Backgrounder

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Plenary Power
Should Judges Control U.S. Immigration Policy?

By Jon Feere

The U.S. Constitution provides no direction to any branch of government on "immigration," although it does invest the power of "naturalization" in Congress.[1] Immigration law has developed over time through numerous statutes and regulations created and adopted by the legislative and executive branches — the political branches of the United States government. Historically, the U.S. Supreme Court has taken a hands-off approach when asked to review the political branches' immigration decisions and policymaking. The ability of Congress and the executive branch to regulate immigration largely without judicial intervention is what has come to be known as the political branches' "plenary power" over immigration.[2] Ever since immigration became an issue of political significance more than 100 years ago, the political branches have been able to exclude and deport aliens or deny certain benefits according to political, social, economic, or other considerations, largely without being second-guessed by the judicial branch. The Supreme Court, in fact, did not seek to assert judicial authority and instead recognized that immigration decisions "are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary."[3] Ultimately, for much of America's history, immigration-related decisions were made within the political branches by politically accountable actors according to legislation written by elected representatives of the American citizenry.

Courts have articulated numerous justifications for keeping immigration regulation largely within the confines of the political branches. Some of those justifications include:

- **Political Question Doctrine:** Federal courts generally refuse to hear cases that involve policy questions best resolved by elected officials. The logic is that elected officials are more accountable to the public and can best represent the public's interests. Elected officials are also more likely to understand the political implications of their decisions. The connection between immigration and foreign affairs, national security, and similar policy-related fields has often resulted in courts invoking this doctrine.

- **Lack of Capacity:** Courts are designed to adjudicate legal issues and simply lack the institutional capacity to make political judgments. Immigration law is inherently political because it's created entirely within the political branches. Any judicial invalidation of immigration statutes almost always requires some amount of "legislating from the bench" and, even still, courts simply do not have the ability to remedy the potentially far-reaching political, social, and economic effects of a ruling that goes against statutory law.[4]

- **Uniformity:** The specifics of immigration (how many, who gets admitted, who gets deported, etc.) are regulated by federal-level political-branch policies. If lower courts become too involved in this process and craft unique statutory interpretations, there is a strong likelihood of an inconsistent immigration system that varies from one jurisdiction to another. This would arguably be in direct violation of the Constitution, which requires a "uniform rule of naturalization." Such a result would make it difficult for citizens to change the system if so desired. Aliens would also find it difficult to navigate the system.

- **Efficiency:** From a resource perspective, a court-run immigration system would be problematic. Judges are already grappling with the ever-escalating onslaught of immigration cases; reducing the authority of the political branches to easily remove or exclude aliens would obviously increase the caseload.

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- **Immigration Enforcement Is Not Punishment:** The Supreme Court has held that due process protections apply when an individual faces punishment in the form of deprivation of life, liberty, or property, but that an alien being returned to his homeland or denied entry to the United States is not being punished and therefore cannot expect the courts to grant him these protections. Deportation and exclusion is simply an administrative procedure.

- **History:** The great weight of legal authority is in support of judicial deference to the political branches on the issue of immigration. The concept of *stare decisis*, which stands for the principle that past holdings should be respected by the courts, ensures that the plenary power doctrine cannot easily be abandoned.

While the plenary power rests on a solid history, attempts to weaken the plenary power doctrine and undermine the role of Congress and the executive branch in the realm of immigration regulation have been afoot for years. This is, in part, a result of an increased judicial focus on individual rights, a willingness of courts to dissect and/or rewrite statutes (what some might call "legislating from the bench"), and the general tendency of those granted power by the state to aggrandize that power. At the same time, open-border immigration attorneys have been desperately searching for an argument that would erase decades of Supreme Court precedent and the authority of the political branches to regulate immigration at all, their aim being more opportunities for appeal and a more lenient immigration policy over all. Outside academia, they have been largely unsuccessful, save for a few anomalous and narrow Supreme Court holdings, critiqued below, and an increasing willingness on the part of a number of lower courts to openly evade the plenary power doctrine by applying their own inconsistent statutory interpretation methodology to even the most basic immigration cases.

This attempt at erasing the plenary power must not go unaddressed. Without the plenary power doctrine, the judicial branch — rather than elected members of the political branches — would be in control of much of the nation's immigration system as courts apply constitutional or "constitutional-like" standards to all exclusion and deportation cases. Theoretically, the ability of the political branches to determine who should be welcomed to our shores, who should stay, and who should go could be almost completely abolished in favor of a judge-regulated immigration system. Immigration policy decisions would be less likely to be shaped through the political process and would therefore lessen the power of the electorate to control the nation's future and to decide who we are as a nation and who we will be. Furthermore, detailed political considerations appropriate to expert agency officials may not be adequately considered by judges who are generally without the requisite immigration expertise. This is good for neither citizens nor aliens. Fortunately, the plenary power doctrine rests on a solid foundation and will remain strong, provided that the political branches steadfastly rebuff any attempts to weaken it.

This *Backgrounder* provides a brief history of the plenary power doctrine and attempts to discredit the case law highlighted by those seeking to weaken the doctrine. It concludes with recommendations on how to protect the political branches' power over immigration. On a basic level, Congress must make sure that immigration laws are clear and decisive as to the issue of authority and the executive branch must vigorously defend its regulation and enforcement of those laws. Without attention to this matter, the courts will continue to encroach upon immigration regulation and policy.

The Immigration Courts

To appreciate a century of plenary power history, a basic understanding of the immigration court system is necessary. An alien charged with violating immigration law initially faces an administrative process separate and distinguishable from the traditional court system. After being detained by immigration authorities and placed in removal proceedings, an alien's first contact with a judicial-like authority is an Immigration Judge (IJ) in the Immigration Court; this assumes, of course, that the alien actually gets into court and is not summarily deported via expedited removal at the border, for example.[5] The IJ determines if the alien is removable or inadmissible under federal immigration statutes, and also whether the alien is entitled to some form of relief (e.g., asylum). If the alien loses in this court and chooses to appeal, he appeals to the Board of Immigration Appeals (BIA), which generally reviews the lower court's hearing on paper rather than by a new trial. These courts make up the Executive Office for Immigration Review (EOIR) and fall under the U.S. Department of Justice, an executive branch agency. This is notable for the fact that, unlike traditional courts of law, the Immigration Court and the BIA are not part of the judicial branch. One clear difference is that the U.S. Attorney General can review a BIA decision, vacate it, and issue his own decision in its place; due to separation of powers issues, the Attorney General obviously cannot do the same for decisions rendered by judicial branch (Article III) courts. Although this is only one difference between the immigration courts and judicial branch courts, it illustrates how the regulation of immigration falls squarely within the executive branch. Nevertheless, should the alien

lose administratively, Congress has authorized appeal to the judicial branch in some instances. There are numerous exceptions to how and when an alien is granted the right to appeal into an Article III court, and the process is ever-changing as Congress amends and tightens the process; those opposing the plenary power doctrine are constantly looking to expand opportunities for appeal.[6]

Plenary Power: A Brief History

When immigration to the United States became a political issue over a century ago, the original understanding of each of the three branches of government was that immigration was to be regulated administratively by the political branches with minimal court intervention. One of the earliest and most significant immigration cases in Supreme Court history is *Chae Chan Ping v. United States* (1889), also known as the "Chinese Exclusion Case." At issue in this case was whether an 1882 law barring all future immigration of Chinese laborers should work to exclude Chae Chan Ping, a Chinese immigrant residing in the United States who left in 1887 for what he thought would be a brief visit to China. Although the 1882 law contained a waiver provision designed to allow previously-admitted Chinese laborers like Chae Chan Ping to leave and return, that provision was discontinued by a new act of Congress in 1888 while Chae Chan Ping was on his return voyage to the United States. Upon arrival, he was denied entry. In upholding his exclusion, the Court recognized an inherent federal power to exclude non-citizens, even though such power is not clearly written into the Constitution. In a unanimous decision, the Court held:

> "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. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power."[7]

Most significantly, the Court held that decisions by the "legislative department" to exclude aliens are "conclusive upon the judiciary."[8] The Court continued:

> "Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are *not questions for judicial determination*. If there be nay just ground of complaint on the part of China, it must be made *to the political department of our government*, which is alone competent to act upon the subject."[9] (emphasis added).

By holding as it did, the Court affirmed the political branches' authority to exclude aliens as the branches see fit. The Court signaled an unwillingness to second-guess what it considered policy-based decisions and gave strong deference to both Congress and the executive branch in the area of immigration, thus forming the basis of the plenary power doctrine.

Three years later, the Court largely rejected due process limits — namely, the right of the alien to appeal the executive branch's immigration decision — in *Nishimura Ekiu v. United States* (1892).[10] In this case, Nishimura Ekiu, a citizen of Japan, arrived in the United States by boat, claiming that she was to meet up with her husband. Ekiu did not know the husband's address and carried with her only $22. For various reasons the immigration officer did not believe Ekiu and denied her entry under a statute that directed immigration officers to deny admission to anyone likely to become a public charge. Ekiu appealed her case up to the Supreme Court arguing that complete judicial deference to immigration decisions made by executive branch immigration officers amounted to a denial of due process. The Court disagreed. It held that the statute that empowered the immigration officials to make admission decisions also entrusted the final fact-finding to these officials. In other words, the Court again held that the judicial branch was not to second-guess the political questions inherent in any immigration decision. The Court explained:

> "An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful. Congress may, if it sees fit…authorize the courts to investigate and ascertain the facts on which the right to land depends. But…the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made *the sole and exclusive judge* of the existence of those facts, and *no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted*."[11] (emphasis added).

The Court also explained its definition of "due process" in the context of immigration proceedings:

> "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, *are due process of law*."[12] (emphasis added).

One year later, in 1893, the Court extended the principles in the two exclusion cases above to the issue of deportation in *Fong Yue Ting v. United States*.[13] After reaffirming the holdings in both *Chae Chan Ping* and *Ekiu*, the Court held that:

> "The power of Congress…to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers…."[14]

The Court also held that because deportation is "not a punishment," the due process protections of the Constitution are not applicable:

> "The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."[15]

Taken together, *Chae Chan Ping*, *Ekiu*, and *Fong Yue Ting* represent the foundation of the political branches' plenary power over immigration. The principles in these cases have since been reiterated by the courts numerous times and they have never been overturned.[16]

Over the decades that followed, the Supreme Court advanced the plenary power doctrine even further, culminating in a series of cases in the 1950s that are considered by some legal scholars to be the high-water mark for the doctrine. These cases strengthened the Court's deference to the political branches and continued to limit non-citizens' rights to due process and, in one case, held that excluded non-citizens were not entitled to a day in court even if the result was indefinite detention. In other words, in the realm of exclusion, the political branches of the government had absolute and unreviewable authority.[17]

In 1950, the Court affirmed the exclusion of Ellen Knauff, a German-born war bride working for the U.S. War Department in Germany who sought naturalization in the United States after having married a U.S. citizen employed in the U.S. Army.[18] She was detained on Ellis Island and ordered excluded by immigration officials on national security grounds. In affirming the executive branch decision to exclude her without a hearing, the Court reasoned as follows:

> "An alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides."[19]

And:

> "[T]he decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer.... The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."[20]

The Court then reaffirmed *Ekiu*, discussed above:

> "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[21]

After the ruling, newspaper editorials decried her exclusion and Congress decided to intervene on Knauff's behalf. Hearings were held, private bills were introduced, and eventually — over two years after the exclusion order — the U.S. Attorney General granted Knauff a hearing before the immigration Board of Special Inquiry. After testimony from government witnesses who claimed that Knauff was involved in espionage with the Czechoslovakian government, the Board ruled against Knauff and returned her to Ellis Island. Soon after, Knauff appealed the ruling to the Board of Immigration Appeals which reversed in her favor and ordered that she be admitted into the United States. The Attorney General accepted the ruling and Knauff became a lawful permanent resident.[22]

Knauff illustrates the importance of the plenary power doctrine. The Supreme Court recognized the limited role of the judicial branch in immigration proceedings and the decision appropriately forced the political issues surrounding Ellen Knauff to be debated within political branches rather than in the court system. This ensures that agency experts rather than Article III judges make the final determination. It also allows citizens to control their nation's immigration policy through the ballot box.

In 1952, the Supreme Court reasoned similarly in affirming the deportation of three aliens who were former members of the Communist Party in *Harisiades v. Shaughnessy*.[23] Here, however, the aliens were long-time residents who were fighting against their removal. The Court seemed to note the severity of deporting aliens who had resided within the country for a lengthy period of time, but noted that such expulsion, "is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state."[24] In affirming the deportations, the Court held:

> "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[25]

And:

> "[N]othing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with that of Congress."[26]

In supporting deference to the political branches, the Court held that the aliens' proposition that the judicial branch should review and uphold immigration policy only after a finding of "reasonableness" is a proposition "not founded in precedents of this Court."[27] The Court explained:

> "Under the conditions which produced this Act, can we declare that congressional alarm about a coalition of Communist power without and Communist conspiracy within the United States is either a fantasy or a pretense? This Act was approved by President Roosevelt June 28, 1940, when a world war was threatening to involve us, as soon it did. Communists in the United States were exerting every effort to defeat and delay our preparations. Certainly no responsible American would say that there were then or are now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security…. It would be easy for those of us who do not have security responsibility to say that those who do are taking Communism too seriously and overestimating its danger. But we have an Act of one Congress which, for a decade, subsequent Congresses have never repealed but have strengthened and extended. We, in our private opinions, need not concur in Congress' policies to hold its enactments constitutional. Judicially we must tolerate what personally we may regard as a legislative mistake."[28]

The Court also noted that less deference to the political branches would unwisely turn judges into international policymakers:

> "[I]t would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation. However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers."[29]

Justice Frankfurter's concurring opinion reiterates that it is not the responsibility of the judicial branch to make or rewrite policy and ultimately puts the onus back on Congress:

> "Though as a matter of political outlook and economic need this country has traditionally welcomed aliens to come to its shores, it has done so exclusively as a matter of political outlook and national self-interest. This policy has been a political policy, belonging to the political branch of the Government wholly outside the concern and the competence of the Judiciary… In recognizing this power and this responsibility of Congress, one does not in the remotest degree align oneself with fears unworthy of the American spirit or with hostility to the bracing air of the free spirit. One merely recognizes that the place to resist unwise or cruel legislation touching aliens is the Congress, not this Court."[30]

In 1953, the Court went further in *Shaughnessy v. United States ex rel. Mezei*, holding that a non-citizen facing exclusion is not entitled to any due process whatsoever, even if the result was indefinite detention.[31] In this case, Ignatz Mezei, an eastern European immigrant who had lived in the United States for more than 25 years, left the country, apparently to visit his dying mother in Romania. He was denied entry there, and instead remained in Hungary for 19 months. Thereafter, he returned to the United States, ultimately arriving at Ellis Island where he was then permanently denied entry by the U.S. government on the basis of national security. In an effort to relocate, Mezei shipped out to both Britain and France; each country denied him admission, and Mezei returned to Ellis Island. The U.S. Department of State unsuccessfully negotiated with Hungary to send Mezei there, and Mezei himself unsuccessfully applied for entry to approximately a dozen other countries.[32] Eventually, both the U.S. government and Mezei ended their search. After 21 months of living on Ellis Island, Mezei applied for a writ of habeas corpus, arguing that his exclusion from the United States amounted to an unlawful detention.

Although a lower court granted Mezei's request, the U.S. Supreme Court reversed the decision, holding that the exclusion was a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[33] And in citing more precedent, the Court held:

> "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned. And because the action of the executive officer under such authority is final and conclusive, the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case; it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government. In a case such as this, courts cannot retry the determination of the Attorney General."[34]

And:

> "In sum, harborage at Ellis Island is not an entry into the United States. For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws."[35]

Mezei remained on Ellis Island for nearly four years until he was released on humanitarian grounds and paroled into the United States by the U.S. Attorney General after hearings.[36] Like the decision to admit Ellen Knauff into the United States, discussed above, Mezei's parole was the result of political decisions made within the political branches and involved, for example, private bills in Congress and hearings in executive branch immigration courts. Once again, the plenary power doctrine appropriately placed political decisions in the hands of policymakers.

Many additional Supreme Court cases have affirmed the plenary power doctrine and, like each of the previous cases, the following cases have been citied approvingly many times:

- 1954: *Galvan v. Press* — The Supreme Court affirms a security statute and the deportation order under that statute of a communist Mexican alien. In reaffirming the plenary power doctrine, the Court explains, "[T]he slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." The Court affirmed

the deportation even while recognizing that the alien "legally became part of the American community" and had lived in the country for 36 years with an American wife and four children.[37]

- 1972: *Kleindienst v. Mandel* — The Supreme Court upholds the exclusion of a self-described "revolutionary Marxist" Belgian author who had been invited to speak at Stanford, Princeton, Columbia, and other universities. In deferring to the executive branch's decision to exclude the author, the Court explained that its own "reaffirmations of [the plenary power doctrine] have been legion. The Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."[38] The Court also cited an important case from 1895, holding that the power of Congress "to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, *is settled* by our previous adjudications."[39] (emphasis added). After calling the power "firmly established" the Court explained that "when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it…"[40]

- 1976: *Mathews v. Diaz et al.* — The Supreme Court upholds a statute requiring a five-year period of admission as a prerequisite for aliens wishing to receive Medicare. In reaffirming the plenary power doctrine, the Court held: "For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. This very case illustrates the need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication. Appellees Diaz and Clara are but two of over 440,000 Cuban refugees who arrived in the United States between 1961 and 1972."[41] The Court noted the significant political, social, and economic impact a decision in favor of the aliens — and against the plenary power — would have: "An unlikely, but nevertheless possible, consequence of holding that appellees are constitutionally entitled to welfare benefits would be a further extension of similar benefits to over 440,000 Cuban parolees." In being asked to substitute its judgment for that of Congress, the Court simply responded: "We decline the invitation."[42] The Court understood that it lacked the capacity to rein in the political implications a decision in favor of the alien would have in this case.

The Courts Get Involved In Immigration Policy

Despite decades of judicial support for the political branches' plenary power over immigration, the doctrine is not without some cracks. Soon after the early *Chae Chan Ping*, *Ekiu*, and *Fong Yue Ting* cases and prior to the *Knauff* decision in 1950, the Supreme Court softened the plenary power doctrine in a number of cases and carved out some exceptions, especially for individuals facing deportation who claimed to be U.S. citizens.[43] But most of these small exceptions were short-lived as the plenary power was reinvigorated by *Knauff*, *Mezei*, and the other cases discussed above. Nevertheless, with the inevitable appointment of new justices to the Supreme Court and an increasing focus on individual rights during the 1960s and 70s came a judicial willingness to wield "a scalpel [and] dissect the administrative organization of the Federal Government," at least according to a dissenting Justice Rehnquist in his defense of the plenary power doctrine.[44] As the judicial branch expanded the number and types of immigration claims it would hear, the result was a chipping away of the plenary power doctrine. But trying to make sense of the high court's inconsistent immigration decisions has justifiably been a challenge for the brightest of legal scholars. Quite simply, the agenda of judges opposed to the plenary power doctrine has been to slowly begin applying semi-constitutional norms — what some academics call "phantom norms" — to basic immigration cases that would not otherwise escape the reach of the plenary power doctrine.[45] The thinking is that if the Supreme Court could squeak out a few cases that superficially apply constitutional norms in the immigration context (e.g., the use of a First Amendment analysis as a bar against deportation, race-based civil rights claims as an argument against exclusion, protections against cruel and unusual punishment), then slowly, over time, the entire notion of dragging nearly every deportation or exclusion hearing into the judicial branch and granting constitutional protections to all aliens — both those within and outside the country — would become the status quo. The resulting decisions, logically, are much

more sympathetic to the alien as the increasingly powerful judiciary finds more and more justifications for denying exclusions and deportations. The overall outcome is that political decision-making in immigration law becomes usurped by unelected, and largely unaccountable, Article III judges with little or no understanding of the political implications of their decisions.

A few notable cases seem to have abandoned decades of precedent while simultaneously enlarging the role of judges to that of immigration policymakers. Although some of the cases are heralded as "groundbreaking" by anti-plenary power attorneys, it is likely that these cases represent an anomalous, narrow, and temporary deviation that will not hold up, particularly after the deaths of nearly 3,000 people at the hands of 19 immigrants on September 11, 2001. Post-9/11 developments and possible strategies for reinvigorating the plenary power are discussed later in this report.

The attempted movement away from the plenary power doctrine can be observed in a series of holdings beginning in the mid-1940s in which the Supreme Court over time began applying constitutional norms to immigration cases that could otherwise be decided with a basic application of the plenary power doctrine. This waning and waxing anti-plenary movement included — and continues to include — detailed judicial examinations of immigration statutes and their legislative histories, routine questioning of the executive's handling of immigration cases, and a focus on the impact of deportation on the alien. The end goal for anti-plenary power judges and attorneys, of course, is the complete envelopment of immigration cases by standard constitutional law analysis, an analysis that is much more beneficial to the alien than it is to the government. Cases representing this judicial intervention are examined below.[46]

In the 1948 case *Fong Haw Tan v. Phelan*, a statute regarding the deportation of criminal alien repeat offenders was at issue after Fong Haw Tan was convicted of two different murders and received a life sentence for each during a single trial. The statute required that "any alien…who is sentenced more than once [to imprisonment for a term of one year or more] because of conviction…of any crime involving moral turpitude, committed at any time after entry shall, upon the warrant of the Attorney General, be taken into custody and deported."[47] Both the immigration court and the Ninth Circuit Court of Appeals were not swayed by Fong Haw Tan's argument that the statute did not apply to him because he could not actually serve two life sentences, nor were the courts swayed by the alien's humanitarian appeal. In showing strong deference to the executive branch's interpretation of the statute, the appeals court held simply: "In our opinion there is no harsh injustice involved that justifies a judicial search for a limitation of the plainly expressed scope of the statute."[48] Upon appeal, the Supreme Court reversed in favor of Fong Haw Tan. Instead of deferring to the executive branch interpretation of the statute, the Court dug into the statute's legislative history to find quotes from the statute's authors which emphasized a concern about repetition of offenses by an alien. The Court held that the two murders committed by Fong Haw Tan did not represent the type of repeat offender at whom the statute was aimed and that it authorized deportation "only where an alien having committed a crime involving moral turpitude and having been convicted and sentenced, once again commits a crime of that nature and is convicted and sentenced for it."[49] Additionally, on humanitarian grounds the Court sided with the alien rather than the executive branch, a clear abandonment of basic plenary power deference:

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."[50]

This holding clearly conflicts with *Fong Yue Ting*, discussed earlier, where the Court held that deportation is "not a banishment" and "not a punishment."[51] Clearly, respect for *stare decisis* must be abandoned by those wishing to eliminate the plenary power doctrine. Interestingly, Congress amended the language of this statute not long after this holding so as to render an alien deportable if he is twice convicted of crimes involving moral turpitude, *regardless* of whether the two convictions are in one trial or separate trials, and *regardless* of whether the alien is actually sentenced to a term of imprisonment as a result of such convictions. The exact motive for rewriting the statute is unclear, but it might be evidence of Congress's attempt to override judicial intervention in immigration regulation of the kind noted in *Fong Haw Tan*.[52] While the new statute renders the case *holding* somewhat irrelevant from a legal standpoint, this case nevertheless represents one of the early movements away from absolute judicial deference to the political branches on immigration enforcement and remains highlighted by anti-plenary advocates.

At issue in the 1953 case *Kwong Hai Chew v. Colding* was the exclusion of a returning lawful resident

alien who was deemed to be a threat to national security by immigration authorities. After temporarily leaving the United States working as a seaman, Kwong Hai Chew was detained upon reentry, ordered excluded, and not provided a hearing or made aware of the charges against him because executive branch officials believed that to do so would harm national security. In holding in favor of the government, and noting that the statutes in the case did not provide for judicial review, the district court reiterated much of the strong plenary power reasoning in *Knauff*, discussed above, holding that "whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."[53] The district court also reaffirmed *Ekiu*, another strong plenary power case discussed above, noting that "the admission of aliens is a privilege granted upon such terms as the United States may prescribe."[54] The Second Circuit Court of Appeals upheld the decision largely along the same lines.[55] The Supreme Court, however, reversed in favor of Kwong Hai Chew in what one influential legal scholar has called one of the Court's "feats of creative interpretation."[56]

The statute keeping Kwong Hai Chew from reentering clearly provides that "the alien may be denied a hearing…if the Attorney General determines that he is excludable under one of the [statutorily defined] categories…on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."[57] The Court admitted that an alien arriving to the shores of the United States can be excluded and denied any due process under this statute. But because Kwong Hai Chew was a lawful permanent alien, the Court decided that in evaluating Kwong Hai Chew's due process rights it would "assimilate [his] status to that of an alien continuously residing and physically present in the United States" even though he clearly left the country and was physically outside the border during his detention (i.e. he was detained on a boat).[58] This legal fiction was enough to put Kwong Hai Chew outside the reach of the statute because the statute dealt with "exclusion" rather than "deportation." The Court majority seemed to feel that aliens in Kwong Hai Chew's situation should be entitled to due process protections, but it did not want to go so far as to deem the statute unconstitutional and declare outright that all aliens facing exclusion could invoke the Due Process Clause. In later decisions, however, the Court would admit that this decision set the precedent for doing just that.[59] This was an example of a "phantom" constitutional holding that would later be turned into a real constitutional holding.[60]

The fact that this was not yet a "true" constitutional holding was made clear a month later in *Shaughnessy v. United States ex rel. Mezei*, discussed earlier, where the Court — citing the same statute in *Kwong Hai Chew* — denied the alien bound to Ellis Island any procedural due process, holding:

> "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned. And because the action of the executive officer under such authority is final and conclusive, the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case."[61]

The *Mezei* Court explained the seemingly contradictory holdings by noting that while Kwong Hai Chew had previously undergone a security clearance as a requirement for his seaman position, Mezei left the country "apparently without authorization or reentry papers."[62] Still, anti-plenary advocates cite *Kwong Hai Chew* as another example of the Court's willingness to move away from absolute deference to the political branches on immigration enforcement — a move they believe represents the beginning of the end of the plenary power doctrine. The decision did clear the way for the Court to — in a future case discussed below — grant an alien like Kwong Hai Chew constitutional protections under the Due Process Clause without first "assimilating" the arriving resident alien's status to that of an alien residing within the country.

No More "Phantom" Constitutional Norms

Most of the early constitutional "phantom" norm cases involved the Supreme Court simply interpreting the statutes at issue in a way that would provide some sort of constitutional-like protections to the alien. None of these early cases actually *overturned* a statute by holding it "unconstitutional."[63] Until *Landon v. Plasencia* in 1982, the Court tried to avoid creating new, significantly *constitutional* holdings in the realm of immigration partially due to the principle of *stare decisis,* which directs courts to generally adhere to previous holdings when rendering new decisions, and partially as a result of the doctrine of "constitutional avoidance," where courts try to resolve the issue at hand without creating a new constitutional holding that might upset other cases or raise additional questions that result in an onslaught of new litigation. But by the 1980s, the foundation had been set, and analyzing an immigration case through a fully constitutional lens

was the next obvious step for those in the anti-plenary movement. The argument is that the constitutional-like holding in *Kwong Hai Chew* was transformed into "real constitutional immigration law" in *Plasencia*.[64]

In *Plasencia*, permanent resident alien Maria Plasencia traveled from the United States to Tijuana, Mexico, for the purpose of smuggling several illegal aliens into the United States. Plasencia provided the aliens registration cards belonging to her children. Immigration officers detained Plasencia at the border as she tried to reenter with six illegal aliens in her vehicle and charged her under a section of the Immigration and Nationality Act (INA) that provides for the exclusion of any alien seeking admission "who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law."[65] The immigration judge at the exclusion hearing found that Plasencia's trip to Mexico was a "meaningful departure" from the United States and that her return here was an "entry" under the law and, on the basis of these findings, ordered her "excluded and deported."[66] The Board of Immigration Appeals denied Plasencia's appeal, but via a writ of habeas corpus, the District Court vacated the decision finding no meaningful departure. The District Court declared that Plasencia was entitled to a *deportation* hearing rather than an exclusion hearing and that the government could re-litigate the question of "entry" at that proceeding. The District Court noted that an alien who loses at a deportation hearing is provided more statutory rights than the alien who loses at an exclusion hearing.[67] The Ninth Circuit Court of Appeals affirmed the District Court.[68]

The Supreme Court reversed, holding that an exclusion hearing is an appropriate place for immigration authorities to determine whether an alien was attempting to enter the United States and whether the alien is excludable. Plasencia was *not* entitled to a deportation proceeding where she would be afforded more rights. *However*, the Court then turned to the question of whether an alien facing exclusion who is a "continuously present permanent resident" — just like Plasencia claimed to be — should be afforded a right to due process as articulated by the Due Process Clause of the 5th Amendment of the U.S. Constitution. The Court held that such an alien is protected by the Due Process Clause. However, the Court was clearly attempting to reframe the debate and inject a greater amount of judicial involvement. In citing a variety of due process-related cases, the Court noted that:

> "The constitutional sufficiency of procedures provided in any situation…varies with the circumstances. In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures."[69]

Here, the Court granted Plasencia constitutional protections by analyzing her case through a modern constitutional due process test. The Court did not feel the need to "assimilate" her status or avoid the statute at issue. The plenary power was not mentioned once. Unlike in *Kwong Hai Chew*, the Court had reached the constitutional issue and turned phantom constitutional norms into real immigration law.[70]

Although the anti-plenary crowd heralded this decision as the death of the plenary power doctrine, the holding is not as far-reaching as some claim it to be. The Constitutional protections were only granted to a small, specific type of defendant: returning legal permanent resident aliens, generally continuously present in the United States, with social ties that create a "stake" in living here, and who had been absent from the country for "only a few days."[71] Furthermore, although the Court held that Plasencia was protected by the Due Process Clause, the Court never articulated precisely *what* process is due and instead remanded the case to the lower court for that determination. In other words, the Court did not want to completely abolish the plenary power doctrine and did not speak on the appropriate level of due process afforded an alien.

Developments after the 9/11 Attacks

About two months before the terrorist attacks of September 11, 2001, the Supreme Court took a more active role in immigration regulation than it ever had before in *Zadvydas v. INS*, a case that some argue also signals the abandonment of the plenary power.[72] To be sure, the Court's dissection of specific immigration statutes in this case — as well as the dissection of the executive branch's enforcement of those statutes — was an assault on the plenary power doctrine. But the holding was limited in scope and legislation that came about in the following months as a result of the 9/11 attacks assures a partial reinvigoration of the plenary power doctrine. Nevertheless, *Zadvydas* remains a vivid example of how invasive a court not recognizing the plenary power can be in the realm of immigration regulation. The case is also noteworthy for the fact that its encouragement of judicial intervention created confusion and conflicting rulings in the lower courts, the result of which is a seemingly inconsistent U.S. immigration policy.

Court promises to "Listen with Care." At issue in *Zadvydas* was the long-term detention of two criminal aliens who had been ordered deported. The Court heard both cases in the same hearing. Kestutis Zadvydas' criminal record included drug crimes, attempted robbery, attempted burglary, and theft. He also had a history of flight from both criminal and deportation proceedings. Kim Ho Ma was involved in a gang-related shooting and was convicted of manslaughter. Immigration officials could not find a country willing to receive the aliens within the statutory 90-day removal period. In continuing to detain the aliens after 90 days, the government invoked a statute that provides:

> "An alien ordered removed who is inadmissible [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained beyond the removal period* and, if released, shall be subject to [certain] terms of supervision…."[73] (emphasis added).

In other words, Congress granted the Attorney General the authority to detain an alien beyond 90 days if he or she found it necessary to do so for public safety reasons or otherwise. It is not an unreasonable allowance considering that immigration authorities regularly detain dangerous individuals. It is even more understandable in light of the slow bureaucratic processes that make up our immigration system; 90 days is not always sufficient. The government argued that the decision "whether to continue to detain such an alien and, if so, in what circumstances and for how long" was up to the Attorney General, not the courts.[74]

But the high court did not agree with the government's interpretation of the statute and felt that, as applied, the statute violated the aliens' Constitutional rights to due process. The Court took issue with what it believed to be the "indefinite detention" of Zadvydas and Ma (despite the fact that the government continued to search for a place to deport the aliens during the post-90-day period). In a close 5-4 decision, the Court held that it could not find "any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed."[75] The Court then decided to "construe the statute to contain an implicit 'reasonable time' limitation."[76] Clearly, on its face, the statute requires no such limitations. The Court explained their construction:

> "The government points to the statute's word, 'may.' But while 'may' suggests discretion, it does not necessarily suggest unlimited discretion. In that respect the word 'may' is ambiguous. Indeed, if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."[77]

Of course, one could argue that Congress could *not* speak more clearly and that such decisions were squarely within the discretion of the Attorney General. Nevertheless, in order to eliminate what it considered the "constitutional threat" of the potentially indefinite detention of deportable aliens, the Court held that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."[78] The Court then arbitrarily decided that six months was all that was necessary for determining an alien's deportability:

> "After this six-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink. This six-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."[79]

Put simply, a reviewing court's definition of "reasonably foreseeable" will determine the release of deportable aliens back onto the streets. Put another way, the judicial branch rather than the political branches will have the final say on who is allowed into the country and who is required to leave. Of course, the lower courts had already begun taking control; before it went to the Supreme Court, Kim Ho Ma's lower court case was decided along with approximately 100 similar detention cases in a joint order.[80] It is unclear how many of these aliens in the lower proceeding were released back into our neighborhoods. Furthermore, before the decision in *Zadvydas*, the INS was holding approximately 3,000 individuals in what the Court would consider "indefinite detention." How many of these aliens were released as a result of the decision in *Zadvydas* is unclear. According to the Department of Justice, from January 2001 through September 2002, the

INS reviewed 1,710 alien detention cases and released 1,034 (60 percent) of the aliens.[81]

The Court was well-aware that it was stepping on the political branches' toes and weakening congressional and executive plenary power over immigration. The majority acknowledged the "greater immigration-related expertise of the Executive Branch" and that "principles of judicial review in this area recognize primary Executive Branch responsibility."[82] Such realities, the Court noted, "require courts to listen with care" to the concerns of the Executive.[83] But such sentiment is hollow. The Court clearly moved from the "hands-off" approach articulated by the plenary power doctrine to a somewhat dismissive "listen with care" standard. The plenary power doctrine had seemingly yielded to judicial intervention. It is worth noting that although the decision in *Zadvydas* applied only to admitted aliens later determined to be deportable, a later case — *Clark v. Martinez* (2005) — extended these protections to removable aliens who have never been admitted into the country.[84]

Dissenting in Favor of the Plenary Power. The Court's dissenting justices felt that the case ultimately was about "a claimed right of release into this country by an individual who *concededly* has no legal right to be here" and argued that there is "no such constitutional right."[85] They also noted that the majority "offered no justification why an alien under a valid and final order of removal — which has *totally extinguished* whatever right to presence in this country he possessed — has any greater due process right to be released into the country than an alien at the border seeking entry."[86] This is a legitimate point: neither type of alien has a right to be in the United States, so why should one have a claim for release into the country? Such reasoning rests solely on the seemingly-arbitrary six-month time limit and, as the dissent noted, Zadvydas' case itself "demonstrates that the repatriation process may often take years to negotiate, involving difficult issues of establishing citizenship and the like."[87]

The dissenters also noted that the dangerousness of the alien and the risks he or she poses to society "do not diminish just because the alien cannot be deported within some foreseeable time."[88] Clearly, the dangerousness of an alien and the decision about whether to release him or her is a political question — a question that should be left up to politically-accountable actors who can be taken to task for making a faulty decision. By creating an arbitrary deadline for release, the ruling in *Zadvydas* arguably eliminates the type of accountability that can be corrected through elections: If a dangerous alien is released as a result of *Zadvydas*, executive branch officers can shrug their shoulders and point to the judiciary's demands, while lower court judges can shrug their shoulders noting that they have to abide by the Supreme Court's ruling.

But the dissenting justices' concerns went further than simply the release of dangerous aliens into U.S. society. For them, the larger concern was what they viewed as judicial intervention into a political process, something that upset the balance of powers. Although the majority claimed it was trying to avoid a constitutional question by deciding the case as it did, the dissent felt that the majority raised more constitutional questions than it avoided. In a scathing response, the dissenters laid out their case:

> "The Court says its duty is to avoid a constitutional question. It deems the duty performed by interpreting a statute in obvious disregard of congressional intent; curing the resulting gap by writing a statutory amendment of its own; committing its own grave constitutional error by arrogating to the Judicial Branch the power to summon high officers of the Executive to assess their progress in conducting some of the Nation's most sensitive negotiations with foreign powers; and then likely releasing into our general population at least hundreds of removable or inadmissible aliens who have been found by fair procedures to be flight risks, dangers to the community, or both. Far from avoiding a constitutional question, the Court's ruling causes systemic dislocation in the balance of powers, thus raising serious constitutional concerns not just for the cases at hand but for the Court's own view of its proper authority. Any supposed respect the Court seeks in not reaching the constitutional question is outweighed by the intrusive and erroneous exercise of its own powers."[89]

Had the majority shown greater respect for the plenary power doctrine, and by consequence, greater deference to the political branches, none of these glaring concerns would have been raised. But in attempting to resolve the constitutional rights of the alien, it seems the majority raised numerous and arguably more significant constitutional conflicts.

Foreign Powers Controlling U.S. Immigration Policy? One of the arguments for the political branches' plenary power over immigration involves a focus on foreign affairs. That issue was a factor in the *Zadvydas* decision. Under the Constitution, it is the executive and legislative branches that direct foreign policy matters. This ensures that the U.S. relations with other countries are consistent

and reliable. As explained by the dissenting justices in *Zadvydas*: "judicial orders requiring release of removable aliens, even on a temporary basis, have the potential to undermine the obvious necessity that the Nation speak with one voice on immigration and foreign affairs matters."[90] The problem is that the majority effectively empowered *foreign governments* to control U.S. immigration policy. The dissenting justices in *Zadvydas* explained:

> "The result of the Court's rule is that, by refusing to accept repatriation of their own nationals, other countries can effect the release of these individuals back into the American community. If their own nationals are now at large in the United States, the nation of origin may ignore or disclaim responsibility to accept their return. The interference with sensitive foreign relations becomes even more acute where hostility or tension characterizes the relationship, for other countries can use the fact of judicially mandated release to their strategic advantage, refusing the return of their nationals to force dangerous aliens upon us."[91]

Certainly, such political considerations are not on the average judge's radar, and they shouldn't be. Political issues are to be debated and resolved within the political branches. But the decision in *Zadvydas* arguably *requires* judges to involve the judiciary in foreign affairs. According to the dissenting justices:

> "One of the more alarming aspects of the Court's new venture into foreign affairs management is the suggestion that the district court can expand or contract the reasonable period of detention based on its own assessment of the course of negotiations with foreign powers. The Court says it will allow the Executive to perform its duties on its own for six months; after that, foreign relations go into judicially supervised receivership."[92]

By not adhering to the plenary power doctrine, the *Zadvydas* majority effectively relocates foreign policy considerations from experienced and accountable political actors to arguably less-politically astute judges while simultaneously politicizing the judiciary. The decision also puts foreign governments in the driver's seat.

The Political Branches Respond. Two months after the *Zadvydas* decision, the 9/11 terrorist attacks were perpetrated by 19 aliens. The Department of Justice was in the midst of updating its procedures to accommodate the Supreme Court ruling. While the provisions met the Court's requirements, they also narrowly defined the holding and carved out numerous exceptions. Specifically, the new provisions added immigration procedures for determining whether aliens with final orders of removal are likely to be removed within a reasonable amount of time and whether they should remain in government custody or be released into the United States pending their removal.[93] But the rule also set out a procedure for the *continued* detention of deportable aliens who are *not* likely to be removed in the reasonably foreseeable future. These involve aliens described by four special circumstances: (1) aliens who have highly contagious diseases that pose a danger to the public; (2) aliens who pose foreign policy concerns; (3) aliens who pose national security and terrorism concerns; and (4) aliens who are specially dangerous due to a mental condition or personality disorder (and have previously committed a crime of violence, and are likely to engage in acts of violence in the future).[94] These categories were not mentioned by the Court in *Zadvydas*, although the Court did state that its holding would be different if the case involved "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[95] The political branches have used this language to defend the new regulations and its plenary power over immigration regulation generally; the terms "special circumstances," "foreign policy concerns," "specially dangerous," and "matters of national security" offer some leeway in continuing the detention of many aliens.

The regulations add a handful of other tools that keep much control over immigration in the hands of the political branches. For example:

- Any alien released under supervised conditions due to a finding that there is no likelihood of removal in the reasonably foreseeable future must obey all laws, must continue to seek travel documents, must provide the immigration agency with all correspondence to and from foreign consulates, or face being placed back into detention. This might include a requirement of medical or psychiatric exams and attendance at any necessary rehabilitative programs.

- The government may revoke the alien's release if the government believes there are changed circumstances that create a significant likelihood of removal in the reasonably foreseeable future.

- The government is not required to grant employment authorization to a released inadmissible alien.

- Any alien denied a request for release must wait six months before submitting a new request for review of his detention.

- There is no administrative appeal from the immigration agency's finding of no likelihood of removal in the reasonably foreseeable future.[96]

In addition, the government has set high bonds as a means of keeping aliens detained longer. If the executive branch keeps a firm grasp on the process, all of these procedures give the political branches of the government greater control over immigration regulation than the ruling in *Zadvydas* might seem to allow.

Congress also crafted legislation aimed at weakening *Zadvydas*. Less than four months after *Zadvydas*, the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act" (the "PATRIOT Act") of 2001 was signed into law. It authorizes the continued detention of any alien whose removal is not reasonably foreseeable if the U.S. Attorney General has "reasonable grounds to believe" that the alien represents a security threat or has been involved in terrorist activities. Such detention is indefinitely renewable in six-month increments.[97] This act is viewed not only as a result of the 9/11 attacks, but also as a partial rebuke of the *Zadvydas* holding. Considering that the majority in *Zadvydas* justified the holding in that case by noting that Congress could have "spoken in clearer terms" on the issue of detaining aliens, the PATRIOT Act arguably gives the justices precisely what they wanted. The PATRIOT Act can properly be viewed as the political branches reasserting their control over part of the immigration system. In fact, a few years later, the Court seemed to specifically instruct Congress to reassert its plenary power over immigration in a 2005 immigration case when it noted the following: "The Government fears that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed. If that is so, Congress can attend to it."[98] The Court then referred to the PATRIOT Act as evidence that the political branches can and have overcome some judicial regulation of immigration policy. Of course, the PATRIOT Act addresses terrorism-related concerns. If Congress wants to continue to reassert its authority over immigration in other areas, it could draft additional legislation aimed at non-terrorist aliens. While any such legislation may end up in court, the political branches are not without hope; the dissenting judges in the aforementioned 2005 case asserted that "*Zadvydas* was wrongly decided and should be overruled."[99]

A few years later, the REAL ID Act of 2005 was signed into law. Although the act was aimed at a variety of objectives, one provision focused specifically on the growth of judicial intervention in immigration regulation. Years before, in 2001, the Supreme Court held in *INS v. St. Cyr* that neither the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) or the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) deprived the federal district courts of jurisdiction over habeas corpus petitions filed by convicted criminal aliens challenging removal orders. Congress felt that this was a misreading of each act, that such aliens could only challenge their removal in appeals courts, and that the Court's holding would have the undesirable effect of "allowing criminal aliens to delay their expulsion from the United States for years."[100] In fact, Congress had originally written those two acts with the specific purpose of limiting judicial review of removal orders and also with the purpose of overcoming a judicially created rule on readmission (since abandoned) known as the "Fleuti Doctrine."[101] Seeing the need to reassert itself, Congress responded with the REAL ID Act and explicitly limited criminal alien habeas corpus review of removal orders to the Courts of Appeals. The committee report accompanying the REAL ID Act explains Congress' intent as follows:

> Under *St. Cyr*, "criminal aliens [were] able to begin the judicial review process in the district court, and then appeal to the circuit court of appeals. Criminal aliens thus [could] obtain review in two jurisdictional forums, whereas non-criminal aliens may generally seek review only in the courts of appeals… Not only is this result unfair and illogical…but it also wastes scarce judicial and executive resources."[102]

The committee report also noted that Congress' goal has long been to "abbreviate the process of judicial review of deportation orders and to eliminate the previous initial step in obtaining judicial review." In all, REAL ID was designed to put review of deportation, exclusion, and final orders of removal squarely within the Court of Appeals. It is important to remember that Congress is empowered to limit the district courts' jurisdiction.[103] So far, REAL ID has returned some power to the political branches, but it will take a few years to determine the act's full impact.

Ultimately, these examples show that the political branches can limit judicial intervention and assert authority over immigration regulation should Congress and executive branch officials decide to do so.

The Future of the Plenary Power

It is possible that the Supreme Court will take a more supportive position of the plenary power as a result of new appointments to the Court, and as a response to lower courts going too far in dismissing the power.[104] But if the political branches want to reassert their authority in the regulation of immigration, they will have to take the initiative by drafting focused legislation and vigorously enforcing existing immigration laws. Additionally, political branch attorneys should argue not only the substantive matters in immigration-related cases, but should also routinely challenge the courts on the ease with which they dismiss the plenary power. Two strategies might be useful in limiting judicial regulation of immigration policy: advocacy of the *Chevron* deference, and an expanded expedited removal process.

***Chevron* Deference.** Immigration authorities should invoke the *Chevron* doctrine in court and argue that agencies are better equipped to handle immigration regulation than any judicial authority. In the 1984 case *Chevron, U.S.A., Inc. v. NRDC*, the Supreme Court held that when it comes to interpreting ambiguous statutory language, if the agency responsible for administering the statute at issue has rulemaking or adjudication authority, then courts should give deference to the agency's reasonable interpretation of the statute's language.[105] Specifically, the Court held:

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[106]

The Court also noted that the agency's interpretation need not be the only possible interpretation and that a court should not "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Only if an agency's interpretation of a statute is "arbitrary, capricious, or manifestly contrary to the statute" should courts intervene.[107] The logic is that the agency is staffed with individuals who are experts in the subject matter and more knowledgeable than a judge when it comes to interpreting and applying the statute. This is what has come to be known as the *Chevron* deference analysis. And for reasons outlined by the Supreme Court over the past century, immigration regulation is unquestionably deserving of such analysis. In fact, *Chevron* has been used by the Supreme Court as well as lower courts in the immigration context.[108] Ultimately, courts invoking *Chevron* are less likely to substitute an agency's interpretation and enforcement of immigration statutes for the court's own. This undoubtedly protects some authority of the political branches over immigration regulation. Of course, serious constitutional issues will not be overlooked by the courts, and the burden will remain on the immigration authorities to argue any such issues. And therein lies the weakness of the *Chevron* analysis: The anti-plenary crowd has been working overtime to grant all aliens the constitutional protections of U.S. citizens by interpreting many standard immigration issues as "constitutional" in nature, as explored earlier. The *Chevron* doctrine, then, works best on smaller, statutory issues that do not directly raise constitutional analysis. Finally, the doctrine's success will require Congress to draft immigration statutes in a way that clearly grants authority to the executive's immigration agencies.

Expedited Removal. A more promising strategy is the expansion of expedited removal. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was signed into law. One component of the act was what has come to be known as "expedited removal."[109] The process generally allows federal agents to quickly remove any inadmissible alien who is without a valid claim of asylum. It results in a final order of removal and prohibits the alien from reentering the United States for a period of five years. Most significantly, it circumvents any judicial involvement from either the executive branch immigration courts or the judicial branch courts. In this sense, expedited removal keeps immigration regulation squarely within the political branches; immigration officers, rather than the courts, provide the alien his due process. In other words, expedited removal invokes the plenary power tenets as articulated by the Supreme Court at the doctrine's inception. As written into law, the policy applies to *any* illegal alien apprehended *anywhere* in the United States, provided the alien has not been continuously physically present in the country for longer than the two years preceding the determination of inadmissibility. For whatever reason, however, the executive branch has not taken full advantage of this authority. Both the

Clinton and G.W. Bush Administrations have actually chosen to *limit* their authority; the Clinton White House implemented expedited removal only at a few ports of entry while the Bush White House has decided not to use the removal process for Mexican or Canadian aliens.[110] While there was some expansion of the program in the Bush administration since 9/11, it was minimal; the process is now being used at more ports of entry, but only on any alien apprehended within 100 miles of the borders, and only if the alien is apprehended within 14 days of entry.[111] The large majority of inadmissible aliens apprehended outside of these parameters will have access to the court system. Any future administration wishing to defend plenary power over immigration should expand expedited removal nationwide; Congress has obviously signaled its interest in reclaiming its influence over immigration enforcement by allowing expedited removal to apply nationwide. For the record, in Fiscal Year 2005, the Border Patrol detained over 18,000 aliens under the expedited removal program; over 14,500 of these aliens were removed.[112] The number would be much larger if implemented nationwide.

Conclusion

The plenary power doctrine has a lengthy history and serves the important purpose of keeping the regulation of immigration squarely within the control of politically accountable actors. The doctrine allows for informed deliberation of sensitive issues like foreign relations, national security, and other immigration-related policies. It also assures uniformity and efficiency within our immigration system. Ultimately, it allows citizens to decide the future of the United States through the political process. Should the doctrine be abandoned, the political branches will have their hands tied on the issue of who should be admitted and who should be required to leave. Unelected and largely unaccountable judges would become the nation's immigration gatekeepers. Of course, in order for this to happen, judges will have had to abandon *stare decisis*; unfortunately it is clear that many judges have already done so. If this trend continues, it is not unrealistic to suggest that some judges might make deportation a thing of the past; plenty of judges might have difficulty authorizing the deportation of aliens who, in their opinion, are not immediate threats to national security. And there are probably judges who could find reason to prevent the deportation even of an alien convicted of terrorism (i.e. "he claims he is reformed," "he has family here," etc.). Other justifications for excluding or deporting aliens may be abandoned: Excluding aliens because they might become public charges? Economic discrimination. Excluding aliens because they come from terrorist-sponsoring states? Nationality discrimination. Excluding aliens because they advocate the overthrow of the U.S. government? Viewpoint discrimination. In other words, the result could be effectively open borders, where no one is excluded. Such scenarios are less likely when immigration regulation is left to political actors who can be taken to task by constituents for faulty decisions.

Without the plenary power doctrine, the system of constitutional rights that has evolved to protect Americans from an overbearing government would instead operate to shield deportable aliens from basic enforcement of U.S. immigration law while subtly suggesting, incorrectly, that aliens have some "right" to immigrate here in the first place. Such an immigration system would no longer operate for the benefit of the American people as our immigration system always has; it would instead exist for the benefit of people around the globe. The entire notion of an immigration policy — a system that exists primarily for the benefit of the host country and secondarily for the alien — would be turned on its head.

The increasing complexity and unnecessary hair-splitting advanced by anti-plenary advocates has contributed to the perception that the nation's immigration system is broken. Yet despite their best efforts, the plenary power doctrine will not easily fade away. It is backed by decades of Supreme Court precedent that continues to be favorably cited by many courts. While it is undeniably true that the U.S. immigration system can be improved, the courtroom is not where this process can or should take place. This is not to suggest that the indefinite detention of aliens, for example, is necessarily good policy, but rather that the onus to improve the system should be placed on the political branches. Congress must make sure that immigration laws are clear and decisive as to the issue of authority, and the executive branch must vigorously defend its regulation and enforcement of those laws. Such sentiment must be regularly expressed by the political leadership within the first two branches of government in order to put a halt to judicial branch encroachment over immigration policy.

End Notes

[1] U.S. Const. art. I, § 8: "The Congress shall have power to… establish a uniform rule of naturalization…[And] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

[2] This paper uses the term "plenary power" solely in the context of immigration powers; other plenary powers exist, such as Congress's plenary power over the regulation of interstate commerce, for example.

[3] Mathews v. Diaz et al., 426 U.S. 67, 81 (1976).

[4] *Id.* For example, when the Supreme Court was asked to expand welfare benefits to certain aliens in *Mathews v. Diaz* in 1976, the Court refused to do so and asserted the plenary power doctrine with the following words: "An unlikely, but nevertheless possible, consequence of holding that appellees are constitutionally entitled to welfare benefits would be a further extension of similar benefits to over 440,000 Cuban parolees… We decline the invitation."

[5] Not all aliens facing removal are entitled to a day in immigration court; aliens subject to expedited removal, for example, are generally summarily removed by immigration law enforcement officers. Expedited removal, a way of avoiding anti-plenary courts, is discussed later in this report.

[6] Interestingly, prior to 1983 the Immigration and Naturalization Service (INS) served the dual purpose of detaining aliens and conducting removal proceedings; after that date, enforcement and adjudication was separated.

[7] Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889).

[8] *Id.* at 606.

[9] *Id.* at 609.

[10] Nishimura Ekiu v. United States, 142 U.S. 651 (1892).

[11] *Id.* at 660. (Note: As to habeas corpus, a detained alien generally can apply for the writ in order to get the judicial branch involved only after he has exhausted all administrative remedies. If he does get to the judicial branch courts, the issue then turns to deference; courts supportive of the plenary power will generally uphold the administrative order by deferring to the agency decision-making. For more information on the relationship between habeas corpus and immigration law, *see generally* Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 Cornell L. Rev. 459 (2006)).

[12] *Ekiu*, 142 U.S. at 660.

[13] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[14] *Id.* at 713.

[15] *Id.* at 730 (Note: This reasoning is applicable only to an alien not claiming to be a citizen. A person claiming U.S. citizenship is entitled to due process – a judicial hearing – as deportation of a citizen does amount to deprivation of life, liberty, and property. *See*, *e.g.*, Ng Fung Ho v. White, 259 U.S. 276 (1922)); *see also*, *e.g.*, Carlson v. Landon, 342 U.S. 524 (1952) (affirming, along with many other cases, that "deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution.").

[16] *See*, *e.g.*, Knauff v. Shaughnessy, 338 U.S. 537 (1950); *see also, e.g.*, Shaughnessy v. Mezei, 345 U.S. 206 (1953). Also of significance is *Yamataya v. Fisher*, 189 U.S. 86 (1903) – known as the "Japanese Immigrant Case" – in which the Supreme Court upheld the deportation of an illegal alien determined to be a likely public charge. Here, the Court did suggest that aliens facing deportation are entitled to some amount of due process. The administrative process provided by immigration officers seemed sufficient to meet constitutional requirements: "[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends – not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act." at 100.

[17] *See generally*, Steven H. Legomsky, Immigration and Refugee Law and Policy (4th ed. 2005).

[18] *Knauff*, 338 U.S. 537.

[19] *Id.* at 542 (citing both *Ekiu* and *Fong Yue Ting*).

[20] *Id.* at 543.

[21] *Id.* at 544.

[22] *See generally*, 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)(discussing a detailed account of Knauff's immigration history).

[23] Harisiades v. Shaughnessy, 342 U.S. 580 (1952)(upholding the retroactive application of a 1940 statute that made deportable any alien who had joined the Communist party after entering the United States).

[24] *Id.* at 587.

[25] *Id.* at 588.

[26] *Id.* at 590.

[27] *Id.* at 585.

[28] *Id.* at 590. (Note: Some legal scholars argue that the Court's description of the threat of Communism in and of itself indicates a willingness on the part of the Court to address the "reasonableness" of immigration policy.)

[29] *Id.* at 591.

[30] *Id.* at 596-8.

[31] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953).

[32] United States ex rel. Mezei v. Shaughnessy, 195 F.2d 964 (1952).

[33] *United States ex rel. Mezei*, 345 U.S. at 210.

[34] *Id.* at 212.

[35] *Id.* at 213.

[36] For a detailed account of Mezei's immigration history, see generally Weisselberg, *supra* note 22.

[37] Galvan v. Press, 347 U.S. 522 (1954).

[38] Kleindienst v. Mandel et al., 408 U.S. 753 (1972); *see also* Boutilier v. INS, 387 U.S. 118 (1967).

[39] *Mandel*, 408 U.S. at 766; *see also* Lem Moon Sing v. United States, 158 U.S. 538 (1895); *see also* Yamataya v. Fisher, 189 U.S. 86 (1903).

[40] *Mandel*, 408 U.S. at 770.

[41] *Diaz et al.*, 426 U.S. at 81.

[42] *Id.* at 84.

[43] *See, e.g.*, Ng Fung Ho v. White, 259 U.S. 276 (1922); *see also, e.g.*, Kwock Jan Fat v. White, 253 U.S. 454 (1912) (holding that decisions by immigration officials are "final, and conclusive upon the courts, unless it be shown that the proceedings were manifestly unfair, were such as to prevent a fair investigation, or show manifest abuse of the discretion committed to the executive officers by the statute, or that their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law.").

[44] Hampton v. Mow Sun Wong et al., 426 U.S. 88 (1976)(holding unconstitutional a federal regulation that barred non-citizens from employment with the Civil Service Commission without due process of law.).

[45] For an analysis of the judicial application of semi-constitutional norms to immigration cases, *see* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545 (1990).

[46] For additional examples, *see* Bridges v. Wixon, 326 U.S. 135 (1945)(reversing deportation order of suspected Communist alien and calling deportation a "hardship" and an immigration statute "unconstitutional"); *see also* Woodby v. INS, 385 U.S. 276 (1966)(requiring more due process than would be normal in most civil proceedings – here, deportation – and substantially raising the burden of proof against the executive branch's wishes); *see also* the Woodby dissent (noting, "This is but another case in a long line in which the Court has tightened the noose around the Government's neck in immigration cases.").

[47] Fong Haw Tan v. Phelan, 333 U.S. 6, 8 (1948) (Note: the crime of murder involves "moral turpitude").

[48] Fong Haw Tan v. Phelan, 162 F.2d 663, 665 (1947).

[49] *Fong Haw Tan*, 333 U.S. at 9. Interestingly, the appeals court predicted such a holding and explained why it would be problematic to do anything other than defer to the executive's interpretation of the statute: "By what formula shall the permissible lapse of time between crimes be measured? How closely must the crimes be related to each other? Must they derive from the same impulse? Do separate crimes of different natures committed to clear the way for a main objective come within the conclusion?" *Fong Haw Tan*, 162 F.2d at 665.

[50] *Fong Haw Tan*, 333 U.S. at 10.

[51] *See* cases cited *supra* note 15.

[52] *See* Chanan Din Khan v. Barber, 147 F. Supp. 771, 773 (1957); *see also* 8 U.S.C. § 1227(a)(2)(A)(ii).

[53] United States ex rel. Kwong Hai Chew v. Colding, 97 F. Supp. 592, 594 (1951).

[54] *Id.* at 595 (Note: The court rendered its decision "with some reluctance, not because the court has not the power of judicial review under the statute, but rather…[because Kwong Hai Chew was] to be deported without knowing what charge as been levelled against him.").

[55] United States ex rel. Kwong Hai Chew v. Colding, 192 F.2d 1009 (1951).

[56] Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev. 853, n.40 (1987) (Note: Columbia Law Professor Henkin also counts among these feats the anti-plenary cases of *Rosenberg v. Fleuti* (1963) and *Landon v. Plasencia* (1982), discussed later.)

[57] See, Kwong Hai Chew v. Colding, 344 U.S. 590, 591 n.1 (1953). (Note: The statute allowed exclusion of aliens with membership in "a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest" or for aliens "engaged in organizing, teaching, advocating, or directing any rebellion, insurrection, or violent uprising against the United States," for example.)

[58] *Id.* at 596.

[59] Justice O'Connor describing the holding in *Kwong Hai Chew*: "[T]o avoid constitutional problems, we construed the regulation as inapplicable. Although the holding was one of regulatory interpretation, the rationale was one of constitutional law." Landon v. Plasencia, 459 U.S. 21, 33 (1982).

[60] Interestingly, the Court reviewed a 1953 presidential commission report on immigration entitled, "Whom We Shall Welcome" in rendering its decision and noted that the commission "treats the provisions [above] as applicable to entrant and reentrant aliens but does not even suggest that they are applicable to aliens lawfully admitted to permanent residence and physically present in the United States…[and it] does not…even suggest that the reentry doctrine attempts to limit the constitutional right to a hearing which resident aliens, in the status of [Kwong Hai Chew], may have under the Fifth Amendment." See Kwong Hai Chew, n.11. In other words, the commission did not speak to the situation at issue. Of course, one must ask: If the Court felt it reasonable to look to an executive branch report for help in resolving the case, why would the Court not defer to the executive branch officials who actually enforced the statute in the first place? Had the court done the latter, it would have been making use of the plenary power doctrine – a doctrine that is designed, in part, to resolve the very type of uncertainty found in *Kwong Hai Chew*. Instead, the Court created a legal fiction, applied a constitutional due process analysis, and abandoned decades of precedent.

[61] *United States ex rel. Mezei*, 345 U.S. at 212.

[62] *Id.* at 214.

[63] The earliest Supreme Court case to actually strike down a federal statute involving the admission and expulsion of aliens was not until 1983 in INS v. Chadha et al., 462 U.S. 919. (Note: The case focused largely on separation of powers issues rather than the rights of individual aliens or the plenary power, however.)

[64] Motomura, *supra* note 45, at 580.

[65] Landon v. Plasencia, 459 U.S. 21, 23 (1982).

[66] *Id.* at 24.

[67] For example, an alien who loses in a deportation hearing can designate the country of deportation, depart voluntarily in order to avoid certain legal stigmas, and can seek suspension of deportation.

[68] *Plasencia*, 459 U.S. at 25.

[69] *Id.* at 34 (citing a case not immigration-related but nonetheless constitutionally-significant: Mathews v. Eldridge (1976)).

[70] Motomura, *supra* note 64.

[71] *Plasencia*, 459 U.S. at 34.

[72] *See, e.g* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 Geo. Immigr. L.J. 339 (2002).

[73] Zadvydas v. Davis, 522 U.S. 678, 682 (2001); *see also* 8 U.S.C. § 1231(a)(6).

[74] *Zadvydas*, 522 U.S. at 689.

[75] *Id.* at 697.

[76] *Id.* at 682.

[77] *Id.* at 697.

[78] *Id.* at 699.

[79] *Id.* at 701.

[80] *Id.* at 686.

[81] The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders, No. I-2003-004 (Dep't of Justice, Feb. 2003). Available at: http://www.usdoj.gov/oig/reports/INS/e0304/background.htm

[82] *Zadvydas*, 522 U.S. at 700.

[83] *Id.* at 701.

[84] Clark v. Martinez, 543 U.S. 371 (2005).

[85] *Zadvydas*, 522 U.S. at 702-3.

[86] *Id.* at 704.

[87] *Id.* at 712-13.

[88] *Id.* at 709.

[89] *Id.* at 705.

[90] *Id.* at 711.

[91] *Id.*

[92] *Id.* at 712.

[93] Press Release, Dep't of Justice, "Justice Department Implements Zadvydas v. Davis Supreme Court Decision." (Nov. 14, 2001). Available at: http://www.usdoj.gov/opa/pr/2001/November/01_ins_595.htm.

[94] *Id. See also* 18 U.S.C § 16 (listing crimes of violence in a finding of "specially dangerous"). For the last three types of aliens, there must also be no conditions of release that can reasonably be expected to prevent public danger.

[95] *Zadvydas*, 522 U.S. at 696.

[96] *See* 8 C.F.R. § 241.13,14; *see also* 8 U.S.C. § 1231(a)(3) (outlining post-release supervision requirements).

[97] 8 U.S.C. § 1226a.

[98] Clark v. Suarez Martinez, 543 U.S. 371, 386, n.8 (2005).

[99] *Id.* at 388.

[100] *See, e.g* Enwonwu v. Chertoff, 276 F. Supp. 2d 42, 82 (2005).

[101] In the 1963 Supreme Court case *Rosenberg v. Fleuti*, the Court held that a Legal Permanent Resident (LPR) who took an "innocent, casual, and brief" trip outside the borders of United States could not be deemed to have "intended" to depart, and thus was not "entering" upon his return; the immigration service could not treat the LPR as if he was seeking admission. 374 U.S. 449. This judicially-created rule was replaced with Congress' own definition of admission when Congress wrote the IIRIRA; it allowed the immigration service to treat some LPRs as if they were seeking admission for the first time, even if they were outside the country for only a few hours. For a full explanation of these changes, see *In re Jesus Collado-Munoz*, 21 I. & N. Dec. 1061 (1998).

[102] *Enwonwu*, 276 F. Supp. 2d at 82.

[103] U.S. Const. art. III, § 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

[104] Indeed, the Court already has brought order to inconsistent, anti-plenary power rulings in the lower courts in Demore v. Hyung Joon Kim, 538 U.S. 510 (2003). The Court overruled the idea that due process prohibited detention pending removal proceedings, absent some evidence of the aliens flight risk or danger to the community.

[105] Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

[106] *Id.* at 842.

[107] *Id.* at 843-4.

[108] *See, e.g.* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999): "[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations." *See also* Malagon de Fuentes v. Gonzales, 462 F.3d 498, 502 (2006): "We subject the BIA's construction of the law it administers to a deferential review."

[109] *See, e.g.* 8 U.S.C. §§ 1225, 1228.

[110] Press Release, U.S. Customs and Border Protection, "DHS Expands Expedited Removal Authority Along Southwest Border." (Sept. 14, 2005)(noting, "ER provides DHS the authority to expeditiously return non-Mexican illegal aliens to his or her country of origin as soon as circumstances will allow."). Available at: http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2005_press_releases/092005/09142005.xml

[111] Press Release, Dep't Homeland Security, "DHS Announces Expanded Border Control Plans." (Aug. 10, 2004). Available at: http://www.dhs.gov/xnews/releases/press_release_0479.shtm

[112] Webpage, Immigration and Customs Enforcement, "FAQ – commonly asked questions about ICE." (Visited Aug. 26, 2008). Available at: http://www.ice.gov/about/faq.htm

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Backgrounder

Plenary Power
Should Judges Control U.S. Immigration Policy?

By Jon Feere

Federal policy on immigration has been founded on the "plenary power doctrine," which holds that the political branches — the legislative and the executive — have sole power to regulate all aspects of immigration as a basic attribute of sovereignty. But despite the fact that the courts have affirmed the plenary power doctrine countless times since the 19th century, there is a movement underway to erode political-branch control over immigration in favor of a judge-administered system based on the implicit idea that foreigners have a "right" to immigrate. This *Backgrounder* examines the history of the doctrine, the challenges to it launched by supporters of mass immigration, and some possible responses.

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