SUMMARY OF THE CASE

This is a petition for review in which the petitioner, Alfonso Alvarez-Portillo, seeks judicial

removal against an alien).

Under Section 1252, an alien seeking judicial review of his removal order must file a petition for

[1] Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996), as amended by Section 2(2) of the Extension Of Stay In United States For Nurses Act of Oct. 11, 1996, Pub. L. No.

155, 1996 WL 168955 at 459 ("the ability to cross into the United States over and over with no consequences undermines the credibility of our efforts to secure the border"); id. at 113-114, 1996 WL

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1993, and who had unlawfully reentered the United States on December 20, 1993. See 8 C.F.R. § 241.8(a) (2000). The officer then issued a written "Notice of Intent/Decision to Reinstate Prior Order" advising the petitioner that he was subject to removal. A.R. 93. The petitioner was given an opportunity to make a statement contesting the determination. Id.

[2] Because an alien in reinstatement proceedings is barred from applying for relief from removal, the INS returned unfiled the relative visa petition and adjustment of status application (Forms I-130 and I-485, respectively). His attorney has since filed the relative visa petition with the Service Processing Center in Lincoln, Nebraska. That petition remains pending. See Addendum of Petitioner's Brief.

illegally reenter. Consistent with this objective, the Attorney General has applied the statute to aliens

subject matters than Subtitle A in which Section 1231(a)(5) is located. See Lindh v. Murphy, 521 U.S. 320, 323 (1997).

The Attorney General's application of Section 1231(a)(5) to the petitioner also does not violate

of status. Even if Section 1255(i) were applicable to the petitioner, nothing in that provision requires the Attorney General to defer the deportation of an illegally reentering alien for the purpose of allowing him to apply for adjustment of status relief.

The Attorney General's streamlined procedure which permits the removal of illegally reentering aliens is fully consistent with the requirements of due process in immigration cases. It should be noted that the petitioner lacks standing to challenge the constitutional sufficiency of the procedure because he

II. THE INS'S DECISION TO REINSTATE THE PETITIONER'S 1993

after IIRIRA's April 1, 1997 general effective date.[4] Castro-Cortez, 239 F.3d at 1051. The court

[4] The court made its decision under step one of the retroactivity analysis in Landgraf. It determined that Congress did prescribe the temporal reach of the statute, which was to make the statute applicable only to events occurring after its enactment.

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February 2001. Landgraf's retroactivity analysis concerns whether it is fair for a court to apply a change in the law to a case pending when the law is enacted, not whether Congress can set forth new law governing new proceedings. See Landgraf, 511 U.S. at 250 ("Petitioner's primary submission is that the text of the 1991 Act requires that it be applied to cases pending on its enactment.").

Even assuming, as Castro-Cortez did, that Landgraf's retroactivity analysis applies to this case, that analysis does not aid the petitioner. In Landgraf, the Supreme Court established a two-part test for determining whether a statute should be applied to pending cases. Landgraf, 511 U.S. at 280. Under this test, the fif B50t39 Tf 0 Tcd5 0258.75af

[7] In Lindh

Section 345 has no express effective date. Section 346 specifies that it is effective for grants of non-

is directed at two events that commenced in the past but have continuing effect in the present: the prior

pursuant to the reinstated deportation order. Brief of Petitioner, 15-22. The respondent will address

[10] There are generally two alternative methods for obtaining immigrant status by marriage. The

III. THE REINSTATEMENT PROCEDURE COMPORTS WITH DUE PROCESS.

A. Standard of Review

after the petitioner's removal on the reinstated deportation order, the INS District Director in Kansas City, Missouri granted the petitioner's application for permission to return to the United States after removal, made on Form I-212. A.R. 1, 3. The approved Form I-212 clears the way for the petitioner's return to the United States should he succeed in obtaining approval of his visa petition, a consular-issued immigrant visa, and waiver of the reentry bar. The INS District Director's actions in this case were eminently reasonable. He resolved this matter in a way that is consistent with governing law, while taking into consideration the equities involved.

[13] Because he did not contest the immigration officer's reinstatement decision, the petitioner

C. The Procedure Provides the Process Due to Illegally Reentering

cannot demonstrate any prejudice resulting from the purported constitutional deficiency because there is no doubt that his prior order would have been reinstated even if he were provided a full-blown hearing before an immigration judge. See United States v. Proa-Tovar, 975 F.2d 592, 596 (9th Cir. 1992) (en banc) (no prejudice because alien "would have been deported anyway. The lack of a direct appeal only resulted in his leaving at a somewhat earlier time"). Stated another way, the petitioner has simply suffered no injury from the Attorney General's reinstatement procedure and therefore has no standing to raise his claim. Lewis v. Casey, 518 U.S. 343, 349 (1996) ("The requirement . . . [of] actual injury derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law

immigration. See Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete."). Indeed, the Supreme Court itself has expressly rejected the Mathews test as insufficiently deferential in contexts where Congress's plenary powers are implicated. See, e.g., Weiss v. United States, 510 U.S. 163, 177 (1994) (holding that the Mathews test is inappropriate for procedural due process challenge because it did not arise in the military context in which the "Constitution contemplates that Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and

Roth, 408 U.S. 564, 577 (1972). In Mathews, the Government conceded that Social Security recipients had liberty interests in their benefits. 424 U.S. at 333. In this case, however, the petitioner did not have a protectible liberty interest in returning to the United States after deportation or in remaining here once he unlawfully reentered. The petitioner therefore cannot insist on a procedure to which he has no entitlement.

3. Even if applicable, *Mathews v. Eldridge* does not require more process.

Even if a balancing under Mathews v. Eldridge were appropriate in this case, due process is satisfied by the current procedure which permits a reinstatement determination to be made solely by the INS District Director. Under Mathews, the process required is determined by balancing the (1) private interest affected by the official action; (2) risk of an erroneous deprivation of such interest through the procedures ;d,of dhe pbicab valuasen ifny,sk ofddetiticiasafeguards;of dh(3(2g Governmeciah intereto) Tj T* -061143 Mathews

society allow him to ask for it." Cortez-Castro, 239 F.3d at 1056 (Fernandez, J., dissenting). Had the petitioner presented himself for inspection at a port of entry upon his return to the United States in December 1993 instead of reentering illegally, in all probability he would have been denied admission and ordered excluded pursuant to the procedure Congress prescribed for excludable aliens. See Shaughnessy v. Mezei, 345 U.S. 206, 215 (1953) (quoting Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)) ("'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."'). Just as excludable aliens do not enjoy the same procedural rights afforded to lawfully admitted aliens in removal proceedings, see Landon v. Plasencia, 459 U.S. 21, 32-33 (1982), the petitioner cannot demand more procedure than what Congress has seen fit to provide to aliens in his situation.

Government's weighty interest in deterring aliens from repeatedly reentering the United States by expediting their removal. See Landon v. Plasencia, 459 U.S. at 34 (the Government has a weighty interest in the "efficient administration of the immigration laws at the border. . . ."); United States v. Hernandez-Guerrero, 147 F.3d 1075, 1078 (9th Cir. 1998) ("'[T]here is a strong societal interest in

[14] See

CERTIFICATE OF COMPLIANCE

STATUTES AND REGULATIONS

A. REINSTATEMENT STATUTE AND REGULATIONS

INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (Supp. II 2000) –

(b) Notice. If an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

(c) Order. If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

(d) Exception for applicants for benefits under section 902 of HRIFA or sections 202 or 203 of

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(A) CERTAIN ALIENS PREVIOUSLY REMOVED.–(i) Arriving Aliens.–Any alien who