapping charges.[164] He presented evidence that Filipino authorities routinely torture individuals accused of serious crimes, particularly kidnapping.[165] He submitted expert declarations from human rights organizations and country reports from the State Department and monitoring bodies documenting torture in Filipino prisons.[166] Lastly, he explained that the nature of his alleged crime and his profile made torture especially likely.[167]

The *Trinidad y Garcia* court held that extradition decisions are reviewable for compliance with FARRA, but only under a limited process-based standard[168]—one narrower than traditional arbitrary and capricious review. The per curiam opinion explained that review cannot mean accepting a bare statement that the Secretary of State complied with her duties, but neither does it extend to overturning the Secretary's foreign policy determination simply because a court would decide differently.[169] Critically, *Trinidad y Garcia*

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163 *Trinidad y Garcia*, 683 F.3d at 955–56 (per curiam).

164 *Id.* at 962 (Thomas, J., concurring).

165 *Id.* at 1003 (Pregerson, J., concurring in part and dissenting in part).

166 *Id.*

167 *Id.*

168 *Trinidad y Garcia*, 683 F.3d at 955–56 (per curiam).

169 *Id.* at 956–57.

overruled *Cornejo-Barreto v. Seifert*,[170] which had applied full arbitrary and capricious review to such determinations. By rejecting that framework as too intrusive, the court deliberately calibrated the standard below arbitrary and capricious review: The Secretary must actually analyze the evidence of potential torture and explain why that evidence does not preclude extradition, but courts may not substitute their judgment for the Secretary's ultimate foreign policy assessment.[171] The *Trinidad y Garcia* court applied these principles to the extradition context, holding that the Secretary must at minimum acknowledge relevant evidence and explain why that evidence does not preclude extradition.

Critically, the court emphasized that review focuses on process rather than outcome. This distinction is fundamental. The court does not assess whether the Philippines will torture Trinidad y Garcia—that is a foreign policy judgment committed to the executive branch. The court assesses only whether the Secretary engaged in reasoned decision-making by considering evidence, explaining reasoning, and acting within statutory constraints.

The Ninth Circuit's approach in *Trinidad y Garcia*, while representing a robust framework for judicial review, faces significant opposition from other circuits. In *Kapoor*, the Second Circuit rejected the *Trinidad y Garcia* framework entirely, holding that federal courts lack jurisdiction to review CAT claims in extradition cases.[172] The case involved Monika Kapoor, an Indian citizen facing extradition to India on fraud charges, who claimed that she would face torture if returned. The Second Circuit held that 8 U.S.C. § 1252(a)(4), enacted as part of the REAL ID Act,[173] expressly bars habeas review of CAT claims in the extradition context, noting that "[t]he statute states that '[n]otwithstanding . . . section 2241 of Title 28, or any other habeas corpus provision, . . . a petition for review [of a final order of removal] shall be the sole and exclusive means for judicial review of any cause or claim

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[170] 218 F.3d 1004 (9th Cir. 2000).

[171] *Trinidad y Garcia*, 683 F.3d at 957 (per curiam) (holding that the Secretary must "consider an extraditee's torture claim and find it not 'more likely than not' that the extraditee will face torture" if extradited (quoting 22 C.F.R. § 95.2)). One of the dissenting judges added that "[a] mere statement that the Secretary has complied with her duties is not enough under current precedent." *Id.* at 1007–08 (Pregerson, J., concurring in part and dissenting in part).

[172] *Kapoor*, 132 F.4th at 598–99.

[173] Pub. L. No. 109-13, 119 Stat. 306 (2005) (codified as amended in scattered sections of 8 U.S.C.).

under [CAT].'"[174] The Second Circuit read this provision as a comprehensive jurisdictional bar, reasoning that because FARRA does not create individually enforceable rights, and because Congress channeled immigration-related judicial review exclusively through § 1252, extraditees have no vehicle through which to challenge the Secretary's determinations.[175]

This circuit split is significant. The Fourth Circuit and D.C. Circuit have followed the Second Circuit's approach, holding that CAT claims in extradition cases are unreviewable.[176] Only the Ninth Circuit, sitting en banc in *Trinidad y Garcia*, allowed even limited process-based review. The Supreme Court has not yet resolved this split.

Despite the weight of circuit authority against it, the *Trinidad y Garcia* framework represents the better interpretation for three reasons. First, *Trinidad y Garcia*'s process-based standard occupies the correct middle ground between the available extremes. *Cornejo-Barreto*'s full arbitrary and capricious approach required courts to apply the complete apparatus of *State Farm* hard-look review[177] to foreign policy extradition decisions, a level of scrutiny difficult to square with executive authority over foreign affairs. The Second Circuit's zero-review approach in *Kapoor* goes equally too far in the opposite direction: Under *Kapoor*, the Secretary could certify extradition to a country documented by the State Department as routinely torturing individuals with the extraditee's exact profile, with no obligation to acknowledge that evidence or explain the decision.[178] Zero review is not deference to executive judgment; it is an abdication of the role Congress contemplated when it enacted FARRA's binding prohibition.

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[174] *Kapoor*, 132 F.4th at 608 (alterations in original) (emphasis omitted) (quoting 8 U.S.C. § 1252(a)(4)). The *Kapoor* court emphasized the "rule of non-inquiry," a longstanding principle precluding American courts from examining anticipated treatment in receiving countries. *Id.* at 599. Under this view, determinations about torture risk in foreign countries fall squarely within executive authority over foreign affairs and are unreviewable by courts.

[175] *Id.* at 613–14.

[176] *See* Mironescu v. Costner, 480 F.3d 664, 676 (4th Cir. 2007); Omar v. McHugh, 646 F.3d 13, 18 (D.C. Cir. 2011).

[177] The arbitrary and capricious standard, as articulated in *State Farm*, requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43. Most critically, an agency acts arbitrarily and capriciously when it "entirely fail[s] to consider an important aspect of the problem" or "offer[s] an explanation for its decision that runs counter to the evidence before the agency." *Id.*

[178] *Kapoor*, 132 F.4th at 609–10.

Second, *Kapoor*'s reliance on the "rule of non-inquiry" misconstrues that doctrine.[179] The rule of non-inquiry, articulated in early extradition cases, prevents courts from examining whether foreign criminal justice systems provide fair trials—a substantive judgment about the quality of foreign institutions.[180] *Trinidad y Garcia*'s framework does not violate this rule because it examines domestic agency process, not foreign government quality.

For example, courts following this framework would not assess whether the Philippines will torture the extraditee; courts would assess only whether the Secretary considered evidence that torture might occur and explained the decision. This is a critical distinction. Asking "Is the Philippines' justice system fair?" intrudes on foreign policy; asking "Did the Secretary consider State Department reports before extraditing someone?" does not.

Third, *Loper Bright Enterprises v. Raimondo*[181] strengthens the case for the Ninth Circuit's approach. By overruling *Chevron*,[182] the Supreme Court instructed that courts—not agencies—have final authority over questions of statutory interpretation.[183] The question whether § 1252(a)(4)'s bar on "any cause or claim under [CAT]" reaches extradition-based claims is precisely such a question, and a post–*Loper Bright* court must resolve it independently, without deference to the government's preferred reading.[184] Resolving that question in the way the Ninth Circuit did in *Trinidad y Garcia* is not only permissible but required: Courts owe no deference to an agency's self-serving interpretation that it need not be reviewed at all.

B. Applying the Framework to Third-Country Removals

The functional parallels identified above translate directly into a legal framework. Third-country removals under § 1231(b)(2) implicate the same treaty obligations, the same executive assessment of foreign safety, and the same foreign relations considerations as CAT extraditions. The CAT extradition framework

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179 *Id.* at 599.

180 *See* Neely v. Henkel, 180 U.S. 109, 122–23 (1901) (noting that courts will not inquire into the fairness of a requesting country's procedures).

181 144 S. Ct. 2244 (2024).

182 *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244.

183 *Loper Bright*, 144 S. Ct. at 2273.

184 8 U.S.C. § 1252(a)(4).

therefore provides an appropriate template for reviewing third-country removal determinations.

The statutory language reinforces this parallel. Section 1231(b)(3) prohibits removal when the individual's "life or freedom would be threatened" based on protected characteristics,[185] while FARRA prohibits removal when torture is "more likely than not."[186] Both statutes create categorical prohibitions. Both require the executive branch to make determinations about future harm in foreign countries. The similarity in statutory structure supports applying similar review frameworks.

The CAT extradition framework is superior to alternative frameworks drawn from other areas of immigration law. One might draw on the asylum context to argue that third-country removals should be reviewed under a substantial evidence standard.[187] But that approach is inappropriate. Asylum adjudications involve de novo factual findings by immigration judges about whether applicants will face persecution. Third-country removal determinations, by contrast, involve executive assessments of foreign policy considerations—for example, which countries will accept deportees, what diplomatic assurances are reliable, and what foreign relations costs attend removal decisions. Process-based review fits this posture. The court asks not whether it would reach the same safety conclusion, but whether the executive branch's conclusion rests on a rational connection between the evidence and the judgment.[188] This deferential posture respects executive authority while preserving the minimum judicial foothold necessary to make § 1231(b)(3) enforceable.

Courts reviewing third-country removal determinations should therefore apply process-based review, asking whether the government (1) identified the specific destination country, (2) considered relevant country-conditions evidence, (3) assessed whether the individual possesses characteristics that would make persecution or torture more likely, and (4) explained the basis for determining that the country is safe. This framework respects executive authority while ensuring statutory compliance. Part III's *Mathews* analysis calibrates which procedures due process requires; this Part operationalizes those procedures through the

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185 8 U.S.C. § 1231(b)(3)(A).

186 8 C.F.R. § 208.16(c)(4).

187 *See* 8 U.S.C. § 1252(b)(4)(B) ("[A]dministrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.").

188 *See State Farm*, 463 U.S. at 43.

four-factor process-based standard derived from the CAT extradition cases. The two Parts work in tandem: *Mathews* establishes that some procedural protection is constitutionally required, and the CAT extradition framework supplies the content of that protection.

C. Practical Application: Concrete Examples

To illustrate how this framework operates, consider how courts would review third-country removal determinations in specific scenarios. The examples discussed in this Section demonstrate that the framework has real teeth: Determinations resting on actual assessment survive, while determinations ignoring relevant evidence fail.

1. Removal of an LGBTQ individual to Uganda.

DHS removes an LGBTQ individual to Uganda. The administrative record contains (1) a diplomatic note from Uganda agreeing to accept deportees, (2) an officer's finding that the individual's expressed fears are "not credible," (3) no mention of the individual's sexual orientation, and (4) no reference to Uganda's criminalization of homosexuality or documented anti-LGBTQ violence.

State Department reports extensively document Uganda's anti-LGBTQ laws, including criminalization with potential life imprisonment.[189] The reports detail widespread anti-LGBTQ violence, police refusal to investigate such violence, and societal discrimination that makes it impossible for openly LGBTQ persons to live safely.[190] The government's failure to consider this evidence when removing an LGBTQ individual renders the determination arbitrary.

Under process-based review, this determination fails. The government would need to designate a different country, explain why this individual would not face persecution despite general conditions, or demonstrate that Uganda's assurances are reliable given its documented record.

A mere diplomatic assurance cannot overcome documented country-wide persecution of the individual's category. If Uganda has assured the United States that LGBTQ deportees will be protected, the government must explain why that assurance is reliable given Uganda's systematic persecution of LGBTQ persons

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189 U.S. DEP'T OF STATE, UGANDA, *supra* note 61, at 41–42.

190 *Id.* at 42–43.

generally. Without such explanation, accepting the assurance fails process-based review.

2. Removal to a country with regional safety zones.

The United States removes an individual to Ukraine. The administrative record contains (1) State Department reports on conditions in Ukraine, including maps showing areas under Russian occupation and areas experiencing active combat; (2) analysis explaining that western Ukrainian cities remain safe, with functioning governments, operating courts, and no active combat; (3) an explanation that the individual would be removed to Lviv, a western city approximately three hundred miles from any combat zone; (4) diplomatic assurances from Ukraine regarding treatment of deportees; and (5) explanation that while Ukraine faces ongoing conflict, regional variation in safety permits removal to secure areas.

This determination would survive review. The government identified relevant evidence—State Department reports on Ukraine—that considered country conditions, assessed regional variation in safety, explained its reasoning, and reached a plausible conclusion. The determination rested on an actual assessment rather than blind acceptance of assurances.

A court applying process-based review would not second-guess whether Lviv is actually safe—that is a foreign affairs judgment committed to the executive branch. The court would ensure only that the government engaged in reasoned decision-making, which the record demonstrates. Even if a court disagreed with the safety assessment, the determination would survive so long as it rested on consideration of relevant evidence and rational explanation.[191] The government examined the evidence, explained its analysis, and acted within statutory bounds.

This example illustrates the difference between process review and outcome review. The court does not ask, "Is Ukraine safe?" That question requires foreign policy expertise and involves judgments about acceptable risk levels, which courts are ill-equipped to make. Instead, the court asks, "Did the government consider whether Ukraine is safe before removing someone there?" That question requires examining only whether reasoned decision-making occurred.

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[191] *State Farm*, 463 U.S. at 43.

3. Diplomatic assurances from a religious rights–abusing regime.

A member of a religious minority faces removal to a country that systematically persecutes their religion. State Department reports highlight arbitrary detention of religious minorities, forced renunciation of faith, and torture of religious practitioners. The government presents diplomatic assurances that this individual will not be persecuted. However, the government provides no explanation of why these assurances are credible given the systematic persecution, no monitoring mechanisms, and no explanation of how the receiving country would protect this individual when it persecutes others with the same religious identity.[192]

Under the proposed framework, this removal would fail process-based review. The government has not explained how diplomatic assurances overcome systematic evidence of persecution. A court would note that the determination ignored directly relevant evidence (State Department documentation of religious persecution), failed to address the obvious tension between assurances and documented practice, and provided no rational basis for concluding that this individual would be safe when others with identical characteristics face persecution.

This scenario shows the framework working as envisioned by the statutory entitlement in § 1231(b)(3): blocking removals where the government fails to engage in reasoned decision-making while permitting removals where the government provides rational explanations. The standard is not whether the court agrees with the safety assessment—it is whether the government considered relevant evidence and explained its reasoning.

4. Application to the *D.V.D.* plaintiffs.

The *D.V.D.* plaintiffs allow for the most direct application of the proposed framework to actual facts. Under the Noem Guidance, the government sought to remove each plaintiff to a third country

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192 The regulatory framework requires that assurances be "sufficiently reliable," 8 C.F.R. § 1208.18(c)(2), but the executive branch has developed no publicly available criteria for making that determination, and courts play no role in reviewing it. *See* Katherine R. Hawkins, Note, *The Promises of Torturers: Diplomatic Assurances and the Legality of "Rendition"*, 20 GEO. IMMIGR. L.J. 213, 228 (2006); Jane C. Kim, *Nonrefoulement Under the Convention Against Torture: How U.S. Allowances for Diplomatic Assurances Contravene Treaty Obligations and Federal Law*, 32 BROOK. J. INT'L L. 1227, 1239 (2007); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1388 (2007).

without any documented assessment of whether that country posed dangers based on the plaintiff's protected characteristics. Each removal fails review under the four-factor test.

The first plaintiff—a gay man granted withholding of removal based on persecution in Guatemala for his sexual orientation—was deported to Mexico without notice.[193] The record contained no reference to his sexual orientation, no assessment of Mexico's documented dangers to LGBTQ individuals, and a diplomatic agreement with Mexico that did not address LGBTQ-specific risks. The second plaintiff—a woman granted withholding after severe domestic violence—faced removal to countries where her husband's family connections would enable him to locate her.[194] The record contained no assessment of whether generic diplomatic assurances addressed this private-actor threat, which § 1231(b)(3) protects against in equal measure to government threats.[195] The third plaintiff—granted CAT protection after police beat him for refusing to transport drugs—faced removal to countries with the same trafficking networks that targeted him, with no analysis of cartel presence, state protective capacity, or why diplomatic assurances would address private criminal actors.[196]

These failures share a common thread: The government reached no reasoned answer at all, not merely a wrong one. A determination that engaged with the evidence—consulting State Department reports on Mexico's treatment of LGBTQ persons, addressing the private-actor threat specific to a domestic violence victim, explaining why trafficking networks would not target the third plaintiff—might survive review even if a court assessed the evidence differently. The *D.V.D.* removals fail not because the government was wrong about safety, but because it made no safety judgment at all. That is the distinction the proposed framework is designed to enforce.

The *D.V.D.* district court's injunction and the framework proposed here address distinct but sequential requirements. *D.V.D.*

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193 Class Action Complaint, *supra* note 79, at 24–26; *see also D.V.D.*, 778 F. Supp. 3d at 369.

194 Class Action Complaint, *supra* note 79, at 22–23; *see also D.V.D.*, 778 F. Supp. 3d at 368–69.

195 *See* 8 U.S.C. § 1231(b)(3)(A) (prohibiting removal where life or freedom "would be threatened" based on protected characteristics, without exception for private-actor persecution); *D.V.D.*, 778 F. Supp. 3d at 390 (noting that blanket diplomatic assurances "offer no protection against either torture by non-state actors or chain refoulement").

196 Class Action Complaint, *supra* note 79, at 23–24; *see also D.V.D.*, 778 F. Supp. 3d at 369.

resolved the threshold procedural question: DHS must provide written notice of the destination country and a meaningful opportunity to raise a fear claim before removal occurs.[197] This framework addresses the subsequent question: What must the government's safety determination—the State Department's assessment that a country's diplomatic assurances are credible, or, where a fear claim is raised, USCIS's screening of that claim—contain to survive judicial review? The *D.V.D.* plaintiffs fail both inquiries—they received no notice, and the government made no reasoned safety determination based on their protected characteristics. A removal that satisfies *D.V.D.*'s procedural minimum could still fail this framework if DHS's response to the alien's expressed fear was arbitrary. Together, the two requirements form a complete system: process for the alien to be heard, and a standard ensuring DHS actually engaged with what it heard.

In sum, these scenarios illustrate a clear dividing line. The critical distinction is not whether risk exists but whether the government engaged in reasoned decision-making. Where the government considers evidence, addresses tensions in the record, and provides rational explanation, courts defer even when some risk remains. Where the government ignores evidence or relies on conclusory assertions contradicted by country reports, courts block removal. This process-based standard is judicially manageable: It requires reasoned analysis without requiring judicial agreement with outcomes. The framework does not require the government to prove safety or to satisfy demanding evidentiary burdens. It requires only reasoned decision-making—a modest requirement given the stakes.

D. Category-Based Determinations Operationalize the Statutory Standard

The framework proposed in Part IV.B requires one additional interpretive step to be workable: category-based assessment of country conditions. This step does not conflict with *D.V.D.*'s requirement of individualized alien process, but rather operates at a different level. *D.V.D.* governs what process the alien receives before DHS acts; category-based assessment governs what DHS's

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[197] *See D.V.D.*, 778 F. Supp. 3d at 392–93 (ordering DHS to provide written notice of the destination country, a meaningful opportunity to raise a fear of return under CAT, a motion to reopen if reasonable fear is demonstrated, and a minimum of fifteen days to seek to reopen if no reasonable fear is found).

substantive determination must contain when it responds. The alien presents an individualized fear; DHS must engage with whether individuals sharing the alien's protected characteristics face documented persecution in the destination country. Without this, the framework risks being either toothless, permitting the government to make conclusory safety assertions, or unworkable, requiring individualized assessment for every removal. Category-based assessment solves both problems while remaining faithful to statutory text.

The statutory text of § 1231(b)(3) points toward category-based assessment. The provision prohibits removal when an individual's life or freedom "would be threatened" because of protected characteristics.[198] The future tense—"would be"—requires assessing likely future harm, not certainty of harm to any specific individual. Further, the protected characteristics—race, religion, nationality, political opinion, and membership in a particular social group—are inherently categorical.

Category-based determinations ask whether people in the alien's category face persecution in the destination country. If State Department reports document that a country systematically persecutes LGBTQ individuals, that is strong evidence that an LGBTQ alien's "life or freedom would be threatened" there.[199] The government need not assess whether a specific individual will be persecuted; the statute requires only that their life or freedom "would be threatened." Documented persecution of the category satisfies that standard. An individualized diplomatic assurance cannot overcome documented category-based persecution. An assurance that *this* adherent will be spared, without explaining why the government that persecutes that category would protect the individual, is the kind of conclusory reasoning that process-based review exists to catch.

The Supreme Court has interpreted parallel language in the asylum statute to permit category-based claims.[200] In *Immigration & Naturalization Service v. Cardoza-Fonseca*,[201] the Court held that asylum applicants need not prove that persecution is certain or

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198 8 U.S.C. § 1231(b)(3)(A).

199 *Id.*

200 *See id.* § 1101(a)(42)(A) (defining "refugee" as a person unable or unwilling to return to their country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion").

201 480 U.S. 421 (1987).

even "more likely than not," but rather that there is a "reasonable possibility" of persecution.[202] Showing systematic persecution of one's group establishes such a possibility. The BIA has recognized that demonstrating a pattern or practice of persecution against one's category can establish eligibility for protection without proving individualized targeting.[203]

There are several reasons why category-based assessment is preferable to individual analysis. Category-based assessment reduces administrative burden compared to fully individualized determinations. The government can more efficiently make one finding about whether a country persecutes LGBTQ persons, and then apply that finding to all LGBTQ individuals facing removal to that country. This approach also aligns with how the government already assesses country conditions in other contexts. State Department country reports analyze persecution based on protected categories. That information directly answers the question § 1231(b)(3) poses: Would this alien's life or freedom be threatened based on protected characteristics?

DHS might argue that category-based assessment improperly limits executive discretion by preventing removal of any individual in a persecuted category. But this confuses statutory interpretation with policy preference. Congress chose to protect individuals based on category membership. If the executive branch finds category-based assessment too restrictive, the remedy is legislative amendment, not executive override through unreviewable assertions.[204]

Moreover, category-based assessment does not eliminate all executive discretion. The government retains discretion to (1) select among countries that do not persecute the relevant category; (2) explain why an individual within a persecuted category might nevertheless be safe (perhaps because they can relocate to a safe region within the country, conceal their protected characteristic, or have special government protection); and (3) present evidence that country reports are inaccurate or outdated and the country has reformed its practices. The government simply cannot ignore

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[202] *Id.* at 440.

[203] *See* 8 C.F.R. § 1208.16(b)(2)(i) ("The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion."); Mogharrabi, 19 I. & N. Dec. 439, 446 (B.I.A. 1987) ("A well-founded fear, in other words, can be based on what has happened to others who are similarly situated.").

[204] *Cardoza-Fonseca*, 480 U.S. at 449–50.

documented category-based persecution when removing individuals in that category.

Category-based determinations also align with how courts analyze asylum and withholding of removal claims. In those contexts, showing systematic persecution of one's category strengthens claims considerably.[205] While third-country removal determinations are not identical to asylum adjudications, the parallel supports category-based assessment: Both contexts involve predicting future persecution based on protected characteristics. If showing persecution of one's category supports asylum claims, it should likewise trigger § 1231(b)(3)'s prohibition.

E. Appropriate Remedies

When a court finds that a third-country removal determination fails process-based review, the appropriate remedy is remand to the agency for reasoned decision-making. This mirrors the standard remedy in administrative law: When an agency fails to engage in reasoned decision-making, courts remand for reconsideration rather than ordering specific outcomes.[206] The Supreme Court has established that "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."[207] The remand remedy preserves executive discretion while ensuring statutory compliance, and respects institutional competence by allowing the agency—not the court—to exercise judgment about country conditions and foreign policy considerations.[208]

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[205] Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

[206] *State Farm*, 463 U.S. at 42–43 (remanding an agency action that failed process-based review for reasoned decision-making); SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) ("The cause should therefore be remanded to the Court of Appeals with directions to remand to the Commission for such further proceedings, not inconsistent with this opinion, as may be appropriate."); *see also* Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1563–64 (2014).

[207] Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); *see also* Immigr. & Naturalization Serv. v. Orlando Ventura, 537 U.S. 12, 16 (2002) (per curiam); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (remanding the rescission of an immigration program to the agency to "consider the problem anew" after finding a failure to engage in reasoned decision-making).

[208] *Ventura*, 537 U.S. at 17 (per curiam) ("The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides."); *Chenery*, 318 U.S. at 88 ("[A] judicial judgment cannot be made to do service for an administrative judgment."); Walker, *supra* note 206, at 1564 (explaining how the ordinary remand rule preserves the separation of powers).

On remand, DHS must engage in the reasoned decision-making that process-based review demands. Specifically, the government must (1) consult State Department country reports and human rights documentation, (2) conduct a category-based assessment of whether individuals with the alien's protected characteristics face persecution in the destination country, (3) address evidence submitted by the alien, (4) provide reasoned explanation of the safety determination that articulates a rational connection between the evidence and the conclusion, and (5) create an administrative record documenting the decision-making process.[209] These requirements flow directly from *State Farm*'s requirement that agencies "examine the relevant data and articulate a satisfactory explanation for [their] action[s]."[210]

DHS retains multiple options on remand. It may designate a different third country that does not pose a danger to individuals with the alien's protected characteristics. It may provide additional analysis explaining why the original country is safe for this individual despite category-based risks—for example, by identifying a safe region within the country where the individual could relocate, or by explaining why this individual's specific circumstances differ from the general pattern of persecution. It may present new evidence that country conditions have improved since the State Department reports were published. Or, if no viable third country exists, it may maintain the alien under supervision pursuant to the existing removal order rather than execute removal at all—third-country removal is discretionary, and the government faces no constitutional obligation to exercise it.[211] These options demonstrate that remand does not eliminate executive discretion; it simply requires that discretion be exercised through reasoned analysis rather than conclusory assertion.

Courts should stay removals pending remand. The harm from erroneous removal—potential torture or death in a third

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[209] This framework applies the requirements articulated in *State Farm* and *Ventura* to the third-country removal context. *See State Farm*, 463 U.S. at 43 (stating that an agency acted arbitrarily and capriciously when it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [issued a rule] so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

[210] *Id.* (articulating an application of 5 U.S.C. § 706(2)(A)). *Trinidad y Garcia*'s narrower scope of review reflects FARRA's specific regulatory structure. Because § 1231(b)(3) imposes a nondiscretionary statutory prohibition rather than implementing a discretionary treaty obligation, the statute supports more substantive process-based review than FARRA permits. *See supra* Part IV.A.

[211] *See supra* Part III.D.

country—is irreparable and cannot be remedied after the fact.[212] By contrast, staying removal pending remand imposes minimal burden on the government: The alien remains in the United States under the existing removal order, and the government may complete its reasoned decision-making and proceed with removal if the determination survives review.

V. ADDRESSING COUNTERARGUMENTS

The government has advanced several arguments against judicial review of third-country safety determinations, primarily through the Noem Guidance and related policy statements.[213] These arguments invoke separation of powers, foreign policy, and institutional competence concerns. However, none justify complete unreviewability. The proposed framework addresses each concern while preserving meaningful review.

A. Foreign Affairs Concerns Do Not Preclude Process-Based Review

The government's strongest argument against Article III review invokes foreign affairs, contending that judicial review risks undermining diplomatic negotiations, interfering with treaty relationships, and embarrassing the United States abroad.

But foreign affairs concerns do not preclude all judicial review. In *Munaf v. Geren*,[214] the Supreme Court held that courts should not review whether foreign criminal justice systems will provide fair trials, explaining that such inquiry would "pass judgment on foreign justice systems."[215] However, the Court explicitly assumed that the executive branch had conducted an actual assessment: "The Judiciary is not suited to second-guess such *determinations*"—implying that determinations must be made.[216] The Court did not suggest that a complete absence of any determination would be unreviewable. *Munaf* thus implies that while courts

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[212] *But cf.* Nken v. Holder, 556 U.S. 418, 435 (2009) (discussing irreparable harm in the removal context and noting that aliens can theoretically continue to pursue petitions after removal, and "those [aliens] who prevail can be afforded effective relief by facilitation of their return"). However, the harm from third-country removal to danger is more severe than the removal at issue in *Nken*, in which the alien faced removal to his home country rather than to a third country where he claimed to face persecution.

[213] *See supra* Part I.C.

[214] 553 U.S. 674 (2008).

[215] *Id.* at 702.

[216] *Id.* (emphasis added).

may not pass judgment on a foreign justice system, they retain authority to examine whether the government engaged in a meaningful assessment of the relevant foreign justice system.

Moreover, *Munaf* involved exceptional circumstances that are largely absent in the third-country removal context: ongoing armed conflict, allied relationships, foreign custody, and terrorism prosecution.[217] Individuals facing third-country removal are in U.S. custody, facing deportation to countries to which they have no connection, for immigration violations rather than terrorism.

Critically, process-based review avoids opining on the quality of foreign governments. Courts would not declare that Uganda is dangerous for LGBTQ individuals, as that is a foreign policy decision; they would only ensure that the government considered evidence of danger before removing LGBTQ individuals to Uganda. As *Trinidad y Garcia* explains, process-based review examines process, not foreign policy judgments.[218] This distinction preserves executive authority while ensuring statutory compliance.

The government's foreign affairs argument draws its most powerful support from *United States v. Curtiss-Wright Export Corp.*,[219] which recognized the President's uniquely broad authority as "the sole organ of the federal government in the field of international relations."[220] Defenders of DHS's policy indeed contend that third-country removal negotiation falls within this exclusive executive sphere.[221] Under Justice Robert Jackson's tripartite framework in *Youngstown Sheet & Tube Co. v. Sawyer*,[222] when the President acts pursuant to diplomatic authority authorized by Congress, executive power "is at its maximum."[223] Because Congress granted broad removal authority in § 1231(b)(2), the argument goes, judicial review of third-country removal decisions

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217 *Id.* at 686–87, 700–01.

218 *Trinidad y Garcia*, 683 F.3d at 961 (Thomas, J., concurring).

219 299 U.S. 304 (1936).

220 *Id.* at 320.

221 In its application for a stay from the Supreme Court, the government argued that "[b]y . . . disrupting those carefully negotiated arrangements, the court's actions have already caused major and irremediable 'harm to U.S. foreign policy.'" Application for a Stay, *supra* note 116, at 8 (quoting Declaration of Secretary of State Marco Rubio ¶ 3, *D.V.D.*, 145 S. Ct. 2153 (No. 24A1153)).

222 343 U.S. 579 (1952).

223 *Id.* at 635 (Jackson, J., concurring).

impermissibly intrudes on a coordinate branch at the apex of its constitutional authority.[224]

A related argument invokes treaty withdrawal. Scholars have argued that the Executive possesses inherent authority to terminate treaty obligations unilaterally.[225] If the President can withdraw from CAT obligations by executive action, judicial enforcement of CAT-derived procedural requirements becomes moot.

These arguments are ultimately unpersuasive. *Curtiss-Wright* and *Youngstown* address the Executive's authority to act in foreign affairs; they do not immunize that action from statutory compliance review. Even at its *Youngstown* apex, executive power must operate within congressional mandates;[226] § 1231(b)(3) is exactly such a mandate. Indeed, *Youngstown* itself held a presidential order unconstitutional even during wartime, confirming that courts are not categorically barred from limiting executive action simply because foreign affairs or national security is implicated. The proposed framework does not second-guess the executive branch's foreign policy judgments; it requires only that the executive branch demonstrate that it made a judgment at all—a nonintrusive but necessary check on executive power.[227] The treaty withdrawal argument fails because Congress implemented CAT in domestic statutes—FARRA and § 1231(b)(3)—that remain valid law regardless of executive posture toward the underlying treaty; the President cannot unilaterally repeal a congressional statute.[228] Here, the executive branch is not choosing whether to remove aliens; that decision has already been made. It is choosing where, and that choice is specifically constrained by § 1231(b)(3).

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[224] *See* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1201–02 (2007) (arguing that courts should afford deference to executive interpretations in foreign affairs).

[225] *See* Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 801–20 (2014); Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1244–50 (2018).

[226] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006) (holding that, even assuming executive action fell within *Youngstown* zone one, specific statutory constraints remained binding).

[227] *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015), confirms that even in quintessential foreign affairs matters, executive action must have an affirmative legal basis.

[228] *See* Bradley, *supra* note 225, at 812–14 (explaining that implementing legislation enacted by Congress retains independent statutory force after executive withdrawal from the underlying treaty).

B. *Munaf* and *Kiyemba* Assumed Assessments Had Occurred

In its Supreme Court briefing in *D.V.D.*, the government relied on *Munaf* and *Kiyemba v. Obama*[229] to argue that executive safety assessments are categorically unreviewable. Citing *Munaf*'s holding that courts are "not suited to second-guess such determinations,"[230] the government contended that a categorical diplomatic assurance from a receiving country is "itself a 'foreign policy' judgment the Judiciary 'is not suited' to question."[231] Invoking then-Judge Brett Kavanaugh's *Kiyemba* concurrence, it pressed further: *Munaf*'s principle "applies here a fortiori" because *Munaf* involved American citizens, whereas third-country removal involves aliens with no right to enter the United States.[232] Unlike the broad foreign affairs arguments addressed above, this claim targets the specific act of evaluating safety conditions in a receiving country.

However, both cases involved exceptional circumstances, and neither involved routine immigration removals. *Kiyemba* extended the *Munaf* framework to Guantánamo detainees, rejecting the detainees' demand that the government explain why transferring them to countries where they might face torture was lawful. The per curiam opinion explained that once the government declares a policy against transferring detainees to countries likely to torture them, "the district court may not second-guess the Government's assessment of that likelihood."[233] It grounded that holding in *Munaf*'s principle that "it is for the political branches, not the judiciary, to assess" the adequacy of diplomatic assurances.[234]

But *Kiyemba* involved enemy combatants held at Guantánamo pursuant to the authorization of military force during ongoing armed conflict. The detainees were not within the United States, and national security concerns dominated the analysis. Within the wartime framework from which *Kiyemba* emerged, the Court recognized limits on unreviewable executive authority. In *Hamdi v. Rumsfeld*,[235] the Court held that a citizen detained as

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229 561 F.3d 509 (D.C. Cir. 2009).

230 Application for a Stay, *supra* note 116, at 7 (quotation marks omitted) (quoting *Munaf*, 553 U.S. at 702).

231 *Id.* at 30 (quoting *Munaf*, 553 U.S. at 702).

232 *Id.* at 29 (quotation marks omitted) (quoting *Kiyemba*, 561 F.3d at 517–18 (Kavanaugh, J., concurring)).

233 *Kiyemba*, 561 F.3d at 516 (per curiam).

234 *Id.* at 515 (quoting *Munaf*, 553 U.S. at 700–01).

235 542 U.S. 507 (2004).

an enemy combatant was entitled to meaningful process to contest the factual basis for his detention, emphasizing that "a state of war is not a blank check for the President."[236] If *Hamdi* requires process for enemy combatants during active armed conflict, *Kiyemba*'s no-review posture under a statute that expressly prohibits certain removals cannot extend to routine immigration removals where the national security justification is far weaker but the risk of harm is equally grave. *Hamdi*'s core principle—that the executive branch cannot wholly displace due process even in the national security context—directly undermines the categorical unreviewability the government seeks here.

Here, by contrast, the government provides no assessment process, no consideration of country conditions, and no explanation. Under the government's theory, an officer could remove an alien to any willing country without reviewing a single country report or considering a single protected characteristic. Neither *Munaf* nor *Kiyemba* endorsed such categorical unreviewability. Both cases assumed that the government acted with some process; neither addressed what courts should do when there is no documented assessment, no administrative record, and no evidence that the government evaluated safety conditions. *Hamdi* illustrates what that baseline looks like: The plurality required the government to provide notice of the factual basis for the enemy combatant designation and afford the detainee a meaningful opportunity to contest it before a neutral decision-maker.[237] The government here provides neither. *Munaf* and *Kiyemba* said nothing about what courts should do when that baseline is absent entirely.

This distinction creates space for the framework proposed in this Comment. *Munaf* and *Kiyemba* establish that courts should not second-guess substantive executive judgments when the executive branch actually makes such judgments through genuine processes. Importantly, the court does not itself assess the diplomatic assurances—it only confirms that the agency assessed such assurances.

C. The Administrative Burden Is Manageable and Justified

The government's floodgates concern deserves serious engagement. In its application for a stay in *D.V.D.*, Solicitor General

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[236] *Id.* at 536 (plurality opinion).

[237] *Id.* at 533–34.

D. John Sauer argued that the district court's injunction "delay[s] third-country removal by at least 25 days for every alien who raises a CAT claim, no matter how frivolous,"[238] and that Immigration and Customs Enforcement would "often need to restart the 'entire' removal process afresh" as a result.[239] Secretary of State Marco Rubio and Secretary of Defense Pete Hegseth both submitted declarations stressing the "significant and irreparable" harm to foreign policy and national security caused by judicial disruption of removal timelines.[240] More broadly, requiring individualized review for each alien could burden already-strained immigration courts.[241] If every alien facing third-country removal could obtain a stay pending review, the practical effect may be to eliminate third-country removal as an enforcement tool entirely.

These concerns are real but overstated, and under *Mathews*, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard."[242] The proposed framework imposes far less burden than the district court's injunction that the government challenged in *D.V.D.* It does not require twenty-five days of process for every removal. Instead, it operates through category-based determinations: the State Department makes categorical findings about country conditions for identifiable groups and courts review those categorical findings for reasonableness under the arbitrary and capricious standard.[243] Many aliens will lack colorable claims because the destination country poses no documented risk to people with their characteristics, providing a natural gatekeeping mechanism. Review is available to challenge only inadequate process or failure to account for protected characteristics, not to relitigate country conditions generally.

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[238] Application for a Stay, *supra* note 116, at 7.

[239] *Id.* (quoting Declaration of Acting Deputy Executive Associate Director Garrett J. Ripa ¶ 29, *D.V.D.*, 145 S. Ct. 2153 (No. 24A1153)).

[240] *Id.* at 4. (quoting Declaration of Secretary of State Marco Rubio, *supra* note 221, ¶ 3).

[241] *See* KATHLEEN BUSH-JOSEPH, DORIS MEISSNER & MUZAFFAR CHISHTI, MIGRATION POL'Y INST., BREAKING THE CYCLE OF DYSFUNCTION AT THE U.S. IMMIGRATION COURTS 1–2 (2025) (documenting 3.8 million pending deportation cases and characterizing the immigration court system as "in crisis"); Anusha Mathur & Ximena Bustillo, *U.S. Has a Quarter Fewer Immigration Judges Than It Did a Year Ago*, NPR (Feb. 23, 2026), https://perma.cc/ZA54-2PBS (reporting that immigration courts have lost approximately 25% of their judges through firings and resignations while maintaining a backlog of nearly four million cases).

[242] *Mathews*, 424 U.S. at 348.

[243] *See supra* Part IV.D (describing the category-based determination framework).

Moreover, the framework may actually reduce litigation because procedural shortcuts in immigration adjudication have historically generated more appeals, not fewer, as reviewing courts are forced to remand inadequately reasoned decisions.[244] When decision-making processes are documented and reasoned, aliens and their attorneys can assess whether challenges are likely to succeed, promoting earlier resolution.

Finally, the government argues that the urgent need to remove dangerous individuals justifies dispensing with procedures. In the government's *D.V.D.* stay application, the Solicitor General stressed that aliens "whose removal is most urgent [would] be allowed to remain" if courts imposed procedural requirements.[245] But the Supreme Court has already rejected this logic. In *Trump v. J.G.G.*,[246] all nine Justices agreed that notice and an opportunity to be heard are required before removal under the Alien Enemies Act;[247] in *AARP v. Trump*,[248] the Court held that twenty-four hours' notice "devoid of information about how to exercise due process rights" was constitutionally inadequate.[249] If the Supreme Court requires process even for alleged members of a designated terrorist organization during a claimed invasion, the case for process in routine § 1231(b)(3) removals follows a fortiori. The proposed framework does not require the government to slow down; it requires the government to document why it is safe to proceed.

CONCLUSION

Third-country removals pose a profound challenge to the rule of law. Thousands of individuals each year face deportation to

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[244] Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1657–59 (2010) (documenting how procedural cuts at the BIA produced a surge in federal court appeals rather than reducing litigation).

[245] Application for a Stay, *supra* note 116, at 7–8.

[246] 145 S. Ct. 1003 (2025).

[247] *Id.* at 1006 (per curiam). On March 15, 2025, President Trump invoked the Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24), to order the removal of Venezuelan nationals alleged to be members of Tren de Aragua, a Venezuelan criminal organization designated as a foreign terrorist organization. Proclamation No. 10903, 90 Fed. Reg. 13034 (Mar. 14, 2025). Over two hundred individuals were deported to El Salvador's Terrorism Confinement Center (CECOT) without individualized notice or opportunity to contest their designation. Ceclia Vega, *U.S. Sent 238 Migrants to Salvadorean Mega-Prison; Documents Indicate Most Have No Apparent Criminal Records*, CBS News (Apr. 6, 2025), https://perma.cc/DC7N-2ZR9.

[248] 145 S. Ct. 1364 (2025).

[249] *Id.* at 1368 (per curiam).

countries they have never visited, based on determinations they cannot challenge, without any assessment of whether they possess characteristics that would endanger them there.[250] The government asserts complete unreviewability, claiming that courts cannot examine whether any determination occurred.

But this assertion cannot be reconciled with fundamental legal principles. Section 1231(b)(3) creates a categorical prohibition on removal to danger—a prohibition that must be enforceable or it means nothing. U.S. obligations under international law prevent removing individuals to places they will likely be tortured. Administrative law demands that agency action rest on reasoned decision-making, not arbitrary assertion. And most importantly, the Constitution requires some process before individuals face potential torture or death.

The solution lies in the CAT extradition framework. Courts examining extradition decisions under CAT apply process-based review, asking whether the Secretary of State considered relevant evidence, assessed the individual's vulnerability, and explained the determination. This approach respects executive authority over foreign affairs while ensuring statutory compliance.

Applied to third-country removals, this framework would impose modest but essential requirements. The government would identify the destination country, consider State Department country reports, assess whether the individual possesses characteristics making persecution more likely, and explain its safety determination. These requirements mirror procedures that the government already follows in other contexts, imposing minimal burden while ensuring that § 1231(b)(3)'s prohibition has operative force.

Category-based assessment operationalizes this standard. When evidence documents systematic persecution of LGBTQ persons, political dissidents, or religious minorities, individuals in those categories cannot be removed without explanation. This approach reduces administrative burden while protecting the most vulnerable.

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[250] Maanvi Singh, Will Craft & Andrew Witherspoon, *How Trump Has Supercharged the Immigration Crackdown—in Data*, THE GUARDIAN (July 23, 2025), https://perma.cc/J7CF-JQV5 (reporting that as of July 2025, at least 8,100 individuals had been deported to countries other than their own); Ariel G. Ruiz Soto, *U.S. Third-Country Deportation Agreements Are More About Fear Than Numbers*, MIGRATION POL'Y INST. (Mar. 2026), https://www.migrationpolicy.org/news/us-third-country-deportation-agreements (estimating that approximately fifteen thousand third-country deportations were carried out between January 20 and December 31, 2025).

D.V.D. is likely headed back to the Supreme Court,[251] and when it arrives, the process-based approach developed here offers a middle path: less intrusive than the preliminary injunction that the Court stayed, but more protective than the categorical unreviewability the government seeks. A court willing to hold that § 1231(b)(3)'s prohibition requires some process—without micromanaging every removal decision—can ground its holding in the CAT extradition framework and the *Mathews* analysis developed in this Comment.

The unreviewability alternative is unacceptable. Without procedural protections, diplomatic assurances from human rights abusers are accepted uncritically, protected characteristics are ignored, and individuals are removed to torture and death. The proposed framework charts the necessary middle path—respecting plenary power while enforcing statutory limits, deferring to foreign policy judgments while requiring reasoned decision-making, and imposing minimal burdens while providing essential protections.

Justice Sotomayor warned that without judicial intervention, "thousands will suffer violence in farflung locales."[252] The judiciary must heed that warning. Section 1231(b)(3)'s prohibition on removal to danger is enforceable, and enforcement requires process-based judicial review grounded in the CAT extradition model.

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[251] DHS has already appealed the district court's merits ruling, D.V.D. v. U.S. Dep't of Homeland Sec., No. 26-1212 (1st Cir. *appeal docketed* Feb. 28, 2026), and a divided First Circuit panel granted a stay pending appeal on March 16, 2026, with Judge Lara Montecalvo dissenting. *See generally* Order, *D.V.D.*, No. 26-1212 (1st Cir. Mar. 16, 2026). The court ordered expedited briefing. Oral argument was held on May 13, 2026, and a decision remains pending as of September 14, 2026. *Id.* The Supreme Court's stay order contemplates "disposition of a petition for a writ of certiorari," *D.V.D.*, 145 S. Ct. at 2153, and given the significance of the questions presented, the case is likely to return to the Court for a ruling on the merits.

[252] *D.V.D.*, 145 S. Ct. at 2163 (Sotomayor, J., dissenting).