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Overview of the Federal Government's Power to Exclude Aliens

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Summary

The Supreme Court has determined that inherent principles of sovereignty give Congress "plenary power" to regulate immigration. The core of this power—the part that has proven most impervious to judicial review—is the authority to determine which aliens may enter the country and under what conditions. The Court has determined that the executive branch, by extension, has broad authority to enforce laws concerning alien entry mostly free from judicial oversight. Two principles frame the scope of the political branches' power to exclude aliens. First, nonresident aliens abroad cannot challenge exclusion decisions because they do not have constitutional or statutory rights with respect to entry. Second, even when the exclusion of a nonresident alien burdens the constitutional rights of a U.S. citizen, the government need only articulate a "facially legitimate and bona fide" justification to prevail against the citizen's constitutional challenge.

The first principle is the foundation of the Supreme Court's immigration jurisprudence, so well established that the Court has not had occasion to apply it directly in recent decades. The second principle, in contrast, has given rise to the Court's modern exclusion jurisprudence. In three important cases since 1972—*Kleindienst v. Mandel*, *Fiallo v. Bell*, and the splintered *Kerry v. Din*—the Court applied the "facially legitimate and bona fide" test to deny relief to U.S. citizens who claimed that the exclusion of certain aliens violated the citizens' constitutional rights. In each case, the Court accepted the government's stated reasons for excluding the aliens without scrutinizing the underlying facts. This deferential standard of review effectively foreclosed the U.S. citizens' constitutional challenges. Nonetheless, the Court refrained in all three cases from deciding whether the power to exclude aliens has any limitations. Particularly with regard to the executive branch, the Court left an unexplored margin at the outer edges of the power.

In March 2017, President Trump issued an executive order temporarily barring many nationals of six Muslim-majority countries and all refugees from entering the United States, subject to limited waivers and exemptions. This order replaced an earlier executive order that a federal appellate court had enjoined as likely unconstitutional. Upon challenges brought by U.S. citizens and entities, two federal appellate courts determined that the revised order is likely unlawful, one under the Establishment Clause of the First Amendment and the other under the Immigration and Nationality Act (INA). The Supreme Court agreed to review those cases and, for the meantime, has ruled that the Executive may not apply the revised order to exclude aliens who have a "bona fide relationship" with a U.S. person or entity. In reaching this interim solution, the Supreme Court considered only equitable factors and carefully avoided any discussion of the merits of the constitutional and statutory challenges against the revised order. Even so, the Court's temporary restriction of the executive power to exclude nonresident aliens abroad is remarkable when compared with the Court's earlier immigration jurisprudence.

The merits of these so-called "Travel Ban" cases raise significant questions about the extent to which the rights of U.S. citizens limit the executive power to exclude aliens. It seems relatively clear that, under existing jurisprudence, the "facially legitimate and bona fide" standard should govern the Establishment Clause claims against the revised executive order. However, Supreme Court precedent does not clarify whether that standard contains an exception that might permit courts to test the government's proffered justification for an exclusion by examining the underlying facts in particular circumstances. Nor does Supreme Court precedent resolve whether the standard governs U.S. citizens' statutory claims against executive exercise of the exclusion power, or even whether such statutory claims are cognizable. The outcome of the Travel Ban cases would likely turn upon these issues, if the Supreme Court were to decide the cases on the merits rather than on a threshold question such as mootness (a key issue in light of a presidential proclamation modifying the entry restrictions at issue in the cases).

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Introduction

In precedent stretching back to the Chinese Exclusion Case of 1889,[1] the Supreme Court has held that Congress possesses "plenary power" to regulate immigration.[2] This power, according to the Court, is the most complete that Congress possesses.[3] It allows Congress to make laws concerning aliens that would be unconstitutional if applied to citizens.[4] And while the immigration power has proven less than absolute when directed at aliens already physically present within the United States,[5] the Supreme Court has interpreted the power to apply with most force to the admission and exclusion[6] of nonresident aliens abroad.[7] The Court has upheld or

[1] Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (upholding law that prohibited the return to the United States of Chinese laborers who had been issued, before their departure from the United States and under a prior law, certificates entitling them to return, and recognizing "[t]he power of exclusion of foreigners" as "an incident of sovereignty belonging to the United States as a part of those sovereign powers delegated by the constitution"). Some jurists and commentators have argued that the decision rests on antiquated notions of race. *E.g.*, Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (Douglas, J., dissenting) ("Under The Chinese Exclusion Case ... there could be no doubt but that Congress would have the power to exclude any class of aliens from these shores. The accent at the time was on race."); Adam Chilton and Genevieve Laker, *The Potential Silver Lining in Trump's Travel Ban*, WASH. POST, July 5, 2017 ("The Chinese exclusion laws that the Supreme Court upheld in Chae Chan Ping were motivated by virulent stereotypes of Chinese people as inferior and dangerous. These kinds of racist and xenophobic sentiments are no longer considered a valid basis for formulating government policy."). This criticism notwithstanding, the Supreme Court has never disavowed the case and has cited it as recently as 2001. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

[2] *Mandel*, 408 U.S. at 766 ("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.'") (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967)); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 343 (1909) (noting the "plenary power of Congress as to the admission of aliens" and "the complete and absolute power of Congress over the subject" of immigration); *see also* Galvan v. Press, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government.... But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.").

[3] Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (quoting *Oceanic Steam Navigation Co*., 214 U.S. at 339); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893)("The right of a nation to expel or deport foreigners ... is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

[4] Demore v. Kim, 538 U.S. 510, 522 (2003) ("[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.").

[5] *See Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."); INS v. Chadha, 462 U.S. 919, 957-58 (1983) (holding that law providing for legislative veto of executive branch suspension of deportation determinations violated constitutional requirements of bicameralism and presentment).

[6] This report uses the terms "exclusion" and "denial of entry" interchangeably to mean the denial of permission to enter the United States to someone outside the country. *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.4 (1953). The INA does not define "exclusion," although before 1996 the act used the term "exclusion hearing" to refer to the proceedings that determined the inadmissibility of arriving aliens. Vartelas v. Holder, 566 U.S. 257, 262 (2012) (explaining that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 abolished the distinction between exclusion and deportation procedures and created a uniform proceeding known as "removal."). Nor does the current version of the Immigration and Nationality Act (INA) define "entry," but a prior version defined it as "'any coming of an alien into the United States, from a foreign port or place.'" *Id*. at 261(quoting 8 U.S.C. § 1101(a)(13) (1988 ed.)). The INA's definition of "admission" generally equates it with authorized entry. 8 U.S.C. § 1101(a)(13)(A) ("The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.").

[7] *See Zadvydas*, 533 U.S. at 693, 695 (noting that the "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law" and equating "the political branches' authority to control entry" with "the Nation's armor"); *Fiallo*, 430 U.S. at 792; Jean v. Nelson, 472 U.S. 846, 875

shown approval of laws excluding aliens on the basis of ethnicity,[8] gender and legitimacy,[9] and political belief.[10] Outside of the immigration context, in contrast, laws that discriminate on such bases are almost always struck down as unconstitutional.[11] To date, the only established limitation on Congress's power to exclude aliens concerns lawful permanent residents (LPRs): they, unlike nonresident aliens, generally cannot be denied entry without a fair hearing as to their admissibility.[12]

The plenary power doctrine has long drawn scholarly criticism.[13] Some legal commentators contend that the doctrine lacks a coherent rationale,[14] and that it is an anachronism belonging to an earlier era of constitutional law predating the development of modern individual rights jurisprudence.[15] More than 125 years after its initial recognition of the plenary power doctrine, however, the Supreme Court has continued to rely on it in immigration cases.[16] Some

(Marshall, J., dissenting) (declaring that it is "in the narrow area of entry decisions" that "the Government's interest in protecting our sovereignty is at its strongest and that individual claims to constitutional entitlement are the least compelling").

[8] Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (upholding law that excluded "Chinese laborer[s]").

[9] *Fiallo*, 430 U.S. at 798-99 (upholding law that excluded individuals linked by an illegitimate child-to-natural father relationship from eligibility for certain immigration preferences).

[10] Kleindienst v. Mandel, 408 U.S. 753, 767 (1972) (suggesting that law rendering communists ineligible for visas did not violate the First Amendment or otherwise exceed Congress's immigration powers).

[11] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) (striking down all-male admissions policy at the Virginia Military Institute and stating that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action"); Arizona Free Enterprise Club's Freedom PAC v. Bennett, 564 U.S. 721, 734 (2011) ("Laws that burden political speech are ... subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.") (internal quotation marks omitted).

[12] Landon v. Plasencia, 459 U.S. 21, 33-34 (1982) ("[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.") (quoting Rosenberg v. Fleuti, 374 U.S. 449, 460 (1969)); *id.* at 36 ("If the exclusion hearing is to ensure fairness, it must provide [the returning LPR] an opportunity to present her case effectively though at the same time it cannot impose an undue burden on the government."). As of 1996, the INA treats returning LPRs as aliens seeking admission in certain enumerated circumstances, see 8 U.S.C. § 1101(a)(13)(C) (2014); Vartelas v. Holder, 566 U.S. 257, 261 (2012), but even in those circumstances, the statute does not deny returning LPRs a hearing on the issue of their admissibility. *See* 8 U.S.C. §§ 1225(b)(1)(C) (allowing for administrative review of removal orders against LPRs), 1252(e)(2)(C) (allowing for habeas corpus review of removal orders on issue of LPR status); 8 C.F.R. § 235.3(5)(b)(ii) (exempting verified LPRs from expedited removal procedures); Chen v. Aitken, 917 F. Supp. 2d 1013, 1016 (N.D. Cal. 2013) (recognizing due process rights of returning LPR categorized as applicants for admission under 8 U.S.C. § 1101(a)(13)(C)).

[13] *See* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 (2015) ("Both the [Chinese Exclusion] case and the [plenary power] doctrine have 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.").

[14] *See* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1618-19 (2000) (arguing that none of the conceivable rationales for the plenary power doctrine withstands scrutiny).

[15] *See* Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 27 (1985) ("Individual rights have flourished in the United States since World War II, but they have not shaken the legacy of The Chinese Exclusion Case."); *id.* at 29 ("The Chinese Exclusion Case—its very name an embarrassment—should join the relics of a bygone, unproud era."); Kerry Abrams, *Family Reunification and the Security State*, 32 CONST. COMMENT. 247, 254 (2017) ("[The plenary power] doctrine developed long before modern equal protection doctrine had developed.").

[16] Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (noting "Congress' plenary power to 'suppl[y] the conditions of the privilege of entry into the United States'") (quoting United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950)).

commentators have argued that the Court is in the process of narrowing the parameters of the doctrine's applicability,[17] although they find support for this argument mainly in cases outside of the exclusion context.[18]

The Constitution does not mention immigration. It does not expressly confer upon any of the three branches of government the power to control how citizens of other countries enter, live, and remain in the United States. Parts of the Constitution address related subjects. The Supreme Court has sometimes relied upon Congress's enumerated powers over naturalization[19] and foreign commerce,[20] and to a lesser extent upon the Executive's implied Article II foreign affairs power,[21] as sources of federal immigration power.[22] Significantly, however, the Court has also consistently attributed the immigration power to the federal government's inherent sovereign authority to control its borders and its relations with foreign nations.[23] This inherent sovereign power, according to the Court, gives Congress essentially unfettered authority to restrict the entry of

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[17] Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1282-83 (2016) ("The best view appears to be that the Court is moving in half steps, assessing case by case whether to expand constitutional scrutiny over immigration.").

[18] Abrams, *supra* note 15, at 269-72; Kagan, *supra* note 17, at 1282. For support, these scholars point primarily to the Supreme Court's recognition in *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), that indefinite detention of aliens in removal proceedings in the United States would raise a serious constitutional problem. Abrams, *supra*, at 270; Kagan, *supra*, at 1282. These scholars have also found support for the softening of plenary power in the Supreme Court's recognition that returning LPRs have procedural due process rights, *see* Abrams, *supra*, at 270, in the four dissenting votes in *Din*, *see* Kagan, *supra*, at 1283, and in the Supreme Court's recognition in *Mandel*, discussed at length below, of a limited level of review of exclusion decisions that burden the constitutional rights of U.S. citizens. *Id*. at 1265 ("[T]he [*Mandel*] Court suggested a half step retreat from the Court's position in [United States *ex. rel.* Turner v. Williams, 194 U.S. 279, 290 (1904)] that the First Amendment was not even implicated at all [in an exclusion based on political belief]. The Court held open the possibility that there might be some extreme case in which the government lacked a sufficiently legitimate reason to deny a visa.").

[19] *See* U.S. CONST. art. I, § 8, cl. 4 (Naturalization Clause); Arizona v. United States, 567 U.S. 387, 394-95 (2012); INS v. Chadha, 462 U.S. 940 (1983); *but see Arizona*, 567 U.S. at 422 (Scalia, J., dissenting in part) ("I accept [federal immigration law] as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship).... ").

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

[21] *See* American Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (discussing Article II foreign affairs power generally); United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (relying on foreign affairs power as source of executive power to exclude aliens).

[22] Discussions of the source of congressional immigration power sometimes also mention the power to declare war, U.S. CONST. art. I, § 8, cl. 11, and the Migration and Importation Clause, which barred Congress from outlawing the slave trade before 1808. *Id*. § 9, cl. 1; *see* Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 726 n.95 (1996).

[23] *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative."); Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute.... '") (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)); Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (relying upon "ancient principles of the international law of nation-states"); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (the "traditional power of the Nation over the alien" is "a power inherent in every sovereign state"); Nishimura Eiku v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); *see also Arizona*, 567 U.S. at 394-95 (relying upon Naturalization Clause and the "inherent power as sovereign to control and conduct relations with foreign nations"); Ex. rel. *Turner*, 194 U.S. at 290 (relying on "the accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions," and upon the foreign commerce power).

nonresident aliens.[24] The Court has determined that the executive branch, by extension, possesses unusually broad authority to enforce laws pertaining to alien entry, and to do so under a level of judicial review much more limited than that which would apply outside of the exclusion context.[25]

The scope of the federal government's power to exclude aliens is at the forefront of litigation concerning two successive executive orders (the second revising and replacing the first) issued by President Donald Trump that, in their revised form, seek to deny entry temporarily to foreign nationals from six predominantly Muslim countries and to all refugees, subject to limited waiver.[26] A series of lower court decisions largely enjoined implementation of the orders.[27] In particular, courts ruled that the President's travel restrictions are likely unconstitutional or exceed his statutory authority.[28] The Supreme Court granted certiorari to review decisions by the U.S. Courts of Appeals for the Fourth and Ninth Circuits that upheld nationwide injunctions against the revised executive order.[29] The Supreme Court also partially stayed the injunctions, allowing the executive branch to implement the revised order in part pending the outcome of the litigation.[30] A decision by the Court on the merits of these cases, which have come to be known as the "Travel Ban" litigation,[31] could deliver a major statement about the constitutional and statutory scope of the President's power to exclude aliens. The litigation has threshold issues, however, such as questions of mootness and standing, that may well prevent the Court from reaching the merits, particularly following the issuance of a presidential proclamation superseding and somewhat modifying some of the entry restrictions at issue in the case.[32]

This report provides an overview of the legislative and executive powers to exclude aliens. First, the report discusses a gatekeeping legal principle that frames those powers: nonresident aliens outside the United States cannot challenge their exclusion from the country. Second, the report analyzes the extent to which the constitutional and statutory rights of U.S. citizens limit the exclusion power under the "facially legitimate and bona fide" test of *Kleindienst v. Mandel*. The report concludes with a case study. The report applies the principles of the Supreme Court's immigration jurisprudence to the two primary claims that U.S. persons and entities have pressed against the President's revised executive order in the "Travel Ban" litigation: (1) that the revised

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[24] *See Mandel*, 408 U.S. at 765 ("[T]he power to exclude aliens is 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers-a power to be exercised exclusively by the political branches of government.'") (quoting Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889)).

[25] Kerry v. Din, 135 S. Ct. 2128, 2139-40 (2015) (Kennedy, J., concurring); *Mandel*, 408 U.S. at 768-770; Mathews v. Diaz, 426 U.S. 67, 81 (1976).

[26] Exec. Order No. 13,780, 82 Fed. Reg. 13, 209 (Mar. 6, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8977 (Jan. 27, 2017).

[27] *See* Hawaii v. Trump, 859 F.3d 741, 761 (9th Cir. 2017); IRAP v. Trump, 857 F.3d 554, 575-76 (4th Cir. 2017); Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017); *see infra* "Overview of the "Travel Ban" Executive Orders and Related Litigation."

[28] *Hawaii*, 859 F.3d at 755-56; *IRAP*, 857 F.3d at 572; *Washington*, 847 F.3d at 1165.

[29] Trump v. IRAP, 137 S. Ct. 2080, 2086-87 (2017).

[30] *Id*. at 2087, 2089.

[31] *See, e.g.*, Michael D. Shear and Adam Liptak, *Supreme Court Takes Up Travel Ban Case, and Allows Parts to Go Ahead*, N.Y. TIMES (June 26, 2017), https://www.nytimes.com/2017/06/26/us/politics/supreme-court-trump-travel-ban-case.html; *Judge Nap: SCOTUS Decision on Travel Ban is 'Substantial Political Victory' for Trump*, FOX NEWS INSIDER (Jun. 26, 2017, 11:16 AM), http://insider.foxnews.com/2017/06/26/judge-napolitano-supreme-court-president-trump-travel-ban-appeal-what-comes-next.

[32] *See infra* "Overview of the "Travel Ban" Executive Orders and Related Litigation," at notes 177-184 and 235-240.

order violates the Establishment Clause; and (2) that the revised order violates the Immigration and Nationality Act (INA).[33]

Obstacles to Alien Challenges to Denial of Entry

As discussed later in the report, case law on the exclusion of aliens has come to focus upon whether the rights of U.S. citizens limit the government's power to exclude.[34] The case law arrived at this issue, however, only after the Supreme Court had worked out an essential underlying principle: nonresident aliens outside the United States have no constitutional or statutory rights with respect to entry and therefore no legal grounds to challenge their exclusion.[35]

The Supreme Court developed this principle in a series of cases between the late 19th and mid-20th centuries about aliens denied admission after arriving by sea.[36] The law at the time allowed such aliens to challenge the legality of their exclusion by filing a petition for habeas corpus in federal district court.[37] This procedural right, however, proved hollow. In every case, the Supreme Court determined that the federal government's sovereign prerogative to forbid the entry of foreigners foreclosed the aliens' claims.[38] In one famous case, the Court declared itself powerless to review the government's decision to exclude—without any explanation other than that the entry would be "prejudicial"—the German bride of a U.S. World War Two veteran.[39] In another case, the Court refused to question the government's undisclosed reasons for denying entry to an

[33] In analyzing the "Travel Ban" cases, the report seeks to illustrate how the principles of the Court's exclusion jurisprudence work in application. The report identifies but does not provide in-depth analysis of certain issues in the "Travel Ban" cases that do not arise under immigration law—for example, the issues of standing, mootness, and the constitutionality of the executive order under Establishment Clause jurisprudence outside of the immigration context.

[34] *See, e.g.*, Kerry v. Din, 135 S. Ct. 2128, 2131 (2015) (considering whether the government violates a U.S. citizen's constitutional rights by denying her husband's visa without adequate explanation).

[35] *Id*. (Scalia, J.) (plurality opinion) ("[A]n unadmitted and nonresident alien ... has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission."); *Landon*, 459 U.S. at 329 ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.... ").

[36] *See* Shaughnessy v. Mezei, 345 U.S. 206 (1953); United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537 (1950); Kaplan v. Tod, 267 U.S. 228 (1925); United States *ex. rel*. Turner v. Williams, 194 U.S. 279 (1904); Nishimura Eiku v. United States, 142 U.S. 651 (1892); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[37] *Mezei*, 345 U.S. at 213; *Nishimura Ekiu*, 142 U.S. at 660. A petition for the writ of habeas corpus typically serves as a challenge to the legality of a person's detention. Boumediene v. Bush, 553 U.S. 723, 771 (2008). Aliens arriving by sea often suffered detention as a practical consequence of exclusion, and on this basis the Court recognized their entitlement to the writ. *Nishimura Ekiu*, 142 U.S. at 660 ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful."). Until 1996, the INA similarly authorized arriving aliens found excludable by immigration authorities to challenge their exclusion in habeas corpus proceedings in federal district court. *See* 8 U.S.C. § 1105a(b) (1994).

[38] *See Mezei*, 345 U.S. at 216 ("[R]espondent's right to enter the United States depends on the congressional will.... "); Ex. rel. *Turner*, 194 U.S. at 292 ("[A]s under [the Constitution] the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise."); *Nishimura Ekiu*, 142 U.S. at 660 ("It is not within the province of the judiciary to order that foreigners who have never been ... admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government.").

[39] *Knauff*, 338 U.S. at 543 ("[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."). The excluded alien, and not the U.S. citizen husband, challenged the exclusion. *Id*. at 540. Because the case predated the Court's recognition of the freedom to marry as a substantive due process right in *Loving v. Virginia*, 388 U.S. 1 (1967), the U.S. citizen husband, in contradistinction to his excluded wife, may not have had any plausible claims to press.

essentially stateless alien returning to the United States after a prior period of residence, even though the exclusion relegated the stateless alien to indefinite detention on Ellis Island.[40] The Supreme Court has since relied upon these cases for the proposition that excluded nonresident aliens cannot state legal claims with respect to entry.[41]

The related doctrine of consular nonreviewability precludes judicial review of visa denials.[42] This doctrine developed in the lower courts and appears to derive from the line of Supreme Court cases described above.[43] The consular nonreviewability doctrine, like the rule foreclosing alien claims itself, does not have a clearly enunciated theoretical foundation.[44] It does have a clear

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[40] *Mezei*, 345 U.S. at 212 ("[B]ecause the action of the executive officer under [statutory] authority [to deny entry] is final and conclusive, the Attorney General cannot be compelled to disclose the evidence underlying his determination in an exclusion case.... ").

[41] *See* Kerry v. Din, 135 S. Ct. 2128, 2131 (2015) (Scalia, J.); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

[42] *E.g.*, Bustamante v. Mukasey, 531 F.3d 1059, 1060 (9th Cir. 2008) ("[I]t has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review.") (quoting Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 971 (9th Cir.1986)); Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999). The INA requires an alien to obtain a visa from a U.S. consulate abroad in order to seek admission at a port of entry, *see* 8 U.S.C. §§ 1181(a), 1182(a)(7)(B)(i)(II), unless the alien fits into an exception to the visa requirement, such as the Visa Waiver Program. *See id*. §§ 1182(a)(7)(B)(ii), (d)(4), 1187; Shabaj v. Holder, 602 F.3d 103, 104 (2d Cir. 2010) ("[T]he Visa Waiver Program ... allows individuals from certain nations to visit the United States without a visa for up to 90 days."). The officials who adjudicate visa applications are called consular officers. *See* 8 U.S.C. § 1201(a)(1).

[43] *See* Chiang v. Skeirik, 582 F.3d 238, 242-43 (2009) (citing *Knauff* as authority for the doctrine of consular nonreviewability). Because none of the Supreme Court cases rejecting the habeas corpus petitions of arriving aliens involved visa determinations, whether consular nonreviewability derives from these cases is a somewhat disputed question. *See* Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113, 114, 117 (explaining that consular nonreviewability has "its origins" in the Chinese Exclusion Case and was "firmly established" in *Knauff*); *but see* Legomsky, *supra* note 14, at 1620 (attributing the doctrine to two circuit court cases from the 1920s).

[44] *See* Legomsky, *supra* note 14, at 1618-21 (articulating and rejecting various rationales for the plenary power doctrine and consular nonreviewability). Some fragments from the cases imply a rights-privileges distinction in support of the foreclosure of alien claims: because entry is a privilege rather than a right, an alien cannot challenge its denial. *E.g.*, Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."). This justification does not square well with the general rejection of the rights-privileges distinction in constitutional jurisprudence. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972) ("The Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."). The cases also imply a territorial justification: because the Constitution generally does not apply beyond the nation's borders, it does not protect aliens denied visas abroad. *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders."); *Mandel*, 408 U.S. at 771 (Douglas, J., dissenting) ("[A]n alien who seeks admission [] has no First Amendment rights while outside the Nation ... "). Aside from raising questions under more recent and more complex case law about extraterritorial jurisdiction, *see, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008), the territorial justification does not explain why an alien cannot challenge a visa denial as contravening a statute, regulation, or agency practice. *Compare* Jean v. Nelson, 472 U.S. 846, 853-54 (1985) (declining to reach constitutional questions concerning allegedly discriminatory denial of immigration parole but reaching detained aliens' "challenges [to] the power of low-level politically unresponsive government officials to act in a manner which is contrary to federal statutes ... and the directions of the President and the Attorney General"); *with* Ngassam v. Chertoff, 590 F. Supp. 2d 461, 466-67 (S.D.N.Y. 2008) ("This Court does not have jurisdiction to review a consular official's decision, even if its foundation was erroneous, arbitrary, or *contrary to agency regulations*.") (emphasis added).

Probably the most compelling justification for consular nonreviewability is the absence of a statutory cause of action. When Congress codified, in the Administrative Procedure Act (APA) of 1946, the right to judicial review of agency action, 5 U.S.C. § 702, it did so against the backdrop of the consular nonreviewability jurisprudence and without expressly overruling that jurisprudence by providing for review of consular decisions. *See* Saavedra Bruno v. Albright, 197 F.3d 1153, 1160 (D.C. Cir. 1999) ("In terms of APA § 702(1), the doctrine of consular nonreviewability—the

consequence, however: the millions of nonresident aliens denied visas each year at U.S. consulates abroad cannot themselves challenge the visa denial in federal court.[45] The Supreme Court has never endorsed the doctrine by name, but the Court has twice stated (without holding) that nonresident aliens cannot challenge visa denials.[46] Put simply, under the consular nonreviewability doctrine and the related Supreme Court cases, nonresident aliens located outside the United States cannot challenge their exclusion from the country in federal court.[47]

The rule against alien challenges to denials of entry becomes more convoluted in the context of arriving aliens denied entry at the border, notwithstanding the rule's provenance in cases about such aliens. Arriving alien cases, unlike visa cases, can involve people stranded at the nation's threshold and, accordingly, sometimes present issues that go beyond the denial of entry itself to implicate the government's treatment of persons under its control.[48] Whether the Constitution protects arriving aliens from unduly burdensome enforcement measures, such as prolonged detention pending removal, remains a disputed question.[49] But Congress has provided certain statutory protections in this regard.[50] Moreover, arriving aliens have succeeded in obtaining

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origin of which predates passage of the APA—[] represents one of the 'limitations on judicial review' unaffected by § 702's opening clause granting a right of review to persons suffering 'legal wrong' from agency action."). In other words, because Congress has not given federal courts power to review visa denials, the APA notwithstanding, federal courts do not have such jurisdiction. Nonetheless, it bears noting that no statute expressly bars review of visa denials abroad. *But cf.* 6 U.S.C. § 702(f) (clarifying that provisions granting the Department of Homeland Security authority over some visa functions do not "create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa"). Moreover, a similar type of immigration decision—the nondiscretionary denial of a visa petition by domestic immigration authorities—has been held by some federal courts to be subject to judicial review, apparently even on a claim brought directly by a nonresident alien. *See* Shalom Pentecostal Church v. Acting Sec'y U.S. Dep't of Homeland Sec., 783 F.3d 156, 161 (3d Cir. 2015); Patel v. U.S. Citizenship & Immigration Servs., 732 F.3d 633, 635 (6th Cir. 2013).

[45] The United States refused approximately three million visa applications in 2016, excluding refusals that were later overcome. U.S. Dep't of State, *Table XX, Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2016*, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXX.pdf (last visited Aug. 18, 2017).

[46] *Din*, 135 S. Ct. at 2131; *Mandel*, 408 U.S. at 762.

[47] *Din*, 135 S. Ct. at 2131; *Mandel*, 408 U.S. at 762.

[48] *See* Shaughnessy v. Mezei, 345 U.S. 206, 226-27 (1953) (Jackson, J., dissenting) ("Because the respondent has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate [an alien's] exclusion to eject him bodily into the sea or set him adrift in a rowboat.").

[49] *See Zadvydas*, 533 U.S. at 694 ([W]e need not consider the ... claim that subsequent developments have undermined *Mezei*'s legal authority [concerning indefinite detention for arriving aliens]."); *Jean*, 472 U.S. at 854-55 (declining to reach question whether racially discriminatory denial of immigration parole violated Fifth Amendment equal protection rights of Haitians citizens detained after arriving by sea); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 100 (2001) (arguing that arriving aliens, by virtue of their "membership in a community of persons 'having our common humanity,'" are "entitled to more than [the Supreme Court's decisions in] *Mezei* and *Knauff* gave them when faced with indefinite detention or secret evidence") (quoting Fong Yue Ting v. United States, 149 U.S. 698, 754 (1893) (Field, J., dissenting)).

[50] For example, the current version of the INA directs immigration officers not to immediately remove arriving aliens who express fear of persecution in their countries of origin. 8 U.S.C. §§ 1185(a), 1225(b); *see generally* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 159-60 (1993) (explaining effect of prior version of § 1225(b)). The Supreme Court has also ruled that immigration officials do not have statutory authority to detain inadmissible aliens—that is, aliens "who have not yet gained initial admission"—for more than a presumptively reasonable six-month period after the lapse of an initial 90-day removal period. Clark v. Martinez, 543 U.S. 371, 378 (2005). That decision, however, did not consider any protections that Congress intended to give arriving aliens specifically but instead followed the earlier *Zadvydas* case, which avoided constitutional questions by interpreting the same statute to prohibit indefinite detention of deportable aliens. *Id*. ("To give these same [statutory] words a different meaning for each category [of aliens] would

judicial review of statutory claims against detention or interdiction at sea by U.S. authorities.[51] Such review for aliens pressing claims against the denial of visas abroad, in contrast, does not exist.[52] To be sure, the exclusion power with respect to arriving aliens remains vast, and Congress relied on this broad power in 1996 when it created expedited removal procedures for many arriving aliens that limit or foreclose judicial review.[53] But the exclusion power applies with its maximum force, in practice if not in theory, only to aliens who apply to enter from abroad, because such applications isolate the issue of denial of entry from the treatment issues that physical presence at the border or inside the country sometimes triggers.[54] It is this core of the exclusion power that the remainder of this report addresses and that the Travel Ban cases, which concern the exclusion of aliens generally located far from the nation's shores, implicate most directly.

Claims by U.S. Citizens Against an Alien's Exclusion: the "Facially Legitimate and Bona Fide Reason" Test

Even as applied to aliens abroad, the rule against nonresident alien challenges to denials of entry has a major limitation: the rule only forecloses challenges brought by nonresident aliens themselves. Thus, if a U.S. citizen claims that the exclusion of an alien violated *the U.S. citizen's rights*, the rule against alien challenges does not apply.[55]

be to invent a statute rather than interpret one.").

[51] *See Jean*, 472 U.S. at 849, 857 (holding that class of aliens from Haiti, who sought habeas corpus relief from their detention without parole after they reached south Florida by sea, was entitled to a judicial determination as to whether the authorities had violated applicable agency regulations by denying parole based on race); *Sale*, 509 U.S. at 166-67 (carefully reviewing statutory claims, brought by Haitian citizens detained at Guantanamo and U.S. organizations that represented them, against U.S. Coast Guard interdictions at sea); *infra* "Statutory Challenges to Executive Decisions to Exclude an Alien" (discussing *Jean* and *Sale*).

[52] *See Din*, 135 S. Ct. at 2131 (declaring that a visa applicant in Afghanistan "has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission").

[53] *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 196-97 (2017) ("Congress, through the expedited removal statute enacted in 1996, sought to streamline and strengthen border officials' ability to prevent unauthorized migration at the border, but a series of regulatory and policy shifts in the early 2000s significantly expanded the statute's reach."); *id*. at 201 (noting the "statutory limitations on judicial review of expedited removal embedded in the INA").

[54] *Compare Din*, 135 S. Ct. at 2131 (no cause of action for unsuccessful visa applicant in Afghanistan); *with Sale*, 509 U.S. at 166, 170-77 (carefully reviewing interdicted Haitians' statutory claims to entitlement "to apply for refugee status and avoid repatriation to Haiti"). The histories of the *Knauff* and *Mezei* cases also illustrate this point. Both cases involved aliens detained on Ellis Island following the government's refusal to admit them. Although the Supreme Court held that the aliens could not bring legal challenges against their exclusion, immigration authorities, under pressure from Congress, ultimately allowed both aliens to enter the country—one as a permanent resident and one as a parolee who remained permanently—after their predicaments as detainees rallied public opinion in their favor. 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 (1995).

[55] *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972). In some circuits, courts also make an exception for an alien's challenge to a consular official's failure to act. *See* Bustamante v. Mukasey, 531 F.3d 1059, 1060 (9th Cir.2008) ("[A] court has jurisdiction to review a consular official's actions 'when [the] suit challenges the authority of the consul to take or fail to take an action as opposed to a decision within the consul's discretion.'") (quoting Patel v. Reno, 134 F.3d 929, 931–32 (9th Cir.1997)).

Cases that invoke this limitation account for the entirety of the Supreme Court's modern exclusion jurisprudence. The Court has not considered a nonresident alien's own challenge to a denial of entry in decades.[56] The question about the extent to which U.S. citizens can challenge an alien's exclusion, on the other hand, has occupied the Court in three important cases since 1972: *Kleindienst v. Mandel*,[57] *Fiallo v. Bell*,[58] and the splintered *Kerry v. Din*.[59] Under the rule that these cases establish, the government need only articulate a "facially legitimate and bona fide" reason for excluding a nonresident alien or class of aliens in order to prevail against an American citizen's claim that his or her constitutional rights have been violated by the exclusion.[60]

This section of the report discusses the three exclusion cases, an understanding of each of which is fundamental to this area of the Supreme Court's jurisprudence. Next, the section discusses the cases' implications for the scope of congressional power to exclude aliens and the scope of the concomitant executive power. The section ends by noting two unresolved issues concerning the executive power: (1) the extent to which U.S. citizens may challenge an alien's exclusion on statutory grounds; and (2) the extent to which the Constitution limits the Executive's exclusion decisions under broad delegations of congressional power.

Mandel and the Narrow Review of Exclusion Decisions

In 1972, the Court confronted a case in which a group of American professors claimed that the exclusion of a Belgian intellectual, Ernest Mandel, violated the American professors'—and not Mandel's—First Amendment rights.[61] The professors had invited Mandel to speak at their universities.[62] A provision of the INA rendered him ineligible for a visa because of his communist political beliefs.[63] A separate provision authorized the Attorney General to waive Mandel's ineligibility upon a recommendation from the Department of State, but the Attorney General declined to do so.[64] The case produced the test that continues to govern claims that the exclusion of an alien violates an American citizen's constitutional rights:

> [P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.... We hold that when the Executive exercises [a delegation of this

[56] Other than cases concerning returning LPRs, *see, e.g.*, Vartelas v. Holder, 566 U.S. 257 (2012), Rosenberg v. Fleuti, 374 U.S. 449 (1963), the last Supreme Court case to consider an alien's own challenge to a denial of entry appears to have been Shaughnessy v. Mezei, 345 U.S. 206, in 1953. *But cf. Sale*, 509 U.S. at 166-67 (considering alien and U.S. organization challenges against aliens' interdiction and forced return to Haiti); *Jean*, 472 U.S. at 849 (considering alien challenges against allegedly discriminatory denial of parole). In more recent times, the Court has mentioned the rule against nonresident alien challenges in cases that do not directly implicate it. *See Din*, 135 S. Ct. at 2131 (Scalia, J.); Landon v. Plasencia, 459 U.S. 21, 32 (1982).

[57] 408 U.S. 753 (1972).

[58] 430 U.S. 787 (1977).

[59] 135 S. Ct. 2128 (2015).

[60] *Din*, 135 S. Ct. at 2140 (quoting *Mandel*, 408 U.S. at 770).

[61] *Mandel*, 408 U.S. at 762 ("[T]he American appellees assert that they sue to enforce their rights, individually and as members of the American public, and assert none on the part of the invited alien.") (internal quotation marks omitted).

[62] *Id*. at 756-57, 759 (noting invitations to Stanford, MIT, Princeton, Amherst, the New School, Columbia, and Vassar).

[63] *Id.* at 755 (quoting INA § 212(a)(28) (establishing visa ineligibility for aliens "who advocate the economic, international, and governmental doctrines of world communism" or "write or publish ... the economic, international, and governmental doctrines of world communism")). Under a 1991 amendment to the INA, P.L. 101-649, § 212(a)(28) became § 212(a)(3)(D), which makes the ineligibility apply to immigrant visas only and limits it to applicants who have been "a member of or affiliated with the Communist or any other totalitarian party." 8 U.S.C. § 1182(a)(3)(D). An exception exists for past membership. *Id.* § 1182(a)(3)(D)(iii).

[64] *Mandel*, 408 U.S. at 759.

> power] negatively on the basis of *a facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.[65]

Applying this test, the Court upheld Mandel's exclusion on the basis of the government's explanation that it denied the waiver because Mandel had abused visas in the past.[66] The American professors and two dissenting Justices pointed to indications of pretext and argued that Mandel had actually been excluded because of his communist ideas.[67] Nonetheless, the majority refused to "look behind" the government's justification to determine whether any evidence supported it.[68] In other words, the Court accepted at face value the government's explanation for why it denied Mandel permission to enter.

The "facially legitimate and bona fide" standard resolved what the Court saw as the major dilemma that the dispute over Mandel's visa posed for the bedrock principles of its immigration jurisprudence. The American professors, unlike Mandel himself or the unadmitted aliens from prior exclusion cases, stated a compelling First Amendment claim.[69] But for the Court to grant relief on that claim, or even to grant full consideration of the claim, would have undermined Congress's plenary power to exclude aliens by interjecting the courts into the exclusion process.[70] After all, nearly every exclusion for communist ideology would have been susceptible to the same attack.[71] The "facially legitimate" standard protected the plenary power against dilution by limiting the reach of the American professors' claim.[72] Under the standard, the professors were not entitled to balance their First Amendment rights against the government's exclusion power; they were entitled only to a constitutionally valid statement as to why the government exercised the exclusion power.[73] Significantly, the Court left open the question whether the American professors' rights entitled them to even that much. Although the government proffered a "facially legitimate and bona fide" justification for Mandel's exclusion, the Court declined to say whether the government would have prevailed even if it had offered "no justification whatsoever."[74]

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[65] *Id*. at 769-70 (emphasis added).

[66] *Id*. at 769 ("[T]he Attorney General did inform Mandel's counsel of the reason for refusing him a waiver. And that reason was facially legitimate and bona fide.").

[67] *Id*. at 778 (Marshall, J., dissenting) ("Even the briefest peek behind the Attorney General's reason for refusing a waiver in this case would reveal that it is a sham.") (citing the record for the proposition that the Department of State had never informed Mandel of the relevant visa restrictions before he supposedly violated them).

[68] *Id*. at 769-70.

[69] *Id*. at 764-65 ("The rights asserted here ... are those of American academics who have invited Mandel to participate with them in colloquia debates, and discussion in the United States. In light of the Court's previous decisions concerning the 'right to receive information,' we cannot realistically say that the problem facing us disappears entirely or is nonexistent because the mode of regulation bears directly on physical movement.").

[70] *Id*. at 768-69 ("Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under [INA] s 212(a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard.").

[71] *Id*. at 768 ("In almost every instance of an alien excludable under [INA] s 212(a)(28), there are probably those who would wish to meet and speak with him.").

[72] *See id*. at 769.

[73] *Id*. at 769-70.

[74] *Id*. at 770.

Subsequent Applications of *Mandel: Fiallo* and *Din*

The Court has followed *Mandel* in two subsequent exclusion cases. These cases—one concerning a statute and one concerning the Executive's application of a statute—generally reinforce the notion of the government's plenary power to exclude aliens even in the face of constitutional challenges brought by U.S. citizens. The second case, however, includes limiting dicta that appears to contemplate a pathway for future challenges.

First, in *Fiallo v. Bell*, the Court upheld a provision of the INA that classified people by gender and legitimacy.[75] The statute granted special immigration preferences to the children and parents of U.S. citizens and LPRs, unless the parent-child relationship at issue was that of a father and his illegitimate child.[76] Four U.S. citizens and permanent residents claimed that the restriction violated their equal protection rights by disqualifying their children or fathers from the preferences.[77] Despite the "double-barreled discrimination" on the face of the statute, the Court upheld it as a valid exercise of Congress's "exceptionally broad power to determine which classes of aliens may lawfully enter the country."[78] Although it relied on *Mandel*,[79] the *Fiallo* Court did not identify a concrete "facially legitimate or bona fide" justification for the statute. Instead, the Court simply surmised that a desire to combat visa fraud or to emphasize close family ties may have motivated Congress to impose the gender and legitimacy restrictions.[80] Similar to the analysis in *Mandel*, the *Fiallo* Court justified its limited review of the facially discriminatory statute as a way to prevent the assertion of U.S. citizen rights from undermining the sovereign prerogative to exclude aliens.[81]

In the second case, *Kerry v. Din*, the Court considered a U.S. citizen's claim that the Department of State (State) violated her due process rights by denying her husband's visa application without sufficient explanation.[82] State indicated that it denied the visa under a terrorism-related ineligibility, but it did not disclose the factual basis of its decision.[83] The Court rejected the claim by a vote of 5 to 4 and without a majority opinion. Justice Scalia, writing for a plurality of three Justices, did not reach the *Mandel* analysis because he concluded that Din did not have a protected liberty interest under the Due Process Clause in her husband's ability to immigrate.[84]

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[75] 430 U.S. 787, 799-800 (1977).

[76] *Id*. at 788-89.

[77] *Id*. at 790.

[78] *Id*. at 794.

[79] *Id*. at 795 ("We can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case.").

[80] *Id*. at 799 ("Congress obviously has determined that preferential status is not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations.").

[81] *Id*. at 795 n.6 ("[O]ur cases ... make clear that despite the impact of these [immigration preference] classifications on the interests of those already within our borders, congressional determinations such as this one are subject only to limited judicial review..").

[82] 135 S. Ct. 2128, 2131 (2015).

[83] *Id*. at 2132.

[84] *Id*. at 2138 ("Because Fauzia Din was not deprived of 'life, liberty, or property' when the Government denied Kanishka Berashk admission to the United States, there is no process due to her under the Constitution."). Justice Scalia's opinion emphasizes the challenge that U.S. citizens face in overcoming the consular nonreviewability bar by stating a valid claim for the violation of their own constitutional rights based on the exclusion of somebody else. *See id*. at 2131("Din attempts to bring suit on [her husband's] behalf, alleging that the Government's denial of her *husband's* visa application violated *her* constitutional rights.") (emphasis in original).

But Justice Kennedy, in a concurring opinion for himself and Justice Alito, rejected the claim under the "facially legitimate and bona fide reason" test after assuming without deciding that the visa denial did implicate due process rights.[85]

Justice Kennedy's concurring opinion made two significant statements about how *Mandel* works in application. First, the government satisfies the "facially legitimate and bona fide reason" standard by citing the statutory provision under which it has excluded the alien.[86] According to Justice Kennedy, such a citation fulfills both the "facially legitimate" and "bona fide" prongs of the test.[87] Thus, because the government stated that it denied Din's husband's visa application under the terrorism-related ineligibility, it provided an adequate justification even though it did not disclose the factual basis for applying the ineligibility.[88] Pointing to the statute suffices.[89]

Second, however, Justice Kennedy inserted a caveat into his application of the "bona fide" prong:

> Absent an affirmative showing of bad faith on the part of the consular officer who denied Berashk [Din's husband] a visa—which Din has not plausibly alleged with sufficient particularity—*Mandel* instructs us not to "look behind" the Government's exclusion of Berashk for additional factual details beyond what its express reliance on [the terrorism-related ineligibility] encompassed.[90]

In other words, under Justice Kennedy's reading of the *Mandel* standard, courts will assume that the government has a valid basis for excluding an alien under a given statute unless an affirmative showing suggests otherwise. In *Din*, the facts did not suggest bad faith, because Din's own complaint revealed a connection between the statutory ineligibility and her husband's case.[91] Justice Kennedy therefore had no occasion to apply the caveat, and the opinion does not clarify what kind of "affirmative showing" would trigger it.[92] Nonetheless, as discussed later in the report, the mere mention of a bad faith exception arguably hedges, in a way that has proved significant in the Travel Ban cases, against the absolutism of *Mandel*'s instruction not to examine the government's underlying factual basis for excluding a given alien.[93]

Implications for the Scope of Congressional Power

Mandel and *Din*, in their examination of executive application of the immigration laws, appeared to take the absoluteness of Congress's exclusion power as a given. In *Din*, Justice Kennedy grounded his conclusion—that a visa denial withstands constitutional attack so long as the government ties the exclusion to a statutory provision—on the premise that Congress can impose

[85] *Id*. at 2139.

[86] *Id*. at 2140.

[87] *Id*. at 2140-41.

[88] *Id*.

[89] *Id*. The statute at issue in *Din* encompassed multiple discrete terrorism-related bases for exclusion, and Justice Kennedy concluded that the government's citation to the statute sufficed even though the government did not specify which discrete basis, in particular, it relied upon. *Id*. at 2141 (discussing 8 U.S.C. § 1182(a)(3)(B)). Another provision of the statute, which Justice Kennedy also noted, allows the government to refuse a visa for terrorism-related reasons without providing any notice to the applicant as to the basis of the refusal. *Id*. (citing § 1182(b)(3)) ("[T]he notice requirement does not apply when, as in this case, a visa application is denied due to terrorism or national security concerns.").

[90] *Id*. at 2141.

[91] *Id*. The complaint said that her husband had worked for the Taliban. *Id*.

[92] *See id*.

[93] *See infra* "The Scope of Review of EO-2's Purpose Under Mandel," at note 286.

whatever limitations it sees fit on alien entry.[94] In other words, because Congress's limitations are valid *per se*, executive enforcement of those limitations is also valid.[95] *Mandel* makes the same point, albeit mainly through omission. Recall that the case concerned application of an INA provision that rendered the Belgian academic ineligible for a visa because he held communist political beliefs.[96] The Court acknowledged that the statute triggered First Amendment concerns by limiting, based on political belief, U.S. citizens' audience with foreign nationals.[97] But the Court did not decide whether the statute violated the First Amendment. Rather, the Court simply accepted that Congress had the power to impose such an idea-based entry limitation.[98] As a result, the *Mandel* decision considered only the First Amendment implications of the Attorney General's refusal to waive Mandel's communism-based ineligibility, not the statutory premise of the ineligibility.[99]

The untested assumption underlying *Mandel* and *Din*—that Congress's immigration power encompasses the power to exclude based on any criteria whatsoever, including political belief—raises a fundamental question about the nature of the plenary power. Often, the Court has described the power as one that triggers judicial *deference*, meaning that courts may conduct only a limited inquiry when considering the constitutionality of an exercise of the immigration power.[100] But the plenary power doctrine, as some scholars have noted, can be understood another way, one that perhaps makes more sense of *Mandel*: the "plenary" refers to the scope of the power itself, in substance, and not to its immunity from judicial review.[101] The congressional power to admit or exclude aliens is so complete, this theory goes, as to override the constitutional limitations that typically constrain legislative action.[102] For example, the power overrides the First

[94] 135 S. Ct. at 2140 ("Given Congress' plenary power to 'suppl[y] the conditions of the privilege of entry into the United States,' it follows that the Government's decision to exclude Berashk because he did not satisfy a statutory condition for admissibility is facially legitimate.") (quoting United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950)) (internal citation omitted).

[95] *See id*.

[96] Kleindienst v. Mandel, 408 U.S. 753, 755 (1972)

[97] *See id*. at 762-64 (describing First Amendment right to "receive information and ideas").

[98] *Id*. at 767 (declining to "reconsider" line of cases establishing "'[t]he power of congress to exclude aliens altogether from the United States ... without judicial intervention'") (quoting Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895)); *see also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 63 (1998) ("[T]here was no real question in [*Mandel*] that Congress could have simply banned all persons in the class, and no one would have had any conceivable ground for legal complaint."). The Court determined that the American professors had conceded the statute's constitutionality. *Mandel*, 408 U.S. at 767 ("In seeking to sustain the decision below, [the American professors] concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by [INA] ss 212(a)(28)(D) and (G)(v), and that First Amendment rights could not override that decision."). In dissent, Justice Marshall maintained that the professors had not actually conceded the "blanket prohibition" point. *Id*. at 780 n.43. Whether the professors conceded the point or not, some precedent already existed for the proposition that Congress could discriminate by political belief when regulating immigration. Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (upholding provision of the Alien Registration Act of 1940 that made Communist Party membership a ground for deportation).

[99] *Mandel*, 408 U.S. at 767.

[100] *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 81-82 (1976) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."); Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Harisiades*, 342 U.S. at 588-89 ("[Immigration] matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").

[101] *See* Legomsky, *supra* note 14, at 1616-17.

[102] *See id*.

Amendment principles that would invalidate legislation that expressly provides for unfavorable treatment based on political belief in almost any other context.[103]

Aspects of *Fiallo*, however, arguably do not support this concept of a substantively limitless congressional power to regulate alien entry. Unlike *Mandel* and *Din*, which examined the Executive's application and implementation of authority delegated by statute, *Fiallo* squarely considered the constitutionality of a statute itself.[104] And while *Fiallo*'s outcome (upholding an immigration law that discriminated by gender and legitimacy) aligns with the concept of an unbridled legislative power, the Court's reasoning wavered between statements suggesting that the legislative power might have limits and statements describing the power as absolute.[105] The lack of clarity in the opinion seemed to stem from the awkwardness of applying *Mandel*—which fashioned a rule for review of executive action (the "facially legitimate and bona fide" test)—in a case reviewing legislative action. Ultimately, the *Fiallo* Court cited the *Mandel* test as an analogue but did not actually apply the test.[106] Rather, the Court upheld the statute at issue under something that looked like a version of rational basis review,[107] one in which a hypothetical justification suffices to sustain the statute.[108] While extremely deferential, this version of rational basis review implies an underlying constitutional limitation against legislative unreasonableness, at least in theory.[109] In other words, an even-handed reading of *Fiallo* suggests that statutes regulating the admission of aliens must at least be reasonable.[110]

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[103] *See* Lamont v. Postmaster Gen., 381 U.S. 301, 305-06 (1965) (statute authorizing the government to intercept communist propaganda mailed from abroad violated intended recipients' First Amendment rights).

[104] Fiallo v. Bell, 430 U.S. 787, 788 (1977).

[105] *Compare id*. at 793 n.5 ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens, and there is no occasion to consider in this case whether there may be actions of the Congress with respect to aliens that are so essentially political in character as to be nonjusticiable.), *and id.* at 795 ("This is not to say, as we make clear in n. 5, *supra*, that the Government's power in this area is never subject to judicial review."), *with id.* at 798 ("[T]hese are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress."), *and id.* at 799 ("[T]he decision [to exclude illegitimate children and their natural fathers from the immigration preferences] nonetheless remains one 'solely for the responsibility of the Congress and wholly outside the power of this Court to control.'") (quoting *Harisiades*, 342 U.S. at 597).

[106] *Id*. at 795 ("We can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case.").

[107] Under rational basis review, courts uphold a statute so long as it is "rationally related to legitimate government interests." Washington v. Glucksberg, 521 U.S. 702, 728 (1997).

[108] *See Fiallo*, 430 U.S. at 799 ("Congress obviously has determined that preferential status is not warranted for illegitimate children and their natural fathers, *perhaps because* of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations.") (emphasis added). The Supreme Court and lower courts have generally interpreted *Fiallo* to establish rational basis review of laws that restrict alien entry. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693 (2017) (stating that *Fiallo* applied "minimal scrutiny (rational-basis review)"); Johnson v. Whitehead, 647 F.3d 120, 127 (4th Cir. 2011) (interpreting *Fiallo* as applying rational basis review); Rajah v. Mukasey, 544 F.3d 427, 438 (2d Cir. 2008) (same); Escobar v. I.N.S., 700 F. Supp. 609, 612 (D.D.C. 1988) (same); *see also* Ledezma-Cosino v. Sessions, 857 F.3d 1042, 1050 n.2 (9th Cir. 2017) (en banc) (Kozinski, J., concurring) (interpreting *Fiallo* to establish a version of rational basis review pursuant to which "the set of acceptable rational bases is broader in the immigration context than elsewhere").

[109] *See, e.g.*, Armour v. City of Indianapolis, 132 S. Ct. 2073, 2080 (2012) (explaining, in equal protection context, that "rational basis review requires deference to reasonable underlying legislative judgments").

[110] *See Morales-Santana*, 137 S. Ct. at 1693. The earlier *Harisiades* case, which upheld the statute that made Communist Party membership grounds for deportation, also appeared to apply a reasonableness test:

> Under the conditions which produced this Act, can we declare that congressional alarm about a coalition of Communist power without and Communist conspiracy within the United States is either a fantasy or a pretense? ... Certainly no responsible American would say that there ... are now

Some scholars have argued that *Fiallo* was incorrectly decided and that stricter constitutional scrutiny should apply to admission and exclusion laws that classify aliens by factors such as race, religion, and gender.[111] To date, this argument does not find support in Supreme Court precedent.[112] To be sure, the Supreme Court has made clear that Congress cannot deny certain rights to aliens subject to criminal or deportation proceedings within the United States,[113] and the federal government cannot deny some procedural protections to LPRs returning from brief trips from abroad.[114] But the Court has never suggested that laws regulating the admission of nonresident aliens trigger anything more than the deferential rational basis review that it applied to the gender-based immigration preferences statute at issue in *Fiallo*.[115] In other words, the Court has never called *Fiallo* into question.[116] In one recent case, *Sessions v. Morales-Santana*, the Supreme Court applied heightened constitutional scrutiny to strike down a derivative citizenship statute that, much like the statute in *Fiallo*, used gender classifications.[117] However, the *Morales-Santana* Court distinguished *Fiallo* and the plenary power doctrine by noting that the statute before it concerned citizenship, not immigration.[118] Accordingly, *Morales-Santana* does not appear to portend imminent reconsideration of *Fiallo*.[119]

> no possible grounds on which Congress might believe that Communists in our midst are inimical to our security.
>
> Congress received evidence that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists.... We, in our private opinions, need not concur in Congress' policies to hold its enactments constitutional. Judicially we must tolerate what personally we may regard as a legislative mistake.

342 U.S. at 588-89; *see also* Chin, *supra* note 98, at 65 ("The prevailing judicial and scholarly view [of the standard recognized in *Fiallo*] ... is that rational basis review applies.").

[111] *See* Henkin, *supra* note 15, at 33-34 ("Nothing in the [Constitution] excludes immigration issues from its concern and principles.... A people committed to equality and inalienable rights for all men and women should not permit its government to apply invidious criteria for admission."); Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. Rev. 1309, 1325 (2017) ("[T]here are excellent arguments that the Court decided [*Fiallo*] wrongly.... "); Evangeline G. Abriel, *Presumed Ineligible: The Effect of Criminal Convictions on Applications for Asylum and Withholding of Deportation Under Section 515 of the Immigration Act of 1990*, 6 GEO. IMMGR. L.J. 27, 68 (1992) (noting that under *Fiallo* "it appears that virtually any legislation concerning the admission or expulsion of aliens will withstand substantive due process review" and that *Fiallo* "has been sharply criticized for its undue deference to Congress").

[112] *See* Kerry v. Din, 135 S. Ct. 2128, 2136, 2141 (2015) (citing *Fiallo* with approval).

[113] *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."); Wong Wing v. United States, 163 U.S. 228, 237 (1896) ("[W]hen Congress sees fit to ... subject[] the persons of [unlawfully present] aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.").

[114] Landon v. Plasencia, 459 U.S. 21, 33 (1982) ("'[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.'") (quoting Rosenberg v. Fleuti, 374 U.S. 449, 460 (1963)).

[115] *See Din*, 135 S. Ct. at 2136, 2141.

[116] *Id.*; *see also* DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE 69 (6th ed. 2011) ("To date there have been no successful challenges to federal legislation that refuses admission to classes of non-citizens or removes resident aliens.").

[117] 137 S. Ct. 1678, 1698 (2017).

[118] *Id.* at 1693-94 ("Morales–Santana claims he is, and since birth has been, a U.S. citizen. Examining a claim of that order, the Court has not disclaimed, as it did in *Fiallo*, the application of an exacting standard of review.").

[119] *Id.* Two of the justices who joined the majority opinion in *Morales-Santana*—Chief Justice Roberts and Justice Kennedy—also wrote or joined opinions in *Din* that reaffirmed the breadth of the political branches' power to exclude aliens and that cited *Fiallo* with approval, which suggests that they would not be inclined to overrule the case. *See Din*,

To summarize, dicta in the exclusion cases that decided challenges to executive action, *Mandel* and *Din*, give the impression of a substantively absolute congressional power to control the entry of aliens. But courts have generally interpreted *Fiallo*, which concerned a direct challenge to a law regulating alien admission and exclusion, to mean that such laws must at least survive a review for reasonableness. To date, the Supreme Court has not heeded scholarly calls for more exacting review of laws regulating alien entry.

Implications for the Scope of Executive Power

As described above, *Mandel*'s "facially legitimate and bona fide reason" test governs claims that an exclusion decision violates a U.S. citizen's constitutional rights.[120] The Executive satisfies the test by identifying the statutory basis for the exclusion.[121] However, the Executive may also have to disclose its factual basis for invoking a particular statute where the U.S. citizen challenger makes an "affirmative showing of bad faith."[122] Despite the relatively clear picture of the scope of the Executive's exclusion power drawn from *Mandel*, *Fiallo*, and *Din*, three unresolved issues warrant discussion: (1) whether the Executive possesses inherent exclusion power, as opposed to solely statutory-based power; (2) the extent to which U.S. citizens or entities may challenge an alien's exclusion on statutory grounds; and (3) the extent to which the Constitution limits the Executive's application of broad delegations of congressional power to make exclusion determinations.

Source of Executive Power

The Supreme Court seems to have determined that the authority to exclude aliens reaches the Executive through congressional action alone, rather than through an inherent source of executive power.[123] The text of the Constitution itself does not settle the question. Because the federal government's immigration power rests at least in part upon an "inherent power as a sovereign" not enumerated in the Constitution, courts cannot determine who owns the power by reading Article I or Article II.[124] At least one pre-*Mandel* Supreme Court decision states that the Executive does possess inherent authority to exclude aliens.[125] The case makes this statement, however, only in the context of a now-antiquated challenge to the constitutionality of

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135 S. Ct. at 2136, 2141; *see also* Abrams, *supra* note 15, at 276 ("At oral argument [in *Morales-Santana*], the Justices seemed uninterested in hearing plenary power arguments.... "). On the other hand, before *Morales-Santana*, the Court had equated the legislative powers to regulate citizenship and immigration rather than distinguishing between them. Demore v. Kim, 538 U.S. 510, 521 (2003) (discussing Congress's "'broad power over naturalization and immigration'") (quoting *Mathews*, 426 U.S. at 79-80).

[120] *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring).

[121] *Id*.

[122] *Id*. at 2141.

[123] *See* Galvan v. Press, 347 U.S. 522, 530 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. ") (citations omitted).

[124] *See supra* note 23 (citing cases). Some have argued that the inherent nature of the power obfuscates its features and limitations. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting) ("This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits?").

[125] *See* United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("The right to [exclude aliens] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.").

congressional delegations of immigration authority to executive agencies.[126] The case also acknowledges that, notwithstanding any inherent executive authority, in immigration matters the Executive typically acts upon congressional direction.[127] Moreover, the weight of Supreme Court precedent assigns the immigration power to Congress rather than the Executive.[128] *Din* and *Mandel* illustrate this point perhaps most clearly: even though both cases considered the constitutionality of executive action, they spoke only of statutory sources of executive authority.[129]

Statutory Challenges to Executive Decisions to Exclude Aliens

Because executive exclusion power derives primarily from legislative enactment, the Executive's decision to exclude an alien is susceptible in theory to attack on the grounds that the decision violates the governing statutes. In cases pressed by U.S. citizens, some lower courts have, on statutory grounds, rejected or called into question visa denials.[130] In these cases, the courts have

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[126] *Id*. ("Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power. But ... the exclusion of aliens is a fundamental act of sovereignty."). The constitutionality of this type of congressional delegation to administrative agencies no longer seems to present a close question for reviewing courts. *See, e.g.*, United States v. Cooper, 750 F.3d 263, 270 (3d Cir. 2014) ("The Supreme Court has not invalidated a statute for violating the nondelegation doctrine in the nearly 80 years since *Panama Refining* and *Schechter Poultry*.").

[127] *Knauff*, 338 U.S. at 543 ("Normally Congress supplies the conditions of the privilege of entry into the United States.... Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent.").

[128] Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (discussing "Congress' plenary power" to limit alien entry); Demore v. Kim, 538 U.S. 510, 521 (2003) (attributing power over immigration and naturalization to Congress); Fiallo v. Bell, 430 U.S. 787, 794 (1977) ("Congress ... has exceptionally broad power to determine which classes of aliens may lawfully enter the country"); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) ("Congress' plenary power"); Galvan v. Press, 347 U.S. 522, 530 (1954) ("The power of Congress over the admission of aliens and their right to remain is necessarily very broad.... "); United States *ex. rel.* Turner v. Williams, 194 U.S. 279, 289 (1904) ("Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions of which they may come in; ... and to commit the enforcement of such conditions to ... executive officers.... "); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("The supervision of the admission of aliens into the United States may be intrusted by congress either to the department of state ... or to the department of the treasury.... "); *but see* Mathews v. Diaz, 426 U.S. 67, 81 (1976) (not distinguishing between the two political branches in stating that immigration decisions "are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary"); Washington v. Trump, 858 F.3d 1168, 1175 (9th Cir. 2017) (Bybee, J., dissenting from denial of rehearing en banc) (citing Article II foreign policy clauses for the proposition that "[t]he President likewise has some constitutional claim to regulate the entry of aliens into the United States").

[129] *Din*, 135 S. Ct. at 2140; *Mandel*, 408 U.S. at 766; *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (reasoning that the President's power is "at its maximum" when he acts pursuant to congressional authorization; that his power falls within a "zone of twilight" when he acts "in absence of either a congressional grant or denial of authority;" and that his power is at "at its lowest ebb" when his actions contravene statute); Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 122-23 (2014) (arguing that under Justice Jackson's reasoning in *Youngstown Sheet & Tube Co.*, the President does not have power to undermine the "normative framework" of the "INA's text and structure").

[130] *See* Allende v. Shultz, 845 F.2d 1111, 1119-20 (1st Cir. 1988) (holding that visa denial based on statutory ineligibility for activities prejudicial to the public interest deviated from the statutory criteria) ("[The statute] plainly requires a reasonable belief that an alien will engage in specific activities harmful to the public interest. Mere entry alone does not suffice. Absent the allegation of the requisite activities, the government may not exclude an alien under [the statute]."); Abourezk v. Regan, 785 F.2d 1043, 1053-54 (D.C. Cir. 1986) (remanding for further evidence of past agency practice relevant to whether the State Department's interpretation of the public interest ineligibility violated the statute); *see also* Hill v. I.N.S., 714 F.2d 1470 (9th Cir. 1983) (holding that the Immigration and Naturalization Service violated the INA by excluding homosexuals, under an ineligibility for aliens afflicted with "a psychopathic personality, sexual deviation, or mental defect," without first obtaining a medical certificate from the Surgeon General's Public

not applied *Mandel*'s deferential "facially legitimate and bona fide reason" test when reviewing the government's determination that a particular statutory provision required the denial of a visa application; instead, the courts have approached that statutory question as they would outside of the immigration context.[131] As a result, these cases have analyzed the government's justifications for excluding aliens much more closely than the Supreme Court analyzed the constitutional claims in *Mandel* and *Din*.[132]

Supreme Court precedent offers limited guidance as to whether such statutory claims are cognizable and, if so, what standard of review should govern them. On the one hand, in recognizing that U.S. citizens could challenge exclusion decisions despite the bar against such suits when brought by aliens, *Mandel* and *Din* spoke narrowly of constitutional claims by U.S. citizens.[133] Thus, one could read the cases to imply disapproval of statutory claims by U.S. citizens against exclusion decisions.[134] On the other hand, even though the Supreme Court has never expressly endorsed statutory challenges to visa denials or other exclusion decisions concerning aliens outside the United States, it has reviewed statutory claims in arguably similar contexts. In *Sale v. Haitian Centers Council*, the Court considered and ultimately rejected statutory challenges to the U.S. Coast Guard's interdiction and forced return of Haitian migrants trying to reach the United States by sea.[135] Specifically, the Court analyzed whether the

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Health Service).

[131] *See Allende*, 845 F.2d at 1119-20; *Abourezk*, 785 F.2d at 1053-56. In another line of cases considering constitutional claims, courts have applied *Mandel* but have still closely parsed the government's justifications under the rubric of determining whether the government "properly construed" the statutory basis for the exclusion. *See* Am. Academy of Religion v. Napolitano, 573 F.3d 115, 126-27, 132 (2d Cir. 2009) (citing cases and remanding First Amendment challenge to visa denial for a determination of whether the consular officer provided the alien with a statutorily required opportunity to establish an ineligibility defense). It is unclear whether those cases, which interpreted *Mandel* to permit probing review of the statutory reasoning underlying a government exclusion decision, remain good law in their circuits after Justice Kennedy's opinion in *Din* applied *Mandel* to arrive at a more deferential analysis. *See Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring); IRAP v. Trump, 857 F.3d 554, 592 (4th Cir. 2017) (noting dearth of applications of *Mandel* standard after *Din*).

[132] *Compare Allende*, 845 F.2d at 1115, 1192-20 (rejecting government proffer that alien belonged to a "covert instrument of Soviet policy to manipulate public opinion in the United States" as an inadequate basis for invoking "prejudicial activities" ineligibility); *with Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring) (concluding that government citation to section of statute containing multiple terrorism-related ineligibility provisions, without specifying a particular provision, provided adequate justification for exclusion where the facts "provide[d] at least a facial connection to terrorist activity"); *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 581 (1990) (citing *Abourezk* for the proposition that "some lower court decisions ... have scrutinized executive branch immigration decisions more closely than the plenary power doctrine would seem to allow"). In both *Allende* and *Abourezk*, the circuit courts alluded to or cited the canon of administrative deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but both circuits courts nonetheless disagreed with or called into doubt the State Department's interpretation of statutory grounds for the exclusion of aliens. *Allende*, 845 F.2d 1119-20; *Abourezk*, 785 F.2d at 1053, 1056.

[133] *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring) ("*Mandel* held that an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made on the basis of a facially legitimate and bona fide reason.") (internal quotation marks omitted). At least one circuit court has held that U.S. citizens lack standing to challenge visa denials on statutory grounds, unless constitutional claims accompany the statutory claims. Saavedra Bruno v. Albright, 197 F.3d 1153, 1164 (D.C. Cir. 1999) ("With respect to purely statutory claims, courts have made no distinction between aliens seeking review of adverse consular decisions and the United States citizens sponsoring their admission; neither is entitled to judicial review.").

[134] *See Abourezk*, 785 F.2d at 1050 (noting State Department argument that "[U.S. citizen] plaintiffs have no right to contest ... visa denials on statutory grounds").

[135] 509 U.S. 155, 158-59 (1993). The statutory challenges were brought by U.S. organizations and also by Haitian citizens detained at Guantanamo. *Id*. at 166.

interdictions violated the INA provision requiring immigration authorities to consider potential asylum or withholding of removal claims of arriving aliens before returning them to their place of origin.[136] Similarly, in *Jean v. Nelson*, the Court considered whether the Immigration and Naturalization Service had violated its own regulations in denying immigration parole to a group of arrivals from Haiti who were detained in Florida pending a decision on their admissibility.[137] In both cases, the Supreme Court reviewed the statutory and regulatory issues without applying *Mandel* or any other deferential standard of review.[138] Both cases, however, concerned aliens in the government's control and resulting issues about the proper treatment of those aliens, rather than the issue of exclusion alone.[139]

On balance, a certain level of statutory analysis may sometimes inhere in judicial consideration of constitutional claims against exclusion decisions.[140] Statutory and constitutional challenges do not always lend themselves to clear separation.[141] Under the doctrine of constitutional avoidance, for example, courts strive to avoid "serious constitutional questions" through reasonable construction of underlying statutes or regulations.[142] The Supreme Court invoked this doctrine in the exclusion context when it construed agency regulations to mean that returning LPRs could not be denied entry without a hearing.[143] As one jurist noted in a visa denial case, courts cannot practicably review some constitutional claims without construing the relevant statutes first.[144] Thus,

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[136] *Id*. at 159-60 (" If the proof shows that it is more likely than not that the alien's life or freedom would be threatened in a particular country because of his political or religious beliefs, under [INA] § 243(h) the Attorney General must not send him to that country. The INA offers these statutory protections only to aliens who reside in or have arrived at the border of the United States."). The Court held that the statute did not apply to the Coast Guard interdictions at sea. *Id*. at 159.

[137] 472 U.S. 846, 853-54 (1985). The INA gives immigration authorities power to "parole" inadmissible aliens into the United States, on a case-by-case basis, "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5). Parole generally does not constitute "admission" into the country for immigration purposes and generally does not involve the conferral of immigration status. *See id*. ("[S]uch parole of such alien shall not be regarded as an admission of the alien.... "); *but cf*. Succar v. Ashcroft, 394 F.3d 8, 26 (9th Cir. 2005) ("Congress specifically says parolees are not considered admitted. Despite their status as inadmissible, Congress has also made the policy determination that these paroled aliens should be eligible to apply for adjustment of status, which essentially can act as an admission."). Despite a paroled alien's physical presence in the country, the alien is "still in theory of law at the boundary line" of the United States. Leng May Ma v. Barber, 357 U.S. 185, 189 (1958) (quoting Kaplan v. Tod, 267 U.S. 228, 230 (1925)).

[138] *Sale*, 509 U.S. at 171 (reviewing the "text and structure of the statute"); *Jean*, 472 U.S. at 855.

[139] *Sale*, 509 U.S. at 166 (discussing claims based on "statutory and treaty rights to apply for refugee status and avoid repatriation to Haiti"); *Jean*, 472 U.S. at 849 (noting that petitioners were "incarcerated and denied parole" upon arrival).

[140] *See* Kerry v. Din, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (evaluating sufficiency of government explanation for visa denial against INA notice requirements).

[141] Abourezk v. Regan, 785 F.2d 1043, 1050 (D.C. Cir. 1986) (concluding that courts have "an independent obligation to consider questions of statutory construction" before addressing constitutional claims); *Jean*, 472 U.S. at 854 (same).

[142] Zadvydas v. Davis, 533 U.S. 678, 689 (2001) ("'[I]t is a cardinal principle' of statutory interpretation, however, 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.'") (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). For a full discussion of the canon of constitutional avoidance, see CRS Report R43706, *The Doctrine of Constitutional Avoidance: A Legal Overview*, by Andrew Nolan.

[143] Kwong Hai Chew v. Colding, 344 U.S. 601-02 (1953); *see also* Landon v. Plasencia, 459 U.S. 21, 33 (1982) ("Although the holding [in *Kwong Hai Chew*] was one of regulatory interpretation, the rationale was one of constitutional law.").

[144] *Abourezk*, 785 F.2d at 1062 n.1 (Bork, J., dissenting in part) ("It would be extraordinary if the court found that the statutes did not authorize the exclusions, thus the first amendment did not invalidate the statutes, but, since the challenge and standing were based on the first amendment, the court was without power to rule the unauthorized exclusions illegal.").

principles of federal court jurisprudence probably require courts to consider statutory arguments against exclusion decisions to some extent, although perhaps only when constitutional claims point up those statutory arguments.[145] The question that remains open, however, is what standard of review should govern such statutory arguments and, more specifically, whether courts may conduct a more exacting analysis of the government's justifications when the challenges against an alien's exclusion are styled as statutory rather than constitutional.[146]

Exclusions Based on Broad Delegations of Congressional Power

An issue remains as to what limitations the Constitution imposes on the Executive's manner of implementing broad delegations of congressional exclusion authority. Justice Kennedy concluded in *Din* that the plenary nature of Congress's power to exclude aliens means that an executive exclusion decision for a statutory reason is facially legitimate and bona fide.[147] But what about where Congress transfers its exclusion power to the Executive with few limiting criteria? What constitutional restrictions does the Executive face in that scenario?

As Justice Kennedy observed in *Din*, *Mandel* itself raised this issue.[148] There, the statute gave the Attorney General broad discretion to waive the communism-based ground for exclusion.[149] In addressing the constitutional claim against the denial of Mandel's waiver, the Court assumed that *Congress* had the authority to exclude communists based on their political ideas,[150] but the Court nonetheless proceeded to analyze whether the Attorney General had violated the First Amendment by denying Mandel's waiver because of his political ideas.[151] This approach implies that the First Amendment could potentially limit the Attorney General's, but not Congress's, power to exclude based on political belief.[152] Put differently, *Mandel* implies that congressional delegations of exclusion authority may not transfer the full scope of Congress's plenary power over such matters.[153] Of course, *Mandel* sustained the waiver denial at issue and expressly left open the question whether it would have done so even if the government had declined to justify its action or justified it on less innocuous grounds.[154] The case does at least suggest the possibility, however, that the Constitution limits the Executive's exclusion choices in a way that it does not limit Congress's.[155] At the very least, the reasonableness requirement that appears to

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[145] *See* Saavedra Bruno v. Albright, 197 F.3d 1153, 1163-64 (D.C. Cir. 1999).

[146] *See* Allende v. Shultz, 845 F.2d 1111, 1119-20 (1st Cir. 1988); *Abourezk*, 785 F.2d at 1053-56; *see also infra*, "Standard of Review of Statutory Claims Against EO-2."

[147] Kerry v. Din, 135 S. Ct. 2128, 2140-41 (2015) (Kennedy J., concurring).

[148] *Id*. ("[T]he waiver provision at issue in *Mandel* ... granted the Attorney General nearly unbridled discretion.... ").

[149] Kleindienst v. Mandel, 408 U.S. 753, 755 (1972). The only apparent limitation on this discretion was a requirement that the Attorney General provide a "detailed report to Congress" about any approved waivers. *Id*. at 755-56.

[150] *Id*. at 766-67.

[151] *Id*. at 767 (declining to "reconsider" Congress's plenary immigration power, including the power to "enact a blanket prohibition against entry of all" communists, but considering the argument "that the Executive's implementation of this congressional mandate [to exclude communists subject to a waiver provision] through decision whether to grant a waiver in each individual case must be limited by the First Amendment rights of persons like appellees.").

[152] *See id*.

[153] *Id*; *see* Motomura, *supra* note 132, at 581 (1990) ("[T]he [*Mandel*] Court suggested a distinction between decisions made directly by Congress in an immigration statute and enforcement of those statutes by the executive branch.... [T]he Court suggested some outer limits to executive discretion that might not apply to direct congressional decisions.").

[154] *Mandel*, 408 U.S. at 768 ("The Government ... urg[es] a broad decision that Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given. his record, however, does not require that we [reach this question].").

[155] *Id*. at 767. The *Mandel* Court did not explain why the Constitution might distinguish between executive and

limit legislative action following *Fiallo*[156] would also extend to executive implementation of broad delegations of legislative exclusion authority.[157]

Overview of the "Travel Ban" Executive Orders and Related Litigation

President Trump set forth what has become known colloquially as the "Travel Ban" in two iterations of an executive order titled "Protecting the Nation from Foreign Terrorist Entry into the United States." The second order (EO-2), issued on March 6, 2017,[158] revised and revoked the first (EO-1), issued on January 27, 2017,[159] after the Ninth Circuit upheld an injunction against the first order.[160] The two orders are similar but not identical; as discussed below, the Trump Administration narrowed the scope of EO-2 in response to the Ninth Circuit decision.[161] As its primary source of statutory authority, EO-2 relies upon Section 212(f) of the INA, which allows the President to suspend the entry of any class of aliens where such entry would be "detrimental to the interests of the United States."[162] EO-2's stated purpose is to protect the United States from terrorist acts perpetrated by foreign nationals.[163]

EO-2 imposed temporary bars on the entry of two classes of aliens located outside the United States: (1) foreign nationals from six countries (Iran, Libya, Somalia, Sudan, Syria, and Yemen), for 90 days following the order;[164] and (2) refugees, for 120 days.[165] These entry restrictions, according to the text of EO-2, aim to reduce administrative burdens on executive agencies while they conduct an assessment of current screening procedures for visa applicants and refugees.[166]

congressional exclusion authority where Congress has delegated its authority to the Executive, *see id*., but a commentator has suggested that "[t]he distinction reflects the view that courts intrude on the legislative sphere more when they review decisions made by Congress directly than when they review immigration decisions made by the executive branch pursuant to a delegation of power by Congress." Motomura, *supra* note 153, at 581-82.

[156] *See supra* "Implications for the Scope of Congressional Power," at note 108.

[157] *See* Azizi v. Thornburgh, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990) (equating *Mandel* test with rational basis review).

[158] Exec. Order No. 13,780, 82 Fed. Reg. 13, 209 (Mar. 6, 2017) [hereinafter "EO-2"].

[159] Exec. Order No. 13,768, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter "EO-1"].

[160] Washington v. Trump, 847 F.3d 1151, 1164-65 (9th Cir. 2017). At least one federal court ruled to the contrary, concluding that EO-1 was likely a lawful exercise of the President's statutory authority. *See* Louhghalam v. Trump, No. 17–10154–NMG, ——F.Supp.3d ——, 2017 WL 479779 (D. Mass. Feb. 3, 2017) ("[T]he President has exercised his broad authority under 8 U.S.C. § 1182(f) to suspend entry of certain aliens purportedly in order to ensure that resources are available to review screening procedures and that adequate standards are in place to protect against terrorist attacks. Such a justification is 'facially legitimate and bona fide.'") (citations omitted).

[161] *See* Trump v. IRAP, 137 S. Ct. 2080, 2083 (2017) ("EO–2 sets out a series of directives patterned on those found in EO–1."); *see infra*, notes 225-229.

[162] 8 U.S.C. § 1182(f); *see* EO-2 §§ 2(c), 6(b); *see also* EO-1 §§ 3(c), 5(c),(d). EO-2 also cites a second source of statutory authority: INA § 215(a), which makes it unlawful for an alien to enter the country "except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. § 1185(a)(1); *see* EO-2 § 2(c) (citing INA § 212(f) and § 215(a)).

[163] EO-2 §§ 1(a).

[164] *Id*. § 2(c).

[165] *Id*. § 6(a).

[166] *Id*. §§ 1(f), 2(c), 6(a).

The restrictions exempt certain categories of aliens from their scope, including LPRs, and are also subject to waiver on a case-by-case basis.[167]

A group of plaintiffs—including states, organizations, and individual U.S. citizens and LPRs—contend that EO-2's true purpose is to exclude Muslims from the United States.[168] The plaintiffs argue that the order therefore violates the Establishment Clause of the First Amendment and exceeds the scope of the President's statutory authority.[169] They base the contention of anti-Muslim animus primarily upon statements that President Trump and his advisers made during the 2016 presidential campaign concerning the implementation of a "Muslim ban" on travel to the United States.[170] The U.S. Courts of Appeals for the Fourth and Ninth Circuits upheld district court injunctions against EO-2's entry restrictions in their entirety—the Fourth Circuit on Establishment Clause grounds[171] and the Ninth Circuit on statutory grounds.[172] In contrast, at least one federal district court denied a motion to enjoin EO-2 after concluding that the order was likely lawful.[173]

The Supreme Court granted certiorari to hear both the Fourth and Ninth Circuit cases in the 2017 October Term.[174] The Supreme Court also limited the lower court injunctions to allow the government to apply EO-2's entry restrictions against aliens who do not have a "bona fide relationship" to a person or entity within the United States.[175] The Court left the injunctions in place with respect to aliens who have such relationships.[176] Importantly (for the litigation, though not for the underlying issues of immigration law), the Court also drew attention to the issue whether the temporary entry restrictions would expire before the Court could decide the two cases, thereby rendering the cases moot.[177] A subsequent event has brought the mootness issue even more into the forefront. On September 24, 2017, the President issued a proclamation that modified EO-2's 90-day entry restrictions on persons from the six listed countries.[178] The proclamation deleted one country (Sudan) and added three others (Chad, North Korea, and

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[167] *Id*. § 3.

[168] Trump v. IRAP, 137 S. Ct. 2080, 2084-85 (2017).

[169] *Id*. at 2084.

[170] *Id*. at 2085; Hawaii v. Trump, 859 F.3d 741, 761 (9th Cir. 2017); IRAP v. Trump, 857 F.3d 554, 575-76 (4th Cir. 2017).

[171] *IRAP*, 857 F.3d at 572.

[172] *Hawaii*, 859 F.3d at 755-56.

[173] Sarsour v. Trump,—F. Supp. 3d—, 2017 WL 1113305, at *12 (E.D. Va. Mar. 24, 2017).

[174] Trump v. IRAP, 137 S. Ct. 2080, 2086-87 (2017).

[175] *Id*. at 2087, 2089.

[176] *Id*. Following further litigation about the meaning of the term "bona fide relationship," operative court orders now define the term to encompass employment relationships and "close familial relationships," including extended family such as grandparents and cousins. "Bona fide relationship" does not include refugees covered by a formal assurance from a U.S. resettlement agency. "Bona fide relationship" also does not include any relationship created simply to avoid EO-2. *See* Trump v. Hawaii, Nos. 17A275, 16-1540, 2017 WL 4014838 (S. Ct. Sept. 12, 2017); Hawaii v. Trump, No. 17–16426, 2017 WL 3911055, at *1 (9th Cir. Sept. 7, 2017).

[177] *See id*, 137 S. Ct. at 2086-87, 2089 (granting certiorari on question "[w]hether the challenges to [EO-2] § 2(c) became moot on June 14, 2017" and indicating expectation that the partial stay would allow the government to "conclude its internal work" within the 90-day life of the entry restriction on citizens of the six listed countries). A case becomes moot "[i]f an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation.... " Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72 (2013) (internal citations and quotation marks omitted).

[178] Proclamation No.—, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States or Other Public-Safety Threats,—Fed. Reg. – (Sept. 24, 2017), https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry.

Venezuela) from the list of affected countries;[179] made the restrictions indefinite;[180] and also modified the scope of the restrictions for persons from several of the countries.[181] The proclamation does not appear to alter EO-2's restrictions on refugee entry.[182] The day after the President issued the proclamation, the Supreme Court cancelled the scheduled oral argument in the Travel Ban cases and ordered the parties to submit briefs on whether the proclamation rendered the cases moot.[183] Thus, it seems that the Supreme Court will, at the very least, carefully consider whether the claims in the Travel Ban cases are moot or whether other considerations make a decision on the merits of those claims inappropriate.[184]

Table 1. Travel Ban Timeline (all dates 2017)

January 27	Issuance of EO-1 • Barred entry to the following classes of aliens: (1) persons from seven countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen), for 90 days;[185] (2) refugees from any country other than Syria, for 120 days;[186] and (3) refugees from Syria, indefinitely.[187] • Lowered cap for refugee admissions for fiscal year 2017 from 110,000 to 50,000.[188] • For future refugee applications, instructed the State Department and DHS to prioritize claims of religious persecution "provided that the

[179] *Id*. § 2.

[180] *Id*. § 4.

[181] *Id*. § 2. Perhaps most notably, the entry restrictions set forth in the Proclamation do not apply to many categories of nonimmigrants from most of the listed countries. *See id*; *see also* 8 U.S.C. § 1101(a)(15) (defining "nonimmigrant" to mean an alien who falls within any of multiple enumerated categories of temporary admission).

[182] *See* Proclamation No.—, § 1(c) (referencing only EO-2's provisions concerning immigrant and nonimmigrant travelers, as opposed to refugees).

[183] Trump v. IRAP, Nos. 16-1436, 16-1540 (S. Ct. Sept. 25, 2017). Oral argument had been scheduled for October 10, 2017. *See* Supreme Court of the United States, October Term 2017, Argument Calendar for the Session Beginning October 2, 2017, https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2017.pdf. The Court also directed the parties to address whether the impending expiration of the provisions temporarily limiting refugee entry may moot aspects of the cases as well. *Id*. For a broader discussion of the mootness issue, which is beyond the scope of this report, see CRS Legal Sidebar WSLG1844, *Supreme Court Grants Review and Partial Stay of Injunctions in Cases Involving Challenges to Executive Order Restricting Entry of Some Aliens*, by Hillel R. Smith and Ben Harrington.

[184] *See* Trump v. IRAP, Nos. 16-1436, 16-1540 (S. Ct. Sept. 25, 2017). Even leaving the mootness issues aside, the Court might hesitate to address the claims against EO-2 before lower courts have evaluated whether the September 24th Proclamation has any bearing on the merits of those claims. *See, e.g.*, Zivotofsky *ex. rel.* Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) ("Ordinarily, we do not decide in the first instance issues not decided below.") (internal citations and quotation marks omitted).

[185] EO-1 § 3(c) ("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.") The referenced statute, 8 U.S.C. § 1187(a)(12), coupled with agency determinations made under the statute, excludes citizens of the seven countries and recent visitors to those countries from the Visa Waiver Program. *See* Washington v. Trump, 847 F.3d 1151, 1156-57 (9th Cir. 2017).

[186] EO-1 § 5(a) ("The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days.").

[187] *Id*. § 5(a) ("I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.").

[188] *Id*. § 5(d).

	religion of the individual is a minority religion in the individual's country of nationality."[189] • Did not, by its terms, exempt LPRs or dual nationals who also held a passport issued by a nonlisted country. • Provided for case-by-case waivers "in the national interest,"[190] including for refugee adherents of minority religions fleeing religious persecution.[191]
February 3	U.S. district court in Seattle issues temporary restraining order (TRO) barring implementation nationwide of all EO-1 entry restrictions.[192]
February 3	Massachusetts district court rules for the government in denying a motion to extend a TRO against EO-1 entry restrictions.[193]
February 9	Ninth Circuit affirms the Seattle court's TRO on due process grounds.[194]
March 6	Issuance of EO-2 (with effective date of March 16) • Removed Iraq from the list of restricted countries.[195] • Removed the indefinite restriction on Syrian refugees, placing them into the general 120-day bar for all refugees.[196] • Removed instruction to prioritize future refugee claims of religious persecution for adherents of minority religions.[197] Also removed reference to minority religions in waiver provisions.[198] • Exempted from entry restrictions, *inter alia*, LPRs, dual nationals traveling on the passport of a nonrestricted country, and aliens already in the U.S. or already in possession of valid U.S. visa.[199] • Expanded waiver provisions for persons from the six countries to include numerous bases, including "significant contacts" with the United States and prevention of "undue hardship" from familial separation.[200]

[189] EO-1 § 5(b). The order also called for legislative proposals to prioritize such claims. *Id*. ("Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.").

[190] *Id*. § 3(g) ("[T]he Secretaries of State and Homeland Security may, on a case-by-case basis, and when in the national interest, issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked.").

[191] *Id.* § 5(e).

[192] Washington v. Trump, No. C17-0141-JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017). The brief order did not explain the reasoning behind its conclusion that plaintiffs had shown a likelihood of success on their claims against EO-1. *See id*. Ten days later, a district court in Virginia issued a second nationwide preliminary injunction, but only against § 3(c)'s bar of foreign nationals of the seven countries. Aziz v. Trump, No. 1:17–cv–116 (LMB/TCB), —— F.Supp.3d ––––, 2017 WL 580855 (E.D. Va. Feb. 13, 2017) (holding that plaintiffs were likely to succeed on the merits of claims that EO-1 violated the Establishment Clause).

[193] Louhghalam v. Trump, No. 17–10154–NMG, ——F.Supp.3d ——, 2017 WL 479779, at *37 (D. Mass. Feb. 3, 2017).

[194] Washington v. Trump, 847 F.3d 1151, 1164-65 (9th Cir. 2017) (holding that the government did not show a likelihood of success on the merits of its argument that EO-1 satisfied due process requirements).

[195] EO-2 §§ 1(g), 2(c).

[196] *Compare id*. § 6, *with* EO-1 § 5(c).

[197] *Compare* EO-2 § 6, *with* EO-1 § 5(b).

[198] *Compare* EO-2 § 6(c), *with* EO-1 § 5(e).

[199] EO-2 § 3(a), (b).

[200] *Id*. § 3(c).

March 15	Hawaii district court issues preliminary injunction barring implementation nationwide of all EO-2 entry restrictions.[201]
March 16	Maryland district court issues preliminary injunction barring implementation nationwide of entry restrictions against citizens of the six listed countries.[202]
March 24	Virginia district court rules for the government in declining to enjoin EO-2 entry restrictions.[203]
May 25	Fourth Circuit affirms Maryland district court injunction on constitutional grounds (Establishment Clause).[204]
June 12	Ninth Circuit affirms Hawaii district court injunction on statutory grounds.[205]
June 26	Supreme Court issues per curiam opinion (1) agreeing to hear Fourth and Ninth Circuit cases in 2017 October Term; and (2) granting partial stay of injunctions, allowing government to apply EO-2 to aliens who do not have a "bona fide relationship" with a U.S. person or entity.[206]
July 13	Hawaii district court rules that "bona fide relationship" includes (1) extended family members and (2) refugees covered by a formal assurance from a U.S. resettlement agency.[207]
July 19	Supreme Court, in one-paragraph order, leaves part (1) of the July 13 Hawaii district court decision in place but stays part (2) pending the government's appeal to the Ninth Circuit.[208]
September 7	Ninth Circuit affirms both parts of the July 13 Hawaii district court decision.[209]
September 12	Supreme Court, in one-paragraph order, stays the Ninth Circuit decision with respect to refugees covered by a formal assurance, thus allowing the government to apply EO-2 to exclude such refugees but not extended family members during the pendency of the litigation.[210]
September 24	Presidential proclamation, issued on the day that EO-2's 90-day entry restriction on persons from the six listed countries was set to expire, extends the entry restrictions on some persons from each of the six countries except Sudan.[211] The proclamation also adds certain entry restrictions, effective October 18, 2017, against persons from North Korea, Chad, and Venezuela.[212] The proclamation contains substantially the same waiver and exemption provisions as EO-2.[213] All of the entry restrictions in the proclamation are indefinite, subject to periodic reassessment procedures.[214]

[201] Hawaii v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017).

[202] IRAP v. Trump,—F. Supp. 3d—, 2017 WL 1018235 (D. Md. Mar. 16, 2017).

[203] Sarsour v. Trump,—F. Supp. 3d—, 2017 WL 1113305, at *12 (E.D. Va. Mar. 24, 2017).

[204] IRAP v. Trump, 857 F.3d 554 (4th Cir. 2017).

[205] Hawaii v. Trump, 859 F.3d 741, 761 (9th Cir. 2017).

[206] Trump v. IRAP, 137 S. Ct. 2080, 2084-85 (2017).

[207] Hawaii v. Trump, CV. No. 17–00050 DKW–KSC, 2017 WL 2989048 (D. Ct. Haw. July 13, 2017).

[208] Trump v. Hawaii, No. 16-1540, 2017 WL 3045234 (S. Ct. July 19, 2017).

[209] Hawaii v. Trump, No. 17–16426, 2017 WL 3911055, at *1 (9th Cir. Sept. 7, 2017).

[210] Trump v. Hawaii, Nos. 17A275, 16-1540, 2017 WL 4014838 (S. Ct. Sept. 12, 2017); *see supra* note 175.

[211] Proclamation No.—, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States or Other Public-Safety Threats,—Fed. Reg. – (Sept. 24, 2017), https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry.

[212] *Id*. §§ 2(a), (d), (f), 7(b).

[213] *Id*. § 3.

[214] *Id*. § 4.

	The restrictions in the proclamation bar entry of the following specific categories of persons: • Yemen, Libya, Chad: all immigrants; nonimmigrants seeking entry on B-1, B-2, and B-1/B-2 temporary visitor visas.[215] • Syria, North Korea: all immigrants and nonimmigrants.[216] • Somalia: all immigrants.[217] • Iran: all immigrants and nonimmigrants, except nonimmigrants seeking entry on valid student (F and M) or exchange (J) visas.[218] • Venezuela: officials of certain government agencies, and the immediate family members of such officials, seeking entry on B-1, B-2, and B-1/B-2 temporary visitor visas.[219] • *Sudan: no restrictions*.[220]
September 25	Supreme Court cancels oral argument, which was previously scheduled for October 10, 2017,[221] and orders parties to submit supplemental briefings on mootness issue in light of the September 24 proclamation and the impending expiration of EO-2's refugee restrictions.[222]

Source: Congressional Research Service, based on various sources cited in **Table 1**.

Evolution of Litigation from EO-1 to EO-2

Although the Travel Ban cases pose novel questions about the scope of the President's power to exclude aliens, some aspects of the litigation thus far have reaffirmed basic principles of the Supreme Court's immigration jurisprudence. First, the crucial distinction in that jurisprudence between LPRs and all other aliens—and to a lesser extent, between aliens physically present in the United States and aliens abroad—had a major impact on the EO-1 litigation[223] and did much to shape the President's revisions to EO-2.[224] EO-1 covered a broader group of aliens than does EO-2. Specifically, EO-1 applied not only to nonresident aliens abroad, but also was understood by reviewing courts to cover LPRs (inside and outside the country) and aliens other than LPRs who were already present in the United States on valid visas.[225] This coverage beyond the core of the exclusion power described in Supreme Court precedent became a focus in the cases about EO-1's lawfulness.[226] Most notably, when the Ninth Circuit upheld the temporary restraining order against EO-1, it emphasized that the order's applicability to LPRs and other aliens already

[215] *Id*. § 2(a), (c), (d). These visas cover aliens who "hav[e] a residence in a foreign country which [they] ha[ve] no intention of abandoning and who [are] visiting the United States temporarily for business or temporarily for pleasure." *See* 8 U.S.C. 1101(a)(15)(B).

[216] *Id*. § 2(d), (e).

[217] *Id*. § 2(h).

[218] *Id*. § 2(b). The criteria for F, M, and J student and exchange visas are set forth at 8 U.S.C. § 1101(a)(15)(F), (M), (J).

[219] *Id*. § 2(f).

[220] *See id*. § 1(g), (i).

[221] Supreme Court of the United States, October Term 2017, Argument Calendar for the Session Beginning October 2, 2017, https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCal0otober2017.pdf.

[222] Trump v. IRAP, Nos. 16-1436, 16-1540 (S. Ct. Sept. 25, 2017).

[223] Washington v. Trump, 847 F.3d 1151, 1165 (9th Cir. 2017).

[224] EO-2 § 1(i).

[225] *See* EO-1 § 3(c) (exempting only holders of certain diplomatic visa categories from the entry bar).

[226] *Washington*, 847 F.3d at 1165.

present in the United States likely violated due process.[227] EO-2, which the government crafted with the Ninth Circuit decision in mind,[228] sought to repair this constitutional infirmity by carefully limiting the applicability of its entry restrictions to nonresident aliens only, and to only those nonresident aliens not physically present in the United States and without valid visas.[229] As a result, the due process issues concerning LPRs and physically present nonresident aliens that arose in the EO-1 cases largely fell out of the EO-2 challenges.[230]

Second, the contours of the litigation thus far have been influenced by the rule that nonresident aliens outside the United States cannot challenge their exclusion from the United States in federal court. The identities of the plaintiffs in both Travel Ban cases reflect this rule: their ranks include states, U.S. organizations, and U.S. citizens and LPRs, but not any excluded nonresident aliens themselves.[231] At no juncture has the litigation challenged the proposition that such aliens cannot press their own claims with respect to entry.[232] Moreover, the Supreme Court's June 26 per curiam opinion seemed to rely on this proposition as the basis of the "bona fide relationship" test that it adopted to limit the injunctions against EO-2 pending resolution of the Travel Ban cases.[233] The exclusion of aliens who do not have bona fide relationships with persons or entities in the United States, the Court reasoned, could not form the basis of a claim under *Mandel*.[234]

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[227] *Id*. ("[T]he Government has failed to establish that lawful permanent residents have no due process rights when seeking to re-enter the United States."); *id*. at 1166 (noting potential due process claims of "non-immigrant visa holders who have been in the United States but temporarily departed or wish to temporarily depart"). Although the White House Counsel issued guidance stating that EO-1's entry bar did not apply to LPRs, the circuit court did not accept the guidance as controlling for purposes of the constitutional analysis. *Id*. at 1165-66 ("The Government has offered no authority establishing that the White House counsel is empowered to issue an amended order superseding the Executive Order ... [nor that] the White House counsel's interpretation of the Executive Order is binding on all executive branch officials"). The federal district court in Virginia that enjoined EO-1 also emphasized the order's applicability to LPRs and current visa holders. *Aziz*, 2017 WL 580855 at *2, *8.

[228] EO-2 § 1(i) (referencing Ninth Circuit decision affirming injunction against EO-1 and stating that "this order ... expressly excludes from the suspensions categories of aliens that have prompted judicial concerns").

[229] EO-2 § 3(a), (b). The order establishes some other exceptions for aliens with connections to the United States; e.g., aliens admitted on parole or issued advance parole documents. *Id*.

[230] Plaintiffs in the *IRAP* and *Hawaii* cases also brought due process claims against EO-2. Hawaii v. Trump, 859 F.3d 741, 760 (9th Cir. 2017); IRAP v. Trump, 857 F.3d 554, 578 (4th Cir. 2017). However, the due process claims—like plaintiffs' claims under the equal protection component of the Fifth Amendment Due Process Clause—drew no attention from the circuit courts and are not before the Supreme Court. Trump v. IRAP, 137 S. Ct. 2080, 2084-86 (2017) (granting certiorari on issues that do not include equal protection or due process). The Supreme Court has previously held that aliens seeking initial entry into the country, unlike LPRs, do not have due process rights with regard to denial of entry. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.... "); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (distinguishing "an alien entrant" from "a resident alien" for due process purposes).

[231] *Hawaii*, 859 F.3d at 760; *IRAP*, 857 F.3d at 577. The issue of whether LPRs and entities—as opposed to U.S. citizens alone—may challenge exclusion decisions under *Mandel* has received little attention in the Travel Ban litigation. *See, e.g.*, *IRAP*, 857 F.3d at 587 (determining that consular nonreviewability does not bar "'claims by United States citizens rather than by aliens,'" without discussing how consular nonreviewability applies to an LPR plaintiff determined to have standing) (quoting Abourezk v. Reagan, 785 F.2d 1043, 1051 n.6 (D.C. Cir. 1986)). *Mandel* itself addressed only claims by U.S. citizens. 408 U.S. 753, 759 (1972). In *Fiallo*, however, the plaintiffs included both citizens and LPRs, and the Court analyzed the claims together. 430 U.S. 787, 790 n.3 (1977). The distinction between citizen, LPR, and U.S. entity plaintiffs therefore appears to have little bearing on whether claims are cognizable under *Mandel*, *see id*., particularly since the general rule against nonresident alien challenges to denials of entry applies only to claims by the excluded aliens themselves. *See* Kerry v. Din, 135 S. Ct. 2128, 2131 (2015) (Scalia, J.).

[232] *Trump*, 137 S. Ct. at 2084-85 (noting challenges pressed by U.S. persons and entities, but not excluded aliens).

[233] *Id*. at 2088.

[234] *Id*. ("Denying entry to such a foreign national [located abroad who has no connection to the United States] does not burden any American party by reason of that party's relationship with the foreign national. And the courts below did

The litigation's conformity thus far with the doctrine against nonresident alien claims for entry has, in turn, given rise to the litigation's major threshold issue: whether the plaintiffs have suffered cognizable injuries from EO-2's entry restrictions sufficient to give them standing to sue.[235] The U.S. government contends, in short, that plaintiffs do not adequately assert violations of their own rights (and therefore do not have standing) because EO-2 affects them only indirectly, through the exclusion of others.[236] Both circuit courts, however, held that certain U.S. citizen and LPR plaintiffs with relatives in the six listed countries have standing based on the prolonged familial separation that EO-2 would likely cause them.[237] This conclusion drew a dissenting opinion in the Fourth Circuit.[238] The contested nature of the standing issue shows the obstacles that U.S.-citizen (or LPR) plaintiffs face in stating claims under *Mandel* against exclusion orders that do not actually apply to them.[239] In this regard, the government's arguments against standing in the Travel Ban cases echo Justice Scalia's conclusion in *Din* that the denial of a visa to a nonresident alien does not burden the due process rights of that alien's American spouse.[240]

But while the Travel Ban litigation has tracked in some ways the basic tenets of long-standing immigration jurisprudence, it has also produced something unique: a Supreme Court opinion that upholds a measure of relief against the exclusion of nonresident aliens outside the United States, provided those aliens have a "bona fide relationship" with persons or entities within the country.[241] To be sure, the Court did not at all consider the merits of the challenges to EO-2's

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not conclude that exclusion in such circumstances would impose any legally relevant hardship on the foreign national himself.") (quoting *Mandel*, 408U.S. at 762 ("An unadmitted and nonresident alien ... [h]as no constitutional right of entry to this country") (alterations in original)).

[235] *See Hawaii*, 859 F.3d at 761-62; *IRAP*, 857 F.3d at 581-82. To establish standing to sue, litigants must show a "personal stake in the outcome of the controversy" by virtue of an "injury in fact" that is "concrete and particularized." Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014) (internal citations and quotation marks omitted). They must also show "a sufficient causal connection between the injury and the conduct complained of, and [] a likel[ihood] that the injury will be redressed by a favorable decision." *Id*. (internal citations and quotation marks omitted) (alteration in original).

[236] Brief for Petitioners at 23, 29, 33, *Trump v. IRAP* (Nos. 16-1436 and 16-1540) [hereinafter "Solicitor General Opening Brief"].

[237] *Hawaii*, 859 F.3d at 763; *IRAP*, 857 F.3d at 583-84. The Fourth Circuit also held that an LPR plaintiff had standing based on "feelings of disparagement" caused by EO-2's allegedly anti-Muslim message. *IRAP*, 857 F.3d at 584-85. The Ninth Circuit also held that the State of Hawaii had standing-based harms that its public university would suffer from the likely exclusion of students and faculty from the six listed countries. *Hawaii*, 859 F.3d at 765.

[238] *IRAP*, 857 F.3d at 666 (Agee, J., dissenting).

[239] *See id*. ("Plaintiffs do not have standing to allege violations of the Establishment Clause on behalf of their immigrant relatives.... The relatives, in turn, do not have rights of entry or any Establishment Clause rights.").

[240] *Compare id*., *with* Kerry v. Din, 135 S. Ct. 2128, 2131 (2015) (Scalia, J.) ("[B]ecause [Din's husband] is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission. So, Din attempts to bring suit on his behalf, alleging that the Government's denial of her *husband's* visa application violated *her* constitutional rights.) (citation omitted). The full standing analysis is beyond the scope of this report. For more information about standing generally, see CRS Report R40825, *Legal Standing Under the First Amendment's Establishment Clause*, by Cynthia Brown.

[241] *See* Trump v. IRAP, 137 S. Ct. 2080, 2087 (2017) ("We leave the injunctions entered by the lower courts in place with respect to respondents and those similarly situated, as specified in this opinion."); *id*. at 2088 ("[EO-2] § 2(c) may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States."); *id*. at 2089 ("Section 6(a) may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States. Nor may § 6(b); that is, such a person may not be excluded pursuant to § 6(b), even if the 50,000-person cap has been reached or exceeded.").

entry restrictions in its June 26 per curiam decision.[242] Rather, the Court arrived at the "bona fide relationship" rule as the interim measure that, in the Court's view, imposed the most equitable balance between the government's and the plaintiffs' interests pending the outcome of the litigation.[243] Nonetheless, the prospect of a Supreme Court decision upholding—even temporarily, even in part, and even on equitable rather than legal grounds—an injunction against the executive branch's exclusion of nonresident aliens abroad might have struck some immigration law observers as unlikely before the outset of the Travel Ban controversy, particularly in the aftermath of the *Din* decision.[244]

Constitutionality of EO-2: the Establishment Clause

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion."[245] The Supreme Court's interpretations of this language have given rise to one of the most complex areas of constitutional law, with an array of standards fashioned for discrete categories of government action such as legislative prayer, school prayer, and religious displays on public property.[246] However, the various strains of jurisprudence generally (though not universally) agree on one point: the government violates the Establishment Clause if it undertakes official action with the purpose of favoring or disfavoring a particular religion.[247] The Fourth Circuit and multiple district courts applied this rule to hold that EO-2 likely violates the Establishment Clause because, in the view of these courts, the purpose of the

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[242] *Id*. at 2087.

[243] *Id*.

[244] *See Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring) (noting that *Mandel* deference to executive exclusion decisions "has particular force in the area of national security"); Martin, *supra* note 13, at 32 (arguing that "the reasons for the [plenary power] doctrine's survival are likely to gain strength over coming decades," that "bold constitutional reforms through the judicial branch are not in the offing [but that] constitutional values can be invoked in other ways besides litigation," and that the Supreme Court missed a "golden opportunity" in *Din* to "make inroads into the plenary power doctrine"); Weissbrodt & Danielson, *supra* note 116, at 98 ("Although the Supreme Court has not quite deemed exclusion cases non-justiciable under the political question doctrine, the extreme degree of deference the Court has given to legislative determinations on this issue makes the ground of review so narrow as to be practically nonexistent."); *see also infra* "Implications for the Scope of Executive Power."

[245] U.S. CONST. amend. I.

[246] *See* Van Orden v. Perry, 545 U.S. 677, 685 (2005) (opinion of Rehnquist, C.J.) (describing inconsistent application of Establishment Clause tests) ("Many of our recent cases simply have not applied [one particular] test. Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test."); *id*. at 692-93 (Thomas, J., concurring) (describing the "inconsistent guideposts [the Court] has adopted for addressing Establishment Clause challenges"); *see also* Smith v. Jefferson Cnty. Bd. of School Com'rs, 788 F.3d 580, 596 (6th Cir. 2015) (Batchelder, C.J., concurring in part) ("For more than four decades, courts have struggled with how to decide Establishment Clause cases, as the governing framework has profoundly changed several times.... This confusion has led our court to opine that the judiciary is confined to 'Establishment Clause purgatory.'") (quoting ACLU v. Mercer Cnty., 432 F.3d 624, 636 (6th Cir. 2005).

[247] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (holding that to survive Establishment Clause scrutiny, a law "must have a secular legislative purpose"); *cf.* Town of Greece v. Galloway, 134 S. Ct. 1811, 1824 (2014) ("Absent a pattern of prayers that over time denigrate, proselytize, *or betray an impermissible government purpose*, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.") (emphasis added); *but see* McCreary Cnty. v. ACLU, 545 U.S. 844, 859 n.10 (2005) ("Establishment Clause doctrine lacks the comfort of categorical absolutes. In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious. No such reasons present themselves here.") (citations omitted).

order is to exclude Muslims from the United States.[248] At least one district court, on the other hand, has agreed with the government's position that EO-2 likely does not violate the Establishment Clause.[249]

Applicability of Establishment Clause Jurisprudence Concerning Matters Unrelated to Immigration

Before considering how the exclusion jurisprudence applies to the constitutional claim against EO-2, one should understand that the Supreme Court could ultimately resolve that claim without applying *Mandel* or considering the immigration context. *Mandel* and *Din* bear upon the Establishment Clause question because they instruct courts to limit the depth of their constitutional inquiry when dealing with executive decisions to exclude aliens.[250] In contrast, the Supreme Court's Establishment Clause jurisprudence concerning government actions unrelated to immigration would appear to allow a much closer level of scrutiny than the exclusion cases.[251] The Establishment Clause jurisprudence has on occasion rejected the government's proffered, secular justifications and invalidated laws or actions based on evidence of other, religiously oriented motives.[252] The plaintiffs in the Travel Ban cases rely heavily on evidence beyond the face of the government's proffered justifications; most notably, they rely on campaign statements as evidence that anti-Muslim animus motivated EO-2.[253] The government, however, has argued throughout the litigation that not even the Establishment Clause cases condone judicial searches for government purpose in campaign discourse.[254] In essence, the government's argument is that EO-2, which does not on its face single out Muslims, survives a stricter level of review than *Mandel* requires.[255] A Supreme Court decision on Establishment Clause principles, without addressing *Mandel*, would arguably comport with the Court's previous efforts to keep its pronouncements as narrow as possible when addressing the outer reaches of the political branches' power to exclude aliens.[256]

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[248] IRAP v. Trump, 857 F.3d 554, 601 (4th Cir. 2017) ("We find that the reasonable observer would likely conclude that EO-2's primary purpose is to exclude persons from the United States on the basis of their religious beliefs.... Accordingly, we hold that the district court did not err in concluding that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim."); IRAP v. Trump,—F. Supp. 3d—, 2017 WL 1018235, at *12 (D. Md. Mar. 16, 2017); Hawaii v. Trump,—F. Supp. 3d—, 2017 WL 1011673, at *13-16 (D. Haw. Mar. 15, 2017).

[249] Sarsour v. Trump,—F. Supp. 3d—, 2017 WL 1113305, at *12 (E.D. Va. Mar. 24, 2017).

[250] *See* Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring).

[251] *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 864-66 (2005); *IRAP*, 857 F.3d at 593 (citing Establishment Clause cases that permit consideration of "text, legislative history, and implementation," as well as "historical context" and "the specific sequence of events" that led to the official act in question).

[252] *McCreary Cnty*., 545 U.S. at 864-66.

[253] Trump v. IRAP, 137 S. Ct. 2080, 2085-86 (2017).

[254] *Id*. at 2086 ("[T]he Government also contends that ... the Fourth Circuit erred by focusing on the President's campaign-trail comments to conclude that § 2(c)—religiously neutral on its face—nonetheless has a principally religious purpose."); *see also* Washington v. Trump, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting from denial of rehearing en banc) (arguing that consideration of campaign discourse to discern government purpose "will chill campaign speech, despite the fact that our most basic free speech principles have their 'fullest and most urgent application precisely to the conduct of campaigns for political office'") (McCutcheon v. Fed. Election Comm'n, 134 S.Ct. 1434, 1441 (2014)) .

[255] Solicitor General Opening Brief, *supra* note 236, at 70 ("Even assuming that domestic Establishment Clause precedent were applicable.... [s]earching for purpose outside the operative terms of government action makes no sense.... ").

[256] *See* Fiallo v. Bell, 430 U.S. 787, 793 n.5 (1977) ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens,

The Establishment Clause Claim Under Exclusion Jurisprudence

The discussion below analyzes the Establishment Clause claim against EO-2 under the Supreme Court's exclusion jurisprudence. There are three primary questions: (1) whether the *Mandel* standard governs the constitutional analysis of EO-2; (2) whether *Mandel*, if it does govern, permits consideration of evidence of government purpose beyond the text of EO-2; and (3) whether extrinsic evidence of anti-Muslim animus, if it can be considered, demonstrates an Establishment Clause violation.

Applicability of Mandel *Test*

The Supreme Court has applied *Mandel*'s "facially legitimate and bona fide" standard—or a version of that standard adapted to the legislative context—to three different types of constitutional claims: free speech (*Mandel*),[257] equal protection (*Fiallo*),[258] and due process (*Din*).[259] The standard thus appears to apply to all constitutional challenges brought by U.S. persons or entities against executive exercise of the exclusion power. Accordingly, the issue of EO-2's constitutionality under the Establishment Clause appears to boil down to whether the government has supplied a "facially legitimate and bona fide" justification for the order.[260]

Agreement as to *Mandel*'s applicability to EO-2 is not, however, universal. At least two counterarguments exist. First, some courts have described *Mandel* as governing only challenges to individual visa denials, not broader executive policy.[261] Dissenting judges have pointed out that this argument may be difficult to square with *Fiallo*, which relied on *Mandel* in upholding a gender-discriminatory immigration statute.[262] Indeed, *Fiallo* described its analytical approach to the statute as an effort to apply something approximating the *Mandel* standard of review to a "broad congressional policy choice."[263]

Another argument for why *Mandel* should not govern the Establishment Clause claim has surfaced in legal commentary. According to some commentators, the Establishment Clause, unlike individual rights such as free speech and equal protection, creates a structural limitation on the scope of government action rather than an individual right against certain forms of government regulation.[264] According to this argument, a religiously discriminatory government

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and there is no occasion to consider in this case whether there may be actions of the Congress with respect to aliens that are so essentially political in character as to be nonjusticiable."); Kleindienst v. Mandel, 408 U.S. 753, 769 (1972) (declining to answer whether a visa denial "for any reason or no reason" would survive First Amendment review).

[257] 408 U.S. at 769-70.

[258] 430 U.S. at 795.

[259] 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring).

[260] *Cf.* Trump v. IRAP, 137 S. Ct. 2080, 2087 (2017) (citing *Mandel* favorably in discussing claims brought by "people or entities in the United States who have relationships with foreign nationals abroad, and whose rights might be affected if those foreign nationals were excluded").

[261] Washington v. Trump, 847 F.3d 1151, 1162 (9th Cir. 2017) ("[T]he *Mandel* standard applies to lawsuits challenging an executive branch official's decision to issue or deny an individual visa ... [E]xercises of policymaking authority at the highest levels of the political branches are plainly not subject to the *Mandel* standard."); IRAP v. Trump,—F. Supp. 3d—, 2017 WL 1018235, at *16 (D. Md. Mar. 16, 2017). (same).

[262] Washington v. Trump, 858 F.3d 1168, 1180 (9th Cir. 2017) (Bybee, J., dissenting from denial of rehearing en banc) ("The [conclusion] that exercises of policymaking authority at the highest levels of the political branches are plainly not subject to the *Mandel* standard is simply irreconcilable with the Supreme Court's holding [in *Fiallo*].")

[263] Fiallo v. Bell, 430 U.S. 787, 795 (1977) ("We can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*, a First Amendment case.").

[264] *See, e.g.*, Michael Dorf, *Standing, Substantive Rights, and Structural Provisions in the Challenge to Muslim Ban*

exclusion policy effects an establishment of religion as much as a parallel domestic policy would, because the identity of the persons harmed by the policy (aliens or citizens) does not alter the constitutional limitation.[265] In other words, by the terms of the argument, it does not matter for Establishment Clause purposes whether the government hangs a sign stating its religious preferences at the border or in the interior—both statements violate the structural rule of religious neutrality. This argument does not find direct support in any Supreme Court cases.[266] But, on the other hand, the Supreme Court has never actually applied *Mandel* to an Establishment Clause claim or otherwise considered the extent to which the Establishment Clause may limit the exclusion power.[267] If the Court were inclined to apply closer constitutional scrutiny to EO-2 than it applied in *Mandel*, *Din*, and *Fiallo*, the arguably structural nature of the Establishment Clause guarantee could serve as a basis for distinguishing those cases. Such a distinction would arguably follow the mold of *Morales-Santana*, which also relied on a distinction not previously considered salient (derivative citizenship statutes versus immigration statutes) in determining not to apply *Fiallo*.[268]

The Scope of Review of EO-2's Purpose Under Mandel

If *Mandel* does govern the Establishment Clause claim against EO-2, the principal question becomes whether it permits consideration of evidence of the President's purpose beyond the face of EO-2 itself. Most reviewing courts, including those that have ruled that EO-2 likely violates the Establishment Clause, have concluded that the order does not have an expressly discriminatory purpose.[269] The order purports to exclude aliens from countries that are "state sponsor[s] of terrorism, ha[ve] been significantly compromised by terrorist organizations, or contain[] active combat zones."[270] The order does not, according to most courts, purport to exclude Muslims.[271] But the plaintiffs assert that extrinsic evidence shows that during the

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2.0, DORF ON LAW (Mar. 7, 2017, 7:58 PM); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 2-3 (1998) ("For government to avoid violating a right is a matter of constitutional duty owed to each individual within its jurisdiction. On the other hand, for government to avoid exceeding a structural restraint is a matter of limiting its activities and laws to the scope of its powers.").

[265] *See* Corey Brettschneider, *The Fourth Circuit & Animus Under Mandel*, TAKE CARE (May 25, 2017) ("[T]he [Establishment] Clause is fundamentally about what constitutes illegitimate uses of government power, not about particular rights holders.").

[266] *See* IRAP v. Trump, 857 F.3d 554, 646 (4th Cir. 2017) (Niemeyer, J., dissenting) ("[Plaintiffs] argue that the holding of *Mandel* does not apply to claims under the Establishment Clause, but they are unable to point to any case in which the Supreme Court has ever suggested the existence of such a limitation.... ").

[267] *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), might be the closest example of a case addressing the interplay between the First Amendment religion clauses and the exclusion power. There, the Court appeared to draw from the Free Exercise Clause in interpreting a statute that prohibited the importation of foreign labor to contain an implicit exception for the hiring of foreign religious ministers. *Id*. at 465 ("[N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."). The case is more commonly associated with an outdated doctrine of statutory interpretation than with immigration law. *See* Lexington Ins. Co. v. Precision Drilling Co., L.P., 830 F.3d 1219, 1222 (10th Cir. 2016) (citing *Holy Trinity Church* for proposition that "at one time some thought a court could override even unambiguous statutory texts ... in order to avoid putatively absurd consequences in their application.").

[268] *See* 137 S. Ct. 1678, 1693-94 (2017); *supra* "Implications for the Scope of Congressional Power," at notes 118-119.

[269] *See IRAP*, 857 F.3d at 595; Hawaii v. Trump, 241 F. Supp. 3d 1119, 1134 (D. Haw. 2017) ("It is undisputed that the Executive Order does not facially discriminate for or against any particular religion, or for or against religion versus non-religion.").

[270] EO-2 § 1(d).

[271] *See IRAP*, 857 F.3d at 595. The Fourth Circuit majority accepted EO-2's facial neutrality for purposes of the Establishment Clause analysis. *Id*. Others have argued, however, that the order's inclusion of only Muslim-majority

presidential campaign, then-candidate Donald Trump considered excluding aliens based on their religion,[272] and the courts that have determined that EO-2 likely violates the Establishment Clause have relied heavily upon this extrinsic evidence.[273] The strength of the Establishment Clause claim under *Mandel*, therefore, appears to turn upon the scope of reviewable evidence.

On the one hand, *Mandel* and *Din* may be read to provide much support for those who argue that the Court should limit its review to the face of EO-2. *Mandel* itself instructed courts not to "look behind" the Executive's stated reason for excluding an alien,[274] and it did so in the face of a government justification that the petitioners argued included indications of pretext.[275] Just as the Court declined to scrutinize the Attorney General's explanation that he had denied Mandel's visa because of his prior visa abuse and not because of his political views, the argument goes, so too should the Court decline to probe the express purpose of EO-2.[276] Similarly, in his *Din* opinion, Justice Kennedy required nothing more of the government than a statutory citation to sustain a visa denial under a terrorism-related ineligibility.[277] Justice Kennedy did not examine the government's evidentiary basis for applying the statute.[278] Because EO-2 likewise cites a statutory source of exclusion power—INA § 212(f)—the government and some jurists contend that EO-2, too, should be sustained without further inquiry against the Establishment Clause challenge.[279]

The counterargument, and the analysis that guided the Fourth Circuit decision, rests on the "bona fide" prong of the *Mandel* test. Because the Fourth Circuit concluded that ample evidence suggests that EO-2's stated purpose is a bad-faith pretext for religious discrimination, the court reasoned that it need not accept that stated purpose.[280] Under this reasoning, upon such an affirmative showing of bad faith, courts must cast aside the deferential *Mandel* test and apply the same level of constitutional scrutiny they would apply outside of the immigration context.[281] For an Establishment Clause claim such as the one asserted against EO-2, such standard scrutiny

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countries in the § 2(c) entry restriction, along with other requirements in the order, show facial discrimination against Muslims. *See id*. at 635 (Thacker, J., concurring) (arguing that EO-2's requirement that agencies report on "honor killings" is premised upon a "stereotype about Muslims ... [that has] no connection whatsoever to the stated purpose of the Order").

[272] *Id*. at 594 ("For instance, on December 7, 2015, Trump posted on his campaign website a 'Statement on Preventing Muslim Immigration,' in which he 'call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on '.... ") (alterations in original).

[273] *Id*; *Hawaii*, 241 F. Supp. 3d at 1136.

[274] Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

[275] *Id*. at 778 ("There is no basis in the present record for concluding that Mandel's behavior on his previous visit was a 'flagrant abuse'-or even willful or knowing departure-from visa restrictions. For good reason, the Government in this litigation has never relied on the Attorney General's reason to justify Mandel's exclusion.").

[276] *See IRAP*, 857 F.3d at 648 (Niemeyer, J., dissenting) ("*Mandel*, *Fiallo*, and *Din* have for decades been entirely clear that courts are not free to look behind these sorts of exercises of executive discretion in search of circumstantial evidence of alleged bad faith.").

[277] 135 S. Ct. 2128, 2140-41.

[278] *Id*.

[279] *IRAP*, 857 F.3d at 647 (Niemeyer, J., dissenting) ("Nowhere did the *Din* Court authorize going behind the government's notice for the purpose of showing bad faith."); Solicitor General Opening Brief, *supra* note 236, at 66-67.

[280] *IRAP*, 857 F.3d at 591.

[281] *Id*. ("Where plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith, we understand *Mandel*, as construed by Justice Kennedy in his controlling concurrence in *Din*, to require that we step away from our deferential posture and look behind the stated reason for the challenged action."); *id*. at 592 ("Because Plaintiffs have made a substantial and affirmative showing that the government's national security purpose was proffered in bad faith, we find it appropriate to apply our longstanding Establishment Clause doctrine.").

encompasses consideration of the "historical context" and the "specific sequence of events" that led to the order's passage.[282] The Fourth Circuit held that those categories of information include statements about a potential "Muslim Ban" that then-candidate Donald Trump made during the 2016 campaign.[283]

Dissenting judges and the government have criticized the Fourth Circuit's approach to the "bona fide" prong as circular, because it relies upon evidence beyond the face of EO-2 to make a determination about whether to consider evidence beyond the face of EO-2.[284] The Fourth Circuit majority opinion that employs this analysis does, to some extent, give the impression of addressing the same question twice.[285] Nonetheless, the analysis finds some support in Justice Kennedy's statement in *Din* that courts should not look beyond the face of the government's proffer "absent an affirmative showing of bad faith."[286] Justice Kennedy did not have occasion to apply that statement of law to fact, and his opinion in *Din* garnered only two votes.[287] His choice of language, however, might be construed to contemplate judicial consideration of a plaintiff's proffer of extrinsic bad faith evidence, and the Fourth Circuit in fact construed the language this way.[288]

On balance, consideration of campaign statements and other extrinsic evidence of EO-2's purpose would certainly exceed the scope of the review that the Supreme Court conducted in *Mandel* and *Din*. In those cases, the Court did not probe the government's stated justifications for excluding the aliens in question. The allegations of religious animus in the Travel Ban cases arguably present unique facts, however, and the Supreme Court has yet to clarify what the "bona fide" prong of the *Mandel* test means in application. If the Court reaches the merits and applies *Mandel*, the scope of its review will probably depend on whether it determines (1) that a bad faith exception exists to *Mandel*'s rule against looking behind the government's justification for excluding aliens; and (2) if so, that the Travel Ban case facts trigger the exception.

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[282] McCreary Cnty. v. ACLU, 545 U.S. 844, 864-66 (2005).

[283] *IRAP*, 857 F.3d at 594-95 (considering Trump campaign statements, including a December 7, 2015, post on the campaign website that called for "a total and complete shutdown of Muslims entering the United States).

[284] *Cf. id*. at 648 (Niemeyer, J., dissenting) ("In looking behind the face of the government's action for facts to show the alleged bad faith, rather than looking for bad faith on the face of the executive action itself, the majority grants itself the power to conduct an extra-textual search for evidence suggesting bad faith, which is exactly what three Supreme Court opinions have prohibited."); Solicitor General Opening Brief, *supra* note 236, at 69 (arguing that the Fourth Circuit's application of the bona fide prong "defeats *Mandel*'s central point that the exclusion of aliens abroad, over which the political branches have broad authority, calls for especially deferential review.").

[285] *Compare IRAP*, 857 F.3d at 591 (considering campaign statements "expressing animus toward the Islamic faith" to determine scope of review under *Mandel*); *with id*. at 594 (considering "campaign statements reveal[ing] ... anti-Muslim sentiment" to determine EO-2's purpose under the Establishment Clause test).

[286] 135 S. Ct. 2128, 2141 (2015).

[287] *Id*. at 2139, 2140-41 (Kennedy, J., concurring and joined by Alito, J.). Additional authority exists for the bad faith exception, however: before *Din*, at least two federal appellate courts had already recognized it. *See* American Academy of Religion v. Napolitano, 573 F.3d 115, 126 (2d Cir. 2009) ("We also conclude, in agreement with the Ninth Circuit, that the absence of an allegation that the consular officer acted in bad faith satisfies the requirement that the reason is bona fide.") (citing Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008)).

[288] *See IRAP*, 857 F.3d at 591 ("Where plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith, we understand *Mandel*, as construed by Justice Kennedy in his controlling concurrence in *Din*, to require that we step away from our deferential posture and look behind the stated reason for the challenged action.").

The Constitutional Significance of Alleged Religious Animus

In the Travel Ban cases, the government does not argue that the President has authority to exclude aliens based on their religion.[289] Perhaps for this reason, those reviewing courts that have deemed it appropriate to consider campaign statements and other extrinsic evidence of EO-2's allegedly anti-Muslim purpose have generally held that the order violates the Establishment Clause.[290] In the only example of a case that considered extrinsic evidence but ruled in the government's favor, a federal district court held that the extrinsic evidence did not suffice to show discriminatory purpose.[291] Even there, however, the district court seemed to assume that EO-2 would violate the Establishment Clause if it had a religiously discriminatory purpose.[292]

This litigation posture—the absence of any contention that the President may exclude aliens based on religion—creates an interesting contrast with *Mandel*. There, the unchallenged assumption cut the other way: that Congress had the power to exclude aliens based on their political belief.[293] The executive branch argued that it, too, could exercise congressionally delegated exclusion authority to deny entry based on political belief or for "any reason or no reason."[294] The *Mandel* Court adopted the "facially legitimate and bona fide" standard to avoid addressing this contention.[295] Thus, *Mandel* and the Travel Ban cases start from inverted executive branch contentions about the scope of its exclusion power. In *Mandel*, the executive branch contended that it possessed, through legislative delegation, Congress's uncontested (in that case) power to exclude aliens based on political belief.[296] In the Travel Ban cases, in contrast, the executive branch seems to tacitly concede that it does not have power to exclude based on religion.[297] The upshot of both cases might remain the same, however. The Supreme Court likely will not address the underlying question about the outer limits of the executive power. In *Mandel*, the Court used the "facially legitimate and bona fide" standard to avoid answering whether the Executive could deny waivers based on political belief.[298] In the Travel Ban cases, the Supreme Court probably will not answer directly whether the executive branch can exclude aliens based on religion, because the executive branch does not argue this point.[299]

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[289] *See* Solicitor General Opening Brief, *supra* note 236, at 62-69.

[290] *See IRAP*, 857 F.3d at 601 n.22 ("There is simply too much evidence that EO-2 was motivated by religious animus for it to survive any measure of constitutional review.").

[291] Sarsour v. Trump,—F. Supp. 3d—, 2017 WL 1113305, at *12 (E.D. Va. Mar. 24, 2017) ("[T]he substantive revisions reflected in EO–2 have reduced the probative value of the President's statements [concerning a 'Muslim Ban'] to the point that it is no longer likely that Plaintiffs can succeed on their claim that the predominate purpose of EO–2 is to discriminate against Muslims based on their religion and that EO–2 is a pretext or a sham for that purpose.").

[292] *Id*.

[293] Kleindienst v. Mandel, 408 U.S. 753, 767 (1972).

[294] *Id*. at 769.

[295] *Id*. ("Appellees [argue] ... that the First Amendment claim should prevail, at least where no justification is advanced for denial of a waiver. The Government would have us reach this question, urging a broad decision ... that any reason or no reason may be given.... This record, however, does not require that we do so, for the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver. And that reason was facially legitimate and bona fide.").

[296] *See id*.

[297] Solicitor General Opening Brief, *supra* note 236, at 62 ("This Court's decisions ... forbid invalidating the President's religion-neutral action.... "); *id*. at 22 ("The Order's text and operation are entirely religion-neutral. The Fourth Circuit erred by discounting those objective indicia.... ").

[298] *Mandel*, 408 U.S. at 769.

[299] Solicitor General Opening Brief, *supra* note 236, at 22, 62.

Statutory Arguments Against EO-2

The statutory arguments against EO-2 boil down to the contention that the entry restrictions set forth in the order exceed the scope of the President's authority to exclude aliens under the INA. On this statutory theory, the Ninth Circuit concluded that EO-2 is likely unlawful,[300] as did three concurring judges in the Fourth Circuit.[301] This section briefly summarizes the three principal statutory arguments against EO-2 and how lower courts have addressed those arguments. The section then analyzes an issue that the Supreme Court might confront in addressing the statutory challenges: identifying the appropriate standard of review.

A preliminary point: the statutory and constitutional claims against EO-2 may not operate entirely independently of each other. Through the canon of constitutional avoidance, the Supreme Court's approach to the Establishment Clause claim raised against EO-2 may influence the Court's resolution of the statutory claims.[302] If the Supreme Court entertains serious doubts about EO-2's constitutionality, the Court might assess whether EO-2 violates the underlying statutes under any "fairly possible" interpretation before striking the order down as a violation of the Establishment Clause.[303] The Ninth Circuit appeared to take this approach, although it did not invoke the avoidance canon clearly.[304] One of the Fourth Circuit concurring opinions, in contrast, expressly framed its statutory analysis as a method for avoiding a serious Establishment Clause question.[305]

Summary of Three Principal Statutory Arguments

There are three principal arguments raised in the Travel Ban litigation that EO-2 exceeds the scope of the President's statutory authority:

1. The President did not properly invoke his authority under INA § 212(f). That provision gives the President power to exclude "any class of aliens," but only if he finds that the entry of such aliens "would be detrimental to the interests of the

[300] Hawaii v. Trump, 859 F.3d 741, 776 (9th Cir. 2017) ("The actions taken in Sections 2 and 6 [of EO-2] require the President first to make sufficient findings that the entry of nationals from the six designated countries and the entry of all refugees would be detrimental to the interests of the United States. We conclude that the President did not satisfy this precondition before exercising his delegated authority.").

[301] IRAP v. Trump, 857 F.3d 554, 606-39 (4th Cir. 2017) (concurring opinions of Keenan, Wynn, and Thacker).

[302] *See* "Statutory Challenges to Executive Decisions to Exclude Aliens," at note 142.

[303] *See* Zadvydas v. Davis, 533 U.S. 678, 689 (2001).

[304] *Hawaii*, 859 F.3d at 761 (criticizing district court for deciding the "important and controversial" Establishment Clause question before the statutory question, and noting "the Supreme Court's admonition that 'courts should be extremely careful not to issue unnecessary constitutional rulings,' '[p]articularly where, as here, a case implicates the fundamental relationship between the Branches'") (quoting *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989)). The opinion does not actually mention the avoidance canon or make an explicit finding that EO-2 raises a serious constitutional problem, which courts invoking the doctrine typically do. *See Zadvydas*, 533 U.S. at 690 (explaining that the government's interpretation of the statute at issue "would raise a serious constitutional problem").

[305] *IRAP*, 857 F.3d at 615 (Wynn, J., concurring).

United States."[306] EO-2, it is argued, does not evince an adequate finding that the entry of the aliens it seeks to bar would be "detrimental."[307]

2. EO-2's exclusion of citizens of the six listed countries violates INA § 202(a)(1)(A), which prohibits discrimination based on nationality in the issuance of immigrant visas.[308]
3. EO-2's reduction in the FY2017 refugee cap from 110,000 to 50,000 refugees violates INA § 207, which establishes specific procedures—including consultation with Congress—for establishing the annual refugee cap.[309]

Of the three arguments, only the first applies to the full scope of EO-2's entry restrictions. The basis of the argument is that INA § 212(f) contains a prerequisite: the President must find that the entry of a class of aliens would be "detrimental" to invoke the exclusion authority that the statute delegates to him.[310] EO-2 attempts to satisfy the prerequisite with findings about the presence of terrorist organizations and conditions of instability within the six restricted countries.[311] The order concludes that such conditions within the identified countries increase the likelihood that "terrorist operatives or sympathizers" could enter the United States from those locations.[312] The order also provides examples of persons implicated in terrorism-related crimes who were

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[306] The statute reads in full:

> **(f) Suspension of entry or imposition of restrictions by President**
>
> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

8 U.S.C. § 1182(f) (2013).

[307] *Hawaii*, 859 F.3d at 774 ("[T]he Order does not offer a sufficient justification to suspend the entry of more than 180 million people on the basis of nationality.... [Section 212(f)] requires that the President exercise his authority only after meeting the precondition of finding that entry of an alien or class of aliens *would be* detrimental to the interests of the United States. Here, the President has not done so.).

[308] 8 U.S.C. § 1152(a)(1)(A) ("[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.").

[309] *Id.* § 1157; *see Hawaii*, 859 F.3d at 781 (holding that EO-2 does not comply with INA 207's establishment of "specific actions the President must take before setting the number of refugees who may be admitted as justified by humanitarian concerns or as otherwise in the national interest").

[310] *Hawaii*, 859 F.3d at 770. As mentioned above, *supra* note 162, EO-2 also cites as a second source of authority INA § 215(a), which makes it unlawful for an alien to enter the country "except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. § 1185(a)(1); *see* EO-2 § 2(c) (citing INA § 212(f) and § 215(a)). The Ninth Circuit determined, however, that § 215(a) does not confer any exclusion authority independent of § 212(f). *Hawaii*, 859 F.3d at 770 n.10 ("Because ... [§ 215(a)] does not grant the President a meaningfully different authority than § [212](f) ... the 'reasonable rules, regulations, and orders' the President prescribes would need to, at a minimum, align with the President's authority under § [212](f).") (quoting INA § 215(a)). The government does not substantially dispute this conclusion. Solicitor General Opening Brief, *supra* note 236, at 40 (arguing that § 215(a)'s "additional, express grant of authority to the President confirms his expansive discretion" before proceeding to analyze the propriety of the President's "detrimental" finding under § 212(f)).

[311] EO-2 § 1(e).

[312] *Id.* § 1(d); *see also id.* § 1(f) ("[T]he risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high.").

admitted to the United States as refugees.[313] The Ninth Circuit, and some of the Fourth Circuit concurring opinions, rejected these justifications as inadequate. The circuit courts concluded that EO-2 does not demonstrate a link between an individual alien's nationality and the alien's propensity to engage in terrorism,[314] and that the order does not explain why current visa and refugee screening procedures do not suffice to address the risk of terrorist entry.[315] The government, for its part, argues that the Ninth Circuit's rejection of the President's articulated justifications for the EO-2 entry restrictions showed an improper failure to defer to the President's national security determinations.[316]

The second and third statutory arguments are more limited. The second argument, concerning INA § 202(a)(1)(A), only applies to citizens of the six listed countries who seek entry as immigrants rather than nonimmigrants (i.e., aliens authorized to permanently reside in the United States versus those permitted to remain in the country on a temporary basis).[317] In other words, the argument is that EO-2 violates the INA by denying entry based on nationality to prospective immigrants from the six restricted countries, and that argument would not impact the lawfulness of EO-2's applicability to prospective *nonimmigrants* from those countries.[318] The third argument, concerning the refugee admissions procedures in INA § 207, applies only to EO-2's reduction in refugee admissions.[319]

The two arguments proceed on the premise that specific provisions in the INA limit the scope of the President's exclusion authority under § 212(f), even though § 212(f) does not impose such limitations itself. The Ninth Circuit agreed with this premise, concluding that both § 202(a)(1)(A) and § 207 limit the President's § 212(f) authority—and that EO-2 violates those limitations—because the former two statutes were enacted after § 212(f) and are more specific than § 212(f).[320] Other judges have rejected the § 202(a)(1)(A) argument on the reasoning that its nondiscrimination bar applies only to immigrant visa decisions, not entry restrictions.[321] Put

[313] *Id*. § 1(h).

[314] *Hawaii*, 859 F.3d at 773; IRAP v. Trump, 857 F.3d 554, 610 (4th Cir. 2017) (Keenan, J., concurring) ("[T]he Order [does not] articulate a relationship between the unstable conditions in these countries and any supposed propensity of the nationals of those countries to commit terrorist acts or otherwise to endanger the national security of the United States.).

[315] *Hawaii*, 859 F.3d at 773; *IRAP*, 857 F.3d at 611 (Keenan, J., concurring).

[316] Solicitor General Opening Brief, *supra* note 236, at 48 ("The President was entitled to assess the [national security] situation and reach a different conclusion than the court of appeals or his predecessors. The Ninth Circuit's decision, in contrast, subjugates the Executive's national-security judgments to that of courts.... ").

[317] *See IRAP*, 857 F.3d at 581 (noting that statutory claim based on INA § 202(a)(1)(A) only affects the issuance of immigrant visas); 8 U.S.C. § 1101(a)(15) (defining "nonimmigrant" to mean an alien who falls within an enumerated category of temporary admission and defining "immigrant" to mean all other aliens). One Fourth Circuit concurring opinion connected the first and second statutory arguments by drawing upon § 202(a)(1)(A) to support the conclusion that the President exceeded the scope of his § 212(f) authority, in that § 202(a)(1)(A) serves to indicate that the INA in general does not permit the President to discriminate by nationality when exercising authority to exclude classes of aliens under § 212(f). *See IRAP*, 857 F.3d at 625 (Wynn, J., concurring) ("Interpreting Section 1182(f) to allow the President to suspend the entry of aliens based solely on their race, nationality, or other immutable characteristics also would conflict with 8 U.S.C. § 1152(a).").

[318] *See IRAP*, 857 F.3d at 580-81.

[319] *See Hawaii*, 859 F.3d at 781.

[320] *Id*. at 778 ("[Section] 1152(a)(1)(A) was enacted in 1965, after § 1182(f) was enacted in 1952. Section 1152(a)(1)(A) is also more specific, and sets a limitation on the President's broad authority to exclude aliens—he may do so, but not in a way that discriminates based on nationality."); *id*. at 780 ("[Section] 1182(f) was adopted in 1952, and § 1157 was adopted in 1980, indicating that this subsequent statute shapes the scope of the President's authority.... Section 1157 provides a very specific process for "appropriate consultation" that the President must follow.").

[321] *IRAP*, 857 F.3d at 608 (Keenan, J., concurring) ("[T]he plain language of Section 1152(a)(1)(A) addresses an alien's

differently, these judges have reasoned that EO-2's denial of entry to immigrants from the six restricted countries based on their nationality does not run afoul of § 202(a)(1)(A)'s prohibition of the denial of *visas* based on nationality.[322] As for the § 207 argument concerning refugee admissions, the Ninth Circuit's agreement with the argument marks the only judicial consideration of it thus far.[323] In response to both the § 202(a)(1)(A) and the § 207 arguments, the government contends primarily that § 212(f) can and should be interpreted to harmonize with the other two statutes, because § 202(a)(1)(A) does not restrict denials of entry[324] and the § 207 procedures for setting the annual refugee cap do not restrict the President's ability to limit (rather than expand) refugee admissions mid-year.[325]

Standard of Review of Statutory Claims Against EO-2

The statutory arguments against EO-2 raise an unresolved question: should the courts defer to the President's evidentiary basis for invoking his exclusion authority under INA § 212(f)? If so, what standard of deference should apply? For the Establishment Clause claims, these questions have reasonably clear answers under existing case law. *Mandel* and *Din* establish that the "facially legitimate and bona fide" standard of review governs constitutional challenges to an alien's exclusion.[326] In contrast, as noted above, the Supreme Court has never explained what standard of review—*Mandel* or something else—applies to a U.S. person or entity's claim that the exclusion of an alien violates a statute.[327]

In reaching its determination that EO-2 likely violates the INA, the Ninth Circuit concluded that *Mandel* did not govern its analysis of the statutory claims against the order.[328] The conclusion proved significant, as it led the court to apply an exacting standard of review to the government's justifications.[329] The Ninth Circuit determined that EO-2 does not "bridge the gap" between the country conditions it describes (terrorist activity and instability) and the individual aliens from those countries that the order excludes.[330] In other words, according to the Ninth Circuit, the order's use of a broad classification (nationality) to exclude aliens does not match the justification

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ability to obtain an immigrant visa. Section 1182(f), on the other hand, explicitly addresses an alien's ability to *enter* the United States, and makes no reference to the issuance of visas.") (emphasis in original); *contra Hawaii*, 859 F.3d at 776-77 ("EO2's suspension of entry on the basis of nationality, however, in substance operates as a ban on visa issuance on the basis of nationality.... We cannot blind ourselves to the fact that, for nationals of the six designated countries, EO2 is effectively a ban on the issuance of immigrant visas. If allowed to stand, EO2 would bar issuance of visas based on nationality in violation of § 1152(a)(1)(A).").

[322] *See IRAP*, 857 F.3d at 608.

[323] *See Hawaii*, 859 F.3d at 780.

[324] Solicitor General Opening Brief, *supra* note 236, at 51(citing Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976) ("When two statutes are capable of co-existence, it is the duty of the courts ... to regard each as effective.")).

[325] *See id*. at 60.

[326] *See* Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring).

[327] *See supra* "Statutory Challenges to Executive Decisions to Exclude Aliens."

[328] *Hawaii*, 859 F.3d at 769 n.9 ("Because [the claim that EO-2 violates § 212(f)] does not look at whether 'the Executive exercises this [delegated and conditional exercise of] power *negatively*,' *Mandel*, 408 U.S. at 770, 92 S.Ct. 2576 (emphasis added), nor involves a constitutional challenge by a citizen to a visa denial on the basis of congressionally enumerated standards, *id.* at 769–70, 92 S.Ct. 2576, but rather looks at whether the President exceeded the scope of his delegated authority, we do not apply *Mandel*'s 'facially legitimate and bona fide reason,' *id*., standard. *See Sale*, 509 U.S. at 166–77, 113 S.Ct. 2549 (reviewing whether the executive order complied with the INA without reference to *Mandel*'s standard).") (all but first alteration in original). *Sale* is discussed *supra* at note 135.

[329] *See Hawaii*, 859 F.3d at 769 n.9, 773.

[330] *Id*. at 773.

(to prevent terrorist acts) with sufficient precision.[331] This analysis resembles what is known as strict judicial scrutiny in constitutional jurisprudence.[332] It demands much more of the government's justification for its measures than did the level of deference the Supreme Court applied when considering constitutional claims in *Mandel* and *Din*.[333]

A reviewing court might identify multiple factors to explain why statutory challenges to an alien's exclusion should draw closer scrutiny of government justifications than corresponding constitutional challenges. Perhaps the heightened scrutiny of statutory claims results from the application of constitutional avoidance, which a deferential level of statutory review could hamper.[334] Or, as the Ninth Circuit proposed, perhaps heightened scrutiny should apply in situations where the Executive affirmatively invokes statutory authority to exclude otherwise eligible aliens, as President Trump did in EO-2, as opposed to situations where the Executive declines to invoke statutory waiver authority to admit ineligible aliens, as the Attorney General did in *Mandel*.[335] The government, for its part, argues that the national security concerns underlying EO-2 require judicial deference to the President's factual basis for invoking § 212(f).[336] Whatever the merit of these or other arguments, the Supreme Court has yet to endorse any of them. The appropriate standard of review for a statutory argument against exclusion remains an open issue.

Conclusion

The Travel Ban cases implicate the nucleus of the political branches' immigration power: the power to deny entry to aliens abroad.[337] The cases against EO-2, unlike the first wave of litigation

[331] *See id*.

[332] *See* Johnson v. California, 543 U.S. 499, 505 (2005) ("Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests.").

[333] *Compare* Kerry v. Din, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (concluding that the government "was not required ... to point to a more specific provision within § 1182(a)(3)(B)" even though that provision "covers a broad range of conduct"); *with Hawaii*, 859 F.3d at 772-73 ("Indeed, [EO-2's] use of nationality as the sole basis for suspending entry [under § 212(f)] means that nationals without significant ties to the six designated countries, such as those who left as children or those whose nationality is based on parentage alone, should be suspended from entry.").

[334] In a related context, courts do not apply the doctrine of administrative deference when construing statutes to avoid a serious constitutional question posed by an agency's statutory interpretation. Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) ("We ... read the statute as written to avoid [] significant constitutional and federalism questions ... and therefore reject the request for administrative deference.); *see also*, Jonathan D. Urick, Note, Chevron *and Constitutional Doubt*, 99 VA. L. REV. 375, 375-76 (2013) (explaining that the Supreme Court has resolved the conflict between administrative deference and constitutional avoidance "in favor of the avoidance canon"). On the other hand, the "facially legitimate and bona fide" test itself serves a constitutional avoidance function: the Court adopted it to avoid the question whether the government could exclude Ernest Mandel for "any reason or no reason." Kleindienst v. Mandel, 408 U.S. 753, 769 (1972). To avoid a constitutional question that *Mandel* would control, one could argue, is to choose an avoidance rule that disfavors the government over one that favors it. *Cf id*. ("This record ... does not require that we [determine whether the government may refuse a waiver without explanation], for the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver. And that reason was facially legitimate and bona fide.").

[335] *See Hawaii*, 859 F.3d at 769 n.9.

[336] Solicitor General Opening Brief, *supra* note 236, at 50 ("'[W]hen it comes to collecting evidence and drawing factual inferences' in the national-security context, 'the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate.'") (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2010)). The Supreme Court has mentioned the national security issues that inhere in the exercise of the exclusion power in its applications of the *Mandel* test. *See Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring); *Mandel*, 408 U.S. at 765, 769.

[337] *See supra* note 7.

challenging EO-1, concern only the exclusion of aliens physically outside the United States. The cases do not involve aliens at the border or aliens who have entered the country physically.[338] Accordingly, the cases isolate the issue of the scope of the Executive's power to deny entry from the issue of what measures the Executive may lawfully take to carry out the exclusion of an alien already on American soil. The cases, in other words, concern a pure exclusion issue, and they could thus set the stage for a landmark statement from the Supreme Court about the political branches' plenary immigration power.

If the plaintiffs win on the merits of their Establishment Clause claim, and to a lesser extent on their statutory claims, their victory would represent a judicial check on executive exercise of the exclusion power unlike any in the Supreme Court's history. That check could come in the form of a distinction between legislative and executive power—i.e., that EO-2 is unlawful because it contravenes the INA—or as a clear holding that U.S. citizens' Establishment Clause rights limit the exclusion of nonresident aliens. A victory for the plaintiffs in the latter form would exceed prior Supreme Court limitations of the plenary power doctrine.[339] On the other hand, if the government wins on the merits under application of *Mandel* deference, the decision (depending on its reasoning) could stand as a reaffirmation of the exceptional extent of the Executive's power to deny entry to nonresident aliens.

A third outcome, however, seems equally viable: that the Supreme Court will not actually decide whether EO-2 exceeds the scope of the President's statutory or constitutional power. The Court could dismiss the government's appeals in the Travel Ban cases as moot[340] or reject the plaintiffs' claims for lack of standing rather than decide them on the merits;[341] or, maybe most in line with its approach in prior exclusion cases, the Court could decide the merits of the plaintiffs' claims in a way that does not require it to define the boundaries of the Executive's power, such as by rejecting the claims under domestic Establishment Clause jurisprudence.[342] In prior exclusion cases concerning the rights of U.S. citizens, the Court has preferred such narrow grounds of decision that do not require a defining statement about if and where the plenary power ends.[343] If the Court adopts this approach or does not decide for other reasons the merits of the Travel Ban cases, the June 26 per curiam decision limiting the Executive's power to exclude aliens with "bona fide relationships" to U.S. persons or entities will remain in the case reporters as a unique example of judicial involvement in exclusion decisions.[344] But because that decision avoids any discussion of the merits of the claims against EO-2, it probably will not itself change how courts review U.S. citizen challenges to the exclusion of nonresident aliens abroad in the future.[345]

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[338] *See supra* notes 228-229 (EO-2 does not apply to aliens within the United States or to aliens with valid visas).

[339] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (reasoning that a determination that the Constitution circumscribes indefinite detention of aliens in removal proceedings does not conflict with prior plenary power cases, in part because "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law").

[340] *See supra* note 177.

[341] *See supra* notes 235 - 240.

[342] *See supra* "Applicability of Establishment Clause Jurisprudence Concerning Matters Unrelated to Immigration."

[343] *See* Fiallo v. Bell, 430 U.S. 787, 794 n.5 (1977) ("[T]here is no occasion to consider in this case whether there may be actions of the Congress with respect to aliens that are so essentially political in character as to be nonjusticiable."); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) ("What First Amendment or other grounds may be available for attacking exercise of discretion [to exclude] for which no justification whatsoever is advanced is a question we neither address or decide in this case.").

[344] Trump v. IRAP, 137 S. Ct. 2080, 2084-85 (2017).

[345] *Id*. at 2087 (considering only equitable factors).

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