Artl.S8.C18.8.1 Overview of Congress's Immigration Powers

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

Long-standing Supreme Court precedent recognizes Congress as having "plenary" power over immigration, giving it almost complete authority to decide whether foreign nationals ("aliens," under governing statutes and case law) may enter or remain in the United States.[1] But while Congress's power over immigration is well established, defining its constitutional underpinnings is more difficult. The Constitution does not mention immigration, but parts of the Constitution address related subjects. The Supreme Court has sometimes relied upon Congress's powers over naturalization (the term and conditions in which an alien becomes a U.S. citizen),[2] foreign commerce,[3] and, to a lesser extent, upon the Executive Branch's implied Article II foreign affairs power,[4] as sources of federal immigration power.[5] While these powers continue to be cited as supporting the immigration power, since the late nineteenth century, the Supreme Court has described the power as flowing from the Constitution's establishment of a federal government.[6] The United

States government possesses all the powers incident to a sovereign, including unqualified authority over the Nation's borders and the ability to determine whether foreign nationals may come within its territory.[7] The Supreme Court has generally assigned the constitutional power to regulate immigration to Congress, with executive authority mainly derived from congressional delegations of authority.[8]

In exercising its power over immigration, Congress can make laws concerning aliens that would be unconstitutional if applied to citizens.[9] The Supreme Court has interpreted that power to apply with most force to the admission and exclusion of nonresident aliens abroad seeking to enter the United States.[10] The Court has further upheld laws excluding aliens from entry on the basis of ethnicity,[11] gender and legitimacy,[12] and political belief.[13] It has also upheld an Executive Branch exclusion policy, premised on a broad statutory delegation of authority, that some evidence suggested was motivated by religious animus.[14] But the immigration power has proven less than absolute when directed at aliens already physically present within the United States.[15] Even so, the Supreme Court's jurisprudence reflects that Congress retains broad power to regulate immigration and that the Court will accord substantial deference to the government's immigration policies, particularly those that implicate matters of national security.

Footnotes

1. ^ Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (“The Court without exception has sustained Congress’s ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’”) (quoting Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 123 (1967)); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 343 (1909) (noting the “plenary power of Congress as to the admission of aliens” and “the complete and absolute power of Congress over the subject” of immigration); *see also* Galvan v. Press, 347 U.S. 522, 531 (1954) (“Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. . . . 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.”).

2. ^ *See* U.S. Const. art. I, § 8, cl. 4 (Naturalization Clause); Arizona v. United States, 567 U.S. 387, 394–95 (2012); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 940 (1983); *but see Arizona*, 567 U.S. at 422 (Scalia, J., concurring in part and dissenting in part) (“I accept [federal immigration law] as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship)”).

3. ^ *See* U.S. Const. art. I, § 8, cl. 3 (Foreign Commerce Clause); Toll v. Moreno, 458 U.S. 1, 10 (1982); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 290 (1904) (citing Foreign Commerce Clause as a source of immigration power).

4. ^ *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (relying on foreign affairs power as source of executive power to exclude aliens).

5. ^ Discussions of the source of congressional immigration power sometimes also mention the power to declare war, U.S. Const. art. I, § 8, cl. 11, and the Migration and Importation Clause, *id.* § 9, cl. 1; which barred Congress from outlawing the slave trade before 1808. *See* Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 Iowa L. Rev. 707, 726 n.95 (1996).

6. ^ Ping v. United States, 130 U.S. 581, 609 (1889) (upholding law that prohibited the return to the United States of Chinese laborers who had been

issued, before their departure from the United States and under a prior law, certificates entitling them to return, and recognizing "[t]he power of exclusion of foreigners" as "an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution").

7. ^ *See* Trump v. Hawaii, No. 17-965, slip op. at 30 (U.S. June 26, 2018) ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments.'") (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)); Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative."); *Mandel*, 408 U.S. at 765 (relying upon "ancient principles of the international law of nation-states"); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) (the "traditional power of the Nation over the alien" is "a power inherent in every sovereign state"); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); *see also Arizona*, 567 U.S. at 394–95 (relying upon the Naturalization Clause and the "inherent power as sovereign to control and conduct relations with foreign nations"); *Ex rel. Turner*, 194 U.S. at 290 (relying on "the accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions," and upon the foreign commerce power).

8. ^ *See* Galvan v. Press, 347 U.S. 522, 530 (1954) ("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.") (internal citations omitted).

9. ^ Demore v. Kim, 538 U.S. 510, 522 (2003) ("[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens

that would be unacceptable if applied to citizens.”).

10. ^ *See* Zadvydas v. Davis, 533 U.S. 678, 693, 695–96 (2001) (noting that the “distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law” and equating “the political branches’ authority to control entry” with “the Nation’s armor”); *Fiallo*, 430 U.S. at 792; Jean v. Nelson, 472 U.S. 846, 875 (1985) (Marshall, J., dissenting) (declaring that it is “in the narrow area of entry decisions” that “the Government’s interest in protecting our sovereignty is at its strongest and that individual claims to constitutional entitlement are the least compelling”).
11. ^ Ping v. United States, 130 U.S. 581, 609 (1889) (upholding law that excluded “Chinese laborer[s]”).
12. ^ *Fiallo*, 430 U.S. at 798–99 (upholding law that excluded individuals linked by an illegitimate child-to-natural father relationship from eligibility for certain immigration preferences).
13. ^ *See Mandel*, 408 U.S. at 767 (suggesting that law rendering communists ineligible for visas did not exceed Congress’s immigration powers).
14. ^ Trump v. Hawaii, No. 17-965, slip op. at 22–23, 39 (U.S. June 26, 2018).
15. ^ *See Zadvydas*, 533 U.S. at 690 (observing that “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem”).