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# The Power of Congress and the Executive to Exclude Aliens: Constitutional Principles

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SUMMARY

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**Ben Harrington**
Legislative Attorney

# The Power of Congress and the Executive to Exclude Aliens: Constitutional Principles

Supreme Court precedent establishes 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 non-U.S. nationals (aliens) may enter the United States and under what conditions. The Court has also established that the executive branch, when enforcing the laws concerning alien entry, has broad authority to do so mostly free from judicial oversight.

Two principles frame the scope of the political branches' power to exclude aliens. First, nonresident aliens abroad generally cannot challenge exclusion decisions because they do not have constitutional rights with respect to entry and cannot obtain judicial review of the statutory basis for their exclusion unless Congress provides otherwise. Second, even when the exclusion of a nonresident alien burdens the constitutional rights of a U.S. citizen, the government need only satisfy a "highly constrained" judicial inquiry to prevail against the citizen's constitutional challenge.

The Supreme Court developed the first principle—that nonresident aliens generally cannot challenge exclusion decisions—in a line of late 19th to mid-20th century exclusion cases. These cases culminated in the 1950 decision *United States* ex rel. *Knauff v. Shaughnessy*, in which the Court declared that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." This rule forms the basis of the doctrine of consular nonreviewability, which in almost all circumstances bars nonresident aliens abroad from challenging visa denials by U.S. consular officers. But the rule set forth in *Knauff* applies with less force to decisions to exclude aliens arriving at the border. Aliens at the cusp of entry into the United States may be detained by immigration authorities pending their removal. Their cases can trigger habeas corpus proceedings for that reason and may also implicate complex statutory frameworks on judicial review.

The second principle, concerning exclusion decisions that burden the rights of U.S. citizens, has been the primary subject of the Supreme Court's modern exclusion jurisprudence. In four cases since 1972—*Kleindienst v. Mandel*, *Fiallo v. Bell*, the splintered *Kerry v. Din*, and *Trump v. Hawaii*—the Court has recognized that U.S. citizens who claim that the exclusion of aliens violated the citizens' constitutional rights may obtain judicial review of the exclusion decisions. Yet the standard of review that the Court applies to such claims is so deferential to the government as to all but foreclose U.S. citizens' constitutional challenges. In the most recent case, *Trump v. Hawaii*, the Court applied a "highly constrained" level of review to uphold a broad executive exclusion policy notwithstanding some evidence that the purpose of the policy was to exclude Muslims.

The *Mandel* line of cases reaffirms the unique scope of Congress's power to legislate for the exclusion of aliens. Exclusion statutes draw minimal judicial scrutiny even when they classify people by disfavored criteria, such as gender or legitimacy. With respect to the executive power, the cases reaffirm generally that, in the absence of statutory provisions to the contrary, courts play almost no role in overseeing the application of admission and exclusion laws to nonresident aliens abroad. However, the cases leave some questions about executive exclusion power unresolved, including whether the Executive has inherent, constitutional power to exclude aliens and whether U.S. citizens may bring statutory challenges against executive decisions to exclude aliens abroad.

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Under long-standing Supreme Court precedent, Congress has "plenary power" to regulate immigration.[1] This power, according to the Court, is the most complete that Congress possesses.[2] It allows Congress to make laws concerning non-U.S. nationals (aliens)[3] 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.[7] The Court has upheld or shown approval of laws excluding

[1] Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) ("The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'") (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.").

[2] 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.").

[3] *See* 8 U.S.C. § 1101(a)(3) ("The term 'alien' means any person not a citizen or national of the United States."); *cf.* Trump v. Hawaii, 138 S. Ct. 2392, 2443 n.7 (2018) (Sotomayor, J., dissenting) ("It is important to note . . . that many consider 'using the term "alien" to refer to other human beings' to be 'offensive and demeaning.' I use the term here only where necessary 'to be consistent with the statutory language' that Congress has chosen and 'to avoid any confusion in replacing a legal term of art with a more appropriate term.'") (quoting Flores v. United States Citizenship & Immigration Servs., 718 F.3d 548, 551-552 n. 1 (6th Cir. 2013)).

[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 v. Davis, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."); INS v. Chadha, 462 U.S. 919, 957-58 (1983) (affirming lower court decision that blocked a deportation order and reasoning that a 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. *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.4 (1953) ("In this opinion 'exclusion' means preventing someone from entering the United States who is actually outside of the United States or is treated as being so."). The Immigration and Nationality Act (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. *See* 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 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 (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").

aliens on the basis of ethnicity,[8] gender and legitimacy,[9] and political belief.[10] It has also upheld an executive exclusion policy that was premised on a broad statutory delegation of authority, even though some evidence considered by the Court tended to show that religious hostility may have prompted the policy.[11] Outside of the immigration context, in contrast, laws and policies that discriminate on such bases are almost always struck down as unconstitutional.[12] To date, the only judicially recognized limit 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.[13]

The plenary power doctrine has roots in the *Chinese Exclusion Case* of 1889, which upheld a federal statute that provided for the exclusion of Chinese laborers.[14] Some jurists and commentators have criticized the *Chinese Exclusion Case* for indulging antiquated notions of race.[15] More generally, many legal scholars contend that the plenary power doctrine lacks a

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[8] Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (upholding a statute 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] Trump v. Hawaii, 138 S. Ct. 2392, 2417-20, 2423 (2018).

[12] *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).

[13] 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 an applicant for admission under 8 U.S.C. § 1101(a)(13)(C)).

[14] Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one."). Specifically, the statute 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. *Id*. at 599.

[15] *See, 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."); Gouveia v. Vokes, 800 F. Supp. 241, 252 n.18 (E.D. Pa. 1992) ("It risks understatement to note here that scholars have subjected the *Chinese Exclusion Case* to unrestrained criticism.") (citing Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 859 (1987) ("The *Chinese Exclusion* doctrine and its extensions have permitted, and perhaps encouraged, paranoia, xenophobia, and racism, particularly during periods of international tension.")); *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."); 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

coherent rationale[16] and that it is an anachronism that predates modern individual rights jurisprudence.[17] Yet the Supreme Court continues to employ the doctrine.[18] Some commentators have argued that the Court is in the process of narrowing the parameters of the doctrine's applicability,[19] but they find support for this argument mainly in cases outside the exclusion context.[20] In the exclusion context, the Court's 2018 decision in *Trump v. Hawaii* reaffirms the exceptional scope of the plenary power doctrine.[21]

Congress's plenary power to regulate the entry of aliens rests at least in part on implied constitutional authority. The Constitution itself does not mention immigration. It does not expressly confer upon any of the three branches of government the power to control the flow of foreign nationals into the United States or to regulate their presence once here. To be sure, parts of the Constitution address related subjects. The Supreme Court has sometimes relied upon

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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."). The Supreme Court has not disavowed the case. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (citing the Chinese Exclusion Case); *id*. at 704 (Scalia, J., dissenting).

[16] *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).

[17] *See* Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 IND. L.J. 653, 667 (2018) ("Plenary power has been roundly critiqued by academics and advocates who see it as an unwarranted exception to baseline constitutional protections, born of an era of xenophobia and racism."); 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."); 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.").

[18] 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)); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'") (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[19] 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.").

[20] Abrams, *supra* note 17, at 269-72; Kagan, *supra* note 19, at 1282. For support, scholars point to *Sessions v. Dimaya*, 138 S. Ct. 2392 (2018), which struck down a ground of deportation as unconstitutionally vague, and to the Supreme Court's recognition in *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), that indefinite detention of lawfully admitted aliens following completion of removal proceedings in the United States would raise a serious constitutional problem. Gordon, *supra* note 17, at 670; Abrams, *supra*, at 270; Kagan, *supra*, at 1282. 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.").

[21] *See Trump v. Hawaii*, 138 S. Ct. at 2418; Gordon, *supra* note 17, at 656 ("[I]n *Trump v. Hawaii* . . . the Court relied heavily on the plenary power doctrine in upholding the third iteration of President Trump's travel ban . . . . [T]he opinion cleared a broad path for essentially unreviewable presidential action in the immigration arena."); *cf. id*. at 669 ("With some major exceptions, including *Trump v. Hawaii* in 2018, in recent years plenary power has appeared to be in decline.").

Congress's enumerated powers over naturalization[22] and foreign commerce,[23] and to a lesser extent upon the Executive's implied Article II foreign affairs power,[24] as sources of federal immigration power.[25] 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.[26] It is this inherent sovereign power, according to the Court, that gives Congress essentially unfettered authority to restrict the entry of nonresident aliens.[27] 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.[28]

Recent events have generated congressional interest in the constitutional division of responsibilities between Congress and the Executive in establishing and enforcing policies for the

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[22] *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) but because it is an inherent attribute of sovereignty no less for the United States than for the States.").

[23] *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); *see generally*, Gordon, *supra* note 17, at 671 ("From early in the nation's history, it was understood that the Commerce Clause permitted the federal government to control certain aspects of immigration—those that were analogous to international trade in commercial goods—with the states retaining all other authority under their police powers.").

[24] *See* Am. 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).

[25] 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).

[26] *See Trump v. Hawaii*, 138 S. Ct. at 2418; Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative."); 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) (observing that 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"); *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).

[27] *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)).

[28] *Trump v. Hawaii*, 138 S. Ct. at 2409 (upholding a presidential proclamation providing for the exclusion of a broad class of aliens under INA § 212(f) and reasoning that "a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere"); United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) ("[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."); Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895) ("The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."); *see infra* "Implications of Supreme Court Jurisprudence for the Scope of Executive Power ."

exclusion of aliens. Through three iterative executive actions in 2017, commonly known as the "Travel Ban," the President provided for the exclusion of broad categories of nationals of specified countries, most of which were predominantly Muslim.[29] These executive actions relied primarily upon a delegation of authority in the Immigration and Nationality Act (INA) allowing the President, by way of proclamation, to exclude "any aliens" or "any class of aliens" whose entry he determines would be "detrimental to the interests of the United States."[30] In June 2018, the Supreme Court upheld the third iteration of the Travel Ban as likely lawful, rejecting claims that it was motivated by unconstitutional religious discrimination and that it exceeded the President's authority under the INA.[31] Since that decision, some Members of Congress have proposed curtailing executive authority to craft exclusion policy or subjecting executive exclusion decisions and policies to more stringent judicial review.[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 in federal court because Congress has not expressly authorized such challenges. But aliens at the threshold of entry have more access to judicial review of exclusion decisions, compared to aliens abroad, because of statutory provisions and other considerations. Next, the report analyzes the extent to which the constitutional and statutory rights of U.S. citizens limit the exclusion power. Specifically, the report examines a line of Supreme Court precedent, starting with *Kleindienst v. Mandel* and ending with *Trump v. Hawaii*, that makes a highly curtailed form of judicial review available to U.S. citizens who claim that the exclusion of one or more aliens abroad violates the U.S. citizens' constitutional rights. The report concludes by analyzing the implications of these cases for the scope of the congressional power to legislate for the exclusion of aliens and, separately, for the scope of the executive power to take action to exclude aliens.

# *Knauff* and the General Rule Against Judicial Review of Exclusion Decisions

**Key Takeaways of This Section**

- In *United States* ex rel. *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), the Supreme Court established a general presumption against judicial review of exclusion decisions.
- Visa denials generally are not subject to judicial review under the doctrine of consular nonreviewability.
- The *Knauff* presumption against judicial review appears less relevant under current law to decisions to exclude aliens arriving at the U.S. border.

[29] Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017); 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); *see* Trump v. Hawaii, 138 S. Ct. 2392, 2403-05, 2417 (2018).

[30] 8 U.S.C. § 1182(f).

[31] *Trump v. Hawaii*, 138 S. Ct. at 2423; *see infra* "*Trump v. Hawaii*."

[32] National Origin-Based Antidiscrimination for Nonimmigrants Act, S.1123, 116th Cong. (2019); NO BAN Act, H.R. 221, 116th Cong. (2019); Freedom of Religion Act of 2019, H.R. 590, 116th Cong. (2019); *see also* S.246, 116th Cong. (2019) (proposing to prohibit use of funds to implement or enforce Travel Ban orders).

As discussed later, Supreme Court 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.[33] The case law arrived at this issue, however, only after the Supreme Court developed an underlying principle: nonresident aliens outside the United States do not have constitutional rights with respect to entry.[34] Further, any statutory provisions that govern the admission of nonresident aliens do not permit judicial review unless Congress "expressly authorize[s]" such review,[35] something that federal courts generally conclude Congress has not done.[36] Put differently, Congress's plenary power over immigration includes not merely the power to set rules as to which aliens may enter the country and under what conditions, but also the power to have such rules "enforced exclusively through executive officers, without judicial intervention" unless Congress provides otherwise.[37] Because Congress has not provided otherwise, judicial review of decisions to exclude aliens abroad is generally unavailable.[38]

The Supreme Court developed these general principles against judicial review of exclusion decisions in a series of cases between the late 19th and mid-20th centuries about aliens denied admission after arriving by sea.[39] In one illustrative early case, the 1895 decision *Lem Moon Sing v. United States*, a Chinese national contended that immigration officers improperly denied him admission under the Chinese exclusion laws.[40] Those laws barred the entry of Chinese laborers, but the Chinese national described himself as a merchant and argued that the laws therefore did not apply to him.[41] As a consequence of his exclusion, he was detained by the steamship company.[42]

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[33] *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. at 2406 (examining claims brought by U.S. citizens, lawful permanent residents, and entities against a broad executive exclusion policy); 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).

[34] *Trump v. Hawaii*, 138 S. Ct. at 2419 ("[F]oreign nationals seeking admission have no constitutional right to entry . . . ."); *Din*, 135 S. Ct. at 2131 (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 32 ("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 . . . ."); *Mandel*, 459 U.S. at 762 (concluding that "an unadmitted and nonresident alien[] had no constitutional right of entry to this country as a nonimmigrant or otherwise"); Kiyemba v. Obama, 555 F.3d 1022, 1025, 1029 (D.C. Cir. 2009) ("Ever since the decision in the *Chinese Exclusion Case*, the [Supreme] Court has, without exception, sustained the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms."), vacated, 559 U.S. 131, 132 (2010), judgment reinstated as amended, 605 F.3d 1046 (D.C. Cir. 2010).

[35] United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

[36] *See* Allen v. Milas, 896 F.3d 1094, 1108 (9th Cir. 2018); Saavedra Bruno v. Albright, 197 F.3d 1153, 1162 (D.C. Cir. 1999) ("[W]e may infer that the immigration laws preclude judicial review of consular visa decisions. There was no reason for Congress to say as much expressly.").

[37] Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895); *see Allen*, 896 F.3d at 1104-05; Ventura-Escamilla v. INS, 647 F.2d 28, 30 (9th Cir. 1981).

[38] *See Knauff*, 338 U.S. at 543; Yafai v. Pompeo, 912 F.3d 1018, 1020 (7th Cir. 2019) ("Congress has delegated the power to determine who may enter the country to the Executive Branch, and courts generally have no authority to second-guess the Executive's decisions."); *Kiyemba*, 555 F.3d at 1025, 1029.

[39] *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).

[40] 158 U.S. at 539-40.

[41] *Id*.

[42] *Id*.

The Supreme Court recognized that the professed merchant could challenge the legality of his detention through a petition for habeas corpus.[43] This procedural right ultimately proved hollow, however, because the Court held that it could not review the immigration officials' determination that the petitioner fell within the scope of the provision excluding Chinese laborers.[44] The Court explained that Congress had precluded such review by providing in statute that the decisions of immigration officers to deny admission to aliens under the Chinese exclusion acts "shall be final, unless reversed on appeal to the secretary of the treasury."[45] In other words, the statute allowed only the Secretary of the Treasury to review exclusion decisions under the acts.[46] Accordingly, the Court limited its consideration of the habeas petition to the narrow question of whether the immigration officers who excluded the professed merchant had authority to make exclusion and admission decisions under the statutes (in other words, whether the officers had jurisdiction).[47] Determining that the immigration officers did have such statutory authority, the Court rejected the habeas petition without reviewing the petitioner's contention that he was in fact a merchant, not a laborer.[48] To review that contention, the Court reasoned, would "defeat the manifest purpose of congress in committing to subordinate immigration officers . . . exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country."[49]

The Court saw no constitutional problem in Congress's assignment of final authority over exclusion decisions to executive officials.[50] The Court considered it a settled proposition that, because aliens lack constitutional rights with respect to entry, exclusion decisions "could be constitutionally committed for final determination to subordinate immigration or other executive officers . . . thereby excluding judicial interference so long as such officers acted within the authority conferred upon them by congress."[51]

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[43] *Id*. at 543 ("'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.'") (quoting Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892)).

[44] *Id*. at 547.

[45] *Id*. at 540, 546-47.

[46] *Id*.

[47] *Id*. at 546-47, 549-50. Lower courts interpreting *Lem Moon Sing* disagreed about the precise scope of the limited habeas inquiry that it endorsed. *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1012 (1998) ("Although most of the *Lem Moon Sing* opinion suggests that finality relates only to issues of fact, some passages could be read as giving finality to the officials' determinations of the reach of the exclusion laws as well. Lower courts differed in their interpretations of this decision."). Similar uncertainty persists today about the scope of habeas review of exclusion decisions. *See* Thuraissigiam v. Dep't of Homeland Sec., 917 F.3d 1097, 1119 (9th Cir. 2019) (holding that INA limitation on judicial review of expedited removal orders violated the Suspension Clause, but not deciding "what right or rights [an excluded alien] may vindicate via use of the writ"), *cert. granted*, -- S. Ct. -- , No. 19-161, 2019 WL 5281289 (Mem) (Oct. 18, 2019); *see infra* "Habeas Corpus Review."

[48] *Lem Moon Sing*, 158 U.S. at 549-50 ("[T]he court does not now express any opinion upon the question whether, under the facts stated in the application for the writ of habeas corpus, Lem Moon Sing was entitled of right, under some law or treaty, to re-enter the United States. We mean only to decide that that question has been constitutionally committed by congress to named officers of the executive department of the government for final determination.").

[49] *Id*. at 547.

[50] *Id*.

[51] *Id*.; *see id*. at 547-48 (explaining that an alien within the United States enjoys constitutional protections but lacks any constitutional rights with respect to reentry following departure).

### Habeas Corpus Review of Exclusion Decisions

A petition for the writ of habeas corpus serves as a mechanism for a detained person to challenge, in federal court, the legality of his or her detention.[52] Because aliens arriving to the United States by air, sea, or land typically suffer detention as a practical consequence of exclusion, since the 19th century the Supreme Court has recognized that such aliens may petition for the writ.[53] By contrast, excluded aliens who are located abroad—e.g., unsuccessful visa applicants—do not end up in the detention of U.S. officials and therefore cannot challenge their exclusion in habeas proceedings.[54]

In the immigration context, habeas corpus review and judicial review are different concepts.[55] Thus, in some cases where the Supreme Court has declared that judicial review of an exclusion decision is unavailable, the Court has nonetheless appeared to engage in habeas review.[56] The scope of habeas corpus review of exclusion decisions appears limited and is narrower than most forms of statutorily authorized judicial review,[57] although its precise contours are not well defined.[58] On various occasions when the Supreme Court has reviewed exclusion decisions in habeas corpus proceedings, it has declined to reach the merits of those decisions after confirming that executive officials had statutory authority to apply the exclusion laws and followed statutorily required procedures.[59] The Supreme Court has yet to resolve whether and to what extent Congress may bar habeas corpus review of exclusion decisions that result in an alien's detention,[60] but the High Court has granted certiorari to consider this question in 2020.[61]

Two major Supreme Court decisions from the 1950s appeared to transform the principle from *Lem Moon Sing* and earlier cases—that Congress may bar judicial review of exclusion decisions affirmatively—into a presumption that judicial review of exclusion decisions is barred unless Congress expressly provides otherwise.[62] First, in the 1950 case *United States* ex rel. *Knauff v. Shaughnessy*, the Court declared itself powerless to review an executive branch decision to exclude the German bride of a U.S. World War II veteran, even though executive officials failed to explain the exclusion beyond stating that the woman's entry would have been "prejudicial."[63]

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[52] Boumediene v. Bush, 553 U.S. 723, 739-45 (2008).

[53] *See* Nishimura Eiku v. United States, 142 U.S. 660 (1892) ("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."); *see also* Thuraissigiam v. Dep't of Homeland Sec., 917 F.3d 1097, 1114-15 (9th Cir. 2019) (tracing history of Supreme Court doctrine on the availability of habeas review to excluded aliens), *cert. granted*, -- S. Ct. -- , No. 19-161, 2019 WL 5281289 (Mem) (Oct. 18, 2019).

[54] Allen v. Milas, 896 F.3d 1094, 1098 n.1 (9th Cir. 2018) (explaining that an "excluded noncitizen" did not have a "right to judicial review absent a personal detention by the United States. In that case she could challenge her detention by writ of habeas corpus").

[55] INS v. St. Cyr, 533 U.S. 289, 311-13 (2001).

[56] *See* Shaughnessy v. Mezei, 345 U.S. 206, 213 (1953) ("[The alien's] movements are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion."); United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 540 (1950).

[57] *St. Cyr*, 533 U.S. at 311-12.

[58] *See Thuraissigiam*, 917 F.3d at 1116 n.20.

[59] *See Mezei*, 345 U.S. at 212; *Knauff*, 338 U.S. at 544; Lem Moon Sing v. United States, 158 U.S. 538, 546 (1895); *but see* Gegiow v. Uhl, 239 U.S. 3, 9 (1915) ("The courts are not forbidden by statute to consider whether the reasons [for an exclusion decision], when they are given, agree with the requirements of the act.").

[60] *Thuraissigiam*, 917 F.3d at 1105.

[61] Dep't of Homeland Sec. v. Thuraissigiam, -- S. Ct. -- , No. 19-161, 2019 WL 5281289 (Mem) (Oct. 18, 2019).

[62] *See* Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1391-92 (1953) (explaining the new presumption and arguing that it was an "aberration" imposed by "new justices in Washington").

[63] 338 U.S. 537, 543 (1950). The excluded alien, 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 may not have had any plausible claims to press. *But cf. Knauff*, 338 U.S. at 552 (Jackson, J., dissenting) (stressing impact of the exclusion decision on the U.S. citizen husband in

The Court reiterated that aliens do not have constitutional rights with respect to entry and reasoned that, as a consequence, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[64] In what would become an oft-cited sentence, the Court also announced the presumption against judicial review of exclusion decisions: "it is not within the province of any court, *unless expressly authorized by law*, to review the determination of the political branch of the Government to exclude a given alien."[65] Next, in the 1953 case *Shaughnessy v. Mezei*, the Court refused to question the Executive's undisclosed reasons for denying entry to an essentially stateless alien returning to the United States after a prior period of residence, even though the exclusion relegated the stateless alien to potentially indefinite detention on Ellis Island.[66] The *Mezei* Court cited *Knauff* for the proposition that federal courts may not review exclusion decisions "unless expressly authorized by law," and the Court held that the Attorney General's decision to exclude Mezei and detain him as a consequence of that exclusion was "final and conclusive."[67]

The issue of detention complicated the *Knauff* and *Mezei* cases.[68] Because the aliens in both cases suffered detention as a result of their exclusion, they filed petitions for habeas corpus challenging the legality of their detention.[69] And in both cases, in accord with *Lem Moon Sing* and other early precedents, and notwithstanding the Court's declaration in *Knauff* and *Mezei* that judicial review of the exclusion decisions was unavailable, the Court conducted a limited inquiry into whether the governing statutes empowered the Attorney General to exclude the aliens without a hearing.[70] As explained further below, in the immigration context, the Supreme Court does not construe a general bar on judicial review to preclude habeas corpus review, although the proper scope of habeas review in cases concerning the exclusion of arriving aliens remains unclear.[71] In any event, even though the *Knauff* and *Mezei* Courts conducted a limited habeas inquiry into the Attorney General's statutory authority to exclude aliens without a hearing, federal courts often

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reasoning that Congress meant to require the Attorney General to justify the exclusion of war brides with adequate evidence).

[64] *Knauff*, 338 U.S. at 544. A leading immigration law casebook describes this sentence from *Knauff* as "words that every immigration scholar now knows by heart." STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 137 (6TH ED. 2015).

[65] *Knauff*, 338 U.S. at 543 (emphasis added); *see, e.g.*, Samirah v. Holder, 627 F.3d 652, 663 (7th Cir. 2010) (citing the quoted sentence for the proposition that "there's a presumption against judicial review of denials of visas to foreigners, but not a conclusive one"); Hart, *supra* note 62, at 1391 (quoting the "unless expressly authorized by law" sentence from *Knauff*). At least one earlier deportation case anticipated *Knauff*'s presumption, *see* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("The power to exclude or to expel aliens . . . is vested in the political departments of the government . . . and [is] to be executed by the executive authority according to the regulations so established, except so far the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the constitution, to intervene."), although deportation cases in the intervening years had established that some constitutional guarantees applied to deportation proceedings. *See* Hart, *supra* note 62, at 1390 n.85 ("The turning point was the Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903), involving an immigrant taken into custody for deportation four days after her landing.").

[66] *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 . . . .").

[67] *Id*. at 212.

[68] *See* LEGOMSKY & RODRÍGUEZ, *supra* note 64, at 147.

[69] *Mezei*, 345 U.S. at 209; *Knauff*, 338 U.S. at 539-40.

[70] *Mezei*, 345 U.S. at 214-15; *Knauff*, 338 U.S. at 544.

[71] *See infra* "Habeas Corpus Review" (discussing INS v. St. Cyr, 533 U.S. 289, 311-12 (2001)).

cite the cases (and especially *Knauff*) for the proposition that courts may not review exclusion decisions unless Congress expressly provides otherwise.[72]

Many scholars criticize *Knauff* and *Mezei* as incorrectly decided.[73] The aspect of *Mezei* that upholds as constitutional the indefinite detention of an arriving alien, in particular, is controversial and has been limited by some lower federal courts to apply only in cases that implicate national security.[74] The Supreme Court, however, has cited *Knauff* and earlier exclusion cases for the proposition that excluded nonresident aliens do not have grounds to challenge their exclusion in federal court.[75] Under current law, this proposition forms the basis for the doctrine of consular nonreviewability, which bars judicial review in almost all circumstances of the denial of visas to aliens abroad.[76] The general principle against judicial review of exclusion decisions applies with less force to executive decisions to exclude aliens arriving in the United States, even though the rule arose from cases about such aliens.[77] The general principles that govern reviewability of both of these two categories of exclusion decisions—(1) visa denials and other exclusion decisions concerning aliens located abroad; and (2) decisions to deny entry to aliens arriving at U.S. borders or ports of entry—are discussed below.

## Nonresident Aliens Located Abroad: Consular Nonreviewability

The doctrine of consular nonreviewability precludes judicial review of challenges brought by nonresident aliens located abroad against visa denials[78] and also possibly against other actions by

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[72] *See* Allen v. Milas, 896 F.3d 1094, 1104 (9th Cir. 2018); Samirah v. Holder, 627 F.3d 652, 663 (7th Cir. 2010); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018) ("[T]he Government contends that because aliens have no 'claim of right' to enter the United States, and because exclusion of aliens is 'a fundamental act of sovereignty' by the political branches, review of an exclusion decision 'is not within the province of any court, unless expressly authorized by law.'") (quoting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542–543 (1950)).

[73] *See* Hart, *supra* note 62, at 1393 (arguing that in *Knauff* and *Mezei*, the Supreme Court drew "distinctions between when the Constitution applies and when it does not apply at all. Any such distinction as that produces a conflict of basic principle, and is inadmissible."); LEGOMSKY & RODRÍGUEZ, *supra* note 64, at 144 ("Professor Henry Hart . . . criticized these cases sharply. Subsequent commentary has been similarly critical.").

[74] *See* Rosales-Garcia v. Holland, 322 F.3d 386, 413-14 (6th Cir. 2003) (en banc); Kouadio v. Decker, 352 F. Supp. 3d 235, 240 (S.D.N.Y. 2018) ("As the Sixth Circuit held en banc, *Mezei* is limited to the national security context in which it was decided."); *cf.* Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018) (leaving undecided question whether prolonged immigration detention of aliens during removal proceedings, including aliens seeking admission, violates due process); *but see* Poonjani v. Shanahan, 319 F. Supp. 3d 644, 648 (S.D.N.Y. 2018) (relying on *Mezei* to hold that due process does not require bond hearings for arriving aliens subject to prolonged detention during removal proceedings); Aracely v. Nielsen, 319 F. Supp. 3d 110, 145 (D.D.C. 2018) ("While *Mezei* may be under siege, it is still good law, and it dictates that for an alien who has not effected an entry into the United States, '[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'") (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212(1953)) (alteration in original).

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

[76] *See infra* "Nonresident Aliens Located Abroad: Consular Nonreviewability."

[77] *See infra* "Aliens Excluded at the Border or Port of Entry."

[78] *E.g.*, Morfin v. Tillerson, 851 F.3d 710, 711 (7th Cir. 2017) ("[F]or more than a hundred years courts have treated visa decisions as discretionary and not subject to judicial review for substantial evidence and related doctrines of administrative law."); 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

executive branch officials to deny them admission.[79] Under the doctrine, the millions of nonresident aliens denied visas each year at U.S. consulates abroad cannot themselves challenge their visa denials in federal court on statutory or constitutional grounds.[80] The doctrine may also bar U.S. citizens, LPRs, and U.S. entities from challenging the exclusion of a nonresident alien abroad on statutory grounds (as opposed to constitutional grounds),[81] although the Supreme Court has not decided this issue.[82] The general unavailability of judicial review of visa denials under the doctrine means that U.S. consular officers (the officials who adjudicate visas abroad)[83] have considerable power to make final decisions about visa applications.[84] **Table 1** provides an overview of the types of claims to which the doctrine of consular nonreviewability applies.

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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.").

[79] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018) (considering applicability of consular nonreviewability doctrine to broad government exclusion policy); Kiyemba v. Obama, 555 F.3d 1022, 1028 n.12 (D.C. Cir. 2009) (applying *Knauff* to hold that executive branch decision to deny entry to seventeen aliens detained in Guantanamo Bay was not reviewable), vacated, 559 U.S. 131, 132 (2010), judgment reinstated as amended, 605 F.3d 1046 (D.C. Cir. 2010); Samirah v. Holder, 627 F.3d 652, 662 (7th Cir. 2010) (discussing applicability of consular nonreviewability to revocation of advance parole for alien abroad).

[80] *See* Allen v. Milas, 896 F.3d 1094, 1099 n.1 (9th Cir. 2018) (explaining that alien denied visa in U.S. Consulate in Frankfurt, Germany, had "no personal right to entry, nor a right to judicial review absent a personal detention by the United States"); *Bustamante*, 531 F.3d at 1060; *Saavedra Bruno*, 197 F.3d at 1159; *see also see also* Kerry v. Din, 135 S. Ct. 2128, 2131 (2015) (Scalia, J.) (plurality opinion) ("[B]ecause Berashk 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."). The United States refused approximately 3 million visa applications in fiscal year 2018, 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 2018*, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20%20-%20TableXX.pdf (last visited July 9, 2019).

[81] *See Allen*, 896 F.3d at 1107-08 (holding that the doctrine of consular nonreviewability bars statutory claims brought by a U.S. citizen against the denial of a visa to a nonresident alien); *Saavedra Bruno*, 197 F.3d at 1163-64 ("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."); *infra* "Statutory Challenges to Executive Decisions to Exclude Aliens."

[82] *Trump v. Hawaii*, 138 S. Ct. at 2407 (assuming without deciding that statutory claims brought by U.S. citizens, LPRs, and entities against presidential proclamation providing for the exclusion of certain classes of aliens were judicially reviewable, "notwithstanding consular nonreviewability or any other statutory nonreviewability issue, and we proceed on that basis").

[83] 8 U.S.C. § 1101(a)(9).

[84] *See generally* Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113, 119 (2010); Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 SAN DIEGO L. REV. 887, 888 (1989) ("The lack of any meaningful administrative or judicial review of the denial of United States entry visas is one of the major outrages of the American immigration system. . . . American consular officers, stationed abroad, still wield unbridled power with respect to the issuance or denial of immigrant and nonimmigrant visas. "). The Secretary of State, too, lacks power to overturn visa denials. 8 U.S.C. § 1104(a) (granting the Secretary of State authority to administer and enforce "the immigration and nationality laws relating to [] the powers, duties, and functions of diplomatic and consular officers of the United States, *except those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas*") (emphasis added); *see* Shen v. U.S. Consulate Gen., 866 F. Supp. 779, 780 (S.D.N.Y. 1994) ("Congress specifically exempted from the Secretary of State's authority to review the work of consular officers 'those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas.' This exemption has been interpreted to eliminate administrative and judicial review as well.") (quoting 8 U.S.C. § 1104(a)). Under Department of State policies, however, supervisory consular officers may in some instances review and re-adjudicate visa applications following denial, 9 FAM 403.12-3(B), and applicants or their representatives may also submit legal questions about visa denials to the Department's Visa Office through the LegalNet system. 9 FAM 103.4; *see also* 22

**Table 1. Applicability of Doctrine of Consular Nonreviewability**

| Type of Claim Against Visa Denial | Does Consular Nonreviewability Bar Judicial Review? |
|---|---|
| Statutory claim by excluded alien | Yes.[85] |
| Constitutional claim by excluded alien | Yes.[86] |
| Statutory claim by U.S. citizen, LPR, or U.S. entity | Maybe.[87] |
| Constitutional claim by U.S. citizen, LPR, or U.S. entity | No. Limited review available under *Mandel* and later cases.[88] |

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

## Legal Basis for Consular Nonreviewability

Much controversy surrounds the doctrine of consular nonreviewability.[89] Some scholars argue that it lacks a compelling foundation in law.[90] No statute speaks expressly to the issue of whether visa decisions should be subject to judicial review.[91] Even so, lower federal courts recognize the doctrine with apparent uniformity (although some have recognized exceptions to it, as discussed in the next subsection).[92]

C.F.R. § 41.121(d) ("The Department may request a consular officer in a specific case or in specified classes of cases to submit a report if a visa has been refused. The Department will review each report and may furnish an advisory opinion to the consular officer for assistance in considering the case further.").

[85] *See* Saavedra Bruno v. Albright, 197 F.3d 1153, 1162-63 (D.C. Cir. 1999) (holding that an alien's statutory challenges to visa denial "cannot be heard"); Onuchukwu v. Clinton, 408 F. App'x 558, 560 (3d Cir. 2010).

[86] *See* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); Burrafato v. Dep't of State, 523 F.2d 554, 556-57 (2d Cir. 1975) (rejecting constitutional claim brought by noncitizen against visa denial and reasoning that "[t]he significant distinguishing feature of the instant case is that no constitutional rights of American citizens over which a federal court would have jurisdiction are 'implicated' here.").

[87] *See Trump v. Hawaii*, 138 S. Ct. at 2407; *infra* "Statutory Challenges to Executive Decisions to Exclude Aliens."

[88] *See Trump v. Hawaii*, 138 S. Ct. at 2419 ("[A]lthough foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen."); Yafai v. Pompeo, 912 F.3d 1018, 1020 (7th Cir. 2019).

[89] *See, e.g.*, Wildes, *supra* note 84, at 888.

[90] *See* Legomsky, *supra* note 16, at 1623 ("In the visa denial cases, the courts have been unable to point to any evidence, light or otherwise, to support an exemption from the usual rules that govern judicial review of administrative decisions."); Dobkin, *supra* note 84, at 119; *see also* Samirah v. Holder, 627 F.3d 652, 662 (7th Cir. 2010) (reasoning that consular nonreviewability "in the United States at least has a tarnished pedigree, having been first recognized by the Supreme Court in cases that authorized the expulsion of hapless Chinese laborers").

[91] *See Saavedra Bruno*, 197 F.3d at 1162 (holding that consular nonreviewability precludes judicial review of visa decisions and reasoning that "[t]here was no reason for Congress to say as much expressly."); Legomsky, *supra* note 16, at 1623; *cf.* 6 U.S.C. § 236(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").

[92] *See* Allen v. Milas, 896 F.3d 1094, 1107 (9th Cir. 2018) (referencing "more than a century of decisions limiting our review of consular visa decisions"); Legomsky, *supra* note 16, at 1623 ("Whether or not some defensible rationale exists, more than seventy years of judicial adamancy have lent respectability to consular absolutism."); Dobkin, *supra* note 84, at 114 ("The overwhelming majority of courts in the United States have followed the doctrine of consular nonreviewability.").

As authority for the doctrine, courts often cite *Knauff* and the other Supreme Court cases referenced above concerning the denial of admission to aliens arriving by sea.[93] In particular, the consular nonreviewability cases cite these Supreme Court precedents for the proposition that Congress's plenary immigration power includes the power to have statutes governing the admission of aliens "enforced exclusively through executive officers, without judicial intervention"[94] and that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."[95] Thus, the reasoning that supports lower court applications of the doctrine appears to be that Congress has not expressly authorized judicial review of visa denials.[96] Because the doctrine has its basis in *Knauff* and the presumption against judicial review of *exclusion* decisions, it does not apply to the decisions of domestic immigration authorities to deny immigration benefits,[97] unless perhaps those decisions underlie eventual visa denials or otherwise work to exclude aliens located abroad.[98]

Some federal courts have sought to reconcile the doctrine of consular nonreviewability with the provisions governing judicial review of final agency action set forth in the Administrative Procedure Act (APA).[99] The APA establishes a "strong presumption" that the actions of federal

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[93] *See Allen*, 896 F.3d at 1104 (citing *Mezei*, *Knauff*, *Lem Moon Sing*, and other Supreme Court exclusion cases); Chiang v. Skeirik, 582 F.3d 238, 242-43 (1st Cir. 2009) (citing *Knauff* and *Mandel*); Saavedra Bruno v. Albright, 197 F.3d 1153, 1160 (D.C. Cir. 1999) (reasoning that the nonreviewability of visa decisions follows in part "from the [Supreme] Court's recurring statements, of which [*Knauff*] is an example, that there may be no judicial review of the decisions to exclude aliens unless Congress has 'expressly authorized' this."); Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 971 (9th Cir. 1986) (relying upon *Mandel* and *Lem Moon Sing*). Because none of the Supreme Court cases rejecting the habeas corpus petitions of arriving aliens involved visa determinations, the proposition that consular nonreviewability derives from these cases is disputed. *See* Dobkin, *supra* note 84, at 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 16, at 1620 (attributing the doctrine to two circuit court cases from the 1920s).

[94] *Allen*, 896 F.3d at 1104 (quoting Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895)); *Li Hing of Hong Kong*, Inc., 800 F.2d at 971 (9th Cir. 1986); Ventura-Escamilla v. INS, 647 F.2d 28, 30 (9th Cir. 1981) (quoting the "without judicial intervention" language from *Lem Moon Sing* and concluding that "[f]rom this foundation evolved the doctrine of nonreviewability of a Consul's decision to grant or deny a visa").

[95] Chiang, 582 F.3d at 242-43 (quoting *Knauff*, 338 U.S. at 543); *Saavedra Bruno*, 197 F.3d at 1160 (reasoning that the nonreviewability of visa decisions follows in part "from the [Supreme] Court's recurring statements, of which [*Knauff*] is an example, that there may be no judicial review of the decisions to exclude aliens unless Congress has 'expressly authorized' this.").

[96] *See, e.g.*, Yafai v. Pompeo, 912 F.3d 1018, 1020 (7th Cir. 2019) ("Congress has delegated the power to determine who may enter the country to the Executive Branch, and courts generally have no authority to second-guess the Executive's decisions."); *Allen*, 896 F.3d at 1104-05 (citing *Knauff*, *Mezei*, *Lem Moon Sing*, and other exclusion cases for the proposition that Congress may provide for the enforcement of exclusion laws "without judicial intervention" and that judicial review of visa decisions must be "authorized by treaty or by statute") (internal quotation marks omitted).

[97] *See, e.g.*, Shalom Pentecostal Church v. Acting Sec'y U.S. Dep't of Homeland Sec., 783 F.3d 156, 161 (3d Cir. 2015) (reviewing DHS's denial of visa petition for alien beneficiary already in the United States); Patel v. U.S. Citizenship & Immigration Servs., 732 F.3d 633, 635 (6th Cir. 2013) (similar).

[98] *See* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (indicating that excluded nonresident alien could not challenge Attorney General's denial of an inadmissibility waiver); Chiang v. Skeirik, 582 F.3d 238, 242 (1st Cir. 2009) (applying consular nonreviewability to DHS denial of visa petition for alien located abroad); Okpoko v. Heinauer, 796 F. Supp. 2d 305, 321-22 (D.R.I. 2011) (applying *Mandel*'s narrow standard of review to claims against USCIS denial of derivative asylum petition); *but see* Macena v. U.S. Citizenship & Immigration Servs., No. TDC-14-3464, 2015 WL 6738923, *3-4 (D. Md. Nov. 2, 2015) (reviewing challenge to USCIS's failure to "reopen" case of alien abroad who had been denied a fiancé visa, and indicating that consular nonreviewability barred review only of "the actions of the consular officer").

[99] 5 U.S.C. §§ 701-706; *see, e.g.*, *Allen*, 896 F.3d at 1104-08; *Saavedra Bruno*, 197 F.3d at 1160-62.

agencies—including the Department of State—are subject to judicial review.[100] Yet, according to these courts, Congress enacted the APA against the backdrop of already-existing consular nonreviewability jurisprudence and without expressly overruling that jurisprudence by providing for review of consular decisions.[101] On this basis, these courts have concluded that the doctrine of consular nonreviewability constitutes a preexisting limitation on judicial review that the APA preserves through its stipulation, in 5 U.S.C. § 702(1), that nothing in the statute "affects other limitations on judicial review."[102] In other words, the APA preserves consular nonreviewability as an exception to the general rule that judicial review is available for agency action.[103]

Although the doctrine of consular nonreviewability is well established, it remains true that no statute expressly bars judicial review of visa denials abroad.[104] For this reason, courts generally hold that the doctrine "supplies a rule of decision, not a constraint on the subject matter jurisdiction of the federal courts."[105] The legislative history of the original Immigration and Nationality Act of 1952 indicates that Congress considered and rejected the idea of creating within the Department of State a system of administrative appeals for visa denials,[106] and the

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[100] Bowen v. Mich. Academy of Family Physicians, 476 U.S. 667, 670 (1986); Sharkey v. Quarantillo, 541 F.3d 75, 84 (2d Cir. 2008).

[101] *See Saavedra Bruno*, 197 F.3d at 1160-62 (noting that the "doctrine of consular nonreviewability . . . predates passage of the APA" and concluding that "[g]iven the historical background against which it has legislated over the years . . . Congress could safely assume that aliens residing abroad were barred from challenging consular visa decisions in federal court unless legislation specifically permitted such actions.); Allen, 896 F.3d at 1107 (quoting and agreeing with the "historical background" reasoning from *Saavedra Bruno*).

[102] 5 U.S.C. § 702(1); *see Saavedra Bruno*, 197 F.3d at 1160 ("In terms of APA § 702(1), the doctrine of consular nonreviewability . . . 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."); *Allen*, 896 F.3d at 1107 (quoting *Saavedra Bruno* for same proposition). These two decisions also suggest that judicial review under the APA may be unavailable for visa denials because the INA "impliedly forbids" such review within the meaning of APA § 702(2) or "precludes" such review within the meaning of APA § 701(a)(1). *See Allen*, 896 F.3d at 1108-09 (considering APA § 702(2)); *Saavedra Bruno*, 197 F.3d at 1160 ("[W]e may infer that, in the words of APA § 701(a)(1), the immigration laws 'preclude judicial review' of the consular visa decisions.").

[103] *Allen*, 896 F.3d at 1107; *Saavedra Bruno*, 197 F.3d at 1160. On the other hand, the consular nonreviewability exception to APA review apparently does not encompass the nondiscretionary denial of a visa petition by domestic immigration authorities, which some federal courts have held is subject to judicial review. *See, e.g.*, 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). The approval of a visa petition is a prerequisite to the issuance of many types of visas. *See, e.g.*, 8 U.S.C. § 1154(a) (petitioning procedure for family-based immigrant visas).

[104] *Saavedra Bruno*, 197 F.3d at 1162 ("[W]e may infer that the immigration laws preclude judicial review of consular visa decisions. There was no reason for Congress to say as much expressly."); *cf.* 6 U.S.C. § 702(f).

[105] *Allen*, 896 F.3d at 1102; Matushkina v. Nielsen, 877 F.3d 289, 294 n.2 (7th Cir. 2017) ("We treat the doctrine of consular nonreviewability as a matter of a case's merits rather than the federal courts' subject matter jurisdiction."); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018) ("The Government does not argue that the doctrine of consular nonreviewability goes to the Court's jurisdiction, nor does it point to any provision of the INA that expressly strips the Court of jurisdiction over plaintiffs' claims.") (citations omitted). Some earlier cases styled the doctrine as a jurisdictional rule, but the most recent line of decisions calls these earlier cases into question. *See Allen*, 896 F.3d at 1099 ("We admit that some statements in [earlier] cases might be read to suggest the district courts lack subject matter jurisdiction over cases in which a plaintiff requests the court order a consular officer to issue a visa, but the cases cannot bear the weight the government places on them."); *Matushkina*, 877 F.3d at 294 n.2 ("To the extent that *Saavedra Bruno* has been read to apply the doctrine [of consular nonreviewability] using the language of subject matter jurisdiction, we note that the opinion was written in 1999, before the Supreme Court's series of more recent decisions clarifying and narrowing the scope of subject matter jurisdictional doctrines, as distinct from a host of other case-processing rules.").

[106] H.R. REP. No. 82-1365 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 1653, 1688 ("Although many suggestions were made to the committee with a view toward creating in the Department of State a semijudicial board, similar to the Board of Immigration Appeals, with jurisdiction to review consular decisions pertaining to the granting or refusal of

current version of the INA bars the Secretary of State from overturning visa decisions.[107] But Congress has not legislated affirmatively to shield visa decisions from *judicial* review. The doctrine of consular nonreviewability is therefore premised upon the absence of any specific statutory authorization for the review of visa denials, not upon an explicit statutory prohibition on such review.[108]

## Exceptions to Consular Nonreviewability

Supreme Court case law qualifies the doctrine of consular nonreviewability in one important respect discussed at length later in this report: if a U.S. citizen challenges the exclusion of a nonresident alien abroad on the ground that the exclusion violates the citizen's constitutional rights, then, under the rule of *Kleindienst v. Mandel* and later cases, courts "engage[] in a circumscribed judicial inquiry" of the constitutional claim.[109] *Mandel* recognized that U.S. citizens may have constitutional rights that bear upon the entry of nonresident aliens, even though nonresident aliens themselves do not have such rights.[110] As such, the case law of multiple federal circuit courts of appeals establishes that "a U.S. citizen raising a constitutional challenge to the denial of a visa is entitled to a limited judicial inquiry regarding the reason for the decision."[111] This is the only exception to consular nonreviewability that federal courts have recognized uniformly.[112] As explained later in the section on the *Mandel* line of cases, it allows challengers only exceedingly slim prospects of obtaining relief from a visa denial.[113] Lower federal courts have split over whether U.S. citizens may also challenge visa denials on statutory grounds.[114]

Some lower federal courts have recognized other exceptions to consular nonreviewability's bar on judicial review of decisions to exclude aliens abroad. For instance, at least one federal circuit court decision extends the *Mandel* principle to allow a limited level of judicial review of a constitutional challenge brought directly by an excluded nonresident alien (rather than a U.S. citizen) against the denial of a visa.[115] This extension, however, seems at odds with *Mandel* itself, which concluded that a nonresident alien who was denied the statutory waivers needed to secure a

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visas, the committee does not feel that such body should be created by legislative enactment, nor that the powers, duties, and functions conferred upon consular officers by the instant bill should be made subject to review by the Secretary of State.").

[107] 8 U.S.C. § 1104(a)(1) (providing that the administration and enforcement of laws "relating to the granting or refusal of visas" do not fall within the powers of the Secretary of State).

[108] *See Saavedra Bruno*, 197 F.3d at 1162 ("Congress could safely assume that aliens residing abroad were barred from challenging consular visa decisions in federal court unless legislation specifically permitted such actions."); *cf.* Legomsky, *supra* note 16, at 1623 ("Whether or not some defensible rationale exists, more than seventy years of judicial adamancy have lent respectability to consular absolutism. In some other context, one might even argue that at this juncture Congress can be regarded as having acquiesced in this interpretation.").

[109] *Trump v. Hawaii*, 138 S. Ct. at 2419; Kleindienst v. Mandel, 408 U.S. 753, 770 (1972); *see infra*, "Claims by U.S. Citizens against an Alien's Exclusion: 'Highly Constrained' Judicial Review."

[110] 408 U.S. at 762.

[111] Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir.2008) (noting similar holdings by "the First, Second, and D.C. Circuits").

[112] *See, e.g.,* Yafai v. Pompeo, 912 F.3d 1018, 1020-21 (7th Cir. 2019) (mentioning only *Mandel* exception); Morfin v. Tillerson, 851 F.3d 710 (7th Cir. 2017) (same); Dobkin, *supra* note 84, at 132 (explaining with regard to exceptions beyond *Mandel* that "some courts have explicitly disallowed this type of legal maneuvering").

[113] *See infra* "Claims by U.S. Citizens Against an Alien's Exclusion."

[114] *See infra* "Statutory Challenges to Executive Decisions to Exclude Aliens."

[115] Matushkina v. Nielsen, 877 F.3d 289, 294 (7th Cir. 2017) ("[W]e may conduct a limited review [of an alien's challenge to a visa denial] to determine whether a visa was denied for a bona fide and facially legitimate reason.").

visa "had no constitutional right of entry," and that limited judicial review was therefore available only because of constitutional claims brought by U.S. citizens against the alien's exclusion.[116] Other federal appellate court decisions make clear that review of visa denials under *Mandel* is available only for claims brought by U.S. citizens.[117]

In another non-uniformly recognized exception, a line of decisions by the U.S. Court of Appeals for the Ninth Circuit[118] allows nonresident aliens to challenge a consular officer's failure to act upon a visa application (as opposed to the denial of an application).[119] The supporting rationale is that the Mandamus Act supplies a basis for judicial review where an official fails to take a legally required action, such as the adjudication of a visa application, even if the APA does not.[120] This exception to the rule of consular nonreviewability is not as well established as the exception allowing for limited review of constitutional claims brought against visa denials by U.S. citizens.[121] Federal district courts outside the Ninth Circuit have split over whether to recognize the exception.[122] However, as discussed in the next section, in cases not specifically concerning

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[116] *See* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise. . . . The case, therefore, comes down to the narrow issue whether the First Amendment confers upon the [American] appellee professors, because they wish to hear, speak, and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country . . . ."); *see also Trump v. Hawaii*, 138 S. Ct. at 2419 ("[A]lthough foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.").

[117] Yafai v. Pompeo, 912 F.3d 1018, 1020-21 (7th Cir. 2019) ("The Supreme Court has identified a limited exception to this doctrine [of consular nonreviewability], however, when the visa denial implicates a constitutional right of an American citizen."); Morfin v. Tillerson, 851 F.3d 710, 711 (7th Cir. 2017) ("*Mandel* recognized a potential exception [to consular nonreviewability] for situations in which denial of a visa violates the constitutional rights of a U.S. citizen . . . ."); *Bustamante*, 531 F.3d at 1062; *Saavedra*, 197 F.3d at 1163 ("Judicial review [i]s proper . . . when United States sponsors of a foreign individual claim that the State Department's denial of a visa to an alien violated their constitutional rights."); Adams v. Baker, 909 F.2d 643, 647 (1st Cir. 1990) (recognizing the availability of limited review of visa denials under *Mandel* where claims are "based upon constitutional rights and interests of United States citizens"); Burrafato v. Dep't of State, 523 F.2d 554, 556-57 (2d Cir. 1975) (rejecting constitutional claim brought by noncitizen against visa denial and reasoning that "[t]he significant distinguishing feature of the instant case is that no constitutional rights of American citizens over which a federal court would have jurisdiction are 'implicated' here.").

[118] This report references a number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Ninth Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[119] *See Bustamante*, 531 F.3d at 1060 ("[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)); Rivas v. Napolitano, 714 F.3d 1101, 1111 (9th Cir. 2013) (reviewing consular officer's failure to reconsider a visa refusal pursuant to Department of State regulations).

[120] *See Rivas*, 714 F.3d at 1111 ("Because 22 C.F.R. § 42.81(e) by its plain terms imposes a nondiscretionary, ministerial duty to reconsider the denial of a visa application when the applicant adduces further evidence tending to overcome the ground of ineligibility, the district court has subject matter jurisdiction under the Mandamus Act [28 U.S.C. § 1361] where the government fails to comply with the regulation."); *Patel*, 134 F.3d at 933 ("[W]e find that the consulate had a duty to act and that to date, eight years after application of the visas, the consulate has failed to act in accordance with that duty and the writ [of mandamus] should issue.").

[121] *See* Matushkina v. Nielsen, 877 F.3d 289, 296 (7th Cir. 2017) (discussing decision in which "the Ninth Circuit issued a writ of mandamus ordering the consulate to act, one way or another, on a visa application that had been pending for eight years" and declining to reach a conclusion as to "[w]hether that decision was correct or not").

[122] *Compare, e.g.,* Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry, 168 F. Supp. 3d 268, 291 (D.D.C. 2016) ("Confirming that the doctrine [of consular nonreviewability] is inapplicable in the absence of a consular decision, the Court of Appeals for the Ninth Circuit has held that visa applicants may challenge the Government's suspension (rather than adjudication) of their visa applications. . . . District courts outside the Ninth Circuit have reached the same conclusion."), *with* Abdo v. Tillerson, No. 17 Civ. 7519, 2019 WL 464819, at

the adjudication of visas, other courts have recognized that the Mandamus Act creates an exception to the presumption against judicial review of decisions to exclude aliens abroad.[123]

Other federal district court opinions may suggest further exceptions to consular nonreviewability that have yet to gain uniform recognition, such as an exception allowing visa applicants to challenge the validity of generally applicable statutes, regulations, or policies that govern their applications.[124] Nonetheless, the review available under *Mandel* for constitutional challenges brought by U.S. citizens remains the only exception to consular nonreviewability grounded in Supreme Court case law and universally recognized by lower federal courts.[125]

## Nonresident Aliens Abroad Who Seek Entry to Remedy Prior Violations of Constitutional or Statutory Rights

Other cases concerning aliens abroad that implicate the presumption against judicial review of exclusion decisions and the doctrine of consular nonreviewability address the following question: may a federal court order the executive branch to grant entry to a nonresident alien located abroad in order to remedy violations of constitutional or statutory rights that the alien suffered while in the United States or while detained by the United States? The Seventh and Ninth Circuits have both answered in the affirmative. The D.C. Circuit, however, has held that *Knauff* bars courts from ordering the executive branch to grant entry to an alien unless a statutory provision authorizes courts to do so.

The Ninth Circuit held that a federal district court has authority to order the executive branch to parole aliens whom it removed in violation of due process back into the country to attend fair

*3 (S.D.N.Y. Feb. 5, 2019) ("In this Circuit, the doctrine of consular nonreviewability applies not only when a plaintiff challenges an official's discretionary decision to approve or deny a visa application, but also where a plaintiff seeks to compel an official to simply adjudicate a visa application.") (internal quotation marks omitted); *see also Matushkina*, 877 F.3d at 296 (reviewing prior precedent in which "the Ninth Circuit issued a writ of mandamus ordering the consulate to act, one way or another, on a visa application that had been pending for eight years" and declining to reach a conclusion as to "[w]hether that decision was correct or not"); Saleh v. Holder, 84 F. Supp. 3d 135, 139 (E.D.N.Y. 2014) (suggesting that "no case or statute bestow[s] upon a federal court the power to order a consulate to adjudicate a visa application by some judicially-determined calendar").

[123] *See* Samirah v. Holder, 627 F.3d 652, 663 (7th Cir. 2010) (granting writ of mandamus in favor of excluded alien whose advance parole DHS revoked while the alien was travelling abroad, and concluding that an exception to the rule against judicial review of exclusion decisions exists for "aliens entitled to mandamus because they have a clear right to be in the United States"); Shia Ass'n of Bay Area v. United States, 849 F. Supp. 2d 916, 924 (N.D. Cal. 2012) (following *Samirah*); *see also* Mulligan v. Schultz, 848 F.2d 655, 657 (5th Cir. 1988) (reviewing challenge to Department of State regulation setting registration dates for certain immigrant visas and concluding that the doctrine of consular nonreviewability did not bar review of "the authority of the Secretary of State to specify those dates").

[124] *See, e.g.*, Emami v. Nielsen, 365 F. Supp. 3d 1009, 1018-19 (N.D. Cal. 2019) (reasoning that consular nonreviewability does not apply "to systemic practices" concerning visa adjudication, such as a blanket policy of denying waivers to inadmissible aliens, as opposed to "individualized determinations for any specific person"); P.K. v. Tillerson, 302 F. Supp. 3d 1, 12 (D.D.C. 2017) ("[T]he doctrine of consular non-reviewability does not apply because Plaintiffs challenge the State Department's policy, not the discretion of a specific consular officer in applying the policy."); *see also* S.A. v. Trump, No. 18-cv-03539-LB, 2019 WL 990680, at *2 (N.D. Cal. Mar. 1, 2019) (not discussing consular nonreviewability but holding that DHS's decision to rescind conditional parole approvals for 2,714 aliens in Central America, mostly children, violated the Administrative Procedure Act); *see generally*, Dobkin, *supra* note 84, at 133 ("When courts allow review of an underlying statute, regulation, or internal operating procedure, courts are recognizing—either explicitly or implicitly—that the doctrine of consular nonreviewability is anomalous and should not be used to shield unconstitutional statutes from judicial review."); *but cf.* Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) (holding that the deferential standard of review under *Mandel* governs challenges to broad executive exclusion policies and noting that "[l]ower courts have similarly applied *Mandel* to broad executive action").

[125] *See Trump v. Hawaii*, 138 S. Ct. at 2419.

removal proceedings.[126] "Without a provision requiring the government to admit individual [aliens] into the United States so that they may attend the hearings to which they are entitled," the court reasoned, the determination that their removal proceedings violated due process "would be virtually meaningless."[127] In other words, the only way to remedy the constitutional violation was to order the government to grant the aliens reentry.[128] In a recent district court case that relied on the Ninth Circuit decision, the district court reasoned that ordering the government to grant reentry to aliens who were removed in violation of law did not contravene the political branches' broad authority over exclusion decisions because the remedy formed part of the review that Congress authorized courts to conduct of removal orders under the INA.[129]

The Seventh Circuit reached a broader holding in a different context. The case, *Samirah v. Holder*, concerned an alien who had overstayed his nonimmigrant visa but who had applied for LPR status (through a process called "adjustment of status").[130] When his mother fell ill in Jordan, the alien received a grant of advance parole from the Department of Homeland Security (DHS) so that he could visit her without abandoning his application for adjustment and with some assurance that he would be able to return to the United States to pursue the application.[131] But while the alien was abroad, DHS revoked his advance parole and did not allow him to board a connecting flight back to the United States.[132] Reviewing the alien's application for a writ of mandamus ordering executive branch officials to grant him reentry, the Seventh Circuit reasoned that DHS had used the advance parole as "a trap—a device for luring a nonlawful resident out of the United States so that he can be permanently excluded from this country."[133] The circuit court held that DHS's parole regulation unambiguously granted the plaintiff a right to reenter the country to continue pursuing his pending application for adjustment of status and that the court could enforce that right through mandamus.[134] Further, the circuit court reasoned that the Supreme Court's holding in *Knauff*—that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien"—does not apply in instances where a statute or regulation

[126] Walters v. Reno, 145 F.3d 1032, 1050-51 (9th Cir. 1998).

[127] *Id*. at 1051.

[128] *See id*.

[129] Grace v. Whitaker, 344 F. Supp. 3d 96, 145 (D.D.C. 2018) ("[P]laintiffs have availed themselves of the 'framework under which aliens may enter the United States.' Because plaintiffs have done so, this Court 'possesses the power Congress gives it to review Executive action taken within that framework.'") (quoting Kiyemba v. Obama, 555 F.3d 1022, 1028 n.12 (D.C. Cir. 2009), vacated, reinstated in amended form, 605 F.3d 1046 (D.C. Cir. 2010)).

[130] 627 F.3d 652, 654-55 (7th Cir. 2010).

[131] *Id.* For more information about advance parole, see CRS Report R45158, *An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others*, by Ben Harrington, at 17 ("Advance parole, another exercise of the executive parole authority directed toward physically present aliens, allows aliens to depart the United States with parole already approved, so as to facilitate their re-entry.").

[132] *Samirah*, 627 F.3d at 656 ("[The plaintiff's] flight happened to make a stop at Ireland's Shannon Airport. . . . Upon entering the [DHS] Shannon checkpoint the plaintiff was handed a letter from a U.S. immigration official in Chicago informing him that his advance parole had been revoked because he was a 'security risk' and he would not be permitted to enter the United States. He flew back to Jordan and has not returned to the United States since . . . .").

[133] *Id*. at 662.

[134] *Id*. at 661 ("The plaintiff . . . wants only to be allowed to return to the United States to pursue his application for adjustment of status. That is a right that the regulation unambiguously confers on him, and the unequivocal violation of a statute or regulation imposing a duty on a federal official can be rectified by mandamus . . . ."); *see also* Shia Ass'n of Bay Area v. United States, 849 F. Supp. 2d 916, 924 (N.D. Cal. 2012) (following *Samirah* and holding that aliens "were entitled to return to the United States after Defendants revoked their advance parole so that they could renew their applications for an adjustment of status").

grants an excluded alien a right to physical presence in the United States.[135] Put differently, where a nonresident alien abroad "has a right, conferred by a regulation the validity of which is conceded all around, to be in this country," *Knauff* and the doctrine of consular nonreviewability do not bar a court from ordering executive branch officials to grant the alien entry.[136] The Court did not clarify, however, whether the alien's right to be in the United States under the parole regulation also constituted an "express[] authoriz[ation]" of *judicial review*, within the meaning of *Knauff*, of the alien's exclusion.[137] The Supreme Court, for its part, has held at least once that the potential existence of a right to entry does not give rise to judicial review of an alien's exclusion.[138]

A D.C. Circuit decision stands in tension with the Seventh and Ninth Circuit cases. In *Kiyemba v. Obama*, the D.C. Circuit held that it did not possess authority to order executive branch officials to grant entry into the United States to seventeen Chinese nationals detained without sufficient evidence as enemy combatants in Guantanamo Bay.[139] The aliens feared that they would face persecution in China and requested entry and release into the United States, at least until authorities could locate an appropriate third country to accept them, but executive branch officials denied their request and continued to hold the aliens at Guantanamo Bay while pursuing resettlement options through diplomacy.[140] Although the illegality of the aliens' detention was undisputed, the D.C. Circuit held that it could not order the government to release the aliens into the United States.[141] The circuit court cited *Knauff*, *Mezei*, and other exclusion cases for the principle that the political branches have "exclusive power . . . to decide which aliens may, and which aliens may not, enter the United States," and reasoned that this principle barred it from granting the requested relief.[142] The "critical question" under *Knauff*, the circuit court reasoned, was whether any law "expressly authorized" courts "to set aside the decision of the Executive Branch and to order the[] aliens brought to the United States."[143] The Court concluded that the aliens did not have due process rights and that no other "statute or treaty" authorized it to override the executive branch's decision not to grant the aliens entry to the United States.[144] As such, the rule that "in the United States, who can come in and on what terms is the exclusive province of the political branches" foreclosed the aliens' claims for relief.[145]

In conclusion, the Seventh and Ninth Circuit cases suggest that the doctrine of consular nonreviewability does not bar federal courts from ordering executive branch officials to grant

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[135] *Samirah*, 627 F.3d at 663.

[136] *Id*.

[137] *See id*.

[138] *See* Lem Moon Sing v. United States, 158 U.S. 538, 549-50 (1895) ("[I]t is proper to say that the court does not now express any opinion upon the question whether, under the facts stated in the application for the writ of habeas corpus, Lem Moon Sing *was entitled of right*, under some law or treaty, to re-enter the United States. We mean only to decide that that question has been constitutionally committed by congress to named officers of the executive department of the government for final determination.") (emphasis added); *but see Samirah*, 627 F.3d at 662 (reasoning that "[t]he doctrine of 'consular nonreviewability,' . . . in the United States at least has a tarnished pedigree, having been first recognized by the Supreme Court in cases that authorized the expulsion of hapless Chinese laborers").

[139] 555 F.3d 1022, 1029 (D.C. Cir. 2009), vacated, 559 U.S. 131, 132 (2010), judgment reinstated as amended, 605 F.3d 1046 (D.C. Cir. 2010).

[140] *Id*. at 1024.

[141] *Id*. at 1023.

[142] *Id*. at 1025.

[143] *Id*. at 1026.

[144] *Id*. at 1026-27.

[145] *Id*. at 1029.

entry to nonresident aliens abroad for the purpose of remedying constitutional, statutory, or regulatory violations that the aliens suffered in the United States. However, the cases may not fully explain how such judicial authority to order a nonresident alien's entry comports with *Knauff* and the principles underlying the doctrine of consular nonreviewability. The D.C. Circuit opinion, in contrast, appears to stand for the proposition that *Knauff* allows federal courts no authority to order the entry of a nonresident alien located outside the United States, unless a statute expressly authorizes such relief.

## Aliens Excluded at the Border or Port of Entry

Under current law, the general rule against challenges to denials of entry appears less relevant in the context of arriving aliens at the threshold of entry,[146] notwithstanding the rule's provenance in *Knauff* and other cases about such aliens. Unlike in the visa context, it is not rare for federal courts to review and even strike down executive exclusion decisions and policies concerning aliens arriving at the border.[147] At least three interrelated considerations contribute to the diminished relevance of the rule against challenges to exclusion decisions in arriving alien cases.

### Detention and Other Consequences of Exclusion

First, decisions to exclude arriving aliens, unlike decisions to exclude aliens abroad, typically result in detention.[148] Although nonresident aliens do not have constitutional rights with respect to *entry*, they may enjoy some protection from burdensome enforcement measures, such as prolonged detention, that sometimes flow from denial of entry.[149] Recall, for example, the 1953 *Mezei* case mentioned above, where the Supreme Court denied relief to a stateless alien whose exclusion left him detained on Ellis Island without prospects for release.[150] Unlike cases about aliens denied visas abroad, *Mezei* raised not only the question of whether the alien had grounds to challenge his exclusion from the United States, but also whether the government could keep him in detention on Ellis Island as a consequence of the exclusion decision.[151] The majority answered

[146] This report uses the term "arriving alien" in a plain language sense to mean aliens arriving at U.S. ports of entry or the U.S. border, including aliens apprehended at or near the border when attempting to enter surreptitiously. By contrast, under DHS and DOJ regulations, "arriving alien" is a term of art that does not encompass aliens arriving at the border between ports of entry but does encompass aliens inside the United States on immigration parole. *See* 8 C.F.R. §§ 1.2, 1001.1(q); Zheng v. Gonzales, 422 F.3d 98, 110-11 (3d Cir. 2005).

[147] *See, e.g.,* Thuraissigiam v. Dep't of Homeland Sec., 917 F.3d 1097, 1115 (9th Cir. 2019) (holding unconstitutional an INA limitation on judicial review of expedited removal orders, and remanding to district court for consideration of the alien's "legal challenges to the procedures leading to his expedited removal order") *cert. granted*, -- S. Ct. -- , No. 19-161, 2019 WL 5281289 (Mem) (Oct. 18, 2019); East Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1232 (9th Cir. 2018) (upholding temporary restraining order against a DHS interim rule concerning the asylum eligibility of aliens apprehended near the southern border); Grace v. Whitaker, 344 F. Supp. 3d 96, 126, 140-41 (D.D.C. 2018) (reviewing and vacating executive branch policies for screening asylum claims pressed by aliens arriving at the border without valid documentation).

[148] *See, e.g.,* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (mandating the detention of aliens subject to expedited removal procedures); Shaughnessy v. Mezei, 345 U.S. 206, 213 (1953) (alien's movements were "restrained by authority of the United States" as a consequence of his exclusion).

[149] *See* Jean v. Nelson, 472 U.S. 846, 872 (1985) (Marshall, J., dissenting) ("The broad and ominous nature of the dicta in *Knauff, Chew,* and *Mezei* becomes clear when one realizes that they apply not only to aliens outside our borders, but also to aliens who are physically within the territory of the United States and over whom the Executive directly exercises its coercive power.").

[150] *Mezei*, 345 U.S. at 215-16.

[151] *See id*.; *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 64, at 147 ("Mezei faced more than exclusion; he faced the prospect of indefinite, possibly life-long detention.").

this second question in the affirmative, reasoning that Mezei's lack of constitutional rights with respect to entry, and Congress's decision not to provide him with any judicially enforceable statutory rights to entry, foreclosed his challenge to the detention that resulted from his exclusion.[152] In dissent, Justice Jackson made a famous retort:

> 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. [153]

In more recent cases, the Supreme Court has hesitated to rely on *Mezei* for the proposition that the federal government has the constitutional power to subject arriving aliens to prolonged detention in order to carry out their exclusion.[154] Some lower courts have gone further and held that arriving aliens have due process rights that offer some protection against unreasonably prolonged detention, reasoning that *Mezei* applies only in cases that implicate specific national security concerns.[155] The Supreme Court has yet to resolve the issue.[156] As such, the extent to which aliens arriving at the border enjoy constitutional protections against prolonged detention or other enforcement measures connected to the denial of entry is a disputed issue.[157] And while the law

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[152] *Mezei*, 345 U.S. at 216 ("That exclusion by the United States plus other nations' inhospitality results in present hardship cannot be ignored. But, the times being what they are, Congress may well have felt that other countries ought not shift the onus to us . . . . Whatever our individual estimate of that policy and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.").

[153] *See id*. at 226-27 (Jackson, J., dissenting).

[154] *See* Zadvydas v. Davis, 533 U.S. 678, 694 (2001) ("[W]e need not consider the . . . claim that subsequent developments have undermined *Mezei*'s legal authority [concerning indefinite detention for aliens seeking entry]."); *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)).

[155] *See* Kouadio v. Decker, 352 F. Supp. 3d 235, 240 (S.D.N.Y. 2018) ("*Mezei* is limited to the national security context in which it was decided."); Lett v. Decker, 346 F. Supp. 3d 379, 385-86 (S.D.N.Y. 2018); *see also* Rosales-Garcia v. Holland, 322 F.3d 386, 413-14 (6th Cir. 2003) (en banc) ("[T]he *Mezei* Court explicitly grounded its decision in the special circumstances of a national emergency and the determination by the Attorney General that Mezei presented a threat to national security."); *but see* Poonjani v. Shanahan, 319 F. Supp. 3d 644, 648 (S.D.N.Y. 2018) (relying on *Mezei*, without recognizing a national security limitation, to reject arriving alien's due process challenge to prolonged detention during removal proceedings); Aracely v. Nielsen, 319 F. Supp. 3d 110, 145 (D.D.C. 2018) (similar).

[156] Jennings v. Rodriguez, 138 S. Ct. 830, 851 (2018) (leaving undecided question whether prolonged immigration detention during removal proceedings violates due process).

[157] *See id*; *Kouadio*, 352 F. Supp. 3d at 238 (explaining that *Jennings* did not decide "whether the Due Process Clause constitutionally requires bond hearings for several categories of aliens, including non-resident aliens arriving at the U.S. border"); *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 64, at 148 ("The indefinite detention of excluded noncitizens is not just a relic of the Cold War era. It has remained a vital issue in recent years."). In a different vein, courts have held that in some circumstances nonresident aliens at the border enjoy constitutional rights against enforcement measures that are not connected to the denial of entry, such as gratuitous physical abuse by U.S. law enforcement. *See, e.g.,* Martinez-Aguero v. Gonzalez, 459 F.3d 618, 623, 625 (5th Cir. 2006) (holding that a nonresident alien who had developed "substantial connections" to the United States through prior visits was "entitled to Fourth Amendment protection" against a U.S. immigration official's use of excessive force against her in front of a port of entry) ("[T]he sovereign should enjoy particularly broad discretion in the immigration context, because the power to decide which, and how many, outsiders may join our society is critical to national self-determination. There are, however, no identifiable national interests that justify the wanton infliction of pain."); *see also* Hernandez v. Mesa, 137

remains clear on the point that arriving nonresident aliens do not have constitutional rights with respect to entry itself,[158] the proposition that they may have constitutional rights against detention or other enforcement measures that implicate fundamental rights often leads to judicial review of issues arising from their exclusion.[159]

## Habeas Corpus Review

Second, also because of the detention issue, arriving alien cases may trigger some level of habeas corpus review.[160] *Knauff* and *Mezei* establish that no judicial review is available for exclusion decisions unless a statute expressly authorizes such review. But at the same time, the cases confirm an arguably countervailing proposition: that arriving aliens who suffer detention as a consequence of exclusion may challenge their exclusion in habeas corpus proceedings.[161] Thus, in *Knauff*, the Court disavowed judicial review but still considered and rejected the excluded alien's argument that the applicable statutes required the Attorney General to conduct a hearing on her admissibility and that an executive branch regulation providing to the contrary was "unreasonable."[162] Similarly, in *Mezei*, the Court's habeas review included an assessment that the exclusion of the stateless alien in that case without a hearing conformed to the procedural requirements of the immigration statutes.[163] As the Court has noted elsewhere, "[i]n the

S. Ct. 2003, 2007 (2017) (declining to decide whether a cross-border shooting by a Border Patrol agent of a 15-year-old unarmed Mexican national who was standing on the Mexican side of the border violated Fourth Amendment rights, calling the issue "sensitive" and with potential "consequences that are far-reaching"); *cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (holding that the Fourth Amendment does not apply "to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country"). Whether aliens at the border who suffer excessive force violations or other constitutional violations not connected to exclusion have a cause of action to recover damages under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), is a separate question. *See* CRS Legal Sidebar LSB10135, *Is There Liability for Cross-Border Shooting?*, by Charles Doyle.

[158] Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) (recognizing that "foreign nationals seeking admission have no constitutional right to entry").

[159] *See, e.g.*, *Kouadio*, 352 F. Supp. 3d at 238; *Lett*, 346 F. Supp. 3d at 385-86; Aracely, R. v. Nielsen, 319 F. Supp. 3d 110, 141 (D.D.C. 2018) (reviewing whether due process entitled arriving asylum seekers, whom DHS allegedly detained for deterrence purposes, to bond hearings); Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1144 (S.D. Cal. 2018) (holding that separation of alien families that entered the United States between ports of entry, for the purpose of prosecuting the adults for illegal entry, likely violated due process because the government did not make plans to reunite the families at the conclusion of the criminal proceedings). The histories of the *Knauff* and *Mezei* cases further illustrate how detention distinguishes arriving alien cases from other exclusion cases. Both *Knauff* and *Mezei* 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).

[160] *Compare* Thuraissigiam v. Dep't of Homeland Security, 917 F.3d 1097, 1115 (9th Cir. 2019) (holding that habeas corpus review of expedited removal decisions under 8 U.S.C. § 1225(b)(1) is constitutionally required), *cert. granted*, -- S. Ct. -- , No. 19-161, 2019 WL 5281289 (Mem) (Oct. 18, 2019); *with* Castro v. Dep't of Homeland Security, 835 F.3d 422, 448-49 (3d Cir. 2016) (holding that Congress may bar habeas corpus review of expedited removal proceedings without providing for adequate substitute proceedings).

[161] *See* Shaughnessy v. Mezei, 345 U.S. 206, 213 (1953) ("[The alien's] movements are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion."); United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 540 (1950).

[162] *Knauff*, 338 U.S. at 544 ("We find no substantial merit to petitioner's contention that the regulations were not 'reasonable' as they were required to be by the 1941 Act.").

[163] *Mezei*, 345 U.S. at 214-15.

immigration context, 'judicial review' and 'habeas corpus' have historically distinct meanings."[164] The Court has held in the deportation context that the preclusion of judicial review does not bar habeas corpus proceedings.[165] *Knauff*, *Mezei*, and earlier exclusion cases suggest that the same principle applies in the exclusion context: the cases declare that judicial review is unavailable for challenges to exclusion decisions, but they nonetheless engage in some review of executive jurisdiction and procedure under the rubric of habeas corpus.[166]

The scope of federal court review in habeas corpus proceedings of a decision to exclude an alien appears extremely limited, although its exact contours remain unclear (as does the question whether such proceedings are constitutionally required).[167] The habeas review that the Court conducted in *Knauff* and *Mezei* did not reach the merits of the exclusion decisions. In *Knauff*, the Court declined to review the Attorney General's determination that the German war bride's entry would be "prejudicial."[168] Similarly, in *Mezei*, the Court held that it could not review the Attorney General's undisclosed reasons for excluding the stateless alien.[169] As such, one might read *Knauff* and *Mezei* to mean that courts reviewing exclusion decisions in habeas proceedings (1) may review pure questions of law, such as whether immigration officials had jurisdiction to enforce the relevant exclusion statutes and whether the statute authorized them to forgo a hearing, but (2) may not review the basis for the officials' determination that the statutes require the aliens' exclusion.[170]

Other cases complicate this picture, however. In at least one early habeas case that the Supreme Court has not overruled, the Court reviewed and reversed the determination of immigration officers that a group of arriving aliens was subject to exclusion under the immigration statutes.[171]

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[164] INS v. St. Cyr, 533 U.S. 289, 311 (2001).

[165] *Id*. at 312-313 (holding that two INA provisions that barred judicial review without mentioning habeas proceedings did not "speak[] with sufficient clarity to bar jurisdiction pursuant to the general habeas statute").

[166] *Mezei*, 345 U.S. at 214-15; *Knauff*, 338 U.S. at 544; Lem Moon Sing v. United States, 158 U.S. 538, 546 (1895); Nishimura Ekiu v. United States, 142 U.S. 651, 664 (1892); *see* Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1967 (2000) ("When the constitutionality of entrusting the adjudication of immigration matters to executive officials was challenged, the Supreme Court affirmed that 'the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law,' but the Court also preserved judicial authority to determine [on habeas] whether the officials were indeed acting within the powers conferred.") (quoting Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892)).

[167] *See* Thuraissigiam v. Dep't of Homeland Sec., 917 F.3d 1097, 1116 n.20, 1119 n.24 (9th Cir. 2019) (leaving unresolved whether review of the merits of an exclusion decision is constitutionally required in habeas corpus proceedings), *cert. granted*, -- S. Ct. -- , No. 19-161, 2019 WL 5281289 (Mem) (Oct. 18, 2019). One federal appellate court has held that habeas proceedings for arriving nonresident aliens are not constitutionally required, such that Congress may expressly bar habeas corpus review of the exclusion of such an alien without providing adequate alternative proceedings to test the legality of the exclusion. Castro v. Dep't of Homeland Security, 835 F.3d 422, 448-49 (3d Cir. 2016) ("[A]s recent surreptitious entrants deemed to be 'alien[s] seeking initial admission to the United States,' Petitioners are unable to invoke the Suspension Clause, despite their having effected a brief entrance into the country prior to being apprehended for removal."); *but see Thuraissigiam*, 917 F.3d at 1115 (disagreeing with *Castro* and holding that habeas proceedings or an adequate substitute are constitutionally required to test the legality of decisions to exclude arriving nonresident aliens).

[168] *Knauff*, 338 U.S. at 544 ("[W]e have no authority to retry the determination of the Attorney General.").

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

[170] *See, e.g.*, Lem Moon Sing v. United States, 158 U.S. 538, 546 (1895) (endorsing judicial review to extent necessary to ascertain executive officials' jurisdiction).

[171] Gegiow v. Uhl, 239 U.S. 3, 9 (1915) ("The courts are not forbidden by statute to consider whether the reasons [for an exclusion decision], when they are given, agree with the requirements of the act."). The Court reasoned that it was reviewing a question of law, not a factual determination, because the facts of the case were undisputed in its view. *Id*. ("The only matter that we have to deal with is the construction of the statute with reference to the present case."); *see*

One federal circuit court has interpreted Supreme Court case law to suggest that "the Suspension Clause requires review of legal *and mixed questions of law and fact* related to removal orders, including expedited removal orders."[172]

The proper reach of a habeas court's review of the exclusion of an arriving alien thus remains unsettled,[173] although the Supreme Court is scheduled to consider this issue in 2020.[174] Regardless, the availability of any level of habeas review in arriving alien cases means that, in practice, the general rule against judicial review of exclusion decisions applies with less force in this context than in the context of visa denials or other decisions to exclude aliens *located abroad*, where the lack of detention makes habeas unavailable.[175]

## INA Framework for Judicial Review of Removal Orders

Third and finally, Congress has established a limited framework in the INA for the review of orders of removal against arriving nonresident aliens.[176] The INA sets forth two primary procedures by which DHS officials may remove aliens arriving in the United States. These procedures are expedited removal, a streamlined process that contemplates removal without a hearing before an immigration judge,[177] and formal removal, a more traditional proceeding in which an immigration judge determines whether to order the alien's removal.[178] The INA specifies the limited circumstances in which an alien ordered removed under these procedures may obtain judicial review.[179] The INA also expressly bars or limits judicial review of a range of executive branch actions and determinations connected to the removal process.[180] This INA scheme of limitations on judicial review purports to bar review of expedited removal orders in most circumstances,[181] but it may not bar review of some executive branch exclusion policies that

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INS v. St. Cyr, 533 U.S. 289, 306 (2001) (describing *Gegiow* as a habeas case where the Court "review[ed] the Executive's legal determinations."). The question that the Court reviewed might also be described as one of fact-law application. *See Thuraissigiam*, No. 19-161, 2019 WL 1065027, at *17 ("In *Gegiow*, the Court also reviewed the executive's application of a legal standard to undisputed facts, concluding that the government had incorrectly determined that the petitioner was likely to become a public charge.").

[172] *Thuraissigiam*, 917 F.3d at 1117.

[173] *See id*.

[174] Dep't of Homeland Sec. v. Thuraissigiam, -- S. Ct. -- , No. 19-161, 2019 WL 5281289 (Mem) (Oct. 18, 2019).

[175] *See* Allen v. Milas, 896 F.3d 1094, 1098 n.1 (9th Cir. 2018) (explaining that an unsuccessful visa applicant "has no personal right to entry, nor a right to judicial review absent a personal detention by the United States"); *see also* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (indicating that a nonresident alien abroad can bring no more than a "symbolic" challenge to his exclusion because he has "no constitutional right of entry").

[176] *See* 8 U.S.C. § 1252 (providing judicial review of orders of removal).

[177] *Id*. § 1225(b)(1); *see generally* CRS Report R45314, *Expedited Removal of Aliens: Legal Framework*, by Hillel R. Smith.

[178] 8 U.S.C. §§ 1225(b)(2), 1229a.

[179] *Id*. §§ 1252(a)(5) ("[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e)."), 1252(e) (barring judicial review of expedited removal orders, with limited exceptions).

[180] *E.g.*, *id*. §§ 1226(e) (barring judicial review of the "Attorney General's discretionary judgment regarding the application of" detention and release provisions for certain aliens in removal proceedings), 1252(g) ("Except as provided in this section . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.").

[181] *Id*. §§ 1252(a)(2)(A), 1252(e); *see* CRS Report R45314, *Expedited Removal of Aliens: Legal Framework*, *supra* note 177, at 30; Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 196-97 (2017)

bear upon the expedited removal process (such as, for example, executive policies that restrict asylum eligibility for some aliens arriving at the border who are subject to expedited removal procedures).[182]

These INA provisions concerning the reviewability of removal orders appear to have replaced the *Knauff* presumption—that judicial review of exclusion decisions is unavailable "unless expressly authorized by law"—as the touchstone for whether executive decisions or policies for the exclusion of arriving nonresident aliens are subject to judicial review.[183] When the INA expressly authorizes judicial review of orders or policies for the removal of arriving aliens, federal courts engage in such review.[184] More broadly, however, federal courts have also shown a willingness to review statutory challenges to exclusion decisions or policies concerning aliens at the threshold of entry so long as the INA does not expressly bar such review (even if it does not expressly authorize review).[185] This situation typically arises in cases where arriving aliens or their advocates challenge an executive branch exclusion policy under the APA.[186]

How judicial review in such exclusion cases—where the INA neither expressly authorizes nor bars review—comports with the *Knauff* presumption remains largely unexplained in the case law.[187] Yet the Supreme Court has on at least one occasion allowed for judicial review of

("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"); *cf*. Thuraissigiam v. Dep't of Homeland Sec., 917 F.3d 1097, 1103, 1118 (9th Cir. 2019) (explaining that § 1252(e)(2) "limits a district court to reviewing three basic factual determinations related to an expedited removal order" but holding that the Suspension Clause requires the availability of more expansive review of expedited removal orders in habeas proceedings).

[182] *See* East Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 756 (9th Cir. 2018) (upholding temporary restraining order against a DHS interim rule concerning the asylum eligibility of aliens apprehended near the southern border, and concluding that the court could "review the political branches' actions to determine whether they exceed the constitutional or statutory scope of their authority").

[183] *See* Brownell v. We Shung, 352 U.S. 180, 184 (1956) ("We conclude that unless the [Immigration and Nationality Act of 1952] is to the contrary, exclusion orders may be challenged either by habeas corpus or by declaratory judgment action.").

[184] *See, e.g.*, Am. Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38, 47 (D.D.C. 1998) (reviewing challenges to expedited removal system brought by two aliens whose claims met the "jurisdictional requirements" of 8 U.S.C. § 1252(e)).

[185] *See East Bay Sanctuary Covenant*, 932 F.3d at 756; Innovation Law Lab v. McAleenan, 924 F.3d 503, 506 (9th Cir. 2019) (reviewing, in emergency stay posture, APA claims against DHS policy directing "the 'return' of asylum applicants who arrive from Mexico as a substitute to the traditional options of detention and parole"); Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284, 1308 (S.D. Cal. 2018) (reviewing under the APA an executive "metering" policy of restricting the number of asylum applicants accepted for processing at ports of entry).

[186] *See, e.g.*, *East Bay Sanctuary Covenant*, 932 F.3d at 767-68 ("The Organizations bring their claims under the APA.").

[187] *Compare* United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."), *with East Bay Sanctuary Covenant*, 932 F.3d at 756, 769 (holding that APA grants courts authority to review executive policy concerning the asylum eligibility of aliens apprehended at the southern border); *Innovation Law Lab*, 924 F.3d at 507-10 (reviewing executive policy of returning asylum seekers arriving to southern border to Mexico during proceedings, without addressing reviewability issues); *Al Otro Lado, Inc*., 327 F. Supp. 3d at 1308. Some but not all of the APA cases concern unlawful entrants apprehended on the U.S. side of the border, a factor that, even if the aliens managed only a fleeting entry, could distinguish *Knauff* and other cases about aliens stopped at the threshold. *See* Martin, *supra* note 154, at 97 ("Practice has traditionally treated an entrant without inspection (EWI) more favorably, for purposes of constitutional and statutory claims, than parolees or applicants for admission at the border.").

inadmissibility determinations of arriving aliens on the ground that Congress had not expressly barred such review: in the 1956 case *Brownwell v. We Shung*, the Court held that arriving aliens could challenge inadmissibility determinations through declaratory judgment actions because the relevant statute—a prior version of the INA that Congress later amended in disapproval of the Supreme Court decision—did not bar such actions.[188] This decision appeared to disregard the presumption against judicial review of exclusion determinations established in *Knauff* and earlier exclusion cases, although the *We Shung* Court did not address this point.[189] The underlying implication of *We Shung*, and of the more recent lower court decisions reviewing statutory challenges to executive branch policies concerning the exclusion of arriving aliens, may be that the INA's judicial review framework for orders of removal occupies the territory that the *Knauff* presumption against judicial review once occupied and therefore replaces the *Knauff* presumption as the law governing the availability of judicial review in arriving alien exclusion cases.[190]

To recap: the current case law generally provides that statutory challenges to the exclusion of arriving aliens are reviewable unless a statute expressly bars such judicial review. However, the case law does not thoroughly reconcile this approach with the *Knauff* presumption that there should be no review of an exclusion determination unless the review is expressly authorized in statute.[191]

## Conclusion Concerning General Rule Against Judicial Review of Exclusion Decisions

The line of Supreme Court exclusion jurisprudence culminating in *Knauff* and *Mezei* establishes that courts may not review challenges to the exclusion of nonresident aliens unless Congress expressly provides for such review. In the context of aliens located abroad, this jurisprudence has developed into the rule of consular nonreviewability, which bars judicial review in most circumstances of visa refusals and other decisions to exclude nonresident aliens abroad. In the context of arriving aliens, however, the *Knauff* presumption against judicial review of exclusion decisions appears to have been mostly overshadowed by constitutional issues concerning enforcement measures related to the denial of entry, the potential availability of some level of habeas review, and the framework of INA provisions governing judicial review of removal orders.

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[188] 352 U.S. 180, 184 (1956); *see* Saavedra Bruno v. Albright, 197 F.3d 1153, 1161 (D.C. Cir. 1999) (explaining that "[i]n 1961, Congress overruled *We Shung*, amending the INA to make clear that habeas corpus was the only method for judicial review of exclusion orders").

[189] *See We Shung*, 352 U.S. at 184 (reasoning that declaratory judgment actions against exclusion decisions for arriving aliens should be available "unless the [INA] is to the contrary" and that an INA provision making exclusion decisions final "refers only to administrative finality").

[190] *See id*.; East Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094, 1119 (N.D. Cal. 2018) (holding that because the INA did not expressly bar judicial review, court could review claims that a DHS policy concerning the exclusion of certain arriving asylum seekers violated the asylum statute) ("As the Supreme Court has observed, where 'Congress wanted [a] jurisdictional bar to encompass [particular] decisions [under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") ] . . . it expressed precisely that meaning.'"), aff'd, 932 F.3d 742 (9th Cir. 2018).

[191] *See East Bay Sanctuary Covenant*, 932 F.3d at 756; *cf.* Sale v. Haitian Centers Council, Inc., 509 U.S. 155 158-59 (1993) (considering and ultimately rejecting statutory challenges to the U.S. Coast Guard's interdiction and forced return of Haitian migrants trying to reach the United States by sea, without addressing reviewability issues); Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018) (The Court in [*Sale*] . . . went on to consider on the merits a statutory claim like the one before us without addressing the issue of reviewability.").

# Claims by U.S. Citizens Against an Alien's Exclusion

**Key Takeaways of This Section**

- If an executive branch decision to exclude an alien abroad burdens the constitutional rights of a U.S. citizen, a federal court may conduct a "highly constrained" review of the decision to determine if it is supported by "a justification independent of unconstitutional grounds."
- The Supreme Court has considered four U.S. citizen challenges to the exclusion of aliens abroad and in each instance has upheld the exclusion under deferential review.

Even as applied to aliens abroad, the rule against nonresident alien challenges to denials of entry has a major limitation: the rule only clearly forecloses challenges brought by nonresident aliens themselves.[192] Thus, if a U.S. citizen claims that the exclusion of an alien violated *the U.S. citizen's* constitutional rights, the rule against alien challenges does not apply with its full force.[193]

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.[194] 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 four important cases since 1972: *Kleindienst v. Mandel*,[195] *Fiallo v. Bell*,[196] the splintered *Kerry v. Din*,[197] and *Trump v. Hawaii*.[198] Under the rule that these cases establish, the government need satisfy only a "highly constrained" judicial inquiry into whether the exclusion "had a justification independent of unconstitutional grounds" in order to prevail against an American citizen's claim that the exclusion violated his or her constitutional rights.[199] This is an extremely limited level of judicial review under which the government has always prevailed before the Supreme Court.[200]

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[192] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) ("[A]lthough foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.").

[193] *See id*.; Kleindienst v. Mandel, 408 U.S. 753, 770 (1972). Other cases have applied this principle to review claims brought by LPRs and U.S.-based entities, alongside claims brought by U.S. citizens, but the cases have not clarified whether the noncitizen claims would be reviewable on their own. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2406 (2018); Fiallo v. Bell, 430 U.S. 787, 790 n.3 (1977).

[194] 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 pending decisions on admission or exclusion). In more recent times, the Court has mentioned the rule against nonresident alien challenges in cases that do not directly implicate it. *See Trump v. Hawaii*, 138 S. Ct. at 2419; *Din*, 135 S. Ct. at 2131 (Scalia, J., plurality opinion); Landon v. Plasencia, 459 U.S. 21, 32 (1982).

[195] 408 U.S. 753 (1972).

[196] 430 U.S. 787 (1977).

[197] 135 S. Ct. 2128 (2015).

[198] 138 S. Ct. 2392 (2018).

[199] *See id*. at 2420.

[200] *See id*. at 2419-20; *see also* Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J. FORUM 641, 642 (2019) (criticizing *Trump v. Hawaii* as a decision

## *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.[201] The professors had invited Mandel to speak at their universities.[202] A provision of the INA rendered him ineligible for a visa because of his communist political beliefs.[203] 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.[204] The case produced a standard of review for 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 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.[205]

Applying this "facially legitimate and bona fide" 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.[206] 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.[207] Nonetheless, the majority refused to "look behind" the government's justification to determine whether any evidence supported it.[208] 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. Unlike Mandel himself and the unadmitted aliens from prior exclusion cases, the

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that "perpetuates . . . very-near-blind deference to the executive branch"); Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391, 412 (2018) ("The majority [in *Trump v. Hawaii*] unmistakably endorsed the view that, in almost all cases, decisions on the question of which noncitizens should and should not be allowed to enter the United States are best left to the political branches of the government, and that judges should rarely if ever invoke the Constitution to overturn such decisions.").

[201] *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).

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

[203] *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, Pub. L. No. 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).

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

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

[206] *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.").

[207] *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).

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

American professors stated a compelling First Amendment claim based on their "right to receive information" from the Belgian intellectual.[209] 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.[210] After all, many other exclusions of aliens for communist ideology could also have implicated the rights of U.S. citizens who sought to "meet and speak with" the excluded aliens.[211] The "facially legitimate" standard protected the plenary power against dilution by limiting the reach of the American professors' claim.[212] 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.[213] 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."[214]

## Subsequent Applications of *Mandel: Fiallo, Din,* and *Trump v. Hawaii*

The Court has followed *Mandel* in three subsequent exclusion cases. The first of these cases, *Fiallo v. Bell*, concerned the constitutionality of a statute;[215] the second, *Kerry v. Din*, concerned the Executive's application of a statute in an individual visa case;[216] and the third, *Trump v. Hawaii*, concerned the Executive's invocation of statutory authority to exclude a broad class of aliens by presidential proclamation.[217] All three cases 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 and third cases, however, indicate that a different standard of review than *Mandel*'s "facially legitimate and bona fide" test may apply when challengers present extrinsic evidence of an unconstitutional justification for an executive exclusion decision or policy.[218] The Supreme Court has assumed without definitively holding that, in such cases, reviewing courts may consider the extrinsic evidence to determine whether the exclusion decision or policy "can

[209] *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.").

[210] *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] § 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.").

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

[212] *See id*. at 769.

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

[214] *Id*. at 770.

[215] 430 U.S. 787, 792 (1977).

[216] 135 S. Ct. 2128, 2131 (2015).

[217] 138 S. Ct. 2392, 2403 (2018).

[218] *See Trump v. Hawaii*, 138 S. Ct. at 2420; *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring).

reasonably be understood to result from a justification independent of unconstitutional grounds."[219]

### *Fiallo v. Bell*

In *Fiallo v. Bell*, the Court upheld a provision of the INA that classified people by gender and legitimacy.[220] 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.[221] Two U.S. citizens and two LPRs claimed that the restriction violated their equal protection rights by disqualifying their children or fathers from the preferences.[222] 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."[223] Although it relied on *Mandel*,[224] the *Fiallo* Court did not identify a concrete "facially legitimate or bona fide" justification for the statute. Instead, the Court 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.[225] 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.[226]

### *Kerry v. Din*

In *Kerry v. Din*, the Court considered a U.S. citizen's claim that the Department of State violated her due process rights by denying her husband's visa application without sufficient explanation.[227] The Department indicated that it denied the visa under a terrorism-related ineligibility but did not disclose the factual basis of its decision.[228] 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.[229] But Justice Kennedy, in a concurring opinion for himself and Justice Alito, which some lower

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[219] *Trump v. Hawaii*, 138 S. Ct. at 2420.

[220] 430 U.S. 787, 799-800 (1977).

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

[222] *Id*. at 790.

[223] *Id*. at 794.

[224] *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.").

[225] *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.").

[226] *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..").

[227] 135 S. Ct. 2128, 2131 (2015).

[228] *Id*. at 2132.

[229] *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).

courts view as the controlling opinion in the case,[230] assumed without deciding that the visa denial implicated due process rights but rejected the claim under the "facially legitimate and bona fide reason" test.[231]

Justice Kennedy's concurring opinion made two significant statements about how *Mandel* works in application. First, the government may satisfy the "facially legitimate and bona fide reason" standard by citing the statutory provision under which it has excluded the alien.[232] Such a citation fulfills the "facially legitimate" prong by grounding the exclusion decision in legislative criteria enacted under Congress's "plenary power" to restrict the entry of aliens, and the citation also, by itself, suffices to "indicate[] [that the government] relied upon a bona fide factual basis" for the exclusion.[233] Thus, because the government stated that it denied Din's husband's visa application under the terrorism-related ineligibility, it provided an adequate justification under *Mandel* even though it did not disclose the factual findings that triggered the ineligibility.[234] Pointing to the statute suffices.[235]

Second, however, Justice Kennedy indicated that his interpretation of the "bona fide" prong might be susceptible to a caveat in some cases:

> 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.[236]

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.[237] Justice Kennedy therefore had no occasion to apply the caveat, and the opinion did not clarify what kind of "affirmative showing" would trigger it.[238] Nonetheless, Justice Kennedy's concept of a bad faith exception to *Mandel*'s rule against judicial scrutiny of the government's

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[230] *See* Cardenas v. United States, 826 F.3d 1164, 1167 (9th Cir. 2016) ("We hold today that, under *Marks v. United States*, 430 U.S. 188, 193 (1977) . . . Justice Kennedy's concurrence in *Din* is the controlling opinion."); Singh v. Tillerson, 271 F. Supp. 3d 64, 70 (D.D.C. 2017) (referring to Justice Kennedy's concurring opinion in *Din* as the "controlling opinion in that case"); *but see* Saleh v. Tillerson, 293 F. Supp. 3d 419, 425-26 (S.D.N.Y. 2018) (holding that the concurring opinion in *Din* is not controlling under *Marks v. United States* because "[t]he logic of Justice Kennedy's opinion was not a narrower subset of the *ratio decidendi* of the plurality").

[231] *Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring).

[232] *Id*. at 2140.

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

[234] *Id*.

[235] *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.").

[236] *Id*. at 2141.

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

[238] *See id*.

underlying factual basis for an exclusion decision became a prominent issue in the Supreme Court's most recent exclusion case, *Trump v. Hawaii*.[239]

### *Trump v. Hawaii*

Most recently, in *Trump v. Hawaii*, the Court rejected a challenge brought by U.S. citizens, the state of Hawaii, and other U.S.-based plaintiffs against a presidential proclamation that provided for the indefinite exclusion of broad categories of nonresident aliens from seven countries, subject to some waivers and exemptions.[240] Five of the seven countries covered by the proclamation were Muslim-majority countries.[241] The proclamation, like two earlier executive orders that imposed entry restrictions of a similar nature, became known colloquially as the "Travel Ban" or "Muslim Ban."[242]

As statutory authority for the proclamation, the President relied primarily upon INA § 212(f).[243] That statute grants the President power "to suspend the entry of all aliens or any class of aliens" whose entry he "finds . . . would be detrimental to the interests of the United States."[244] In the proclamation, the President concluded that the entry of the specified categories of nationals from the seven countries would have been "detrimental" to the United States because, based on the results of a multiagency review, the countries did not adequately facilitate the vetting of their nationals for security threats or because conditions in the countries posed particular risks to national security.[245] Thus, the stated purpose of the proclamation was to protect national security by excluding aliens who could not be properly vetted due to the practices of their governments or the conditions in their countries.[246] The challengers contended, however, that the actual purpose of the proclamation was to exclude Muslims from the United States. They based this argument primarily upon extrinsic evidence—that is, evidence outside of the four corners of the proclamation—including statements that the President had made as a candidate calling for a "total and complete shutdown of Muslims entering the United States."[247]

The challengers argued that the proclamation was illegal on statutory and constitutional grounds. With respect to statute, the challengers contended that INA § 212(f) conferred upon the President only a "residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct" and therefore did not authorize the proclamation's indefinite exclusion of

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[239] Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018) ("A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. For our purposes today, we assume that we may look behind the face of the [executive exclusion policy] to the extent of applying rational basis review.").

[240] *Id*. at 2403, 2406.

[241] Proclamation No. 9645, 82 Fed. Reg. at 45161, 45,165–67 (Sept. 24, 2017). The proclamation originally applied to nationals of eight countries: Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia. *Id*. The President terminated the restrictions on nationals of Chad, however, after determining that their government "had made sufficient improvements to its identity-management protocols." *Trump*, 138 S. Ct. at 2410.

[242] *See Trump v. Hawaii*, 138 S. Ct. at 2403-04, 2437; *id*. at 2430 (Breyer, J., dissenting).

[243] Proclamation No. 9645, 82 Fed. Reg. at 45,162; *see Trump v. Hawaii*, 138 S. Ct. at 2403.

[244] 8 U.S.C. § 1182(f).

[245] *Trump v. Hawaii*, 138 S. Ct. at 2404-05.

[246] Proclamation No. 9645, 82 Fed. Reg. at 45161–62; *see Trump v. Hawaii*, 138 S. Ct. at 2421 ("The Proclamation is expressly premised on . . . preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.").

[247] *Trump v. Hawaii*, 138 S. Ct. at 2417 (quoting record).

nationals of seven countries.[248] The challengers also made other statutory arguments, including that the proclamation did not make sufficient findings that the entry of the excluded aliens would be "detrimental to the interests of the United States," as the language of § 212(f) requires.[249] With respect to the constitutional ground, the challengers argued that the proclamation violated the Establishment Clause because, based on the extrinsic evidence, the President issued the proclamation for the actual purpose of excluding Muslims from the United States.[250] As such, according to plaintiffs, the proclamation ran afoul of the "clearest command" of the Establishment Clause: "that one religious denomination cannot be officially preferred over another."[251]

A five-Justice majority of the Supreme Court rejected all of these challenges in an opinion by Chief Justice Roberts that generally reaffirmed the unique breadth of the political branches' power to admit or exclude aliens.[252] On the statutory claims, the Court declined to decide whether the doctrine of consular nonreviewability barred judicial review of the U.S. plaintiffs' arguments that the proclamation violated § 212(f) and other provisions of the INA.[253] The Court instead held that the proclamation did not violate the INA because § 212(f) "exudes deference to the President" and grants him "'ample power' to impose entry restrictions in addition to those elsewhere enumerated in the INA," even restrictions as broad as those in the proclamation.[254] The Court also reasoned that the "deference traditionally accorded the President" in national security and immigration matters means that courts must not conduct a "searching inquiry" into the basis of the President's determination under § 212(f) that the entry of certain aliens would be "detrimental to the interests of the United States."[255] The Court suggested that such a presidential determination might not be subject to judicial review at all—calling the premise for such review "questionable"—but ultimately held that, "even assuming some form of review [was] appropriate," the findings in the proclamation about the results of the multiagency review of vetting practices satisfied § 212(f)'s requirements.[256] In short, although the Court reviewed the statutory claims against the proclamation, it rejected those claims by holding that Congress has delegated extraordinary power to the President to exclude aliens and that the President's decisions to employ this power warrant deference.[257]

On the constitutional issue, the Court reiterated the holdings in *Mandel* and *Fiallo* that matters concerning the admission or exclusion of aliens are "'largely immune from judicial control'" and are subject only to "highly constrained" judicial inquiry when exclusion "allegedly burdens the constitutional rights of a U.S. citizen."[258] Interestingly, however, the Court did not decide whether the limitations on the scope of this inquiry barred consideration of extrinsic evidence of the

[248] *Id*. at 2408.

[249] *Id*. at 2409.

[250] *Id*. at 2406.

[251] *Id*. (quoting Larson v. Valente, 456 U.S. 228, 244 (1982)).

[252] *See id*. at 2418.

[253] *Id*. at 2407 ("[W]e may assume without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue, and we proceed on that basis.").

[254] *Id*. at 2408 (quoting Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 187 (1993)).

[255] *Trump v. Hawaii*, 138 S. Ct. at 2409.

[256] *Id*.

[257] *Id*. at 2415.

[258] *Id*. at 2418–20 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

proclamation's purpose.[259] Much of the litigation in the lower courts had turned on this issue. A majority of judges on the U.S. Court of Appeals for the Fourth Circuit, citing Justice Kennedy's concurrence in *Din*, had relied on the campaign statements and other extrinsic evidence of anti-Muslim animus to hold that the proclamation likely violated the First Amendment.[260] Dissenting Fourth Circuit judges had reasoned that *Mandel* and the other exclusion cases prohibited consideration of the extrinsic evidence.[261] The Supreme Court, instead of resolving this disagreement, assumed without deciding that consideration of the extrinsic evidence was appropriate in connection with a rational basis inquiry:

> A conventional application of . . . [the] facially legitimate and bona fide [test] would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.[262]

In other words, the Court concluded that, even if plaintiffs' evidence of anti-Muslim animus warranted expansion of the scope of judicial review beyond the four corners of the proclamation itself, the appropriate inquiry remained extremely limited: whether the proclamation was rationally related to the national security concerns it articulated.[263] And that rational basis inquiry, the Court explained, is one that the government "hardly ever" loses unless the laws at issue lack any purpose other than a "'bare . . . desire to harm a politically unpopular group.'"[264] Applying this forgiving standard, the Court held that the proclamation satisfied it mainly because agency findings about deficient information-sharing by the governments of the seven covered countries established a "legitimate grounding in national security concerns, quite apart from any religious hostility."[265]

In the principal dissent, Justice Sotomayor argued that the majority failed to provide "explanation or precedential support" for limiting its analysis to rational basis review after deciding to go beyond the "facially legitimate and bona fide reason" inquiry.[266] In Justice Sotomayor's view, the

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[259] *Id*. at 2420.

[260] IRAP v. Trump, 883 F.3d 233, 264 (4th Cir. 2018) (en banc) ("Justice Kennedy's concurrence in *Din* elaborated on [*Mandel*'s] 'bona fide' requirement. An action is not considered 'bona fide' if Plaintiffs make an 'affirmative showing of bad faith,' which they must 'plausibly allege[ ] with sufficient particularity.' Upon such a showing, a court may 'look behind' the Government's proffered justification for its action.") (quoting Kerry v. Din, 135 S. Ct. 2128, 2139-41 (2015) (Kennedy, J., concurring).

[261] *Id*. at 364 (Niemeyer, J., dissenting) ("[J]ust as the Court in *Mandel* rejected the plaintiffs' challenge because, even assuming a constitutional violation lurked beneath the surface of the Executive's implementation of its statutory authority, the reasons the Executive had provided were 'facially legitimate and bona fide,' so must we reject this similar challenge today."); IRAP v. Trump, 857 F.3d 554, 648 (4th Cir. 2017) (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 [to exclude aliens] in search of circumstantial evidence of alleged bad faith.").

[262] *Trump v. Hawaii*, 138 S. Ct. at 2420.

[263] *Id*.

[264] *Id*. (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[265] *Id*. at 2421 ("The Proclamation . . . reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review . . . . But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country.").

[266] *Id*. at 2441 (Sotomayor, J., dissenting).

Court's Establishment Clause jurisprudence required the Court to strike down the proclamation because a "reasonable observer" familiar with the evidence would have concluded that the proclamation sought to exclude Muslims.[267] She also reasoned that, even if rational basis review were the correct standard, the proclamation failed to satisfy it because the President's statements were "overwhelming . . . evidence of anti-Muslim animus" that made it impossible to conclude that the proclamation had a legitimate basis in national security concerns.[268] Finally, Justice Sotomayor criticized the majority for, in her view, tolerating invidious religious discrimination "in the name of a superficial claim of national security."[269] She compared the majority decision to *Korematsu v. United States*, a case that upheld as constitutional the compulsory internment of all persons of Japanese ancestry in the United States (including U.S. citizens) in concentration camps during World War II.[270] (The majority responded that unlike the exclusion order in *Korematsu* the proclamation did not engage in express, invidious discrimination against U.S. citizens and that, as such, "*Korematsu* has nothing to do with this case."[271] The majority also took the occasion to overrule *Korematsu*—which had long been considered bad law but which the Supreme Court had never expressly overruled—calling it "gravely wrong the day it was decided."[272])

In conclusion, *Trump v. Hawaii* leaves some questions unresolved about how the *Mandel* test works in practice, but *Trump v. Hawaii* leaves no uncertainty on one point: *Mandel* and its progeny permit courts to conduct only a vanishingly limited review of executive decisions to exclude aliens abroad. The Court did not decide whether U.S. citizens may challenge exclusion decisions on statutory grounds or whether, and in what circumstances, courts may consider extrinsic evidence of the government's purpose for an exclusion decision or policy. Yet the majority opinion reaffirms that the standard of review that applies to constitutional claims brought by U.S. citizens against the exclusion of aliens abroad is a "highly constrained" one that favors the government heavily, even when extrinsic evidence suggests that the Executive may have acted for an unconstitutional purpose.

# Implications of Supreme Court Jurisprudence for the Scope of Congressional Power

**Key Takeaways of This Section**

- Congress has extraordinary power to legislate for the exclusion of aliens: the Supreme Court has indicated that, at most, it will apply the forgiving rational basis standard of review to federal exclusion statutes.
- Some scholars and litigants have called for more exacting judicial review of statutes regulating alien entry, but to date the Supreme Court has not heeded these calls.

[267] *Id*. at 2445 ("[A] reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.").

[268] *Id*. at 2442.

[269] *Id*. at 2448.

[270] *Id*. at 2447–48 (citing Korematsu v. United States, 323 U.S. 214 (1944)). In a separate dissent, Justice Breyer, joined by Justice Kagan, argued that the Court should have remanded the case for further proceedings to determine whether the government was applying in good faith the proclamation's provisions providing for case-by-case waivers for aliens who demonstrate undue hardship and who do not pose security risks. *Id*. at 2433 (Breyer, J., dissenting).

[271] *Id*. at 2423 (majority opinion).

[272] *Id*.

The *Mandel* line of cases embraces the broad view of congressional power over the admission and exclusion of aliens that the Supreme Court established in *Knauff* and earlier precedent, although the cases do leave some uncertainty about the outer edges of the congressional power.

*Mandel* and *Din* 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 whatever limitations it sees fit on alien entry.[273] In other words, because Congress's limitations are valid *per se*, executive enforcement of those limitations is also valid.[274] *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.[275] The Court acknowledged that the statute triggered First Amendment concerns by limiting, based on political belief, U.S. citizens' audience with foreign nationals.[276] But the Court did not assess whether the statute violated the First Amendment. Rather, the Court accepted without significant analysis that Congress had the power to impose such an idea-based entry limitation.[277] 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.[278]

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 Supreme 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.[279] But the plenary power doctrine, as some scholars have noted, can be understood another

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[273] 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).

[274] *See id*.

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

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

[277] *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).

[278] *Mandel*, 408 U.S. at 767; *see Morfin v. Tillerson*, 851 F.3d 710, 712 (7th Cir. 2017) ("[T]he [*Mandel*] Court reaffirmed earlier opinions saying that Congress has plenary authority to exclude particular categories of aliens. The possibility of an exception for speech arose only because Congress had authorized the Attorney General to waive some speech-related conditions of excludability.").

[279] *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

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.[280] 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.[281] For example, the power overrides the First Amendment principles that would invalidate legislation that expressly provides for unfavorable treatment based on political belief in almost any other context.[282]

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.[283] 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.[284] 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.[285] Rather, the Court upheld the statute at issue under something that looked like a version of rational basis review,[286] one in which a hypothetical justification suffices to sustain the statute.[287] While extremely deferential, this version of rational basis review implies an underlying constitutional limitation against legislative unreasonableness,

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.").

[280] *See* Legomsky, *supra* note 16, at 1616-17.

[281] *See id*.

[282] *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).

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

[284] *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).

[285] *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.").

[286] 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).

[287] *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").

at least in theory.[288] In other words, an even-handed reading of *Fiallo* suggests that statutes regulating the admission of aliens must at least be reasonable.[289]

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.[290] To date, this argument does not find support in Supreme Court precedent, particularly not after the Court relied on *Fiallo* in *Trump v. Hawaii* to describe the breadth of the political branches' exclusion power.[291] 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,[292] and that the federal government cannot deny some procedural protections to LPRs returning from brief trips from abroad.[293] But the Court has never suggested that laws regulating the admission of non-LPR aliens trigger anything more than the deferential

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[288] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018) (describing rational basis review in the exclusion context as an assessment of whether the government action "can reasonably be understood to result from a justification independent of unconstitutional grounds"); 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").

[289] *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 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 277, at 65 ("The prevailing judicial and scholarly view [of the standard recognized in *Fiallo*] . . . is that rational basis review applies.").

[290] *See* Henkin, *supra* note 17, 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").

[291] *Trump v. Hawaii*, 138 S. Ct. at 2418 ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'") (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)); *see also* Kerry v. Din, 135 S. Ct. 2128, 2136, 2141 (2015) (citing *Fiallo* with approval).

[292] *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.").

[293] 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)).

rational basis review that it applied to the gender-based immigration preferences statute at issue in *Fiallo*.[294] In other words, the Court has never called *Fiallo* into question.[295]

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.[296] However, the *Morales-Santana* Court distinguished *Fiallo* and the plenary power doctrine by noting that the statute before it concerned citizenship, not immigration.[297] Accordingly, *Morales-Santana* does not appear to portend imminent reconsideration of *Fiallo*.[298] The term after *Morales-Santana*, the Court applied rational basis review in *Trump v. Hawaii* to an executive exclusion policy that was based on a statutory delegation of authority, suggesting that nothing more than rational basis review could apply to an exclusion statute itself.[299]

To summarize, dicta in two of 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 calls by some scholars and litigants for more exacting review of laws regulating alien entry.

# Implications of Supreme Court Jurisprudence for the Scope of Executive Power

**Key Takeaways of This Section**

- Executive exclusion authority derives primarily from statute, rather than from an inherent constitutional source.
- The Supreme Court has yet to resolve whether executive branch decisions to exclude aliens abroad are subject to U.S. citizen challenges on statutory grounds (as opposed to constitutional grounds).
- *Trump v. Hawaii* indicates that the Executive must comply with constitutional guarantees when creating exclusion policies using authority delegated by Congress, although such policies remain subject to an extremely deferential standard of review.

[294] *See Trump v. Hawaii*, 138 S. Ct. at 2418; *Din*, 135 S. Ct. at 2136, 2141.

[295] *See Trump v. Hawaii*, 138 S. Ct. at 2418; *Din*, 135 S. Ct. at 2136, 2141.

[296] 137 S. Ct. 1678, 1698 (2017).

[297] *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.").

[298] *See id*. 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).

[299] *See Trump v. Hawaii*, 138 S. Ct. at 2419 ("[I]n *Fiallo,* we applied *Mandel* to a 'broad congressional policy' giving immigration preferences to mothers of illegitimate children. Even though the statute created a 'categorical' entry classification that discriminated on the basis of sex and legitimacy, the Court concluded that 'it is not the judicial role in cases of this sort to probe and test the justifications' of immigration policies.") (citations omitted); *cf. id*. at 2440 n.5 (Sotomayor, J., dissenting) ("*Fiallo,* unlike this case, addressed a constitutional challenge to a statute enacted by Congress, not an order of the President. *Fiallo*'s application of *Mandel* says little about whether *Mandel*'s narrow standard of review applies to the unilateral executive proclamation promulgated under the circumstances of this case."). Two of the justices in the majority in *Trump v. Hawaii*—Chief Justice Roberts and Justice Kennedy—were also in the majority in *Morales-Santana*. *See id*. at 2403; *see also* Abrams, *supra* note 17, at 276 ("At oral argument [in *Morales-Santana*], the Justices seemed uninterested in hearing plenary power arguments . . . .").

*Mandel*, *Din*, and *Trump v. Hawaii* trace the contours of the Executive's exclusion power. As described above, *Mandel*'s "facially legitimate and bona fide reason" test governs claims that an exclusion decision or policy violates a U.S. citizen's constitutional rights.[300] The Executive satisfies the test by identifying the statutory basis for the exclusion.[301] Where the U.S. citizen challenger proffers extrinsic evidence that the Executive acted with an unconstitutional purpose, it might be proper for a reviewing court to consider that evidence, but only as part of a rational basis inquiry under which the exclusion decision or policy must be upheld if "it can reasonably be understood to result from a justification independent of unconstitutional grounds."[302]

However, the cases do not resolve definitively at least three issues about the executive power. These issues, discussed below, are (1) whether the Executive possesses inherent exclusion power, as opposed to solely statutory-based power; (2) the extent to which U.S. persons 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's exclusion cases generally indicate that the authority to exclude aliens reaches the Executive through congressional delegation.[303] The cases generally assign the constitutional power to regulate immigration to Congress and imply that an executive exclusion decision or policy must have a basis in statute.[304] *Mandel*, *Din*, and *Trump v. Hawaii* illustrate this implied point: even though all three cases considered the constitutionality of executive action, the Court focused its analysis in each case on a statutory source of authority for the executive action.[305] For instance, in *Trump v. Hawaii*, the Court analyzed whether the "Travel Ban" order fit within the President's authority under INA § 212(f) to "suspend the entry of all aliens or any class

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

[301] *Id*.

[302] *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

[303] *See, e.g.*, 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).

[304] 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"); East Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1231-32 (9th Cir. 2018) ("The Constitution also vests power in the President to regulate the entry of aliens into the United States. . . . And while Congress has the power to regulate naturalization, it shares its related power to admit or exclude aliens with the Executive.").

[305] *See Trump v. Hawaii*, 138 S. Ct. at 2415 ("The Proclamation is squarely within the scope of Presidential authority under the INA."); *Din*, 135 S. Ct. at 2140; *Mandel*, 408 U.S. at 766.

of aliens."[306] *Trump v. Hawaii* and the Court's other exclusion cases proceed on the assumption that executive action to exclude aliens requires statutory authorization.[307]

An opposing view held by at least one current Supreme Court Justice posits that the Executive has "*inherent* authority to exclude aliens from the country."[308] Under this view, Congress does not have authority to constrain executive exclusion decisions.[309] This view arguably finds some support in Supreme Court immigration jurisprudence. Many of the cases, for example, do not distinguish between Congress and the Executive when discussing the constitutional power to regulate immigration, suggesting that the two branches could share the power.[310] Furthermore, at least one pre-*Mandel* Supreme Court decision states expressly that the Executive possesses inherent authority to exclude aliens.[311] The case makes this statement, however, only to rebuff a challenge to the constitutionality of congressional delegations of immigration authority to executive agencies.[312] In other words, the case states that the Executive has inherent exclusion authority only to explain why Congress may delegate exclusion authority to the Executive, not to establish that the Executive may exclude aliens absent statutory authority.[313] The case goes on to acknowledge that, notwithstanding any inherent executive authority, in immigration matters the Executive typically acts upon congressional direction.[314]

The text of the Constitution itself does not resolve whether the Executive has a constitutional power to exclude aliens that is independent of statutory authorization. Because the federal government's immigration power rests at least in part upon an "inherent power as a sovereign"

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[306] 138 S. Ct. at 2407-08.

[307] *See id*.

[308] *Id*. at 2424 (Thomas, J., concurring) (emphasis in original); *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1248–1249 (2018) (Thomas, J., dissenting) ("[T]here is some founding-era evidence that "the executive Power," Art. II, § 1, includes the power to deport aliens."); 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").

[309] *See Trump v. Hawaii*, 138 S. Ct. at 2424 (Thomas, J., concurring).

[310] *See*, *e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977) (describing the "'power to expel or exclude aliens'" as a "'fundamental sovereign attribute exercised by the Government's political departments'") (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)); 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").

[311] *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.").

[312] *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."). Under more recent case law, the constitutionality of this type of congressional delegation to administrative agencies has not presented a close question. *See* Gundy v. United States, 139 S.Ct. 2116, 2129 (2019) (plurality opinion) (explaining that the standards of the nondelegation doctrine are "not demanding" and that the Supreme Court has only struck down a legislative delegation as excessive twice, both times in 1935); *cf. id. at* *9-10 (Alito, J., concurring in the judgment) ("[S]ince 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. . . . If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *but see* Doe v. Trump. – F. Supp. 3d --, 2019 WL 6324560, at *12 (D. Or. Nov. 26, 2019) (holding that 8 U.S.C. § 1182(f) "is without any intelligible principle and thus fails under the nondelegation doctrine," at least when the President invokes it "to engage in *domestic* policymaking") (emphasis in original).

[313] *Knauff*, 338 U.S. at 542.

[314] *Id*. 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.").

not enumerated in the Constitution, courts cannot determine who owns the power by reading Article I or Article II.[315] Neither does Supreme Court precedent resolve the issue definitively. In one 1915 case, *Gegiow v. Uhl*, the Court held that an executive exclusion decision violated the governing statute.[316] That holding implies that legislative restrictions on such decisions are constitutionally valid.[317] But that brief decision did not discuss the concept of inherent executive authority over immigration, and more recent exclusion cases have not decided the issue because they have resolved statutory challenges by holding that the executive action at issue complied with the relevant statutes.[318]

On balance, the weight of authority favors the view that the power to exclude aliens belongs primarily to Congress, at least in the first instance. The idea that the Executive could exclude aliens in contravention of a statute—or, to a lesser extent, without statutory authorization—would challenge separation of powers principles[319] and does not find support even in the one Supreme Court opinion that expressly endorses the concept of an inherent executive immigration power.[320] The idea of an extra-statutory executive exclusion power would also undermine basic features of the Court's exclusion jurisprudence, such as the long-standing rule that a court reviewing the exclusion of an arriving alien in habeas corpus proceedings must ascertain whether immigration officers had statutory authorization to make the exclusion determination.[321]

The point remains, however, that the Court has not established clearly that the Executive may not exclude aliens in contravention of a statute or without statutory authorization.[322] This lack of definitive precedent on the issue may result from Congress's extremely broad delegation of exclusion authority to the Executive, most notably in INA § 212(f), and from the limited judicial review available for executive enforcement of exclusion statutes.[323] Finally, a specific aside about the field of diplomacy: because the Reception Clause of the Constitution grants the President the

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[315] *See supra* note 26 (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?").

[316] 239 U.S. 3, 9 (1915).

[317] *See id*.

[318] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2413-14 (2018); Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 158-59 (1993) (considering and ultimately rejecting statutory challenges to the U.S. Coast Guard's interdiction and forced return of Haitian migrants trying to reach the United States by sea).

[319] *See* 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").

[320] *See* United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (explaining that Congress prescribes entry restrictions but may make broad delegations of authority to the Executive).

[321] *See* Lem Moon Sing v. United States, 158 U.S. 538, 546 (1895) (reasoning that executive exclusion decisions are not subject to "judicial interference so long as such officers acted within the authority conferred upon them by congress"); *See supra* "Habeas Corpus Review."

[322] *See Knauff*, 338 U.S. at 543 (reasoning that executive exclusion power "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation"); *but see* Gegiow v. Uhl, 239 U.S. 3, 9 (1915) ("The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus.").

[323] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2408-09 (2018).

exclusive power to "receive Ambassadors and other public Ministers," it seems more than plausible that a President could override a statute at least when making decisions about the admission or exclusion of foreign diplomats.[324]

## Statutory Challenges to Executive Decisions to Exclude Aliens

Because executive exclusion power appears to derive primarily from statute, executive exclusion decisions or policies are susceptible in theory to attack on the ground that they violate the governing statutes. In *Trump v. Hawaii*, for instance, the Supreme Court analyzed and rejected arguments that the "Travel Ban" exclusion policy violated provisions of the INA.[325] But the Court declined to resolve a threshold question about such challenges: whether they are barred by the doctrine of consular nonreviewability, which, as discussed above, forms part of the general rule against judicial review of exclusion decisions.[326] Specifically, consular nonreviewability prohibits judicial review of a visa denial unless the denial burdens the constitutional rights of a U.S. citizen, in which case the deferential standard of review under the *Mandel* line of cases applies to the constitutional claim.[327] The *Mandel* Court, in recognizing for the first time that U.S. citizens could challenge exclusion decisions despite the bar against such suits when brought by aliens, spoke narrowly of *constitutional claims* by U.S. citizens.[328] *Trump v. Hawaii* reasoned that the statutory claims at issue there failed on the merits even if they were subject to judicial review, and the Court therefore declined to answer whether the *Mandel* exception also encompasses statutory claims brought by U.S. citizens against the exclusion of aliens abroad.[329]

At least two federal circuit courts have held that the doctrine of consular nonreviewability bars U.S. citizen challenges to visa denials on statutory grounds, at least when the citizen does not also state constitutional claims.[330] These courts reasoned that permitting review of purely statutory claims would "convert[] consular nonreviewability into consular reviewability" and "eclipse the *Mandel* exception" by subjecting statutory claims to a more exacting level of review under the APA than constitutional claims receive under the "highly constrained" review that applies under the *Mandel* line of cases.[331]

On the other hand, in two other cases involving a combination of statutory and constitutional claims brought by U.S. citizens against visa denials, courts in the First Circuit and D.C. Circuit

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[324] *Cf.* Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2085 (2015) ("It is a logical and proper inference . . . that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations."). The INA specifies requirements for the admission of foreign diplomats, 8 U.S.C. § 1101(a)(15)(A), but also grants the executive branch power to parole inadmissible aliens into the country and to waive certain restrictions on admission. 8 U.S.C. § 1182(d)(3),(5).

[325] *Id*. at 2408.

[326] *Id*. at 2407; *see supra* "Nonresident Aliens Located Abroad: Consular Nonreviewability."

[327] *See, e.g.,* Yafai v. Pompeo, 912 F.3d 1018, 1020-21 (7th Cir. 2019).

[328] Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (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).

[329] *See Trump v. Hawaii*, 138 S. Ct. at 2407, 2415.

[330] *See* Allen v. Millas, 896 F.3d 1094, 1097, 1107-08 (9th Cir. 2018) (holding that the doctrine of consular nonreviewability barred a statutory claim brought by a U.S. citizen against the denial of a visa to a nonresident alien, where the "one and only cause of action" was statutory); Saavedra Bruno v. Albright, 197 F.3d 1153, 1163-64 (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.")

[331] *Allen*, 896 F.3d at 1107-08; *see Saavedra-Bruno*, 197 F.3d at 1163-64.

reviewed the statutory claims and rejected or called into question the visa denials on statutory grounds.[332] One of these decisions concluded that the statutory claims were reviewable because, among other rationales, the canon of constitutional avoidance required the court to construe the relevant statutes before considering whether the Executive's application of the statutes violated the Constitution.[333] In both cases, the courts analyzed the statutory claims without deferring to the government's determination that the INA required the denial of the visa applications at issue.[334] As a result, the cases scrutinized the government's justifications for excluding aliens much more closely than the Supreme Court analyzed the constitutional claims in *Trump v. Hawaii*, *Mandel*, and *Din*.[335] It was the Ninth Circuit's disagreement with this framework endorsed by the First and

[332] *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, and not reaching question whether the visa denial violated U.S. citizens' First Amendment rights) ("[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. INS, 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 Health Service); Doe v. Trump, -- F. Supp. 3d --, 2019 WL 6324560, at *9 (D. Or. Nov. 26, 2019) (holding that both statutory and constitutional claims brought by U.S. citizens against an executive exclusion policy are reviewable).

[333] *Abourezk*, 785 F.2d at 1052 ("[T]he court has an independent obligation to consider questions of statutory construction. We should so proceed in order to avoid a constitutional confrontation, if it is possible for us to stop short of that point."); *see also id*. at 1062 n.1 (Bork, J., dissenting) ("A court faced with [a] constitutional challenge must first construe the statutes to determine whether they authorize what was done and, if so, whether they pass constitutional muster. 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."). The argument that the constitutional avoidance canon requires courts to scrutinize the statutory basis for visa decisions before assessing constitutional challenges to those decisions, notwithstanding the immunity from judicial review that typically covers consular decisions, may find support in the principle of administrative law establishing that constitutional avoidance trumps the doctrine of administrative deference. 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"). If constitutional avoidance displaces administrative deference, it may displace consular nonreviewability too. *See Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 174. On the other hand, *Mandel* too serves a constitutional avoidance function: the Court adopted the constrained level of review in that case 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 about exclusion decisions 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.").

[334] *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). Although those cases interpreted *Mandel* to permit probing review of the statutory reasoning underlying a government exclusion decision, the Supreme Court has since applied greater deference when reviewing the statutory underpinnings for executive exclusion decisions. *See Trump v. Hawaii*, 138 S. Ct. at 2409; *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring) (reasoning that a consular officer's citation to a statutory ground of exclusion in a visa denial notice "suffices to show that the denial rested on a determination that [the alien] did not satisfy the statute's requirements").

[335] *Compare Allende*, 845 F.2d at 1115, 1192-20 (rejecting government proffer that alien belonged to a "covert

D.C. Circuits—that statutory challenges to visa denials should draw stricter review than constitutional challenges—that led it, among other reasons, to hold in a pure statutory case that consular nonreviewability bars statutory claims.[336]

The Supreme Court has on at least two occasions rejected statutory challenges brought by U.S. citizens or organizations against the exclusion of aliens abroad without deciding whether such challenges are subject to judicial review. As already mentioned, in *Trump v. Hawaii*, the Court acknowledged but did not decide the reviewability question in a case that involved a combination of statutory and constitutional claims brought by U.S. citizens and other U.S. parties.[337] In the 1993 case *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.[338] Specifically, the Court analyzed and rejected the argument that the interdictions violated an INA provision requiring immigration authorities to determine whether aliens would suffer persecution in a particular country before returning them to that country.[339] The *Sale* Court did not address the consular nonreviewability issue, even though the government argued it, but instead seemed to assume without discussion that the statutory challenges to the interdictions and forced returns were reviewable.[340] The only clear holding about consular nonreviewability that arises from *Hawaii* and *Sale* is that the doctrine does not deprive federal courts of subject matter jurisdiction over statutory challenges brought by U.S. citizens against the exclusion of aliens abroad, even though the doctrine might supply a rule of decision requiring courts to reject such statutory challenges without reviewing their merits.[341]

In summary, federal appellate courts have held that the doctrine of consular nonreviewability bars exclusively statutory challenges brought by U.S. citizens against the executive branch decisions

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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.

[336] Allen v. Millas, 896 F.3d 1094, 1107 (9th Cir. 2018) ("We fail to see why legal claims based on statute should receive greater protection than legal claims based on the Constitution.").

[337] 138 S. Ct. at 2407.

[338] 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.

[339] *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.

[340] *See Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) (explaining that the government argued consular nonreviewability in *Sale* but that the "Court in that case . . . went on to consider on the merits a statutory claim like the one before us without addressing the issue of reviewability").

[341] *See Trump v. Hawaii*, 138 S. Ct. at 2407 (noting that the government did "not argue that the doctrine of consular nonreviewability goes to the Court's jurisdiction" before assuming without deciding that the Court could review the statutory claims); *Allen*, 896 F.3d at 1102 ("[T]he rule of consular nonreviewability[] supplies a rule of decision, not a constraint on the subject matter jurisdiction of the federal courts.").

to exclude aliens abroad, but not where the citizens also press constitutional challenges. The Supreme Court has not resolved the issue, but the Court reviewed statutory challenges that were combined with constitutional challenges in *Trump v. Hawaii* and reviewed exclusively statutory challenges in *Sale*.

## Exclusions Based on Broad Delegations of Congressional Power

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.[342] 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?

*Trump v. Hawaii* indicates that the Executive, at least in theory, must comply with constitutional guarantees when exercising power delegated from Congress to create exclusion policies. Even though the Court in that case engaged in only a "highly constrained" level of judicial review, it stated that the purpose of the review was to determine whether the challenged exclusion policy could "reasonably be understood to result from a justification independent of unconstitutional grounds."[343] Presumably, if the Court had concluded that the "Travel Ban" proclamation was "'inexplicable by anything other than [anti-Muslim] animus,'" it would have struck down the proclamation for violating the Establishment Clause.[344]

Although the proposition that constitutional guarantees restrict executive exercises of exclusion authority may seem unremarkable, the Court actually avoided deciding this issue in *Mandel*. The relevant statute in that case gave the Attorney General broad discretion to waive the communism-based ground for exclusion.[345] The parties and the Court assumed that *Congress* had the authority to exclude communists based on their political ideas.[346] 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."[347] The *Mandel* Court, in adopting the "facially legitimate and bona fide" standard, avoided addressing this contention.[348] The Court reasoned that it did not have to decide whether the government could deny an inadmissibility waiver for "any reason or no reason" because the government had in fact supplied a reason for denying Mandel's waiver—his alleged prior visa abuse—"and that reason was facially legitimate and bona fide."[349] Thus, *Mandel* left open the possibility that the First Amendment could limit the executive branch's, but not Congress's, power to exclude based on political belief, but the Court did not decide the

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

[343] *Trump v. Hawaii*, 138 S. Ct. at 2420.

[344] *See id*. (quoting Romer v. Evans, 517 U.S. 620, 632, 635 (1996)).

[345] 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.

[346] *Id*. at 766-67 (noting the American professors' concession that "Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by [the communism-based exclusion provisions], and that First Amendment rights could not override that decision").

[347] *Id*. at 769.

[348] *See id*.

[349] *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.").

issue.[350] After *Trump v. Hawaii*, however, it seems relatively clear that executive exclusion policies must find support in justifications that are "independent of unconstitutional grounds," even though courts will apply only a "narrow standard of review" to assess those justifications.[351] In other words, constitutional guarantees might not restrict Congress's exercise of the exclusion power,[352] but they apparently do restrict the Executive's exercise of exclusion power delegated to it by Congress.[353]

# Conclusion

The Supreme Court has consistently reaffirmed that legislative and executive decisions to exclude aliens abroad are "'largely immune from judicial control.'"[354] The doctrine of consular nonreviewability bars judicial review of decisions to exclude aliens abroad in most circumstances. And even where such decisions burden the constitutional rights of U.S. citizens, the *Mandel* line of cases stands for the proposition that federal courts must grant the decisions a level of deference so substantial that it mostly assures government victory over any challenges. Notably, however, Supreme Court precedent mainly describes the deference due to executive exclusion decisions as an issue within Congress's control.[355] The doctrine of consular nonreviewability and the *Mandel* line of cases take their cue from legislative inaction: because Congress has not *said* that courts may review executive decisions to exclude aliens abroad, courts mostly do not conduct such review or (where constitutional claims of U.S. citizens are at stake) conduct only an extremely limited form of review.[356] Ultimately, the cases indicate that Congress has authority to expand review through affirmative legislation.[357]

## Author Information

Ben Harrington
Legislative Attorney

[350] *See id*.

[351] Trump v. Hawaii, 138 S. Ct. 2392, 2419-20 (2018).

[352] *Mandel*, 408 U.S. at 766-67; *but cf.* 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, 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.").

[353] *Trump v. Hawaii*, 138 S. Ct. at 2420.

[354] *Id.* at 2418 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[355] *See id*. at 2407 ("[R]eview of an exclusion decision 'is not within the province of any court, unless expressly authorized by law.'") (quoting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542–543 (1950)).

[356] *See id*. at 2407, 2418.

[357] *See id*.

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