Artl.S8.C18.8.6 Immigration Jurisprudence (1889–1900)

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.*

Federal regulation of immigration began just as the Supreme Court was solidifying its short-lived doctrine that the Foreign Commerce Clause supplied the basis for exclusive federal power over the subject. In 1875, Congress passed the Page Act, which, among other things, barred the entry of aliens with criminal convictions and women "imported for the purposes of prostitution."[1] Then, in 1882, Congress restricted the entry of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."[2] In that same year, Congress passed the Chinese Exclusion Act, which generally barred the entry of "Chinese laborers" into the United States.[3] And in 1891, Congress expanded the categories of excludable aliens to include "[a]ll idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any persons whose ticket or passage is paid for with the money of another

or who is assisted by others to come."[4] Thus, by the late 1800s, Congress had established a statutory regime governing the admission of aliens.

The Supreme Court set the foundation for its doctrine that inherent principles of sovereignty give Congress plenary power to regulate immigration in the *Chinese Exclusion Case* of 1889. In this historic case, the Court upheld a federal law that expanded upon the Chinese Exclusion Act by prohibiting Chinese laborers from returning to the United States even if they had received, before their departures from the United States, certificates allowing their return issued under the earlier Chinese Exclusion Act.[5] In a break from earlier cases relying on the Foreign Commerce Clause as the basis for the federal immigration power, the Court reasoned that the power to exclude aliens was "an incident of sovereignty belonging to the government of the United States," and that—without exception—this sovereign power could be "exercise[d] at any time when, in the judgment of the government, the interests of the country require it."[6]

Three years later, in 1892, the Supreme Court held that Congress's inherent immigration power, as recognized in the *Chinese Exclusion Case*, foreclosed an alien's challenge to his exclusion from the United States pursuant to the Immigration Act of 1891. In *Nishimura Ekiu v. United States*, the Court determined that "[i]t 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."[7] Instead, the Court declared, "the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law" for aliens who seek to enter the United States.[8]

By the end of the nineteenth century, the Supreme Court construed Congress's broad immigration power as covering not only the exclusion of foreign nationals seeking entry into the United States, but also the expulsion of aliens already within the territorial boundaries of this country.[9] For example, in 1896 in *Fong Yue Ting v. United States*, the Court upheld the deportation of Chinese nationals residing in the United States following their failure to obtain "certificates of residence" under the Chinese Exclusion Act.[10] The Court determined that "[t]he right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."[11] Thus, based on the Supreme Court's early jurisprudence, Congress, and by extension, the Executive Branch, had virtually unlimited authority to exclude and deport aliens from the United States with little judicial intervention.

Footnotes

1. ^ Page Act of 1875, ch. 141, § 5, 18 Stat. 477.
2. ^ Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214.
3. ^ Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).
4. ^ Immigration Act of 1891, ch. 551, 26 Stat. 1084.

5. ^ Ping v. United States, 130 U.S. 581, 609 (1889).
6. ^ *Id.*
7. ^ 142 U.S. 651, 660 (1892).
8. ^ *Id.*; *see also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) ("[I]t 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.").
9. ^ *See* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893); Wong Wing v. United States, 163 U.S. 228, 236–38 (1896).
10. ^ *Fong Yue Ting*, 149 U.S. at 732.
11. ^ *Id.* at 707; *but see Wong Wing*, 163 U.S. at 237 (holding that, while the government could summarily expel aliens already residing within the country, it could not subject such aliens to criminal punishment on account of their unlawful presence without due process).