A SUPREME CHALLENGE:

REDUCING JUDICIAL RELIANCE ON THE PLENARY POWER DOCTRINE IN IMMIGRATION LAW

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Introduction

Plenary power is an "official doctrine of special judicial deference"[1] to the political branches' authority to establish and enforce immigration laws.[2] The term, immigration law, is used here to describe the body of law governing aliens' admission to and exclusion from this country.[3] The judicial branch has used the doctrine to avoid addressing the constitutionality of immigration statutes and regulations. It is without doubt that the plenary power doctrine is in decline.[4] Predictions of its demise have been around for decades.[5] Much of the decline is attributed to "subconstitutional" decisions that have chipped away at the doctrine.[6] These decisions have become a way for courts to apply statutory solutions to avoid striking down statutes as unconstitutional. Although contributing to an expansion of judicial review in immigration cases, they have not been

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[1] See Stephen Legomsky, "Ten More Years of Plenary Power: Immigration, Congress, and the Courts," 22 Hastings Const. L.Q. 925 (1995) ("Ten More Years") (U.S. Supreme Court "has translated the differences [in immigration law] into an official doctrine of special judicial deference to Congress...it has described Congressional power to regulate immigration as 'plenary'") *citing* e.g., Kleindienst v. Mandel, 408 U.S. 753, 766, 768, 769 (1972); Boutilier v. INS, 387 U.S. 118, 123 (1967).

[2] See e.g., Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (it is the "right to exclude or to expel all aliens...being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare..."); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (authority over immigration matters stems not just from legislative power "but is inherent in the executive power to control the foreign affairs of the nation."); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (any policies toward aliens...are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.")

[3] See also Stephen Legosmky, "Immigration Law and the Principle of Plenary Congressional Power," ("Plenary Power"), 1984 Sup. Ct.Rev. 255, 256 (1985).

[4] Hiroshi Motomura, "Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation," ("Immigration Law") 100 Yale L.J. 545, 550 (1990).

[5] See Legomsky, "Plenary Power" 1984 Sup. Ct.Rev. at 307. (An inevitable breaking point will be reached when the lower court's dissatisfaction with plenary power becomes too large.) See also Peter H. Schuck, "The Transformation of Immigration Law," ("Transformation") 84 Columb. L.Rev. 1, 4, 90 (1984) (The central elements of classical immigration law are under siege and immigration is gradually rejoining the mainstream of our public law.) See also Legomsky, "Ten More Years," Hastings Const. L.Q. at 934. (The Supreme Court will allow the plenary power doctrine to wear away by attrition.)

[6] See Motomura, "Immigration Law," 100 Yale L.J. at 549.

for either man. As a result, both face indefinite detention. Ma and Zadvydas challenge such detention as a violation of their substantive due process right to liberty. Petitions for certiori were granted in both cases.[16]

The Court is unlikely to expressly overrule the doctrine. However, it could further weaken plenary power by refusing the government's request to apply it. It could do this under statutory interpretation by determining that the Attorney General does not have the authority to detain aliens indefinitely. Or the Court could determine that once it is no longer a means to effectuate deportation, detention is outside the realm of immigration policy. Thus, the doctrine is irrelevant to these indefinite detention cases.[17] Either way, the doctrine would be further eroded and restricted in its use by the lower courts.[18]

Part One of the paper provides the background of the plenary power doctrine and reviews the evolution of immigration law over the subsequent century in light of the doctrine. Part Two discusses the Ma and Zadyvdas decisions in the lower courts as examples of both the schizophrenic nature of immigration jurisprudence and evidence of the necessity for the Supreme Court to narrow the use of the plenary power doctrine.

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threshold of initial entry," and placed in INS custody, are "excludable" aliens. See Shaughnessy v. United States ex. rel. Mezei, 345 U.S. 206, 212 (1953). The Supreme Court has recognized additional Constitutional rights and privileges for deportable aliens. For example, they are entitled to procedural due process during deportation proceedings. See Yamata v. Fisher, 189 U.S. 86 (1903). See also Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.")

[16] Reno v. Ma, 121 S. Ct. 297 (2000) (consolidating the Ma and Zadvydas cases).

[17] This argument was made by both Ma and Zadvydas.

[18] Legomsky argues that a "restricted plenary power doctrine—a new 'PPD lite'—"is much more likely than a complete abolition of this special deference by the Court. "Ten More Years," 22 Hastings Const. L.Q. at 937.

A. Establishment of Plenary Power in Classical Immigration Law

The doctrine was articulated in three cases[29] forming the foundation of what would be known as "classical immigration law."[30] The opinions recognized absolute congressional power to exclude aliens from United States territory. The source of that power emanated not from an enumerated power in the Constitution[31] but from an inherent sovereign power that is "an incident of every independent nation."[32] The Court pointed to the preservation of independence and security against foreign aggression as the highest duty of any government a duty that is exclusive to the legislative and executive branches.[33] Judicial review of constitutional limitations protecting individual rights was therefore precluded.

The Court's primary concern in the Chinese Exclusion Case was whether the 1888 statute excluding Chinese laborers from the United States was "beyond the competency of Congress to pass."[34] Chae Chan Ping, a Chinese laborer and long time resident of the United States, had returned to China for a visit. When he tried to reenter the United States, he was prevented from doing so because of a law that had been passed in his absence barring the return of Chinese laborers. The Court's opinion set the framework

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[29] See the Chinese Exclusion Case, 130 U.S. 581 (1889), Nishimura Ekiu v. United States, 142 U.S. 651 (1892) and Fong Yue Ting v. United States, 13 S. Ct. 1016 (1893).

[30] Until 1875, immigration law did not exist in the United States. Classical immigration law confronted for the first time the country's perception that immigration needed to be regulated in significant ways. See Schuck at 2.

[31] Several enumerated powers over immigration were suggested in other cases. They included the commerce power, the naturalization power, and the war power. See Legomsky, "Supreme Court," 1984 Sup. Ct.Rev. at 274.

[32] See Chinese Exclusion Case, 130 U.S. at 603.

[33] See id.

[34] See id. at 603.

interest."[39] Fong Yue Ting, a long time resident of the United States, was ordered deported because he did not have a certificate of residence required under an 1892 Act.[40] He challenged his detention and deportation as a deprivation of liberty without due process and as a violation of 6th and 8th Amendment rights.

The Court, asserting what came to be a fundamental tenet of classical immigration law,[41] claimed that deportation is not punishment for a crime.[42] Therefore, provisions of the Constitution securing right of trial by jury and prohibiting cruel and unusual punishment had no application to the case.[43] The legal consequences of this controversial determination that deportation is a civil, administrative proceeding are still being felt today by aliens whose constitutional challenges to indefinite detention are being rebuffed by the courts.

All three dissenters in Fong refused to buy the assumption that deportation—"the forcible removal of a person from home, family, business, and property"[44]—is not punishment. "No euphemism," the Chief Justice declared, can "disguise the character"

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[39] See Fong Yue Ting, 149 U.S. at 724.

[40] Chinese Deportation Act of 1892, 27 Stat. 25, c. 60. Act allowed the arrest and detention of any Chinese laborer without a certificate of residence. To avoid deportation, the laborer had to establish, through the testimony of a "credible white witness," that he was a resident of the United States at the time the Act was enacted.

[41] See Schuck, "Transformation," 84 Colum. L.Rev. at 25.

[42] See Fong Yue Ting, 149 U.S. at 730. The Court wrote:

"The order of deportation is not punishment for a crime. It is not a banishment, in the sense in which that word in 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."

[43] See id. at 732.

[44] See Fong Yue Ting, 149 U.S. at 740. (Fuller,C.J., Brewer, J., Field, J., dissenting).

of national sovereignty, the overpowering force of stare decisis, and external influences on judges.[52] Among the external influences on judges are societal and ideological forces.[53]

For example, before the 1880's, an expansionist policy of essentially open borders prevailed with mass immigration actually encouraged, as people were needed to populate the American frontier and to supply needed labor.[54] Eventually, the country's attitude towards new arrivals fundamentally shifted as the frontier began closing and urban industrialization took center stage. Immigrants began to be seen as a hindrance rather than a benefit to society, and exclusionary immigration policies replaced the ideology of openness.[55] Chinese laborers who had begun arriving in the United States around 1850 when labor was in short supply were no longer wanted when the labor market became glutted. Anti-Chinese prejudice grew as their immigration into the United States continued.

During the 1880's, a new wave of immigrants from Japan became the next target for nativist sentiments.[56] The public hostility towards Asians seemed not to be lost on the Court whose references to "vast hordes of [Chinese] crowding in upon us"[57] who "might endanger good order"[58] are troubling at the least.[59] It was during this period of anti-Asian

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beginning to give way...as lower courts are testing and sometimes transcending the confines of the classical canons.")

[52] See discussions by Legomsky, "Plenary Power," 1984 Sup. Ct.Rev. 255; "Fear and Loathing," 78 Texas L.Rev. 1615. See also Schuck, "Transformation," 84 Colum. L.Rev. 1.

[53] See Schuck, "Transformation," at 2.

[54] See id.

[55] See id.

[56] See Legomsky, "Plenary Power," 1984 Sup. Ct.Rev. at 288.

[57] See Chinese Exclusion Case, 130 U.S. at 630.

[58] See Fong Yue Ting, 149 U.S. at 717.

[59] See Legomsky's discussion of the "vitriolic attacks" against Chinese immigrants by Justice Field who authored the majority opinion in the Chinese Exclusion Case where the Court first recognized an inherent Congressional power to exclude aliens. "Plenary Power," 1984 Sup. Ct.Rev. at 289.

detention must have as its purpose the effectuation of deportation became the basis for constitutional challenges of aliens' whose deportation was practically impossible. [67]

In another result differing sharply from classical immigration law's treatment of alien's rights, the Court in Yick Wo v. Hopkins held that invidious discrimination by a state against any nationality is prohibited by the 14th Amendment.[68] The statute successfully challenged was an ostensibly race neutral municipal ordinance making it impossible for aliens of Chinese descent to operate laundries in San Francisco.

One commentator, Hiroshi Motomura, views these two seminal cases as the emergence of "phantom constitutional norms" decisionmaking in immigration law.[69] They are part of a long line of cases affording protections to aliens that are outside the field of "immigration law," that is, the law of admission and expulsion of aliens. These phantom norms are borrowed from mainstream public law, Motomura argues, and stand in stand in stark contrast to the unreviewable plenary power norm the courts use when they directly decide constitutional issues in immigration cases.[70] The phantom cases, although favorable in their outcomes to immigrants, are not controlling when constitutional immigration law issues are raised.[71] The two conflicting sets of constitutional norms that emerge over the next 100 years have resulted in a confusion and tension in immigration law that are with us today.

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[67] See Ma, 208 F.3d 815, Zadvydas, 185 F.3d 279. See also supra notes 12, 13, 15 and related text. See also Rosales-Garcia v. Holland, 2001 FED App. 0033P (6th Cir. 2001) discussed at notes 127-134 and related text.
[68] See 118 U.S. 356, 374 (1886).
[69] Motomura, "Immigration Law," 100 Yale L.J. at 564, 565.
[70] See id. at 549.
[71] See id.

D. Resurgence of the Full Harshness of Plenary Power: the 1950's

The decision that the Court made to essentially free exclusion proceedings from any significant constitutional restraints[75] while limiting government's plenary power only in deportation proceedings—and then, minimally, would have significant effects during the 1950's. It was in this period that national hostility towards aliens was at another high, in part a result of the typical anti-alien backlash of a major war and in part because of the public's perception that aliens were associated with Communism.[76] The Court's response during the McCarthy era to several constitutional challenges in both the exclusion and deportation arenas was remarkable for the absence of constitutional protections.[77]

In two cases challenging deportation orders,[78] the Court reinvigorated the plenary power doctrine when it declared that Congress could constitutionally deport long time permanent residents on the basis of their past membership in the Communist Party. In a line notable as an example of the influences on judges of popular political attitudes, the Harisiades Court said that if American citizens can be sent to foreign countries "to stem the tide of Communism,"[79] then it is hard to justify why the Constitution should spare Communist aliens from the severity of deportation.[80] Since "expulsion is a weapon of defense and reprisal confirmed by international law as a power inherent in every

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[74] See id. at 101, 102.
[75] See Schuck's discussion of the extraconstitutional status of exclusion. "Transformation," 84 Colum. L.Rev. at 18.
[76] Legomsky, "Plenary Power," 1984 Sup. Ct.Rev. at 290.
[77] Schuck describes as "notorious," Knauff v. Shaughnessy, 70 S. Ct. 309) (1950). See "Transformation," 84 Colum. L.Rev. at 20. Hart calls several of the majority opinions "aberrations" citing only "the harsh precepts of the earliest decisions." See "The Power of Congress," 66 Harvard L.Rev. at 1392.
[78] See Harisiades v. Shaughnessy, 342 U.S. 580 (1952) and Galvan v. Press, 347 U.S. 522 (1954).
[79] See Harisiades, 342 U.S. at 591.
[80] See id.

the consequences of deportation were so close to punishment for a crime, and that perhaps the ex post facto clause should be applied, the Supreme Court would not because the "slate is not clean."[88] Judicial deference was too well "imbedded in the legislative and judicial tissues of our body politic."[89]

The dissents in both cases called the majority to task for placing more importance in an implied power of deportation over an express right to life and liberty. Quoting Justice Brewer's dissent in Fong, the Justices reminded the Court that the "doctrine of powers inherent in sovereignty is both indefinite and dangerous."[90] Congress was ordering people to be deported for what they once were rather than for being a current danger to the safety and welfare of the nation.

The absence of constitutional protections in exclusion proceedings made judicial deference even starker. "Admission as a privilege, not a right" was a theory justifying the Court's conclusion in Knauff v. Shaughnessy that due process for entrants is whatever Congress says it is.[91] In that case, the government's exclusion of Knauff, the alien wife of a U.S. citizen, was challenged for due process deficiency. The Court ruled that a hearing was not required, nor did the government have to disclose the reason for its decision that had been made on the basis of confidential information.[92]

The government's plenary power to exclude aliens often involves the awesome power to detain. In classical immigration law, the power to detain was seen as a

[88] See id at 531.
[89] See id.
[90] See Harisiades, 342 U.S. at 600.
[91] See 70 S.Ct. 309, 313 (1950).
[92] See id. at 547.

Knauff and Mezei together confirm that the where the alien is located and what constitutional right he is seeking in large part have determined the Court's response. An alien "outside" (pretend or for real) of the United States, would have a difficult time challenging immigration decisions.

E. Modern Plenary Power Cases

In the next decades, the Court continued to stand fast to the plenary power doctrine. In several cases, the Court rebuffed significant constitutional issues in immigration statutes, even when those issues affected United States citizens. In Kleindienst v. Mandel,[99] the Court accorded "unprecedented"[100] deference to the Executive branch when it refused to review the Attorney General's decision to deny entry to a journalist, Ernest Mandel, who advocated world communism. Six United States citizens joined Mandel in challenging provisions of the Immigration and Nationality statute. The citizens, university professors, had invited the journalist to speak at various forums and complained that the statute deprived them of their First Amendment free speech rights to meet with Mandel in person for discussions.

The Court refused to apply the compelling interest standard of review implicated in the denial of a fundamental constitutional right. Instead, it found that the Attorney General had given a "facially legitimate and bona fide reason" for his decision, and the Court would not look further.[101] Although it afforded "unprecedented" deference to the Attorney General's discretionary decision, the fact that the Court conditioned approval on a legitimate reason for the decision was significant. The government argued that it did not have to give any reason for its decision. In making this point, the Court was careful

[99] 408 U.S. 753 (1972).
[100] See id. at 777. (Marshall,J., Brennan, J., dissenting).

The majority noted that the government's power to exclude or expel aliens is *largely* immune[108] from judicial control. It would not in this case review the statute for equal protection defects since immigration legislation was "solely for the responsibility of Congress and wholly outside the power of this Court to control."[109] The dissent aptly quipped, "such review reflects more than due deference; it is abdication."[110]

Since the Japanese Immigrant Case in 1903, procedural due process claims for deportable aliens were the only exception to the plenary power doctrine.[111] Yet the exception was used sparingly as Court decisions reflected unwillingness to overturn government decisions even for procedural defects.[112] The Supreme Court's 1982 decision in Landon v. Plasencia,[113] however, marked in retrospect the "arrival of the due process revolution in immigration law." [114] Maria Plasencia, a returning permanent resident, was refused reentry after her visit to Mexico, and placed into exclusion proceedings. She then alleged several due process violations. Although in Mezei, the Court said a returning resident's constitutional status was no greater than someone seeking admission for the first time,[115] that is, no due process protections applied, the Court here declared that a returning resident, although an excludable alien, was not necessarily barred from procedural due process claims.[116] The case was remanded to the Court of Appeals to explore whether Plasencia was accorded procedural due process.[117]

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[108] See id. at 792.
[109] See id. at 796.
[110] See id. at 805 (Marshall, J. dissenting).
[111] Motomura, "Curious Evolution," 92 Columbia L.Rev. at 1638.
[112] See id. at 1652.
[113] 459 U.S. 21 (1982).
[114] See id. at 1638.
[115] See Mezei, 345 U.S. at 213-214.
[116] See Plasencia, 459 U.S. at 32-34.
[117] See id. at 37.

In its reversal, the en blanc panel would not, however, reach the same subconstitutional abuse of discretion decision. In fact, it determined that the Executive had the power to discriminate on the basis of national origin in making parole decisions, since those decisions are an integral part of the admissions process—an area of plenary power. It also reaffirmed the lack of constitutional rights plaintiffs, as excludable aliens, have. It noted that the Executive's power over immigration has two sources: the power delegated by Congress through immigration statutes and the inherent power from its plenary power over foreign relations.[124] It is when the President enjoys constitutional power in his own right as well as that delegated, noted Justice Jackson, that the President's authority "is at its maxim."[125] And, by implication, where judicial review is most problematic.[126]

Courts have used this double source of power, the Eleventh Circuit said in Jean, as justification for the "remarkably broad delegations of authority" that Congress has given the Executive in the immigration field.[127] Nevertheless, the "Court's repeated statements that decisions by the political branches in the immigration area are '*largely* immune from judicial control' (i.e., Fiallo) clearly do not altogether preclude judicial scrutiny" of executive action.[128] That scrutiny, however, would be minimal.[129]

In 1980, about 125,000 Cubans fled their native country from the port of Mariel. Some of these "Marielitos" were excludable from the United States, often because of

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[124] 727 F.2d at 965.
[125] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring). Interestingly, like in Youngstown, here executive power to exclude aliens (like executive power to seize steel mills) is not clearly enumerated in the Constitution.
[126] See Schuck, "Transformation," 84 Colum. L.Rev. at 18.
[127] 727 F.2d at 967.
[128] See id. (Citations omitted.)
[129] See id. The scope of review over executive discretionary decisions in the immigration field is "extremely limited."

no right to be free from detention because whatever procedures Congress authorized were due process for excludable aliens.[135]

Nevertheless, the 9th Circuit did feel a need to comment that the Cubans were not really being indefinitely detained because they had the opportunity during an annual INS review of each case to prove they were no longer a threat to society.[136] The dissent called the majority to task on this fiction saying that it could try to recharacterize the confinement "as a series of one year periods of detention," but that did not alter the reality that since the INS can successively deny parole, plaintiffs' detention is indefinite and unconstitutional.[137]

In a marked departure from subconstitutional decision making, the 6th Circuit recently found that the INS had statutory authority to detain excludable aliens indefinitely but lacked the constitutional authority to do so.[138] Mario Rosales-Garcia arrived in the United States during the Cuban boatlift, was granted parole, and later served a federal prison sentence for criminal activity. Upon his release from prison, Rosales was taken back into INS custody pending deportation to Cuba. He was denied parole. Rosales became one of 1,750 Mariel Cubans remaining in U.S. prison facilities who are neither eligible for parole nor deportable.[139]

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[135] Mezei, 73 S.Ct. at 629 and Knauff v. Shaughnessy, 338 U.S. at 544. See also supra notes 82, 89 and related texts.

[136] Barrera-Echaverria, 44 F.3d at 1450.

[137] See id. at 1451.

[138] The court applied former 8 U.S.C. § 1226(e) (1994) because Rosales was declared excludable in 1987 and his immigration parole was last revoked prior to the implementation of the Illegal Immigration Reform and Responsibility Act (IRRIRA). § 1226(e) was repealed and reenacted by Congress in IRRIRA. Six circuits (2nd, 3rd, 5th, 7th, 9th, 10th) have found §1226(e) to authorize the Attorney General to detain indefinitely an excludable alien who has been convicted of an aggravated felony. See Rosales-Garcia v. Holland, 2001 FED App. 0033P, *29 to*33 (6th Cir. 2001).

[139] Id. at *17. (Since he was not declared excludable until 1987, Rosales was not among those named in the 1984 agreement between U.S. and Cuba under which Cuba agreed to the return of 2,746 excludable aliens from the Mariel boatlift.)

framework to conclude Rosales' indefinite confinement was indeed punishment in violation of his liberty interest.[145]

Contrary to the 9th Circuit in Barrera-Echavarria, the 6th Circuit refused to conclude that INS annual review of detainees' parole status meant detention was not indefinite. Even monthly review, it commented, would not change the fact that Rosales will not be released until Cuba agrees to accept him (a prospect the court discounted) or until INS grants him parole. Since INS has broad discretion to deny parole, Rosales could never be certain of receiving it, no matter how well he behaves.[146]

The 6th Circuit also swam upstream when it decided it would not require excludable aliens to show that deportation was impossible before their detention would be considered indefinite.[147] Instead, the court put the burden on the government to demonstrate that "(1) the alien's home nation and this government are engaged in diplomatic discussions which encompass a specific repatriation agreement whose details are currently being negotiated; and (2) the alien is among those whose repatriation the agreement contemplates."[148]

In its opinion, the court determined that plenary power doctrine had "lost its rationale altogether" when detention was no longer a means to effectuate deportation.[149] When it directly conflicted with an alien's fundamental constitutional interest in liberty, deference became "less compelling."[150] The 6th Circuit refused to accord the Executive branch the deference traditionally due under the doctrine.

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[145] See id. at *52-69.
[146] See id. at *66.
[147] See e.g., Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999) (detention is not indefinite until there is a showing that "deportation is impossible, not merely problematical, difficult, and distant").
[148] Rosales, 2001FED App. at *65.
[149] Id. at *69.
[150] Id. at *68.

court.[157] When issues collateral to the legal questions in deportation orders arose, jurisdiction lay in district courts under federal question, habeas corpus and INA provisions.[158]

In 1996, perhaps in partial response to frustration with judicial encroachments into immigration matters, Congress enacted amendments to the Immigration and Nationality Act (INA) that would have direct bearing on judicial review of Executive authority. Moreover, under the Antiterrorism and Effective Death Penalty Act (AEDPA), judicial review of final orders of deportation against those who were deemed deportable for enumerated criminal convictions was eliminated.[159]

In the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), changes to the INA went even further than under AEDPA. IIRIRA denied judicial review not only of certain orders of removal but also of INS decisions to detain deportable aliens pending removal.[160] In an "exclusive jurisdiction" section, IIRIRA bars review of "any claim by or on behalf of an alien arising from the decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter."[161]

The Act also eliminated statutory distinctions between exclusion and deportation proceedings, replacing them with a single removal proceeding.[162] It is unclear how this change will ultimately influence constitutional analysis of protections that formerly

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[157] 8 U.S.C. § 1105a.
[158] 28 U.S.C.A. § 1331 provided federal question jurisdiction; 28 U.S.C.A. § 2241 provided habeas corpus jurisdiction; 8 U.S.C. § 1329 provided jurisdiction for all claims arising under the immigration laws.
[159] Pub. L. No. 104-132, 110 Stat. 1214 (1996), 8 U.S.C.A. § 1105a(10) (West Supp. 1998).
[160] Pub. L. No. 104-208, 110 Stat. 3009 (1996), 8 U.S.C.A. § 1226(e) (West Supp. 1998).
[161] IRRIRA § 306(a), 8 U.S.C.A. § 1252(g) (West Supp. 1998).
[162] 8 U.S.C.A. § 1225 (West Supp. 1998) Some distinctions remain. The burden of proof is on the government when deporting an alien, but on the alien when determining excludability. See David Cole, "Congress and the Courts," 86 Geo. L.J. at 2486, 2487.

B. Impact of IRRIRA on the long term detention of Kim Ho Ma and Kestutis Zadvydas

The Supreme Court's decision in AADC was crucial for non-removable[169] immigrants with final deportation orders in "mandatory detention" claiming statutory error or abuse of discretion. Mandatory detention provisions of IIRIRA[170] which went into effect in 1998 authorize the confinement of virtually all aliens deportable on criminal grounds including those who have received final orders of deportation, for 90 days following their order of removal.[171] IIRIRA provides the INS "may" retain aliens after the 90-day period[172] and release of those with criminal convictions is permitted only if the detainee does not constitute a flight risk or danger to the community.[173] The mandatory confinement provisions have led to a "surge" in administratively detained persons.[174]

Among those in detention with final deportation orders are resident aliens Kim Ho Ma and Kestutis Zadvydas. The felony convictions of both men triggered mandatory detention and deportation. [175] Ma is a Cambodian who arrived in the United States as a

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[169] Immigrants who are in indefinite INS custody because no country will accept them and INS will not release them. See Donald M. Kerwin, "Throwing Away the Key: Lifers in INS Custody," Interpreter Releases, Vol. 75, No. 18 (1998). See also supra note 131.

[170] Pub.L. No. 104-208, 110 Stat. 3656 (Sept. 30, 1996), § 303, amending INA § 236(c).

[171] 8 U.S.C. § 1231(a)(1)(A)-(B). IIRIRA also mandates confinement of almost all inadmissible aliens on criminal and national security grounds (INA § 236(c)(1)); asylum seekers in the "expedited removal process" until they demonstrate a "credible fear" of persecution (INA § 235(b)(1)(B)(iii)(IV)); and aliens who appear inadmissible for other than document related reasons (INA § 235(b)(2)(A)).

[172] 8 U.S.C. § 1231(a)(6).

[173] INA § 236(c)(2).

[174] Kerwin, Interpreter Releases, Vol. 75, No. 18, p. 650. In fiscal year (FY) 1996, the INS had bed space for 8,592 administrative detainees at any one time. By FY 2000, according to the U.S. Department of Justice's May 1997 "Federal Detention Plan," it was to have ballooned to 23, 376 per day, a 172 percent increase in four years.

[175] 8 U.S.C. 1226(c)(1) (Supp. II 1996). Although legal permanent residents had been subject to deportation for criminal convictions prior to the 1996, the new laws (IRRIRA and AEDPA) made such deportation mandatory in large classes of cases. In the past, INS could consider such issues as whether the person had shown rehabilitation, whether deportation would hurt family members, and whether the person had strong ties to his country of origin. The new laws virtually eliminates individual assessment of the appropriateness of deportation. For an important discussion of these and other consequences on immigrant

INS. The INS also petitioned the Dominican Republic to admit Zadvydas because his wife was born in that country. The Dominican Republic did not respond. Zadvydas remained in INS detention from 1994 until his release in October 1997 by the United States District Court for the Eastern District of Louisiana.[178] Ma remained in detention from April 1, 1997 until October 25, 1999 following the grant of his petition for writ of habeas corpus by the Western District of Washington.[179] Both men challenged the constitutionality of the INS decisions to deny them parole. Their cases have wound their way up to the U.S. Supreme Court, which granted certiori in October 2000.

C. Collision between substantive due process challenges and the plenary power doctrine in the Ma and Zadvydas district courts.

The schizophrenic nature of immigration caselaw is glaringly obvious in the district and appellate courts' responses to the constitutional challenges brought by Ma and Zadvydas. Certainly, the challenges collide with plenary power doctrine. The decisions of the two district courts reflect their discomfort with the doctrine and desire to circumvent it somehow. The Ninth and Fifth Circuits, deciding appeals in the Ma[180] and Zadvydas[181] cases respectively, handled the collision by either refusing to apply the doctrine (the 9th Circuit) or reinforcing it (the 5th Circuit).

Both Ma and Zadvydas claimed their indefinite detention pending deportation was beyond statutory authority[182] and beyond permissible constitutional limits under the due

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[178] United States v. Zadvydas, 986 F. Supp. 1011 (E.D. La. 1997).
[179] Unpublished Order filed Sept. 29, 1999; No. C99-151L.
[180] Ma v. Reno, 208 F.3d 815 (9th Cir. 2000).
[181] Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999).
[182] In general, after an alien is found removable, the Attorney General is required to remove him within 90 days after the order is final. 18 U.S.C. § 1231(a)(1)(A)-(B). However, "an alien ordered removed who is inadmissible under sec. 1182, removable under sec. 1227...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*... U.S.C. § 1231 (a)(6).

The Eastern District Court for Louisiana deciding Zadvydas paid lip service to the plenary power accorded Congress in enacting immigration statutes. It referenced the principle that "in exercising its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'"[188] It agreed that the language of the INA[189] authorized the Attorney General to indefinitely detain deportable aliens.[190] Applying the rational basis standard, it proceeded to analyze under the United States v. Salerno test[191] whether indefinite detention violated Zadvydas' substantive due process rights.

The Louisiana district court considered first whether detention constitutes punishment or is incidental to another government interest. Second, it considered whether detention is excessive in relation to the alternative purpose assigned to it.[192] Analyzing the text of the statute, it was clear to the district court that Congress did not intend detention as a means of punishment for those who have already served their criminal sentences. Rather, the purpose was to protect the community from dangerous felons, and to effectuate deportation by preventing aliens from fleeing.[193]

Although other courts[194] had said that continued deportation of excludable aliens was not an excessive means of accomplishing the goals of the statute, the court here found "particularly troublesome" the potential infinite duration of detention for the

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[188] Zadvydas , 986 F.Supp. at 1024 quoting Mathews v. Diaz, 426 U.S. 67 (1976).
[189] 8 U.S.C. § 1252 (a)(2)(A) provides for the detention of aggravated convicted felons.
[190] Zadvydas, 986 F.Supp. at 1025.
[191] 481 U.S. 739 (1987). See supra note 144 and related text.
[192] See id. at 1025, 1026 quoting Gisbert v. United States Attorney General, 988 F.2d 1437, 1441 (5th Cir. 1993).
[193] See id. at 1026. See also Wing Wong , 163 U.S. 228 (1896), supra, where the U.S. Supreme Court established that detention as part of the means necessary to give effect to the exclusion or expulsion of aliens is valid.
[194] See Gisbert, 988 F.2d 1437 and Caballero v. Caplinger, 914 F.Supp. 1374 (E.D.La. 1996).

Ma's petition for habeas corpus was one of more than 100 pending in the Western District Court. Each contained procedural and or substantive due process challenges to continued detention. Of these 100, the court selected five representative cases of which Ma was one. A five-judge panel issued a joint order in these five lead cases. On doctrinal grounds, the panel pointedly rejected the government's argument that petitioners' legal status had "assimilated" to excludable once final deportation orders were issued and they therefore lacked constitutional protections.[202] The Supreme Court previously held that a lawful permanent resident who leaves the United States and later seeks reentry may "assimilate" to the status of a continuously residing lawful permanent resident for purposes of his constitutional right to due process. [203] However, the government had offered no precedent that used the assimilation doctrine to *reduce* the constitutional protections of lawful permanent residents who had not left the country, and the Washington district court refused to establish such precedent.[204] This meant that the court would treat petitioners as deserving of Fifth Amendment due process protection.

In a move making vivid the lower courts' "extreme disquiet"[205] with plenary power, the panel explicitly decided to reject the doctrine's relevance in post-deportation order detention cases.[206] It acknowledged that judicial deference was supported by plenary power doctrine in substantive immigration matters, but indefinite detention of aliens with final deportation orders was not a matter of immigration policy.[207] Nor do the cases raise foreign relations questions, the court said.[208] Finally, since detention threatens

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[202] Phan v. Reno, 56 F.Supp. 2d 1149, 1154 (W.D. Wa. 1999).
[203] *See* Kwong Haie Chew v. Colding, 344 U.S. 590 (1953).
[204] See Phan, 56 F. Supp. 2d at 1154.
[205] Legomsky, "Plenary Power," 1984 Sup.Ct. at 296.
[206] Phan, 56 F.Supp. 2d at 1155.
[207] See id. at 1155.
[208] See id.

deported.[215] Without that realistic chance, detention is no longer an aid of deportation and thus is "excessive" in relation to the government's interest.[216]

In response to petitioners' procedural due process claims, the panel determined that since the procedure as applied to all claimants was the same, its decision would be applied equally to all 100 cases.[217] Utilizing the Mathews v. Eldridge[218] test, the panel found that the risk of erroneous deprivation of petitioners' liberty interest was too great to provide anything less than full procedural due process. It required a hearing before an immigration judge at which evidence could be presented to support release pending deportation. The immigration judge must specifically explain how the decision to deny parole was reached given each petitioner's unique circumstances.[219]

As the panel directed, the judge reviewing Ma's particular case first addressed his substantive due process challenge.[220] It concluded, "there is not a realistic chance that the government will accomplish Ma's deportation to Cambodia," and "Ma's interest in liberty clearly outweighs the government's present interest in detaining him." Ma was ordered released.[221] Since the case was resolved on substantive due process grounds, the court did not reach the procedural due process question. In an unreported order, the court denied the government's motion to stay Ma's release pending its appeal to the 9th Circuit.[222] The 9th Circuit and U.S. Supreme Courts affirmed the district court's order.[223]

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[215] See id.
[216] See id.
[217] See id.
[218] 424 U.S. 319, 334-335 (1976). The test considers the interest at stake, 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 current procedures.
[219] Phan v. Reno, 56 F.Supp. 2d at 1156.
[220] Ma v. Reno, Order Granting Writ of Habeas Corpus, filed 9/29/99, No. C99-151L.
[221] See id.
[222] Brief for Respondent, Reno v. Ma, 2000 U.S. Briefs 38, *1 (Dec. 22, 2000).
[223] See id.

limitations into statutes that appeared to confer broad power on immigration officials in order to avoid constitutional problems."[230] For example, in Jean v. Nelson, the U.S. Supreme Court held that immigration parole does not permit race discrimination in order to avoid reaching the constitutional question.[231]

Implicit in the 9th Circuit's narrow interpretation of the statute is that it would not apply the plenary power doctrine in this case. This unwillingness to apply the doctrine could be considered a de facto limitation on its use.[232] In fact, in a footnote, the court made a point of rejecting INS' argument that it was entitled to substantial deference for all immigration-related decisions.[233] Citing INS v. Chadha,[234] it noted that the U.S. Supreme Court has not applied the doctrine in every case and "it is not clear why it should be applied here."[235]

Like the Western District Court of Washington, it refused the government's efforts to assimilate petitioners to "excludable" status with limited due process protection. It rejected the government's argument that the 9th Circuit's decision in Barrera-Echavarria v. Rison[236] and the U.S. Supreme Court's Mezei[237] decision were controlling. The

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constitutional questions." *(other cites omitted)*. The 6th Circuit in Rosales pointedly did not use the canon of constitutional avoidance when it found that the statute gave the Attorney General authority to detain indefinitely. Instead, it based its decision on a due process violation. 2001 FED App. at *33.

[230] See Ma, 208 F.3d at 15.

[231] See id. at 18, *citing* Jean, 472 U.S. 846, 854-56 (1985). See also supra, notes 111-114 and related text.

[232] See Motomura, "Immigration Law," 100 Yale L.J. at 549 ("Many courts have undermined the plenary power doctrine through statutory interpretation.") See also supra note 51.

[233] Ma, 208 F.3d at 30.

[234] 462 U.S. 919, 940-41 (1983) (striking down law governing suspension of deportation, stating that "what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing the [plenary] power...Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.")

[235] *See id.* at 30. The 6th Cir. also cited Chadha for the proposition that judicial deference in the immigration context becomes less compelling when it directly conflicts with other constitutional interests. Rosales, 2001 FED App. at *68.

[236] 44 F.3d 1441 (9th Cir. 1995) (en banc). (the government has the statutory authority to detain indefinitely an undeportable, excludable alien)

[237] 345 U.S. 206 (1953) (the government has the authority to indefinitely detain an excludable alien) See also supra, note 97 and related text.

order had become final, the court said in deference to the government, he no longer had the due process protections afforded to legal residents.[245] Unlike the 9th Circuit, the court here implicitly accepted the government's assimilation-to-excludable-status argument. Reiterating dicta in Knauff,[246] the 5th Circuit affirmed that "the exclusion of aliens is a fundamental act of national sovereignty" that "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."[247] In other words, because of the plenary power doctrine, the district court was without authority to conclude that Zadvydas' liberty interests were violated.

Nor did the 5th Circuit accept the lower court's conclusion that Zadvydas would never be deported. The circuit court acknowledged that Zadvydas was "stateless"[248] but since Lithuania had not "definitively denied"[249] Zadvydas' citizenship application, deportation was still possible. [250] Traditional deference would be shown to the political branches in matters of immigration policy, the court concluded, until there is showing that deportation is impossible, "not merely problematical, difficult, and distant."[251]

The 5th Circuit attempted to buttress its position that Zadvydas, as a resident alien with a final deportation order, has the same constitutional rights as an excludable alien—no more, no less. It first acknowledged that an excludable alien has some due process and other constitutional protections. It then agreed that deportable aliens are entitled to procedural due process regarding the government's decision to deport them. But once a

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[245] See id. at 290.
[246] United States ex. Rel. Knauff v. Shaughnessy, 70 S.Ct. at 312. See also supra notes 90-91 and related text.
[247] See Zadvydas, 185 F.3d at 288.
[248] See id. at 292.
[249] See id.
[250] See id. at 294.

alien, the government must now worry about two things. First, getting a country to accept him and second, worrying if he'll commit a crime against the general population.[257] The whole point of earmarking criminal aliens for deportation or exclusion, the court clarified, is "that while we must tolerate a certain risk of recidivism from our criminal citizens, we need not be similarly generous when it comes to those who have not achieved citizenship."[258]

The 5th circuit concluded that the "government may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place."[259] Zadvydas appealed to the U.S. Supreme Court.

E. The U.S. Supreme Court's Pending Review of Ma and Zadvydas

On October 10, 2000, the U.S. Supreme Court granted a writ of certiorari and consolidated the Ma and Zadvydas cases for oral argument.[260] Oral argument took place on February 21, 2001. As of this writing, the Court has not yet issued its decision.

The Court is likely to determine for how long the Attorney General is authorized under 8 U.S.C. § 1231(a)(6)[261] to detain aliens ordered deported but who cannot be removed for the foreseeable future. In so doing, the Court will decide whether it will grant the deference that the government claims is due the political branches. It is most unlikely that the Court will expressly overrule the plenary power doctrine. But it can and should narrow the doctrine by refusing to apply plenary power in these two cases. It can do this implicitly by interpreting the statute under the doctrine of constitutional avoidance

[257] See id.
[258] See id. at 296-297.
[259] See id. at 297.
[260] Reno v. Ma, 121 S.Ct. 297 (2000).

different parts of a statute to have the same meaning. Therefore, the government argues, "Congress must have intended the same language to confer the same authority with respect to each category."[266]

The Court should refuse to accept the government's statutory construction argument. What is most objectionable about it is its blithe disregard for 100 years of jurisprudence. By attempting to remove the substantive due process protections that the Court had previously extended to deportable aliens, the government is presuming extraordinary power without express delegation by Congress. The Court should not use the cover of the plenary power doctrine to permit this presumption to stand. Instead, it should determine that some clearer demonstration of Congressional intent is needed before the Court will conclude that the government is authorized to "put so drastic a limitation on the rights of [deportable] aliens by so indirect a means, particularly when [Congress] could have easily included express language to that effect in the statute."[267]

Although the outcome is not at all sure, it is hopeful the presumption will not stand. During oral arguments, several members of the Court, including Justice Sandra Day O'Connor, appeared concerned with the government's assimilation-to-excludable status theory.[268] Justice O'Connor pressed the government for precedent supporting its position and did not seem appeased by the Mezei case that the government raised. She questioned whether there wasn't a "vast difference" between saying a person who has never been in the country (albeit partly fictional) has not acquired Constitutional

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[265] 345 U.S. 206 (1953). See supra notes 96-98 and related text.
[266] See id. at *47.
[267] See Ma v. Reno, 208 F.3d at 34. See also supra note 242 and related text.
[268] See Transcript of Oral Argument, Zadvydas v. Underdown v. Ma, p. 46, Alderson Reporting Co., Inc. 1111 Fourteenth St. NW, Washington, D.C. 20005.

Bail Reform Act, the decision maker here is the INS district director, not a neutral judge or magistrate.[274]

The Court should also reject the government's argument that deference should be accorded because negotiations with a foreign country concerning a deportable alien's return affects international relations and foreign policy.[275] Because these negotiations can be sensitive and difficult, says the government, it is especially important that the judiciary not give the appearance of speaking with a different voice than the executive branch.[276] A foreign country could misinterpret a judicial opinion ordering release of a detained alien as implying that the United States believes the removal is futile.[277]

Invoking foreign policy as cause for judicial restraint in immigration cases is not new.[278] The Court in the past has often referred to its reluctance to interfere with the conduct of foreign relations in deferring to the political branches on immigration matters.[279] Its review of Ma and Zadvydas, though, presents the Court with an opportunity to disclaim foreign relations concerns as a blanket justification by the government for deference. It is not being suggested that immigration cases never affect foreign policy. But an assumption by the government that it automatically does here is unrealistic.[280] As Respondent argues in Ma, there is no indication that releasing a deportable alien has any effect on the government's ability to continue negotiations with a

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[274] See supra note 216 and related text for the holding of the Western District of Washington Court procedural due process requires a hearing before an immigration judge at which evidence could be presented to support release pending deportation.
[275] See Brief for the Petitioners, Reno v. Ma, 2000 U.S. Briefs at *44.
[276] See id.
[277] See id.
[278] See supra note 62 and related text.
[279] E.g., Fong Yue Ting, 149 U.S. at 705-06; Knauff, 338 U.S. at 542; Harisiades, 342 U.S. at 588-91.
[280] See Stephen Legomsky, "Plenary Power," 1984 Sup. Ct. Rev. at 261-269 for a discussion on foreign affairs and the political question doctrine. Legomsky suggests that courts should ask in each individual case whether judicial review would interfere with foreign policy. Even if it does interfere, he further argues