THE DOCTRINE OF CONSULAR NONREVIEWABILITY IN THE TRAVEL BAN CASES: *KERRY V. DIN* REVISITED

DESIRÉE C. SCHMITT*

When ruling on the recent Travel Ban Cases, the U.S. Supreme Court and judges of the Fourth and Ninth Circuit Courts were required to consider the question of justiciability and reviewability. To answer these questions, the judges turned to the Doctrine of Consular Nonreviewability and Justice Kennedy's concurring opinion in the U.S. Supreme Court decision Kerry v. Din *(2015). Interestingly, the lower-court judges interpret both the doctrine and Kennedy's concurrence in different ways, and so have begun to define the scope of the Doctrine of Consular Nonreviewability, thereby interpreting the crucial Mandel test[1] distinctively, too. Several questions arise from the Travel Ban Cases. First, it must be asked if they can be seen as appropriate application cases of the Consular Nonreviewability Doctrine. If the proposed executive action was properly addressed by the courts, it must then be determined which judge(s) had the correct reading of Kennedy's concurrence in Kerry v. Din and the precise interpretation of the Mandel test. To answer these questions, the paper takes account of the Doctrine of Consular Nonreviewability, its "cousin" the Plenary Power Doctrine,* Kerry v. Din *and the Travel Ban Cases. It has to be examined how these cases ended up in front of American courts via the construction of a "third-party" or "indirect standing" to avoid the legal fact that there is no real standing for aliens outside the U.S. territory. A short comparative analysis shows the differences to the legal systems of Germany and Great Britain. A closer look at how the judges made use of Kennedy's concurrence in Kerry v. Din and of the Mandel test illustrates whether or not the judges in the Travel Ban Cases were correct to apply the Doctrine of Consular Nonreviewability. A further distinction between the Travel Ban Cases and* Kerry v. Din *can be drawn by looking at the (non-) analysis of substantive due process: is there a possible*

---

* Lawyer, PhD student and Research Fellow at the Max Planck Institute for Comparative Public Law and International Law (Germany). This paper was developed during a Fulbright research visit at the Washington and Lee University School of Law. Special thanks to Prof. Margaret Hu and Theodor Shulman for their valuable comments on the paper. Moreover, I want to thank Prof. Dr. Thomas Giegerich, LL.M., Prof. Dr. Armin von Bogdandy, Prof. Russell A. Miller, Prof. David Baluarte and Prof. Kerry Abrams for contributing to my PhD research, the success of which the paper builds upon.

1. Kleindienst v. Mandel, 408 U.S. 753 (1972).

fundamental right for those affected by the travel bans that was not addressed in the courtrooms so far?

TABLE OF CONTENTS

I. INTRODUCTION

When ruling on the recent Travel Ban Cases, both the Supreme Court and the judges of the Fourth and Ninth Circuit Courts were required to consider the question of justiciability and reviewability. The lower courts used the Doctrine of Consular Nonreviewability and Justice Kennedy's concurring opinion in the U.S. Supreme Court decision *Kerry v. Din* to answer this question.[2] Interestingly, the judges interpret both the doctrine and Kennedy's concurrence in different ways, and so have begun to define the scope of the Doctrine of Consular Nonreviewability, thereby interpreting the crucial *Mandel* test[3] distinctively, too. The Supreme Court also had a look at the Doctrine of Consular Nonreviewability, but assumed reviewability without deciding the question.[4]

Several questions arise from the Travel Ban Cases. First, it must be asked if they can be seen as appropriate application cases of the Consular Nonreviewability Doctrine. If the proposed executive action was properly addressed by the courts, it must then be determined which judge(s) had the correct reading of Kennedy's concurrence in *Kerry v. Din* and the precise interpretation of the *Mandel* test.

To answer these questions, this paper starts with a short description of the Doctrine of Consular Nonreviewability, its "cousin" the Plenary Power Doctrine, *Kerry v. Din* and the Travel Ban Cases. It focuses on the major current developments in the courtrooms. This first section also briefly examines how these cases ended up in front of American courts via the construction of a "third-party" or "indirect standing" to avoid the legal fact that there is no real standing for aliens outside U.S. territory. A short comparative analysis shows the differences between the legal systems of Germany and Great Britain, both of which opted for a construction of standing independent of nationality or residence. The following section consists of a closer look at how the judges made use of Kennedy's concurrence in *Kerry v. Din* and of

2. International Refugee Assistance Project [IRAP] v. Trump, 857 F.3d 554, 587, 590–93 (4th Cir. 2017); IRAP v. Trump, No. TDC-17-0361, 2017 U.S. Dist. LEXIS 171879, at *59–61 (D. Md. 2017); Hawaii v. Trump, 859 F.3d 741, 768–69 (9th Cir. 2017); Hawaii v. Trump, 241 F. Supp. 3d 1119, 1135–36 (D. Haw. 2017). Each with reference to Kerry v. Din, 135 S. Ct. 2128 (2015).

3. Kleindienst v. Mandel, 408 U.S. 753 (1972).

4. Trump v. Hawaii, 138 S. Ct. 2392, 2413-2414 (2018).

the *Mandel* test. The question of whether the judges in the Travel Ban Cases were correct to apply the Doctrine of Consular Nonreviewability is examined, as well as how these cases can be distinguished from *Kerry v. Din* and *Mandel*. A further distinction between the Travel Ban Cases and *Kerry v. Din* can be drawn by looking at the (non-) analysis of substantive due process. The author reflects briefly on a possible fundamental right for those affected by the travel bans that was not addressed in the courtrooms so far. Finally, this paper will address what developments of the Doctrine of Consular Nonreviewability can be expected in the near future.

II. THE DOCTRINE OF CONSULAR NONREVIEWABILITY AND ITS APPLICATION IN *KERRY V. DIN*

The Doctrine of Consular Nonreviewability seals off the consular decisions in matters of visa issuances from administrative or judicial review. How did the consular officer end up with such a powerful position, one that has been described as the 21st century's "absolute monarch?"[5]

A. *The Development of the Doctrine of Consular Nonreviewability*

The answer to this question lies in an examination of how underlying case law grapples with questions of due process. When coupled with the absence of clear adverse language in the Immigration and Nationality Act [INA],[6] consular officers are shown absolute deference in their decision-making.

The Doctrine of Consular Nonreviewability originated in the Supreme Court's development of the Plenary Power Doctrine, which was constructed over a line of cases[7] starting with the Chinese Exclusion Case.[8] This doctrine, the "cousin" of the Doctrine of Consular Nonreviewability,[9] restricts the judicial review of federal laws dealing with immigration matters, even if those laws infringe on constitutional rights.[10] The Supreme Court reasoned that questions of immigration are deeply intermingled with concerns about foreign affairs, national security, and sovereignty, and the Court decided it lacked the ability to interfere with highly political subjects that it saw as

5. *Cf.* Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 SAN DIEGO L. REV. 887–909 (1989).

6. Immigration and Nationality Act of 1952, Pub.L. 82–414, 66 Stat. 163, enacted June 27, as amended until the recent date [hereinafter INA].

7. Ekiu v. United States, 142 U.S. 651 (1892); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Knauff v. Shaughnessy, 338 U.S. 537 (1950); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953); Fiallo v. Bell, 430 U.S. 787 (1977).

8. Chae Chan Ping v. United States, 130 U.S. 581 (1889).

9. Kevin Johnson, *Argument preview: The doctrine of consular non-reviewability – historical relic or good law?*, SCOTUSBLOG, http://www.scotusblog.com/2015/02/argument-preview-the-doctrine-of-consular-non-reviewability-historical-relic-or-good-law (Oct. 12, 2017, 10.19 a.m.); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30, note 3 (2015).

10. *Cf.* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 178 (1978); Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 603 (2013).

belonging solely to the political branches.[11] The Plenary Power Doctrine was born out of the Court's conviction that Congress had ultimate power in the realm of immigration, thereby granting some sort of immunity to Congress's immigration laws and to the executive branch implementing those laws. This judicial immunity allows for a long list of case law perpetuating discrimination against people with Asian ancestry,[12] against people with marginalized political beliefs,[13] and against people because of their gender.[14] Although the Court developed some exceptions concerning the due process rights of noncitizens in deportation procedures[15] and of returning legal permanent residents,[16] the Plenary Power Doctrine is still good law, especially vis-à-vis the exclusion of aliens. For this group of people, the Court stated: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[17]

Congress has the ability to delegate some of its authority to the executive branch.[18] Therefore, and because it has plenary power to decide who can enter the U.S. and who cannot, it has also the authority to confer this power to the executive branch, including to the consular officers.[19] The immunity from judicial review that Congress enjoys in immigration law matters because of the Plenary Power Doctrine was thereby transferred to the consular officer: within the framework of issuing visas, he has broad discretion—discretion that is generally[20] not reviewable by any court or other administrative entity outside the Department of State.[21] This immunity is the core of the Doctrine of Consular Nonreviewability.

Aside from the case law, it is argued that the statutory language of the INA, the plenary will of Congress, forbids reviewability. One could argue that Congress never intended the grant of any review procedure.[22] That there

---

11. Chae Chan Ping v. United States, 130 U.S. 581 (1889); Ekiu v. United States, 142 U.S. 651 (1892); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Knauff v. Shaughnessy, 338 U.S. 537 (1950); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953); Fiallo v. Bell, 430 U.S. 787 (1977).

12. Chae Chan Ping v. United States, 130 U.S. 581 (1889); Ekiu v. United States, 142 U.S. 651 (1892); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

13. Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Galvan v. Press, 347 U.S. 522 (1953).

14. Fiallo v. Bell, 430 U.S. 787 (1977).

15. Yamataya v. Fisher, 189 U.S. 86 (1903); but more restrictive in Harisiades v. Shaughnessy, 342 U.S. 580 (1952) and Galvan v. Press, 347 U.S. 522 (1953).

16. Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Rosenberg v. Fleuti, 374 U.S. 449 (1963); Landon v. Plasencia, 459 U.S. 21 (1982).

17. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

18. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

19. *Cf.* Ventura-Escamilla v. INS, 647 F.2d 28, 30 (9th Cir. 1981).

20. The exception that was developed in Kleindienst v. Mandel (408 U.S. 753 (1972)), which will be discussed in chapters II.B.2, 3.

21. Within the Department of State, the supervising consul reviews a negative decision by a lower-ranking consul, 22 C.F.R. § 41.121(c). If the supervising consul does not agree with the decision, he can himself adjudicate or refer the case to the Department of State. But the applicant himself plays no role in this intra-agency review and has no right to such a review.

22. *Cf.* H.R. Rep. No. 1365, 82nd Congress, 2d Session, U.S.Code Cong. & Admin.News, 1653, 1688 (1952): "Consular decisions—Although many suggestions were made to the committee with a view toward creating in the Department of State a semi judicial board, similar to the Board of Immigration

is in fact no review procedure laid out in the INA could speak in favor of this argument. At the same time, however, Congress never outright forbade administrative or judicial review.[23] The key provision of the INA, 8 U.S.C. § 1104(a), only explicitly excludes the interference of the Secretary of State in the functions of the consular officers relating to the granting or refusal of visas.[24] Nevertheless, it has been claimed that Congress intended this statute to exclude administrative and judicial review in general.[25] But the congressional intent is somewhat unclear, especially given the fact that the Secretary of Homeland Security has had the power to interfere with those functions since 2002:[26] although the State Department is still in charge for issuing visas, the Department of Homeland Security is responsible for the visa policy.[27] Thus, the question arises: what is the meaning of 8 U.S.C. § 1104(a)?

One plausible interpretation of the statute is that Congress intended to enable the Secretary of State to disavow any responsibility for the denial of a visa, and thereby avoid getting dragged into related foreign policy tensions.[28] Alternatively, the norm could be understood as excluding review by the Secretary of State, but at the same time leaving other review possibilities open, for example by the Advocate General or the courts.[29] According to the doctrine of strict construction of immigration statutes, a narrow interpretation of the statutory provision is necessary.[30] If Congress intended to exclude administrative and judicial review, it would have needed to do so

---

Appeals, with jurisdiction to review consular decisions pertaining to the granting or refusal of visas, the committee does not feel that such body should be created by legislative enactment, nor that the power, duties and functions conferred upon Consular officers by the instant bill should be made subject to review by the Secretary of State."; Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651; H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1961); Homeland Security Act of 2002, Pub. L. No. 107-296, § 428(b), (e), (f), 116 Stat. 2187–2190 ("Nothing in this section shall be construed to 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."); Visa Waiver Permanent Program Act, Pub. L. No. 106-396, § 206, 114 Stat. 1643–1644 (amendment of 8 U.S.C. § 1187(c)); H.R. 3305, 103d Cong., 1st Sess. (1993); H.R. 2975, 104th Cong., 2d Sess. (1996); H.R. 4539, 105th Cong., 2d Sess. (1998); H.R. 1345, 107th Cong., 1st Sess. (2001). This is also the argument by the government in *Kerry v. Din*, Brief for the Petitioners, at 36–38.

23. *Cf.* 8 U.S.C. § 1252 with specific instructions on reviewability in removal procedures.

24. "The Secretary of State shall be charged with the administration and the enforcement of the provisions of this chapter and all other immigration and nationality laws relating to (1) the powers, duties, and functions of diplomatic and consular officers of the United States, except those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas."

25. *See* Loza-Bedoya v. INS, 410 F.2d 343, 347 (9th Cir. 1975); Saavedra Bruno v. Albright, 197 F.3d 1153, 1156–57, 1159, note 2 (D.C. Cir. 1999). This also the argument by the government in Kerry v. Din, Brief for the Petitioners, at 7.

26. *Cf.* 6 U.S.C § 236(b),(c); § 428 (b), (e) Homeland Security Act of 2002.

27. T. ALEXANDER ALEINIKOFF ET AL., IMMIGR. & CITIZENSHIP 262 (2016). *Cf.* the Memorandum of Understanding on Respective Authority In Visa Process, available at: http://www.nafsa.org/Resource_Library_Assets/Regulatory_Information/DOS-DHS_MOU_On_Respective_authority_In_Visa_Process/ (March 24, 2018, 2.05 p.m.).

28. James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 24 (1991).

29. Senate Jud. Comm., Revision of Immigration and Nationality Laws, S. Rep. No. 1137, 82d Cong., 2nd Sess. 1952, at 7; Nafziger, *supra* note 28, at 24; Wildes, *supra* note 5, at 903; Zas, 37 J. MARSHALL L. REV. 577, 585, 591 (2004).

30. Wildes, *supra* note 5, at 903.

explicitly.[31] Hence, it is not compelling to argue that administrative and judicial review are excluded by 8 U.S.C. § 1104(a).[32]

After the enactment of the Administrative Procedure Act (APA),[33] the question arose if the judiciary can uphold the Doctrine of Consular Nonreviewability. The regulations of the APA, which entail a presumption in favor of reviewability of administrative decisions,[34] are applicable to administrative decisions in immigration law.[35] The only way to keep the doctrine alive was to claim that the exceptions of 5 U.S.C. § 701(a) would be fulfilled. However, neither the INA nor any other statute explicitly precludes judicial review of consular decisions (5 U.S.C. § 701(a)(1)),[36] nor is the consular officer's discretion empowered in a way that there would be no applicable law or no standard of review (5 U.S.C. § 701(a)(2)[37]).[38] Therefore, despite the background of adverse case law and the fact that the INA does not guarantee a right of action to challenge a visa denial, it seems that the APA does.[39]

This is the heart of the dispute about the Doctrine of Consular Nonreviewability, whose underlying case law stems from an era of discrimination against nationals of Asian descent and later of mistrust in the heat of the Cold War.[40] Although those times are over, the doctrine is still alive and arose again in the Supreme Court decision *Kerry v. Din*.

---

31. Wildes, *supra* note 5, at 903, with reference to Kent v. Dulles, 357 U.S. 116 (1958); Rosenberg v. Fleuti, 374 U.S. 449 (1963).

32. *Cf.* Nafziger, supra note 28, at 35–37; Wildes, supra note 5, at 902–905.

33. Pub. L. 79–404, 60 Stat. 237, June 11, 1946.

34. 5 U.S.C. § 702.

35. Shaughnessy v. Pedreiro, 349 U.S. 48, 52 (1955); Brownell v. Tom We Shung, 352 U.S. 180, 183–85 (1956); Rusk v. Cort, 369 U.S. 367, 379–80 (1962); Nafziger, *supra* note 28, at 25.

36. One possible statutory anchor would be 8 U.S.C. § 1104(a). But this provision, as seen in the previous paragraph, does not explicitly exclude judicial review. The other possible anchor (in an "other statute") could be 6 U.S.C. § 236(f): "Nothing in this section shall be construed to 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." But this provision was introduced only to point out, that the new competences of the Secretary of Homeland Security ("this section") do not create any right of action; Charles Gordon/Stanley Mailman/Stephen Yale-Loehr/Ronald Y. Wada, 4-55 Immigration Law and Procedure § 55.09 (2017). Furthermore, the provision does not state, that other causes of actions, such as by the APA, would be impermissible; *cf.* IRAP v. Trump, Nos. 17-2231, 17-2232, 17-2233, 17-2240, 2018 U.S. App. LEXIS 3513, at *74 (4th Cir. 2018) (Gregory, J., concurring).

37. *Cf.* Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 410 (1971); Heckler v. Chaney, 470 U.S. 821, 830 (1985).

38. *Cf.* Nafziger, *supra* note 28, at 27–30; Wildes, *supra* note 5, at 899–901; both with further references.

39. Nafziger, *supra* note 28, at 30. Thus, the amendment of 8 U.S.C. § 1329 by § 381(a) IIRIRA (Pub. L. 104-208, 110 Stat. 3009) to only allow for actions *by* the U.S. does not change the outcome because the jurisdiction of the federal courts is given under the Federal Question Doctrine, 28 U.S.C. § 1331. See e.g. Din v. Clinton, No. C 10-0533 MHP, 2010 U.S. Dist. LEXIS 62429, at *9 (N.D. Cal. 2010); Bustamante v. Mukasey, 531 F.3d 1059, 1061 (9th Cir. 2008). This is also true with regard to the Travel Ban Cases and 8 U.S.C. §§ 1182(f), 1885, 1152; IRAP v. Trump, Nos. 17-2231, 17-2232, 17-2233, 17-2240, 2018 U.S. App. LEXIS 3513, at *72–80 (jurisdiction), *93–103 (cause of action under the APA) (4th Cir. 2018) (Gregory, J., concurring).

40. Kleindienst v. Mandel, 408 U.S. 753 (1972). *Cf.* United States ex rel. London v. Phelps, 22 F.2d 288 (2d Cir. 1927); United States ex rel. Ulrich v. Kellogg, 30 F.2d 984, 985 (D.C. Cir. 1929).

B. *Kerry v. Din: A Fragmented Court Decision*

1. *Facts of the Case*

Fauzia Din is an American citizen.[41] She came to the U.S. as an admitted refugee and was naturalized in 2007. Since 2006, she has been married to Kanishka Berashk, an Afghan citizen living in Afghanistan and working as a payroll clerk for the Afghan Ministry. Because they wanted to live together as a married couple in the U.S., Din started the procedure to reunify with her husband by petitioning to declare him as an "immediate relative" according to 8 U.S.C. § 1151(b)(2)(A)(i)—there is no numerical cap on immigration for "immediate relatives."[42] As the petition was granted, the next step was Berashk's visa interview with the consular officer in Afghanistan. After the interview, Berashk and Din waited for a notification of the consular officer's decision. Although the officer told Berashk that the visa would be issued in two to six weeks,[43] the couple waited months with no resolution. Din eventually received support for Berashk's visa application from Congressman Pete Stark, resulting in a decision by the consular officer denying the visa according to 8 U.S.C § 1182(a), later specified as 8 U.S.C. § 1182(a)(3)(B) ("terrorist activities").[44] Further explanations were not provided.

Din brought suit before the U.S. District Court for the Northern District of California, seeking "a writ of mandamus directing the United States to properly adjudicate Berashk's visa application; a declaratory judgment that 8 U.S.C. § 1182(b)(2)–(3), which exempts the Government from providing notice to an alien found inadmissible under the terrorism bar, is unconstitutional as applied; and a declaratory judgment that the denial violated the Administrative Procedure Act."[45] The District Court denied all claims, *inter alia* with reference to the Doctrine of Consular Nonreviewability.[46] However, the Ninth Circuit reversed, holding that the lower court infringed on Din's liberty interest in her marriage, which required a reasoned decision and review.[47] The Supreme Court granted certiorari, vacated the judgment by the Ninth Circuit and remanded the case.[48]

2. *Justices Scalia, Kennedy and Breyer Fight over Fundamental Rights and the Quality of Procedural Due Process*

The result was a fragmented court decision with an unclear holding. Justice Scalia could only find two more Justices, Chief Justice Roberts and

41. Kerry v. Din, 135 S. Ct. 2128 (2015).
42. 8. U.S.C. § 1151(b)(1)(A).
43. *See* Brief of Amici Curiae Former Consular Officers in Support of Respondent at 3; Kerry v. Din, 135 S. Ct. 2128 (2015).
44. Din v. Clinton, No. C 10-0533 MHP, 2010 U.S. Dist. LEXIS 62429, at *4 (N. D. Cal., June 21, 2010).
45. Kerry v. Din, 135 S. Ct. 2128, 2132 (2015).
46. Din v. Clinton, No. C 10-0533 MHP, 2010 U.S. Dist. LEXIS 62429 (N. D. Cal. 2010).
47. Kerry v. Din, 718 F. 3d 856, 860, 868 (9th Cir. 2013).
48. Kerry v. Din, 135 S. Ct. 2128 (2015).

Justice Thomas, to join his plurality opinion. Justice Kennedy wrote a concurring opinion, in which Justice Alito joined. Justice Breyer wrote a dissenting opinion, in which Justices Ginsburg, Sotomayor, and Kagan joined.

Justice Scalia argued that Din had no infringed liberty interest in the scope of the Due Process Clause of the Fifth Amendment. According to the plurality, any implied liberty interest[49] in marriage does not include a right to live with your spouse in the United States.[50] Because Justice Scalia saw no implied right to cohabitation in the U.S., the Court ruled that Din had no procedural due process rights that she could claim.[51]

Justice Kennedy sidestepped the question of whether Din had a protected liberty interest. Even assuming she did, he found no violation of procedural due process.[52] With reference to *Kleindienst v. Mandel*[53], he was of the opinion that by stating a provision of the INA when denying a visa application, the consular acted with a "facially legitimate and bona fide reason."[54] What this application of the *Mandel* test tells us about the status quo of the Doctrine of Consular Nonreviewability and how it was used in the Travel Ban Cases will be discussed in the next section.

The dissenters answered both the substantive and procedural due process questions in the affirmative. Under the dissent's reasoning, Din would have a fundamental right, i.e. the right to live together with her spouse in the U.S.[55] In addition, Justice Breyer argued that there is a category of "non-fundamental liberty interests" that arises out of penumbral statutory expectations and that only benefit from procedural due process.[56] Din's procedural due process rights flowing from the fundamental and the non-fundamental liberty interests were infringed by only stating the broad grounds for the denial of Berashk's visa.[57]

3. *What We Learned About the Validity of the Doctrine of Consular Nonreviewability*

The exact holding of the decision in *Kerry v. Din* was unclear, as was its impact on the Doctrine of Consular Nonreviewability.[58] In *Marks v. United States*, the Supreme Court determined that "[w]hen a fragmented Court

49. *Id.* at 2128 (his finding concedes that implied powers exist. Even given that concession he still does not see a right to live with your spouse in the US).
50. *Id.* at 2134.
51. *Id.* at 2138.
52. *Id.* at 2139 (Kennedy, J., concurring).
53. Kleindienst v. Mandel, 408 U.S. 753 (1972).
54. Kerry v. Din, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring).
55. *Id.* at 2141–43 (Breyer, J., dissenting).
56. *Id.* at 2142–43 (Breyer, J., dissenting).
57. *Id.* at 2144–47 (Breyer, J., dissenting).
58. Chuck Roth, *What is the "Holding" of Kerry v. Din?*, IMMIGRATIONPROFBLOG, http://lawprofessors.typepad.com/immigration/2015/06/symposium-on-kerry-v-din-chuck-roth-what-is-the-holding-of-kerry-vdin.html (Oct. 12, 2017, 3.29 p.m.); Laurel Scott, *What is the Law Following Kerry v Din?*, THE LAW OFFICE OF LAUREL SCOTT, http://www.scottimmigration.net/NewsArchive (Oct. 12, 2017, 3.32 p.m.).

decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." [59] The *Marks* test applies when "the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position."[60] In a case in the aftermath of *Kerry v. Din*, again in the Ninth Circuit, the court stated that "the narrowest grounds" were encompassed in Kennedy's concurring opinion.[61]

Let me repeat that Justice Kennedy said that even assuming a citizen spouse has a due process right and thereby standing to challenge a visa denial, the challenge fails if the consular officer has provided a statutorily valid reason for inadmissibility that implies a facially legitimate and bona fide reasoning behind the denial.[62] The Ninth Circuit Court argued that "[t]he plurality would necessarily agree that, when the consular officer cites such a statute, the denial stands, at least in a case only raising the due process rights of a citizen spouse."[63]

Having maintained that the Kennedy concurrence contains the narrow test underlying *Kerry v. Din* and therefore displays the holding of the case, the Ninth Circuit Court continued with the interpretation of the concurrence and the application of the *Mandel*-test, emphasizing its two prongs: "First, the consular officer must deny the visa under a valid statute of inadmissibility. [. . .] Second, the consular officer must cite an admissibility statute that 'specifies discrete factual predicates the consular officer must find to exist before denying a visa,' or there must be a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility. [. . .] Once the government has made that showing, the plaintiff has the burden of proving that the reason was not bona fide by making an 'affirmative showing of bad faith on the part of the consular officer who denied [. . .] a visa.'"[64] One could summarize the first step as the "facial legitimacy-test" and the second step as the "bona fide-test". If step one and step two are met, the only way that the court would question the consular officer's decision is, as a step three, the plaintiff's showing of the officer's bad faith. Distilling this as the holding of *Din* shows that the *Mandel*-standard ("facially legitimate and bona fide reason") overall still applies. Thus, the Doctrine of Consular Nonreviewability is not absolute, but has a tiny window through which review is possible.

---

59. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U. S. 153, 169 (1976)).

60. United States v. Epps, 707 F.3d 337, 348, 404 (D.C. Cir. 2013) (quoting King v. Palmer, 950 F.2d 771, 782 (D.C. Cir. 1991)).

61. Cardenas v. United States, 826 F.3d 1164, 1171 (9th Cir. 2016). This was also accepted by the Fourth Circuit Court in IRAP v. Trump, 857 F.3d 554, 590, n. 15 (4th Cir. 2017) and IRAP v. Trump, Nos. 17-2231, 17-2232, 17-2233, 17-2240, 2018 U.S. App. LEXIS 3513, at *47, n. 11 (4th Cir. 2018).

62. Kerry v. Din, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring).

63. Cardenas v. United States, 826 F.3d 1164, 1171 (9th Cir. 2016).

64. *Id* at 1172.

However, two major questions remain undecided. First, how much evidence must an applicant provide to show that the consular officer has acted in bad faith? The formulation that Kennedy and the Ninth Circuit provide are open to different interpretations, especially when it comes to the sole reference to a statute by the consular officer. Second, considering Justice Kennedy did not address the issue – does a U.S. citizen have a due process right that would stipulate standing in front of U.S. courts?[65] Justice Scalia, who denied this claim, could only win three votes; the affirming dissenters won four votes.

The subject of standing of a U.S. citizen who sues before a U.S. Court on behalf of a noncitizen outside the U.S. territory leads to the next section, which asks why this construction is even necessary.

4. *Why There Is a Need for a "Construction" of Standing and How Other States Handle It*

In the beginning of his plurality opinion, Justice Scalia observed, "an 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."[66] This statement is undisputed in U.S. law and goes hand in hand with the correlation between the applicability of the U.S. Constitution and the accessibility of the court system on the one hand, and the U.S. territory on the other hand.[67] In other words, there is neither extraterritorial application of the U.S. Constitution nor access to U.S. courts for aliens outside of the U.S. in immigration matters. This is the reason why, in *Kerry v. Din*, the U.S. citizen spouse Din sued before a U.S. court. Berashk, a noncitizen outside of the U.S. territory, lacked standing to bring the suit himself, although the state action (the visa denial) by the consular officer was an action directed against him and not against his wife.

The case would have been a completely different one if Berashk's potential due process rights would have been at stake in *Kerry v. Din*: to argue that *his* liberty interest was touched upon by denying him a visa without giving

---

65. *Cf.* Ali v. United States, 849 F.3d 510, 515, note 3 (1st Cir. 2017); Morfin v. Tillerson, 851 F.3d 710, 713 (7th Cir. 2017). Nevertheless, all lower courts deciding after *Kerry v. Din* accepted standing. *See, e.g.* Cardenas v. United States, 826 F.3d 1164 (9th Cir. 2016); Morfin v. Tillerson, 851 F.3d 710, 713-14 (7th Cir. 2017); Chehade v. Tillerson, No. 16-55236 2017 WL 4966863 (9th Cir. 2017); Singh v. Tillerson, No. 16–922 (CKK), 2017 WL 4232552 (D.D.C. 2017); Abebe v. Perez, No. 3:14-cv-4415, 2016 WL 454897 (D.S.C. 2016); Santos v. Lynch, No. 1:15-cv-00979-SAB, 2016 WL 3549366 (E.D. Cal. 2016); Allen v. Milas, No. 1:15-cv-00705-MCE-SAB, 2016 WL 704353 (E.D. Cal. 2016); Mayle v. Holder, No. 14–cv–04072–JSC, 2015 WL 4193864 (N.D. Cal. 2015). The U.S. Supreme Court decided in Hawaii v. Trump that there is indeed standing for relatives who are affected by the government "keeping them separated from certain relatives who seek to enter the country." 585 U.S. ___ (2018), 2018 U.S. LEXIS 4026, at *45–46.

66. Kerry v. Din, 135 S. Ct. 2128, 2131 (2015) (citing Kleindienst v. Mandel, 408 U.S. 753, 762 (1972)).

67. This limitation is no longer absolute. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Boumediene v. Bush, 553 U.S. 723 (2008). Nevertheless, this limitation is still the basic principle.

him any well-founded reasoning would have been an easier task. However, as aliens outside the U.S. territory have no cause of action, the plaintiffs must try to construe standing for the party that is in the U.S. and affected by the decision at least indirectly.[68]

To demonstrate that this constructed standing is abdicable only requires a look across the Atlantic Ocean. Both Germany and the United Kingdom—one a civil law country and the other a common law country—have opted to structure standing differently in the immigration context.

In Germany, there are two ways a noncitizen applying for a visa in a German consulate abroad can push for review in case of a denial. First, the visa applicant has the option of filing for a *Remonstrationsverfahren* (procedure of remonstration).[69] If the denied visa applicant opts to do this, she undergoes an informal administrative review procedure by another consular officer than the one who issued the denial, where the complainant can state his objections to the decision and potentially overcome the denial.

Second, the applicant can sue the Federal Republic of Germany—which is represented by the Federal Foreign Affairs Office—in a German administrative court and demand the issuance of the visa in an action for performance. According to Section 52 of the German Administrative Procedure Code, the administrative court in Berlin has jurisdiction.[70] The plaintiff has standing in this administrative procedure, independent of his citizenship or his place of abode. Furthermore, in compliance with the normal procedural requirements, he has access to an appeal and revision procedure as well as a constitutional complaint.[71]

A two-track review process based on the visa applicant's standing and right to request the review also exists in the United Kingdom. According to the "Royal Prerogative,"[72] there is a limit on judicial review of foreign affairs (and therefore immigration), but the denial of a visa by a consular officer is reviewable. It may be reviewed within 28 days in an administrative

---

68. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972). In *Kleindienst*, the issue arose out of a complaint dealing with the First Amendment Freedom of Speech complaint of U.S. professors, who had invited a Marxist Belgian speaker whose visa was denied.

69. The legal basis is the manual of Federal Foreign Affairs Office of Germany. Auswärtiges Amt, Visumhandbuch, supp. 66, state of play: July 2017, at 336, https://www.auswaertiges-amt.de/blob/207816/3aea735b3f8b1cc9ca7cabc20e1d48a8/visumhandbuch-data.pdf (Oct. 12, 2017, 6.27 p.m.). This means, that the legal basis is not a statute, but more like an administrative guideline, drafted by the Federal Foreign Affairs Office. As the procedure is only optional and it can only be positive for the plaintiff, this is compatible with the rule of law principle (more specially: *Vorbehalt des Gesetzes*). Cf. Anna Sophie Poschenrieder, *Das Remonstrationsverfahren vor den Auslandsvertretungen der Bundesrepublik Deutschland – Ein Plädoyer für die Einführung des Widerspruchsverfahrens*, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1349–51 (2015).

70. ANDREAS DIETZ, AUSLÄNDER- UND ASYLRECHT 65, para. 120 (2016).

71. ROLF STAHMANN/HANS-HERMANN SCHILD, in: Hofmann (ed.), AUSLÄNDERRECHT, § 6 AufenthG, para. 66 (2016); ANDREAS DIETZ, AUSLÄNDER- UND ASYLRECHT 65–66 (2016).

72. STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 87–89 (1978). *See also* HELEN FENWICK/GAVIN PHILLIPSON/ALEXANDER WILLIAMS, TEXT, CASES AND MATERIALS ON PUBLIC LAW AND HUMAN RIGHTS, at 484–85, 510–20, 708–09 (2017); ROGER MASTERMAN, THE SEPARATION OF POWERS IN THE CONTEMPORARY CONSTITUTION, at 96, 113 (2011).

procedure.[73] In some (e.g. humanitarian-related) cases, it is possible to appeal to the "First-tier Tribunal (Immigration and Asylum)" with a second possible appeal to the "Upper Tribunal (Immigration and Asylum Chamber)."[74] Both tribunals consist of independent judges.[75] If there is a hearing, the applicant is invited to attend it if he or she is in the U.K., but the applicant can also participate via video.[76] Furthermore, he can send someone else, such as the sponsor or a representative, to the hearing on his behalf.[77] If the applicant loses in front of the Upper Tribunal, he can appeal to a higher court, where a judicial review process—the second track of reviewability—would start.[78]

This brief examination of Germany and the United Kingdom shows how different countries handle the procedural position of noncitizens outside the territory. It is in sharp contrast to U.S. policy on alien standing, which reveals the powerlessness and insignificance of the alien within the U.S. legal system. This societal value judgment is shown in bold relief with the following Travel Ban Cases.

III. THE TRAVEL BAN CASES

Soon after his inauguration, President Donald J. Trump issued three executive orders which impacted U.S. immigration policy. The first focused on interior enforcement of immigration laws,[79] the second concerned "the wall" along the U.S.-Mexican border,[80] and the third introduced a "travel ban".[81] This "travel ban" [hereinafter EO1] was based on 8 U.S.C. § 1182(f), and it suspended the entry of citizens of Iraq, Iran, Libya, Sudan, Somalia, Syria or Yemen into U.S. territory for 90 days due to concerns about terrorism.[82] It also suspended the United States Refugee Admissions Program (USRAP) for 120 days; suspended indefinitely the entry of Syrian refugees; declared that

---

73. *See* Ask for a visa administrative review, Gov.UK (Oct. 12, 2017, 7:25 pm), https://www.gov.uk/ask-for-a-visa-administrative-review; *See also* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 145 (1978).

74. *See* Appeal against a visa or immigration decsision, Gov.UK (Oct. 12, 2017, 7:38 pm), https://www.gov.uk/immigration-asylum-tribunal. More information can be found in the Tribunals, Courts and Enforcement Act 2007 (http://www.legislation.gov.uk/ukpga/2007/15/contents) and the Practice Statements (https://www.judiciary.gov.uk/wp-content/uploads/2014/11/revised-ps-iac-13112014.pdf).

75. Tribunals, Courts and Enforcement Act §§ 3–5.

76. *See* Appeal a decision by the immigration and asylum tribunal, Gov.UK (March 3, 2018, 9:44 a.m.), https://www.gov.uk/upper-tribunal-immigration-asylum/if-you-have-a-hearing.

77. *See* Appeal a decision by the immigration and asylum tribunal, Gov.UK (March 3, 2018, 9:44 a.m.), https://www.gov.uk/upper-tribunal-immigration-asylum/if-you-have-a-hearing.

78. *See* Appeal a decision by the immigration and asylum tribunal, Gov.UK (March 3, 2018, 9:44 a.m.), https://www.gov.uk/upper-tribunal-immigration-asylum/if-you-have-a-hearing.

79. Executive Order: Enhancing Public Safety in the Interior of the United States, 25 January 2017, https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united (Oct. 13, 2017, 9.14 a.m.).

80. Executive Order: Border Security and Immigration Enforcement Improvements, 25 January 2017, https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements (Oct. 13, 2017, 9.17 a.m.).

81. Executive Order (No. 13.769): Protecting the Nation from Foreign Terrorist Entry into the United States, 27 January 2017, https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states (Oct. 13, 2017, 9.20 a.m.).

82. EO1 § 1.

future refugee admission should favor persons that are part of a religious minority in their home country and therefore persecuted (in short: Christians); and reduced the cap on refugee admissions for the year 2017 from 110,000 to 50,000.[83]

Unsurprisingly, EO1 resulted in a massive amount of litigation, some of it directly at airports where people were literally stranded. This litigation resulted in a nationwide preliminary injunction,[84] and in response, the President issued a second "travel ban" on March 6, 2017[85] (EO2). Although EO2 brought some minor changes to the proposed entry limitations, the decisive factors stayed the same. The "travel ban" was directed only against six of the abovementioned states—Iraq was removed from the list.[86] EO2 ordered a review procedure, focusing on how states cooperate with the U.S. when it comes to information sharing about potential immigrants and nonimmigrants.[87] EO2 no longer included the indefinite suspension of entry of Syrian refugees or the preferential treatment of religious minorities. The waiver regulations were broadened and the applicability of EO2 restricted: Legal Permanent Residents, dual citizens with one citizenship not on the list, and persons with a valid visa or refugee admission at the time EO1 or EO2 entered into force, were out of its scope.[88] The other provisions remained unchanged: USRAP was suspended for 120 days, the refugee cap was set at 50,000, and the entry of citizens of six predominant Muslim countries (Iran, Libya, Somalia, Sudan, Syria and Yemen) was suspended for 90 days.[89] EO2 was the subject of much litigation, which resulted in nationwide preliminary injunctions stopping its implementation pending further review. The decisions dealing with EO2 and the following executive orders will be described in the following sections to provide some background knowledge necessary for the comparison between those cases and *Kerry v. Din*.

A. *The Judgments of the Fourth and the Ninth Circuit Courts*

Although questions arose as to constitutional (Establishment Clause, Equal Protection Clause) and statutory violations (INA, Religious Freedom Restoration Act, Refugee Act, Administrative Procedure Act), the courts did not deal with the merits of the cases because the Fourth and the Ninth Circuit were so far only asked to review the preliminary injunctions issued by the district courts.[90] While the Fourth Circuit Court answered this question by

83. EO1 § 3 (c), § 5 (a), § 5 (c), § 5 (b), § 5 (d).
84. Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. 2017); Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).
85. Executive Order (No. 13.780): Protecting the Nation from Foreign Terrorist Entry into the United States, 6 March 2017, https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states (Oct. 13, 2017, 9.49 a.m.).
86. EO2 § 2 (c).
87. EO2 § 2 (a), (b), (d), (e).
88. EO2 § 3 (c).
89. EO2 §§ 2(c), 6(a)-(b).
90. IRAP v. Trump, 857 F.3d 554 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017).

looking at the Establishment Clause, the Ninth Circuit focused on the (in-) consistency with the INA.[91]

1. *International Refugee Assistance Project v. Trump*

The District Court of Maryland issued a nationwide preliminary injunction stopping the implementation of the travel ban (Section 2(c) of EO2).[92] The Fourth Circuit Court in general affirmed.[93] The Court applied the *Lemon*-test[94] to determine a likely violation of the Establishment Clause.[95] It decided that, because of legally relevant statements by President Trump and his representatives during the campaign and post-election which seemingly influenced the issuing of EO1 and EO2, the primary purpose of EO2 was not secular, but anti-Muslim.[96] Therefore, the *Lemon*-test was not fulfilled. The other *Winter* requirements of a preliminary injunction,[97] except for the District Court's inclusion of the President in the scope of the preliminary injunction, were satisfied.[98]

2. *Hawaii v. Trump*

A concurrent suit was brought at more or less the same time in Hawaii. The District Court of Hawaii issued a preliminary injunction that stopped the implementation of the entire EO2,[99] which was affirmed by the Ninth Circuit Court in regard to stopping the implementation of § 2 ("travel ban") and § 6 EO2 (refugee cap, USRAP).[100] The Ninth Circuit Court dealt with two legal disputes: the breadth of the power granted to the President in 8 U.S.C. § 1182(f); and whether EO2 infringed upon the anti-discrimination provision in 8 U.S.C. § 1152(a)(1)(A).

8 U.S.C. § 1182(f) states that:

> [w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.[101]

---

91. *Id.*
92. IRAP v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017).
93. IRAP v. Trump, 857 F.3d 554 (4th Cir. 2017).
94. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The consideration of the Doctrine of Consular Nonreviewability will be discussed in depth in chapter IV.
95. IRAP v. Trump, 857 F.3d 554, 592-93 (4th Cir. 2017).
96. *Id.* at 594-601.
97. Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) ("a plaintiff 'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'").
98. IRAP v. Trump, 857 F.3d 554, 601-66 (4th Cir. 2017).
99. Hawaii v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017).
100. Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017).
101. 8 U.S.C. § 1182(f).

The court examined whether or not the President could show a "finding" that the entry of citizens of the six designated states for the next 90 days, the entry of every refugee in the next 120 days as well as every refugee that exceeded 50,000 would be "detrimental to the interests of the United States."[102]

The court concluded that the President could not sufficiently show this finding. EO2 justified itself inter alia with national security concerns and state conditions, whereas the legal consequences were dependent on the citizenship of the person affected.[103] In other words, the government could not connect the problem of security concerns from state conditions with the potential threat by citizens of those states, since their individual relationship to the state or to terror organizations was not taken into account.

Furthermore, the court concluded that EO2 infringed upon the anti-discrimination provision in 8 U.S.C. § 1152(a)(1)(A), which forbids discrimination based on race or nationality.[104] Although the provision itself only applies explicitly to the "issuance of an immigrant visa,"[105] the court determined that it also applies here: while Section 2(c) of EO2 only expressly targets the entry of non-immigrants and not the visa issuance for immigrants, the effect of the "travel ban" is that the targeted persons will not receive a visa.[106] 8 U.S.C. § 1152(a)(1)(A) applies to 8 U.S.C. § 1182(f), so that the President cannot circumvent the anti-discrimination provision by restricting the scope of application to the entry of an alien.[107]

Moreover, the court ruled that the reduction of the refugee cap violated 8 U.S.C. § 1157.[108] "The statute requires the President to set the number of annual refugee admissions (1) before the start of the new fiscal year, and (2) after appropriate consultation with Congress."[109] Both requirements were not met, as the President "ordered a midyear reduction in the level of refugee admissions [. . .] without consulting Congress."[110]

The other Winter requirements of the preliminary injunction were met as well,[111] except that the review procedures provided in Sections 2 and 6 of EO2 were permissible. The President was not to be included in the

---

102. Hawaii v. Trump, 859 F.3d 741, 770-76 (9th Cir. 2017).
103. *Id*. at 772.
104. *Id*. at 776-79
105. 8 U.S.C. § 1152(a)(1)(A) (emphasis added).
106. Hawaii v. Trump, 859 F.3d at 776–77. For details, see Desirée C. Schmitt, *"Travel Ban" und "DACA/DAPA" – (traurige) migrationsrechtliche Kuriosita«ten aus den Vereinigten Staaten von Amerika*, at 16-18, JEAN MONNET SAAR BLOG (Oct. 13, 2017, 2.32 PM), http://jean-monnet-saar.eu/wp-content/uploads/2013/12/Schmitt-Travel-Ban-Saar-Expert-Paper.pdf.
107. Hawaii v. Trump, 859 F.3d at 777-78.
108. *Id*. at 779-82.
109. *Id*. at 780.
110. *Id*. at 780.
111. *Cf*. *id*. at 769, 782-85: "Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief . . . . In weighing the harms, the equities tip in Plaintiffs' favor . . . . The public interest favors affirming the preliminary injunction." *See* Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).

preliminary injunction.[112]

B. *The Supreme Court Order*

The government petitioned for a writ of certiorari and applied for a stay of the preliminary injunctions.[113] The Supreme Court granted certiorari and stayed in part the preliminary injunctions by the lower courts.[114] The partial stay affected those persons who had no credible claim to a bona fide relationship to a close familial person or entity in the U.S.[115] For those persons, the security concerns of the government outweighed the interest in coming to the U.S, to which they do not have any right.[116] This outcome of the court's equity analysis also applied in regard to the suspension of USRAP and the lowering of the refugee cap.[117]

Justice Thomas, with whom Justices Alito and Gorsuch joined, concurred in part and dissented in part.[118] They believed the preliminary injunctions should have been stayed completely because they feared new litigation in which the lower courts had to decide in every individual case if there was a sufficient bona fide relationship.[119]

C. *The Aftermath: The New Permanent "Proclamation" and the New Refugee Admission Policy*

1. *EO3—A Game Changer?*

The 90-day-deadline for Section 2(c) of EO2 after the partially allowed application by the Supreme Court ended on September 24, 2017. In response to the expiration, President Trump swiftly issued the "Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats."[120] Surprisingly, the President chose the form of a proclamation instead of an executive order, as he did the last two times. According to Section 2(a) of EO2, the security threat of over 200 States and their cooperation with the U.S. government when it comes to data sharing relating to potential immigrants had to be

112. Hawaii v. Trump, 859 F.3d at 782-89.

113. *Trump v. IRAP, Petition for a Writ of Certiorari*, http://scotusblog.com/wp-content/uploads/2017/06/16-1436-petition-trump-v.-irap.pdf (Oct. 13, 2017, 2:47 PM).

114. Trump v. IRAP, 137 S. Ct. 2080 (2017).

115. *Id.* at 2087.

116. *Id.* at 2087-88.

117. *Id.* at 2089.

118. *Id.* at 2089-90.

119. *Id.*

120. Proclamation (No. 9645): Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45,161 (Sept. 24, 2017) [hereinafter EO3], https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry.

evaluated.[121] Based on this, the Department of Homeland Security issued two reports.[122] After evaluating those reports and relying on 8 U.S.C. § 1182(f) for legal basis, President Trump released EO3, which contains—to some extent a partial and to some extent a complete—entry ban for citizens of eight States: Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia.[123] Depending on the specific security threat of a state, EO3 prevents either only immigrants from emigrating to the U.S., or alternately blocks even nonimmigrants from entering the United States.[124] The entry into the U.S. of nationals of Chad (new to the "black list") was suspended for immigrants and nonimmigrants on business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas.[125] The same still holds true for nationals of Libya and Yemen.[126] Officials of government agencies of Venezuela, who are involved in screening and vetting procedures,[127] and their immediate family members, as nonimmigrants on business (B-1), tourist (B-2), and business/tourist (B-1/B-2) visas, are suspended from entering the U.S. territory.[128] The entry into the U.S. of citizens of Iran as immigrants and as nonimmigrants is suspended, except if they enter under valid student (F and M) and exchange visitor (J) visas.[129] Citizens from North Korea and Syria are suspended from entering as immigrants as well as nonimmigrants, regardless of visa categories.[130] The entry into the U.S. of citizens of Somalia as immigrants is suspended; visa adjudications and decisions regarding their entry as nonimmigrants is "subject to additional scrutiny to determine if applicants are connected to terrorist organizations or otherwise pose a threat to the national security or public safety of the United States."[131] The scope of application and waiver possibilities are comparable to those of EO2.[132] In contrast, refugees were not part of

121. Prior to § 1 EO3; § 1 (c), (e) EO3.The criteria were: Identity-management information, National security and public-safety information; National security and public-safety risk assessment. 16 states were found to be "inadequate"; 31 were found to be "at risk of becoming inadequate."

122. EO3 § 1(h), 9 July 2017 and 15 September 2017. Both reports are not open to the public. There is current litigation (FOIA Request) to get access to those reports, Brennan Center for Justice v. Department of State, Case No. 17 Civ. 7520 (S.D.N.Y. 2017).

123. EO2 § 2(a); EO3 § 1(h)(ii), 1(i).

124. EO3 § 1(h)(ii)-(iii).

125. EO3 § 2(a)(ii). Chad was removed from the list on April 10, 2018. Proclamation (No. 9645): Presidential Proclamation Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 83 Fed. Reg. 15,937 (Apr. 13, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-maintaining-enhanced-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/.

126. EO3 § 2(c)(ii), 2(g)(ii).

127. Including the Ministry of the Popular Power for Interior, Justice and Peace; the Administrative Service of Identification, Migration and Immigration; the Scientific, Penal and Criminal Investigation Service Corps; the Bolivarian National Intelligence Service; and the Ministry of the Popular Power for Foreign Relations. EO3 § 2(f)(ii).

128. EO3 § 2(f)(ii).

129. EO3 § 2(b)(ii). Although those allowed nonimmigrants "should be subject to enhanced screening and vetting requirements." *Id*.

130. EO3 § 2(d)(ii), (e)(ii).

131. EO3 § 2(h)(ii).

132. EO3 § 3(a)-(b), (c)(iv).

EO3.[133] The adjustment procedure of the indefinite proclamation is circumscribed in Section 4 of EO3: every 180 days, the Secretary of the Department of Homeland Security should issue a report to the President, and he can recommend to remove a state from the constraints at any time.

The new proclamation would have entered into force on September 24, 2017 for those persons that were already included in the ban of Section 2(c) of EO2 and who had no bona fide relationship to a person or entity in the U.S.[134] Besides this specific circumstance, EO3 would have become effective on October 18, 2017, also for those citizens of Iran, Libya, Syria, Yemen and Somalia *who do have* a bona fide relationship to a person or entity in the U.S.[135] This means, simply put, that the bona fide differentiation by the Supreme Court was not applied anymore. To discuss the manifold problems of EO3 would exceed the scope of this article.[136] However, it is interesting to consider that the non-application of the Supreme Court's bona fide relationship-test was not accepted in the lower courts. On October 17, 2017, just before EO3's effective date, a District Court in Hawaii issued a nationwide preliminary injunction against EO3,[137] as did a District Court in Maryland that same day.[138]

Hawaii's preliminary injunction only encompassed nationals from Chad, Iran, Libya, Syria, Yemen and Somalia,[139] because only those nationals were part of the original suits against EO3.[140] The reasoning of the District Court is comparable to the one concerning EO2. The reports created by the United States were incoherent and therefore not able to bridge the logical gap between the findings of the reports and the restrictions imposed by EO3 because nationality was used as a mere risk factor. For these reasons the court concluded that because of a likely violation of 8 U.S.C. § 1182(f) and § 1152 (a)(1)(A) the petitioners were likely to succeed on the merits of the claim.[141]

The preliminary injunction by the District Court in Maryland was somewhat less far-reaching. It stopped the implementation of EO3 only for those persons who had a bona fide relationship in the U.S.[142] That means that the Supreme Court's criteria were applied to EO3; a step that President Trump's proclamation seemingly did not want to take. The court opined that the First Amendment Establishment Clause was likely to be violated.[143] With

133. EO3 § 6(c). *See also infra* at subchapter 2.
134. EO3 § 7(a).
135. EO3 § 7(b). For the latter three states, all newly included in the travel restrictions, there was no need to determine explicitly whether the bona fide exemption would apply because they were not party of the Supreme Court opinion. For those states, in the end, the exemption does not matter.
136. *But cf*. Schmitt, *supra* note 106, at 33-34.
137. Hawaii v. Trump, 265 F. Supp. 3d 1140, 1160-61 (D. Haw. 2017) (issuing a nationwide temporary restraining order that could convert to a preliminary injunction).
138. IRAP v. Trump, 265 F. Supp. 3d 570, 633 (D. Md. 2017).
139. Hawaii v. Trump, 265 F. Supp. 3d 1140, 1158-59 (D. Haw. 2017).
140. *Id*. at 1147.
141. *Id*. at 1155-61.
142. IRAP v. Trump, 265 F. Supp. 3d 570, 630 (D. Md. 2017).
143. *Id*. at 622-29.

reference to the same arguments the court adopted in the previous decisions, EO3 still discriminated against Muslim countries. The mere inclusion of North Korea and Venezuela was not enough to convince the court of a religion-neutral policy, especially given the small-to-no relevance in future praxis.[144] The net migration rate from North Korea is zero;[145] only officials of government agencies of Venezuela, who are involved in screening and vetting procedures, and their immediate family members are suspended from entering the U.S. territory.[146] The Fourth Circuit Court affirmed the preliminary injunction granted by Maryland's District Court on February 15, 2018.[147]

Approximately three months before, the Ninth Circuit Court already reviewed the preliminary injunction issued by the Hawaiian District Court.[148] The court granted a partial stay of the preliminary injunction by adapting the more restrictive approach of the District Court in Maryland. EO3 could thus enter into force for those persons who do not have a bona fide relationship in the U.S.[149] With reference to the former Ninth Circuit Travel Ban Case,[150] the court once again made clear that those relatives that could have a close familial relationship were grandparents, grandchildren, brothers and sisters-in-law, aunts and uncles, nephews, and cousins.[151] For the bona fide relationship to the entity in the U.S., the relationship must be formal, documented and not entered into fraudulently to circumvent the application of the order.[152]

After these decisions, EO3 could enter into force for persons in the scope of the Proclamation and lacking the necessary bona fide relationship in the U.S. The Trump Administration was not satisfied with this result and asked the Supreme Court to stay the preliminary injunctions.[153] Although the injunction by the District Court in Maryland and the modified Hawaiian version seemed to be on the same page with the Supreme Court, the latter stayed the preliminary injunctions entirely on December 4, 2017.[154] The court did not provide any reasons for this decision. It only mentioned that Justices Ginsburg and Sotomayor would have denied the application.[155] But the court

144. *Id*. at 623.

145. Central Intelligence Agency, THE WORLD FACTBOOK, *Net Migration Rate*, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2112rank.html (Mar. 3, 2018, 2.01 PM).

146. EO3 § 2(f)(ii).

147. IRAP v. Trump, 833 F.3d 233 (4th Cir. 2018).

148. Hawaii v. Trump, No. 17-17168, 2017 WL 5343014 (9th Cir. 2017).

149. *Id*. at *1.

150. Hawaii v. Trump, 871 F.3d 646, 658 (9th Cir. 2017).

151. Hawaii v. Trump, No. 17-17168, 2017 WL 5343014, at *1 (9th Cir. 2017).

152. *Id*. at *1 (referencing the U.S. Supreme Court, *Trump v. IRAP*, 137 S. Ct. 2080, 2088 (2017)).

153. Trump v. Hawaii, No. 17A550 (U.S. Nov. 20, 2017) (petition for stay), http://www.supremecourt.gov/DocketPDF/17/17A550/20998/20171120191451356_17A%20Trump%20v.%20Hawaii%20CA9%20Stay%20Application.pdf.

154. Trump v. Hawaii, 138 S. Ct. 542 (order granting stay of preliminary injunction), https://www.supremecourt.gov/orders/courtorders/120417zr1_j4ek.pdf.

155. *Id*.

must have seen a difference between EO2 and EO3, which convinced the majority that the bona fide relationship-test, invented by the Supreme Court itself, would no longer be the determining criteria.

Based on the motto "all good things go by three," EO3 entered into force without any restrictions: the government started to implement EO3 on December 8, 2017.[156] But the stay by the Supreme Court was ordered pending disposition of the Government's appeal in the Fourth Circuit Court, and disposition of the Government's petition for a writ of certiorari if such writ was sought. In the latter case, the order would only be valid until the Supreme Court denied or granted a writ of certiorari and ordered its judgement on the merits. As the government wanted to have a final decision, proving that they were right in the first place, the Trump Administration petitioned for a writ of certiorari, which was granted by the Supreme Court on January 19, 2018.[157] The writ of certiorari was also granted with regard to the Fourth Circuit Court decision,[158] thus showing the Court's interest in possible violations of the Establishment Clause, which have so far only been addressed by the Fourth Circuit and not by the Ninth Circuit Court. Oral argument was scheduled for April 25, 2018. In the meantime, the decisions of the Fourth and Ninth Circuit Courts were stayed pending the Supreme Court's decision.[159]

The Supreme Court decided the case on June 26, 2018 with five to four votes that the third travel ban is lawful. The Justices Robert, Kennedy, Thomas and Alito were of the opinion that the President had the power to issue the proclamation under the provisions of the INA. Furthermore, they concluded that there was no violation of the Establishment Clause.

According to the Court, EO3 is covered by the authority laid down in 8 U.S.C. § 1182(f).[160] But the majority emphasized that they only "assume[d] without deciding that plaintiffs' statutory claims are reviewable, notwithstanding

156. U.S. Department of State, Press Release, Presidential Proclamation Fully Implemented Today, Dec. 8, 2017, https://www.state.gov/r/pa/prs/ps/2017/12/276376.htm (Mar. 3, 2018, 11:20 AM).

157. Trump v. Hawaii, 138 S. Ct. 923 (2018). The questions presented are: "1. Whether respondents' challenge to the President's suspension of entry of aliens abroad is justiciable. 2. Whether the Proclamation is a lawful exercise of the President's authority to suspend entry of aliens abroad. 3. Whether the global injunction is impermissibly overbroad." (Petition for a writ of certiorari, https://www.supremecourt.gov/DocketPDF/17/17-965/26928/20180106115022487_Trump%20v%20Hawaii%20Revised%20Petition.pdf). The fourth question initially raised by the Brief in Opposition (https://www.supremecourt.gov/DocketPDF/17/17-965/27771/20180112172848825_Trump%20v.%20Hawaii%20Brief%20in%20Opposition.pdf) was added by the U.S. Supreme Court: Whether Proclamation No. 9645 violates the Establishment Clause.

158. IRAP v. Trump, No. 17-1194 (U.S. Feb 23, 2018) (Petition for a Writ of Certiorari), https://www.supremecourt.gov/DocketPDF/17/17-1194/36361/20180223123953498_Petition%20for%20Certiorari_International%20Refugee%20Assistance%20Project%20v.%20Trump.pdf; Trump v. IRAP, No. 17-1270 (U.S. Mar. 9, 2018) (Cross-Petition for a Writ of Certiorari), http://www.supremecourt.gov/DocketPDF/17/17-1270/38418/20180309165936226_IRAP%20-%20Cross-Pet%20-Hold.pdf.

159. The stay was initially granted concerning the decision of the Ninth Circuit Court. *See supra* note 154. The Fourth Circuit, on February 15, 2018, stayed its decision in *IRAP v. Trump*, 833 F.3d 233, 274 (4th Cir. 2018).

160. Hawaii v. Trump, 138 S. Ct. 2392, 2407-15 (2018).

consular nonreviewability or any other statutory nonreviewability issue."[161] In any case, the President had shown that EO3 was based on concrete security concerns and hence fulfilled the requirements of the statutory provision.[162] Additionally, the President is not bound by the antidiscrimination provision of 8 U.S.C. § 1152(a)(1)(A), as this rule only applies to the issuance of immigrant visas.[163] But, according to the majority, EO3 entails general admissibility determinations that precede visa issuances, thus excluding the applicability of the antidiscrimination provision.[164]

Furthermore, the majority found no violation of the First Amendment's Establishment Clause.[165] Again, the Court emphasized that it only assumes to be able to look behind the face of EO3. Assuming the rational-basis test to be the right standard of review, the majority concluded that the "Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices."[166] Focusing on the state reports and refusing to "second-guess" the Executive's predictive judgements on complex national security matters, the majority declared that "the Government has set forth a sufficient national security justification to survive rational basis review."[167]

As a result, the Court reversed the grant of the preliminary injunction and remanded the case for further proceedings consistent with the decision. As the likelihood to succeed on the merits is now very small, the lower courts will have to decline the requests for preliminary injunctions against EO3.

Justice Kennedy concurred in the judgement but emphasized that even absent judicial reviewability officials are nevertheless bound by the Constitution, as they have sworn an oath to protect it.[168] Justice Thomas, who also filed a concurring opinion, criticized the issuance of nationwide preliminary injunctions by the lower courts. He questioned the authority of the courts to do so and warned against the excessive practices.[169]

Justices Breyer, Kagan, Sotomayor, and Ginsburg dissented. Justice Breyer, joined by Justice Kagan, examined the waiver possibilities and their actual implementation by the Executive. The application of the exemption provisions of EO3 would show if the Proclamation rested upon anti-Muslim bias.[170] He believed an analysis of the application revealed that the Executive was in practice not making use of the waiver possibilities. This, he reasoned, constituted a sufficient basis for finding animus towards Muslims, which

---

161. *Id*. at 2407. *Cf*. *id*. at 2409 ("But even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained.").
162. *Id*. at 2407-13.
163. *Id*. at 2413-15.
164. *Id*. at 2414.
165. *Id*. at 2415-23.
166. *Id*. at 2421.
167. *Id*. at 2423.
168. *Id*. at 2423-24 (Kennedy, J., concurring).
169. *Id*. at 2424-29 (Thomas, J., concurring.
170. *Id*. at 2429-33 (Breyer, J., dissenting).

barred a referral to "national security" under 8 U.S.C. § 1182(f). Justice Sotomayor also filed a dissenting opinion, in which Justice Ginsburg joined. They found a violation of the Establishment Clause:

> "The Court's decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a 'total and complete shutdown of Muslims entering the United States' because the policy now masquerades behind a façade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus."[171]

Sotomayor took into consideration the statements of President Trump before and after the inauguration as well as the developments leading up to the third travel ban. She also stressed that the Court's judgment in Masterpiece Cakeshop had indeed taken into account statements of a state civil-rights commission when ruling on a violation of the Free Exercise Clause. She argued that the same should apply to statements of President Trump.[172]

How the court dealt with the question of reviewability of executive immigration decisions is highly significant for the analysis at hand. Section IV will consider in detail what we can learn from the majority's "cautious" approach to this question. To complete the picture, however, we first will have a look at the *fourth* travel ban.

2. *The Inconclusive EO4 and the Refugee Screening Policy*

EO3 did not provide any guidance on the restart of USRAP,[173] as the review procedure according to EO2 was set for 120 days and therefore the resuming date for the refugee resettlement program was set for the October 24, 2017. Again, just in time, President Trump issued a new Executive Order (EO4) on that exact day.[174] The order concludes that the screening and vetting procedures of prospective refugees before resettling in the United States in general fulfill the security standards and hence can be continued.[175] Nevertheless, review, risk assessment, and possible counter measurements

---

171. *Id*. at 2433 (Sotomayor, J., dissenting).

172. *Id*. at 2446-47 (Sotomayor, J., dissenting) (citing Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018)).

173. After the U.S. Supreme Court ruling, USRAP could already resettle refugees with a bona fide relationship in the United States. Besides from that, resettlement procedures by USRAP were stopped.

174. Presidential Executive Order on Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities, https://www.whitehouse.gov/presidential-actions/presidential-executive-order-resuming-united-states-refugee-admissions-program-enhanced-vetting-capabilities/ (Nov. 19, 2017, 11:10 PM).

175. EO4 § 2 (b)-(c).

have to be conducted by the Secretary of Homeland Security, after consultation with the Secretary of State and the Secret Service, in the 90 days to follow, resulting in a conclusive report by the Attorney General within 180 days.[176]

The striking part of EO4 is what is *not* in EO4. In a memorandum by several departments to the President, the secretaries assert that the abovementioned measures aim at refugees with a nationality from one of eleven designated states.[177] Those nationalities supposedly pose "a higher risk to the United States"[178]; but which states are on this new "black list" can only be hypothesized.[179] The memorandum points to the Security Advisory Opinion list of states. However, this list is not publicly accessible either.

Furthermore, family reunification with already settled refugees in the U.S. ("following-to-join-refugees") is—independent of any nationality—suspended until "those enhancements [additional security measures] have been implemented."[180] Again, we are left in the dark about what those security measures consist of and why they are needed, although EO4 tells us that the security standards are met. It is purely absurd that EO4 does not mention those two important aspects at all.

Maybe that is why a district court judge in December 2017 issued a preliminary injunction and stayed the implementation of EO4 as far as refugees with bona fide relationships in the U.S. are concerned.[181] Judge Robart was of the opinion that it was likely that the notice and comment rulemaking procedure was violated.[182] In addition, he found a likely violation of the rules that govern family reunification with refugees (8 U.S.C. § 1157(c)(2)(A) and § 1157(c)(1)).[183] Balancing the competing interests, Judge Robart applied the bona fide test developed by the Supreme Court in the IRAP case.[184] Hence, because a bona fide relationship is always a prerequisite for the following-to-join-refugee (8 U.S.C. § 1157(c)), this preliminary injunctions factually stops the whole part two of the memorandum. It changes part one of the memorandum (refugees from the 11 States) in so far, as for those with a bona fide relationship in the USA, the memorandum will not apply. Meanwhile, it is unclear if the bona fide test should have been used here, because the Supreme Court did not apply the test when deciding about the preliminary injunctions

176. EO4 § 3.

177. Memorandum to the President, 23 Oct. 2017, https://www.state.gov/documents/organization/275306.pdf (Feb. 3, 2018, 1:45 PM). *Cf*. Factsheet, Status of the U.S. Refugee Admissions Program, 24 Oct 2017, https://www.state.gov/r/pa/prs/ps/2017/10/275074.htm (Nov. 19, 2017, 11:12 AM).

178. *Id*.

179. Krishnadev Calamur, *Trump's New Refugee Policy Targets These 11 Countries*, ATLANTIC, (Nov. 19, 2017, 5.03 p.m.) (identifying Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Syria, and Yemen), https://www.theatlantic.com/international/archive/2017/10/us-refugees-11-countries/543933/.

180. Factsheet, *supra* note 177.

181. Doe v. Trump, 288 F. Supp. 3d 1045 (W.D. Wash. 2017).

182. *Id*. at 1073-77.

183. *Id*. at 1077-82.

184. *Id*. at 1083-85.

stopping the implementation of EO3. But EO3 did not deal with refugees and family reunification. Hence, the outset could be different in EO4, which takes into account the special need of refugees.[185] That is why it could be argued that the bona fide test needs to be applied with respect to EO4.

Attempts by the government to review or to stay the preliminary injunction were denied in January 2018 by the district court.[186] An appeal to the Ninth Circuit Court is currently pending. [187]

IV. THE "(NON-)APPLICATION" OF THE DOCTRINE OF CONSULAR NONREVIEWABILITY IN THE TRAVEL BAN CASES

In the Fourth Circuit Court, as well as in the Ninth Circuit Court, the government proffered the Doctrine of Consular Nonreviewability to cut off judicial review of EO2.[188] The same holds true for another round of litigation, this time directed against EO3.[189] The government offered the same argument when petitioning twice for a writ of certiorari.[190] But all courts refused to accept the government's assertion. The Fourth Circuit Court dealt with the doctrine in an extensive way when looking at EO2 (A.).[191] But the Supreme Court's decision regarding EO3 also sheds some light on the current status of the doctrine (B.).

A. *The Fourth Circuit Court's Interpretation of Kennedy's Concurring Opinion in Kerry v. Din*

The Fourth Circuit Court found that "the doctrine of consular nonreviewability does not bar judicial review of constitutional claims."[192] The argumentation by the government was a "dangerous idea," that will not be considered because it is the "the province and duty of the judicial department to say what the law is."[193] Additionally, the Fourth Circuit held that:

---

185. *Cf*. Doe v. Trump, 284 F. Supp. 3d 1172, 1181 (W.D. Wash. 2018).

186. Doe v. Trump, 284 F. Supp. 3d 1182 (W.D. Wash. 2018); Doe v. Trump, 284 F. Supp. 3d 1172 (W.D. Wash. 2018).

187. Doe v. Trump, 284 F. Supp. 3d 1172, 1176 (W.D. Wash. 2018).

188. IRAP v. Trump, 857 F.3d 554, 587 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d 741, 768–69 (9th Cir. 2017). Compare the Ninth Circuit Court's statement addressing the government's argument with regard to EO1, Washington v. Trump, 847 F.3d 1151, 1161–1164 (9th Cir. 2017).

189. IRAP v. Trump, 883 F.3d 233, 263–65 (4th Cir. 2018); Hawaii v. Trump, 265 F. Supp. 3d 1140, 1153–54 (D. Haw. 2017); IRAP v. Trump, 265 F. Supp. 3d 570, 602–03 (D. Md. 2017).

190. IRAP v. Trump, 857 F.3d 554 (4th Cir. 2017), *petition for cert. filed*, 2017 WL 2391562 (June 1, 2017) (No. 16-1436), at 14–26; Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017), *petition for cert. filed*, 2018 WL 333818 (Jan. 5, 2018) (No. 17-965), at 17–21. *See also* Brief for Petitioners at 18–22, Trump v. Hawaii, 138 S. Ct. 2392 (No. 17-965).

191. The Fourth Circuit Court repeated its explanations when looking at EO3 in IRAP v. Trump, 883 F.3d 233, 263–65 (4th Cir. 2018).

192. IRAP v. Trump, 857 F.3d 554, 587 (4th Cir. 2017) (citing Kerry v. Din, 135 S. Ct. 2128, 2132 (2015)).

193. *Id*. at 587 (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)). Judge Shedd underscores the importance of national security in his dissent in IRAP v. Trump, 857 F.3d 554, 654–60 (4th Cir. 2017) (Shedd, J., dissenting).

> "[t]he Government has repeatedly asked this Court to ignore evidence, circumscribe our own review, and blindly defer to executive action, all in the name of the Constitution's separation of powers. We decline to do so, not only because it is the particular province of the judicial branch to say what the law is, but also because we would do a disservice to our constitutional structure were we to let its mere invocation silence the call for meaningful judicial review. The deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution."[194] [...] "We are likewise unmoved by the Government's rote invocation of harm to "national security interests" as the silver bullet that defeats all other asserted injuries."[195]

The Fourth Circuit, examining the issue with an eye to the Establishment Clause, used the *Lemon* test to determine a likely violation of the First Amendment.[196] The government disagreed with the application of this test, arguing that *Mandel* deference ought to be applied.[197] The court decided that Mandel is indeed the starting point of the analysis: when the government has acted with a "facially legitimate and bona fide reason," the court may not "look behind" the challenged action.[198] But because it is the court's task to serve as a check upon the constitutional limitations even in the field of immigration law, Mandel is just the starting point.[199] To determine the proper application of Mandel's "facially legitimate and bona fide"-test, the court looks at Kennedy's controlling concurring opinion in Kerry v. Din.[200]

> "To be 'facially legitimate,' there must be a valid reason for the challenged action stated on the face of the action. [...T]he 'bona fide' requirement concerns whether the government issued the challenged action in good faith. [. . .W]here a plaintiff makes 'an affirmative showing of bad faith' that is 'plausibly alleged with sufficient particularity,' courts may 'look behind' the challenged action to assess its 'facially legitimate' justification."[201]

Although national security is a legitimate governmental interest, and therefore "facially legitimate," the plaintiffs showed that the government acted in bad faith. Specifically the plaintiffs demonstrated that the government's assertion is just "a pretext for what really is an anti-

194. IRAP v. Trump, 857 F.3d 554, 601 (4th Cir. 2017).
195. *Id*. at 603.
196. *Id*. at 603; *see also* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
197. IRAP v. Trump, 857 F.3d 554; *see also* Kleindienst v. Mandel, 408 U.S. 753 (1972).
198. IRAP v. Trump, 857 F.3d 554, 588-91 (4th Cir. 2017).
199. *Id*. at 590.
200. *Id*. at 590–93. This same sentiment was repeated in IRAP v. Trump, 883 F.3d 233, 263, n.11 (4th Cir. 2018) (Gregory, C.J., concurring).
201. IRAP v. Trump, 857 F.3d 554, 590–91 (4th Cir. 2017).

Muslim religious purpose."[202] Therefore, the *Mandel*/*Din*-criteria were not met.[203] As a consequence, as the court did not have further guidance on what "to look behind" means, it applied the normal standard of review in Establishment Clause cases, here the *Lemon*-test.[204] After conducting the review, the court concluded that the government failed to prove a foremost secular governmental aim.[205]

Was this reasoning in line with Kennedy's concurring opinion in *Kerry v. Din*? Justice Kennedy did indeed indicate that when there is proof of bad faith on the side of the consular officer, his decision-making rationale can be reviewed by the judiciary.[206] One difference to the case at issue here is that the terrorism bar has specialized grounds of denials for a visa application whereas 8 U.S.C. § 1182(f) does not mention specific criteria on how to make a determination.[207] But the terrorism bar is in the end as broad as "detrimental to the interest of the United States" and riddled with a comparable amount of broad deference. Nevertheless, a distinction could be drawn between *Mandel* and *Din* on the one hand, dealing both with visa denials, and the Travel Ban Cases on the other hand, dealing with presidential executive orders or proclamations.[208] Judge Gregory distinguishes "between a challenge to the *substance* of the executive's decision [the Doctrine of Consular Nonreviewability applies] and a challenge to the *authority* of the executive to issue that decision [the Doctrine does not apply]."[209] Hence, one could argue that *Mandel* and *Din* are distinguishable[210] because the question at stake is whether the President had the authority to issue the executive orders/proclamation. But one could also argue the opposite, that there is no such difference here because it is in the end still the task of the consular officers to apply the

202. *Id*. at 591–92. ("Here, Plaintiffs offered detailed, undisputed evidence of the illegitimate reason motivating the Proclamation [*inter alia* the words of the President], demonstrating that the Proclamation's proffered rationale was offered in bad faith."). *See also* IRAP v. Trump, 883 F.3d 233, 265, n.13 (4th Cir. 2018) (Gregory, C.J., concurring).

203. The case would insofar be distinguishable from other cases, where the bona fide prong was satisfied. *See, e.g*., Bustamante v. Mukasey, 531 F.3d 1059, 1063 (9th Cir. 2008); Cardenas v. United States, 826 F.3d 1164, 1172 (9th Cir. 2016); IRAP v. Trump, 883 F.3d 233, 264–65 (4th Cir. 2018).

204. IRAP v. Trump, 857 F.3d 554, 592 (4th Cir. 2017).

205. *Id*. at 593–601.

206. Kerry v. Din, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring).

207. Josh Blackman, *The 9th Circuit's Contrived Comedy of Errors in Washington v. Trump*, 95 TEXAS L. REV. SEE ALSO 18, 39 (2017).

208. IRAP v. Trump, 265 F. Supp. 3d 570, 611–12 (D. Md. 2017). *See also* Brief for Respondents at 15, Trump v. Hawaii, 138 S. Ct. 2392 (No. 17-965).

209. IRAP v. Trump, 883 F.3d 233, at 277–79 (4th Cir. 2018) (Gregory, J., concurring) (discussing Knauff v. Shaughnessy, 338 U.S. 537 (1950)).

210. *Cf*. Washington v. Trump, 847 F.3d 1151, 1162 (9th Cir. 2017) ("The present case, by contrast, is not about the application of a specifically enumerated congressional policy to the particular facts presented in an individual visa application. Rather, the States are challenging the President's *promulgation* of sweeping immigration policy."). *See also* Hawaii v. Trump, 859 F.3d 741, 768 (9th Cir. 2017); IRAP v. Trump, 265 F. Supp. 3d 570, 602–03 (D. Md. 2017); IRAP v. Trump, 883 F.3d 233, 277–79 (4th Cir. 2018) (Gregory, J., concurring); IRAP v. Trump, 883 F.3d 233, 309 (4th Cir. 2018) (Keenan, J., concurring); Trump v. Hawaii, 138 S. Ct. 2392, 2440, n.5 (Sotomayor, J., dissenting).

executive orders and to accordingly deny or grant visas. [211] Furthermore, *Mandel* can arguably govern whenever Congress has delegated immigration law powers, including discretionary decision-making competences to the executive, and the plaintiffs challenge the executive's exercise of that power in violation of their constitutional rights.[212] This would further broaden the scope of the Doctrine of Consular Nonreviewability. To grant the government yet another way of avoiding judicial review would be a dangerous development.

If *Mandel* and *Din* do govern here, Kennedy's concurring opinion must be carefully applied.[213] Justice Kennedy did not propose a look behind the political rationale behind the statute at why the ground of refusal exists. Instead, he carefully proposed a look behind the concrete factual basis of the consular officer's decision.[214] Accordingly, the courts could only review *if* the decision was based on its face on 8 U.S.C. § 1182(f).[215] Similarly, the consular officer could—according to Kennedy—deny the visa without showing bad faith simply by making reference to 8 U.S.C. § 1182(f).[216] It was Kennedy himself who saw it as a bona fide act to only cite the broad norm that included the ground of denial.

However, it is argued that when bad faith is shown, the courts can review the legality of an act.[217] This, in turn, is criticized heavily in the Travel Ban Cases: the Fourth Circuit Court would not only undermine *Mandel* and *Din* by "looking behind" the policy to find bad faith, but in addition using campaign statements and tweets to find bad faith.[218] Accordingly, the court is "looking behind" twice—first to determine bad faith, and second to find a discrimination *vis-à-vis* religion for the *Lemon*-test. In his dissent in *IRAP v. Trump*, Judge Niemeyer criticizes that bad faith "must appear on the face of the government's actions" and must not be excavated.[219] Stating the norm has been enough—in *Din* as well as in the Travel Ban Cases—to show that

---

211. Blackman, supra note 207, at 39–40; Joshua Blackman, *Kerry v. Din, Kleindienst v. Mandel, and Washington v. Trump*, JOSH BLACKMAN'S BLOG, http://joshblackman.com/blog/2017/02/11/kerry-v-din-kleindiesnt-v-mandel-and-washington-v-trump/ (Nov. 20, 2017, 6:51 PM). In both cases, power has been transferred from Congress to the executive.

212. *See* IRAP v. Trump, 857 F.3d 554, 645 (4th Cir. 2017) (Niemeyer, J., dissenting); Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017), *petition for cert. filed*, 2018 WL 333818 (Jan. 5, 2018) (No. 17-965), at 18 ("The nonreviewability rule rests on the separation-of-powers principle that the exclusion of aliens abroad is a foreign-policy judgment committed to the political Branches.").

213. The government argued in this direction in the IRAP case dealing with EO3, stating that the application of the bona fide inquiry in this way would depart from the Mandel test as a "minimal scrutiny" test; IRAP v. Trump, 883 F.3d 233, 293, n.14 (4th Cir. 2018) (Gregory, C.J., concurring).

214. Blackman, supra note 207, at 40–41.

215. *Id* at 41.

216. *Id* at 41; Blackman, supra note 211.

217. See IRAP v. Trump, 857 F.3d 554, 588–91 (4th Cir. 2017); Michael Dorf, *Trump Could, But Probably Won't, Clean Up the Immigration Mess He Created*, DORF ON LAW, http://www.dorfonlaw.org/2017/02/trump-could-but-probably-wont-clean-up.html (Nov. 20, 2017, 8:04 PM).

218. IRAP v. Trump, 857 F.3d 554, 646 (4th Cir. 2017) (Niemeyer, J., dissenting).

219. *Id*. at 646–47; *see also* IRAP v. Trump, 883 F.3d 233, 360–65 (4th Cir. 2018) (Niemeyer, J., dissenting).

the government facially has acted in good faith.[220] Judge Niemeyer says that the majority in *IRAP* was not only wrong in interpreting the test, but also wrongfully citing Kennedy's concurrence. [221] He concludes, "[n]owhere did the *Din* Court authorize going behind the government's notice for the purpose of showing bad faith. The plaintiff had to show facially that the notice was in bad faith, i.e., not bona fide."[222] The Fourth Circuit Court addressed Judge Niemeyer's assertion when looking at EO3. The court held that *Mandel* did not require that a lack of good faith be evident on the face of the government's action.[223] "If that were the case, the Court would not have needed to examine the record evidence to determine if the Government's reason for denying Mandel's requested waiver—violation of his prior visas—was true. [. . .]. Nor would it have been necessary in Din to emphasize that the plaintiff 'admit[ted] in her Complaint' facts that demonstrated the Government 'relied upon a bona fide factual basis for denying' the requested visa."[224] This reasoning is problematic, however, given that in neither Mandel nor Din did the court actually examine the record, but rather was satisfied with whatever the government alleged.[225]

Even if the prerequisites of 8 U.S.C. § 1182(f) would not have been met, the courts would be barred from reviewing exactly this question according to the Doctrine of Consular Nonreviewability, because it is not "facially" visible that this would be the case. By stating the statutory authority, the government already has done enough to fulfill Kennedy's criteria. To rebut this argument, the complainants must demonstrate that this norm was obviously referred to in bad faith. But "obviously" means that one cannot excavate evidence of bad faith by "looking behind" the government's policy, because this is only the second part of the test, deployed when the proof of bad faith is successful. Interestingly, the Ninth Circuit Court, having dealt with *Kerry v. Din* in the initial case and after the remand by the Supreme Court, did not argue using Kennedy's opinion.[226] Rather, the court argued that *Mandel* (and thus *Din*)

---

220. IRAP v. Trump, 857 F.3d 554, 647–48 (4th Cir. 2017) (Niemeyer, J., dissenting).

221. *Id* at 647. The Fourth Circuit cited (*id*. at 590–91): "Justice Kennedy explained that where a plaintiff makes 'an affirmative showing of bad faith' that is 'plausibly alleged with sufficient particularity,' courts may 'look behind' the challenged action to assess its 'facially legitimate' justification." This is what Justice Kennedy in *Kerry v. Din* (*infra*, at 2141) actually said: "Absent an affirmative showing of bad faith on the part of the consular officer who denied Berashk 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 § 1182(a)(3)(B) encompassed."

222. IRAP v. Trump, 857 F.3d 554, 647 (4th Cir. 2017) (Niemeyer, J., dissenting).

223. IRAP v. Trump, 883 F.3d 233, 291, n.12 (4th Cir. 2018) (Gregory, C.J., concurring).

224. *Id*. (citing Kleindienst v. Mandel, 408 U.S. 753, 756–58 (1972) and Kerry v. Din, 135 S. Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring)).

225. *See* Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) ("Finding the Government had proffered such a reason—Mandel's abuse of past visas—the Court ended its inquiry and found the Attorney General's action to be lawful."); *cf*. Kleindienst v. Mandel, 408 U.S. 753, 778 (1972) (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.").

226. Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017).

are not governing here.[227] Perhaps it was concerned that once finding those cases to govern here, the standard of review would be limited to the narrowest extent. In every other case that followed *Din*, the proof of bad faith has not succeeded. This shows the restrictive nature of Kennedy's opinion. The Fourth Circuit Court, in what might be an understandable case of a court being result-oriented, has ignored this reality.

B. *The Supreme Court's Assumptions in the Travel Ban Case*

The Supreme Court, dealing with EO3, did not definitively decide the question of reviewability. Rather, the majority worked with several assumptions of reviewability.

The first assumption concerned the reviewability of the statutory limitations of authority. The "difficult question" was left undecided because the majority "assume[d] without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue [. . .]."[228] A second and similar assumption strategy was adopted with regard to the substantive reviewability of the "findings" according to 8 U.S.C. § 1182(f).[229]

With reference to *Fiallo v. Bell*, *Kleindienst v. Mandel* and *Kerry v. Din*, the Supreme Court tackled the question whether EO3 can be reviewed for Establishment Clause violations, thereby making use of a third assumption.[230]

> "We need not define the precise contours of that inquiry in this case. 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 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."[231]

Justice Sotomayor's first point of criticism was that the cited case law was inapplicable: while *Mandel* and *Din* only involved a constitutional challenge to an executive decision to deny a single foreign national entry on specific statutory grounds of inadmissibility, EO3 categorically affects the

227. *Id*. at 768–69, n.9.
228. Trump v. Hawaii, 138 S. Ct. 2392, 2407 (referencing Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993)).
229. Trump v. Hawaii, 138 S. Ct. 2392, 2409 ("But even assuming that some form of review is appropriate, plaintiffs' attacks on the sufficiency of the President's findings cannot be sustained.").
230. *Id*. at 2418–20.
231. *Id*. at 2420 (emphasis added).

admission of millions of individuals.[232] Likewise, *Fiallo* did not fit because that case dealt with a constitutional challenge to a congressional statute and not a presidential proclamation.[233] "Finally, even assuming that Mandel and Din apply here, they would not preclude us from looking behind the face of the Proclamation because plaintiffs have made 'an affirmative showing of bad faith.'"[234]

The majority stated that the *Mandel* test has also been applied in different contexts, contexts into which EO3 would fit perfectly, especially because it shared the other cases' national-security context.[235] Nevertheless, the Court assumed that the rational-basis test provided the most fitting standard of review. This did not satisfy Justice Sotomayor either. She pointed out that the rational-basis test must not be applied in Establishment Clause cases, which require a stricter standard of review.[236] In contrast, the majority thought it "problematic" to transfer to the national-security and foreign-affairs context the standard of review regularly used in Establishment Clause cases.[237] Hence, they rejected Sotomayor's "reasonable observer test".[238–239]

In conclusion, the majority opinion did not comment on the details of the Mandel-/Din-test but rather assumed the applicability of rational-basis review for scrutinizing a presidential order in immigration matters. Thus, the deliberations of the Fourth Circuit Court in IRAP v. Trump are still relevant for determining the scope and restrictions of the Doctrine of Consular Nonreviewability. However, the majority of the Justices showed some inclination to extend the doctrine to executive measures other than consular activities. From now on, the concrete scope of the doctrine might also become decisive in determining the lawfulness of presidential orders.

Justice Kennedy recalled in this context the significance of the oath all officials have sworn. "The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise."[240] His concurrence sounds like a warning directed

232. *Id*. at 2420, n.5.
233. *Id*.
234. *Id*. (referencing Kerry v. Din, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring)).
235. Hawaii v. Trump, 138 S. Ct. 2392, 2419–20.
236. *Id*. at 2422, n.6 ("Deference is different from unquestioning acceptance. Thus, what is 'far more problematic' in this case is the majority's apparent willingness to throw the Establishment Clause out the window and forgo any meaningful constitutional review at the mere mention of a national-security concern.").
237. *Id*. at 2420, n.5 (regarding "immigration policies, diplomatic sanctions, and military actions.").
238. *Id*. at 2422, n.6 ("This Court's Establishment Clause precedents require that, if a reasonable observer would understand an executive action to be driven by discriminatory animus, the action be invalidated. [. . .] That reasonable-observer inquiry includes consideration of the Government's asserted justifications for its actions.").
239. *Id*. at 2420, n.5.
240. *Id*. at 2424 (Kennedy, J., concurring).

against President Trump, but at the same time like an attempt to comfort the rest of the world: we take seriously our function as guardians of the Constitution. "An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts."[241] This should also be true with respect to national security, as, "[a]lthough national security is unquestionably an issue of paramount public importance, it is not 'a talisman' that the Government can use 'to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'"[242]

V. PANDORA'S BOX: THE DUE PROCESS COMPONENT

The main dispute arising in *Kerry v. Din* was the scope of substantive due process. As a thought experiment, it is interesting to draw a further comparison between *Kerry v. Din* and the Travel Ban Cases and to reflect briefly on possible fundamental rights for those affected by the travel bans that were not addressed in court cases so far. Whereas some Justices on the bench even deny the existence of substantive due process, other Justices promote an extensive understanding of fundamental rights. In a nutshell, the dispute is about the protection of fundamental rights otherwise not expressly mentioned in the Constitution or the Amendments. Is it the task of the Justices to invent those fundamental rights, or should the Constitution be (more) democratically amended, the latter being highly unrealistic and leaving individuals without fundamental rights? This essential question of constitutional law surely cannot be answered in this paper. Nevertheless, some aspects are inherent in the mentioned cases and thus worth comparing. In *Obergefell v. Hodges*, Justice Kennedy, writing for the majority, did not explicitly link the right to same-sex marriage to the fundamental-rights doctrine under the Substantive Due Process Clause.[243] Two weeks before, in *Kerry v. Din*, he also avoided opening what seems to be Pandora's Box.

In the Travel Ban litigation dealing with EO2, the applicants only raised substantive due process claims in the *Hawaii* cases.[244] However, neither the district nor the circuit courts in the *Hawaii* and *IRAP* cases addressed the question of substantive due process. The same is true with regard to the EO3 litigation. Of course it sufficed to find a likely violation of the INA and the Establishment Clause in order to grant the preliminary injunction. Interestingly, in *Washington v. Trump*, dealing with EO1, the Ninth Circuit Court dealt with the due process protection of the right to travel.[245] But the

241. *Id.*
242. *Id.* at 2446 (Sotomayor, J., dissenting) (referencing Ziglar v. Abbasi, 137 S. Ct. 1843 (2017)).
243. Obergefell v. Hodges, 135 S. Ct. 2584, 2593–2611 (2015).
244. Hawaii v. Trump, 241 F. Supp. 3d 1119, 1128 (D. Haw. 2017); Hawaii v. Trump, 859 F.3d 741, 760 (9th Cir. 2017). Compare the claims in *IRAP v. Trump*, 241 F. Supp. 3d 539, 560 (D. Md. 2017) and *IRAP v. Trump*, 857 F.3d 554, 578–79 (4th Cir. 2017). This decision only discusses the Equal Protection component of the Fifth Amendment.
245. Washington v. Trump, 847 F.3d 1151, 1164–66 (9th Cir. 2017).

right to travel, even though it is constitutionally protected for U.S. citizens as a right to exit the country, is in general not applicable to those aliens who want to come to the United States.[246] Although the courts have expanded the scope of those rights to returning Legal Permanent Residents and non-immigrant visa holders,[247] the right to travel is at least not at stake in the Travel Bans following EO1. There have been several exemption provisions included in EO2 and EO3 for dual citizens, Legal Permanent Residents and visa holders. Thus, the right to travel was not brought forward in the cases dealing with EO2 and EO3, as they were "only" about aliens coming to the U.S. This group of people is undisputedly not in the scope of the constitutional right to travel.

In *Darweesh v. Trump*, the court dealt with substantive due process, but only because the aliens affected by EO1 were already in removal procedure and/or detained.[248] Hence, a liberty interest in the original sense was at stake. Apart from detention cases, a fundamental right is not as apparent.

Dealing with EO3, the Supreme Court reviewed possible statutory and constitutional violations, *inter alia* the INA and the Establishment Clause. It was unlikely that the court would open Pandora's Box. Nevertheless, is it possible at all to construe, similarly to *Kerry v. Din*, a substantive due process right of those negatively affected by the travel ban(s)? Margaret Hu argues in her article about big data blacklisting, that there must be substantive due process protection in cases where there is a data-based "suspicion upon suspicion."[249] The latter is the case "when digital data is flagged as 'suspicious' through big data tools and data tracking systems, and when individuals are categorized as 'guilty until proven innocent' through big data-generated inferential guilt."[250] If the Substantive Due Process Clause would protect against this categorization of human beings, there is also a common denominator in *Kerry v. Din* and the Travel Ban Cases: it is the freedom from stigmatization for being a terrorist. In both cases, the underlying factor is to protect national security. In pursuit of this aim, the government uses stigmatization (religion, nationality) and data bases (e.g. Consular Lookout and Support System, Terrorist Watch List) to determine who could be a terrorist and who is allowed to come to the U.S. If there is such a substantive due process right and how it could be legally enforceable must be explored by future scholarship.

When the Supreme Court issued its EO3 judgment, the Justices of course did not touch upon Pandora's Box, i.e., substantive due process. Nevertheless,

246. Kent v. Dulles, 357 U.S. 116 (1958).

247. Washington v. Trump, 847 F.3d 1151, 1165–66 (9th Cir. 2017) (referencing Landon v. Plasencia, 459 U.S. 21, 33–34 (1982) and Rosenberg v. Fleuti, 374 U.S. 449, 460 (1963)).

248. Darweesh v. Trump, 2017 U.S. Dist. LEXIS 13243 (E.D.N.Y. 2017); Darweesh v. Trump, No. 17-CV-480 (CBA), 2017 U.S. Dist. LEXIS 27225 (E.D.N.Y. 2017).

249. Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1794–98 (2017).

250. *Id.* at 1798.

broadening substantive due process to adapt to modern legal challenges "remains a speculative but perhaps necessary venture."[251]

VI. CONCLUSION

The Doctrine of Consular Nonreviewability and the Plenary Power Doctrine threaten the rule of law in the United States. The Ninth Circuit, probably knowing better after the rebuttal by the Supreme Court, avoided invoking *Mandel* and *Din*. Knowing that those cases and their underlying doctrines would not help its line of reasoning, the Ninth Circuit found the cases to be inapplicable.

On the other side of the country, the Fourth Circuit interpreted Kennedy's opinion in *Din* in a way that facilitated its line of reasoning. This construction, although producing a positive outcome in favor of the reviewability of immigration laws and their implementation by the executive, seemed not to be Kennedy's original intent. Whether this progressive interpretation creating a wide exception to the abovementioned doctrines will stand in future cases, remains to be seen. Maybe this is mere wishful thinking. The Supreme Court hinted it was open to applying the doctrine in cases similar to the travel ban but refrained from definitively deciding the question. But the Court could have easily circumvented *any* question of constitutional or statutory review by referring to the Doctrine of Consular Nonreviewability. Not only Pandora's Box could thereby have remained closed. It would have also signaled another step towards the exclusion of judicial reviewability. Thankfully, the Court opted otherwise and at least *assumed* it could review the travel ban using the rational-basis test.

Fortunately, both the Fourth and the Ninth Circuit Courts have rebutted the government's argument of a complete judicial nonreviewability of the cases. The Supreme Court was somewhat less outspoken about the question. The lower courts have, by contrast, vehemently underscored the judiciary's task in balancing Congress's and the executive's power, going back to *Marbury v. Madison*. Even when accepting the importance of national security, the "public interests in uniting families and supporting humanitarian efforts in refugee resettlement"[252] is vital in these decisions. To think that the courts would not at all review cases that touch upon national security issues, would be dangerous indeed. This would mean the end of judicial review in cases where the government acts under a pretext of national security. The courts would then

---

251. *Id.* at 1794.

252. Hawaii v. Trump, 859 F.3d 741, 784 (9th Cir. 2017) (referencing Solis-Espinoza v. Gonzales, 401 F.3d 1090, 1094 (9th Cir. 2005) ("Public policy supports recognition and maintenance of a family unit. The [INA] was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members.") and Kaliski v. Dist. Dir. of INS, 620 F.2d 214, 217 (9th Cir. 1980) (explaining that "the humane purpose" of the INA is to reunite families)).

be forbidden to review any case within this pretext, all but writing the government a blank check in the modern era, where literally everything can be construed as touching upon national security. The Supreme Court's ability to interpret all law in light of the Constitution was established in 1803 with *Marbury v. Madison*. It is imperative that more than 200 years of separation of powers be not superseded by the Administration's disregard for judicial reviewability.