COMMENTS

PROTECTING ALIEN-INFORMANTS: THE STATE-CREATED DANGER THEORY, PLENARY POWER DOCTRINE, AND INTERNATIONAL DRUG CARTELS

I. INTRODUCTION

> How can this be in modern day America?
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> Mr. Enwonwu is an immigrant alien.
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> . . . Congress does not much care about immigrant aliens, even those who, after endangering themselves assisting our law enforcement efforts to stem the international drug trade, are deported into the hands of the very drug traders upon whom they have informed.
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> Does this shock your conscience as an American? If so, read on and dispassionately judge for yourself[1]:

In 1986, Frank Igwebuike Enwonwu accepted an offer from a Nigerian military official to smuggle five ounces of heroin into the United States in exchange for $5000.[2] U.S. Customs officials stopped and searched Enwonwu on his arrival at Logan International Airport in Boston and discovered the heroin concealed inside his body.[3] Drug Enforcement Agency ("DEA") agents promised Enwonwu that he could avoid prosecution and receive their protection if he helped the DEA find the intended recipients of the heroin.[4] Enwonwu agreed, and his efforts enabled the DEA to arrest three individuals who were awaiting the delivery of the drugs.[5] His testimony before a grand jury also helped federal prosecutors indict two of the individuals.[6] After the arrests, the DEA informed Enwonwu that his life was in danger because the people he betrayed were part of a large, violent drug-trafficking cartel.[7]

At first, the DEA helped Enwonwu adjust to life in the United States by assisting him in obtaining a work authorization form.[8] For eighteen years, Enwonwu worked as a taxi driver and later a nursing assistant in the Boston

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1. Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 43 (D. Mass. 2005), *rev'd sub nom.* Enwonwu v. Gonzales, 438 F.3d 22 (1st Cir. 2006).

2. *Id.* at 43-44.

3. *Id.* at 43.

4. *Id.* at 44.

5. *Id.* at 44-46.

6. *Enwonwu*, 376 F. Supp. 2d at 48.

7. *Id.* at 47.

8. *Id.* at 47-48.

area;[9] however, Enwonwu's legal status in the United States was never formalized.[10] Meanwhile, Congress amended the Immigration and Nationality Act[11] to retroactively make any alien convicted of a past drug-related offense removable from the United States.[12] Enwonwu later obtained his realtor's license and, in 2004, he visited the Bureau of Customs and Immigration Services office to seek the necessary employment authorization to begin a job as a real estate agent.[13] Enwonwu later obtained his realtor's license, and in addition, in 2004, he visited the Bureau of Customs and Immigration Services office to seek the necessary employment authorization to begin a new job. Officials arrested and detained Enwonwu when he identified himself at the office, and the federal government initiated deportation proceedings against him.[14]

After exhausting his administrative remedies,[15] Enwonwu filed a petition for habeas corpus.[16] He claimed that the deportation violated his substantive due process rights based on the "state-created danger theory."[17] Under the state-created danger theory, the government may assume a constitutional duty, based on the Due Process Clause, to protect an individual from private harm when the government creates or enhances the threat of harm to the individual.[18] The district court found that the government's combined acts of inducing Enwonwu's cooperation and affirmatively attempting to deport him, where he would be readily accessible to those who wished to harm him, violated Enwonwu's substantive due process rights.[19]

The First Circuit reversed the district court's ruling.[20] The First Circuit held that entertaining a state-created danger claim, as a means of relief from deportation proceedings, would intrude on the constitutional powers assigned to

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9. *Id.* at 48, 49.

10. *Id.* at 49-50.

11. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in various sections of Title 8).

12. 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii) (2000).

13. *Enwonwu*, 376 F. Supp. 2d at 55.

14. *Id.* at 55-56.

15. *Id.* at 59-62.

16. *Id.* at 56.

17. *Id.* at 66-79.

18. *See, e.g.*, Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001) (stating that under state-created danger theory, one may demand from government a substantive due process right to protection from third-party violence when government officials act affirmatively to create or enhance danger leading to individual's injury).

19. *Enwonwu*, 376 F. Supp. 2d at 73-74. Eight days after the district court concluded an evidentiary hearing on Enwonwu's habeas petition, Congress enacted the REAL ID Act, which included a provision that stripped the district courts of habeas jurisdiction in removal cases. *Id.* at 81 (discussing REAL ID Act of 2005, Pub. L. No. 109-13, § 106(c), 119 Stat. 231, 302 (2005) limitation of habeas corpus review of removal orders to courts of appeals). The Act also required district courts to transfer any pending habeas cases that challenged "final administrative order[s] of removal" to the appropriate court of appeals. REAL ID Act of 2005 § 106(c). Thus, the district court's order simply transferred Enwonwu's case to the First Circuit, and its decision was merely an advisory opinion. *Enwonwu*, 376 F. Supp. 2d at 85.

20. Enwonwu v. Gonzales, 438 F.3d 22, 29-30 (1st Cir. 2006).

Congress and the executive.[21] It would mark an "impermissible effort to shift to the judiciary the power to expel or retain aliens," which is "a power the Constitution has assigned to the political branches."[22] As a result, the First Circuit held that "an alien has no constitutional substantive due process right not to be removed from the United States."[23]

This Comment addresses the claims of a group of aliens, like Enwonwu, who faced deportation proceedings after working as government informants. Like Enwonwu, a number of aliens have asserted that the deportation proceedings violate their Fifth Amendment due process rights under the state-created danger theory.[24] Simply explained, the state-created danger theory imposes an affirmative obligation on the government to protect individuals from private harm when the government has placed the individuals in a position of danger. The aliens maintained that the government placed them in a state-created danger when it solicited their help in prosecuting members of international drug cartels. The subsequent deportation would violate the aliens' life and liberty interests because they would face an imminent risk of death or torture when returning to their native countries.

This Comment examines the viability of the state-created danger theory in the context of deportation proceedings. Historically, Congress and the executive have exercised plenary or unchecked power to regulate immigration.[25] Part II.A examines the development of the state-created danger theory in the U.S. courts of appeals. Part II.B describes the cases in which aliens have invoked the state-created danger theory in deportation proceedings. In Parts II.C and II.D, this Comment examines Congress's and the executive's plenary power over immigration law and policy. Finally, in Part III, this Comment argues that the plenary power doctrine should be abandoned and that state-created danger

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21. *Id.* at 30.

22. *Id.*

23. *Id.* at 29.

24. See *infra* Part II.B for a discussion of several cases involving the state-created danger theory. *See also* Guerra v. Gonzales, 138 F. App'x 697, 699 (5th Cir. 2005) (describing informant's claim that he and his family would be hunted and killed by Columbian cartel if deported to his native country); Lawson v. Gerlinski, 332 F. Supp. 2d 735, 737 (M.D. Pa. 2004) (describing petitioner's claim that he would become victim of retaliation for his cooperation with law enforcement officials in prosecution of marijuana trafficking scheme if deported to Jamaica); Momennia v. Estrada, 268 F. Supp. 2d 679, 682 (N.D. Tex. 2003) (describing alien's claim that he would face "virtually certain death" if returned to Iran because of information he provided to FBI about activities of Shiite Muslims in Oklahoma); Builes v. Nye, 239 F. Supp. 2d 518, 520-21 (M.D. Pa. 2003) (describing alien's claim that he would be killed by drug traffickers if returned to Columbia because of his cooperation with American prosecutors); Rosciano v. Sonchik, No. CIV-01-472-PHX-FJM, 2002 U.S. Dist. LEXIS 25419, at *12 (D. Ariz. Sept. 9, 2002) (describing petitioner's claim that she would face grave risk of death if deported to Columbia because she helped government authorities learn identity of prominent Columbian drug trafficker).

25. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens. . . . Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" (internal citations omitted)).

claims should be recognized in deportation proceedings. Furthermore, this Comment proposes a test for evaluating state-created danger claims in the context of deportation proceedings.

II. OVERVIEW

A. *The State-Created Danger Theory*

The Due Process Clause of the Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law."[26] In general, the Due Process Clauses of the Fifth and Fourteenth Amendments operate as a limitation on government power. They do not impose affirmative obligations on the state or federal government to protect individuals from harm caused by private actors.[27] By proscribing certain governmental actions, the Due Process Clause simply prevents "governmental power from being 'used for purposes of oppression.'"[28] Nevertheless, under limited circumstances a government actor may assume a constitutional duty to protect an individual from private harm.

In *DeShaney v. Winnebago County Department of Social Services*,[29] the Supreme Court addressed whether Wisconsin had an affirmative duty to protect Joshua, a four-year-old boy within the state's child protection services, from injuries caused by his father. The state had reason to know that Joshua's father abused him, yet the state repeatedly released Joshua into his father's custody.[30] Eventually, the father beat Joshua so severely he fell into a coma and sustained permanent mental injuries.[31] The Court held that the state's failure to protect Joshua from private harm did not violate the Due Process Clause.[32] It emphasized that the Due Process Clause does not "guarantee certain minimal levels of safety and security."[33] Rather, the purpose is to "protect people from the State, not to ensure that the State protected [people] from each other."[34]

The Court's ruling, however, was not absolute. First, the Court noted that when a state holds a person in custody against his will, as in cases of incarceration or institutionalization, the Constitution imposes a corresponding duty on the state to ensure the person's basic safety and general well-being.[35] Second, the Court suggested, in dicta, that a state may assume a constitutional duty to protect an individual in a noncustodial setting if the state created the

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26. U.S. CONST. amend. V.

27. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

28. Daniels v. Williams, 474 U.S. 327, 331 (1986) (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1855)).

29. 489 U.S. 189 (1989).

30. *DeShaney*, 489 U.S. at 192-93.

31. *Id.* at 193.

32. *Id.* at 197.

33. *Id.* at 195.

34. *Id.* at 196.

35. *DeShaney*, 489 U.S. at 199-200.

danger. The Court wrote, "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their *creation*, nor did it do anything to render him any more vulnerable to them."[36] As a result, the state did not assume a constitutional obligation to protect Joshua in *DeShaney*. This language raised the possibility, however, that the Constitution may impose a duty on the state to protect an individual from private harm when the state *does* create the danger.

Numerous courts have relied on this language in *DeShaney* to find due process violations where government actors affirmatively place individuals in dangerous situations.[37] For example, in *Reed v. Gardner*,[38] the Seventh Circuit reversed summary judgment in a § 1983 action where police officers arrested a safe driver, leaving an intoxicated passenger and the keys behind.[39] The passenger later drove the vehicle and caused a head-on collision.[40] The court found that the victims of the accident stated a claim for a due process violation by alleging that the police officers' actions created a danger the victims would not have otherwise faced.[41] The court noted that "[b]y removing a safe driver from the road and not taking steps to prevent a dangerous driver from taking the

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36. *Id.* at 201 (emphasis added).

37. *See, e.g.*, Butera v. District of Columbia, 235 F.3d 637, 640-41 (D.C. Cir. 2001) (finding that victim's family properly asserted state-created danger claim against police who failed to adequately protect victim they recruited to be police informant); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066-67 (6th Cir. 1998) (finding that state officials placed police officers in state-created danger in violation of officers' due process rights when they released officers' personnel files, including officers' addresses and personal information, to defense counsel for extremely violent gang); Kneipp v. Tedder, 95 F.3d 1199, 1201, 1208-09 (3d Cir. 1996) (holding that plaintiff alleged state-created danger claim when police arrested plaintiff's husband, leaving plaintiff in inebriated state to walk home alone, and she fell into ditch and sustained injuries from cold); Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993) (reversing district court's decision and holding that victims of car accident stated state-created danger claim where police arrested driver, allowing drunk passenger, who later hit victims, to take control of vehicle); Dwares v. City of New York, 985 F.2d 94, 98-99 (2d Cir. 1993) (finding that demonstrator injured at flag-burning rally stated claim for due process violation where police made agreement with violent group of skinheads not to intervene if skinheads attacked demonstrators), *overruled in part by* Letherman v. Tarant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Freedman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (finding that estate properly alleged state-created danger claim where police failed to enforce restraining order against decedent's estranged husband who later killed decedent and her daughter); Cornelius v. Town of Highland Lake, 880 F.2d 348, 356, 359 (11th Cir. 1989) (holding that plaintiff properly alleged state-created danger claim against officials who knowingly let violent inmates participate in outside work program, enabling their abduction and terrorization of plaintiff while on release in program), *overruled in part by* White v. Lemacks, 183 F.3d 1253, 1256 (11th Cir. 1999); Wood v. Ostrander, 879 F.2d 583, 589-90 (9th Cir. 1989) (finding that passenger stated state-created danger claim where police arrested driver and impounded car, leaving passenger in high-crime area, where she was raped); *cf.* Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995) (noting that plaintiff asserted state-created danger exception against state officials who released violent patient into general hospital population who later killed plaintiff's wife, but finding summary judgment appropriate because there was no issue of material fact regarding whether defendants acted recklessly and in conscience-shocking manner).

38. 986 F.2d 1122 (7th Cir. 1993).

39. *Reed*, 986 F.2d at 1123, 1127.

40. *Id.*

41. *Id.* at 1126-27.

wheel, the defendants arguably changed a safe situation into a dangerous one."[42] The doctrine that gave rise to this type of claim became known as the "state-created danger" theory.[43]

Since *DeShaney*, a majority of the circuits have adopted some form of the state-created danger theory. Two notable exceptions are the First and Fifth Circuits, which have failed to adopt the state-created danger theory because they have never found facts sufficient to support such a claim.[44] The First Circuit, however, has observed that the "Due Process Clause may be implicated where the government affirmatively acts to increase the threat to an individual of third-party private harm or prevents that individual from receiving assistance."[45] Thus, it appears that the First Circuit would adopt the theory under the proper circumstances.[46] In contrast, the Fifth Circuit's prior rulings strongly suggest that the state-created danger exception is not a viable theory in that jurisdiction because no facts will *ever* be sufficient to support such a claim.[47] In addition, the Fourth Circuit has held that state law enforcement officials are entitled to qualified immunity from state-created danger claims because the state-created danger exception is not clearly established in the law.[48]

With the exception of the Fifth Circuit, and possibly the First and Fourth Circuits, the state-created danger exception remains a viable theory in most jurisdictions. Nevertheless, it is difficult to synthesize a single interjurisdictional standard for applying the state-created danger exception, which leads to some variation among the circuits. Some courts have recognized the doctrine but have

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42. *Id.* at 1127.

43. *See, e.g.*, McClendon v. City of Columbia, 305 F.3d 314, 324-25 (5th Cir. 2002) (noting that many circuits have adopted some version of "state-created danger" theory). Although the name of the doctrine suggests that it only applies as a limitation to the actions of state governments, the state-created danger theory equally applies to the actions of the federal government. With respect to the state-created danger theory, the analysis under the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment are the same. *See* Butera v. District of Columbia, 235 F.3d 637, 645-46 & n.7 (2001) (adopting state-created danger doctrine under Fifth Amendment's Due Process Clause). This Comment uses the term "state-created danger" when referring to actions of both the state and federal governments.

44. *See* Rivera v. Rhode Island, 402 F.3d 27, 35 (1st Cir. 2005) (noting that First Circuit has discussed state-created danger theory but never found actionable claim); *McClendon*, 305 F.3d at 325 (noting that Fifth Circuit has yet to determine whether state official has duty to protect individuals from state-created dangers).

45. Coyne v. Cronin, 386 F.3d 280, 287 (1st Cir. 2004).

46. Recently, a district court within the First Circuit appeared to find facts sufficient to establish a state-created danger claim but held that the defendants were entitled to the defense of qualified immunity. *See* McIntyre v. United States, 336 F. Supp. 2d 87, 114 (D. Mass. 2004) (finding that FBI agents rendered plaintiff more vulnerable to harm by disclosing his identity as confidential informant to organized crime figures who later murdered him).

47. *See McClendon*, 305 F.3d at 334 (Parker, J., dissenting) ("The only way to explain the majority opinion is that it clearly reflects a court that aspires to be the only circuit in the country to reject the state-created danger theory but cannot bring itself to admit it.").

48. Pinder v. Johnson, 54 F.3d 1169, 1172 (4th Cir. 1995). Six years later, in an unpublished opinion, the Fourth Circuit did note the state-created danger theory was an exception to the general rule that the Due Process Clause did not impose affirmative duties on the government. Stevenson v. Martin County Bd. of Educ., 3 F. App'x 25, 31 (4th Cir. 2001).

not articulated specific circumstances in which the theory applies. For example, the Eighth Circuit wrote, "It is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect. It is clear, though, that at some point such actions do create such a duty."[49] Other courts, such as the Third and Tenth Circuits, have set up specific, multipart tests that must be satisfied in order to establish a state-created danger claim.[50]

Although each circuit applies a different test to evaluate state-created danger claims, Professor Oren observed that the circuits' tests contain four common elements: (1) a government official exercised authority or power, (2) in such a way that the official put someone in a *worse* position than he would have otherwise faced, (3) risking and causing a significant harm, (4) with a degree of culpability that "shocks the conscience."[51] The fourth element of this standard requires further discussion. The U.S. Supreme Court has not addressed a claim based on the state-created danger theory.[52] As a result, there is some disagreement among the circuits about the level of culpability with which a government official must act in order to commit a due process violation under the doctrine.[53] Nonetheless, the Court's prior rulings examining constitutional challenges to executive action based on traditional substantive due process claims shed some light on this issue.[54]

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49. Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990).

50. The Third Circuit established a four-part test for a state-created danger claim:

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996) (quoting Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995)). The Tenth Circuit requires a plaintiff to demonstrate that the

> (1) [plaintiff] was a member of a limited and specifically definable group; (2) Defendants' conduct put [plaintiff] at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking.

Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995).

51. Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1139, 1189 (2005).

52. David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 REV. LITIG. 357, 358 (2001).

53. *Compare* Butera v. District of Columbia, 235 F.3d 637, 652 (D.C. Cir. 2001) (finding deliberate indifference sufficient to establish state-created danger claim in case involving death of police informant), *with Kneipp*, 95 F.3d at 1208 (finding "willful disregard" sufficient to establish state-created danger claim in case where police abandoned drunk passenger who later sustained injuries from cold). As a whole, the courts that have adopted the state-created danger theory generally require a plaintiff to show that the government official acted, at a minimum, with deliberate indifference to the plaintiff. McClendon v. City of Columbia, 305 F.3d 314, 326 (5th Cir. 2002).

54. See *infra* notes 55-68 and accompanying text for more on these rulings. *See also* Collins v. City of Harker Heights, 503 U.S. 115, 125-30 (1992) (discussing and rejecting petitioner's claim that deliberate indifference was sufficient to establish substantive due process violation where city's failure to adequately train sanitation worker about workplace hazards led to employee's death).

For example, in *County of Sacramento v. Lewis*,[55] the Court addressed whether police violated the Due Process Clause when they hit and killed an individual in a high-speed automobile chase while driving in a manner that showed deliberate or reckless disregard for human life.[56] The Court recognized that substantive due process protections limit government action in both its legislative and executive capacities; however, the criteria used to determine whether a due process violation occurs differs depending on whether legislation or a specific act of a government officer is at issue.[57] The Court determined that "in a due process challenge to *executive* action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[58] Moreover, the executive official must act with a particular degree of culpability or fault for his actions to shock the conscience.[59] The Court compared the constitutional requirement to tort law's spectrum of culpability with negligently inflicted harm at one end of the spectrum and intentionally inflicted harm at the other.[60] Negligently inflicted harm, the Court stated, could never amount to a due process violation.[61] Whether government actions that fall between negligently and intentionally inflicted harm rise to the conscience-shocking level varies depending on the particular circumstances of the case.[62]

Therefore, the *Lewis* Court recognized that deliberate indifference is sufficient to satisfy the culpability requirement for substantive due process claims in a situation where prison officials were deliberately indifferent to the medical needs of a prisoner awaiting trial.[63] Nevertheless, the Court cautioned that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another . . . [a] substantive due process [claim] demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking."[64] In a high-speed automobile chase, the Court emphasized that police officers are faced with decisive, instantaneous decisions with no opportunity for reflection.[65] Whereas a prison official's repeated indifference to the obvious medical needs of a prisoner may shock the conscience, a higher degree of culpability was required in a pursuit case.[66] Accordingly, the Court held that injuries inflicted by the police in high-speed chases with no intent to harm did not shock the conscience, and therefore, did not violate substantive due

55. 523 U.S. 833 (1998).

56. *Lewis*, 523 U.S. at 836.

57. *Id.* at 845-46.

58. *Id.* at 847-48 & n.8 (emphasis added).

59. *Id.* at 848-50.

60. *Id.* at 848-49.

61. *Lewis*, 523 U.S. at 849 (citing Daniels v. Williams, 474 U.S. 327, 328 (1986)).

62. *Id.* at 848-50.

63. *Id.* at 850 (citing Barrie v. Grand County, 119 F.3d 862, 867 (10th Cir. 1997); Weyant v. Okst, 101 F.3d 845, 856 (2d Cir. 1996)).

64. *Id.*

65. *Id.* at 853.

66. *Lewis*, 523 U.S. at 853.

process protections.[67] Many of the circuits have incorporated *Lewis*'s culpability and "shocks the conscience" requirements into their analysis of state-created danger claims.[68]

In short, the state-created danger theory is a viable doctrine in most jurisdictions. Generally, a plaintiff must prove the following elements to establish a claim under the state-created danger theory:

> (1) Did state officials exercise authority or power; (2) in such a way that they put someone in a *worse* position than they would otherwise have occupied; (3) risking and causing a significant harm; (4) with a degree of culpability (which might be deliberate indifference) amounting to conscience-shocking behavior in the factual context?[69]

The executive official must act with a degree of culpability greater than negligence in order to violate an individual's substantive due process rights; however, the precise level of requisite fault varies depending on the particular circumstances of the case.

B. *State-Created Danger Doctrine in Deportation Cases*

The Constitution provides aliens who are physically present in the United States the due process protections of the Fifth and Fourteenth Amendments, regardless of whether their presence is lawful, unlawful, temporary, or permanent.[70] These aliens possess protected liberty interests, including the right to be free from torture and death.[71] Several aliens, who have worked as government informants, have invoked the state-created danger doctrine in an attempt to prevent the federal government from deporting them to their native countries, where they face an imminent risk of death or torture.

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67. *Id.* at 854.

68. *See, e.g.*, Ewolski v. City of Brunswick, 287 F.3d 492, 510 (6th Cir. 2002) (stating that plaintiff must show government's conduct was "so 'egregious' that it can be said to be 'arbitrary in the constitutional sense'" to show that government acted with requisite degree of culpability to establish state-created danger claim (quoting *Lewis*, 523 U.S. at 846)); Butera v. District of Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001) ("To assert a substantive due process violation, however, the plaintiff must also show that the District of Columbia's conduct was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" (quoting *Lewis*, 523 U.S. at 847 n.8)).

69. Oren, *supra* note 51, at 1189.

70. Zadvydas v. Davis, 533 U.S. 678, 693 (2001); *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Whatever his status under immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("The Fifth Amendment, as well as the Fourteenth Amendment, protects [aliens] from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." (citations omitted)).

71. *See* Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 67 n.20 (D. Mass. 2005), *rev'd sub nom.* Enwonwu v. Gonzales, 438 F.3d 22 (1st Cir. 2006) (recognizing interest in being free from torture is constitutionally protected).

1. Courts that Have Found Deportation Proceedings Violate the State-Created Danger Theory

Several courts have found that the removal of aliens, who have placed their lives at risk by acting as informants for the federal government, violates the aliens' substantive due process rights under the state-created danger theory. In *Builes v. Nye*,[72] authorities arrested Jorge Yamel Builes, a lawful permanent resident and Columbia native, for his involvement in an international drug-trafficking cartel.[73] Builes agreed to cooperate with Miami federal prosecutors and testify against other members of the cartel.[74] One of the cartel members threatened Builes and his family if he testified, but despite the threat, Builes testified and helped secure the defendants' convictions.[75] At Builes's sentencing hearing, the prosecutor recommended a downward departure on the basis of Builes's cooperation.[76]

Despite Builes's assistance, the federal government ordered Builes's removal after he served a thirty-three month prison sentence.[77] After exhausting his administrative remedies, Builes filed a habeas petition, alleging that his deportation to Columbia would violate his substantive due process rights under the state-created danger theory.[78] The U.S. District Court for the Middle District of Pennsylvania applied the Third Circuit's four-part test, announced in *Kneipp v. Tedder*,[79] and found that (1) the harm to Builes was foreseeable, (2) the Immigration and Naturalization Service ("INS") officials acted in deliberate disregard to the risk of harm to Builes's life, (3) the INS had a relationship with Builes because it held him in its custody, and (4) returning Builes to Columbia would create an opportunity for others to kill Builes that otherwise would not have existed.[80] As a result, the court prohibited the government from deporting Builes under the state-created danger exception.[81]

The United States District Court for the District of Arizona granted the same relief to a permanent resident in *Rosciano v. Sonchik*.[82] Maria Rosciano, a Columbia native, had family ties to a major Columbian drug lord known as "El Indio."[83] In 1996, the FBI sent confidential informants to "befriend" Rosciano in Arizona in an effort to learn El Indio's identity.[84] The FBI's informants convinced Rosciano to help them purchase heroin, and the FBI arrested her

72. 239 F. Supp. 2d 518, 520 (M.D. Pa. 2003).

73. *Builes*, 239 F. Supp. 2d at 520-21.

74. *Id.* at 521.

75. *Id.*

76. *Id.*

77. *Id.* at 521.

78. *Builes*, 239 F. Supp. 2d at 523, 525-26.

79. 95 F.3d 1199, 1208 (3d Cir. 1996).

80. *Builes*, 239 F. Supp. 2d at 526.

81. *Id.*

82. No. CIV-01-472-PHX-FJM, 2002 U.S. Dist. LEXIS 25419 (D. Ariz. Sept. 9, 2002).

83. *Rosciano*, 2002 U.S. Dist. LEXIS 25419, at *2.

84. *Id.*

shortly after the transaction.[85] The authorities urged Rosciano to help them learn the identity of El Indio, and Rosciano cooperated by contacting her sister in Columbia to acquire the information.[86]

Rosciano received a shorter sentence for her cooperation, and federal prosecutors told her it was unlikely she would be deported.[87] Nevertheless, the INS instituted removal proceedings after Rosciano completed her sentence.[88] Rosciano argued that the deportation was unconstitutional because it would violate her substantive due process rights under the state-created danger theory. At Rosciano's habeas trial, the government conceded that Rosciano faced a grave risk of death as punishment for helping authorities learn El Indio's identity.[89] The district court also found that the government played a role in creating the risk of death by running a sting operation that would place Rosciano in a position to cooperate.[90] Moreover, the court found that authorities had represented to Rosciano her deportation was unlikely but took no active steps to ensure she would not be removed.[91] Finally, the court found that the government actively attempted to deport Rosciano, despite a known danger to her life.[92] On the basis of these facts, the court found that removal would place Rosciano in a state-created danger and refused to allow the INS to deport her.[93]

2. Courts that Have Applied the State-Created Danger Doctrine but Found Insufficient Facts to Find a Constitutional Violation

Some courts have examined aliens' substantive due process claims but found insufficient facts to declare a violation of the state-created danger exception. In *Guerra v. Gonzales*,[94] authorities arrested Carlos Arturo Guerra, a Columbia native residing in the United States as a lawful permanent resident, for his involvement in a Columbian drug-trafficking cartel.[95] In 1999, he pleaded guilty to conspiracy to possess with intent to distribute cocaine, and he agreed to testify against other individuals involved in the cartel in exchange for leniency in his sentencing and immunity from further prosecution.[96] After Guerra agreed to cooperate, Guerra's wife received a threatening phone call, and federal authorities warned Guerra of threats made against him by members of the cartel.[97] After serving a prison sentence, Guerra received a removal notice from

85. *Id.* at *2-3.
86. *Id.* at *3.
87. *Id.* at *3-4.
88. *Rosciano*, 2002 U.S. Dist. LEXIS 25419, at *4.
89. *Id.* at *8.
90. *Id.* at *12-13.
91. *Id.*
92. *Id.* at *13.
93. *Rosciano*, 2002 U.S. Dist. LEXIS 25419, at *16.
94. 138 F. App'x 697 (5th Cir. 2005).
95. *Guerra*, 138 F. App'x at 698.
96. *Id.*
97. *Id.* at 698-99.

the Department of Homeland Security, stating that he was removable as an alien convicted of a controlled substance offense.[98]

After exhausting his administrative remedies, Guerra sought relief in the Fifth Circuit, arguing that his removal would deprive him of his substantive due process rights under the state-created danger exception.[99] The Fifth Circuit noted that neither it nor the Supreme Court had applied the state-created danger doctrine in an immigration case.[100] Assuming the doctrine was viable in the immigration context, the court rejected Guerra's claim on the basis that Guerra had failed to establish the threshold requirement that a danger existed.[101] The court found that a threatening telephone call and threats made in court by the individuals against whom Guerra testified, which were made five or six years earlier,[102] were the only definitive evidence of danger to Guerra's life.[103] The court found no evidence of continuing threats or other danger that awaited Guerra in Columbia.[104] Accordingly, the Fifth Circuit rejected Guerra's argument that the deportation would violate his substantive due process rights.[105] Although the Fifth Circuit ultimately denied Guerra's claim, the ruling at least entertained the possibility that the state-created danger theory could be applied in the immigration context, assuming the theory is a viable doctrine in the Fifth Circuit.[106]

3. Courts that Have Rejected the Application of the State-Created Danger Theory to Deportation Proceedings

Unlike the Fifth Circuit, the Third Circuit did not even reach the issue of whether an actual danger existed. In *Kamara v. Attorney General*,[107] the Third Circuit broadly held that the state-created danger exception did not apply to immigration cases. In 1982, Mohamed Kamara, a native of Sierra Leone, entered the United States illegally on a nonimmigrant transit visa while traveling from Cuba to Sierra Leone.[108] Kamara eventually settled in a crime-infested area in

98. *Id.* at 698.

99. *Id.* The court found that it had jurisdiction to review a constitutional challenge to an alien's removal. *Guerra*, 138 F. App'x at 699.

100. *Id.*

101. *Id.*

102. *Id.* at 700.

103. *Id.* at 699-700.

104. *Guerra*, 138 F. App'x at 700.

105. *Id.*

106. *See* Lawson v. Gerlinski, 332 F. Supp. 2d 735, 743 (M.D. Pa. 2004) (remanding case for evidentiary hearing to determine risk of bodily harm or death to alien in alien's habeas petition, claiming that his removal to Jamaica would violate his substantive due process under state-created danger exception); Momennia v. Estrada, 268 F. Supp. 2d 679, 687-88 (N.D. Tex. 2003) (rejecting alien-informant's claim that deportation proceedings violated his due process under state-created danger claim because alien voluntarily assisted FBI and government was unaware of risk of danger to alien).

107. 420 F.3d 202 (3d Cir. 2005).

108. *Kamara*, 420 F.3d at 206. In the early 1980s, Kamara was studying medicine in Cuba on a grant by the Sierra Leone government. *Id.* He "and other . . . students stormed the Sierra Leone

New York.[109] In the late 1990s, an undercover police officer approached Kamara and offered him ten dollars to help him purchase cocaine.[110] Police arrested Kamara after he complied with the request, and a trial court convicted Kamara in 1999 for attempted sale of a controlled substance.[111]

The federal government sought to remove Kamara after he completed a six-month sentence.[112] Kamara petitioned the U.S. District Court for the Middle District of Pennsylvania for habeas relief, providing ample evidence that the Sierra Leone government and a prominent rebel group were committing numerous human rights violations in the country.[113] He argued that he would be singled out by either entity because of his long absence from the county and because he belonged to a small minority of elites.[114] The district court determined that deporting Kamara would violate his substantive due process rights under the state-created danger theory, but the Department of Homeland Security appealed the district court's decision to the court of appeals.[115]

The Third Circuit recognized that it had previously adopted the state-created danger theory in *Kneipp v. Tedder*; however, it noted that none of the circuits had extended the doctrine to immigration cases.[116] The Third Circuit also noted that the Supreme Court repeatedly made clear that Congress exercises nearly complete legislative power over the admission and deportation of aliens.[117] Relying on the Supreme Court's decisions in *Fiallo v. Bell*,[118] *Kleindienst v. Mandel*,[119] and *Galvan v. Press*,[120] the Third Circuit broadly held that the state-created danger exception had no place in immigration jurisprudence because extending the doctrine to "final orders of removal would impermissibly tread upon the Congress' virtually exclusive domain over immigration, and would unduly expand the contours of our immigration statutes and regulations."[121] Accordingly, the Third Circuit reversed the district court's

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embassy in Cuba, . . . accosted the Sierra Leonian Ambassador, and publicly accused the Sierra Leone government of corruption" after "the Sierra Leone government failed to provide the financial support it . . . promised." *Id.* At the direction of the Sierra Leone government, Kamara was expelled from Cuba and forced to return to Sierra Leone. *Id.* Kamara entered the United States, while in transit through Miami, Florida, by leaving the airport. *Id.*

109. *Kamara*, 420 F.3d at 206.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 207-09.

114. *Kamara*, 420 F.3d at 208.

115. *Id.* at 208-09.

116. *Id.* at 216-17.

117. *Id.*

118. 430 U.S. 787 (1977).

119. 408 U.S. 753 (1972).

120. 347 U.S. 522 (1954).

121. *Kamara*, 420 F.3d at 217-18; *see also* Edwards v. INS, No. 03-286, 2003 U.S. Dist. LEXIS 15572, at *15 (E.D. Pa. Aug. 21, 2003) ("[T]here is no indication . . . appellate courts that established the state created danger doctrine intended the doctrine to be a defense to removal or deportation. . . . Allowing removal to be stayed based on this doctrine would conflict with . . . immigration statutes . . .

decision and rejected the argument that deportation would violate Kamara's substantive due process rights.[122]

C. *The Plenary Power Doctrine*

The Third Circuit based its ruling in *Kamara* on the plenary power doctrine, under which courts have traditionally deferred to Congress's judgment about the constitutionality of immigration laws.[123] The Supreme Court has "recognized [that] the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[124] Pursuant to the plenary power doctrine, many courts have held that Congress's immigration laws,[125] which govern the admission or deportation of aliens, are largely insulated from various constitutional challenges, even when those laws threaten an alien's individual rights and liberties.[126] Courts extend such deference not only to congressional legislation, but also executive actions concerning the regulation of immigration.[127] As one commentator noted, "In an undeviating line of cases spanning almost one hundred years, the [Supreme] Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy."[128]

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and would be an extension of the concept of substantive due process that has not previously been accepted by the United States Supreme Court or any court of appeals.").

122. *Kamara*, 420 F.3d at 217, 219; *see also* Enwonwu v. Gonzales, 438 F.3d 22, 29-30 (1st Cir. 2006) (holding that state-created danger claim is not viable in deportation context).

123. Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 382 (2004).

124. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953).

125. By the term "immigration law," I refer to laws governing the admission and expulsion of aliens, a definition proposed by Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256 (1984). Federal laws regulating the admission and deportation of aliens must be distinguished from laws governing the states' rights and obligations to aliens, such as welfare and public education. *Id.* at 256. The former laws have historically been free from judicial scrutiny. State laws that classify on the basis of alienage, however, have been subjected to heightened levels of scrutiny. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that state violated Equal Protection Clause by imposing different eligibility requirements on resident aliens than U.S. citizens for state's welfare program).

126. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 756, 769-70 (1972) (rejecting respondents' claim that government's refusal to admit socialist scholar violated their First Amendment rights); Galvan v. Press, 347 U.S. 522, 529 (1954) (rejecting alien's argument that Internal Security Act, which authorized deportation of any alien who has been a member of Communist Party, violated Due Process Clause); *Shaughnessy*, 345 U.S. at 215-16 (holding that federal government's exclusion of alien from United States and detention at Ellis Island without hearing did not violate Due Process Clause); Harisiades v. Shaughnessy, 342 U.S. 580, 588, 596 (1952) (finding that Alien Registration Act, which authorized deportation of any legal resident-alien because of membership in Communist Party, did not violate Due Process Clause).

127. Cox, *supra* note 123, at 381 (noting that plenary power doctrine applies to legislative and executive branches of federal government with "little discernible difference").

128. Legomsky, *supra* note 125, at 255.

The Court first embraced the plenary power doctrine during a period of anti-Asian immigration at the end of the nineteenth century.[129] Before the Civil War, the federal government largely encouraged immigration and left it unregulated.[130] Congress enacted the first immigration act in 1875 in response to growing hostility toward Chinese laborers.[131] The Court adopted the plenary power doctrine in a series of cases that challenged the constitutionality of these statutes.

In *Chae Chan Ping v. United States (Chinese Exclusion Case)*,[132] a Chinese laborer challenged an 1882 Act that prohibited him from entering the United States when he sought reentry after briefly visiting China.[133] The petitioner argued that the law violated existing treaties between the United States and China and challenged Congress's authority to enact the law.[134] Addressing the second point, the Court held that "[t]hose laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy."[135] The Court noted that Congress's authority to exclude aliens was a power incident to the sovereignty of the United States.[136] Such a power could neither be "granted away" nor restrained.[137]

The Court reaffirmed the doctrine three years later in *Ekiu v. United States*,[138] in which a Japanese citizen challenged an act that authorized an immigration inspector to exclude her from the United States and detain her on suspicion that she was likely to become a "public charge."[139] The Court upheld the validity of the act, finding that:

> [E]very sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions . . . . In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.[140]

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129. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 5-6 (1984) (noting that Chinese immigration "triggered the explosive passions of racial and religious prejudice, fears of revolutionary contagion, class conflict, and other deep-seated animosities," resulting in perceived threat to American values and pressure to limit immigration and aliens' rights).

130. Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 855 (1987).

131. *Id.* at 855-56.

132. 130 U.S. 581 (1889).

133. *Chinese Exclusion Case*, 130 U.S. at 589.

134. *Id.*

135. *Id.* at 603.

136. *Id.* at 609.

137. *Id.*

138. 142 U.S. 651 (1892).

139. *Eiku*, 142 U.S. at 661-62.

140. *Id.* at 659.

Finally, in *Fong Yue Ting v. United States*,[141] the Court extended the doctrine to apply not only to the exclusion of aliens, but also to the expulsion or deportation of aliens. The Court reasoned that the power to exclude was an inherent power incident to the United States' sovereignty and self-preservation.[142] The Court held:

> The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds [as the *Chinese Exclusion Case*], and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.[143]

According to Professor Legomsky, the *Chinese Exclusion Case*, *Ekiu*, and *Fong Yue Ting* may be viewed as the "basic building blocks" of the plenary power doctrine.[144] He explains that the "*Chinese Exclusion Case* recognized an inherent federal power to exclude noncitizens; *Ekiu* appeared to reject due process limits on the exercise of that power, and *Fong Yue Ting* extended the principles of both cases from exclusion to deportation."[145] These three cases originated the plenary power doctrine and continue to influence immigration law today.[146]

In the twentieth century, the Supreme Court continued to rely on the plenary power doctrine to abstain from its judicial function and refuse to apply constitutional limits to Congress's immigration powers. For example, in *Fiallo*, the Court rejected an equal protection challenge to a statute that gave preferential immigration status to the alien children of unwed mothers who were citizens or lawful permanent residents but did not extend such treatment to the children of unwed fathers.[147] In reaching this conclusion, the Court noted that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."[148] The Court further noted that "[o]ur cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"[149]

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141. 149 U.S. 698 (1893).

142. *Fong Yue Ting*, 149 U.S. at 705.

143. *Id.* at 707.

144. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 50 (3d ed. 2002).

145. *Id.*

146. *See, e.g.*, Detroit Free Press v. Ashcroft, 303 F.3d 681, 682-83 (6th Cir. 2002) (citing *Chinese Exclusion Case* to support statement that Congress and executive enjoy nearly unrestrained power to control nation's borders).

147. Fiallo v. Bell, 430 U.S. 787, 799-800 (1977).

148. *Id.* at 792 (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)); *accord* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting same passage). The *Fiallo* Court did qualify its opinion, however, by disclaiming the suggestion that "the Government's power in [immigration] is *never* subject to judicial review." *Fiallo*, 430 U.S. at 795 n.6 (emphasis added). Nevertheless, Congress's determinations concerning immigration matters "are subject only to limited judicial review." *Id.*

149. *Id.* at 792 (quoting Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206, 210 (1953)).

The plenary power cases also indicate the Court's strong reluctance to overturn its prior decisions.[150] In *Galvan v. Press*,[151] the Court addressed whether a law that authorized the deportation of any alien who had once been a member of the Communist Party violated the Constitution.[152] In upholding the statute, the Court wrote:

> In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . .
>
> But the slate is not clean.[153]

Thus, the plenary power cases of the late nineteenth and early twentieth centuries lend support to the court of appeals' assertions in *Kamara* and *Enwonwu v. Chertoff*[154] that courts have little or no ability to review the constitutionality of deportation proceedings.

D. *Modern Erosion of the Plenary Power Doctrine*

In recent years, the federal judiciary has demonstrated an increased willingness to subject immigration laws to some form of constitutional review. Although the Supreme Court has not expressly abrogated the plenary power doctrine, several cases suggest that its force has been greatly diminished.

In *Mathews v. Diaz*,[155] the Court addressed an equal protection challenge to a federal law that denied Medicare supplemental medical insurance to aliens unless they had been admitted as permanent residents and resided in the United States for at least five years.[156] The Court had previously struck down similar residency requirements for state welfare benefits in *Graham v. Richardson*,[157] finding that the imposition of different eligibility standards on aliens violated the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, the Court upheld the unequal requirements for *federal* assistance in *Diaz*.[158] The Court's reasoning sometimes mirrored its arguments in earlier plenary power cases. Unlike the earlier plenary power cases, however, the *Diaz* Court seemed to

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150. Legomsky has examined the role of stare decisis in the plenary power cases. Legomsky, *supra* note 125, at 285-86. He observed that the "more support the plenary power doctrine accumulated, the more entrenched it became." *Id.* at 285; *see also* Henkin, *supra* note 130, at 861 (asserting that Supreme Court felt bound by plenary power doctrine when it decided *Galvan v. Press*, 347 U.S. 522 (1954)).

151. 347 U.S. 522 (1954).

152. *Galvan*, 347 U.S. at 523-25.

153. *Id.* at 530-31 (citations omitted).

154. 376 F. Supp. 2d 42 (D. Mass. 2005), *rev'd sub nom.* Enwonwu v. Gonzales, 438 F.2d 22 (1st Cir. 2006).

155. 426 U.S. 67 (1976).

156. *Diaz*, 426 U.S. at 69-70.

157. 403 U.S. 365 (1971).

158. *Diaz*, 426 U.S. at 86-87.

subject the federal immigration law to rational basis review.[159] The Court found it "unquestionably reasonable" for Congress to base an alien's eligibility for federal benefits on his immigration status and length of residency.[160] Because the eligibility requirements were not "wholly irrational," the Court held that the law did not violate the alien's equal protection or due process rights.[161]

The Court also used a rationality standard in *Reno v. Flores*,[162] in which the Court addressed whether an immigration statute violated the substantive due process rights of a group of juvenile aliens. The statute authorized the detention of the juvenile aliens, who were arrested on suspicion of being deportable, pending their deportation proceedings.[163] A group of alien-juveniles alleged that the detention deprived them of a fundamental right to be free of physical restraint.[164] The Court ultimately upheld the validity of the statute; however, the Court subjected the statute to a rational basis test.[165] After citing the plenary power cases, the Court wrote "the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose."[166] The Court found that this standard had been met because the Attorney General demonstrated that the detention was required to protect the welfare of the juveniles.[167] Although the Court ultimately affirmed the immigration statutes at issue in *Mathews* and *Flores*, these cases marked some of the first occasions in which the Court imposed a rational basis standard, rather than unchecked judicial deference, to review a constitutional challenge to an immigration statute.

The Court suggested that an even higher standard of review might be applied to immigration statutes in *Zadvydas v. Davis*.[168] In that case, the Court addressed whether an immigration statute authorized the Attorney General to indefinitely detain a group of aliens after their removal had been ordered. The petitioners argued that an *indefinite* detention violated their substantive due process rights under the Fifth Amendment.[169] The Court did not directly address the merits of this claim, choosing to narrowly interpret the statute to contain a requirement that the detention only last for a period "reasonably necessary" to

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159. *See* Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 602-04 (1994) (examining Court's use of rationality standard in *Diaz*).

160. *Diaz*, 426 U.S. at 82-83.

161. *Id.* at 83.

162. 507 U.S. 292 (1993).

163. *Flores*, 507 U.S. at 294-95.

164. *Id.* at 299.

165. *Id.* at 303; *see also* Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 931 (1995) (noting Court's use of rationality standard in *Flores*).

166. *Flores*, 507 U.S. at 306.

167. *Id.* at 312.

168. 533 U.S. 678 (2001); *see also* Cox, *supra* note 123, at 386 (citing *Zadvydas* as evidence that that Supreme Court has recently hinted at "potential demise" of plenary power doctrine).

169. *Zadvydas*, 533 U.S. at 682.

secure the alien's removal.[170] The Court sought to interpret the statute in a way that would avoid the need to address a "serious constitutional threat."[171]

Nevertheless, the *Zadvydas* decision provides valuable insight to the Court's understanding of the plenary power doctrine. Significantly, the Court viewed the indefinite detention of aliens as a "serious constitutional threat." Under a traditional view of the plenary power doctrine, a constitutional challenge to an immigration statute would be categorically dismissed. In addressing the government's argument that the plenary power doctrine authorized the Attorney General to indefinitely detain the aliens, the Court flatly stated that the plenary "power is subject to *important* constitutional limitations."[172] Finally, the Court recognized the constitutional concerns raised by authorizing an administrative agency to indefinitely detain an alien. The Court wrote that "the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.'"[173]

The Court decided *Nguyen v. INS*[174] the same year it decided *Zadvydas*. In *Nguyen*, the Court addressed an equal protection challenge to an immigration statute governing the acquisition of citizenship by a foreign-born child when the child's parents are unmarried and only one of the child's parents is a United States citizen.[175] The statute provided different requirements for the child's acquisition of United States citizenship depending on whether the citizen-parent was the child's mother or father.[176] The Court upheld the validity of the immigration law;[177] however, it did not do so by relying on the plenary power doctrine.[178] Rather, the Court determined that the statute withstood intermediate scrutiny, the traditional level of equal protection scrutiny subjected to gender classifications.[179] Since the statute withstood intermediate scrutiny, the Court did not need to "decide whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power."[180] Although the Court did not repudiate the plenary power doctrine, the Court's reasoning in *Nguyen* demonstrated a significant departure from its reasoning in earlier decisions.[181]

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170. *Id.*

171. *Id.* at 699.

172. *Id.* at 695 (emphasis added).

173. *Id.* at 692 (quoting Superintendent, Mass. Corr. Inst. at Walpole v. Hill, 472 U.S. 445, 450 (1985)).

174. 533 U.S. 53 (2001).

175. *Nguyen*, 533 U.S. at 56-57.

176. *Id.*

177. *Id.* at 73.

178. *Id.* at 61-62.

179. *Id.* at 60-71.

180. *Nguyen*, 533 U.S. at 61.

181. See *supra* Part II.B and accompanying text for a discussion of the Court's previous reasoning.

In response to these decisions, lower federal courts have begun to entertain various constitutional challenges to immigration statutes. For example, in *Kwai Fun Wong v. United States*[182] an unadmitted alien alleged that her equal protection rights were violated at an INS detention facility.[183] The Ninth Circuit refused to dismiss her claims based on the plenary power doctrine.[184] The Ninth Circuit noted that "[a]lthough 'Congress has "plenary power" to create immigration law, and . . . the judicial branch must defer to legislative and executive decision making in that area, . . . that power is subject to important constitutional limitations.'"[185]

In *New Jersey Media Group v. Ashcroft*,[186] the Third Circuit refused to apply the plenary power doctrine to deny a newspaper's claim that it had a First Amendment right to access closed deportation hearings following the September 11, 2001 attacks. The court held that the newspaper did not have a First Amendment right to access the deportation proceedings;[187] however, the court made clear that its ruling was not based on the plenary power doctrine.[188] Notwithstanding the federal government's plenary power over immigration, the Third Circuit stated that it granted *no* deference to the executive over matters concerning constitutional liberties.[189]

These cases demonstrate that federal courts no longer apply the plenary power doctrine with the same force as they did in previous years.[190] Although the Court has not expressly overruled the early plenary power precedents,[191] recent cases clearly indicate a growing tendency by the federal judiciary to subject immigration statutes to some form of constitutional review.

182. 373 F.3d 952 (9th Cir. 2004).

183. *Kwai Fun Wong*, 373 F.3d at 959.

184. *Id.* at 974-75.

185. *Id.* at 974 (quoting Zadvydas v. Davis, 533 U.S. 678, 695 (2001)).

186. 308 F.3d 198 (3d Cir. 2002).

187. *N.J. Media Group*, 308 F.3d at 220.

188. *Id.* at 219 n.15.

189. *Id.*

190. *See* Rosales-Garcia v. Holland, 322 F.3d 386, 410 (6th Cir. 2003) (finding that Fifth Amendment protections apply to excludable aliens and prohibit indefinite detention of aliens who cannot be removed); Detroit Free Press v. Ashcroft, 303 F.3d 681, 692 (6th Cir. 2002) (noting importance of providing aliens with strong procedural protections when constitutional rights are involved); Ashley v. Ridge, 288 F. Supp. 2d 662, 670, 675 (D.N.J. 2003) (noting that immigration powers of Congress and executive are subject to important constitutional limitations and holding that indefinite detention of alien violated his substantive due process rights). Sympathetic judges have also found other ways to strike the government's immigration policies. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560-61 (1990) (discussing how courts have sometimes reversed government immigration decisions through statutory interpretation rather than constitutional grounds).

191. *See* Legomsky, *supra* note 165, at 934 (noting that U.S. Supreme Court has not expressly overruled its plenary power precedents).

III. DISCUSSION

A. *Rethinking the Plenary Power Doctrine*

The plenary power doctrine has long been considered a legal oddity among scholars.[192] As one commentator observed:

> Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system. . . . [I]mmigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir.[193]

Numerous scholars have predicted and advocated for the abandonment of the plenary power doctrine.[194] The plenary power doctrine is wholly inconsistent with the Court's commitment to the protection of constitutional rights and should be abandoned.[195]

The power to regulate immigration is not one of Congress's enumerated powers.[196] Several provisions of the Constitution, including the Commerce Clause,[197] the Migration or Importation Clause,[198] the Naturalization Clause,[199]

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192. *See, e.g.*, Legomsky, *supra* note 125, at 255 (arguing that plenary power doctrine is derived from misconstrued doctrinal theory and range of external forces); Schuck, *supra* note 129, at 1 ("Immigration has long been a maverick, a wild card, in our public law.").

193. Schuck, *supra* note 129, at 1.

194. *See, e.g.*, Cox, *supra* note 123, at 378 ("[T]he [plenary] power's contours and underpinnings are the subject of substantial doctrinal confusion and extended academic criticism."); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 771 (1996) ("In the end, We the People must square immigration policy with cherished constitutional values."); *see also* Carrasco, *supra* note 159, at 641 (stating author's hope that constitutional protections will be extended to noncitizens); Henkin, *supra* note 130, at 863 ("The power of Congress to control immigration and to regulate alienage and naturalization is plenary. But even plenary power is subject to constitutional restraints."); Schuck, *supra* note 129, at 73 ("The courts' almost complete deference to Congress and the immigration authorities . . . is beginning to give way to a new understanding and rhetoric of judicial role . . . ."); Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 48 (1996) ("The Court has taken the worst possible course as an institution of final authority in constitutional interpretation, by neither overruling the plenary power doctrine, nor reaffirming it with any analysis."); Tamara J. Conrad, Comment, *The Constitutional Rights of Excludable Aliens: History Provides a Refuge*, 61 WASH. L. REV. 1449, 1450 (1986) (proposing that constitutional limits be placed on government's authority over immigration); Philip Monrad, Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CAL. L. REV. 831, 836 (1989) (challenging validity of plenary power doctrine and proposing First Amendment exception to doctrine).

195. *See* Henkin, *supra* note 130, at 886 ("The power of the United States to control immigration, whatever the source of that power, is subject to the Constitution, which includes due process protections for life, liberty, and property and provides for the equal protection of the laws.").

196. *See* LEGOMSKY, *supra* note 144, at 10 (observing that "nowhere does the Constitution expressly authorize the federal government to regulate immigration"); Henkin, *supra* note 130, at 854-58 (arguing that Congress's power to regulate immigration is unenumerated power).

197. U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress to "regulate Commerce with foreign Nations").

the War Clause,[200] and the Necessary and Proper Clause[201] provide some textual support for Congress's immigration power.[202] Nevertheless, scholars have not identified a single dispositive source of Congress's immigration power in the Constitution, and the Supreme Court has struggled with the issue since the mid-nineteenth century.[203] As *Chae Chan Ping v. United States (Chinese Exclusion Case)*[204] indicates, the Court has often relied on extraconstitutional concepts, such as sovereignty, to justify the existence of the plenary power doctrine.[205] While few seriously challenge Congress's authority to regulate immigration, neither the Constitution nor these extraconstitutional concepts justify granting Congress unchecked power to regulate immigration.[206]

The Supreme Court has frequently relied on the concept of sovereignty to exempt Congress's regulation of immigration from constitutional limitations.[207] It has been argued that sovereignty inherently includes the power of nations to regulate the exclusion and expulsion of aliens.[208] If a sovereign nation could not exclude aliens, the independence of that nation would be compromised.[209] Thus, the Court has reasoned that the federal government must exercise the power to regulate immigration in order to maintain absolute independence and security within its borders.[210] Nonetheless, by relying primarily on the extraconstitutional concept of sovereignty to support the existence of the plenary power, rather than the Constitution, this argument undermines the principle that all of the federal government's powers must be enumerated or fairly implied in the Constitution.[211]

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198. *Id.* art. I, § 9, cl. 1 (prohibiting Congress from abolishing importation or migration of slaves before 1808).

199. *Id.* art. I, § 8, cl. 4 (authorizing Congress to "establish an uniform Rule of Naturalization").

200. *Id.* art. I, § 8, cl. 11 (providing Congress with power to "declare war").

201. *Id.* art. I, § 8, cl. 18 (granting Congress the power necessary and proper to execute its duties).

202. *See* LEGOMSKY, *supra* note 144, at 10-13 (reviewing possible sources of Congress's immigration power within Constitution).

203. *Id.* at 10; *see also* Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad at Our Gates*, 27 WM. & MARY L. REV. 11, 30 (1985) (reasoning that immigration jurisprudence depends "on the constitution as a whole, its political theory, and its status and character in our polity" and not on the particular text of the constitution).

204. 130 U.S. 581 (1889).

205. See *supra* notes 142-54 for more about the plenary power doctrine and extraconstitutional concepts.

206. *See* Henkin, *supra* note 130, at 861 (stating that plenary power doctrine is not required by fact that Congress's power to control immigration is "unenumerated, inherent in sovereignty, and extraconstitutional").

207. See *supra* notes 132-54 and accompanying text for examples of Congress's use of sovereignty in the immigration context.

208. Cox, *supra* note 123, at 384.

209. Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893).

210. *Id.*

211. Cox, *supra* note 123, at 384; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 364 (1819) (noting that U.S. government must confine itself to "means [as] are specifically enumerated in the constitution, or such auxiliary means as are naturally connected with the specific means").

Moreover, while the regulation of immigration implicates issues of national security, the concept of sovereignty alone does not justify granting Congress *unchecked* deference to establish the nation's immigration policies. Scholars have frequently observed that "the 'plenary power doctrine' is an extraordinary doctrine of judicial abdication which has few, if any, analogues in other fields of public law."[212] The *Chinese Exclusion Case* was decided in an era before the Bill of Rights became "our national hallmark and the principal justification and preoccupation of judicial review."[213] Since that era, the Court has held that the Bill of Rights imposes limits on virtually all of the government's legislative and executive powers.[214] Many of the federal government's powers could be described as "plenary"; yet, even plenary power is subject to the restraints of the Constitution.[215] The Court has simply failed to articulate any reason why the government's authority to regulate immigration should be treated differently.[216]

Courts have advanced several other theories to support the existence of the plenary power doctrine. For example, courts have sometimes argued that the regulation of immigration involves "political questions" best addressed by the political branches of government.[217] Other courts maintain that the plenary power doctrine is justified by the principles of stare decisis.[218] An examination of each of these rationales is beyond the scope of this Comment. For the purposes of this discussion, it is sufficient to simply note that each of these arguments have been thoroughly refuted by legal scholars[219] and that the plenary power doctrine has been the subject of continued academic criticism for over two decades.[220]

More importantly, decisions such as *Mathews v. Diaz*,[221] *Reno v. Flores*,[222] *Zadvydas v. Davis*,[223] and *Nguyen v. INS*[224] indicate that the U.S. Supreme Court and lower federal courts have already taken up scholars' calls to abandon the plenary power doctrine. Clearly, courts can no longer extend unchecked judicial deference to Congress or the executive over immigration policies that threaten

212. Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1091 (1994).

213. Henkin, *supra* note 130, at 862.

214. *Id.* at 862-63.

215. *Id.* at 863.

216. *See* Wu, *supra* note 194, at 48 ("The Court has taken the worst possible course as an institution of final authority in constitutional interpretation, by neither overruling the plenary power doctrine, nor affirming it with any analysis.").

217. *See, e.g.*, Legomsky, *supra* note 125, at 261-69 (describing and refuting political questions theory as justification for plenary power doctrine).

218. *See, e.g.*, Wu, *supra* note 194, at 47-48 (describing and refuting argument that plenary power doctrine is justified by stare decisis).

219. See generally Legomsky, *supra* note 125, for a comprehensive analysis and critique of the justifications of the plenary power doctrine.

220. See *supra* note 194 and accompanying text for examples of academic criticism of the plenary power.

221. 426 U.S. 67 (1976).

222. 507 U.S. 292 (1993).

223. 533 U.S. 678 (2001).

224. 533 U.S. 53 (2001).

constitutional liberties. Although cases such as *Fiallo v. Bell*[225] and *Galvan v. Press*[226] remain good law, these decisions cannot be unequivocally cited to support the traditional view that courts are powerless to review the constitutionality of immigration laws.[227] At a minimum, *Flores*, *Zadvydas*, and their progeny have imposed a rational basis standard of review on immigration legislation that treads on constitutional liberties. The impact of these cases on the plenary power doctrine cannot be ignored.

The plenary power doctrine is a relic of a past era that has no place in modern constitutional jurisprudence.[228] Courts should continue to repudiate the plenary power doctrine and subject the federal government's immigration powers to the same constitutional restraints imposed on all other government powers. Accordingly, the Third Circuit and First Circuit erred in *Kamara v. Attorney General*[229] and *Enwonwu v. Gonzales*,[230] respectively, when they categorically dismissed the application of the state-created danger theory to deportation proceedings. As a result, the Third and First Circuits should have reached the merits of the petitioners' claims and addressed whether the deportation proceedings violated the petitioners' substantive due process rights under the state-created danger theory.

B. Applying the State-Created Danger Theory to Deportation Cases

The modern erosion of the plenary power doctrine provides an opportunity for aliens to challenge the constitutionality of deportation proceedings under the state-created danger theory. Nonetheless, state-created danger jurisprudence cannot be applied in the exact same way to the deportation context as it is in other cases because there are significant differences between deportation proceedings and the circumstances under which typical state-created danger claims arise. The most apparent difference is the type of relief aliens seek when invoking the state-created danger theory in deportation proceedings. Typically, plaintiffs who invoke the state-created danger theory do so under 42 U.S.C. § 1983[231] to obtain postdeprivation monetary relief.[232] In the deportation context,

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225. 430 U.S. 787 (1977).

226. 347 U.S. 522 (1954).

227. See *supra* notes 147-53 and accompanying text for a discussion of these cases.

228. Henkin, *supra* note 130, at 861.

229. 420 F.3d 202 (3d Cir. 2005).

230. 438 F.3d 22 (1st Cir. 2006).

231. Under 42 U.S.C. § 1983 (2000), "[e]very person who, under color of [law] . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." *Id.*

232. *See, e.g.*, McClendon v. City of Columbia, 305 F.3d 314, 320 (5th Cir. 2002) (describing plaintiff's § 1983 action against state government for violation of his due process rights under state-created danger theory); Butera v. District of Columbia, 235 F.3d 637, 644 (D.C. Cir. 2001) (describing plaintiff's § 1983 complaint against District of Columbia for violation of his constitutional rights under state-created danger theory); Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996) (describing

the petitioners seek predeprivation relief through an injunction of deportation proceedings.[233]

Nevertheless, many of the principles in traditional state-created danger cases, brought under § 1983, are relevant to the deportation context. The courts of appeals generally require plaintiffs to establish four elements in a state-created danger claim: (1) a government official exercised authority or power, (2) in such a way that the official put someone in a *worse* position than he would have otherwise faced, (3) risking and causing a significant harm, (4) with a degree of culpability that "shocks the conscience."[234] This standard provides the basic framework for analyzing a state-created danger claim in the deportation context.

1. A Government Official Exercised Authority or Power

In the deportation context, the government official's actions are relevant at two distinct stages for establishing a state-created danger claim. First, the court must examine the government official's actions at the time the alien is arrested and agrees to act as an informant for the government. Second, the court must evaluate the government's actions at the time of the actual deportation.

At the first stage, the court must determine whether a government official made representations to the alien-informant that he would not be deported. Many of the aliens in the state-created danger cases alleged that the government made assurances they would not be deported in exchange for their cooperation with law enforcement officials. The court's determination that government officials made such representations is crucial.[235] Several courts appear to focus their analysis primarily on the government's actions at the time of the deportation.[236] They seem to reason that the deportation would place the alien in a position of danger where he would be subject to violence at the hands of private parties.[237] Accordingly, the mere act of deporting the alien, with no other government action, would violate the alien's substantive due process rights.

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plaintiff's § 1983 action against City of Philadelphia and police officers for violation of her constitutional rights under state-created danger theory).

233. *See, e.g.*, Builes v. Nye, 239 F. Supp. 2d 518, 521 (M.D. Pa. 2003) (describing alien's request for injunctive relief from removal to Columbia based on state-created danger theory).

234. Oren, *supra* note 51, at 1189.

235. *See* Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 78 (D. Mass. 2005) (questioning decisions in *Builes*, 239 F. Supp. 2d at 521, and *Rosciano v. Sonchik*, No. CIV-01-0472-PHX-JATMS, 2002 U.S. Dist. LEXIS 25419, at *13 (D. Ariz. Sept. 9, 2002) because neither of them "involved affirmative assurances of protection from the danger arising from cooperation" so the "danger was less clearly 'state-created'"), *rev'd sub nom.* Enwonwu v. Gonzales, 438 F.3d 22 (1st Cir. 2006).

236. *See, e.g.*, *Builes*, 239 F. Supp. 2d at 525 (analyzing government's actions only at time of deportation in state-created danger claim).

237. *See id.* (finding that deportation of alien when government knows deportation will create opportunity for drug traffickers to kill alien is sufficient government action to establish state-created danger claim).

This analysis, however, is deficient because it fails to establish that the government created a danger to the alien.[238] The alien-petitioner must be able to demonstrate that government action, before the deportation, created or enhanced a danger to the alien.[239] The aliens in the deportation cases committed drug offenses that provided proper statutory grounds for deportation.[240] Because the alien himself committed a deportable offense, the government does not place the alien in a *worse* position than he otherwise would have faced simply by deporting him. Although the alien may become the victim of private violence when he is returned to his native country, the injury cannot be considered state created.[241] Indeed, this situation is indistinguishable from *DeShaney v. Winnebago County Department of Social Services*.[242] In *DeShaney*, state officials continuously returned the child-victim to the custody of his abusive father.[243] Although returning the victim to his father's custody could be considered an affirmative government act, the Court held that the state did not violate the victim's substantive due process rights because the government did nothing to create the danger or make the victim more vulnerable to the danger.[244]

Similarly, the federal government cannot be liable for violating an alien's substantive due process rights simply by returning the alien to his native country. Rather, it is the act of making affirmative assurances to the alien that he will not be deported that makes the impending harm a state-created danger.[245] Such representations are made so the alien will agree to cooperate with law enforcement officials to help prosecute other members of an international drug cartel.[246] This cooperation is what subjects the alien to the threat of retaliation by other members of the cartel and triggers the state-created danger theory.[247] Therefore, the alien must be able to establish that government officials made representations that he would not be deported in order to establish a state-created danger claim in the deportation context.

The second stage in which the government official's actions are relevant is at the time of the deportation. The alien must establish that government officials

238. *Cf.* Butera v. District of Columbia, 235 F.3d 637, 650 (D.C. Cir. 2001) (stating most important element of theory is state created danger, which creates individual harm).

239. *Enwonwu*, 237 F. Supp. 2d at 78.

240. *See, e.g.*, Lawson v. Gerlinski, 332 F. Supp. 2d 735, 738 n.5 (M.D. Pa. 2004) (finding alien removal pursuant to statutory authority because he was convicted of trafficking controlled substance).

241. *See* Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 73 (D. Mass. 2005) (stating it is not enough that government render individual more vulnerable to harm to trigger constitutional duty to protect), *rev'd sub nom.* Enwonwu v. Gonzales, 438 F.3d 22 (1st Cir. 2006).

242. 489 U.S. 189 (1989).

243. *DeShaney*, 489 U.S. at 192-93.

244. *Id.* at 201-02.

245. *Enwonwu*, 376 F. Supp. 2d at 78 (stating that it is unclear whether danger is state created in absence of government's affirmative assurances of protection).

246. *See id.* at 58 (describing alien's testimony that he would be "damndest fool" to cooperate with authorities if he knew he would be deported afterward).

247. *See* Guerra v. Gonzales, 138 F. App'x 697, 699 (5th Cir. 2005) (describing threats made to alien and his family after he testified against members of drug-trafficking cartel).

exercised their authority or power to actively seek the alien's deportation.[248] Because all of the state-created danger claims were raised during deportation proceedings,[249] aliens will most likely be able to establish this stage of government action.

2. In Such a Way that the Official Put Someone in a Worse Position than He Would Have Otherwise Faced

In order to establish a state-created danger claim in the deportation context, the alien must be able to show that the government official placed him in a worse position than he would have otherwise faced. To do so, the alien must again be able to demonstrate that government officials made assurances that he would not be deported if he cooperated with law enforcement officials.[250] Helping law enforcement officials subjects the alien to the threat of violent retaliation by other members of the cartel which, in turn, triggers the state-created danger theory.[251] In many cases, the alien is clearly cognizant of the additional risks he faces by cooperating with federal authorities.[252] He only agrees to cooperate with law enforcement officials because of the assurances he receives that he will not be deported.[253] The government's assurances of immunity from deportation also provide the requisite evidence that the government's actions render the alien more vulnerable to private harm.

The government does not create a danger if it refuses to make assurances that the alien will not be deported.[254] Similarly, no state-created danger exists when an alien *voluntarily* assists federal law enforcement officials with the prosecution of others.[255] In such a situation, it is the alien's own actions that create the risk of harm. The result remains the same when an alien volunteers to help federal authorities simply with the *hope* of avoiding deportation proceedings or further prosecution. The state-created danger theory does not apply when an alien voluntarily assists law enforcement officials because the

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248. *See* Rosciano v. Sonchik, No. CIV-01-0472-PHX-JATMS, 2002 U.S. Dist. LEXIS 25419, at *13 (D. Ariz. Sept. 9, 2002) (stating government's active attempt to deport alien despite known danger to her was necessary element of state-created danger claim).

249. See *supra* Part II.B for a discussion of state-created danger claims in deportation cases.

250. *Enwonwu*, 376 F. Supp. 2d at 78 (suggesting that it is government's affirmative assurances of protection that make subsequent danger to alien "state-created").

251. *See Rosciano*, 2002 U.S. Dist. LEXIS 25419, at *13 (emphasizing that government cannot send petitioner to Columbia because of increased danger).

252. *See Guerra*, 138 F. App'x at 699 (describing alien's testimony that authorities warned him that his cooperation would put him in danger and notified him of threats made to other witnesses). *Contra* Momennia v. Estrada, 268 F. Supp. 2d 679, 687 (N.D. Tex. 2003) (rejecting alien's state-created danger claim, in part because FBI agents had no knowledge that alien's cooperation would subject him to increased risk of harm if he returned to native country).

253. *See, e.g.*, *Enwonwu*, 376 F. Supp. 2d at 58 (describing alien's testimony that he would not have cooperated had he known he would be sent back to Nigeria).

254. *See id.* at 73-74, 77 (finding government's affirmative assurances of protection necessary element of state-created danger claim).

255. *See Momennia*, 268 F. Supp. 2d at 687 (rejecting alien's state-created danger claim, in part because alien voluntarily offered to assist FBI agents following September 11, 2001 attacks).

state has not placed the alien in a worse position than he otherwise would have faced.[256] Under such circumstances, the alien placed himself in the worse position.

3. Risking and Causing a Significant Harm

In a typical state-created danger claim, a plaintiff must demonstrate that a government official created a danger that caused a significant harm to the plaintiff.[257] Evidence of the injury is usually easy to establish because most plaintiffs who invoke the state-created danger theory have already been injured and are seeking postdeprivation monetary relief.[258] In the deportation context, however, the alien has not yet sustained an injury. Rather, the alien invokes the state-created danger theory in order to enjoin deportation proceedings and prevent the injury from eventually occurring.[259] Thus, unlike a typical state-created danger claim, an alien cannot provide evidence that an injury resulted from the government official's abusive conduct.

The absence of such an injury should not defeat the application of the state-created danger claim to the deportation context.[260] A plaintiff is not limited to postdeprivation relief for due process violations when a predeprivation remedy exists. Indeed, in cases involving procedural due process claims, predeprivation procedures are generally preferred over postdeprivation monetary relief.[261] Moreover, it is clear that tort-like monetary damages would be insufficient to redress the alien's injuries when the threatened harm is death or torture.[262]

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256. *See id.* (finding that government did not create or increase danger to alien when alien voluntarily assisted federal authorities).

257. *See* Oren, *supra* note 51, at 1189 (suggesting that state-created danger doctrine requires plaintiff to show that state officials risked and caused "significant harm").

258. *See, e.g.*, Kneipp v. Tedder, 95 F.3d 1199, 1203-04 (3d Cir. 1996) (describing plaintiff's § 1983 action against City of Philadelphia for injuries she sustained when police arrested her husband and abandoned her in intoxicated state).

259. *See, e.g.*, Builes v. Nye, 239 F. Supp. 2d 518, 521 (M.D. Pa. 2003) (describing alien's request for injunctive relief from removal to Columbia based on state-created danger theory).

260. *See* Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995) (requiring plaintiffs to show that government created "substantial risk" of harm, but not necessarily an injury, to prove state-created danger claim). *But see* Enwonwu v. Gonzales, 438 F.3d 22, 25 (1st Cir. 2006) (questioning whether state-created danger theory can be used to restrain government from taking action, but denying relief on other grounds).

261. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982) (stating that absent showing of impracticability of providing predeprivation process, postdeprivation hearing would be constitutionally inadequate). Generally, substantive due process protections only apply to state action so arbitrary and outrageous that they are literally incapable of avoidance by predeprivation procedures. S. Blasting Servs., Inc. v. Wilkes County, 288 F.3d 584, 594 (4th Cir. 2002). The aliens' state-created danger claims may be one of the few circumstances in which predeprivation remedies exist to prevent a violation of substantive due process rights. Because such a remedy is available, it should be used.

262. *Cf.* Bejjani v. INS, 271 F.3d 670, 688 (6th Cir. 2001) (finding that temporary stay of removal is appropriate while appeal of immigration decision is pending when alien shows, in part, that irreparable harm would occur if stay is not granted).

Although an alien cannot prove that government action caused a significant injury, the alien should be required to show a reasonable probability that such an injury would occur if he were deported.[263] Moreover, the alien must demonstrate that the government had knowledge of the risk of injury.[264] Such a showing provides a court with sufficient justification to provide equitable relief[265] and establishes the requisite degree of government culpability in a state-created danger claim.[266] By showing that the government actively pursued the alien's deportation despite the knowledge that the deportation would likely lead to the alien's death or torture, the alien can show that the government acted with the degree of fault necessary to establish a state-created danger claim.

4. With a Degree of Culpability that "Shocks the Conscience"

In order for a plaintiff to show that an executive official's conduct violated his substantive due process rights under the state-created danger theory, the plaintiff must demonstrate that the official's actions were so arbitrary and outrageous that they "shock the conscience."[267] Moreover, the government official must act with a particular degree of culpability for this conduct to reach a conscience-shocking level.[268] In *County of Sacramento v. Lewis*,[269] the U.S. Supreme Court held that a police officer's actions did not shock the conscience when the officer hit and killed an individual during a high-speed automobile chase.[270] The Court found that the police officer acted with reckless or deliberate indifference for human life.[271] Yet, under the circumstances of the case, conduct committed with deliberate indifference did not shock the conscience.[272] The Court emphasized that a police officer in pursuit is forced to make split-second decisions under pressure without the luxury of a second chance.[273] Under these circumstances, only an "intent to harm" would suffice to shock the conscience.[274]

263. *See Uhlrig*, 64 F.3d at 574 (requiring plaintiff to establish that government's conduct placed him at "substantial risk of serious, immediate and proximate harm").

264. *See* Rosciano v. Sonchik, No. CIV-01-0472-PHX-JATMS, 2002 U.S. Dist. LEXIS 25419, at *13 (D. Ariz. Sept. 9, 2002) (granting alien relief under state-created danger theory because government actively attempted to remove her, in spite of "known danger" to her life).

265. *See Bejjani*, 271 F.3d at 688 (finding that temporary stay of removal is appropriate when alien shows that irreparable harm would occur if stay is not granted).

266. *See* Builes v. Nye, 239 F. Supp. 2d 518, 526 (M.D. Pa. 2003) (finding government acted with "deliberate indifference" when it attempted to remove alien despite knowledge that deportation would impose grave risk to alien's life).

267. *See* McClendon v. City of Columbia, 305 F.3d 314, 326 (5th Cir. 2002) (noting that only most egregious executive conduct shocks the conscience).

268. *See Uhlrig*, 64 F.3d at 572-73 (requiring plaintiff to demonstrate that defendant acted with degree of culpability that "shocks the conscience" in order to establish state-created danger claim).

269. 523 U.S. 833 (1998).

270. *Lewis*, 523 U.S. at 854.

271. *Id.*

272. *Id.*

273. *Id.* at 853.

274. *Id.* at 854.

Nonetheless, the Court explicitly stated that a lesser degree of culpability may shock the conscience in other circumstances.[275]

In deportation proceedings, it is likely that a lesser degree of culpability will be sufficient to shock the conscience.[276] Unlike a high-speed chase, the government has the opportunity to reflect and make thoughtful judgments in a deportation proceeding. Deportation proceedings are typically lengthy procedures that involve several layers of administrative and judicial review.[277] During these proceedings, the government has the opportunity to learn and fully appreciate the dangers the alien faces by deportation. Thus, an alien should not be required to show that the government intended to harm him in order to establish that the deportation would violate his substantive due process rights under the state-created danger theory.

Instead, an alien should be able to establish the requisite degree of fault if he shows that the government intentionally took action to deport him when the government knew or reasonably should have known that he would be tortured or killed upon return to his native country.[278] Such a standard properly balances the alien's constitutionally protected interests[279] with the Court's concern that only the most egregious government conduct should be considered a violation of an individual's substantive due process rights.[280]

C. *Evaluating State-Created Danger Claims in Deportation Cases*

Based on the foregoing analysis, this Comment proposes the following standard for evaluating state-created danger claims in deportation cases. In order to prevail on such a claim, an alien must be able to establish the following elements: (1) the alien cooperated with law enforcement officials in reliance on explicit assurances by the government that he would not be deported; (2) such cooperation subjected the alien to a danger of violent retribution in his native country that he otherwise would not have faced; (3) the government knew or reasonably should have known that the alien's cooperation would create such a

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275. *Lewis*, 523 U.S. at 848-50.

276. *See* Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 73-74 (D. Mass. 2005) (finding "deliberate indifference" sufficient to establish culpability requirement), *rev'd sub nom.* Enwonwu v. Gonzales, 438 F.3d 22 (1st Cir. 2006); Momennia v. Estrado, 268 F. Supp. 2d 679, 683 (N.D. Tex. 2003) (rejecting alien's state-created danger claim because he failed to show that government authorities acted with "deliberate indifference"); Builes v. Nye, 239 F. Supp. 2d 518, 526 (M.D. Pa. 2003) (evaluating executive official's conduct under "deliberate indifference" standard).

277. A particularly extreme example is *Enwonwu*, where the INS first initiated removal proceedings in June 1997. *Enwonwu*, 376 F. Supp. at 49. On February 13, 2006, the First Circuit remanded the case for further proceedings, Enwonwu v. Gonzales, 438 F.3d 22, 35 (1st Cir. 2006), where the final outcome is still pending.

278. *Cf.* Uhlrig v. Harder, 64 F.3d 567, 573 (10th Cir. 1995) (noting that "wrongful intent" includes an "intent to place a person unreasonably at risk of harm").

279. *Enwonwu*, 376 F. Supp. 2d at 67 (recognizing constitutionally protected interest in life and freedom from torture).

280. *See* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (emphasizing that only behavior that shocks one's conscience is due process violation).

danger; (4) the danger was significant; and (5) despite knowledge of the danger, the government intentionally took action to deport the alien. When all these elements are met, the government's attempt to deport an alien is properly considered conscience shocking.

Under this standard, the alien's petition in *Kamara* failed to establish a claim under the state-created danger theory. The Third Circuit erred by holding that the plenary power doctrine categorically bars the recognition of state-created danger claims in deportation proceedings.[281] Nevertheless, Kamara failed to establish the necessary elements of a state-created danger claim. The police arrested Kamara because he helped an undercover police officer purchase cocaine, which is a deportable offense.[282] Government officials never solicited Kamara's help in prosecuting members of an international drug cartel, and they never made assurances that Kamara would not be deported if he provided such assistance. Rather, Kamara claimed that he faced a risk of death at the hands of the government or a rebel group in his native country because he was a member of the nation's elite minority and had been absent from the country for a long time.[283] Kamara faced these dangers regardless of any actions the government took. The government did nothing to place Kamara in a worse position than he otherwise would have faced. Accordingly, the danger that Kamara faced was not state created and his substantive due process claim should fail.

In contrast, the alien in *Enwonwu* properly established a claim under the state-created danger theory. The district court explicitly found that DEA agents assured Enwonwu that his life would be protected from the drug traffickers he was asked to betray.[284] Enwonwu understood these assurances to include a promise that he would not be deported.[285] The district court further found that Enwonwu would not have cooperated with the DEA if he had not received such assurances, and the DEA was aware that deportation would subject Enwonwu to retribution by Nigerian drug traffickers.[286] In addition, the district court found that Enwonwu faced a threat of violent retribution for his cooperation with the DEA.[287] Finally, the district court found that the government took affirmative steps to deport Enwonwu to Nigeria, where he would be readily accessible to those who wished to harm him.[288] Based on these facts, the First Circuit should have affirmed the district court and held that Enwonwu successfully established a claim for relief under the state-created danger theory.

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281. Kamara v. Attorney General, 420 F.3d 202, 217-18 (3d Cir. 2005).

282. *Id.* at 206.

283. *Id.* at 208.

284. *Enwonwu*, 376 F. Supp. 2d at 59.

285. *Id.*

286. *Id.*

287. *Id.* at 72.

288. *Id.* at 73.

IV. CONCLUSION

The erosion of the plenary power doctrine enables courts to extend some constitutional protections to aliens in deportation proceedings.[289] This Comment suggests that state-created danger claims should be available in deportation cases when an alien establishes the following elements: (1) the alien cooperated with law enforcement officials in reliance on explicit assurances by the government that he would not be deported; (2) such cooperation subjected the alien to a danger of violent retribution in his native country that he otherwise would not have faced; (3) the government knew or reasonably should have known that the alien's cooperation would create such a danger; (4) the danger was significant; and (5) despite knowledge of the danger, the government intentionally took action to deport the alien. When these elements are met, the government's attempt to deport an alien "shocks the conscience."

Although several district courts have granted relief under such a theory,[290] it is important not to underestimate the difficult task aliens face in convincing courts to recognize state-created danger claims in deportation cases. The first challenge is that some courts, like the First and Fifth Circuits, have yet to recognize the state-created danger theory.[291] This reluctance stems, in part, from the notion that substantive due process is a disfavored doctrine.[292] Indeed, the U.S. Supreme Court has recognized its own longstanding reluctance to "expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."[293] Congress imposed a second obstacle to the recognition of this type of claim on May 11, 2005, when it stripped the district courts of jurisdiction to hear habeas petitions that challenge a "final administrative order of removal, deportation, or exclusion."[294] Rather, Congress granted exclusive jurisdiction over these types of claims to the court of appeals.[295] To date, no court of appeals has recognized such a claim.[296]

Nevertheless, fairness and respect for human life requires the application of the state-created danger theory to the deportation context in certain cases. Although the government has a strong interest in combating the drug trade in the United States, courts should not permit the government to jeopardize the lives of aliens to accomplish this objective. As the district court stated in

289. See *supra* Part II.D for a discussion of the erosion of the plenary power doctrine.

290. See *supra* notes 72-93 and accompanying text for a discussion of cases where courts have granted relief from deportation proceedings under the state-created danger theory.

291. See *supra* notes 44-48 and accompanying text regarding the First Circuit's and Fifth Circuit's positions on the state-created danger theory.

292. Oren, *supra* note 51, at 1190.

293. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225-26 (1985)).

294. REAL ID Act of 2005, Pub. L. No. 109-13, § 106(c), 119 Stat. 231, 311 (2005).

295. *Id.*

296. See *supra* Parts II.B.2-3 for a discussion of the recognition of state-created danger claims in appeals courts.

Enwonwu, the "Constitution simply cannot permit the executive to endanger the life of an alien, promise to protect him, and then cast him aside like refuse when he is no longer useful."[297] Over one hundred years ago, the U.S. Supreme Court recognized that the "Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."[298] Now is the time for courts to give force to these words by refusing to abdicate their judicial role in deportation cases and protect the lives of aliens from unconstitutional executive action.

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297. Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 74 (D. Mass. 2005), *rev'd sub nom.* Enwonwu v. Gonzales, 438 F.3d 22 (1st Cir. 2006).

298. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

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