Consular Nonreviewability and the Limits of Plenary Power: *Kerry v. Din* and *Zivotofsky v. Kerry*

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Most immigration practitioners have been on the receiving end of the phone call or email from our U.S. Citizen client informing the attorney that during the interview at the Embassy in [insert country here], her spouse or other family member was denied the immigrant visa because … well … just *because*. At least that's how it seems to the layman (and sometimes even to practitioners) given the innocuous nature of the denial which usually comes with a less than illuminating reference to INA § 221(g) or one of the myriad grounds of inadmissibility in INA § 212. There is no right of appeal, no real review of the decision, and few options for overturning it even where the decision is legally or factually flawed. Underlying these results is the idea of plenary power within the context of immigration and citizenship law--that is, the federal government's plenary authority to decide issues of immigration free from judicial review and constitutional boundaries. This article considers the likely effects of recent jurisprudence on plenary power within the immigration and citizenship context in light of the Supreme Court's recent affirmance of the Plenary Doctrine as it relates to consular nonreviewability and executive power.

AN OVERVIEW OF PLENARY POWER JURISPRUDENCE

Plenary Power in Practical Context. Sixty-five years ago, in *Knauff v. Shaughnessy*, the Supreme Court succinctly summarized legislative plenary authority within immigration when it stated that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[1] In the years since, some scholars claim that the doctrine of plenary power in the U.S. immigration and citizenship context is receding from its former glory during Chinese exclusion when the primacy of Congressional or executive power was protected and preserved at all costs.[2] Whether the doctrine of plenary power is in decline or not, the question is hardly purely academic. The struggle over the scope of plenary power in the immigration context has significant, life-altering consequences for the families who draw the short end of the Department of State's unwieldy stick, and the scope of remedies available to individuals denied remedies, visas or waivers has neither been enlarged or assisted by recent case law whether in the form of Congress' authority to make immigration policy subject to modest judicial oversight (at issue in *Kerry v. Din*[3]) or exclusive executive branch authority to acknowledge sovereign nations (at issue in *Zivotosky v. Kerry*[4]).

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[1] *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).
[2] *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889); *see also* Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 Mich. L. Rev. 21 (2015).
[3] *Kerry v. Din*, 576 U.S. ____ (2015).
[4] *Zivotosky v. Kerry*, 135 S. Ct. 2076 (2015).

A Brief History of Plenary Power in Immigration and Citizenship. Immigration law is not specifically enumerated by the Constitution as a federal power. Rather, the Supreme Court's interpretation of "sovereignty" carved out and afforded the political branches of the federal government plenary power during the Chinese exclusion cases of the 1880s. Specifically, regarding Congress' plenary authority to exclude aliens, the Supreme Court held that "[j]urisdiction over its own territory ... is an incident of every independent nation. [and]... part of its independence" such that "[i]f it could not exclude aliens it would be … subject to the control of another power."[5] A few years later, the Court affirmed executive branch plenary power to exclude aliens when it held that where "a statute gives a discretionary power to an [executive branch] 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."[6] Having defined immigration as the province of the political branches, the judiciary quickly eschewed any authority to review those determinations, stating that:

> 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.[7]

The Court's deference continued through its 1950 decision in *Knauff v. Shaughnessy,* cited above, in which it stated that due process is "whatever the procedure [is] authorized by Congress." In 1972,[8] the Supreme Court acknowledged that a minimal ("restrained") form of judicial review should apply when a self-described "revolutionary Marxist" was invited to speak at U.S. universities. While the Court acknowledged that the visa denial impacted freedom of speech, the Court held that the government need only state a "facially legitimate and bona fide" basis for the visa denial.[9]

Citing many of the afore-mentioned cases, the Court in *Kerry v. Din* held that it "has consistently recognized that [on] policy questions entrusted exclusively to the political branches of our Government … we have no judicial authority to substitute our political judgment for that of the Congress."[10] On what "could have been a momentous day in the evolution of American immigration law," *Kerry v. Din* was not "the renunciation of the plenary power doctrine" that many had hoped for, but as one scholar states, it

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[5] *Chae Chan Ping*, 130 U.S. at 603.
[6] *Nishimura Ekiu v. United States* 142 U.S. 651, 660 (1892).
[7] *Id.*
[8] *Kleindienst v. Mandel*, 408 U.S. 753 (1972)
[9] *Id.*
[10] *Kerry v. Din*, 576 U.S. ____ (2015) (citing *Fiallo v. Bell*, 430 U.S. 787, 798 (1977)).

"was not a reaffirmation of the doctrine, either."[11] Rather, it indicates that "the plenary power doctrine … does not carry the force that it once did," and that there were at least four justices prepared to "apply fundamental rights in the context of immigration" but that perhaps "[t]he Justices may … be confused and divided about how to bring the doctrine down for a gentle landing."[12] While *Zivotofsky* addresses "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations,"[13] and occasions debate between those who believe in expansive executive power on foreign affairs and those who want the legislative branch to have more authority, both cases fundamentally deal with the authority of the Department of State to be free in its decisions from mandate, oversight or review. Accordingly, both cases have practical import for immigration practitioners, advocates and activists.

RECENT JURISPRUDENCE: PLENARY POWER IN DECLINE?

Those who insist that the plenary power doctrine is in decline offer as proof the last fifteen years of jurisprudence in which the courts have placed judicial limitations on the political branches' authority to detain and deport, *Zadvydas v. Davis* chief among them.[14] In *Zadvydas,* the Court considered whether the federal government had the authority to indefinitely detain deportable aliens. While prior jurisprudence had affirmed an unfettered government right to detain, the *Zadvydas* Court asserted that the government's authority is subject to "important constitutional limitations," and that even deportable aliens have a "liberty interest that is, at least, strong enough to raise a serious question as to whether …. the Constitution permits detention that is indefinite and potentially permanent."[15]

While the Court continues to assign the political branches of the federal government broad immigration powers, it considers in *Kerry v. Din* only whether the asserted liberty interest (the right to live in the U.S. with her husband) entitled her to more due process than was afforded the petitioner in *Knauff v. Shaughnessy* (that is, more than what Congress or the executive branch says should be afforded). Likewise, in *Zivotofsky,* the Court limited its holding to those matters involving the President's authority to recognize foreign states, and left open considerations of other contexts in which executive authority assumes plenary, irreproachable power.

Is plenary power as exercised in the immigration and citizenship context losing its historical foothold and what insight do the recent Supreme Court cases in *Kerry v. Din* and *Zivotofsky v. Din* offer into the nature of its decline? In order to appreciate what these cases mean in the context of immigration law and practice, it's important first to understand their facts and holdings.

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[11] Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 Mich. L. Rev. 21, 22 (2015).
[12] *Id at* 23, 29.
[13] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).
[14] Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 Mich. L. Rev. First Impressions 21 (2015).
[15] *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Kerry v. Din: Consular Nonreviewability. Fauzia Din, a United States citizen, filed a visa petition for her husband Kanishka Berashk, a citizen and resident of Afghanistan. The State Department denied the petition based on terrorism-related grounds. Berashk asked for clarification of the visa denial and was told that it is not possible for the Embassy to provide him with a detailed explanation of the reasons for denial. After several other unsuccessful attempts to receive explanation of the visa denial, Din sued and argued that denying notice for aliens who were not granted a visa based on terrorism grounds is unconstitutional. The district court held that Din did not have standing to challenge the visa denial notice. The U.S. Court of Appeals for the Ninth Circuit reversed and held that the government is required to give notice of reasons for visa denial based on terrorism grounds.[16] The U.S. Supreme Court granted the writ of certiorari.

Justice Antonin Scalia delivered the opinion for the three-judge plurality, which held that no Constitutional rights were violated by denying a full explanation of why an alien's visa was denied. The Due Process Clause of the Fifth Amendment states that no citizen may be deprived of "life, liberty, or property" without due process, but judicial precedent has held that no due process is owed when these interests are not at stake. Because none of these interests are implicated in the denial of a nonresident alien's visa application, there is no denial of due process when the visa application is rejected without explanation. Although "liberty" has been construed to refer to fundamental rights, there is no precedent that supports the contention that the right to live with one's spouse is such a fundamental right.

Justice Anthony M. Kennedy wrote an opinion concurring in the judgment in which he argued that the notice of the denial of the visa application was sufficient to satisfy the due process requirement. Because the decision was made based on a "facially legitimate and bona fide reason," the courts do not need to look further, especially when national security is involved. Justice Samuel A. Alito, Jr. joined in the concurrence in the judgment.

Justice Stephen G. Breyer wrote a dissent in which he argued that the Due Process Clause entitles a citizen to procedural due process when a liberty interest flows implicitly from the Due Process Clause or when a statute creates the expectation that the interest will not be denied without due process. The right at issue in this case—the right to live with one's spouse—satisfies those requirements, and therefore entitles Din to procedural due process. Because a statement of the reasons for a decision is a fundamental element of due process, its denial in this case amounts a denial of due process. Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor, and Justice Elena Kagan joined in the dissent.

Zivotofsky v. Kerry: Limits on Congressional Power. In 2002, Manachem Zivotofsky was born in Jerusalem to parents who are United States citizens. Manachem's parents requested that the U.S. State Department record his place of birth on his passport as "Israel," in accordance with Section 214(d) of the Foreign Relations Authorization Act of 2003 (Act). The State Department refused and instead issued Manachem a passport that listed "Jerusalem" as his place of birth. His parents sued the Secretary of State on his behalf and sought the enforcement of Section 214(d). The district court dismissed the case

[16] *Kerry v. Din*, Oyez, https://www.oyez.org/cases/2014/13-1402 (last visited Nov 13, 2015).

on the grounds that it presented a non-justiciable political question. The U.S. Supreme Court, in Zivotofsky v. Clinton, reversed that holding and remanded the case. On remand, the district court held that Section 214(d) "impermissibly intereferes" with the President's exclusive power to recognize foreign states. The U.S. Court of Appeals for the District of Columbia Circuit affirmed and held that the section goes beyond the scope of Congress's passport power to affect United States foreign policy, which is a realm the Constitution reserves for the executive branch.[17] The U.S. Supreme Court granted the writ of certiorari on the question of whether the federal statute that directs the Secretary of State to record the birthplace of an American citizen born in Jerusalem as "Israel," if requested to do so, impermissibly infringes on the President's power to recognize foreign states?

Justice Anthony M. Kennedy delivered the opinion for the 6-3 majority. The Court held that, although the Constitution does not explicitly address the issue of recognition of foreign nations, the Reception Clause in Article II of the Constitution—which states that the President will receive foreign ambassadors—grants the President the power to recognize foreign states. The fact that Article II also vests the President with the power to make treaties and appoint ambassadors gives the President further control over recognition decisions. Although Congress has a role to play in other aspects of foreign policy, often by granting the President's formal recognition practical effect, Congress has no such power to initiate international diplomacy without involving the President. Because the question of whether the American government recognizes a foreign nation must have only one answer, the President's power is assumed to be exclusive, and therefore Congress cannot act in a manner that contradicts Executive branch policy regarding recognition. The Court also held that precedent and history support the view that the formal recognition power belongs exclusively to the President. Because the Executive branch has maintained a neutral position by not recognizing any nation's sovereignty over Jerusalem, the federal statute in question unconstitutionally infringes on the President's recognition power.

In his concurring opinion, Justice Stephen G. Breyer wrote that this case presented a political question beyond the purview of the judiciary, but because precedent precluded political resolution, he joined in the majority opinion. Justice Clarence Thomas wrote an opinion concurring in part and dissenting in part in which he argued that the federal statute in question was an unconstitutional usurpation of the President's recognition power with regards to passports but not consular reports of birth abroad. The historical record indicates that any residual foreign affairs powers that were not explicitly allocated were assumed to be vested in the President. While passport regulation has traditionally been an executive function and falls squarely within the residual foreign affairs power reserved to the President, the consular reports are part of the naturalization powers that are granted to Congress. Therefore, the enforcement of the statute in question as it relates to passports would violate the separation of powers doctrine, but it may be constitutionally applied to consular reports of birth abroad.

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[17] *Zivotofsky v. Kerry*, Oyez, https://www.oyez.org/cases/2014/13-628 (last visited Nov 13, 2015).

Chief Justice John G. Roberts, Jr. wrote a dissent in which he argued that, in order for the President to constitutionally ignore the express will of Congress, the President must be exercising a power that the Constitution "conclusively and preclusively" granted to the Executive branch. Because the history and the precedent regarding the power to recognize foreign states is at best conflicting, Chief Justice Roberts argued that the Constitution does not conclusively and preclusively grant the President the power to recognize foreign states. Even if the President did have that power, the statute in question would not be unconstitutional because an optional passport designation does not amount to official recognition. Justice Samuel A. Alito, Jr. joined in the dissent. In his separate dissent, Justice Antonin Scalia wrote that, to the extent that the Constitution grants the President the power to recognize foreign states, the power is not exclusive. The Constitution grants Congress such a power in the form of its authority to regulate commerce with foreign nations. Regardless, the statute in question does not implicate the recognition power; it merely directs the State Department to make an accommodation regarding a geographic description that is in line with similar accommodations the State Department already offers. Chief Justice Roberts and Justice Alito joined in the dissent.

CONSULAR NONREVIEWABILITY & LIMITATIONS ON JUDICIAL REVIEW

Consular Nonreviewability: While a half a century ago, only case law precluded judicial review of consular determinations,[18] the Immigration and Naturalization Act ("INA") specifically exempted consular decisions from judicial or administrative review.[19] Accordingly, consular officers enjoy absolute authority to grant or deny visas with historically unfettered oversight or review. Nearly all visa denials that come to some favorable conclusion do so only as a result of fierce advocacy and diligent and delicate liaising on the client's behalf, whether institutionally (through a formal agency liaison or Congressional assistance) or informally (between attorney and consular officer). Inevitably, a great deal of finesse and considerable aplomb are critical to a successful outcome.

The Quandary of Visa Denials. Although *Kerry v. Din* and other cases[20] indicate that a U.S. citizen may feasibly raise a constitutional challenge to a visa denial (unless the reasons are facially legitimate and bona fide), the question remains whether a petitioner can ever satisfy this exception when the facts on which the State Department predicates the denial are so nebulously enumerated in the denial itself. Had Din's spouse been excluded on a fiance visa rather than a Petition for Alien Relative, would Din have successfully invoked a liberty interest in marriage that would constitute a greater liberty interest beyond simply residing in the U.S. with her spouse? What about the exclusion of an alien spouse or fiance on the basis of a legal error--for example, where the State Department insists on proof of a prior marriage's termination when the prior marriage cannot be lawfully "terminated"

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[18] *Ulrich v. Kellogg*, 30 F.2d 984 (D.C.Cir. 1929).

[19] INA § 104(a)("The Secretary of State shall be charged with the administration and the enforcement of the provisions of [the INA] and all other immigration and nationality laws relating to (1) the powers, duties and functions of diplomatic and consular officers of the United States, except those powers, duties and functions conferred upon the consular officers relating to the granting or refusing of visas."); *see also* INA §§ 221 to 222 (authority of consular officers to grant or refuse visas).

[20] *Bustamanate v. Mukasey*, 531 F. 3d 1059 (9th Cir. 2013).

because it was *void ab initio*? Does a U.S. Citizen's inability to marry invoke a higher liberty interest and thus, offer the opportunity for the Court to review where the lines lie between a fundamental liberty interest that "directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally."[21] *Kerry v. Din* does not promise the quick relief that many hoped it would to the quandary of how to attack the impenetrable fiefdom of consular nonreviewability and overturn visa denials. At the same time, it leaves open the issue of whether there may be any liberty interest so highly esteemed as to invite the Court's review and further attention.

LIMITATIONS ON CONGRESSIONAL PLENARY POWER IN FOREIGN AFFAIRS

While some individuals favor greater Congressional participation in foreign affairs (including many members of the Senate and House of Representatives who signed onto the *amici briefs* encouraging narrow construction of the President's recognition power), the Supreme Court in *Zivotofsky* nonetheless construed executive plenary power broadly in the context of whether the President has exclusive power to grant formal recognition to a foreign sovereign and if he does, whether Congress can command the executive branch to issue a formal statement that contradicts a prior recognition.[22] The majority held that the recognition power resides in the President and that because recognition of foreign states is "a topic on which the National must speak ... with one voice," that voice "is the President's."[23]

In spite of affirming the exclusivity of the President's authority under the recognition power, the Court concluded that "[a]lthough the President alone effects the formal act of recognition," Congress has "substantial authority regarding many of the policy determinations that precede and follow the act of recognition itself."[24] Likewise, the Court declined to define the recognition power so broadly as to vest in the executive branch "exclusive authority to conduct diplomatic relations along with the bulk of foreign-affairs powers."[25]

The practical effect of this decision by the Supreme Court, however, lies in its exploration of the constitutionality of INA § 214(d), the provision that provides that the Secretary of State shall by request, note Israel as the birthplace of those U.S. Citizens born abroad in Jerusalem. On this issue, the High Court stated that:

> If the power over recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's

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[21] *Kerry v. Din*, 576 U.S. ____ (2015)(citing O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 788 (1980).
[22] *Zivotosky*, 135 S. Ct. at 2081.
[23] *Id* at 2086.
[24] *Id* at 2087.
[25] *Id* at 2089 (citing Respondent's brief at 18, 16).

> statements.... [I]f Congress could alter the President's statements on matters of recognition or force him to contradict them, Congress in effect would exercise the recognition power.[26]

In short, Congress may cooperate with executive recognition power, but may not create a "mandate that the Executive contradict his prior recognition determination in an official document."[27]

The implications of the *Zivotofsky* opinion are different than those enumerated by *Kerry v. Din*. But the two opinions nonetheless secure executive branch power within domains over which (in these cases) the Department of State exercises plenary authority either through the executive recognition power or the plenary power over immigration afforded to the Department of State to grant or deny visas. The political implications in the context of *Zivotofsky* may be limited or expansive, depending on who one asks. If the holding in *Zivotofsky* is limited to matters involving only the recognition power and only applies when legislation "somehow hinders the President's ability to "maintain [a recognition] determination in his and his agent's statements," then the decision may have little import for Congress' own authority to act in foreign affairs.[28] On the other hand, would *Zivotofsky* have implications for Congressional mandates forbidding the President from returning Guantanamo to Cuba or authorizing military aid to sub-national forces in Iraq if those mandates contradicted the President's "one voice"[29] regarding the sovereignty and recognition of foreign states?[30]

CONCLUSION

While an exploration of plenary power in the context of immigration generally, and the recognition power specifically may seem as fruitless as debating how many angels dance on the head of a pin, understanding the doctrine of plenary power in the context of consular nonreviewability is critical to determining whether federal litigation will serve your client (*Kerry v. Din*), and where Congressional and Executive powers live separate and apart or peaceably (or not so peaceably) coexist within the Constitutional framework governing foreign affairs authority (*Zivotofsky v. Kerry*). Without question, with the stay on President's executive actions from November 2014 now being appealed by the administration to the Supreme Court, the Court will rely on many of the same doctrines--namely the scope of executive authority *viz a viz* Congressional power--to make its determination of the validity of the President's actions. Likewise, visa denials will continue to come before the federal courts, each alleging a constitutional right sufficient to entice the Court to reign in the doctrine of consular nonreviewability.

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[26] *Id* at 2094-95.
[27] *Id* at 2095.
[28] Jennifer K. Elsea, *Zivotofsky v. Kerry: The Jerusalem Passport Case and Its Potential Implications for Congress's Foreign Affairs Powers* (CRS Report No. R43773) (Washington, DC: Congressional Research Service, 2015), https://www.fas.org/sgp/crs/misc/R43773.pdf.
[29] *Zivotofsky*, 135 S. Ct. at 2123.
[30] Jennifer K. Elsea, *Zivotofsky v. Kerry: The Jerusalem Passport Case and Its Potential Implications for Congress's Foreign Affairs Powers* (CRS Report No. R43773) (Washington, DC: Congressional Research Service, 2015), https://www.fas.org/sgp/crs/misc/R43773.pdf.