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PLENARY POWER IS DEAD! LONG LIVE PLENARY POWER!

*Michael Kagan**

*For decades, scholars of immigration law have anticipated the demise of the plenary power doctrine. The Supreme Court could have accomplished this in its recent decision in *Kerry v. Din*, or it could have reaffirmed plenary power. Instead, the Court produced a splintered decision that did neither. This Essay examines the long process of attrition that has significantly gutted the traditional plenary power doctrine with regard to procedural due process, while leaving it largely intact with regard to substantive constitutional rights.*

June 15, 2015 could have been a momentous day in the evolution of American immigration law. This was the day the Supreme Court announced its decision in *Kerry v. Din*,¹ a case in which a U.S. citizen, Fauzia Din, challenged the State Department's refusal to grant a visa to her Afghan husband, Kanishka Berashk, effectively refusing the couple the right to live together.² Din argued that the visa denial infringed her right to marriage, and as a matter of due process, the State Department owed her a specific explanation for the decision.³ The State Department had given no explanation except for a vague reference to the statute banning people who have engaged in terrorist activities from entering the United States.⁴ Din did not ask the Court to rule on whether her husband actually was a terrorist.⁵ Rather, she asked for a process that would meaningfully allow the couple to respond to the allegations.⁶

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1. 135 S. Ct. 2128 (2015) (plurality opinion).

2. *Din*, 135 S. Ct. at 2131. For an explanation as to why the couple could not live anywhere but in the United States, see Elizabeth Keyes, *Symposium on Kerry v. Din: Another Choiceless Choice*, IMMIGRATIONPROF BLOG (June 16, 2015), <http://lawprofessors.typepad.com/immigration/2015/06/symposium-on-kerry-v-din-another-choiceless-choice-by-elizabeth-keyes.html> [<http://perma.cc/C5AU-A9LA>].

3. *Din*, 135 S. Ct. at 2131 (plurality opinion).

4. *Id.* at 2139 (Kennedy, J., concurring).

5. *See id.* at 2132 (plurality opinion).

6. *Id.*

Had Din won it would have been a very big deal. In fact, if she had won, it might have been possible to state that the plenary power doctrine that has long been the foundation of immigration law had finally been overruled. That is because the federal government's plenary authority to regulate immigration free from judicial review or constitutional limitations was usually assumed to be at its height when a noncitizen had not yet entered the country. Sixty-five years ago, in *Knauff v. Shaughnessy*, the Court (in)famously said: "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁷ Ms. Din directly challenged that premise, and she did it at a time when there was good reason to wonder what was left of the plenary power doctrine.

Alas, Din did not win. She will not be reunited with her husband, at least not by order of the Supreme Court.⁸ Din's defeat shows that plenary power is not dead yet. But Din came very close, winning four Justices on the Court: Justices Breyer, Ginsburg, Sotomayor, and Kagan. Moreover, her challenge severely divided the other five Justices, so much so that there is no controlling decision in the case.⁹ Only two Justices—Justices Kennedy and Alito—used an analysis based on the plenary power doctrine as it has been traditionally known in immigration law.¹⁰ Yet, even they were willing to assume for the sake of argument that Din was owed some measure of due process.¹¹ The plurality opinion by Justice Scalia largely sidestepped the Court's immigration jurisprudence and focused instead on a critique of substantive due process jurisprudence generally.¹²

Thus, while *Kerry v. Din* was not a renunciation of the plenary power doctrine, it was not a reaffirmation of the doctrine, either.¹³ The case is therefore an indication that the plenary power doctrine is indeed on fragile jurisprudential ground and does not carry the force that it once did. The Court's decision in *Kerry v. Din*, moreover, is an indication that the Justices find it difficult to entirely discard the plenary power doctrine and to fully

7. U.S. *ex rel.* *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

8. Historically, some spouses of U.S. citizens who have been denied entry to the United States on vague security grounds have later won entry through the political branches even after losing their cases in the Supreme Court. *See, e.g.*, Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995) (profiling the people involved in the *Knauff* and *Mezei* cases).

9. *See Din*, 135 S. Ct. 2128 (plurality opinion).

10. *See id.* at 2139–41 (Kennedy, J., concurring).

11. *See id.* at 2139.

12. *Id.* at 2131–38 (plurality opinion).

13. Kevin Johnson, *Limited Judicial Review of Consular Officer Visa Decisions—Foreshadowing the Result in the Same-Sex Marriage Case?*, SCOTUSBLOG (June 15, 2015, 5:02 PM), <http://www.scotusblog.com/2015/06/opinion-analysis-limited-judicial-review-of-consular-officer-visa-decisions-foreshadowing-the-result-in-the-same-sex-marriage-case/> [<http://perma.cc/4NES-CDW8>] (“[T]here was no ready defense of the doctrine of consular non-reviewability and no aggressive invocation of cases contrary to modern constitutional sensibilities such as *Knauff* and *Mezei*.”).

apply normal means of constitutional scrutiny to all aspects of immigration law. The Justices may, however, be confused and divided about how to bring the doctrine down for a gentle landing.

This Essay addresses the confusing current state of the plenary power doctrine. I first summarize what this doctrine meant as it developed in the late nineteenth century and evolved through most of the twentieth century. I then outline reasons why recent case law has significantly weakened the doctrine. I then suggest reasons why the Court may be hesitant to discard the doctrine entirely. I conclude by suggesting paths that the Court may choose to take going forward.

I. THE TRADITIONAL DOCTRINE

The original challenge of immigration law is that it is not explicitly one of the enumerated constitutional powers of the federal government. In the Chinese Exclusion Case in 1889, the Supreme Court reasoned that the authority to regulate immigration is inherent in national sovereignty and the national “right of self-preservation,” rather than stemming from any specific constitutional provision.¹⁴ Having chosen an extra-constitutional foundation for immigration law, the Court quickly came to the conclusion that the judiciary had little or no role in reviewing decisions prohibiting foreigners from entering the country,¹⁵ nor in reviewing decisions to arrest, detain, and deport noncitizens who were already inside the country.¹⁶

The result of this sweeping doctrine was that immigration law became “a constitutional oddity” (in Professor Legomsky’s words),¹⁷ largely immune from the civil liberties revolution of the twentieth century.¹⁸ By mid-century, the Court was willing to approve indefinite detention of a would-be immigrant on the theory that noncitizens had no due process rights, especially when they were seeking entry.¹⁹ However, this exceptional approach had foundations that have become jurisprudentially questionable in the twenty-first century. One was the court’s tendency to see immigration authority as emanating from national sovereignty rather than from the Constitution, which seemed to correspond to a reluctance to impose constitutional constraints. Another was the nonrecognition of any due process rights in immigration cases, based on the theory that immigration

14. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 604–06, 608 (1889).

15. *See, e.g., Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

16. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 702 (1893).

17. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255.

18. *See Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).

19. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206.

was a purely civil matter, and thus did not require the kinds of safeguards that the Constitution expected in criminal cases.²⁰

II. RECENT CRACKS IN THE DOCTRINE

In 2001, the Supreme Court decided *Zadvydas v. Davis*, which presented the question of whether the government could indefinitely detain deportable noncitizens when the United States was unable to find another country willing to take them.²¹ Half a century earlier, the Court had affirmed indefinite detention in somewhat similar circumstances.²² But this time, the Court found that the government's immigration authority "is subject to important constitutional limitations."²³ The Court also found that even deportable immigrants with serious criminal records have a "liberty interest [that] is, at the least, strong enough to raise a serious question as to whether . . . the Constitution permits detention that is indefinite and potentially permanent."²⁴ Even under a fairly narrow reading, *Zadvydas* made clear that procedural due process concerns apply to immigration enforcement, at least to the degree that immigration enforcement entails deprivations of liberty. But it also opened up a broader question: What other constitutional limitations might apply to immigration?

A significant reason why the Court has become more willing to apply procedural due process appears to be that the Court has seen much less significance in the formalistic civil-criminal distinction. The Court has acknowledged that deportation could be worse than imprisonment for some people,²⁵ such that the Sixth Amendment requires defendants in criminal cases to be advised about immigration consequences of potential plea agreements.²⁶ The Court has analogized pretrial detention in criminal cases to pre-removal detention in immigration cases.²⁷ Whereas in the 1950s the Court cited the civil-criminal distinction to interpret grounds of deportation loosely,²⁸ the Court more recently has adopted a strict categorical approach to criminal grounds of deportation, requiring the government to prove every

20. *Fong Yue Ting*, 149 U.S. at 730 ("The order of deportation is not a punishment for crime. . . . He has not, therefore, been deprived of life, liberty or property without due process of law . . .").

21. 533 U.S. 678, 682 (2001).

22. *Mezei*, 345 U.S. at 215–16.

23. *Zadvydas*, 533 U.S. at 695.

24. *Id.* at 696.

25. *INS v. St. Cyr*, 533 U.S. 289, 322 (2001); *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010).

26. *Padilla*, 559 U.S. at 356.

27. *United States v. Salerno*, 481 U.S. 739, 748 (1987).

28. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952).

element of the deportation ground.²⁹ This change makes grounds of deportation much more like offenses in a criminal statute.

Just as the Court has become more willing to find constitutional limitations on immigration enforcement, it has also changed its conception of the foundations of that power. The Court continues to hold that the federal government has broad immigration authority, but it has more recently rooted this authority in constitutionally enumerated powers, specifically naturalization, foreign affairs, and the impact on commerce.³⁰ These two changes—finding both a source and a limit for immigration law in the Constitution—push strongly toward normalizing immigration within constitutional law.³¹

One way to understand the traditional plenary power doctrine is that it did not limit immigrant rights so much as it limited judicial review.³² If this is correct, then all that is required for immigration exceptionalism to end would be for the Court to begin to review immigration cases against established constitutional doctrines.

Justice Scalia's opinion in *Din* may provide some indirect support for this view. Justice Scalia did not rely on *Knauff* or any other plenary power case. Instead, he questioned whether *Din* had presented a valid liberty interest in the "right to live in the United States with her spouse."³³ He attacked the Court's fundamental rights jurisprudence.³⁴ There is no need here to review the merits of Justice Scalia's arguments.³⁵ The point is that there is nothing about them that is unique to immigration. Most of Justice Scalia's opinion could have applied to any substantive due process cases in which Justice Scalia might have a jurisprudential debate with the four liberal Justices. Thus, in *Din*, the plurality appeared willing to debate an immigrant's fundamental rights (or lack thereof) on similar terms as any other fundamental rights case. By contrast, Justice Kennedy explicitly cited

29. See *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); see also *Silva-Trevino*, 26 I&N Dec. 550, 551 (A.G. 2015) (noting the shift to the categorical approach).

30. E.g., *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

31. Kevin R. Johnson, *Immigration and the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 67 OKL. L. REV. (forthcoming 2015) (concluding that the Roberts Court "has to a large extent continued to bring U.S. immigration law into the legal mainstream").

32. See Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1, 33 (arguing that plenary power did not create alternative constitutional standards for immigration but it restrained courts from reviewing immigration laws against established constitutional norms).

33. *Din*, 135 S. Ct. at 2131 (plurality opinion).

34. *Id.* at 2134–36.

35. For a critique of Justice Scalia's narrowing of the right to marriage, see Michael Kagan, *Symposium on Kerry v. Din: Married, But Separated*, IMMIGRATIONPROF BLOG (June 18, 2015), <http://lawprofessors.typepad.com/immigration/2015/06/symposium-on-kerry-v-din-married-but-separated-by-by-michael-kagan.html> [<http://perma.cc/JQ79-FG3E>].

the plenary power doctrine to hold that courts should have a limited role in reviewing decisions about granting noncitizens entry into the country.³⁶ Because of plenary power, Justice Kennedy thought it irrelevant whether Din had a bona fide liberty interest.³⁷ But this exceptionalist view of immigration attracted the support of only two Justices.

III. AND YET, PLENARY POWER LIVES ON

For Justice Kennedy, the most important precedent for *Kerry v. Din* was the 1972 decision in *Kleindienst v. Mandel*, in which the Supreme Court affirmed the government's authority to refuse a visa to a Belgian journalist who described himself as "a revolutionary Marxist," and who had been invited to speak at American universities.³⁸ The Court acknowledged that the visa denial impacted freedom of speech and thus allowed that a minimal form of judicial review should apply.³⁹ But *Mandel* required the government only to state a "facially legitimate and bona fide" basis for the visa denial,⁴⁰ which is a far lower level of scrutiny than would apply in a free speech infringement case outside the immigration context.⁴¹ Justice Kennedy would have extended this logic to infringements on other fundamental rights, such as the right to marriage.⁴² Like the Court in *Mandel*, Justice Kennedy expressed fear the courts could be dragged into every case in which the government found a person inadmissible and would be asked to balance the would-be immigrant's interests against the interests of that of the United States.⁴³

It would be tempting to view *Mandel* as applying only to visa requests from outside the country. But it is not entirely clear that this explains the Court's decisions in which fundamental rights conflict with immigration enforcement decisions. In *Reno v. American-Arab Anti-Discrimination Committee*, the Court allowed Congress to foreclose selective enforcement as a defense against deportation of noncitizens inside the United States, even if a noncitizen could show that the government was using deportation to suppress unpopular political views.⁴⁴ As a result, it may be a fair reading to suggest that the Court has departed from the traditional plenary power

36. *Din*, 135 S. Ct. at 2139–40 (Kennedy, J., concurring).

37. *Id.* at 2140.

38. 408 U.S. 753, 756–57 (1972).

39. *Mandel*, 408 U.S. at 770.

40. *See id.*

41. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

42. *Din*, 135 S. Ct. at 2139–41 (Kennedy, J., concurring).

43. *Id.* at 2140–41.

44. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

doctrine on matters of procedural due process for noncitizens inside the United States but that the Court has not yet been willing to apply substantive constitutional rights to immigration law.⁴⁵

Why might the Court be reluctant to do this? Cases about free speech, like *Mandel* and *American-Arab*, raise the specter of the government being forced to tolerate noncitizens with threatening political views.⁴⁶ Usually, however, it is only a minority of immigrants who come as political activists. It is far more common for immigrants to come for family reasons. Thus, Din's claim had far greater implications. Once the Court recognizes that immigration exclusions must bend to a citizen's right to marriage, other questions would follow. For one thing, Congress places a quota on spousal unification visas for spouses of legal permanent residents.⁴⁷ Is their right to marriage equivalent to that of citizens, and is the quota thus invalid? What about other types of family members on which Congress has imposed a quota? Do these policies pose a constitutional problem? Even more provocative questions are raised if the Court were to apply the Equal Protection Clause to immigration. Among other things, Congress has imposed a per country quota on family-based immigration.⁴⁸ In practice, this means that some Mexican families must wait thirteen years longer than similarly situated families of other nationalities.⁴⁹ Does this pass constitutional muster? The Supreme Court has avoided these questions by resisting applying substantive rights to immigration entirely.

CONCLUSION

A sober observer would point out that immigration law scholars have been predicting the imminent demise of the plenary power doctrine for at least three decades.⁵⁰ In 1995, Legomsky wrote an essay reassessing his own predictions for the rapid and dramatic demise of the plenary power. He wrote:

45. See Johnson, *supra* note 31 (observing that plenary power remains intact with regard to substantive rights).

46. See Carrie Rosenbaum, *Symposium on Kerry v. Din: Kerry v. Din as a Troubling "Terrorism" and "National Security" Case*, IMMIGRATIONPROF BLOG (June 18, 2015), <http://lawprofessors.typepad.com/immigration/2015/06/symposium-on-kerry-v-din-kerry-v-din-as-a-troubling-terrorism-and-national-security-case-by-carrie-r.html> [<http://perma.cc/4DS3-JFFJ>].

47. See 8 U.S.C. § 1151(c) (2014) (establishing worldwide numerical limitations on family-sponsored immigration).

48. 8 U.S.C. § 1152(a) (2014) (setting per country levels of immigration).

49. See *Visa Bulletin for July 2015*, U.S. DEP'T OF ST., (June 9, 2015), <http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-july-2015.html> [<http://perma.cc/H59T-7788>] (depicting differential wait times for most nationalities and those subject to the per country quota).

50. E.g., Legomsky, *supra* note 17, at 305 (predicting that the Court would "conclude that the time has come to lay the general principle to rest"); Motomura, *supra* note 18, at 547–48 (describing disappointment after the plenary power doctrine was critiqued in the 1980s but continued).

I expected the dam to burst with a sudden, dramatic announcement that, henceforth, immigration cases would be treated like any other cases. . . . Obviously, that has not happened. . . . [However], a different scenario seems to be in progress already. Under this revised scenario, the lower courts and the Supreme Court allow the plenary power doctrine to wear away by attrition. Little by little, exceptions and qualifications will reduce the doctrine to a shadow of its former self without an express overruling of contrary precedent.⁵¹

Twenty years after that was written, we can note significant progress in this war of attrition. On questions of procedural due process, plenary power is indeed a shadow of its former self. The Court's acknowledgement that the stakes in a deportation case are at least as high as the stakes in a criminal case, coupled with the Court's recognition in *Zadvydas* that noncitizens have a liberty interest in avoiding detention, provide ample foundation for a top-to-bottom reassessment of whether the routine procedures of immigration enforcement meet due process standards. Recently, lower courts have shown increasing discomfort with the routine ways in which noncitizens are arrested and detained without an independent finding of probable cause.⁵² The Court of Appeals for the Ninth Circuit has extended *Zadvydas* to establish a right to a bond hearing for lengthy prehearing detention of people facing removal, even when the Immigration and Nationality Act imposes mandatory detention.⁵³ In *Din*, six Justices were willing to assume that even a noncitizen outside the country might have a claim to at least some due process.

We still must wait to see if the Court will push this due process revolution to its logical conclusion, and fully treat immigration cases for purposes of procedural due process like any other matter with similarly high stakes. But even if the Court reaches that remarkable threshold regarding questions of procedure, plenary power will remain intact with regard to the substance of immigration law. In immigration, Congress remains free to discriminate by nationality and by political opinion. Our seminal plenary power case—the Chinese Exclusion Case—is known by its explicitly racist title. Not only has it never been repudiated by the Court, we have no case law

51. Stephen Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L. Q. 925, 934 (1995).

52. See generally Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L. J. (forthcoming 2015), <http://ssrn.com/abstract=2568903> [<http://perma.cc/3YRL-L9KT>].

53. *Rodriguez v. Robbins*, 715 F.3d 1127, 1137–38 (9th Cir. 2013) (holding that *Zadvydas* requires a bond hearing once pre-order detention lasts beyond six months); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 950 (9th Cir. 2008) (holding that prolonged detention while a respondent petitions in federal court for review of a removal order requires a bond hearing); see generally Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L. J. 363 (2014).

suggesting that the original Chinese Exclusion Act is constitutionally problematic. To reach such a conclusion, the Court would have to be willing to apply Equal Protection analysis to the substance of immigration law, and that would potentially raise questions about the validity of a great deal of the Immigration and Nationality Act.

Clearly, there are already four Justices who are ready to apply fundamental rights in the context of immigration. If the Court eventually takes that step, it will face a choice. It could declare broadly that substantive constitutional rights apply in immigration. That would cause the dam to break, to borrow Legomsky's phrase. But history counsels us not to expect this. Instead, the Court may be more likely to take one small substantive right at a time, much the way the Court began applying the Bill of Rights to the states.⁵⁴ In a sense, the Court already started this process, by announcing in *Zadvydas* that noncitizens have a constitutionally protected right to liberty. The question is, what else do they have a right to?

Expect the war of attrition to continue.

54. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193, 1195 (1992) ("A list of cases applying various parts of the Bill of Rights against states reads like the "greatest hits" of the modern era . . .").

