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## THE UNREVIEWABLE EXECUTIVE? NATIONAL SECURITY AND THE LIMITS OF PLENARY POWER

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# THE UNREVIEWABLE EXECUTIVE? NATIONAL SECURITY AND THE LIMITS OF PLENARY POWER

SHAWN E. FIELDS\*

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## I. INTRODUCTION

Immigration reform has become the new third rail in politics. In the three decades since President Reagan's executive immigration orders and the accompanying Immigration Reform and Control Act

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of 1986,<sup>1</sup> not a single major immigration measure has passed in Congress.<sup>2</sup> Nor is one likely to pass anytime soon. Inaction on such a politically divisive issue appears, for now, to be the more prudent electoral expedient.

The irony of this inaction is that Congress could, legally, pass any type of immigration measure it wants without fear of meaningful court intervention. Due to the “constitutional oddity” known as the plenary power doctrine, the political branches of government are given near carte blanche to enact any immigration control measure they see fit without judicial review of its constitutionality.<sup>3</sup> In the absence of Congressional action, however, much of the significant movement on immigration has come from the executive branch in the form of executive orders, signed pursuant to broad immigration control powers delegated to the President by Congress in 1965.<sup>4</sup> That power has been wielded most recently in the form of President Trump’s two controversial executive orders on immigration—the so-called “Muslim bans”—that have sucked up so much of the oxygen in this nation’s political discourse during the President’s first months in office.<sup>5</sup>

But there is something uniquely different about these executive orders: unlike all other immigration policies enacted since the plenary power doctrine was established in 1889, these orders appear likely to be struck down as unconstitutional.<sup>6</sup> While the Trump

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1. Immigration Reform and Control Act (“Simpson-Mazzoli Act”), Pub. L. 99-603, 100 Stat. 3445 (1986) (providing legal status to certain classes of undocumented immigrants who entered the country before 1982).

2. Roger Chapman and James Clement, *CULTURE WARS: ISSUES, VOICES, AND VIEWPOINTS* 77 (2009) (“Until 2012, there was virtually no movement in Congress to deal with the problem of the 11 million illegal immigrants living in the United States since the passage of the Immigration Reform and Control Act of 1986, which granted amnesty to many of the 3.2 million illegal immigrants living in the United States.”).

3. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 282 (1984).

4. Immigration and Nationality Act of 1965 (“Hart-Celler Act”), H.R. 2580, Pub. L. 89-236, 79 Stat. 911 (1968); 8 U.S.C. § 1101 et seq. (delegating to the executive branch the power to control migration from specific countries).

5. Exec. Order No. 13769, titled “Protecting the Nation From Foreign Terrorist Entry Into the United States” (Jan. 27, 2017); Exec. Order No. 13780, titled “Protecting the Nation From Foreign Terrorist Entry Into the United States” (Mar. 6, 2017) (hereinafter the “executive orders” or the “orders”).

6. See *Washington v. Trump et al.*, Case No. 2:17-cv-00141-JLR, Dkt. No. 52 (W.D. Wash. Feb. 3, 2017) (finding that the states “are likely to succeed on the merits of the claims that would entitle them to relief,” including constitutional claims based on the Equal Protection Clause of the First and Fourteenth Amendments and the

Department of Justice has quite reasonably relied on over a century of precedent to argue that immigration actions of the executive are simply “unreviewable,”<sup>7</sup> courts preliminarily rejected that contention in what has become “sprawling” litigation over the Orders.<sup>8</sup> It appears that some immigration actions—at least those with an explicitly anti-Muslim origin story, a thinly-veiled religious preference, and an even thinner national security justification—may in fact be so noxious and violative of “contemporary constitutional norms” as to fall outside the limits of the previously-limitless plenary power.<sup>9</sup> At a minimum, these orders have tested and will continue to test the outer limits of plenary power in the national security context.

This Article endeavors to define those limits, and offers a new judicial review paradigm for constitutional challenges to immigration actions implicating national security interests. The Article proceeds in three parts. First, the Article examines the three doctrinal pillars upon which plenary power rests: 1) the extra-constitutional, inherent sovereign right of nations to control

Due Process Clause of the Fifth and Fourteenth Amendments); *Int’l. Refugee Assistance Project v. Trump, et al.*, 857 F.3d 554, 622 (4th Cir. 2017) (finding that “Section 2(c) of EO-2 is likely unconstitutional”); cf. *Trump v. Int’l. Refugee Assistance Project v. Trump*, 582 U.S. \_\_\_\_ (2017) (granting certiorari and staying the injunction entered by the Fourth Circuit Court of Appeals).

7. *Washington v. Trump*, 2:17-cv-00141-JLR, Dkt. No. 50 (W.D. Wash. Feb. 2, 2017) at 20-22 (asserting that immigration decisions are “areas within the exclusive domain of the political branches of government. . . . It is thus well-established that courts cannot evaluate the President’s national security and foreign affairs judgments, especially in the immigration context. . . . It is simply not possible for the Court here to evaluate the President’s executive order without passing judgment on the President’s national security and foreign affairs determinations. . . . There is . . . no basis for the Judiciary to second-guess the President’s determinations in that regard.”).

8. David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 N.W. L. REV. 583, 585 n.6 (2017) (listing the growing number of litigations and declaring that “[t]he litigation over President Trump’s executive order is sprawling”); *Int’l. Refugee Assistance Project v. Trump*, 857 F.3d at 89 (“The Government has repeatedly asked this Court to ignore evidence, circumscribe our own review, and blindly defer to executive action . . . we would do a disservice to our constitutional structure were we to . . . silence the call for meaningful judicial review.”).

9. See Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction For Our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 259 (2000) (“[I]f a case arises which challenges discrimination on a ground that violates contemporary constitutional norms, the Court will be faced with a new situation.”).

migration as they see fit; 2) judicial deference to the political branches to “speak with one voice” on behalf of the nation in the exercise of this sovereign right, even when such exercise violates constitutional rights; and 3) recognition of the linkage between foreign affairs and national security on the one hand, and immigration controls on the other. These three fundamental characteristics of plenary power have led the Court to “uphold[] with depressing regularity statutes discriminating on the basis of race, sexual orientation, political activity, and sex and birth out-of-wedlock.”<sup>10</sup>

Second, the Article highlights recent implied and express attacks on each of these plenary power pillars, suggesting that the doctrine is “less robust in the twenty-first century.”<sup>11</sup> Courts no longer invoke “inherent national sovereignty” as a justification to uphold an immigration decision, nor do they cite the notorious but still controlling Chinese Exclusion Case articulating this justification and establishing the plenary power doctrine.<sup>12</sup> Moreover, while no federal immigration decision has yet been struck down on the merits as unconstitutional<sup>13</sup>, courts in the twenty-first century have become increasingly comfortable with reviewing the constitutionality of immigration actions, itself a departure from the traditional plenary power doctrine.<sup>14</sup> Perhaps most surprisingly, courts have intimated

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10. *Id.* at 257 (“These decisions, and the statutes they upheld, are inconsistent with fundamental values reflected in domestic constitutional law, yet they continue to constitute the foundation of immigration law.”).

11. Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President is Trying to Find Out)*, 1 NEV. L.J. FORUM 80, 85 (2017) (hereinafter “*Is the Chinese Exclusion Case Still Good Law?*”).

12. *Id.* at 91.

13. As this Article goes to print, the various court decisions concerning the Trump executive orders have only considered whether the plaintiffs have made a sufficient showing of irreparable harm and likelihood of success on the merits for a preliminary injunction to issue. No case has yet issued a final decision on the merits, though the Supreme Court will hear merits arguments in October 2017. *Trump v. Int’l. Refugee Assistance Project*, 582 U.S. \_\_ (“The clerk is directed to set a briefing schedule that will permit the cases to be heard during the first session of October Term 2017.”). By that point, challenges to an executive order designed to remain in effect for only 120 days may very well be moot. See Garrett Epps, *Trump’s Limited Travel Ban Victory*, THE ATLANTIC (Jun. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/06/the-trump-administrations-limited-victory/531708/> (“The Supreme Court granted review of the president’s travel ban in October, but the Court clearly hopes – and strongly hints – that the case will be moot by then.”).

14. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (finding that the indefinite detention of a deportable alien would violate constitutional due process)

that they will not simply step aside on the assumption that a particular immigration action affects national security. As we have seen in litigation over Trump's executive orders, courts may be willing to engage in a more searching judicial inquiry of the national security interests served by an otherwise nakedly discriminatory immigration decision, at least in limited circumstances.

Third, the Article attempts to reconcile plenary power's past with its present and to articulate a new judicial review paradigm for immigration decisions implicating both national security interests and important constitutional rights. In doing so, the Article does not endorse a wholesale rejection of plenary power as a relic of a distant and racist past, as so many progressive immigration scholars have urged for decades.<sup>15</sup> Nor does it defend the doctrine against recent rational, if inconsistent, judicial critiques. Instead, it acknowledges the wisdom of some level of judicial deference when immigration decisions truly affect national security interests, but advocates for a more searching judicial inquiry of whether national security interests are central to the immigration decision, as well as a limited "normalizing" of constitutional immigration review where national security concerns are not implicated.

The Article concludes with four recommendations that, standing alone, have been suggested in various places, but together form a new judicial paradigm for constitutional review. First, courts should legitimize the immense power of the federal government to control immigration by directly and affirmatively articulating the source of that power as enumerated in the Constitution. This textual source will differ depending on the individual case, as the vast realm of "immigration law" writ large often affects domestic interstate

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(quoting *INS v. Chadha*, 462 U.S. 919, 941-42 (1983) (Congress must choose "a constitutionally permissible means of implementing" its immigration power)); cf. Peter J. Spiro, *How the Courts Could See Their Way to Striking Down the Trump Travel Ban*, LAWFARE (Feb. 2, 2017, 1:48 PM), <https://www.lawfareblog.com/how-courts-could-see-their-way-striking-down-trump-travel-ban> ("The courts have never imposed meaningful constraints on the executive branch in th[e immigration] context.")

15. See David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 (2015) (hereinafter "*Why Plenary Power Endures*") (observing that "the doctrine ha[s] been widely and persistently condemned in the scholarly literature. It almost seems an obligatory rite of passage for scholars embarking on the study of immigration law to provide their own critique of plenary power or related doctrines of deference.").

commerce, naturalization, foreign affairs, and other enumerated powers.<sup>16</sup>

Second, courts should thoroughly examine whether immigration actions do—or do not—implicate national security interests *and* were taken primarily for national security reasons. This searching judicial inquiry calls for more than accepting at face value a governmental statement that a national security interest exists. Instead, courts should independently examine the four corners of the immigration action and the facts and circumstances giving rise to the action to determine both: 1) whether a genuine and bona fide national security interests actually exists to justify the action, and 2) whether this national security interest primarily motivated the action.<sup>17</sup>

Third, where courts find legitimate national security interests and motivations at stake, they should adhere to a modified form of plenary power deference consistent with the Court's holdings in *Kleindienst v. Mandel* and *Kerry v. Din*.<sup>18</sup> By implementing a threshold level of review with bite to determine whether an immigration case truly implicates national security, courts can then justifiably accord deference in areas where the political branches truly ought to “speak with one voice” on behalf of the nation—such as foreign affairs and national security—and apply more exacting scrutiny to purely domestic or ministerial actions justifying no such deference.

Fourth, courts should continue the process of normalizing or “constitutionalizing” immigration law affecting purely non-national security interests, and apply similar judicial review doctrines to these cases as it does a domestic due process or equal protection case. This approach, while a direct repudiation of plenary power in most immigration contexts, finds far greater moral and structural justification than the expansive plenary power doctrine of the twentieth century.

Plenary power does in fact “endure,”<sup>19</sup> though “it remains quite difficult to define exactly where it stands. Donald Trump assumed

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16. Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. 1, 25 (2015) (hereinafter “*Plenary Power is Dead!*”).

17. As discussed below, the Article anticipates and addresses critics of this approach, who will alternately claim that *all* immigration decisions implicate national security concerns and that *no* court is equipped to divine the true motivations of legislators and executives.

18. See generally *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Kerry v. Din*, 135 S.Ct. 2128 (2015).

19. See generally Martin, *supra* note 15, at 1.

the presidency in the midst of this constitutional ambiguity[,]”<sup>20</sup> and wasted no time forcing courts to clarify the scope of the doctrine. Even if his executive orders ultimately withstand constitutional scrutiny, that would not necessarily signal a reinvigoration of plenary power. Conversely, neither would a rejection of his actions by the Court spell the death knell for deference to the political branches on immigration. As with so much of the Trump presidency, we must take his orders on immigration for what they are—extreme, unprecedented actions, at least for the twenty-first century. But to make sense of the long-term jurisprudential fallout from these unprecedented times, we must examine the entire shifting landscape of immigration law and its effect on the next, likely less extraordinary case. This Article attempts to pinpoint that shifting landscape and provide a way forward for the next case.

## II. THE THREE PILLARS OF PLENARY POWER

The plenary power doctrine, as currently constructed, rests on three doctrinal pillars: inherent national sovereignty, judicial deference, and national security linkage. The doctrine endures despite a century of withering criticism because of continued fealty to these three foundational characteristics. The common narrative justifying plenary power along these pillars proceeds as follows:

- 1) The right to regulate the flow of non-citizens entering the country, including the right to determine who may enter, who must leave, and under what circumstances they may enter or leave, is an inherent power of any sovereign nation.<sup>21</sup> As an “inherent” power, it does not derive from any enumerated constitutional power, but exists as an “extra-constitutional” natural right of all sovereign nations.<sup>22</sup>
- 2) As an extra-constitutional power, the right to control immigration is not subject to traditional constitutional limitations. These limitations include both individual

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20. *Is the Chinese Exclusion Case Still Good Law?*, *supra* note 11, at 82.

21. *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889) (“The power of the . . . government to exclude aliens from the United States is an incident of sovereignty which cannot be surrendered . . .”).

22. *Immigration Exceptionalism*, *supra* note 8, at 582-83 (discussing the need to “tame immigration’s extra-constitutional stats and thus allow for normal judicial review when constitutional rights are implicated”).

rights that might otherwise be asserted by individuals challenging state action, as well as separation of powers limitations such as judicial review.<sup>23</sup> Thus, in the tripartite system of the federal government, this inherent sovereign power should be exercised by the political branches, and the judiciary should exercise deference to the executive and legislative branches in exercising this power.<sup>24</sup>

- 3) Nowhere is this deference accorded more weight than in the area of foreign affairs generally, and national security specifically. Immigration policies are inexorably linked with foreign affairs, and courts should tread lightly in reviewing the foreign policy rationales of the political branches.<sup>25</sup> When immigration implicates national security interests, courts should accord even greater deference, as it does in other non-immigration national security contexts.<sup>26</sup>

This section sketches the contours of these three pillars upon which plenary power rests, and highlights various doctrinal and textual critiques of each. The following section discusses how each of plenary power's three pillars are under attack, with reference to recent Supreme Court precedent and events surrounding President Trump's executive orders.

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23. *Id.*

24. Spiro, *supra* note 14. (With such a consistent history of deference, it is easy for one to assume that "[t]he court has given the political branches the judicial equivalent of a blank check to regulate immigration as they see fit.").

25. See *Why Plenary Power Endures*, *supra* note 15, at 40-41. (urging critics of plenary power to reconsider the inexorable "linkage" between immigration policy and foreign affairs); cf. Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L. L. 121, 165-67 (1994) (arguing that immigration law has long been tied to the façade of a foreign policy rationale to justify federal preemption).

26. See Joel Rubin, *Courts rarely second-guess the president on national security. But that doesn't mean they can't, experts said*, L.A. TIMES, (Feb. 7, 2017, 3:37 PM), <http://www.latimes.com/politics/la-live-updates-9th-circuit-arguments-courts-have-been-reluctant-to-1486509412.htmlstory.html> ("The tendency by judges not to question the president on national security issues is rooted in the belief that the president, aided by national security advisors and the wealth of information at their disposal, is in the best position to make such decisions, said Matt Waxman, a national security law expert at Columbia University.").

A. Plenary Power Foundations: Inherent National Sovereignty

“The original challenge of immigration law is that it is not explicitly one of the enumerated constitutional powers of the federal government.”<sup>27</sup> Under our federalist constitutional system, the federal government possesses only those powers expressly enumerated in the Constitution, while the states retain the residual police powers.<sup>28</sup> However, the Constitution is silent on authority to enact immigration controls. By what authority, then, does the federal government assert what has become the immense power to authorize or restrict migration into the country?<sup>29</sup> The Court answered that question in *Chae Chan Ping v. United States*, commonly known by its derisively descriptive moniker: the Chinese Exclusion Case.<sup>30</sup> While the facts, circumstances surrounding, and ultimate holding of this case are so noxious to the twenty-first century observer as to be commonly analogized to other “anticanon”<sup>31</sup> cases like *Plessy v. Ferguson*, the Chinese Exclusion Case remains among the most important precedents for defining the foundations and scope of immigration plenary power. Perhaps more importantly, it has never been overturned.<sup>32</sup>

27. *Plenary Power is Dead!*, *supra* note 16, at 2.

28. *Why Plenary Power Endures*, *supra* note 15, at 34; see also *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (“In preemption analysis, courts should assume that ‘the historic police powers of the States’ are not superseded . . .”); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 838 (2008).

29. *Why Plenary Power Endures*, *supra* note 15, at 34 (“The closest enumerated power would seem to be Congress’s authority to adopt ‘an uniform Rule of Naturalization.’ But naturalization is not the same thing as admission to the territory, and the Naturalization Clause has never seemed fully up to the task of supporting the complicated superstructure of federal immigration controls erected” in the century-plus of constitutional immigration jurisprudence.); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 734 (2013) (discussing range of subfederal immigration-related measures in response to lack of enumerated federal authority and federal policymaking inaction); *Immigration Exceptionalism*, *supra* note 8 at 600-609 (contending that immigration must be viewed as “exceptional” from a federalism standpoint to justify federal preemption over immigration law).

30. 130 U.S. at 604.

31. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (arguing that infamous Supreme Court cases like *Plessy v. Ferguson* and *Korematsu v. United States* do not “involve bad reasoning, nor are they morally repugnant . . . I argue that anticanonical cases achieve their status through historical happenstance . . .”).

32. Peter J. Spiro *Trump’s Anti-Muslim Plan is Awful. And Constitutional*, N.Y. TIMES (Dec. 8, 2015), <https://nyti.ms/1NKbY67n> (“Unlike other bygone constitutional

Chae Chan Ping was a Chinese immigrant who lawfully settled in California in 1875, during a period of rampant anti-Chinese xenophobia.<sup>33</sup> In 1882, Congress enacted the Chinese Exclusion Act, prohibiting new Chinese immigrants from arriving, but not expelling Mr. Chae and others like him who were already in the U.S.<sup>34</sup> The law also provided a procedure by which lawful Chinese immigrants already present in the United States could leave the country temporarily and return without threat of exclusion.<sup>35</sup>

Mr. Chae decided to visit China in 1887, but journeyed back only after “carefully obtaining the official certificate provided by law as the means for his readmission.”<sup>36</sup> On September 7, 1888, after his visit to China, Mr. Chae left Hong Kong on a steamship carrying his return certificate.<sup>37</sup> Three weeks after Mr. Chae left China and was quite literally in uncharted waters in the middle of the Pacific Ocean, Congress passed the following law: “[I]t shall be unlawful for any Chinese laborer . . . who shall have departed . . . and who shall have not returned before the passage of this act, to return to or remain in the United States.”<sup>38</sup> Completely unaware of the passage of this act, and with no option but to return to the U.S., Mr. Chae arrived by boat to San Francisco, his home of fifteen years.<sup>39</sup> He was promptly detained and ordered excluded from the country pursuant to Congress’s act.<sup>40</sup>

Mr. Chae challenged the law on equal protection grounds, and appealed the case all the way to the Supreme Court. Sidestepping the equal protection issue, the Court focused instead on a more basic, novel question: Could Congress enact an immigration exclusion law?<sup>41</sup> Given the lack of any enumerated constitutional

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curiosities that offend our contemporary sensibilities, the Chinese Exclusion case has never been overturned.”).

33. *Chae Chan Ping*, 130 U.S. at 582.

34. *Id.* at 597.

35. *Id.*

36. *Id.* at 582; *Why Plenary Power Endures*, *supra* note 15, at 31.

37. *Chae Chan Ping*, 130 U.S. at 582.

38. *Id.* at 599.

39. *Id.*

40. *Id.* This 1888 law stemmed from xenophobic and racist agitation in California scapegoating the Chinese in the midst of a severe economic recession, and represented the low point in decades of anti-Chinese rhetoric by, among others, the namesake of the former Boalt Hall. See Charles Reichmann, *Anti-Chinese Racism at Berkeley: The Case for Renaming Boalt Hall* (May 8, 2017), available at SSRN: <https://ssrn.com/abstract=2965219>.

41. *Is the Chinese Exclusion Case Still Good Law?*, *supra* note 11, at 83.

power to enact such a regulation, the Court rested on the inherent powers of a nation, which to the Court included the power of immigration control:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.<sup>42</sup>

The Court further explained why this sovereign authority cannot be a power exercised by the states despite not being explicitly conferred upon the federal government in the Constitution:

[T]he United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. . . . “[T]he government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. . . . It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. . . .”<sup>43</sup>

In this sense, the Court “invoke[d] sovereignty . . . primarily to justify exclusive federal power to control immigration, despite the

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42. *Chae Chan Ping*, 130 U.S. at 603-04; *Why Plenary Power Endures*, *supra* note 15, at 35 (“By invoking the very concept of independent nationhood, Field is staking out an additional theoretical foundation for specific federal powers – one not confined to enumerated text. The Constitution emphatically was written to establish a nation, not a mere association of persons seeking to achieve a limited range of contractual purposes. Asserting jurisdiction over a territory, which includes authority to choose which noncitizens to admit or exclude, is simply part of what it means to be a sovereign nation.”).

43. *Chae Chan Ping*, 130 U.S. at 608 (“It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws . . .”).

lack of an anchor in explicit constitutional text.”<sup>44</sup> This extra-constitutional justification has long drawn the ire of originalists and textualists.<sup>45</sup> Nevertheless, this aspect of the Court’s holding—that Congress has the power to enact restrictions on immigration—remains good law today.<sup>46</sup> However, the Court gave little more than passing acknowledgement to what should have been an uncontroversial maxim of constitutional law: that sovereign powers, even inherent sovereign powers, are still restricted by the Constitution.<sup>47</sup> It never discussed, much less ruled on, the substance of Mr. Chae’s claim that a blanket ban on Chinese immigration based on widespread racial animus might offend the Equal Protection Clause of the Constitution.<sup>48</sup> The Court just assumed that because the power to control immigration was “inherent,” that it was also unlimited. This endorsement of unchecked federal authority over immigration “established the basic parameters for immigration law for over a century,” and opened the door for the political branches to enact openly discriminatory and unjust

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44. *Why Plenary Power Endures*, *supra* note 15, at 38; *cf. Arizona v. United States*, 132 S.Ct. at 2511-12 (Scalia, J., dissenting) (“As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress.”).

45. See Ilya Somin, *Why Trump’s refugee order is unconstitutional*, WASH. POST (Feb. 5, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/05/why-trumps-refugee-order-is-unconstitutional-discrimination-on-the-basis-of-religion/?utm\\_term=.1ef799e5e5d4](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/05/why-trumps-refugee-order-is-unconstitutional-discrimination-on-the-basis-of-religion/?utm_term=.1ef799e5e5d4) (“I would add that the plenary power doctrine is ultimately indefensible and should be overruled by the Supreme Court. Nothing in the text or the original meaning of the Constitution indicates that immigration law is an exception to the constitutional rights that constrain every other type of government policy. The text does limit a few specific constitutional rights to American citizens, such as those protected by the Privileges or Immunities Clause of the Fourteenth Amendment. But this only underscores the fact that other constitutional rights extend to everyone. There would be no need to explicitly limit some rights to citizens if there were a general presumption that non-citizens are excluded.”).

46. *Is the Chinese Exclusion Case Still Good Law?*, *supra* note 11, at 83; Spiro, *supra* note 14.

47. See, e.g., Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F. 93, 102-05 (2014) (discussing inherent rights of sovereign nations to enter into treaties, but observing that such treaty-making powers remain constrained by constitutional separation of powers and federalism limitations).

48. *Is the Chinese Exclusion Case Still Good Law?*, *supra* note 11, at 84 (“Raising such a claim for a Chinese man would have posed a doctrinal challenge, since at the time the Court was of the opinion that the ‘main purpose of [the Fourteenth Amendment] was the freedom of the African race.’ Moreover, the Court did not apply the Equal Protection Clause to the federal government until the twentieth century.”).

immigration policies immune from constitutional challenge or meaningful judicial review.<sup>49</sup>

*B. Plenary Power Application: Judicial Deference*

Having chosen an extra-constitutional foundation for immigration law, the Court quickly determined that no role existed for the judiciary to review constitutional challenges to immigration laws. The result of this sweeping doctrine was that immigration law became “a constitutional oddity” largely immune from the civil liberties revolution of the twentieth century.<sup>50</sup>

In *Chae Chan Ping*, for example, the Court refused even to consider the merits of Mr. Chae’s equal protection challenge, holding in a unanimous opinion that immigration decisions by the “legislative department” to exclude aliens are “conclusive upon the judiciary.”<sup>51</sup> The Court reasoned that the propriety of immigration decisions and their impact on foreign affairs with other countries “are not questions for judicial determination. If there be nay just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act on the subject.”<sup>52</sup>

Three years later, in *Nishimura Ekiu v. United States*, the Court rejected the claim that aliens possessed any constitutional due process protections to appeal immigration decisions.<sup>53</sup> In affirming the propriety of an immigration officer’s summary denial of entry to a Japanese immigrant seeking to reunite with her husband, the Court found that Congress may lawfully make immigration officers “the sole and exclusive judge . . . 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.”<sup>54</sup>

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49. *Id.*; cf. *Why Plenary Power Endures*, *supra* note 15, at 38 (rejecting the narrative that “the Court’s invocation of sovereignty in *Chae Chan Ping* [was] an illegitimate judicial move meant to introduce a factor that will trump rights claims.”).

50. Legomsky, *supra* note 3, at 282.

51. *Chae Chan Ping*, 130 U.S. at 606.

52. *Id.* at 609.

53. 142 U.S. 651, 667 (1892).

54. *Id.* (“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 such 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 following year, the Court extended the plenary power doctrine from exclusion of aliens not physically present on sovereign soil to deportation of aliens in the United States. In *Fong Yue Ting v. United States*, the Court upheld the deportation of a Chinese national purely on nationality grounds, finding that, “[t]he power of Congress . . . to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers . . .”<sup>55</sup>

In *Yamataya v. Fisher*,<sup>56</sup> the Court appeared momentarily willing to entertain a limited form of constitutional due process protections for immigrants, but an examination of the case confirms that “the right to due process in immigration proceedings was little more than an empty formalism.”<sup>57</sup> *Yamataya*, a Japanese woman, had been excluded from the U.S. based on a federal immigration inspector’s finding that she was “likely to become a public charge.”<sup>58</sup> *Yamataya* appealed, claiming that she had not been afforded a meaningful opportunity to challenge the inspector’s decision.<sup>59</sup> The Court acknowledged that the petitioner lacked “knowledge of our language; that she did not understand the nature and import of the questions propounded to her; that the investigation made was a ‘pretended’ one; and that she did not, at the time, know that the investigation had reference to her being deported from the country.”<sup>60</sup> Justice Harlan even reasoned that administrative officers “may [not] disregard the fundamental principles that inhere in due process of law.”<sup>61</sup> But the Court nevertheless concluded that such personal “misfortune . . . constitutes no reason . . . under any rule of law, for the intervention of the court.”<sup>62</sup>

This “empty formalism” defined the Warren Court’s immigration decisions of the 1950s and 1960s, at a time when the Court’s domestic constitutional jurisprudence was marked by expansions of

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*the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”*) (emphasis added).

55. 149 U.S. 698, 713-14 (1893).

56. 189 U.S. 86 (1903).

57. Matthew J. Lindsay, *Due Process and Plenary Power*, IMMIGRATION PROF BLOG (Jun. 22, 2015), <http://lawprofessors.typepad.com/immigration/2015/06/symposium-on-kerry-v-din-due-process-and-plenary-power-by-matthew-j-lindsay.html>.

58. *Yamataya*, 189 U.S. at 90.

59. *Id.*

60. *Id.* at 93.

61. *Id.*

62. *Id.* at 95.

rights for individuals. For example, in 1950, a German-born wife of a U.S. citizen challenged her summary exclusion from entry at Ellis Island by an immigration officer on national security grounds.<sup>63</sup> In affirming the executive branch's decision to exclude her without a hearing and on the basis of secret evidence, the Court found that, "The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."<sup>64</sup>

In 1953, the Court extended this reasoning in *Shaughnessy v. United States ex rel. Mezei*, when it found that a non-citizen facing exclusion was not entitled to any due process whatsoever, even if the result was indefinite detention.<sup>65</sup> After living in the United States for more than 25 years, Ignatz Mezei attempted to return to his native Romania to visit his dying mother but was denied entry into the country.<sup>66</sup> Upon his return to the U.S., he was denied entry and held at Ellis Island for over four years on national security grounds while the government attempted and failed to find another country to host him.<sup>67</sup> The Court rejected his habeas claim that his indefinite detention violated due process: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."<sup>68</sup>

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63. *Knauff v. Shaughnessy*, 338 U.S. 537, 540 (1950).

64. *Id.* at 543. Two years after the ruling, Knauff found relief from the political branches when newspaper editorials decried her exclusion and the Attorney General granted her a hearing. Knauff lost before the Immigration Board of Special Inquiry but won a reversal at the Board of Immigration Appeals, after which she became a lawful permanent resident. See Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 945-58 (1995) (providing an illuminating account of Knauff's journey before and after her Supreme Court case).

65. 345 U.S. 206, 209 (1953).

66. *Id.* at 210; see also Weisselberg, *supra* note 64, at 952-56.

67. *Mezei*, 345 U.S. at 213; see also Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U.L. REV. 1017, 1024 (2007) ("Because Mezei could not establish his nationality, other nations would not take him, and he remained confined by the government on Ellis Island.").

68. *Mezei*, 345 U.S. at 213. The Court reached this conclusion even though the "process" afforded Mezei was no process at all. See Slocum, *supra* note 67, at 1024 ("Mezei was excluded without a hearing based on confidential information. . . . Despite the indefinite, and potentially permanent, nature of his detention, the Court

The Court reaffirmed the plenary power doctrine throughout the 1970's, when it upheld the exclusion of a self-described "revolutionary Marxist,"<sup>69</sup> upheld a statute requiring a five-year period of admission as a prerequisite for aliens wishing to receive medical care,<sup>70</sup> and upheld a facially discriminatory provision of the Immigration Act that recognized the relationship between children born out of wedlock with their mothers but not their fathers.<sup>71</sup> As recently as 2015, the Court upheld the exclusion of a permanent resident's spouse on unspecified "national security" grounds based on secret evidence never made public.<sup>72</sup>

In short, "the Supreme Court has never struck down an immigration classification, even one based on race."<sup>73</sup> With such a consistent history of deference, it is easy for one to assume that "[t]he court has given the political branches the judicial equivalent of a blank check to regulate immigration as they see fit."<sup>74</sup> As the *Mandel* Court put it, "over no conceivable subject is the

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held that Mezei's due process rights were not violated because Mezei was treated 'as if stopped at the border' and thus had no due process rights.").

69. *Kleindienst v. Mandel*, 408 U.S. 753, 772 (1972) ("The Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.").

70. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, . . . such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.").

71. *Fiallo v. Bell*, 430 U.S. 787, 797 (1977); see also *Miller v. Albright*, 523 U.S. 420, 430 (1998) (same); cf. Chin, *supra* note 17, at 272 (critiquing the view that these cases turned on the plenary power doctrine, because "unmarried fathers are in a class by themselves; differential treatment of this group is probably the sex classification which the Court has been most willing to find reasonable domestically").

72. *Kerry v. Din*, 135 S. Ct. 2128, 2138 (2015) (recasting petitioner's claim as a deprivation of "her constitutional right to live in the United States with her spouse," for which "[t]here is no constitutional right," instead of focusing on her procedural constitutional right to due process of law); see also *Plenary Power is Dead!*, *supra* note 16, at 8 ("Justice Kennedy's concurrence in *Din* converts constitutional due process into a similar kind of empty shell. It assumes that *Din* held a "protected liberty interest" in the government's consideration of her husband's visa application, yet denies that that interest entitled either her or Berashk to information that would enable them to comprehend, let alone challenge, its rejection of his application.").

73. Spiro, *supra* note 14.

74. *Id.*

legislative power of Congress more complete than it is over the admission of aliens.”<sup>75</sup> While “the courts have justified this constitutional exceptionalism on the grounds that immigration law implicates foreign relations and national security,” it nonetheless has upheld discriminatory decisions “even in the absence of a specific, plausible foreign policy rationale.”<sup>76</sup>

### C. Plenary Power Synchronicity: National Security Linkage

The Court has long deferred to the political branches on matters of national security in a host of constitutional contexts. Immigration is no different. In fact, the *Chae Chan Ping* Court’s invocation of national sovereignty in deference to the political branches rested primarily on the close linkage between foreign affairs and immigration control decisions.<sup>77</sup> And while not every immigration case before the Court presents an explicit national security justification for the actions of the political branches, the ones that do reflect plenary power at its most robust. In these cases, the Court traditionally has been willing to overlook significant, deliberate constitutional rights violations in deference to vaguely articulated national security interests.<sup>78</sup> In this sense, “[t]he Court implicitly remains willing to give the political branches leeway to use immigration authorities in rough-hewn ways, even though deference does mean that some governmental acts deriving from illicit motives

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75. *Kleindienst*, 408 U.S. at 772.

76. Spiro, *supra* note 14 (questioning what possible national security interests could be promoted by denying a father from reuniting with his out-of-wedlock son from the French West Indies).

77. See *supra* at II. A.; see also *Why Plenary Power Endures*, *supra* note 15 at 29 (“The essay illustrates why such linkage is more significant than is often appreciated, even today, as the federal government seeks to work in a complex and uncertain global context, where many powers taken for granted in the domestic arena simply are not reliably available.”).

78. See, e.g., *Fiallo*, 430 U.S. at 797 (upholding gender-based discrimination on the basis of vague references to national security); see also Spiro, *supra* note 14 (“The 1977 decision in *Fiallo v. Bell* – well into the modern-era rights revolution – is particularly instructive. The case involved a facially discriminatory provision of the Immigration Act that recognized the relationship between children born out of wedlock with their mothers but not their fathers. The regime implicated a double-barreled discrimination for equal protection purposes, implicating the suspect classes of gender and legitimacy. The Court upheld the provision on the basis of exactly the kinds of stereotypes that trigger close judicial scrutiny in any other context.”).

rather than genuine foreign affairs considerations may go unremedied in court.”<sup>79</sup>

The *Chae Chan Ping* Court expressly relied on this idea of national security linkage despite a dubious security rationale for Chinese exclusion, noting that, as a matter of “self-preservation,” the government has the “highest duty” to “preserve . . . independence, and give security against foreign aggression and encroachment.”<sup>80</sup> It then presented the blank check:

To achieve these ends, the government is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. . . . The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary.<sup>81</sup>

The Court reaffirmed this holding in *Knauff* and *Messi*, both times confirming that the government need not present the Court with any evidence to substantiate its national security rationales. Likewise, in 1952, three long-time residents of the U.S. were ordered deported because of their former membership in the Communist Party.<sup>82</sup> Though noting the severity of deporting aliens who had resided within the country for such a lengthy period of time, the Court affirmed the deportations by finding that, “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance with a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”<sup>83</sup>

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79. *Why Plenary Power Endures*, *supra* note 15, at 29.

80. *Chae Chan Ping*, 130 U.S. at 606.

81. *Id.* at 612.

82. *Harisiades v. Shaughnessy*, 342 U.S. 580, 585 (1952).

83. *Id.* at 587–88 (“Nothing in our structure of government or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with that of Congress.”). Indeed, this rationale

The Court relied on this rationale again in the 1972 decision *Kleindienst v. Mandel*, in which the Court affirmed the government's authority to refuse a visa to a Belgian journalist who described himself as "a revolutionary Marxist," and who had been invited to speak at American universities.<sup>84</sup> The Court acknowledged that the visa denial impacted freedom of speech and thus allowed—at least formally—that a minimal form of judicial review should apply.<sup>85</sup> But the Court expressed a reluctance to tread heavily upon the decision of the executive branch because the government had articulated a national security justification for the exclusion—namely, the government's desire to exclude Communists and their ideals from the country during the Cold War.<sup>86</sup> Despite compelling arguments that excluding the journalist from the country did nothing to advance national security interests, and possibly even harmed them given the negative press coverage surrounding the case, the Court again deferred, finding that the government only needed to state a "facially legitimate and bona fide" basis for the visa denial.<sup>87</sup>

Relying again on murky national security grounds, a plurality of the Court sought to reaffirm the Court's deference to national security concerns in the absence of any substantiating evidence in the 2015 case *Kerry v. Din*.<sup>88</sup> Fauzia Din, a United States citizen, challenged the State Department's refusal to grant a visa to her Afghan husband.<sup>89</sup> Din argued that the visa denial infringed her right to marriage, and as a matter of due process, the State Department owed her a specific explanation for the decision.<sup>90</sup> The State Department had given no explanation except for a vague reference to the statute banning people who have engaged in terrorist activities from entering the United States.<sup>91</sup> Din did not ask the Court to rule on whether her husband actually was a terrorist. Rather, she asked for a process that would meaningfully allow the couple to respond to the allegations.<sup>92</sup>

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articulates what many believe to be an axiom of immigration policy – that, by definition, immigration actions affect national security because they involve migration from foreign territories. *See generally infra*.

84. *Kleindienst*, 408 U.S. at 760.

85. *Id.*

86. *Id.* at 762.

87. *Id.* at 772.

88. 135 S.Ct. 2128.

89. *Id.* at 2135.

90. *Id.* at 2136.

91. *Id.*

92. *Id.*

In a 5-4 decision, the Court found that the government's vague and unspecified reference to terrorist activity constituted a sufficient "facially legitimate and bona fide" reason to justify the exclusion, even though the "reason" was so generically worded as to prevent Ms. Din from even responding to the denial.<sup>93</sup> Writing for the plurality, Justice Kennedy expressly relied on *Mandel* for the proposition that the government need only state a reason for the denial cloaked in national security to satisfy its burden, regardless of whether any evidence could be mustered to support the proffered reason.<sup>94</sup> Like the Court in *Mandel*, Justice Kennedy expressed fear the courts could be dragged into every case in which the government found a person inadmissible and would be asked to balance the would-be immigrant's interests against the national security interests of that of the United States.<sup>95</sup>

Like the Court in *Harisiades*, some scholars have argued that such deference ought to be afforded on national security grounds in all immigration cases because all immigration decisions implicate foreign affairs, and thus national security concerns.<sup>96</sup> Immigration is one of the nation's many policy tools in the foreign arena, which are "crude and imprecise, with uncertain impact."<sup>97</sup> Therefore, deference to the political branches is necessary to allow flexibility in the application and adaptation of these tools.<sup>98</sup>

In addition to this normative position on national security linkage, consequentialist considerations caution against exacting

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93. *Id.* at 2138.

94. *Id.* at 2140; see also *Plenary Power is Dead!*, *supra* note 16, at 7 ("In so concluding, Kennedy's opinion relieves the government of virtually any accountability in its exclusion decisions, in effect conceding that the courts will not scrutinize a consular decision that is erroneous, arbitrary, or even motivated by ill will, so long as the government remembers to cite a statute that provides for the exclusion of certain noncitizens.").

95. *Id.*

96. See *Why Plenary Power Endures*, *supra* note 15, at 39-40; cf. *Immigration Exceptionalism*, *supra* note 8, at 583 (discussing the "general trend" among plenary power scholars justifying immigration federal preemption on national security grounds); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U.L. REV. 965, 967 (2004) (maintaining that "the immigration power is an exclusively federal power that must be exercised uniformly" because immigration inherently involves foreign affairs and national security).

97. *Why Plenary Power Endures*, *supra* note 15, at 42.

98. *Id.* ("A too-ready judicial interference would also impair our ability to deploy uncertain tools — deriving from immigration control, trade regulation, or other components of our international relations — according to a single unified strategy.").

judicial scrutiny in national security immigration cases. “In the international arena, U.S. actors generally cannot invoke compulsory process or other reliable coercive means under their own government’s control.”<sup>99</sup> Moreover, “the kind of detailed constitutional scrutiny appropriate for the mature and developed domestic public order is not workable in the more primitive international legal system, marked primarily by horizontal action and response to try to rectify breaches.”<sup>100</sup>

### III. WEAKENING FOUNDATIONS: TRUMP’S EXECUTIVE ORDERS AND MODERN PLENARY POWER EROSION

Recent treatment of the plenary power doctrine by courts and litigants alike highlights how each of the three pillars of plenary power are under attack. The recent litigation surrounding Trump’s executive orders on immigration casts these attacks into sharp relief.

First, the exceptional approach to immigration law defined by plenary power had foundations that have become jurisprudentially questionable in the twenty-first century. The Court’s early tendency to see immigration authority as emanating from inherent national sovereignty rather than from the Constitution has come under fire from scholars on the left who decry this reasoning as a justification to trample on individual liberties,<sup>101</sup> and scholars and judges on the right who doubt the validity of jurisprudential doctrines grounded in anything but the original text and meaning of the Constitution.<sup>102</sup> As a result, courts have increasingly acknowledged that at least some minimal constitutional limitations should constrain federal immigration power, even if only in the procedural due process context.<sup>103</sup> Moreover, litigation surrounding the executive orders suggests that federal authorities seeking to justify rights

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99. *Id.*

100. *Id.*

101. See, e.g., *Plenary Power is Dead!*, *supra* note 16 at 10 (welcoming the “war of attrition” diminishing the plenary power doctrine vis-à-vis “questions of procedural due process”); Susan Bibler Coutin, Justin Richland, and Veronique Fortin, *Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law*, 4 U.C. IRVINE L. REV. 97, 100-101 (bemoaning the “veneer of legal form” plenary power provides while in reality authorizing extralegal decisions by immigration officials “to decide the status of immigrants . . . via a calculation that remains almost entirely hidden”).

102. See Somin, *supra* note 45.

103. See *Zadvydas*, 533 U.S. at 696 (in the procedural due process context, immigration power is “subject to important constitutional limitations”).

infringements on national security grounds may have to do more than simply say the magic words “national security” to survive constitutional challenge.<sup>104</sup> That change—incremental as it may be—would itself amount to a sea change for plenary power jurisprudence.

*A. Inherent Sovereignty: The Disappearing Chinese Exclusion Case*

*Chae Chan Ping* remains the seminal case not only for the notion of a federal plenary power over immigration, but for the inherent and absolute right of the federal government to enact immigration laws as representatives of a sovereign nation. Regardless of one’s own feelings about the case itself, no immigration scholar would argue that *Chae Chan Ping* has been consigned to the “dustbin of history” or that it is any less important today as a precedent than it was sixty years ago.<sup>105</sup> Perhaps most importantly, neither the case itself nor its inherent national sovereignty reasoning has ever been overruled.<sup>106</sup> So to the extent immigration cases implicate plenary power and national sovereignty issues, one would expect the government to rely on the Chinese Exclusion Case and would expect courts to discuss it.

But that is not the case. The last time the Supreme Court cited *Chae Chan Ping* was in the 2001 case *Zadvydas v. Davis*.<sup>107</sup> Importantly, the Court referenced *Chae Chan Ping* not to reaffirm its holding or continued relevance, but for the proposition that sovereign power over immigration is subject to constitutional limits.<sup>108</sup> While this proposition was mentioned in passing in *Chae Chan Ping*, it was promptly ignored by the Court as it affirmed the absolute power of the political branches over immigration. That the case would emerge in the twenty-first century not to reaffirm this

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104. See *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 9, 2017) (per curiam) (rejecting the government’s position that immigration decisions regarding national security issues are unreviewable: “There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.”); *Int’l. Refugees Assistance Project v. Trump*, 857 F.3d at 612 (“The deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution.”).

105. KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 18 (2007).

106. Spiro, *supra* note 14.

107. *Is the Chinese Exclusion Case Still Good Law?*, *supra* note 11, at 84.

108. *Id.*; see also *Zadvydas*, 533 U.S. at 696.

absolute federal authority but to caution that it remains constrained by the Constitution is telling. In 2017, the Ninth Circuit cited the Chinese Exclusion Case for exactly the same principle,<sup>109</sup> suggesting that the case, and its reliance on notions of inherent national sovereignty, may be quietly fading from the immigration canon.

Perhaps more telling is the reluctance of Trump's Department of Justice to cite *Chae Chan Ping*. "If ever a case existed to breathe new life into the Chinese Exclusion Case, it is the sprawling litigation over Trump's executive orders. The Chinese Exclusion case so closely parallels the present case that failing to mention it seems like a form of malpractice. The holding of the decision squarely favors the Trump Administration."<sup>110</sup> Just as in *Chae Chan Ping*, the executive orders involve a "blanket ban on immigration based on nationality," "apparent animus as a motivation for the ban," and "refusal to allow re-entry even for legal residents."<sup>111</sup> "And yet, when the first version of the travel ban was enjoined, the Department of Justice failed to mention the Chinese Exclusion Case in its filings to the District Court and in its emergency appeal to the Ninth Circuit."<sup>112</sup> Nor was it mentioned in the government's appeals to the Fourth Circuit and Ninth Circuit Courts of Appeal seeking reversal of the injunctions preventing implementation of the executive orders.

While the Justice Department may simply have concluded that citing a case so openly resting on anti-canonical racist reasoning would be too politically embarrassing, one questions whether a case so squarely favorable to the President would be ignored for purely optics reasons. In contrast, the Attorney General of Washington made the Chinese Exclusion Case a central character in his state's brief seeking to enjoin the first executive order, arguing that the case was a relic of a bigoted past, an episode to be learned from rather than a precedent to be followed: "Accepting the President's approach would take us back to a period in our history when distinctions based on national origin were accepted as the natural order of things, rather than outlawed as the pernicious discrimination that they are."<sup>113</sup>

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109. *Is the Chinese Exclusion Case Still Good Law?*, *supra* note 11 at 84.

110. *Id.*

111. *Id.*

112. *Id.*

113. Motion for Temporary Restraining Order at 20–21, *Washington v. Trump*, No. 2:17–CV– 00141–JLR (W.D. Wash. filed Jan. 30, 2017), 2017 WL 511013; *cf.* *Chae Chan Ping*, 130 U.S. at 595, 606 (1889) (sustaining the Chinese Exclusion Act

This silent rejection of the very case establishing the extra-constitutional basis for plenary power, as well as recent attempts by the Court to ground immigration authority in an enumerated power, strongly suggests that the “inherent sovereignty” rational underpinning plenary power for over a century is likewise slowly falling out of favor.

*B. Subject to Important Constitutional Limitations?*

If plenary power’s extra-constitutional foundations are silently fading from judicial favor, its place as a trump card over constitutional rights is facing a more explicit attack. Much of the immigration jurisprudence of the twentieth century was marked by complete judicial deference to the political branches on immigration laws, even when such laws directly offended fundamental constitutional rights to due process and equal treatment.<sup>114</sup> Yet in the twenty-first century, the Supreme Court has appeared much more willing to review possible procedural due process violations. In addition, the Court has largely eliminated the distinction between criminal punishments requiring heightened judicial scrutiny and “supposedly civil immigration enforcement” authorizing a more limited judicial review.<sup>115</sup> This change promises to inject more exacting review into certain deportation cases, as they are now conceptualized similarly to criminal punishments. In 2017, the President’s executive actions have pushed the envelope further and led courts to rule, at least preliminarily, that his exercise of federal immigration power likely unconstitutionally violated fundamental substantive norms of due process and equal protection, a direct rebuke to the nature of plenary power as we have traditionally known it.<sup>116</sup>

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because the Chinese “remained strangers in the land,” constituted a “great danger [to the country]” unless “prompt action was taken to restrict their immigration,” and were “dangerous to [the country’s] peace and security”).

114. See *supra* II. B.

115. Michael Kagan, *Shrinking the Post-Plenary Power Problem*, 68 FLORIDA L. REV. F. 59, 63 (2016).

116. *Washington v. Trump et al.*, Case No. 2:17-cv-00141-JLR, Dkt. No. 52 (W.D. Wash. Feb. 3, 2017) (finding that the states “are likely to succeed on the merits of the claims that would entitle them to relief”); *Int’l. Refugee Assistance Project v. Trump*, 857 F.3d at 622 (“[I]n the context of an alleged violation of First Amendment rights, a plaintiff’s irreparable harm is inseparably linked to the likelihood of success on the merits. Accordingly, the court’s finding that the plaintiffs are likely to succeed on the merits of their constitutional claim counsels in favor of finding that in the

In *Zadvydas v. Davis*, the Court held that the government lacked statutory authority to detain indefinitely Kestutis Zadvydas, a resident noncitizen subject to a final order of removal, and ordered Zadvydas released from federal custody and paroled into the United States.<sup>117</sup> The issue involved a statute providing that aliens set for deportation could not be held in detention for longer than ninety days unless the Attorney General determined the individuals “to be a risk to the community,” in which case the aliens “may be detained beyond the removal period.”<sup>118</sup> Immigration officials could not find a country willing to receive two deportable aliens within the ninety-day period but continued to hold the aliens in detention pursuant to the statutory exception.<sup>119</sup> Rather than directly confronting the constitutionality of the statute itself, the majority reviewed the legislative intent of the statute and held that it could not find “any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed,” which would constitute a violation of due process.<sup>120</sup> The Court ultimately found that the dictates of constitutional due process required that, after a period of six months’ detention, the government provide evidence that further detention was necessary.<sup>121</sup>

Thus, while the Court rested its holding on statutory interpretation, it nonetheless injected constitutional due process considerations into the analysis to circumscribe an executive branch immigration action.<sup>122</sup> The Court observed the “cardinal principle of

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absence of an injunction, they will suffer irreparable harm.”); cf. *Hawaii v. Trump*, 2017 U.S. App. LEXIS 10356, at \*30 (9th Cir. 2017) (enjoining the second executive order on statutory grounds but declining to reach the constitutional issues because “if a case can be decided on either of two grounds, one involving a constitutional question, the other involving a question of statutory construction or general law, the Court will decide only the latter.”).

117. 533 U.S. at 684–85, 702.

118. *Id.* at 694.

119. *Id.*

120. *Id.*; see also Matthew J. Lindsay, *Disaggregating “Immigration Law,”* 68 FLA. L. REV. 179, 227, 229 (2016) (“By the Court’s own admission . . . the plenary power doctrine prevented *Zadvydas* from challenging the statute directly on Fifth Amendment grounds. . . . [But a] five-Justice majority ‘construe[d] the statute to contain an implicit ‘reasonable time’ limitation, the application of which is subject to federal court review.’”).

121. *Id.* at 696.

122. See Lindsay, *supra* note 120, at 231 (“Given that *Zadvydas* was, at bottom, a case about statutory construction, one might have expected the Court’s analysis to center on the text and perhaps the legislative history of the relevant provision. But

statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”<sup>123</sup> But then the majority acknowledged that, even if Zadvydas lacked a legal right to live at large in the United States and Congress retained plenary power over the removal of noncitizens like Zadvydas, such power nevertheless was “subject to important constitutional limitations.”<sup>124</sup> In a dramatic change in tone from the complete deference of early immigration decisions, the Court noted merely the “greater immigration-related expertise of the Executive Branch” and that “principles of judicial review in this area recognize *primary* Executive Branch responsibility.”<sup>125</sup> Far from a complete abdication of its judicial review role, the Court claimed instead that it would “listen with care” to the concerns of the Executive when reviewing the constitutionality of immigration policies.<sup>126</sup>

Nine years later, in *Padilla v. Kentucky*, the Court largely undermined the formalistic distinction between criminal punishments and supposedly civil immigration enforcement, “a distinction that had long been invoked to prevent immigrants from claiming more procedural rights when they face deportation.”<sup>127</sup> This distinction has meant, among other things, that a noncitizen

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it did not. . . . Justice Stephen Breyer devoted eight pages of his twenty-one page majority opinion to the ‘obvious’ constitutional difficulty ‘arising out of a statute that . . . permits an indefinite, perhaps permanent, deprivation of human liberty without judicial protection.’”).

123. *Zadvydas*, 533 U.S. at 696; see also *Hawaii v. Trump*, 2017 U.S. App. LEXIS at \*30 (same).

124. 533 U.S. at 693 (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Fifth Amendment Due Process] Clause protects.”).

125. *Id.*

126. *Id.*; see also Lindsay, *supra* note 120, at 229 (observing that Justice Breyer discounted “the relevant of the usual rationales for buffering immigration regulations against constitutional review. The case did not involve ‘terrorism or other special circumstances,’ he reasoned, ‘where special arguments’ grounded in national security might justify ‘preventive detention and . . . heightened deference to the judgments of the political branches.’”).

127. 559 U.S. 356, 366 (2010); Lindsay, *supra* note 120, at 230 (“The Supreme Court destabilized another key pillar of the plenary power doctrine in the 2010 case of *Padilla v. Kentucky*: the notion that because removal from the United States is defined legally as a civil proceeding rather than criminal punishment, noncitizens subject to removal are not entitled to the suite of rights that protect criminal defendants against governmental abuses of power.”).

facing the prospect of removal does not have a Sixth Amendment right to appointed counsel, is not entitled to a *Miranda* warning, and cannot suppress evidence obtained in violation of the Fourth Amendment.<sup>128</sup> While the Court again did not directly invalidate an immigration action on constitutional grounds, the majority's emphasis on the enormous stakes of removal as a reason to expand the constitutional rights of noncitizen criminal defendants highlights the increasingly sympathetic approach the Court has taken to constitutional immigration challenges.<sup>129</sup>

These two landmark decisions highlight that some level of constitutional judicial review now exists with respect to immigration laws. Following that trend, a unanimous panel of the Ninth Circuit Court of Appeals emphatically rejected the contention of Trump's Justice Department that the judicial branch cannot review executive branch immigration orders. The Trump Administration advanced this absolutist position in its defense of the first executive order before Judge Robart, asserting that courts "cannot . . . review the President's . . . executive order," precisely because "[t]here is . . . no basis for the Judiciary to second-guess the President's determinations" in the immigration context.<sup>130</sup> While this position had appeared at one time to rest on firm legal footing, both Judge Robart and a unified panel of the Ninth Circuit Court of Appeals rejected the notion of absolute judicial deference.<sup>131</sup>

Opinions by the Fourth Circuit and Ninth Circuit Courts of Appeal regarding the second executive order likewise confirmed the

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128. Lindsay, *supra* note 120, at 231.

129. Padilla, 559 U.S. at 660.

130. *Washington v. Trump*, 2:17-cv-00141-JLR, Dkt. No. 50 (W.D. Wash. Feb. 2, 2017) at 20-22 (asserting that immigration decisions are "areas within the exclusive domain of the political branches of government. . . . It is thus well-established that courts cannot evaluate the President's national security and foreign affairs judgments, especially in the immigration context. . . . It is simply not possible for the Court here to evaluate the President's executive order without passing judgment on the President's national security and foreign affairs determinations. . . . There is . . . no basis for the Judiciary to second-guess the President's determinations in that regard.").

131. See *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 9, 2017) (per curiam) ("[T]he Government has taken the position that the President's decisions about immigration policy . . . are unreviewable, even if those actions potentially contravene constitutional rights and protections. The Government indeed asserts that it violates separation of powers for the judiciary to entertain a constitutional challenge to executive actions such as this one. There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.") (citing *Boumediene v. Bush*, 553 U.S. 723, 765 (2008)).

role of judicial review of immigration actions. However, while by courts affirmed lower court rulings enjoining the order in its entirety, the approach taken by the respective courts in doing so differed dramatically. In a 205-page opinion, the Fourth Circuit delivered a dramatic and forceful rebuke of President Trump's actions with sweeping language about "an Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination."<sup>132</sup> The Fourth Circuit addressed each claim of the plaintiffs – both constitutional and statutory – in exhausting detail, and refuted the arguments of the government point by point.<sup>133</sup> Ultimately, the court rested on the Establishment Clause of the First Amendment in finding that the plaintiffs likely would succeed on the merits that the order unconstitutionally stated a preference for one religion over another, based in large part "on evidence that the order was motivated by the President's desire to exclude Muslims from the U.S."<sup>134</sup>

The Ninth Circuit took a much more restrained approach, deliberately sidestepping the more controversial constitutional questions in favor of finding that the President had exceeded his statutory authority to regulate immigration as delegated to him by Congress.<sup>135</sup> While the court acknowledged the district court's finding that the executive order likely violated the Establishment Clause, it declined to review this finding because "the district court's preliminary injunction order can be affirmed in large part based on statutory grounds."<sup>136</sup>

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132. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d at 565 ("The question for this Court, distilled to its essential form, is whether the Constitution . . . remains 'a law for rulers and people, equally in war and in peace.' And if so, whether it protects Plaintiffs' right to challenge an Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination. Surely the Establishment Clause of the First Amendment yet stands as an untiring sentinel for the protection of one of our most cherished principles – that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another.").

133. *See generally id.*

134. *Id.*

135. *Hawaii v. Trump*, 2017 U.S. App. LEXIS at \*1 ("We concluded that the President, in issuing the Executive Order, exceeded the scope of the authority delegated to him by Congress. . . . On these statutory bases, we affirm in large part the district court's order preliminarily enjoining Sections 2 and 6 of the Executive Order.").

136. *Id.* at \*30 ("After first determining that Plaintiffs have standing to assert their INA-based statutory claim, we conclude that Plaintiffs have shown a likelihood

But what the decisions shared was an unambiguous declaration that the judicial branch has a meaningful role to play in reviewing the immigration decisions of the political branches, breaking with the decades of plenary power deference of the mid-twentieth century. The Ninth Circuit explained its role thusly:

We reject the Government's argument that the Order is not subject to judicial review. Although [t]he Executive has broad discretion over the admission and exclusion of aliens, [] that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie. Whatever deference we accord to the President's immigration and national security policy judgments does not preclude us from reviewing the policy at all.<sup>137</sup>

Likewise, the Fourth Circuit found that:

The Government has repeatedly asked this Court to ignore evidence, circumscribe our own review, and blindly defer to executive action, all in the name of the Constitution's separation of powers. We decline to do so, not only because it is the particular province of the judicial branch to say what the law is, but also because we would do a disservice to our constitutional structure were we to let its mere invocation silence the call for meaningful judicial review. The deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution.<sup>138</sup>

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of success on the merits of that claim and that the district court's preliminary injunction order can be affirmed in large part based on statutory grounds. For reasons further explained below, we need not, and do not, reach the Establishment Clause claim to resolve this appeal. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

137. *Hawaii v. Trump*, 2017 U.S. App. LEXIS at \*30.

138. *Int'l. Refugee Assistance Project v. Trump*, 857 F.3d at 609

Some contend that the Court's recent reconsideration of immigration exceptionalism generally and plenary power specifically is unremarkable because the Court's treatment of immigration policies has never been any more "exceptional" than its treatment of domestic laws.<sup>139</sup> For example, three days after entry of the first executive order, Professor Adam Cox challenged the so-called "myth of unconstrained immigration power" in declaring that the "Muslim ban is likely to be held unconstitutional."<sup>140</sup> According to Cox, the assumption that "[t]he so-called 'plenary power' . . . spell[s] the death knell for any constitutional claim brought by immigrants seeking admission . . . is simply wrong. The 'plenary power doctrine' is more of a rhetorical trope than a coherent judicial doctrine."<sup>141</sup>

Cox claims that plenary power is more myth than reality because each of the seminal constitutional immigration law cases "was decided during a constitutional era when such policies were often accepted as a matter of domestic law as well."<sup>142</sup> Rather than representing a sovereign exception to the reach of the Constitution, these so-called "plenary power" cases were in fact consistent with the contemporary interpretation of the Constitution.<sup>143</sup>

This theory has intuitive historical appeal, but it relies on a tortured reading of precedent. Had *Chae Chan Ping* and its progeny been decided on the basis that the challenged exclusionary classifications were substantively permissible, the decisions surely would have said so. But they did not. Instead, these cases

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139. See, e.g., Chin, *supra* note 9, at 257; cf. Lindsay, *supra* note 120, at 179 (recognizing the "constitutional exceptionalism of federal immigration power" but advancing the claim that such exceptionalism is slowly eroding).

140 Adam Cox, *Why a Muslim Ban is Likely to Be Held Unconstitutional: The Myth of Unconstrained Immigration Power*, JUST SECURITY (Jan. 30, 2017), <https://www.justsecurity.org/36988/muslim-ban-held-unconstitutional-myth-unconstrained-immigration-power/> ("The plenary power does not stand for the proposition that blatant . . . discrimination on the basis of race, sex, religion, or ideology is constitutionally permissible in immigration policy.").

141. *Id.*

142. *Id.*

143. This reinterpretation of the plenary power cases was first introduced by Jack Chin in 1999, when he observed that "the Court's treatment of substantive immigration classifications . . . may not be that different from how it has treated those groups domestically. . . . At the time they were decided, many of the terrible immigration cases could have come out the same way even if they involved the rights of citizens under domestic constitutional law." Chin, *supra* note 9, at 257-58 (asserting that "the Court has rarely, if ever, tested discrimination against a group in the immigration context at a moment when it had already recognized that the Constitution prohibited discrimination on that ground against citizens").

universally reasoned that the challenged immigration policies were immune from constitutional challenge and judicial review, not that they withstood constitutional challenge *after* judicial review.<sup>144</sup> Indeed, this theory that constitutional immigration jurisprudence remains consistent with constitutional domestic jurisprudence is directly contradicted by the Court's clear pronouncement in *Fiallo v. Bell* that, "In the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens."<sup>145</sup>

In short, while the Court has consistently reaffirmed the existence of plenary power, "recent developments in constitutional immigration law have begun to chart a course toward . . . the encroachment of mainstream constitutional norms" into the analysis.<sup>146</sup> These mainstream norms are now on full display in the executive orders litigations.<sup>147</sup>

### *C. Muslims Bans, Pretext, and a More Searching National Security Inquiry*

Scholars have long observed that the Supreme Court has probably overstated the foreign affairs dimension of immigration policy.<sup>148</sup> Most recently, Professor Lindsay forcefully argued that federal authority over foreign affairs and national security provides less than compelling evidence for federal authority over the many routine and practical questions that arise in the daily practice of

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144. See generally *supra* at II. A.

145. 430 U.S. at 797; see also Spiro, *supra* note 14 ("The 1977 decision in *Fiallo v. Bell* – well into the modern-era rights revolution – is particularly instructive. The case involved a facially discriminatory provision of the Immigration Act that recognized the relationship between children born out of wedlock with their mothers but not their fathers. The regime implicated a double-barreled discrimination for equal protection purposes, implicating the suspect classes of gender and legitimacy. The Court upheld the provision on the basis of exactly the kinds of stereotypes that trigger close judicial scrutiny in any other context.").

146. Lindsay, *supra* note 120, at 228.

147. *Id.* at 228–33 (analyzing *Zadvydas v. Davis*).

148. Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 Va. J. Int'l. L. 121, 167 (1994) (asserting that the foreign policy rationales articulated to justify many immigration decisions are overblown); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 Mich. L. Rev. 567, 571–72 (2008) (arguing that the federal exclusivity principle justified by national security concerns "has become a formal doctrine without strong constitutional justification").

"immigration law."<sup>149</sup> But even for those cases where the federal government has unambiguously asserted a foreign policy or national security rationale, it appears that courts are less willing than they once were to simply step aside in the name of plenary power.

To be sure, passionate detractors to national security-based plenary power deference have existed for nearly as long as the doctrine itself. Justice Field, the author of the Chinese Exclusion Case, first condemned in 1893 the "indefinite and dangerous" doctrine of "powers inherent in sovereignty" as they could be wielded in the name of national security.<sup>150</sup> In the 1950's, Justices Black and Douglas powerfully dissented in *Knauff* and *Messi*, with Black comparing the government's "unreviewable discretion" with the arbitrary ruthlessness of twentieth century Europe's most infamous dictators.<sup>151</sup> More recently, Justice Souter decried the government's ability to "lock away" a noncitizen without first providing a "sufficiently compelling" reason for doing so, a state of affairs he claimed denied "the basic liberty at the heart of due process."<sup>152</sup>

But each of these critiques were delivered in dissent. More recently, the Court has shown a greater willingness to directly challenge the notion of blind deference to national security. In *Din*, although the government ultimately prevailed on the basis of secret evidence and vague references to terrorism, a bare majority voted in favor of the government and no majority opinion could be established.<sup>153</sup> Moreover, only two Justices relied on traditional plenary power doctrine while a full six Justices rejected the concept of "consular absolutism"—the notion that there is no right to judicial review when a consular officer rejects a visa application.<sup>154</sup> Thus,

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149. Lindsay, *supra* note 120, at 179-181.

150. *Fong Yue Ting*, 149 U.S. at 722 (Field, J., dissenting).

151. *Knauff*, 338 U.S. at 567 (Black, J., dissenting).

152. *Demore v. Kim*, 538 U.S. 510, 537 (2003) (Souter, J., dissenting); *see also* Lindsay, *Due Process and Plenary Power*, *supra* note 57 ("In spite of the *Mandel* Court's forthright affirmation of the plenary power doctrine, the majority opinion attests that the due process revolution of the 1960s and 1970s had indeed penetrated immigration law in a meaningful if circumscribed way. In *Mandel* the government had informed Mandel of the concrete facts that led to his visa denial—specifically, Mandel's violation of visas issued to him in the past.").

153. *Din*, 135 S.Ct at 2138, 2140-42.

154. *Id.* at 2140-45; *Plenary Power is Dead!*, *supra* note 16, at 22 ("The plurality opinion by Justice Scalia sidestepped the Court's immigration jurisprudence entirely and focused instead on a critique of substantive due process jurisprudence generally as if the case presented a typical domestic constitutional issue.").

“while *Kerry v. Din* was not a renunciation of the plenary power doctrine, it was not a reaffirmation of the doctrine, either.”<sup>155</sup>

This diminished fealty to ambiguous national security concerns is a central feature of the ongoing executive orders litigation. The title of the executive orders themselves bespeaks at least a facial national security justification behind the bans. But simply claiming that a proposed action is designed to stop terrorists and actually proving it is so designed are two different things in this modern era of weakened plenary power. As Judge Robart explained in oral argument held before he enjoined the first executive order, the government must, at the very least, prove that its policy is “grounded in fact instead of fiction . . . You’re here arguing on behalf of someone who says we have to protect the U.S. from these individuals coming from these countries, and there’s no support for that.”<sup>156</sup>

It is possible, then, to conclude that the national security justifications for the executive orders are just “laughably weak,”<sup>157</sup> which explains the administration’s problems in court. But what are the long-term implications for plenary power? What happens when an immigration decision less shrouded in bare animus and more directly linked to a tangible national security concern comes before the Court. Should courts be in the business of examining not only the national security motivations behind certain immigration actions but also the efficacy of those actions vis-à-vis those stated motivations? As the next section illustrates, such a paradigm shift is neither wise nor likely. Instead, courts should attempt to reconcile the reality of a weakened plenary power with the need for continued deference in the area of national security.

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155. *Plenary Power is Dead!*, *supra* note 16, at 22.

156. *Washington v. Trump et al.*, Case No. 2:17-cv-00141-JLR, Dkt. No. 52 (W.D. Wash. Feb. 3, 2017); *see also Int’l. Refugee Assistance Project v. Trump*, 857 F.3d at 612 (“The Government’s argument that EO-2’s primary purpose is related to national security is belied by evidence in the record that President Trump issued the First Executive Order without consulting the relevant national security agencies and that those agencies only offered a national security rationale after EO-1 was enjoined. Furthermore, internal reports from DHS contradict this national security rationale, with one report stating that ‘most foreign-born, US-based violent extremists likely radicalized several years after their entry to the United States, limiting the ability of screening and vetting officials to prevent their entry because of national security concerns.’”).

157. Shikha Dalmia, *The Obscure Doctrine That Could Save Trump’s Travel Ban*, THE WEEK (Apr. 6, 2017) <http://theweek.com/articles/688615/obscure-doctrine-that-could-save-trumps-travel-ban>.

#### IV. RECONCILING A WEAKENED PLENARY POWER WITH A DANGEROUS GLOBAL WORLD

"In theory, the erosion of plenary power should lead to a corresponding erosion of immigration exceptionalism."<sup>158</sup> But should that be the case, at least as far as national security is concerned? While little textual or logical support exists for complete judicial abdication in all immigration matters, there remains an important place for some level of deference to the political branches over vital national security interests, where time-sensitive calculations must be made, where rights infringements are arguably more justified, and where courts often have incomplete information of the purported security threat. The foregoing discussion highlights how plenary power as a doctrine has weakened, and for good reason. But that does not mean it should be discarded entirely, at least where national security interests are at stake.

The following section builds on Professor Lindsay's idea of "disaggregating" immigration law, and advances a three-tiered level of judicial review for immigration cases. First, courts should articulate what precise, enumerated constitutional power confers upon the federal government the ability to engage in whatever immigration action is being challenged in court. Second, courts should engage in a searching judicial inquiry to determine whether vital national security interests are indeed at the heart of the challenged immigration action, and whether these interests primarily motivated the challenged action. Third, depending on the answer to the second inquiry, courts should either accord deference to the government's national security rationales and apply a modified rational basis review to the challenged action, or accord no deference to purely domestic (or non-national security) immigration actions and impose the standard of review appropriate for the claim as if the action were purely domestic in nature.

##### *A. Grounding Immigration Policy in Enumerated Constitutional Power*

If one is to save at least some limited form of plenary power from its slide into irrelevance, one must first address its problematic foundations. The Court's decision in *Chae Chan Ping* to settle on extra-constitutional sources for the federal government's power over immigration contradicts the fundamental limited federalist

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158. Kagan, *supra* note 115, at 63.

structure of our constitutional system and leaves all such exercises of power open to first premise attacks. Basing a federal power on “inherent” concepts of power also leaves little room for a principled, moderated middle ground on such power—either the federal government possesses inherent, unreviewable immigration power or it possesses no separate immigration power at all.

To resolve this tension, courts should be explicit about the specific, enumerated constitutional source of the federal government’s power to enact a particular immigration regulation or take a particular immigration action when it reviews such actions. Doing so will help alleviate the concern of progressive civil libertarians and conservative originalists alike. But it will also achieve something much more important: it will acknowledge the vast and varied applications of “immigration law” in a range of contexts, foreign and domestic, familial and national, territorial and military. Professor Lindsay’s remarkable insight behind his theory of disaggregation is that “immigration law” is not a monolithic entity like torts or contracts or criminal law.<sup>159</sup> It is instead the application of a theoretically limitless sets of legal doctrines and subject matters to theoretically limitless set of fact patterns with a single common denominator – a noncitizen seeking entry to or continued residence in the country. Thus, some cases will involve commerce or naturalization, while others will involve foreign affairs generally or national security specifically.<sup>160</sup>

Courts have already begun doing this, at least implicitly. Just as the Court has become more willing to find constitutional limitations on immigration enforcement, it has also changed its conception of the foundations of that power. The Court continues to hold that the “federal government has broad immigration authority, but it has more recently rooted this authority in constitutionally enumerated powers, specifically naturalization, foreign affairs, and the impact on commerce.”<sup>161</sup> By rooting immigration authority in enumerated text, the Court has continued to “push strongly toward normalizing immigration within constitutional law.”<sup>162</sup>

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159. Lindsay, *supra* note 120, at 180.

160. *Id.* at 183-88.

161. *Plenary Power is Dead!*, *supra* note 16, at 27; *Arizona v. United States*, 132 S. Ct. at 2498. See also Kevin R. Johnson, *Immigration and the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKL. L. REV. 57, 59–60 (2015) (concluding that the Roberts Court “has to a large extent continued to bring U.S. immigration law into the legal mainstream”).

162. *Plenary Power is Dead!*, *supra* note 16, at 27.

*B. Searching For a Legitimate and Bona Fide National Security Interest*

In determining whether a particular immigration action amounts to an exercise of the commerce power, the naturalization power, or the foreign affairs power, courts implicitly will be opining on whether national security interests are implicated. But given the importance of national security as arguably *the* primary responsibility of the federal government, it behooves courts reviewing immigration decisions to further determine whether and to what extent an immigration decision was made for national security reasons. This approach is wise jurisprudentially as well, because courts have traditionally (and for good reason) given more deference to the political branches when vital national security interests are at stake. Before giving such deference, whether in the immigration or another context, it would be wise for courts to affirmatively determine that such deference is warranted.<sup>163</sup>

To this end, courts should carefully examine the record and the arguments advanced by the respective parties in determining whether national security interests were central to the immigration action taken, merely incidental to the action taken, or merely served as a pretext for a potentially more nefarious and less justifiable reason. Hints of this approach can be seen in *Kerry v. Din*, ostensibly a national security immigration case. Only Justices Kennedy and Alito affirmatively relied on plenary power as traditionally understood to find that the federal government acted within its foreign affairs powers to deny basic procedural protections to an Afghan national and his American wife on vague national security grounds.<sup>164</sup> Justice Scalia, while siding with the government, implicitly rejected the contention that the case was about national security at all.<sup>165</sup> Instead, he attacked the Court's

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163. See *Why Plenary Power Endures*, *supra* note 15, at 48 ("A more nuanced branch of the Chae Chan Ping criticism accepts that foreign affairs considerations may well be at stake in some immigration decisions, but would modify the doctrine to allow for a carefully structured closer judicial look. The courts, such observers contend, should not take political branch assertions as controlling, but instead should perform an initial judicial probe of the asserted reasons, to decide whether the challenged immigration restriction rests on a significant foreign affairs foundation. If the answer is yes, then the reviewing court should treat the political branches' decision as dispositive — essentially, as a political question not subject to judicial review.").

164. *Din*, 135 S.Ct. at 2140-42.

165. *Id.* at 2131-38.

fundamental rights jurisprudence in questioning whether Ms. Din had presented a valid liberty interest in the “right to live in the United States with her spouse.”<sup>166</sup> Thus, to Justice Scalia, the case did not require balancing individual rights with national security interests so much as assessing the sufficiency of the individual rights claim itself, much like a traditional domestic civil rights case.

The four dissenting Justices, meanwhile, demanded much more from the federal government than a vague and unspecified reference to excluding terrorists from the country. Justice Breyer’s dissent insisted that the denial of a noncitizen’s visa application interferes with a constitutional liberty interest and that such interference warrants “individualized adjudication,” including “the ordinary application of Due Process Clause procedures.”<sup>167</sup>

Once again, the litigation surrounding Trump’s executive orders throws this issue into sharp relief. The title of both executive orders—“Protecting the Nation from Foreign Terrorist Entry into the United States”—expressly articulates a national security justification for the blanket immigration bans. Under the more deferential plenary power standard of the mid-twentieth century, this would have ended the inquiry. The government has stated that it has a national security reason for its blanket ban, and that is enough. But in 2017, merely putting the word “terrorist” in the title of an immigration order does not – and should not – suffice. A more searching judicial inquiry is warranted.

For example, the Fourth Circuit acknowledged the government’s attempt to proffer evidence in support of its argument that the second executive order’s “primary purpose is related to national security,” but found such evidence lacking.<sup>168</sup> In particular the Court noted that “the only examples [the government] provides of immigrants born abroad and convicted of terrorism-related crimes in the United States include two Iraqis – Iraq is on a designated country in EO-2 – and a Somali refugee who entered the United States as a child and was radicalized here as an adult.”<sup>169</sup> Rejecting this evidence as “unconvincing,” the Fourth Circuit concluded that “any national security justification for EO-2 was secondary to its primary religious purpose as was offered as more of a ‘litigating position’ than as the actual purpose of EO-2.”<sup>170</sup>

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166. *Id.* at 2131.

167. *Id.* at 2144.

168. *Int’l. Refugee Assistance Project v. Trump*, 857 F.3d at 609.

169. *Id.*

170. *Id.*

The executive orders litigation also highlights the problem of judicial parsing of mixed motives and attempting to divine intent from sources beyond the four corners of a legislative or executive enactment.<sup>171</sup> But a closer look at the history and effect of the executive orders illustrates why courts should inquire with some exactitude into whether national security concerns played a primary or merely pretextual role in a particular challenged immigration enactment.<sup>172</sup> In other words, this initial inquiry into the primary motivation behind an immigration decision would be “normalized” or “constitutionalized” to mirror that of a traditional discriminatory intent analysis under the Fifth and Fourteenth Amendments, where a government official’s true intent is determined through extrinsic evidence.<sup>173</sup>

Consider, for example, the language, effect, and stated intent of the first executive order. Section 3(c) of the Order imposed a temporary ban on the entry of immigrants and non-immigrants from seven Muslim-majority nations: Iran, Iraq, Libya, Somalia, Syria, Sudan, and Yemen.<sup>174</sup> While religiously-neutral on its face, the overwhelming evidence points to a discriminatory motive by the Administration to exclude at least some subset of Muslims from the country on the basis of their religious affiliation. In addition to the President’s consistent campaign promises to implement a “Muslim ban” and to “certainly implement” a Muslim registry in the U.S.,<sup>175</sup>

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171. *Id.*

172. *See id.*

173. *See McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 852 (2005) (explaining that “[a]n assessment of the purpose of an action is a ‘common’ task for courts . . . In determining purpose, a court acts as an ‘objective observer’ who considers ‘the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.’”).

174. *See supra* note 5 (“To temporarily reduce investigative burdens on relevant agencies . . . I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order . . .”).

175. Jenna Johnson, *Trump Calls for “Total and Complete Shutdown of Muslims Entering the United States,”* WASH. POST (Dec. 7, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm\\_term=.a8f48091a1ae](https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.a8f48091a1ae); *see also* Alana Abramson, *What Trump Has Said About a Muslim Registry*, ABC NEWS (Nov. 18, 2016), <http://abcnews.go.com/Politics/trump-muslim-registry/story?id=43639946> (documenting then-candidate Trump’s numerous statements about a possible Muslim tracking system, including

Trump surrogate Rudy Giuliani confirmed to Fox News the day after the order was signed that Trump wanted to find a “legal” way to ban Muslims from the U.S.<sup>176</sup> Moreover, when signing the executive order, Trump read out its title “Protecting the Nation from Foreign Terrorist Entry into the United States,” looked up and said “We all know what it means . . .”<sup>177</sup> These admissions “close in time” to the signing of the executive order squares with then-candidate Trump’s explicit admission in a July 2016 interview on Meet the Press that he would revamp his “extreme vetting” proposals to target Muslims without expressly saying so.<sup>178</sup>

The executive order also explicitly stated that the U.S. government would grant priority status to refugees from these seven countries who were persecuted on the basis of their religion, so long as that religion was a “minority” in one of the seven countries.<sup>179</sup>

the following answer to the question “is there going to be a database that tracks Muslims here in this country?”: “Oh I would certainly implement that. Absolutely.”).

176. Amy B. Wang, *Trump asked for a ‘Muslim ban,’ Giuliani says – and ordered a commission to do it ‘legally’*, WASH. POST (Jan. 29, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm\\_term=.93ab42422ef7](https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.93ab42422ef7) (“So when [Trump] first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”). See also Faiza Patel, *Yates Letter Points to Evidence Showing executive order Unconstitutional*, JUST SECURITY (Jan. 31, 2017), <https://www.justsecurity.org/37053/yates-letter-points-evidence-showing-executive-order-unconstitutional/> (“Giuliani then noted that his commission came up with the idea to focus on danger rather than religion; that the ban was based ‘on places where there are [sic] substantial evidence that people are sending terrorists into our country.’ Of course, as many have pointed out, the countries affected by the ban have hardly been a source of terrorist attacks in the United States.”).

177. Faiza Patel, *Yates Letter Points to Evidence Showing Executive Order Unconstitutional*, JUST SECURITY (Jan. 31, 2017) (“And for what it’s worth, the son of then-National Security Advisor Michael Flynn praised the executive order the day after it was signed in a tweet stating “#MuslimBan.”).

178. *Id.* When NBC’s Chuck Todd asked if Trump was retreating from his “Muslim ban” proposal, Trump responded that he was actually expanding on that proposal but lamented that he could no longer be explicit about the intent of the proposal: “I actually don’t think it’s a rollback. It fact, you could say it’s an expansion . . . People were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m OK with that, because I’m talking territory instead of Muslim.” Jeremy Diamond, *Trump on latest iteration of Muslim ban: ‘You could say it’s an expansion’*, CNN (Jul. 24, 2016), <http://www.cnn.com/2016/07/24/politics/donald-trump-muslim-ban-election-2016/index.html>.

179. See Executive Order 13769 at 5(b) (“Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland

This provision obviously excludes Muslim refugees from these seven Muslim-majority nations. Lest there be any confusion about the intent behind this provision, Trump told the Christian Broadcasting Network hours before signing the executive order that the purpose of the order was to prioritize Christian refugees over Muslims who had been “treated terribly” in these countries.<sup>180</sup> These two provisions of the executive order, combined with contemporaneous evidence of the order’s intent, appear to represent textbook government preference for one religion over another.

But contrast this damning and compelling evidence of improper discriminatory motives with the government’s stated and implied national security motivations in the executive orders. It is indisputable that the previous administration had singled out the seven countries listed in the first executive order as “countries of concern” for future terrorist attacks.<sup>181</sup> Standing alone, this fact would seem more than sufficient to conclude that a legitimate national security rationale exists to justify the executive orders. Under traditional notions of plenary power generally, and judicial deference to national security interests specifically, the inquiry would end there.

But this fact does not exist in a vacuum, and while it may prove that a legitimate rationale exists to plausibly justify the orders, it does not prove that such a rationale motivated the orders.<sup>182</sup> This distinction is critical, because “the same government action may be constitutional if taken in the first instance and unconstitutional if it

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Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.”).

180. Daniel Burke, *Trump says US will prioritize Christian refugees*, CNN (Jan. 30, 2017), <http://www.cnn.com/2017/01/27/politics/trump-christian-refugees/>.

181. Kyle Blaine and Julia Horowitz, *How the Trump administration chose the 7 countries in the immigration order*, CNN (Jan. 30, 2017) (“The seven Muslim-majority countries targeted in President Trump’s executive order on immigration were initially identified as ‘countries of concern’ under the Obama administration.”); *cf. Int’l. Refugee Assistance Project v. Trump*, 857 F.3d at 609 (“According to former National Security Officials, Section 2(c) serves ‘no legitimate national security purpose,’ given that ‘not a single American has died in a terrorist attack on U.S. soil at the hands of citizens of these six nations in the last forty years’ and that there is no evidence of any new security risks emanating from these countries.”).

182. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d at 610 (concluding that this national security rationale was proffered more as a post hoc “litigating position” than a motivation for the orders, given that the relevant national security agencies “only offered a national security rationale after EO-1 was enjoined.”).

has a sectarian heritage.”<sup>183</sup> While some may bristle at the “peculiar and unsettling possibility . . . that an identical order would be upheld if Barack Obama had issued it, but . . . invalidated because Trump was the author,”<sup>184</sup> the Supreme Court has long made clear that “purpose matters.”<sup>185</sup>

### C. Exercising Appropriate Deference in National Security Cases

The Fourth Circuit’s decision striking down Trump’s executive orders as unconstitutional did not require the court to overrule the plenary power doctrine in its entirety. The court only ruled that the doctrine is not so sweeping as to permit blatant religious discrimination unsupported by *any reasonable security rationale*. As discussed *supra*, courts evaluating the executive orders have struggled to determine whether national security concerns actually played any significant role in the challenged immigration actions as opposed to bare religious animus. But assuming that the next case presents the Court with an immigration action taken clearly for national security reasons, the question then becomes what standard of review should apply to evaluating these security rationales.

In the area of national security specifically, courts should apply a low level, deferential standard of review to immigration challenges, even if those challenges assert fundamental constitutional rights. In this sense, this Article advocates for a modified plenary power with a more limited scope but which walks and talks like traditional plenary power within that scope. In other words, the plenary power doctrine should only apply to cases implicating true national security concerns, but in those cases plenary power should still largely operate as a mechanism to grant the political branches broad deference to make immigration decisions. While the exact phrasing of the standard of review matters little, both the Court in *Kleindienst* and Judge Robart in the first executive order litigation

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183. *McCreary*, 545 U.S. at 866.

184. Jeffrey Toobin, *The Courts and President Trump’s Words*, THE NEW YORKER (Mar. 17, 2017), <http://www.newyorker.com/news/daily-comment/the-courts-and-president-trumps-words>. (“The Muslim ban is either constitutional or it’s not—and Donald Trump’s words on the campaign trail don’t settle that question one way or the other.”).

185. *McCreary*, 545 U.S. at 866 (citing Justice Oliver Wendell Holmes’s oft-quoted aphorism that “even a dog knows the difference between being kicked and being stumbled over”); Oliver Wendell Holmes, Jr., THE COMMON LAW 7 (M. HOWE ED. 1963).

have articulated standards that reflect the appropriately deferential attitude towards cases involve actual cases of national security.<sup>186</sup>

Two primary justifications exist for this continued adherence to deference in the field of national security. First, courts have proven themselves well-equipped over two centuries to appropriately balance individual constitutional rights with the domestic concerns of a government infringing on those rights. However, the Court has long “harbor[ed] a deep skepticism that lower courts can be trusted to give sufficient weight to foreign policy concerns in making any such threshold assessment. . . . Keeping the plenary power doctrine categorical gives the Supreme Court greater assurance that lower courts will preserve the space needed for government actions to meet real foreign affairs imperatives (even if this stance inevitably also leaves room for some ill-motivated actions adopted by the political branches).”<sup>187</sup>

Second, and relatedly, the changing nature of our global world in the nearly thirty years since the end of the Cold War has been marked less by increased global cooperation and safety than by increased isolation, nation-state distrust, and transnational terrorism. As Professor Martin explains:

It appeared we were on the cusp of a far more benign world order — one that might permit the rapid flowering of more protective international legal institutions and thereby reduce reliance on crude action-and-response in the international arena. Today’s global scene is far more grim. Not only has the United States experienced the trauma of al Qaeda’s September 11 attacks, which revealed a genuine need for more vigilant immigration screening, but democratic nations are also facing new global threats from other nongovernmental actors who actually glorify the use of beheadings, crucifixion, and slavery, in addition to other

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186. See, e.g., *Kleindienst*, 408 U.S. at 772 (holding that a “facially legitimate and bona fide” national security rationale would pass constitutional muster); see *supra* note 6.

187. *Why Plenary Power Endures*, *supra* note 15, at 48 (“The very nature of immigration litigation in the courts of appeals, with an actual and often sympathetic human being front and center, makes a reviewing judge far more likely to overvalue the individual interests at stake and undervalue the more subtle and complex reasons why a particular measure may be needed for system stability or to influence behavior beyond our borders — connections that often would not become fully apparent until broader damage is manifested months or years after an interventionist judicial decision.”).

players using more old-fashioned forms of terrorism directed at civilians. Failed states are more common, and well-armed insurgencies have proliferated. The march of democracy has slowed and, in several countries, reversed. Climate change and even plague-like diseases presage more complicated foreign policy challenges, many of which will have a migration dimension. The risks to the United States, if our government's foreign-policy-linked initiatives are unsuccessful, now seem far higher than in 1989.<sup>188</sup>

This bleak geopolitical reality in no way justifies disregarding the rights of individuals guaranteed under the Constitution. But it does highlight the increasingly complex, multipolar, interconnected world in which we live, and thus the increasing inability to predict with any certainty the long-term impact of governmental foreign policy actions – including immigration actions. For better or worse, we no longer live in a pre-internet world with two readily defined nation-state superpowers, where international actions and reactions were at least moderately more predictable and stable. Today, the proliferation of powerful non-state foreign aggressors with global cyberstrategic capabilities, combined with the other complicating factors outlined by Martin above, render the judiciary that much more incapable of precisely weighing the benefits of a national security objective against the costs of a potential constitutional violation.

It is for this reason as much as any other that this Article advocates for a most searching and exacting threshold judicial inquiry to determine whether an immigration action truly was motivated by national security concerns: because once that determination has been made, the prudent course is for the judicial branch to grant wide latitude to the political branches to act as they see fit in keeping with traditional notions of plenary power. In other words, because the consequences of categorizing an immigration action as one implicating national security are significant, that categorization should not be made lightly.

#### *D. Normalizing Non-National Security Immigration Cases*

Critics of plenary power have long sought to “normalize” or “constitutionalize” immigration law by urging courts to treat all immigration cases raising constitutional challenges exactly the same

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188. *Id.* at 49-51.

as any other domestic constitutional cases.<sup>189</sup> As should be evident at this point, this Article agrees with these critics' concerns about unfettered political plenary power over immigration, but disagrees with the proposed solution of eliminating all deference to the political branches, at least insofar as genuine national security issues are concerned. And while a lengthy discussion of whether and in what form plenary power should survive in non-national security cases is beyond the scope both of this Article, it bears at least mentioning the possibly seismic implications of "constitutionalizing" plenary power.

As the Court of Appeals for the Ninth Circuit found in upholding the injunction against the first executive order, there is ample Supreme Court authority for the rule that non-citizens in the U.S. have procedural due process rights.<sup>190</sup> In particular, in the 1963 decision *Rosenberg v. Fleuti*, the Court held that returning legal residents have a right to a hearing before they are excluded from re-entering the country.<sup>191</sup>

But procedure is one thing. Striking down immigration decisions on substantive constitutional grounds opens a veritable Pandora's box of challenges to immigration law and policy as we know it. For example, what if Ms. Din had prevailed and the Court had recognized not only her right to a fair process but also "that immigration exclusions must bend to a citizen's right to marriage?"<sup>192</sup> Would that necessarily invalidate existing immigration quotas on spousal unification visas?<sup>193</sup> And what of Equal Protection Clause challenges more generally? Immigration law and policy is in many ways defined by nationality-based

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189. See, e.g., Lindsay, *supra* note 120, at 234; *Plenary Power is Dead!*, *supra* note 16, at 29; Anne R. Traum, *Constitutionalizing Immigration Law On Its Own Path*, 33 CARDOZO L. REV. 491, 493 (2011) (arguing that courts should continue to rely on due process "to ensure that immigration proceedings are fair, just, and sufficiently transparent").

190. See *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017) ("The procedural protections provided by the Fifth Amendment's Due Process Clause are not limited to citizens. Rather, they 'appl[y] to all 'persons' within the United States, including aliens,' regardless of 'whether their presence here is lawful, unlawful, temporary, or permanent.' These rights also apply to certain aliens attempting to reenter the United States after travelling abroad.") (citations omitted).

191. 374 U.S. 449, 460 (1963) ("[T]he returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him.").

192. *Plenary Power is Dead!*, *supra* note 16, at 32.

193. *Id.*

discrimination that would be constitutionally unsupportable in a purely domestic context.<sup>194</sup> The wholesale adoption of substantive constitutional rights jurisprudence in the immigration arena, while arguably justified in non-national security cases, would require, at a minimum, a radical rethinking of the entire field of “immigration law.”

Rather than focusing on how individual substantive rights might apply in the immigration context, a more consistent and familiar inquiry may very well be the one defining the executive orders litigation – the intent inquiry. That is, regardless of the rights affected by a particular immigration decision, no immigration will pass muster if it was made with invidious, unconstitutional animus. “If applicable to immigration, the rule against animus would represent an important, though fairly moderate, substantive constitutional limitation on immigration policy. It would allow many forms of nationality discrimination, if based on neutral criteria,” thus allowing generalized immigration policy to continue without requiring massive, judicially-forced upheaval.<sup>195</sup>

Such an anti-animus rule, while facing the same evidentiary problems of any discriminatory intent analysis, would likely help root out those immigration actions that “violate contemporary constitutional norms” and thus test the outer limits of plenary power in the non-national security context.<sup>196</sup> Perhaps, if such “a case arises which challenges discrimination on a ground that violates contemporary constitutional norms, the Court will be faced with a new situation.”<sup>197</sup> Chin called these the “easy, unlikely cases”<sup>198</sup>:

The best test of the plenary power doctrine would involve a statute discriminating on a basis which domestic law clearly forbids. If persons of African ancestry or Jewish religion or Democratic Party membership were made ineligible for immigration or naturalization . . . the Court would overwhelmingly vote to strike it down. Yet, it is not likely

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194. *Id.* (“Since the passage of the Chinese Exclusion Act there has never been a time when the United States had an immigration policy based entirely on individualized criteria, with country of citizenship playing no role.”).

195. *Is the Chinese Exclusion Case Still Good Law?*, *supra* note 11, at 87.

196. Chin, *supra* note 3, at 220.

197. *Id.* Indeed, the recent “encroachment of constitutional norms” in immigration jurisprudence may have less to do with a substantive shift by the Court than a recognition of the societal shift in what may generally be considered in modern American life to be a fundamental constitutional norm.

198. *Id.* at 285

that we will see such a case. It is conceivable that Congress will cut immigration drastically, but it is extremely difficult to imagine in 1999 that any future Congress would pass, and a president would sign, anything like the National Origins Quota System or Chinese Exclusion Act. If the unlikely happened, such laws would probably be invalidated.<sup>199</sup>

If the executive orders serve as prologue for the “extreme vetting” policies of the next four years, the Supreme Court may soon face one of these “easy, unlikely cases.”

## V. CONCLUSION

“The plenary power doctrine has the virtue of being a broad theory capable of guiding the resolution of all of immigration cases, even if it resolves them in problematic ways.”<sup>200</sup> But a blunt tool cannot be justified simply because it is easy to use. A normative justification for such a broad, powerfully influential doctrine is wanted, and yet one remains elusive 128 years after its creation. The various rationales commonly invoked—inherent sovereign powers to control territorial borders, lack of judicial expertise in foreign affairs, the need for the nation to “speak with one voice” on the world stage—fail to adequately explain why courts must treat *all* run-of-the-mill familial immigration cases identically to cases of imminent national threat.

Yet closely examining these underlying rationales highlights the continued relevance – indeed, continued need – for the plenary power doctrine in the twenty-first century. Our world is increasingly global, connected, transnational, and dangerous. Moreover, much of the threat comes not in the form of formal state declarations of war, but in the mobile movement of terrorists and smugglers across international borders, both legally and illegally. Thus, it is obvious that many immigration laws, regulations, and decisions made by the federal government will be aimed squarely at protecting our nation’s security from these threats. In these more limited circumstances, a

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199. *Id.* Some constitutional immigration scholars resist the notion that “[t]he transition to a constitutionally unexceptional immigration power is unlikely to be accomplished all at once in a dramatic act of judicial overturning.” Lindsay, *supra* note 120, at 259. But this contention presupposes a continuation of the sorts of “traditional” immigration cases coming before the Court. Just as few could or did predict the political rise of Donald Trump, few could or did predict the “unlikely case” of an immigration order in 2017 based on all-but explicit religious discrimination.

200. Kagan, *supra* note 115, at 66.

modified form of judicial deference remains wise. While this Article calls for more exacting scrutiny into whether a particular immigration matter truly affects national security, it nonetheless advocates deference to the political branches when a case truly does affect security interests.

The litigation surrounding the Trump executive orders is unique and helpful in this regard in several ways. First, the brazen discriminatory animus motivating the Orders has forced the courts to directly confront whether *any* federal immigration action is so obviously noxious and unconstitutional as to fall outside the purview of the plenary power doctrine. Second, the pretextual national security rationales within which the Trump Administration has sought to drape these orders provides the perfect opportunity to examine why courts should be careful to examine whether a case genuinely implicates legitimate national security concerns before blindly deferring to the will of the political branches. Third, the revised attempt of the administration to offer a legitimate national security reason in its second executive order, coupled with evidence of a genuine threat from the affected countries, gives reason to consider just how much deference ought to be afforded to the political branches on matters of national security, even when basic constitutional guarantees are infringed in the process.

The Trump executive orders do not respond to a true national security emergency, but to a growing xenophobic, nationalist sentiment among a minority of the voting public. They should not survive constitutional scrutiny, nor should any doctrine of deference that would compel their survival in the face of obvious constitutional violations. But the offensiveness and inadequacy of these unprecedented immigration actions should not cause us to throw the baby out with the bathwater. Plenary power is flawed and should be strictly limited, but it should not yet be discarded entirely. In the not-too-distant future our country will face an urgent national security threat, a threat that may legitimately require tightened immigration controls. When that day comes, we will regret not being able to respond effectively to the threat if we allow the racist tendencies of one man to bind our hands when a true threat emerges. If we do, these executive orders may cause more long-term damage to our security than they already have.





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