Due process doesn’t trump plenary power

By Bill Ding Ong

The U.S. Embassy’s decision to deny a visa to Kanishka Berashk, an Afghan alien with close ties to the Taliban, is a correct exercise of Congress’ plenary power over immigration and naturalization. The government argues that it lacks any substantive due process rights to bring a legal challenge to the decision. The courts should not accept this argument.

The Due Process Clause of the Fifth Amendment to the U.S. Constitution “provides a check on governmental excess that may tear the fabric of civil society. Marriage can fulfill this vital interest in the maintenance of decent, ordered, and stable community life” (Planned Parenthood v. Casey, 505 U.S. 823, 968 (1992)). If a governmental action infringes on a liberty protected by the Due Process Clause, the government must show a “compelling governmental interest.” (See Zablocki v. Redhav, 434 U.S. 374, 389 (1978).)

The Due Process Clause was designed to prevent the government from depriving a person of a liberty interest without due process of law. The liberty interest at stake here is the right to have an immigration judge conduct a full and fair hearing on the merits of the case. The Due Process Clause requires the opportunity to be heard on the merits before an impartial decision maker. The government argues that it is not required to provide this right because it lacks any substantive due process rights.

The government’s argument is incorrect. The government has the power to deny visas under 8 U.S.C. §1152(a)(2)(B)(i) for a “rightful claim to admission.” This power is plenary and cannot be limited by the Due Process Clause. The Due Process Clause provides a check on the government’s exercise of plenary power, but it does not limit the government’s power to deny visas.

The government also argues that the Due Process Clause cannot be used to challenge the denial of a visa because the action is a non-decision, not a decision. This argument is incorrect. The Due Process Clause applies to both decisions and non-decisions. The government’s argument is similar to the government’s argument in United States v. Salsberg, 282 U.S. 105 (1930). The Supreme Court held that the Due Process Clause applies to both decisions and non-decisions. The Due Process Clause applies to both decisions and non-decisions.

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