Session III: Consular Non-Reviewability

Readings for Session III

Copies of the following are attached:
1. Donald Dobkin, *Challenging the Doctrine of Consular Non-Reviewability in Immigration Cases* (excerpt)
3. *Din v. Kerry*, 718 F.3d 859 (9th Cir. 2013)
5. *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008)
7. 6 U.S.C. § 236


The following additional materials are available as further background information or to provide the full versions of (non-confidential) excerpted sources distributed by email.

1. Chart: Visa Responsibility (National Immigration Project)
5. *Allende v. Schultz*, 845 F.2d 1111 (1st Cir. 1988)
9. Donald Dobkin, *Challenging the Doctrine of Consular Non-Reviewability in Immigration Cases* (complete)
Challenging the Doctrine of Consular Non-Reviewability in Immigration Cases
Thus, although plaintiffs might need to allege constitutional violations to trigger Mandel review, once Mandel review is triggered, it can be used to challenge consular actions on statutory—and presumably regulatory—grounds as well. This is a crucial weapon for plaintiffs challenging visa denials because it is usually easier to convince a court that a consular officer has violated a statutory or regular provision than to convince a court that a consular officer violated someone’s constitutional rights. One reason for this is that courts are generally quite comfortable engaging in the interpretation of statutes and regulations. This general willingness of courts to engage in statutory and regulatory interpretation leads us to the next major exception to the doctrine of consular nonreviewability.

III.

This Part discusses the various ways that litigants have successfully avoided the doctrine of consular nonreviewability by directing their challenges to something other than the discretionary decision made by a consular officer. Granted, some courts have explicitly disallowed this type legal maneuvering and stated that in general “courts have consistently rejected attacks on consular decisions, whatever form they take.”

124 Garcia v. Baker, 765 F. Supp. 426, 428 (N.D. Ill. 1990) (emphasis added); accord, e.g., Doan v. INS, 990 F. Supp. 744, 746–47 (E.D. Mo. 1997) (“Courts will not review the decisions of consular officers even where those decisions are based on action unauthorized by the INA, on procedural irregularities, or on errors of law.” (internal citation omitted)). Indeed, some courts have stated that such legal maneuvering is never permissible and that there is simply no way around the doctrine of consular nonreviewability:

[Courts] have uniformly held that a consular officer’s denial of a visa application is not subject to judicial review. This rule applies even where it is alleged that the consular officer failed to follow regulations; where the applicant challenges the validity of the regulations on which the decision was based; or where the decision is alleged to have been based on a factual or legal error. Moreover, plaintiffs cannot circumvent this well-established doctrine of consular nonreviewability by claiming that they are not seeking a review of a consular officer’s decision, but rather are only challenging the defendant’s
Nevertheless, litigants have on numerous occasions received judicial review of two types of claims, indicating that at least some courts view these as exceptions to the doctrine of consular nonreviewability: (1) claims that the underlying statute or regulation applied by the consular officer is unconstitutional; and (2) claims that the consular officer made a procedural error. Sections A and B of this Part respectively address those two types of claims.

Both of these types of claims recognize that the doctrine of consular nonreviewability generally bars courts from delving into areas that are within the consular officer’s discretion. Rather than bringing a direct challenge to a consular officer’s exercise of discretion, these arguments go to legally distinct issues that courts are generally more comfortable with analyzing.

A. Constitutional Challenges to the Underlying Statute or Regulation

Some courts have recognized that judicial review exists to allow visa applicants to challenge the constitutionality of the underlying statute or regulation that was the basis for a visa denial. This section discusses the circumstances in which courts have recognized such an exception.

One of the most important cases recognizing an exception for review of an underlying statute is Martinez v. Bell. The Martinez court cited Mandel for the general proposition that “[t]here is authority for the doctrine that the judiciary will not interfere

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failure to issue a legal opinion consistent with the interpretation of the Attorney General and the Courts, securing uniform interpretation of the provisions of the INA. Such attempts to manufacture subject matter jurisdiction by recasting a complaint have consistently been rejected by the courts.


with the visa issuing process,“ and the Martinez court also noted that courts cannot
direct consular officers “to issue a visa . . . to any individual,” but the court then went
on to recognize that review of the constitutionality of an underlying statute is still
available:

The Court may, . . . without violating the consular non-reviewability
doctrine, examine the constitutionality of the statute employed by the
Secretary in exercising his discretion. As was noted in Sovich v. Esperdy,“(f)or the courts to rule upon that issue is not an intrusion into
the (Secretary’s) discretion. It is rather an interpretation of the statutory
prerequisites to any proper exercise of his discretion.” Accordingly, this
Court may test the constitutionality of the underlying provision, section
212(a)(14) of the [Immigration and Nationality] Act as amended, upon
which the defendants’ discretionary decision to deny the plaintiffs’ parents
immigration visas was premised. To this limited extent jurisdiction
exists . . . .

Following a similar rationale, in Chiang v. Skeirik, a federal district court
recognized that judicial review is available to a visa applicant “alleg[ing] constitutional
violations in the application procedure.” According to the Chiang court, such actions
are not challenges to the denial of the visa, but rather simply ask the court to review the
lawfulness and constitutionality of the regulatory procedures followed by the consular
officers.

126 Id. at 725 (quotation omitted) (citing Kleindienst v. Mandel, 408 U.S. 753 (1972)).
127 Id. at 726 (citing Ubiera v. Bell, 463 F. Supp. 181 (S.D.N.Y. 1978)).
128 319 F.2d 21, 26–27 (2d Cir. 1963)).
129 Kovac v. I.N.S., 407 F.2d 102 (9th Cir. 1969); Application of Maringolo, 303 F. Supp. 1389
(S.D.N.Y. 1969)).
130 Martinez, 468 F. Supp. at 726.
132 Id. at 171.
133 Id. Indeed, as discussed later in this Article, when a procedural irregularity is alleged, the plaintiffs
challenging a visa denial might not even need to claim that there has been a constitutional violation. See
infra Part III.B.
When courts allow review of an underlying statute, regulation, or internal operating procedure, courts are recognizing—either explicitly or implicitly—that the doctrine of consular nonreviewability is anomalous and should not be used to shield unconstitutional statutes from judicial review. Perhaps the strongest language along these lines comes from Fiallo v. Levi, a federal district court decision that allowed a group of plaintiffs to bring a lawsuit challenging denials by consular officers of petitions based on preliminary declarations of immigration status:

We will not extend consular nonreviewability, insofar as that rule had been recognized, beyond the actual grant or denial of a visa. This is predicated upon our reluctance to insulate entirely the actions of any public official from judicial scrutiny, and thereby foreclose a group of plaintiffs from seeking relief in the courts.

The Fiallo court’s pronouncement is reminiscent of Chief Justice John Marshall’s famous statement in Marbury v. Madison “that every right, when withheld, must have a remedy, and every injury its proper redress.” Many courts simply do not like the idea that consular officers could base their actions on a statute that is patently unconstitutional.

At the same time, courts do not want to eviscerate the doctrine of consular nonreviewability by allowing review in every instance that a visa applicant alleges the unconstitutionality of a statute. The Eleventh Circuit Court of Appeals has noted that it is willing to entertain such challenges only when the constitutional issues are “substantial”:

“Our finding that we have no jurisdiction to consider [certain] decision[s] does not...completely end our inquiry. In prior cases where we have addressed jurisdictional-limiting provisions of other immigration laws, we have held that we retain

135 406 F. Supp. at 165.
136 5 U.S (1 Cranch) 137 (1803).
137 Id. at 147.
jurisdiction to consider ‘substantial constitutional challenges’ to the statute itself.”138 That said, so far other courts do not seem to require constitutional challenges to be substantial before they are willing to grant judicial review.

In addition to a general unwillingness to allow constitutional challenges to be insulated from all forms of judicial review, courts are also reluctant to defer to consular officers on issues that traditionally fall within the purview of the judiciary, such as statutory interpretation and determining whether a statute is constitutional. As the Third Circuit Court of Appeals noted in Pinho v. Gonzalez,139 courts are willing to grant review in these types of cases because such review often involves “a purely legal question and does not implicate agency discretion.”140 Indeed, as one court recently noted, cases like Pinho call into question the fundamental underpinnings of the doctrine of consular nonreviewability:

The court is . . . sympathetic to petitioners’ argument. Considering the Pinho precedent, the court questions the applicability of the heavily criticized doctrine of consular nonreviewability to eligibility and other statutorily defined determinations, particularly where the court could review the exact same determination if made by a [Department of Homeland Security] official inside the United States.141

Although that court ultimately found that judicial review was unavailable, this part of the opinion reads as an invitation for rethinking whether the doctrine of consular nonreviewability should continue to remain viable.


139 432 F.3d 193 (3d Cir. 2005).

140 Id. at 204; accord, e.g., Sepulveda v. Gonzales, 407 F.3d 59, 63 (2d Cir. 2005) (holding that the bar to judicial review of discretionary determinations made by consular officers “does not bar judicial review of nondiscretionary, or purely legal, decisions”).

This line of cases reveals at least three explanations for why courts show greater willingness to grant judicial review on issues of statutory interpretation and the constitutionality of an underlying statute. First, many statutes and regulations can be interpreted without interfering with a consular officer’s discretionary decisionmaking process. As one scholar has noted, the doctrine of consular nonreviewability is premised on “the long-standing deference to consular discretion.” The idea here is that the doctrine is most protective of the ultimate decision of whether to grant or deny a visa. Thus, in Mulligan v. Schultz, the Fifth Circuit Court of Appeals held that when a challenge is directed at the underlying regulations applied by the Secretary of State, the doctrine of consular nonreviewability “is inapplicable” because the visa applicants “are not challenging the discretion of consuls.” Indeed, as discussed in detail later in this Article, when courts are willing to grant judicial review of alleged procedural defects in a consular officer’s actions, such review is reconciled with the doctrine of consular

142 Steinbock, supra note 11, at 114.

143 That said, the idea that courts cannot infringe upon this area of consular discretion is a bit of a legal fiction. Courts do in fact sometimes even get involved in the review of whether a visa was properly granted. For instance, during denaturalization proceedings brought by the United States, “the federal courts do have jurisdiction ‘to examine visa eligibility.’” United States v. Kumpf, 438 F.3d 785, 788 (7th Cir. 2006) (citing United States v. Tittjung, 235 F.3d 330, 338 (7th Cir. 2000)); accord United States v. Wittje, 422 F.3d 479, 485–86 (7th Cir. 2005) (“The district court had all the jurisdiction necessary to consider whether Wittje was eligible for a visa. The district court had (and has) jurisdiction to hear all civil claims brought by the United States, 28 U.S.C. § 1345, and the district court had specific jurisdiction to consider a claim by the United States that Wittje’s certificate of naturalization should be revoked, 8 U.S.C. § 1451(a). . . . [A] prerequisite to such a certificate [of naturalization] is lawful admission into this country. Lawful admission requires, in turn, a valid visa. The determination that a person’s citizenship should be revoked necessitates, therefore, a review of the visa process.”)). Nevertheless, in general, the discretionary decisions of consular officers still represent an area of the law where courts are very hesitant to grant judicial review.

144 848 F.2d 655 (5th Cir. 1988)

145 Id. at 657.
nonreviewability because it does not involve a challenge to the consular officer’s exercise of discretion.\textsuperscript{146} The same can be said for issues of statutory interpretation.

The second reason why courts may be more willing to grant judicial review of these types of cases is that they often involve questions that are “purely legal.”\textsuperscript{147} Resolving purely legal questions is what courts do best. The doctrine of consular nonreviewability has always been concerned with preventing the judicial branch from going outside its area of expertise. One of the underlying bases for the doctrine of consular nonreviewability is the political question doctrine—the idea that courts should not be involved in foreign relations.\textsuperscript{148} As the United States Supreme Court stated in Japan Whaling Association v. American Cetacean Society,\textsuperscript{149} courts are “particularly ill suited” to address matters of foreign relations.\textsuperscript{150} Those who link the doctrine of consular nonreviewability to the political question doctrine believe that “because immigration includes foreign elements by definition, and immigration-related decisions may affect foreign affairs, all decisions to exclude aliens are political questions that have been entrusted to the political branches of the government, not the judiciary.”\textsuperscript{151} But even in matters involving foreign relations, the political question doctrine does not preclude courts from engaging in statutory interpretation; as the Japan Whaling Court recognized, “it goes without saying that interpreting congressional legislation is a recurring and

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\textsuperscript{146} See infra Part III.B.

\textsuperscript{147} Pinho v. Gonzalez, 432 F.3d 193, 204 (3d Cir. 2005).

\textsuperscript{148} Burt, supra note 123, at 681 (“The political question doctrine is a primary basis for adhering to the doctrine of consular nonreviewability.”).

\textsuperscript{149} 478 U.S. 221 (1986).

\textsuperscript{150} Id. at 230.

\textsuperscript{151} Nafziger, supra note 7, at 46 (recognizing— but ultimately rejecting— this theory).
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accepted task for the federal courts.”

Thus, courts are much more comfortable engaging in judicial review of decisions by consular officers when courts are merely being asked to interpret a statute and decide whether that statute is constitutional. This is true even when the statute touches upon an issue that implicates foreign policy.

The third reason why courts may be more willing to grant judicial review on issues of statutory interpretation is because this is often the best way to further congressional intent. This brings us to a fundamental contradiction underlying the doctrine of consular nonreviewability: while the doctrine was born out of the idea that courts should defer to Congress’s plenary powers in the regulation of immigration, the doctrine in fact weakens congressional powers by permitting consular officers to act in...
ways that flaunt congressional intent. By allowing consular officers to violate statutory guidelines without even the threat of judicial intervention, courts are undoubtedly hampering—not furthering—congressional intent. To do so in the name of deference to Congress is quite ironic. If courts were really concerned with furthering congressional intent, they would grant review of consular decisions to keep the actions of consular officers in line with statutory and regulatory requirements. Indeed, one court came to this precise conclusion when it allowed judicial review of certain INS internal operating procedures regarding the issuance of visas: “federal courts have jurisdiction over this type of case to assure that the executive departments abide by the legislatively mandated procedures.”

While the doctrine of consular nonreviewability has for the most part endured despite this inherent self-contradiction, it could just be a matter of time before more

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156 See, e.g., Matthews, supra note 35, at 72 (noting that the doctrine of consular nonreviewability creates a great potential for “disregard [of] . . . congressional intent”). Professor Hager has also noted that the doctrine of consular nonreviewability represents a “deliberate disregard for congressional intent, as expressed in the [federal Administrative Procedure Act],” which he reads as granting courts authority to review these types of decisions by consular officers. Hager, supra note 20, at 222. But cf. Saavedra Bruno v. Albright, 197 F.3d 1153, 1162–63 (D.C. Cir. 1999) (holding that Congress’s passage of IIRIRA in 1996 expressed an intent to preclude federal courts from having jurisdiction over certain visa denials); Wildes, supra note 33, at 905 (“Over the years, a number of legislative proposals have been introduced in the Congress to provide for either administrative or judicial review of visa denials. None of these proposals has been enacted into law.”) For a discussion of whether the Administrative Procedure Act should be interpreted as allowing the courts to review visa denials, see infra notes 200-205 and accompanying text.

157 See, e.g., Egert, supra note 11, at 755 (arguing for an expansion of judicial review of decisions by consular officers because in many instances courts must “apply stricter judicial scrutiny to guard against evasion of congressional intent”). Professor Egert explains that when an immigrant challenges a visa denial, “courts should require the Executive branch to show that exclusion is substantially related to the foreign policy, national security, or terrorist reasons asserted” to ensure that a consular officer’s decision “reflect[s] congressional intent.” Id. at 758.

158 Int’l Union of Bricklayers & Allied Craftsmen v. Meese, 761 F.2d 798, 801 (D.C. Cir. 1985) (emphasis added); cf. also Friedberger v. Shultz, 616 F. Supp. 1315, 1318 (E.D. Pa. 1985) (“Plaintiff challenges the validity of a regulation of the Department of State and the interpretation thereof in the Foreign Affairs Manual on the grounds that these contravene the intent and plain language of Congressional legislation. We do not understand the government to assert that the doctrine of sovereign prerogative allows the Executive to act in a manner contrary to Congressional mandate.”). The Friedberger court engaged in a thorough analysis of the applicable statutory and regulatory scheme to determine whether the consular officer applied “an invalid regulation” in denying a visa. 616 F. Supp. at 1317.
courts recognize that judicial review is necessary to protect the will of Congress. As discussed earlier, even the threat of judicial review leads to better decisionmaking in the first instance. Thus, if visa applicants had the option of invoking judicial review, consular officers would have to be more faithful to statutory and regulatory requirements when evaluating visa applications. Indeed, this rationale could be one factor that has driven some courts to go even further and grant judicial review of an alleged procedural violation, even where there is no allegation that the underlying statute or regulation is unconstitutional.

B. Procedural Challenges

In addition to granting review of visa denials to address the constitutionality of an underlying statute, courts have sometimes granted review to engage in statutory and regulatory interpretation to determine whether a consular officer complied with procedural requirements in denying the visa, even though no constitutional violation is alleged. This Section addresses situations where courts have granted review to determine whether a consular officer made a procedural error.

As with the situations where courts are willing to grant review of an underlying statute or regulation, one of the reasons that courts are willing to engage in review of alleged procedural errors is because these cases also usually involve purely legal questions of statutory interpretation—the same types of issues that the Japan Whaling Court recognized to be “recurring and accepted task[s] for the federal courts.” The procedural requirements governing consular officers are found in various statutes and regulations. These requirements are generally quite specific, and it is therefore usually a

159 See supra notes 54–55 and accompanying text.
fairly straightforward task for courts to determine whether a consular officer complied with them—certainly a more straightforward (and more politically acceptable) task than determining whether someone’s constitutional rights have been violated.\textsuperscript{161}

Consular officers are subject to a wide array of procedural requirements under statutes and regulations: “A consular officer is not free to deny a visa based on his sole discretion.”\textsuperscript{162} Rather, state department regulations require, for instance, that consular officers inform each applicant of the legal provision that creates the grounds for denying the visa.\textsuperscript{163} In particular, among other requirements, under section 42.81 of title 22 of the Code of Federal Regulations, consular officers must act on all visa applications by either refusing or issuing the visa,\textsuperscript{164} and any refusal must be done on a prescribed form stating “the provision of law or implementing regulation on which the refusal is based and . . . any statutory provisions under which administrative relief is available.”\textsuperscript{165} It is not uncommon for consular officer to fail to issue a written decision at all or to issue a written decision that fails to meet statutory or regulatory requirements. When this occurs, a number of courts have shown a willingness to review claims of statutory and regulatory procedural violations by consular officers.

\textsuperscript{161} Cf., e.g., Cruzan v. Harmon, 760 S.W.2d 408, 412 (M.o. 1988) (noting that a number of constitutional rights are “amorphous”).

\textsuperscript{162} Zas, supra note 2, at 593 n.146 (citing 22 C.F.R. § 42.81(b) (1999)); accord, e.g., Saavedra Bruno v. Albright, 197 F.3d 1153, 1156 (D.C. Cir. 1999).

\textsuperscript{163} 22 C.F.R. § 42.81(b). By statute, consular officers are required to issue written forms only for a subset of visa denials. See 8 U.S.C. § 1182(b)(3) (recognizing that the requirement of written denials does not apply when admission is denied on criminal or security grounds). Nevertheless, the applicable regulation refers to all visa denials. See 22 C.F.R. § 42.81(b). Further, under its own internal regulations, the state department has informed consular officers that it “expect[s] that such [written] notices will be provided to the alien in all . . . cases,” unless otherwise directed. U.S. DEP’T OF STATE FOREIGN AFFAIRS MANUAL § 42.81 N2 (vol. 9 2008).

\textsuperscript{164} 22 C.F.R. § 42.81(a).

\textsuperscript{165} Id. § 42.81(b).
One of the most well-known cases allowing judicial review of an alleged procedural error is Patel v. Reno.\(^{166}\) In Patel, a naturalized United States citizen sought visas for his wife and two daughters, who lived in India.\(^{167}\) The United States Consulate in Bombay, India, refused to act on the visa applications.\(^{168}\) This was done at the request of the INS, which apparently needed time to investigate whether Mr. Patel was naturalized under false pretenses.\(^{169}\) Mr. Patel and his wife then brought a mandamus action to compel the United States Consulate to make a decision on the visa applications.\(^{170}\) At this point, the applications had been pending for eight years without any action.\(^{171}\) Under these circumstances, the Patel court rejected the government’s request to apply the doctrine of consular nonreviewability, and the court granted judicial review to determine whether to compel the United States Consulate to act on the pending visa applications: “Normally a consular official’s discretionary decision to grant or deny a visa petition is not subject to judicial review. However, when the suit challenges the authority of the consul to take or fail to take action as opposed to a decision taken with the consul’s discretion, jurisdiction exists.”\(^{172}\) Because the visa applicants were “challenging the consul’s authority to suspend their visa applications, not challenging a decision within the discretion of the consul,” the Patel court granted review.\(^{173}\)

\(^{166}\) 134 F.3d 929 (9th Cir. 1998).
\(^{167}\) Id. at 930.
\(^{168}\) Id.
\(^{169}\) Id.
\(^{170}\) Id.
\(^{171}\) Id.
\(^{172}\) Id. at 931–32 (internal citations omitted).
\(^{173}\) Id. at 932.
Once review was granted in Patel, it was a straightforward analysis for the court to determine whether to grant mandamus. As mentioned earlier, in a section of the Code of Federal Regulations titled “Issuance or refusal mandatory,” it states that “when a visa application has been properly completed and executed before a consular officer . . . , the consular officer shall either issue or refuse the visa.” The government argued that the consular officer had sent a letter that qualified as a refusal. The court then engaged in a detailed analysis of the regulatory requirements for denying a visa, and the court concluded that the consular officer’s letter did not meet those requirements. The United States Consulate was then ordered to act expeditiously “to either grant or deny the visa applications.”

Courts are divided as to the proper scope of Patel. Some courts have implied that they do not intend to follow Patel or have found ways to limit it—for instance, by holding that “the only nondiscretionary duty of the consular officer is to act.” But it is

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174 22 C.F.R. § 42.81(a).
175 Patel, 134 F.3d at 932.
176 Id. (citing 22 C.F.R. § 42.81(b)).
177 Id. at 933. Patel was not the first court to order this type of action. Rather, the Tenth Circuit Court of Appeals made a similar pronouncement more than fifty years ago regarding the Secretary of State’s duties:

[I]t is the duty of the Secretary of State to act upon the petition for review. He must either grant the application or deny it and state in writing his reasons for his denial. This under the facts in the record he has not done. At least until the Secretary has discharged his duties under the Act the Government should not be heard to say that the cases should be dismissed for want of prosecution.

Wong Don Hong v. Dulles, 218 F.2d 69, 71 (10th Cir. 1954).
178 See, e.g., Li v. Chertoff, No. 06 CIV 13679 LAP, 2007 WL 541974, at *1 (S.D.N.Y. Feb. 16, 2007) (holding that plaintiffs could not “circumvent this long-standing precedent [of consular nonreviewability] by contending that the doctrine does not apply to a request that a visa be adjudicated (as opposed to granted) within a reasonable period of time”).
179 Chen v. Rice, No. 07-4462, 2008 WL 2944878, at *6 (E.D. Pa. July 28, 2008) (emphasis added). Indeed, in a recent unpublished memorandum that inexplicably neglects to even mention Patel, the Ninth Circuit itself has implied that the Patel exception might not apply to other procedural challenges. See Capistrano v. Dep’t of State, No. 06-55912, 2008 WL 466181, at *1 (9th Cir. Feb. 19, 2008) (“That the Appellants
difficult to draw any sort of meaningful distinction between a consular officer’s decision to withhold action on a visa application and any other number of actions or inactions taken by a consular officer in violation of applicable statutes and regulations. Thus, other courts have expanded the instances in which a visa applicant can receive judicial review of a consular officer’s actions. For instance, in Amidi v. Chertoff, a federal district court recently stated that “consular determinations that do not relate to the actual grant or denial of a visa have been deemed to be subject to judicial review.” In Amidi, the plaintiffs challenged the process followed by a consular officer in terminating a visa application. The Amidi court, citing Patel, held that review was available in this instance: “Since the decision at issue . . . involves the consulate’s decision to terminate or cancel the application, as opposed to the discretionary decision of whether to approve or deny the application, it too challenges [the] authority of [the] consulate to take or fail to take action and, therefore, jurisdiction exists . . . .”

One interesting aspect of Amidi is that, as in Patel, the court not only granted review of a consular officer’s decision, but the court went further and found error in the consular officer’s actions and then ordered the consulate to correct this error. In

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181 Id. at *3 (citing Fiallo v. Levi, 406 F. Supp. 162 (E.D.N.Y. 1975), aff’d sub. nom., Fiallo v. Bell, 430 U.S. 787 (1977)).
182 Id.
183 Id.
184 Id. at *6.
particular, the Amidi court held that “the consulate failed to follow the proper procedures and regulations for termination.”\textsuperscript{185}

Decisions like Amidi imply that some courts are willing to grant judicial review whenever a United States citizen joins a visa applicant in alleging that a consular officer made a procedural error in reviewing the visa application. Indeed, one court has noted that judicial review is available when “the core predicate for the challenge . . . is procedural: an alleged failure to follow legally mandated procedures.”\textsuperscript{186} Because legally mandated procedures do “not involve an exercise of discretion,” procedural challenges “do[] not ask the Court to tell the consulate how to rule on his visa.”\textsuperscript{187} Rather, courts need “only . . . determine whether the agency followed the procedures it was required to follow.”\textsuperscript{188}

A similar conclusion was reached in International Union of Bricklayers and Allied Craftsmen v. Meese.\textsuperscript{189} In Bricklayers, a group of union workers were upset when employers brought in foreign workers to do work that the union workers were “ready, willing, and able to perform.”\textsuperscript{190} A coalition of unions then filed a lawsuit to challenge the INS’s decision to grant visas to the foreign workers. The federal district court, citing the doctrine of consular nonreviewability, dismissed the case for lack of jurisdiction. On appeal, the D.C. Circuit reversed and held that the doctrine of consular nonreviewability “has no application here because appellants do not challenge a particular determination in

\textsuperscript{185} Id. (citing 8 U.S.C. § 1153(g)).
\textsuperscript{186} Singh v. Clinton, No. C 08-2362 WDB, 2009 WL 673736, at *2 (N.D. Cal Mar. 11, 2009).
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} 761 F.2d 798 (D.C. Cir. 1985).
\textsuperscript{190} Id. at 801.
a particular case of matters which Congress has left to executive discretion.”

According to the D.C. Circuit, plaintiffs could proceed with their lawsuit because their challenge was not directed at a discretionary decision, but was rather directed at the underlying internal operating instructions that INS relied upon in issuing visas to these foreign workers.

Judicial review of alleged procedural errors could lead to the granting of a number of visas that were previously improperly denied. One of the most common grounds for visa refusal by consular officers is that the applicant did not possess or failed to prove that he had the experience, education, or certification stated in his application. Too often, consular officers are quick to misconstrue statements in an application as “fraud” rather than expressions of one's own qualifications. If visa applicants are given an opportunity to prove that their applications were factually accurate, they could disprove these allegations.

Another procedural error that consular officers sometimes make is failing to act on the submission of new evidence. Rejected visa applicants have the right to request that the consulate retain their documents for one year and allow the applicants to present additional evidence overcoming the alleged grounds of eligibility. This process has a relatively high success rate: "Typically, applicants know that they can return repeatedly to present additional evidence. It is estimated that they are eventually successful in almost fifty percent of all immigrant cases after initial refusal and in sixty percent of all cases

191 Id.
192 Id.
193 22 C.F.R. § 42.81(e); see also, e.g., Christian, supra note 51, at 223 (“[R]ejected applicants can reapply or submit additional evidence to support their claim.”).
after refusal for insufficient documentation.” If the applicant provides “further evidence tending to overcome the ground of ineligibility on which the refusal was based” within one year from the date of refusal, the consulate should grant the visa. If the consulate fails to act on the new evidence—or acts in a way contrary to statutory and regulatory requirements—courts could step in to grant judicial review of these or other alleged procedural errors.

**Conclusion**

The doctrine of consular nonreviewability is a firmly entrenched part of the common law and is unlikely to go away anytime soon. This Article explains the two main exceptions to the doctrine—situations in which visa applicants can receive at least some degree of judicial review when they have been denied a visa. The first exception is for “Mandel review” to determine whether the government has provided a facially legitimate and bona fide reason for denying a visa. The second exception is for situations in which the challenge is directed at an underlying legal issue that does not involve the discretionary decisionmaking of a consular officer. This second exception involves situations in which a visa applicant challenges the constitutionality of the underlying statute or regulation that formed the basis for the visa denial, as well as situations in which visa applicants allege that the consular officer made a procedural error.

While this Article highlights these two main exceptions that to the doctrine of consular nonreviewability, it is worth noting that these are not necessarily the only exceptions. Other efforts have been made over the years to crack the armor of this

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194 Nafziger, supra note 7, at 22.
195 22 C.F.R. § 42.81(e); see also 22 C.F.R. § 42.81(b).
imposing doctrine and open certain visa denials to some form of administrative or judicial review.

In one effort to create another exception to the doctrine of consular nonreviewability, at least one scholar has argued that even if full judicial review is not available, arbitration should be an option for a select class of people whose visas are denied.196 In particular, when businesspeople seek to enter the United States to engage in commerce or trade under what is often referred to as a treaty or “E” visa, arbitration might flow naturally from the treaties underlying such visas.197 According to one scholar, sending these types of visa denials into arbitration “has ample support in both the national and international community.”198 Nevertheless, courts have so far expressed little interest in forcing the government to engage in arbitration when a visa denial is challenged.

Some courts have hinted at other possible exceptions to the doctrine of consular nonreviewability, but none of these has yet to gain any significant traction. For instance, one court has noted in dicta that the diversity visa program may create an exception to the doctrine of consular nonreviewability.199 Another potential exception—again mentioned

196 Hager, supra note 20, at 229.
197 Id.
198 Id.
199 Ahmed v. Dep’t of Homeland Sec., 328 F.3d 383, 388 (7th Cir. 2003) (“[W]e have no need to address the government’s alternative argument that the doctrine of consular nonreviewability bars Ahmed’s suit. We note, however, that it is possible to imagine arguments on both sides of this point. On the one hand, as the government urges, it is generally true that courts do not review judgments regarding alien admissibility made by executive officers outside the United States. But none of those cases dealt with the diversity visa program, under which the responsibilities of the embassies abroad are equivalent to those of the INS (now, the Department of Homeland Security) inside the United States. We would prefer not to resolve the question whether the doctrine of consular nonreviewability provides an alternate ground for our decision here and instead to await a case in which its existence and scope must be addressed squarely.” (internal citations omitted)); cf. also Systronics Corp. v. INS, 153 F. Supp. 2d 7, 11 n.4 (D.D.C. 2001) (“The INS also argues that review of consular action in denying a visa is precluded. However, the consul must deny the visa, not the agency. Here, the INS denied the petition . . . . Therefore, this matter does not fall under the doctrine of consular nonreviewability.” (internal citation omitted)).
by one court in dicta— is a footnote in Patel v. Reno stating that judicial review may sometimes exist under the Administrative Procedure Act (APA). A number of scholars have made forceful arguments for why courts should read the APA as providing judicial review of decisions by consular officers. Further, a federal district court recently reaffirmed the statement in Patel that “judicial review may also exist under the APA.” Nevertheless, numerous other courts— both before and after Patel— have soundly rejected the idea that the APA creates an exception to the doctrine of consular nonreviewability.

Thus, with the possible exception of the Ninth Circuit, most jurisdictions recognize that the only role that the APA currently plays in these types of cases is in setting the standard of review once review has already been granted. For instance, in Singh v. Clinton, where a federal district court recently granted review to analyze an alleged procedural deficiency— one of the generally recognized exceptions to the doctrine

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201 E.g., Wildes, supra note 33, at 902 (“Judicial review of such a [visa] denial has not been precluded by either exception to the APA and therefore should be available as a matter of common law as expressed by the APA.”); see also, e.g., Hager, supra note 20, at 220–22; Nafziger, supra note 7, at 26–30.


203 E.g., Pena v. Kissinger, 409 F. Supp. 1182, 1186 (S.D.N.Y. 1976) (upholding the doctrine of consular nonreviewability even though in more recent years courts have “adopted a more favorable attitude to the reviewability of administrative action under the Administrative Procedure Act”).

204 E.g., Pedrozo v. Clinton, 610 F. Supp. 2d 730, 735 (S.D. Tex. 2009) (“Plaintiffs argue that despite the consular non-reviewability doctrine, the Court maintains subject matter jurisdiction pursuant to the APA . . . However, the Fifth Circuit has rejected such jurisdictional claims.” (internal citation omitted)).

205 For a thorough explanation of why the APA should not be interpreted as allowing judicial review of visa denials, see generally Saavedra Bruno v. Albright, 197 F.3d 1153, 1157–62 (D.C. Cir. 1999).

206 See Raduga, 440 F. Supp. 2d at 1146 n.2 (citing Patel v. Reno, 134 F.3d 929, 932 n.1 (9th Cir. 1998)).

of consular nonreviewability\textsuperscript{208}—the level of review was limited and “extremely
deferential” to the consular officer: “Under the Administrative Procedure Act, a court
may overturn non-discretionary agency action only if the challengers prove that the
action was “arbitrary, capricious . . . [or] not in accordance with law . . . .”\textsuperscript{209} Thus, to
the extent that the APA comes into play when a visa applicant is challenging a visa
denial, the APA generally favors the government by setting a high standard for
overturning a consular officer’s actions.

The \textit{Singh} case highlights the fact that even in those rare cases where a court is
willing to find exceptions to the doctrine of consular nonreviewability, the court’s
granting of judicial review is only one of many hurdles for anyone challenging a visa
denial. As the plaintiffs in \textit{Singh} realized, it is difficult to convince a court that a
government official’s actions were “arbitrary, capricious . . . [or] not in accordance with
law.”\textsuperscript{210} This is particularly true in light of the fact that agency officials—including
consular officers—receive what is often referred to as \textit{Chevron}\textsuperscript{211} deference when courts
are reviewing their actions.\textsuperscript{212} Thus, even if a court grants judicial review of a consular
officer’s actions, those actions must be particularly egregious if a plaintiff is to have any
chance of ultimately succeeding on the merits of the case. Add to this the fact that even if
a plaintiff succeeds, the remedy is not going to be the granting of a visa;\textsuperscript{213} rather, courts

\textsuperscript{208} See supra Part III.B.
\textsuperscript{209} Singh, 2009 WL 673736, at *2 (citing APA, 5 U.S.C. § 706(2)(A)).
\textsuperscript{210} Id. (citing APA, 5 U.S.C. § 706(2)(A)).
\textsuperscript{212} E.g., Singh, 2009 WL 673736, at *3.
\textsuperscript{213} E.g., City of New York v. Baker, 878 F.2d 507, 512 (D.C. Cir. 1989) (“The authority to issue visas
belongs solely to the consular officers of the United States. This circuit has recognized, as has every other
circuit to consider the issue, that the courts are without authority to displace the consular function in the
usually remand the case to a consular officer to issue a new decision—a decision that could easily end up being yet another denial. Further, in some high-profile cases, such as Abourezk v. Reagan, if one of the political branches is unhappy with a court scrutinizing the actions or policies of American consulates, it can reinsert itself into the decisionmaking process by changing the laws to make it more difficult for an immigrant to obtain a visa.

That said, just because so many hurdles lie in the way of an ultimately favorable decision does not mean that visa applicants should abandon their attempts to obtain judicial review of visa denials. To the contrary, the existence of all of these hurdles in many ways makes it all the more important to continue the fight for greater transparency and accountability in the visa application process. Further, plaintiffs can build up momentum by winning a legal battle and convincing a court to recognize that a consular officer has failed to follow proper procedures. At that point, although a consular officer is still free to make the ultimate determination on whether to grant or deny a visa, the officer’s choice will inevitably be under greater scrutiny. For instance, in Raduga USA

214 See, e.g., Benson, supra note 46, at 306 (“The real value of administrative or judicial review to the operation of the administrative process is its ability to preserve integrity and to increase transparency in the operation of the system.”).
Corp. v. U.S. Department of State,\(^{217}\) which, like Patel, involved a court order mandating the consular officer to act to either grant or deny pending visa applications,\(^{218}\) the court took additional actions to ensure that the consular officer followed the court’s order in good faith.\(^{219}\) The visa applicants in Raduga alleged that when the consular officer received the court order from the original proceeding, the officer automatically denied the visas “in bad faith and potentially [as] retaliation for the filing of the mandamus action.”\(^ {220}\) As a result, the Raduga court amended its previous judgment to retain oversight to determine whether the consular officer acted in bad faith.\(^ {221}\) This provided greater scrutiny of the consular officer’s actions following the original court order.

There is a fundamental unfairness involved in the fact that the government can review the granting of a visa and revoke that decision at any point, but visa applicants are without the ability to seek review of a visa denial. Anything that litigants can do to chip away at this power differential is worth pursuing: in the long run, incremental steps— one case at a time, one court at a time— could ultimately lead to abandoning the ancient and flawed doctrine of consular nonreviewability. As one scholar noted more than twenty years ago, the doctrine of consular nonreviewability was ill-conceived to begin with and should be abandoned as soon as possible: “The time for a meaningful review procedure

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\(^{218}\) Id. at 1149.

\(^{219}\) See id. at 1149–52.

\(^{220}\) Id. at 1151.

\(^{221}\) Id. at 1149-52. This type of determination sounds like Mandel review. However, in a later unpublished decision involving the same plaintiffs, the Ninth Circuit held that Mandel review was not available here because the plaintiffs were not United States citizens. Raduga USA Corp. v. U.S. Dep’t of State, No. 07-55140, 2008 WL 2605564, at *1 (9th Cir. 2008).
for visa denials has arrived. It behooves us, as a nation guided under the rule of law, to remove this anachronism from our immigration system.”

While the doctrine of consular nonreviewability is still viable today, and while many courts unfortunately take a hard-line approach in enforcing the doctrine, the doctrine is not an impenetrable barrier to obtaining judicial review. Rather, at least two major exceptions exist to the doctrine, as detailed in this Article. These exceptions allow for judicial review in a wide variety of circumstances. These exceptions could potentially be expanded even further, particularly in those cases where a consular officer acts in an especially egregious manner. It will continue to be an uphill battle, but it is one worth fighting.

222 Wildes, supra note 33, at 908.
Fear and Loathing in Congress and the Courts:
Immigration and Judicial Review

Stephen H. Legomsky*

Introduction

Immigration policy and judicial review have always had a kind of oiland-water relationship. The most famous illustration of this uneasy mix has been the so-called plenary power doctrine, under which the Supreme Court has explicitly accorded Congress unusual deference in matters that affect the admission or expulsion of aliens. This doctrine, which has effectively insulated federal immigration statutes from constitutional review, has long fascinated academic commentators.¹

Yet the plenary power doctrine is not the only evidence, or even the only judicial evidence, of the tormented relationship between immigration and judicial review. The lower courts, for reasons that remain cryptic, have strained to interpret the Immigration and Nationality Act to encompass the doctrine of consular absolutism, which bars judicial review of consular officers’ decisions denying applications for visas.²

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¹ See infra subpart II(A). My own main treatment of this strange phenomenon is a trilogy that traces the history of the doctrine, examines the stated and possible unstated explanations for it, critiques it, updates it, and predicts its eventual erosion. See, e.g., Stephen H. Legomsky, Immigration and the Judiciary—Law and Politics in Britain and America 177-222 (1987) [hereinafter Legomsky, Immigration and the Judiciary]; Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 SUP. CT. REV. 255 [hereinafter Legomsky, SUP. CT. REV.]; Stephen H. Legomsky, Ten More Years of Plenary Power: Immigration, Congress, and the Courts, 22 HASTINGS CONST. L.Q. 925 (1995) [hereinafter Legomsky, Ten More Years]. I shall not try to catalog all the other prolific scholarship on the plenary power doctrine, except to note Professor Cleveland’s fine contribution at the symposium. For a revealing account of the political climate in which the plenary power doctrine developed, see Michael J. Churgin, Immigration Internal Decision Making: A View From History, 78 TEXAS L. REV. 1631 (2000).

² See infra subpart II(B).
But the most ferocious assault on judicial review of immigration decisions was launched recently from Capitol Hill. In 1996, Congress enacted a pair of statutes that, among other things, curtailed judicial review in numerous ways.\(^3\)

As will be seen, each of these individual phenomena—the plenary power doctrine, consular absolutism, and court-stripping legislation—has been the subject of much scholarly commentary. Quite surprisingly, there has been no explicit attempt to link these three major developments. Yet they each reflect, and possibly reinforce, a clear though qualified pattern of genuine discomfort—on the parts of both Congress and the judiciary—with the notion of a significant judicial role in immigration matters. One qualification to this pattern is the periodic judicial enthusiasm, outside the context of visa denials, for interpreting statutory language favorably to immigrants.\(^4\) The other is the general judicial inclination to strike down state legislation that classifies on the basis of alienage.\(^5\)

Part I of this Article summarizes these developments and, in the case of the two judicial contexts, critiques the stated doctrinal explanations. Part II explores why immigration regulation has bred such particularized antagonism to judicial review. It considers some of the external factors that operate on judges, the general unpopularity and political powerlessness of immigrants, and some of the generic costs of judicial review. Part III explains why, despite those costs, judicial review is at least as critical in immigration cases as it is in any other legislative or administrative process.

I. Judicial Review and Immigration Exceptionalism

A. The Principle of Plenary Congressional Power

Within the realm of immigration law scholarship, probably no doctrine has received more attention than the so-called "plenary power doctrine."\(^6\) Its precise contours remain vague, but the general notion is that Congress's power to regulate immigration is "plenary." Consequently, when someone challenges the constitutionality of an immigration statute, the courts accord Congress unusually great deference, at or approaching nonreviewability.\(^7\)

The doctrine can be visualized in either of two ways: (1) the statute is upheld on the merits because the substantive power of Congress is so great that the statute is assumed to be constitutional; or (2) the courts have

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3. See infra subpart II(C).
5. See infra text accompanying notes 15-17.
7. See Legomsky, Sup. Ct. Rev., supra note 1, at 255 ("In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy.").
protection by that state,\textsuperscript{22} the rooting of the immigration power in state sovereignty,\textsuperscript{23} and the extraterritorial nature of that subcategory of immigration law that deals with the admission and exclusion of aliens.\textsuperscript{24} I have argued that none of these rationales withstands scrutiny.\textsuperscript{25}

A third (nondoctral) explanation is that a series of externalities has also contributed to immigration exceptionalism. These include judges’ own social and economic backgrounds and attitudes, their conceptions of their own roles, and contemporary social and political forces.\textsuperscript{26}

B. Consular Absolutism

Even if one were to accept the doctrinal rationales for the plenary power doctrine—and as noted above, all are weak—those rationales in any event would not explain the separate doctrine of consular absolutism. As the following discussion will explain, the lower courts\textsuperscript{27} have consistently interpreted the Immigration and Nationality Act as barring judicial review of the decisions by United States consular officers denying visas. It is one thing to hesitate, as the plenary power doctrine induces judges to do, before striking down \textit{congressional} acts on constitutional grounds. The principle of consular absolutism goes further. It immunizes the decisions

\begin{itemize}
\item \textsuperscript{22} See \textit{id.} at 587 (“So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.”); see also Terrace \textit{v.} Thompson, 263 U.S. 197, 220-21 (1923) (noting that discrimination is permissible because an alien lacks allegiance).
\item \textsuperscript{23} See \textit{Fiallo,} 430 U.S. at 792 (explaining that Supreme Court cases “have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments” (quoting \textit{Shaughnessy \textit{v.} United States ex \textit{rel.} Mezei,} 345 U.S. 206, 210 (1953)); \textit{Kleindienst \textit{v.} Mandel,} 408 U.S. 753, 766 (1972) (affirming the Government’s contention that the “power to exclude aliens is ‘inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers’” (quoting Brief for \textit{Appellants at 20}); \textit{Hartsida,} 342 U.S. at 587-88 (arguing that the power of deportation is “a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state”); \textit{Carlson,} 342 U.S. at 534 (“So long . . . as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.”); United States \textit{ex \textit{rel.} Knuff v. Shaughnessy,} 338 U.S. 537, 542 (1950) (“Admission of aliens to the United States is a privilege granted by the sovereign United States Government.”).
\item \textsuperscript{24} The extraterritoriality question is thoughtfully explored in Gerald L. Neuman, \textit{Whose Constitution?}, 100 \textit{Yale L.J.} 909 (1991) (examining the geographic scope of the Constitution).
\item \textsuperscript{25} See \textit{Legomsky, Immigration and the Judiciary,} supra note 1, at 301-24; Legomsky, \textit{Sup. Ct. Rev.,} supra note 1, at 269-78.
\item \textsuperscript{26} See \textit{Legomsky, Immigration and the Judiciary,} supra note 1, at 223-53 (comparing external influences on American and British judges); Legomsky, \textit{Sup. Ct. Rev.,} supra note 1, at 278-95 (considering external influences on American federal judges); I concede that one of these influences—judges’ conceptions of their own roles—could easily be classified as doctrinal rather than external.
\item \textsuperscript{27} The Supreme Court has never decided this issue. \textit{But cf. Kleindienst,} 408 U.S. 753 (seemingly reviewing on the merits the Attorney General’s decision not to waive the grounds for exclusion on which a visa denial was predicated).
\end{itemize}
of individual administrative officers from judicial oversight, even when the legality of their decisions has been questioned on nonconstitutional grounds, such as lack of evidence or incorrect interpretations of the statute or regulations.

Consular absolutism seems especially odd when contrasted with more general patterns. As I argued in the 1980s, the United States courts have often blunted the effects of the plenary power doctrine by invoking creative statutory interpretations in order to reach results favorable to aliens and unfavorable to the government. For this and other reasons, consular absolutism has been particularly striking and (not surprisingly) the object of persistent scholarly derision.

The principle of consular absolutism originated with two lower court decisions from the 1920s. In United States ex rel. London v. Phelps, the court simply stated, without elaboration, that it lacked “jurisdiction” to review a visa denial. Two years later, in United States ex rel. Ulrich v. Kellogg, a different court reached a similar result. It cited statutory language that mandated denial of the visa “if it appears to the consular officer” that the person is inadmissible. Again there was no elaboration; perhaps the court thought that the breadth of the discretionary power made judicial review inappropriate. The court also reasoned, however, that no provision of the immigration statute specifically authorized judicial review of visa denials.

None of these cursory rationales is defensible. The reference in London to “jurisdiction” is not explained, but a subsequent court, perhaps following this lead, withheld review on the ground that a visa denial takes place outside the United States. Yet, several courts have reviewed decisions made by United States government officials overseas, in some cases even when the complainants were nonresident aliens. Nor are the

28. See Legomsky, Immigration and the Judiciary, supra note 1, at 155-70.
30. 22 F.2d 288 (2d Cir. 1927).
31. Id. at 290.
32. 30 F.2d 984 (D.C. Cir. 1929).
33. Id. at 986.
34. Id.
36. See, e.g., Russian Volunteer Fleet v. United States, 282 U.S. 481, 487, 489 (1931) (giving a nonresident corporation, organized under the laws of Russia, a Fifth Amendment right to just
review provisions of the Administrative Procedure Act limited by geography. The statute authorizes review of “agency action,” with “agency” defined as “each authority of the Government of the United States.” There are no geographic exceptions.

If the London court’s cryptic reference to “jurisdiction” was meant to refer to subject matter jurisdiction rather than to extraterritoriality, then the court failed to consider section 279 of the Immigration and Nationality Act. At the time, this provision established district court jurisdiction over “all causes, civil and criminal, arising under any of the provisions of this subchapter,” including the visa-issuing provisions. The court’s decision is therefore hard to fathom. Since London, section 279 has been amended; now it creates specific federal district court jurisdiction only in those immigration-related actions in which the United States is a plaintiff. Conversely, however, general federal question jurisdiction under 28 U.S.C. section 1331 has now been broadened to confer district court jurisdiction over “all civil actions arising under the Constitution, laws or treaties of the United States” (without the prior requirement of a certain minimum amount in controversy). Thus, the jurisdiction that the Hermina Sauge court should have found to have been created by section 279 now exists under 28 U.S.C. section 1331. And, lest one wonder whether Congress’s 1996 amendment of section 279 was meant to preclude the use of general federal question jurisdiction, the short answer can be found in the conference committee’s explanation of the amendment. It says: “This [amendment] has no effect on other statutory or constitutional grounds for private suits against the Government.”

The court in Ulrich also relied on the broad discretion of consular officers to deny visas. Although again the court did not elaborate, it possibly believed that, to use modern Administrative Procedure Act (APA) terminology, Congress meant to “commit” the decision to agency discretion. If that was the court’s intention, its premise is unsupported.

compensation for the requisitioning of its contracts, and the taking of the naval vessels that were constructed thereunder, for use by the United States); United States v. Tiede, 86 F.R.D. 227, 260, 256-60 (U.S. Ct. for Berlin 1979) (holding that “if the United States convenes a United States court in Berlin . . . and charges civilians with non-military offenses, the United States must provide the defendants with the same constitutional safeguards that it must provide to civilian defendants in any other United States court,” including the right to a jury trial).

39. Id.
42. See id. § 1331 (1976) (amended 1980).
44. Under the Administrative Procedure Act, 5 U.S.C. § 701(a) (1994), the final decisions of federal administrative agencies are generally subject to judicial review “except to the extent that— (1)
The State Department's own regulations make clear that consular officers have no general discretion to deny visas to eligible applicants. Under the regulations, a consular officer who refuses a visa application "shall inform the applicant of the provision of law or implementing regulation on which the refusal is based." 45

Admittedly, some specific grounds of statutory ineligibility require the exercise of discretion, at least to the extent that the term is used to encompass practical judgment. One provision, for example, renders ineligible for a visa "[a]ny alien who, in the opinion of the consular officer . . . is likely at any time to become a public charge." 46 But the fact that some exclusion grounds require the exercise of discretion is no reason to insulate all visa denials from judicial review. More importantly, that a decision is discretionary does not render it "committed to agency discretion" and therefore unreviewable. 47 Otherwise, the APA provision that specifies an "abuse of discretion" standard for the review of discretionary decisions 48 would be meaningless.

Nor do any other statutory provisions preclude judicial review of visa denials. In *Loza-Bedoya v. INS*, 49 the court acknowledged that the consular officer's decision to deny a visa was legally erroneous but held itself helpless to intervene. 50 It cited the older decisions and one statutory provision, 8 U.S.C. section 1201(a). All the latter says, however, is that in specified cases consular officers may issue visas. 51 It says nothing about review of a decision not to issue a visa. Similarly, in *Licea-Gomez v. Pilliod*, 52 the court cited another statutory provision, 8 U.S.C. section 1104(a). But this provision merely authorizes the Secretary of State to administer all the immigration and nationality laws that relate to consular officers except those that relate to visa issuance and denial. 53 It says nothing about judicial review.

Apart from their reliance on the language of either the original court decisions or the statute itself, courts have also invoked legislative history in mysterious ways to attempt to justify consular absolutism. In both *Loza-Bedoya* 54 and *Hermina Sague*, 55 the courts cited a passage from the

45. See 22 C.F.R. § 42.81(b) (1999) (emphasis added).
47. See, e.g., Saferstein, supra note 44, at 371.
49. 410 F.2d 343 (9th Cir. 1969).
50. *See id.* at 346-47.
54. See Loza-Bedoya v. INS, 410 F.2d 343, 347 (9th Cir. 1969).
House committee report prepared for the Immigration and Nationality Act. The cited passage explained that the committee had decided not to make visa denials reviewable by either the Secretary of State or a proposed administrative body. Nothing in the cited passage spoke to the question of judicial review.56

Whether or not some defensible rationale exists, more than seventy years of judicial adamancy have lent respectability to consular absolutism. In some other context, one might even argue that at this juncture Congress can be regarded as having acquiesced in this interpretation. But this is no ordinary question of statutory construction. The Supreme Court has made clear that departures from the judicial review provisions of the APA will not be “lightly presumed.”57 In the visa denial cases, the courts have been unable to point to any evidence, light or otherwise, to support an exemption from the usual rules that govern judicial review of administrative decisions.

C. The 1996 Court-Stripping Provisions

Before the emergence of positive statutory law on the subject, the courts assumed that deportation orders, as they were then called, were reviewable in court. The mechanism typically invoked was habeas corpus.58 Shortly after enactment of the Immigration and Nationality Act in 1952, declaratory and injunctive relief replaced habeas corpus as the principal vehicle for obtaining judicial review of a deportation decision.59 In 1961, Congress made petitions for review in the courts of appeals the “sole and exclusive” procedure for obtaining judicial review of administratively final deportation orders, except that habeas corpus was still permitted for aliens in custody.60 Concerned by tales of long delays in

Although many suggestions were made to the committee with a view toward creating in the Department of State a semijudicial board, similar to the Board of Immigration Appeals, with jurisdiction to review consular decisions pertaining to the granting or refusal of visas, the committee does not feel that such body should be created by legislative enactment, nor that the power, duties and functions conferred upon the consular officers by the instant bill should be made subject to review by the Secretary of State.

Id.
59. See Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1954) (holding that the 1952 Immigration and Nationality Act did not "deprive deportees of all right of judicial review except by habeas corpus").
Din v. Kerry, 718 F.3d 856 (2013)

718 F.3d 856
United States Court of Appeals,
Ninth Circuit.

Fauzia DIN, Plaintiff–Appellant,
v.


Synopsis
Background: United States citizen filed action against Secretary of State and various agency officials, alleging that her right to due process had been violated by refusing to provide either her or her husband, citizen and resident of Afghanistan, with facially legitimate and bona fide reason for denying his visa petition. The United States District Court for the Northern District of California, Marilyn H. Patel, Senior District Judge, 2010 WL 2560492, dismissed action on basis of consular nonreviewability. Citizen appealed.

Holdings: The Court of Appeals, Murguia, Circuit Judge, held that:

[1] government's bare citation to broad section of Immigration and Nationality Act (INA) that contained numerous categories of proscribed conduct was not facially legitimate ground for denying visa petition that United States citizen had filed on behalf of her husband, citizen and resident of Afghanistan, and thus decision was not subject to prohibition on consular review, since government did not assert any facts to support its denial; although alien did not have affirmative statutory right to information, Congress otherwise did not prohibit disclosure of such information, and while government did not have to prove that alien performed an activity that rendered him inadmissible, it at least had to allege what it believed alien did that would render him inadmissible. Immigration and Nationality Act, §§ 212(b)(3), 221(g), 8 U.S.C.A. §§ 1182(a)(3)(B), 1201(g).

3 Cases that cite this headnote

[2] An alien does not have a constitutional right of entry to the United States.

[3] Federal courts are generally without power to review the actions of consular officials.
When the denial of a visa implicates the constitutional rights of an American citizen, a court exercises a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason.

To satisfy Article III's standing requirements, a plaintiff must show (1) she has suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 1 et seq.

In the Article III standing analysis, a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. U.S.C.A. Const. Art. 3, § 1 et seq.; U.S.C.A. Const. Amend. 5.

To satisfy Article III's standing requirements, a plaintiff must show (1) she has suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 1 et seq.

Aliens, Immigration, and Citizenship
Judicial review and intervention
When the denial of a visa implicates the constitutional rights of an American citizen, a court exercises a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason.

Causation; redressability
To satisfy Article III’s standing requirements, a plaintiff must show (1) she has suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 1 et seq.

Declaratory Judgment
Subjects of relief in general
United States citizen had standing to seek declaratory judgment in action against Secretary of State and various agency officials alleging that her right to due process to limited judicial review of statute as applied to her had been violated by refusing to provide either her or her husband, citizen and resident of Afghanistan, with facially legitimate and bona fide reason for denying visa petition that she had filed on his behalf; although it was possible that statute might not apply to her, narrower ground to decide case on merits did not deprive citizen of standing to challenge that law. U.S.C.A. Const. Art. 3, § 1 et seq.; U.S.C.A. Const. Amend. 5; Immigration and Nationality Act, § 212(b)(3), 8 U.S.C.A. § 1182(b)(3); 28 U.S.C.A. § 2201.

Federal Civil Procedure
Causation; redressability
In the Article III standing analysis, a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. U.S.C.A. Const. Art. 3, § 1 et seq.; U.S.C.A. Const. Amend. 5.

Federal Civil Procedure
In general; injury or interest
When reviewing a motion to dismiss, a court cannot project a specific outcome on the merits in order to decide the question of standing. U.S.C.A. Const. Art. 3, § 1 et seq.

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Appeal from the United States District Court for the Northern District of California, Marilyn H. Patel, Senior District Judge, Presiding. D.C. No. 3:10–cv–00533–MHP.

Before: RICHARD R. CLIFTON and MARY H. MURGUIA, Circuit Judges, and RANER C. COLLINS, District Judge. **

Opinion

OPINION
Konkel, Kaitlin 11/19/2013
For Educational Use Only

MURGUIA, Circuit Judge:

United States citizen Fauzia Din filed a visa petition on behalf of her husband Kanishka Berashk, a citizen and resident of Afghanistan. Nine months later, the visa was denied. Consular officials informed Din and Berashk only that the visa had been denied under 8 U.S.C. § 1182(a)(3)(B), a broad provision that excludes aliens on a variety of terrorism-related grounds. The district court granted the Government's motion to dismiss on the basis of consular nonreviewability, concluding that the Government put forth a facially legitimate and bona fide reason for the visa denial, in accordance with Bustamante v. Mukasey, 531 F.3d 1059 (9th Cir.2008). We disagree. Because the Government has not put forth a facially legitimate reason to deny Berashk's visa, we reverse and remand for further proceedings.

I. Background

The following facts are taken from Din's complaint. Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir.2005) (accepting “all factual allegations in the complaint as true” when reviewing an order granting a motion to dismiss). From 1992 to 2003, Din's husband, Berashk, worked as a payroll clerk for the Afghan Ministry of Social Welfare. Since the Taliban controlled Afghanistan from 1996 to 2001, Berashk's employment necessarily included work for the Taliban government. Since 2003, Berashk has worked as a clerk in the Afghan Ministry of Education, where he performs low-level administrative duties, including processing paperwork.

In September 2006, Din and Berashk married. In October of the same year, Din filed a visa petition on Berashk's behalf. On February 12, 2008, United States Citizenship and Immigration Services (“USCIS”) notified Din that the visa petition was approved. Several months later, the National Visa Center informed Din that it completed processing the visa and scheduled a visa interview for Berashk at the Embassy in Islamabad, Pakistan. The interview took place as scheduled on September 9, 2008. Berashk answered all questions truthfully, including inquiries about his work for the Afghan Ministry of Social Welfare during the period of Taliban control and about the difficulty of life under that regime. The interviewing consular officer told Berashk he should expect to receive his visa in two to six weeks. The officer gave Berashk a form to submit at the Kabul Embassy, which he submitted with his passport upon returning to Afghanistan.

Almost nine months later, on June 7, 2009, following several phone calls to the Embassy from both Din and Berashk, Berashk received a Form 194 letter informing him that his visa had been denied under Section 212(a) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1182(a). The letter also stated that there was “no possibility of a waiver of this ineligibility.” On July 11, 2009, Berashk sent an email to the Islamabad Embassy requesting clarification as to the reason his visa had been denied. On July 13, 2009, the Embassy emailed a response, stating the visa had been denied under INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), a section of the INA that lists a wide variety of conduct that renders an alien inadmissible due to “terrorist activities.” The email added that “[i]t is not possible to provide a detailed explanation of the reasons for the denial,” citing INA § 212(b)(2), 8 U.S.C. §§ 1182(b)(2)-(3), which makes inapplicable the requirement that the aliens receive notice of the reason for denials involving criminal or terrorist activity.

Din then obtained pro bono counsel and made several inquiries about the visa denial. Din's counsel sent a letter to the Immigrant Visa Unit of the Islamabad Embassy requesting reconsideration, or, alternatively, a statement of facts in support of the Government's position that Berashk was inadmissible. The Embassy responded with an email again referring only to INA § 212(a)(3)(B). Counsel subsequently sent a similar letter to the Office of Visa Services at the State Department. Following several other unsuccessful attempts to contact different State Department officials, counsel received an additional email again stating that the visa had been denied under Section 212(a)(3) and that a more detailed explanation for the refusal was not possible.

In late 2009, Din attempted to obtain answers directly by traveling from the United States to the Kabul Embassy and then the Islamabad Embassy. Officials at both embassies declined to provide her with a more specific explanation of the visa denial.

Din then initiated this action, asserting three claims for relief: (1) a writ of mandamus directing defendants to lawfully adjudicate Berashk's visa application; (2) a declaratory judgment that 8 U.S.C. § 1182(b)(3), waiving the visa denial notice provisions for aliens deemed inadmissible under
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terrorism grounds, is unconstitutional as applied to Din; and  
(3) a declaratory judgment that defendants are in violation of  
the Administrative Procedure Act. The district court granted  
the Government’s motion to dismiss, concluding that Din  
failed to state a claim because the doctrine of consular  
nonreviewability barred adjudication of her first and third  
claims. The district court also dismissed Din’s second claim,  
concluding that Din did not have standing to challenge the  
visa denial notice provision.

II. Standard of Review

We review de novo the district court’s order granting a motion  
to dismiss. Knievel, 393 F.3d at 1072. When ruling on a  
motion to dismiss, we accept all factual allegations in the  
complaint as true and construe the pleadings in the light most  
favorable to the nonmoving party. Id. To survive dismissal,  
the complaint must allege “enough facts to state a claim to  
relief that is plausible on its face.” Bell Atl. Corp. v. Twombly,  

III. Discussion

A. Consular nonreviewability and the Mandel exception

[1] [2] [3] We begin with the doctrine of consular  
nonreviewability. An alien has *860 “no constitutional right  
of entry” to the United States. Kleindienst v. Mandel, 408 U.S.  
753, 762, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972). The Supreme  
Court “without exception has sustained Congress’ plenary  
power to make rules for the admission of aliens and to exclude  
those who possess those characteristics which Congress has  
forbidden.” Id. at 766, 92 S.Ct. 2576 (quoting Boutlier v. INS,  
387 U.S. 118, 123, 87 S.Ct. 1563, 18 L.Ed.2d 661 (1967)). Accordingly, “[f]ederal courts are generally without  
power to review the actions of consular officials.” Rivas v. Napolitano, 677 F.3d 849, 850 (9th Cir.2012) (citing Li  
Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 971 (9th  
Cir.1986)).

[4] However, we have recognized a limited exception to  
the doctrine of consular nonreviewability. When the denial  
of a visa implicates the constitutional rights of an American  
citizen, we exercise “a highly constrained review solely to  
determine whether the consular official acted on the basis of  
a facially legitimate and bona fide reason.” Bustamante, 531  
F.3d at 1060. This right to review arises from the Supreme  
Court’s holding in Mandel, in which U.S. citizen professors  
asserted a First Amendment right to “receive information  
and ideas” from an alien. 408 U.S. at 770, 92 S.Ct. 2576. The  
Mandel Court held that when the Government denies  
admission “on the basis of a facially legitimate and bona fide  
reason, the courts will neither look behind the exercise of  
that discretion, nor test it by balancing its justification against  
the First Amendment interests of those who seek personal  
communication with the applicant.” 408 U.S. at 762, 92 S.Ct.  
2576. Since Mandel, our Court and several of our sister  
circuits have exercised jurisdiction over citizens’ challenges  
to visa denials that implicate the citizens’ constitutional rights.  
Bustamante, 531 F.3d at 1059; see also Am. Acad. of Religion  
v. Napolitano, 573 F.3d 115, 125 (2d Cir.2009); Adams v.  
Baker, 909 F.2d 643, 647–48 (1st Cir.1990); Abourezk v.  
Reagan, 785 F.2d 1043, 1075 (D.C.Cir.1986). Courts review  
the denials for “a facially legitimate and bona fide reason.”  
Bustamante, 531 F.3d at 1062. In Bustamante, we recognized that a citizen has a protected  
liberty interest in marriage that entitles the citizen to review of  
the denial of a spouse’s visa. 531 F.3d at 1062. 1 We therefore  
consider whether the reason provided by the consular officials  
for the denial of Berashk’s visa is “facially legitimate and  
bona fide.” Id. This inquiry is extremely narrow. Once  
the Government offers a facially legitimate and bona fide  
reason for the denial, courts *861 “have no authority or  
jurisdiction to go behind the facial reason to determine  
whether it is accurate.” Chiang v. Skeirik, 582 F.3d 238, 243  
(1st Cir.2009).

There is little guidance on the application of the “facially  
legitimate and bona fide” standard. See Marczak v. Greene,  
971 F.2d 510, 517 (10th Cir.1992) (“Because the ‘facially  
legitimate and bona fide’ standard is used relatively  
infrequently, its meaning is elusive.”) (quoting Azizi v.  
Thornburgh, 908 F.2d 1130, 1133 n. 2 (2d Cir.1990)). 2  
We agree with the Second Circuit that “the identification  
of both a properly construed statute that provides a ground  
of exclusion and the consular officer’s assurance that he or  
she ‘knows or has reason to believe’ that the visa applicant  
has done something fitting within the proscribed category  
constitutes a facially legitimate reason.” Am. Acad., 573 F.3d  
at 126 (quoting 8 U.S.C. § 1201(g)). This is consistent with  
Bustamante, in which we stated that the visa applicant “was  
denied a visa on the grounds that the Consulate ‘had reason
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We specifically held, “Jose [Bustamante] was denied a visa on the grounds that the Consulate ‘had reason to believe’ that he was a controlled substance trafficker.” 531 F.3d at 1062.

Accordingly, we must determine if the Government’s citation to a broad section of the INA that contains numerous categories of proscribed conduct, without any assurance as to what the consular officer believes the alien has done, is also a facially legitimate reason. Because we conclude that the Government’s position would eliminate the limited judicial review established by the Supreme Court in Mandel and recognized by this Court in Bustamante, and we find no authority to support eliminating this review, we conclude that it is not.

The first problem is that the Government has offered no reason at all for denying Berashk’s visa; it simply points to a statute. While the statute might demonstrate that a particular reason is legitimate, in this case there are no factual allegations that would allow us to determine if the specific subsection of § 1182(a)(3)(B) was properly applied. Din alleges that neither she nor Berashk has any idea what Berashk could have done to be found inadmissible on terrorism grounds, and the Government provides no reason other than its citation to § 1182(a)(3)(B).

In this regard, Din and Berashk’s case is distinguishable from Bustamante and other visa denial challenges by a citizen. In Bustamante, the visa applicant was informed that the consulate had reason to believe he was trafficking illegal drugs and therefore inadmissible, but that the evidence supporting this conclusion was secret. 531 F.3d at 1060. DEA officials later asked the applicant to become an informant, stating that if he did, his visa problems “would go away.” Id. at 1061. The applicant refused and his application was denied. In response to an inquiry from counsel for the Bustamantes, the consular official referenced a letter “written by the ‘Resident Agent–in–Charge of our local Drug Enforcement Administration Office,’ that contained ‘derogatory information’ to support the finding that there was reason to believe that Jose was a controlled substance trafficker.” Id. We upheld the visa denial, noting that “the Bustamantes’ allegation that Jose was asked *862 to become an informant in exchange for immigration benefits fails to allege bad faith; if anything, it reflects the official’s sincere belief that Jose had access to information that would be valuable in the government’s effort to combat drug trafficking.” Id. at 1063.

The first problem is compounded by the sweeping nature of the cited section of the INA. Section 1182(a)(3)(B) exceeds 1,000 words. It contains ten subsections identifying different categories of aliens who may be inadmissible for terrorism reasons. 3 The section defines “terrorist activities” with reference to six different subsections, containing different kinds of conduct. It defines “engage in terrorist activity” in seven subsections, some of which are divided into further subsections. The conduct described in § 1182(a)(3)(B) ranges from direct participation in violent terrorist activities to indirect support of those who participate in terrorist activities. The citation to § 1182(a)(3)(B) contrasts with the much narrower ground of inadmissibility at issue in Bustamante.

It appears that, at a minimum, the Government must cite to a ground narrow enough to allow us to determine that it has been “properly construed.” See Am. Acad., 573 F.3d
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13 Cal. Daily Op. Serv. 5179, 2013 Daily Journal D.A.R. 6593 at 126 (“[T]he identification of both a properly construed statute that provides a ground of exclusion and the consular officer's assurance that he or she ‘knows or has reason to believe’ that the visa applicant has done something fitting within the proscribed category constitutes a facially legitimate reason....”). The Government's citation here is so broad that we are unable to determine whether the consular officer “properly construed” the statute. Unlike the dissent, Dissent at *863 870–71, we are unwilling to assume that the statute has been properly construed without knowing what is being construed, let alone how it is being construed. By contrast, the Second Circuit analyzed three distinct issues of statutory construction in reviewing a challenge to a visa denial based on § 1182(a)(3)(B)(i)(I), one of the subsections that could be relevant here. Am. Acad., 573 F.3d at 125–35. Given the breadth of the encompassed conduct and the sheer number of grounds of inadmissibility under § 1182(a)(3)(B) it is impossible to know if these, or any other, issues of statutory interpretation are at issue here.

Additionally, some of the subsections in § 1182(a)(3)(B) confer upon an alien the right to present evidence to rebut the cited reason for inadmissibility. For activity in support of organizations that have not been designated by the Secretary of State as terrorist organizations, an alien may offer “clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization.” See 8 U.S.C. §§ 1182(a)(3)(B)(i)(I); 1182(a)(3)(B)(iv)(I)(V)(cc); 1182(a)(3)(B)(iv)(V)(cc); 1182(a)(3)(B)(iv)(VI)(dd). The Second Circuit read this language to require a consular officer to present the alien with the evidence of inadmissibility and permit him to offer a rebuttal. Am. Acad., 573 F.3d at 131–32. Without knowing the specific subsection applicable to Berashk, we cannot determine whether the consular officer was required to give Berashk an opportunity for rebuttal.

To be clear, we do not “‘look behind’ exclusion decisions,” Am. Acad., 573 F.3d at 137, but we must at least look at them, see SEC v. Chenery Corp., 332 U.S. 194, 197, 67 S.Ct. 1575 (1947) (“We must know what a decision means before the duty becomes ours to” review it.). The Second Circuit, recognizing, as do we, that no evidentiary inquiry is appropriate, explained that “a reviewing court need only satisfy itself that the conduct alleged fits within the statutory provisions relied upon as the reason for the visa denial.” Am. Acad., at 134 (concluding that visa applicant's alleged donations to a group that provided material support to terrorists fits with the statutory basis for denying the visa). Absent evidence of bad faith, we accept the Government's allegations as facts. Bustamante, 531 F.3d at 1062–63 (“It is not enough to allege that the consular official's information was incorrect.”).

While the Government need not prove that Berashk performed an activity that renders him inadmissible under the statute, see Adams, 909 F.2d at 649, it must at least allege what it believes Berashk did that would render him inadmissible. We seek only to verify that the facts asserted by the Government, however bare, constitute a ground for exclusion under the statute. See Am. Acad., 573 F.3d at 126–29 (reviewing whether facts alleged by the Government were grounds for exclusion, but declining to conduct any review of the facts themselves).

The Government's citation to § 1182(a)(3)(B), when combined with its failure to assert any facts, is not a facially legitimate ground for denying Berashk's visa. Should we conclude that citation to § 1182(a)(3)(B) is a facially legitimate reason for the denial of Berashk's visa, then citation to § 1182(a), which lists all grounds of inadmissibility, would be sufficient. Any judicial review would be wholly perfunctory requiring only that we ensure the Government has properly said nothing more than “8 U.S.C. § 1182(a).” Limited as our review may be, it cannot be that Din's constitutional right to review is a right only to a rubber-stamp on the Government's vague and conclusory assertion *864 of inadmissibility. Cf. United States v. DeGeorge, 380 F.3d 1203, 1215 (9th Cir.2004) (courts should “not simply rubber-stamp the government's request, but hold the government to its burden”).

The dissent does not alleviate our concern that the Government's approach would essentially eliminate all judicial review, even when the constitutional right of a U.S. citizen is implicated. According to the dissent, decisions to exclude aliens are made “exclusively by executive officers, without judicial intervention.” Dissent at 871 (quoting Mandel, 408 U.S. at 766, 92 S.Ct. 2576). This ignores, of course, that “courts have identified a limited exception to the doctrine where the denial of a visa implicates the constitutional rights of American citizens.” Bustamante, 531 F.3d at 1061. The dissent's only attempt to give meaning to the
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exception recognized in Mandel and Bustamante is to state, “[t]here is nothing facially illegitimate in the identification of section 1182(a)(3)(B) as the basis for the denial of Berashk's application.” Dissent at 869–70. We do not think that even the most limited judicial review is so restrained as to ask only if the Government has successfully provided a citation to the U.S.Code.

We are similarly not persuaded by the argument advanced by the dissent that § 1182(b)(3) supports the Government's position. Dissent at 871–73. Section 1182(b) requires that the consular officer notify aliens if their visa is denied and provide the “specific provision or provisions of law under which the alien is inadmissible.” 8 U.S.C. § 1182(b)(1). In 1996, as part of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), Congress amended § 1182 and added (b)(3), which states that the disclosure requirement in § 1182(b)(1) does not apply if the alien is inadmissible for a reason stated in § 1182(a)(2) or (a)(3). Pub. L. No. 104–132, § 421, 110 Stat 1214 (1996) (codified at 8 U.S.C. § 1182(b)(3)).

Despite this provision, State Department regulations require consular officers to “inform the applicant of the provision of law or implementing regulation on which the refusal is based and of any statutory provision of law or implementing regulation under which administrative relief is available,” 22 C.F.R. § 42.81(b), and make no exception for denials based on § 1182(a)(2) or (a)(3). As a result, consular officers appear to regularly disclose information to aliens, even if the denial is based on § 1182(a)(2) or (a)(3). See, e.g., Complaint at 6 (describing email from Islamabad Embassy disclosing statutory basis for Berashk's visa denial); Bustamante, 531 F.3d at 1061 (describing letter from Consulate explaining basis for visa *865 denial); Am. Acad., 573 F.3d at 118 (describing telephone call from Government to applicant explaining that visa was denied because the applicant provided material support to a terrorist organization).

According to the dissent, § 1182(b)(3) means that “the Government was not required to provide more specific information regarding” the denial of Berashk's visa. Dissent at 872. This is correct as a matter of statutory interpretation. Under the statutory scheme, aliens have a statutory right to certain information if their visa is denied for most reasons; aliens have no such statutory right if the denial is based on 1182(a)(3) or (a)(2). This lack of an alien's statutory right to information is, however, not helpful in resolving the question we face: whether Berashk's visa was denied for “a facially legitimate and bona fide reason.” Bustamante, 531 F.3d at 1060. To make that determination, a court needs some information.

First, the statute simply creates a statutory right to information, and limits the scope of that right. The dissent suggests that because the alien does not have a statutory right to information, by implication, the Government has an absolute right to withhold the information from everyone, including a citizen and this Court. Dissent at 872–73. The dissent cites no authority to support its assertion that an alien's lack of an affirmative statutory right to information functions as an implied prohibition on any disclosure to all people, and we decline to adopt such a position.

While we want to make it emphatically clear that the Government's obligation to provide information in this context is not even remotely close to the Government's obligation under Brady v. Maryland, 373 U.S. 83, 91, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), drawing an analogy to Brady exposes the fault in the Government's argument. The Jencks Act provides an affirmative statutory right to information and requires the Government to produce “any statement (as hereinafter defined) of the [testifying] witness in the possession of the United States.” 18 U.S.C. § 3500. Brady requires, at the defendant's request, that the prosecution disclose “[m]aterial evidence favorable to an accused.” 373 U.S. at 87, 83 S.Ct. 1194. Brady is not limited by the Jencks Act and it “exists as an independent foundation to preserve evidence.” United States v. Bernard, 623 F.2d 551, 556 (9th Cir.1979). It would be implausible to suggest that the Government need not disclose Brady evidence that is outside the scope of the Jencks At because the defendant lacks a statutory right to the information. In fact, it is taken for granted that Brady material can exist outside the scope of the Jencks Act. See United States v. Cerna, 633 F.Supp.2d 1053, 1056 (N.D.Cal.2009) (discussing, without controversy, “non-Jencks Brady information”).

Similarly, the fact that Congress created a limited disclosure obligation in the context of visa denials does not mean that Congress otherwise prohibited the disclosure of all other information. We agree that “[i]t makes no sense to read the statute to require disclosure for such denials,” dissent at 873 (emphasis added), but we do not read the statute that way. It

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would *866 also make no sense to read the statute to prohibit the release of any information regarding certain visa denials, because if it did, the executive branch appears to violate the statute regularly. See, e.g., 22 C.F.R. § 42.81(b); Complaint at 6; Bustamante, 531 F.3d at 1061; Am. Acad., 573 F.3d at 118. The statute does not compel nor prohibit disclosure in this case.

Second, the dissent’s reading of the statute is inconsistent with any concept of judicial review—including the dissent’s reading of Bustamante. Because of § 1182(b)(3), when a visa denial is based on (a)(2) or (a)(3), the Government is not statutorily required to disclose “the specific provision or provisions of law under which the alien is inadmissible,” 8 U.S.C. § 1182(b)(1)(B). By implication, the dissent suggests that “[n]o disclosure of information is required,” dissent at 872, and therefore no information can ever be required by a reviewing court. But even the dissent reads Bustamante to require the Government to provide the exact information listed in § 1182(b)(1)(B)—the statutory provision under which the alien is inadmissible—to demonstrate that the visa denial is “facially legitimate.” Dissent at 869. By the dissent’s own logic, that reading of Bustamante is “directly contradict[ed]” by the statute. Dissent at 873. If the statute allows the Government to decline to provide more information in this case, then it must allow the Government to decline to provide any information. This would decisively eliminate judicial review and this reading of the statute is therefore precluded by Bustamante, which guarantees some review, no matter how limited.

The dissent’s concern about “this nation’s desire to keep persons connected with terrorist activities from entering the country,” dissent at 872, is, of course, valid, but the Government never asserted such an argument here. And even if it had, nothing in our opinion compels dangerous disclosure. Another imperfect analogy to criminal procedure exposes the fault in relying on the statute’s purpose to justify withholding information. For the same reason that Congress added § 1182(b)(3)—the desire to not jeopardize an ongoing investigation by announcing its existence—subjects of criminal investigations are routinely not informed that they are being investigated. For example, search warrant proceedings are “necessarily ex parte, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence.” Franks v. Delaware, 438 U.S. 154, 169, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The need for secrecy does not, however, change the fact that the constitution guarantees a judicial determination of probable cause prior to the issuance of a search warrant. United States v. Grubbs, 547 U.S. 90, 99, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006). It is inconceivable that the Government would argue that it could not provide the factual basis supporting probable cause based on the need to keep the investigation a secret—an ex parte hearing conceals the investigation, while still allowing judicial review.

In this case, if necessary, the Government could, as it does in other contexts, disclose the reason for Berashk's visa denial in camera. See, e.g., Hunt v. C.I.A., 981 F.2d 1116, 1118 (9th Cir.1992) (reviewing in camera affidavits justifying the decision to withhold information from Freedom of Information Act disclosure on national security grounds); see also Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1079–90 (9th Cir.2010) (en banc) (describing the history and procedure of the state secrets doctrine and dismissing case). Existing procedures are adequate to address the national security concerns that we share with the dissent, and make it unnecessary *867 to eliminate all judicial review and disclosure.

Because the Government has not offered a facially legitimate reason for the visa denial, the first part of the Mandel test is not met, and the decision is not subject to the prohibition on consular review. It is not necessary to address the second part of the test, whether the citation to § 1182(a)(3)(B) is bona fide. It is worth noting, however, that in Bustamante, we held that to prevail under the bona fide prong of the Mandel test a plaintiff must “allege that the consular official did not in good faith believe the information he had,” 531 F.3d at 1062–63, and the dissent argues that “it would be impossible for plaintiff to plead [bad faith] because she did not know the particular basis for the denial of her husband’s visa application.” Dissent at 869. The “bona fide” inquiry is therefore eliminated under the dissent’s approach because the Government can simply cite a statute—and only a statute—and because the plaintiff is not informed what the consular official believes, she can never allege that the belief is held in bad faith. This suggests that the dissent has come to the incorrect conclusion that a bare citation to a statute is a facially legitimate ground for exclusion. Because the Supreme Court articulated that the Government must put forward a “facially legitimate and bona fide reason,” Bustamante, 531 F.3d at 1062 (citing Mandel, 408 U.S. at
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13 Cal. Daily Op. Serv. 5179, 2013 Daily Journal D.A.R. 6593 770, 92 S.Ct. 2576 (emphasis added), it is unlikely that the “facially legitimate” requirement should be interpreted to allow the Government to withhold information and make an inquiry into the “bona fide” requirement “impossible.”

B. Din’s standing to challenge § 1182(b)(3) 

The district court held that Din lacks standing to seek a declaratory judgment that 8 U.S.C. § 1182(b)(3) is unconstitutional as applied to her because the notice provisions apply to aliens, not to citizens with an interest in an alien’s visa. As discussed above, we agree with the conclusion that § 1182(b)(3) does not apply to Din, and, for that reason, we do not think it supports the Government’s motion to dismiss on consular nonreviewability grounds. When the case is resolved on the merits, it is possible that the court may conclude that it can avoid reaching Din’s constitutional challenge to the statute by determining that the statute, by its own terms, does not apply to her. See Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 205, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009) (constitutional issues should be avoided if a statutory issue resolves the case). But in reviewing a motion to dismiss, we cannot project a specific outcome on the merits in order to decide the question of standing. See Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir.2011) (noting that standing is distinct from the merits). For the purposes of evaluating standing, we “must construe the complaint in favor of the complaining party.” Id. Here, the complaint alleges that the Government is using the statute to justify an action that is injuring Din. If the Government is doing so based on a flawed reading of the statute, that might provide a narrower ground to decide this case on the merits later, but it does not deprive Din of standing to challenge the law. See Nw. Austin, 557 U.S. at 205, 129 S.Ct. 2504.

To satisfy Article III’s standing requirements, Din must show “(1) [she has] suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, *868 that the injury will be redressed by a favorable decision.” Id. at 180–81, 129 S.Ct. 2504. Further, a “person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 n. 7, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Din has a constitutionally protected due process right to limited judicial review of her husband’s visa denial, which stems from her “[f]reedom of personal choice in matters of marriage and family life.” Bustamante, 531 F.3d at 1061–62. To the extent that the Government relies on 8 U.S.C. § 1182(b)(3) to interfere with this right, Din has standing to challenge the provision. Din alleges that the Government has deprived her of due process by refusing to provide either her or her husband with a facially legitimate and bona fide reason for denying his visa. In so refusing, the Government in part relies on 8 U.S.C. § 1182(b)(3). A court’s decision that 8 U.S.C. § 1182(b)(3) cannot defeat Din’s claim could redress her injury. Therefore, § 1182(b)(3) appears to injure Din, and she has standing to challenge it.

IV. Conclusion

We decline the Government’s invitation to turn our limited review into a mere formality. We conclude that the Government’s citation to § 1182(a)(3)(B), in the absence of any allegations of proscribed conduct, is not a facially legitimate reason to deny Berashk’s visa. Because the Government has not proffered a facially legitimate reason, Din’s claims for a writ of mandamus directing the Government to adjudicate Berashk’s visa application and for a declaratory judgment under the APA survive dismissal. Accordingly, we also conclude that Din has standing to challenge 8 U.S.C. § 1182(b)(3) as it has been applied to her. We remand Din’s claims for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CLIFTON, Circuit Judge, dissenting:

The majority opinion acknowledges the doctrine of consular nonreviewability and the “highly constrained” nature of our judicial review of the denial of a visa, see Bustamante v. Mukasey, 531 F.3d 1059, 1060 (9th Cir.2008), but in practice it fails to accept that doctrine and act within that constraint. Instead, assuming that judicial review must be more robust, it imposes upon the Government an obligation to provide information about a visa denial that, by statute, the government is specifically not required to provide when it denies a visa based on concerns for national security or terrorism. I respectfully dissent.
I. The Limited Nature of Judicial Review

The visa application of plaintiff’s husband, Kanishka Berashk, a citizen and resident of Afghanistan, was denied by consular officials under 8 U.S.C. § 1182(a)(3)(B). Section 1182(a) identifies “classes of aliens ineligible for visas or admission” into the United States. The statute lists ten different categories of ineligible aliens, including one “miscellaneous” provision, subsection 1182(a)(10), which encompasses several unrelated grounds. One of the identified categories within section 1182(a) is subsection 1182(a)(3), entitled “Security and related grounds,” one part of which, subsection 1182(a)(3)(B), is captioned “Terrorist activities.” That provision was identified as the basis for the denial of Berashk’s visa application.

As the majority opinion notes, at 7, we may review the denial of a visa only when the constitutional rights of an American citizen are implicated and then only by way of “a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason.” *Bustamante*, 531 F.3d at 1060. Those two elements—facially legitimate and bona fide—were drawn directly from the Supreme Court’s decision in *Kleindienst v. Mandel*, 408 U.S. 753, 770, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972).

We specifically held in *Bustamante* that denial of a visa based upon a statutory basis for inadmissibility is a denial for “a facially legitimate reason.” 531 F.3d at 1062. We also made clear that the inquiry into whether the reason for the visa denial was bona fide is limited to the question of whether the decision was made in good faith. Whether the decision to deny the visa was correct is not the issue. Rather, a plaintiff must “allege that the consular official did not in good faith believe the information he had. It is not enough to allege that the consular official’s information was incorrect.” *Id.* at 1062–63.

The district court dismissed the action based upon its application of *Bustamante*. It concluded that reliance upon a statute, specifically section 1182(a)(3)(B), provided a facially legitimate reason for denying the visa application. As for the bona fide element, the district court noted that plaintiff had not alleged in her complaint that the consular officials acted in bad faith or without a good faith belief in the information on which the denial was based. Further, the court held that it would be impossible for plaintiff to plead to that effect because she did not know the particular basis for the denial of her husband’s visa application and thus would necessarily be unable to satisfy the plausible pleading requirements of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The district court was right.

The majority opinion bases its conclusion on what it describes as the lack of a facially legitimate reason to deny Berashk’s application and says that it does not reach the question of whether the reason given was bona fide. Majority op. at 866–67. The denial here was based on a statute, however. That statute provided a lawful reason for denying the application. The relevant definition of “legitimate” is “accordant with law.” *Webster’s Third New International Dictionary* 1291 (2002). Because the denial of Berashk’s application was based on law, the reason was at least “facially legitimate.”

Although the majority opinion interprets *Bustamante* differently, by my reading that decision held that a statutory basis for inadmissibility is a facially legitimate reason. It stated:

As set forth in the complaint, Jose was denied a visa on the grounds that the Consulate “had reason to believe” that he was a controlled substance trafficker. This is plainly a facially legitimate reason, as it is a statutory basis for inadmissibility. 8 U.S.C. § 1182(a)(2)(C). *Bustamante*, 531 F.3d at 1062. The majority opinion asserts, at 11, that citation to the statute was not enough by itself, and that “[t]he reason for exclusion in *Bustamante* was that ‘the Consulate ‘had reason to believe’ that he was a controlled substance trafficker.’ ” But that portion of our opinion in *Bustamante* simply repeated what the complaint in that case had alleged was the stated reason, one that the plaintiffs disputed. There was no finding or determination by the court. The “facial” legitimacy rested upon the citation to the statute. This case is no different. There is nothing facially illegitimate
Nor is there any factual basis for us to conclude or for plaintiff to allege that the reason for the denial was not bona fide because the consular official who made the decision acted in bad faith. Plaintiff alleges in her complaint that Berashk was not engaged in any terrorist activity and that no facts exist to support a conclusion that he is inadmissible under the statute. The Bustamantes similarly alleged that Jose Bustamante was not a drug trafficker and asked that the case be remanded for factual development, but we held that their complaint must be dismissed because they did not allege that the consular official did not in good faith believe the information he possessed. Bustamante, 531 F.3d at 1062–63. The factual basis of the consular's decision is not within our highly limited review. As we held in Bustamante, quoted above, it is simply not enough to allege that the consular official's decision was wrong. That is not for us to decide.

The majority opinion holds that the reason given for excluding Berashk was inadequate in two ways, statutory and factual. Neither is persuasive.

First, it complains that the Government's reference to section 1182(a)(3)(B) is not sufficiently specific. It contends that the Government must cite to a statutory subsection narrow enough to permit the court to determine that it has been properly construed. Majority op. at 862–63. It observes that the statutory subsection cited in denying Berashk's application, section 1182(a)(3)(B), is longer than the statutory subsection cited in the denial of the application in Bustamante, section 1182(a)(2)(C). Majority op. at 862–63. But the length of a statute does not make it any less of a statute.1

Nor does it provide a principled justification for denying the facial legitimacy of the consular official's decision. It is the Government's application of the statute to Berashk—its assessment of the facts, not any “construction” of the statute—that is disputed by plaintiff here. The key allegation of plaintiff's complaint is that:

No good faith basis exists that is sufficient to constitute a facially legitimate and bona fide reason for the denial of Mr. Berashk's visa application under 8 U.S.C. § 1182(a)(3)(B). The fact of Mr. Berashk's low-level employment in the Afghan Ministry of Social Welfare before, during, and after the Taliban occupation of Afghanistan alone cannot trigger any of the grounds of inadmissibility listed in 8 U.S.C. § 1182(a)(3)(B), and no other facts relevant to those grounds of inadmissibility exist. Plaintiff has argued that the cited subsection is an “umbrella” statute that is not specific enough for Berashk to know what to try to rebut, but plaintiff has not argued that the State Department might have misinterpreted this statute committed to its authority by Congress, and there is nothing in the record that suggests that it has.

The second reason given by the majority opinion is that the plaintiff and the court have not been provided by the Government with enough factual information to “allow us to determine if the specific subsection of § 1182(a)(3)(B) was properly applied.” *871 Majority op. at 861. That gets closer to what I perceive to be the majority opinion's actual concern. The majority opinion is premised on the assumption that the court must be provided with whatever additional information we deem necessary to permit us to conduct a more thorough review and on the corollary that we have the power to require the Government to provide that additional information. Thus, the majority opinion holds that the Government “must at least allege what it believes Berashk did that would render him inadmissible.” Id. at 863. Otherwise, the majority opinion asserts, our review would be only a “rubber-stamp.”2

We must recognize, however, that “[t]he power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country and to have its declared policy in that regard enforced exclusively by executive officers, without judicial intervention, is settled by our previous adjudications.” Kleindienst v. Mandel, 408 U.S. 753, 766, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972) (quoting Lem Moon Sing v. United States, 158 U.S. 538, 547, 15 S.Ct. 967, 39 L.Ed. 1082 (1895)) (internal quotations omitted). Analysis of the applicant's underlying conduct has “been placed in the hands
That does not mean that our review is purely a formality or, as the majority opinion describes it, a rubber stamp. In many instances there will be more specific information available about the basis for a visa denial. When there is more information available, it is appropriate for a court to examine that information, as our court did in *Bustamante*, albeit still in the course of a limited review. But, as discussed below, Congress has specifically provided that the Government is not required to provide specific information about what lies behind a visa denial under subsection 1182(a)(3), the basis for the denial of Berashk's application. When the statute says that the Government does not have to disclose that information, compelling it to disclose the information anyway in order to allow “limited” and “highly restrained” judicial review cannot be justified.

II. 8 U.S.C. § 1182(b)

By requiring the Government to disclose more specific information about the denial of Berashk's visa application, the majority opinion effectively disregards the statute that says that the government is not obligated to disclose that information.

After the categories of aliens deemed ineligible for visas are identified in *872 8 U.S.C. § 1182(a)*, the next part of the statute, *873 section 1182(b)*, provides for the notice to be given following the denial of a visa application. For denials based on most of the subsections of section 1182(a), some notice of the determination and its statutory basis is required. 3 But the statute, in section 1182(b)(3), explicitly carves out denials based on two subsections: 1182(a)(2) (“Criminal and related grounds”) and 1182(a)(3) (“Security and related grounds”). No disclosure of information is required when a visa denial is based on one of those subsections.

The denial of Berashk's visa was based on subsection 1182(a)(3). Under section 1182(b)(3), the Government was not required to provide more specific information regarding that denial. 4 The majority holds otherwise without giving serious consideration to the impact of section 1182(b)(3).

Plaintiff realizes that this statute poses a serious obstacle to her claim, and in her complaint, she presents as a separate claim for relief a challenge to the constitutionality of section 1182(b) as applied to her. The constitutional basis for the challenge is only vaguely described in the complaint as “procedural due process under the Fifth Amendment.” The district court held that the notice provision only applies to the alien applicant for the visa, in this case Berashk, and not to his U.S. citizen wife, the plaintiff in this case, so it concluded that plaintiff lacked standing to challenge the statute. The majority opinion disagrees and reverses that part of the district court's order as well.

The majority opinion does not conclude that the statute is unconstitutional, however. Plaintiff has not yet presented her argument to that effect on the merits. The proposition that this nation's desire to keep persons connected with terrorist activities from entering the country must be subordinated to plaintiff's desire for the information based on “procedural due process” strikes me as highly unlikely, particularly when there is no allegation that the Government failed to provide plaintiff or her husband the process that is required by the applicable statute.

What matters for now, though, is that the majority opinion effectively nullifies *873 the statute simply by asserting that it “does not apply to Din.” Majority op. at 867. 5 That misses the point. Even if the limitation on disclosure does not apply to Din, nothing else gives her the right to demand that the Government provide the information to her. More broadly, Congress has required disclosure to applicants of information regarding visa denials, except for denials based on criminal or security grounds. It makes no sense to read the statute to require disclosure for such denials simply because there might be a U.S. citizen interested in the application.

That statute should not be ignored. It directly contradicts the majority opinion's holding that the Government must provide more information about the denial of Berashk's visa. The statute says otherwise.

In my view, the majority opinion has gone astray in two different ways. It fails to honor the highly constrained nature of judicial review of a decision to deny a visa application. And, in the process, it orders the government to disclose...
The Government's contention that Bustamante is not good law is meritless. First, the Government argues that the text of the INA, as supported by its legislative history, precludes judicial review of consular decisions. This argument is irrelevant to the holding of Bustamante, which conditions judicial review on the constitutional rights of citizens, not an interpretation of immigration statutes. See 531 F.3d at 1062 (“Presented with a procedural due process claim by a U.S. citizen, we therefore consider the Consulate’s explanation for the denial of [the] visa application pursuant to the limited inquiry authorized by Mandel.”). Second, according to the Government, Bustamante is predicated on a liberty interest in the ability to live in the United States with an alien spouse, and because this right has been elsewhere repudiated, Bustamante is in conflict with Circuit precedent and should not be followed. The Government misreads Bustamante; nowhere does the case mention the right of an alien spouse to live in the United States. Rather, it explains that a citizen spouse’s right to judicial review is based on the more general right to “[f]reedom of personal choice in matters of marriage and family life.” Id. We have neither the power to, nor the interest in questioning Bustamante’s authority. See Montana v. Johnson, 738 F.2d 1074, 1077 (9th Cir.1984) (only en banc decisions, Supreme Court decisions, or subsequent legislation overrule the decisions of prior panels).

The deafth of cases explaining the “facially legitimate and bona fide” requirement explains why we, and the dissent, cannot cite any authority conclusively resolving whether the Government’s rationale is sufficiently detailed to constitute a “facially legitimate” basis. See Dissent at 869–70 (asserting, without citation, that “[t]here is nothing facially illegitimate in the identification of section 1182(a)(3)(B) as the basis for the denial of Berashk’s application”).

The subsections cover aliens who: (1) have engaged in terrorist activities; (2) are now or will be engaged in terrorist activities; (3) have incited terrorist activities; (4) are representatives of terrorist organizations or other groups that espouse terrorism; (5) are members of a recognized terrorist organization; (6) are members of an informal terrorist organization; (7) endorse or espouse terrorist activity; (8) have received military-type training from or on behalf of a terrorist organization; (9) are the spouse or child of a person found inadmissible under the subsection; or (10) are officers, officials, representatives, or spokespersons of the Palestinian Liberation Organization. 8 U.S.C. § 1182(a)(3)(B).

While the dissent correctly notes that DeGeorge arose in a different context, we do not think that any form of judicial review, whether a product of statute or precedent, should be a rubber-stamp for the Government.

The rationale for this provision was explained by the House Committee on the Judiciary:

Currently, all foreign nationals who are denied a visa are entitled to notice of the basis for the denial. This creates a difficult situation in those instances where an alien is denied entry on the basis, for example, of being a drug trafficker or a terrorist. Clearly, the information that U.S. government officials are aware of such drug trafficking or terrorist activity would be highly valued by the alien and may hamper further investigation and prosecution of the alien and his or her confederates. An alien has no constitutional right to enter the United States and no right to be advised of the basis for the denial of such a privilege. Thus, there is no constitutional impediment to the limitation on disclosure in this section.


The U.S. Department of State Foreign Affairs Manual explicitly recognizes that the statute only establishes the minimum amount of disclosure and states that “although 212(b) also exempts findings of ineligibility under INA 212(a)(2) and (3) from the written notice requirement, we expect that such notices will be provided to the alien in all 212(a)(2) and (3) cases unless: (1) We instruct you not to provide notice; (2) We instruct you to provide a limited legal citation (i.e., restricting the legal grounds of refusal to 212(a)); or (3) You request permission from us not to provide notice.” 9 Foreign Affairs Manual 42.81 N2.

The citation was not as unspecific as the majority opinion suggests. Section 1182(a)(3)(B) contains several subsections, but all pertain to “terrorist activities.” The Government did not simply cite to section 1182(a) as a whole. As discussed below, at 871–72, the Government is generally required to provide some explanation for a visa denial, but the statute explicitly provides that denials under section 1182(a)(3)(B) are different.
The majority opinion supports this statement with a citation with a “cf.” signal to United States v. DeGeorge, 380 F.3d 1203, 1215 (9th Cir. 2004), describing that case as holding that “courts should ‘not simply rubber-stamp the government’s request, but hold the government to its burden.’ ” That citation provides no support for the majority opinion’s conclusion here. To begin with, that criminal appeal had nothing whatsoever to do with the issue in this case. It made no mention of the doctrine of consular nonreviewability nor any reference to the highly constrained review that we are to apply here. Rather, it addressed a court order issued at the request of the government to toll the statute of limitations because evidence was located in a foreign country, based on a statute that authorized such tolling, 18 U.S.C. § 3292. Moreover, as our decision noted, the judicial review in that case was expressly required by that statute. DeGeorge, 380 F.3d at 1213–14 (citing 18 U.S.C. § 3292(a)(1)). When a statute requires that the district court make a given finding before issuing an order, it is no surprise that in reviewing the district court’s order we held that the Government must be held to its burden. No similar authorization for judicial review exists here.

8 U.S.C. § 1182(b) provides:

(b) Notices of denials

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a) of this section, the officer shall provide the alien with a timely written notice that—

(A) states the determination, and

(B) lists the specific provision or provisions of law under which the alien is inadmissible or adjustment of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a) of this section.

The United States Code Annotated notes that the language quoted above from section 1182(b)(1)(B) is presented that way in the statute but that the word “adjustment” should probably be preceded by “ineligible for.”

Contrary to the majority’s assumption, at 865, the lack of an affirmative right to compel disclosure does not “function[] as an implied prohibition” against disclosure. Rather, courts are prohibited from demanding disclosure, in this context, and our cases say it explicitly. See Bustamante, 531 F.3d at 1062 (rejecting Bustamante's argument for remand in order to require the government “to present specific evidence to substantiate the assert[ed]” basis for the visa denial). Accordingly, the majority's inapposite discussion of Brady obligations, an area of law requiring robust judicial review of due process, lends no support to its holding.

The majority opinion describes this as a concession by the Government. Actually, it is the reason why the Government has argued, as the district court concluded, that Din does not have standing to challenge the exclusions under the statute. The majority opinion concludes that Din does have standing, but its broader conclusion that the statute can be disregarded because it does not apply to Din means that Din's procedural due process challenge is irrelevant—in which case she actually would lack standing.
This appeal concerns a First Amendment challenge to the denial of a visa. Three organizations, Plaintiffs-Appellants the American Academy of Religion (“AAR”), the American Association of University Professors (“AAUP”), and PEN American Center, appeal from the December 20, 2007, decision of the District Court for the Southern District of New York (Paul A. Crotty, District Judge), granting summary judgment to then-Defendants-Appellees Michael Chertoff, former Secretary of the Department of Homeland Security, and Hillary Rodham Clinton, former Secretary of State, Condoleeza Rice, as Appellees in this case.


We conclude that the District Court had jurisdiction to consider the claim, despite the doctrine of consular nonreviewability; the statutory provision expanding visa ineligibility to those who contributed funds to an undesignated terrorist organization before the provision was enacted was validly applied to Ramadan; the knowledge requirement of the statute required the consular officer to find that Ramadan knew his contributions provided material support; and the consular officer was required to confront Ramadan with the allegation against him and afford him the subsequent opportunity to demonstrate by clear and convincing evidence that he did not know, and reasonably should not have known, that the recipient of his contributions was a terrorist organization. Finally, exercising the limited review permitted by Mandel, we conclude that the record does not establish that the consular officer who denied the visa confronted Ramadan with the allegation that he had knowingly rendered material support to a terrorist organization, thereby precluding an adequate opportunity for Ramadan to attempt to satisfy the provision that exempts a visa applicant from exclusion under the “material support” subsection if he “can demonstrate by clear and convincing evidence that [he] did not know, and should not reasonably have known, that the organization was a terrorist organization.” § 1182(a)(3)(B)(ii)(VI)(dd). We therefore remand for further proceedings.


JON O. NEWMAN, Circuit Judge.

1 All references to provisions of the INA will be to the relevant subsections of section 1182 of Title 8 of the 2006 edition of the United States Code, unless otherwise noted.

Background

[...]

Discussion

The appeal presents a host of issues.

*123 I. Authority to review

The initial obstacle to the Appellants’ First Amendment challenge to the visa denial is the Government’s invocation of the doctrine of consular nonreviewability, the principle that a consular officer’s decision to deny a visa is immune from judicial review. The Government considers this doctrine to mean that courts facing this type of challenge lack “jurisdiction,” see Brief for Defendants-Appellees at 13, and this Court has also spoken of “jurisdiction” in rejecting review of a visa denial. See Wan Shih Hsieh, 569 F.2d at 1181 (“The district court correctly held that no jurisdictional basis exists for review of the action of the American Consul in Taiwan suspending or denying the issuance of immigration visas to appellant’s children there.”).

The Supreme Court has cautioned that the term “jurisdiction” is often used imprecisely, see Kontrick v. Ryan, 540 U.S. 443, 454-55, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). We do not believe that traditional subject matter jurisdiction is lacking in this case. The Plaintiffs allege that the denial of Ramadan’s visa violated their First Amendment rights, and subject matter jurisdiction to adjudicate that claim is clearly supplied by 28 U.S.C. § 1331. See Abourezk v. Reagan, 785 F.2d 554, 557 (D.C.Cir.1975) (“Mandel considered a ‘blanket prohibition against entry of all aliens falling into the [excluded] class(es)’ ..., and that First Amendment rights could not override that decision.

In seeking to sustain the decision below, [the plaintiffs] concede that Congress could enact a blanket prohibition against entry of all aliens falling into the [excluded] class[es] ..., and that First Amendment rights could not override that decision.

408 U.S. at 767, 92 S.Ct. 2576. This statement lends some support to the Government’s argument that the limited review required by the First Amendment applies only to the Attorney General’s denial of a waiver. On the other hand, the Mandel plaintiffs’ concession, if that is what it was, cannot have made any law, and can be viewed as merely relieving the Court of the need to decide whether a federal courts clearly had jurisdiction”) (emphasis added). Perhaps the doctrine of consular nonreviewability, where applicable, means that the generally available federal question jurisdiction provided by section 1331 to adjudicate First Amendment claims is withdrawn where the claim is based on a consular officer’s denial of a visa, or that prudential considerations, perhaps arising from separation of powers concerns, counsel against exercising normally available jurisdiction.

In this case, the Plaintiffs seek to overcome the doctrine of consular nonreviewability by relying on Mandel, in which the Supreme Court adjudicated on the merits, albeit to a limited extent, a First Amendment challenge to a visa denial. The Government contends that Mandel does not apply to this case because Mandel reviewed the Attorney General’s discretionary decision not to waive an alien’s inadmissibility, see Immigration and Nationality Act of 1952 § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A) (1970), rather than the consular officer’s threshold decision that the alien was inadmissible. The latter type of decision, the Government contends, is totally immune from judicial review.


Mandel does not provide a definitive answer to the Government’s contention, since the Supreme Court understood the Mandel plaintiffs to have conceded that, in the absence of a discretionary waiver provision, there would be no First Amendment issue. The Court noted:

In seeking to sustain the decision below, [the plaintiffs] concede that Congress could enact a blanket prohibition against entry of all aliens falling into the [excluded] class[es] ...
First Amendment claim requires at least some judicial review of a consular officer’s visa denial.\(^9\)

\(^7\) Justice Douglas, in dissent, focused only on the Attorney General’s waiver decision, contending that once the State Department had recommended a waiver, the statute giving discretion to the Attorney General should be construed to limit that discretion to “matters commonly within the competence of the Department of Justice-national security, importation of drugs, and the like.” *Mandel*, 408 U.S. at 774, 92 S.Ct. 2576 (Douglas, J., dissenting).

\(^8\) Justice Marshall, in dissent, disputed such a concession. He understood the *Mandel* plaintiffs to “have simply noted ... that even if this Court rejects the broad decision below, there would nevertheless be a separate and narrower basis for affirmance.” *Mandel*, 408 U.S. at 780 n. 4, 92 S.Ct. 2576 (Marshall, J., with whom Brennan, J. joins, dissenting) (citations omitted).

\(^9\) Since the grounds for denial of Mandel’s visa were “advocat[ing] and” “writ[ing] or publish[ing]” “the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship,” 8 U.S.C. § 1182(a)(28)(D), (G)(v) (1964), and the three-judge court decision that the Supreme Court reviewed in *Mandel* had declared these grounds unconstitutional under the First Amendment, see *Mandel v. Mitchell*, 325 F.Supp. 620, 634 (S.D.N.Y.1971), it was at least arguable that the visa denial, if reviewable, would have faced a more serious First Amendment challenge than the denial of a waiver.

The case law in the aftermath of *Mandel* favors such review. The Ninth Circuit has explicitly rejected the Government’s distinction, for purposes of permitting some judicial review of a constitutional claim, between a consular officer’s denial of a visa and the Attorney General’s denial of a waiver of inadmissibility. See *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 n. 1 (9th Cir.2008). The First Circuit has done so implicitly, relying on *Mandel* to undertake the limited judicial review of a First Amendment challenge to a visa denial that the Court understood *Mandel* to permit. See *Adams v. Baker*, 909 F.2d 643, 647-50 (1st Cir.1990); *Allende v. Shultz*, 845 F.2d 1111 (1st Cir.1988). The D.C. Circuit has also implicitly rejected the Government’s distinction between a visa denial and the Attorney General’s decision not to waive inadmissibility. See *Abourezk II*, 785 F.2d 1043. *Abourezk II* accepted jurisdiction over First Amendment and statutory challenges to decisions of consular officers and the Secretary of State.\(^10\) See *id.* at 1050.

\(^10\) Although dissenting from the majority’s construction of the relevant statutes and concluding that the plaintiffs’ constitutional claim lacked merit, Judge Bork accorded the plaintiffs “the limited judicial scrutiny defined by the [Mandel ] standard.” *Abourezk II*, 785 F.2d at 1075 (Bork, J., dissenting).

The Government endeavors to diminish the significance of *Abourezk II* by citing the D.C. Circuit’s subsequent decision in *Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C.Cir.1999). Although *Saavedra Bruno* pointed out that *Mandel* concerned the Attorney General’s decision not to waive inadmissibility, whereas *Abourezk II* had concerned a consular officer’s visa denial, the D.C. Circuit adhered to *Abourezk II*, see 197 F.3d at 1163; the challenge to the visa denial was not rejected for lack of jurisdiction, but because the plaintiffs had made no constitutional claims, see *id.*

Our Court has not had occasion to consider whether *Mandel’s* allowance of limited judicial review of First Amendment claims is available on a challenge to a consular officer’s visa denial, as distinguished from the Attorney General’s denial of a waiver of admissibility. In *Burrafato*, we noted that district courts within this Circuit had “interpreted *Mandel* to require justification for an alien’s exclusion.” *Burrafato*, 523 F.2d at 556. We referred to decisions involving the Secretary of State’s refusal to waive inadmissibility. See *id.* (citing *MacDonald v. Kleindienst*, 72 Civ. 1228 (S.D.N.Y. Oct. 10, 1972), and *MacDonald v. Kleindienst*, 72 Civ. 1228 (S.D.N.Y. May 6, 1974)). However, *Burrafato* did not need to resolve the issue because the plaintiff’s challenge to the denial of her alien husband’s visa application, in the absence of any constitutional claim, was dismissed for lack of jurisdiction. See *id.* at 557.

\(^2\) We conclude that, where a plaintiff, with standing to do so, asserts a First Amendment claim to have a visa applicant present views in this country, we should apply *Mandel* to a consular officer’s denial of a visa. Since the First Amendment requires at least some judicial review of the discretionary decision of the Attorney General to waive admissibility, we see no sound reason to deny similar review to the decision of a consular officer to deny
a visa. It seems counterintuitive to review a cabinet officer’s discretionary decision, but not a consular officer’s decision as to statutory ineligibility. We agree with the explicit view of the Ninth Circuit and the implicit views of the First and D.C. Circuits supporting at least limited review where a visa denial is challenged on First Amendment grounds.

II. Scope of review.
We next consider the scope of the limited review permitted by Mandel. The Supreme Court there concluded:

In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under § 212(a)(28) [of the INA], Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

Mandel, 408 U.S. at 769-70, 92 S.Ct. 2576.

This formulation presents two questions: (a) what will render the Government’s reason “facially legitimate and bona fide”? and (b) does the prohibition on “look[ing] behind” the decision mean that a reviewing court may not determine, after considering evidence, whether the facts support the Government’s reason?

(a) The facial legitimacy of the reason. In Mandel, the Supreme Court provided no elaboration of “facially legitimate” or “bona fide.” The reason given for denial of a waiver was that Mandel had exceeded the bounds of his visa on a previous visit to the United States. See id. at 759, 92 S.Ct. 2576. The Court said only that with this statement of a reason, “the Attorney General validly exercised the plenary power that Congress delegated to the Executive.” Id. at 769, 92 S.Ct. 2576. It should be noted that, unlike a visa denial, where statutory provisions specify grounds for inadmissibility, no statute specifies any grounds for the discretionary decision to decline to waive inadmissibility. The “reason” relied on in Mandel was what the alien had done, i.e., exceeded the bounds of a prior visa.

*126 The decisions entertaining First Amendment challenges to visa denials after Mandel have concerned statutory grounds of inadmissibility. In Bustamante, the visa was denied pursuant to § 1182(a)(2)(C), which renders inadmissible an alien whom the consular officer has reason to believe has trafficked in a controlled substance. See Bustamante, 531 F.3d at 1060-61. The Ninth Circuit ruled that this was a facially legitimate reason because it was a statutory basis for inadmissibility. See id. at 1062 (citing § 1182(a)(2)(C)). The Court also ruled that the requirement of a “bona fide” reason was satisfied by the absence of an allegation that the consular officer “did not in good faith believe the information he had.” Id.

In Adams, the visa was denied pursuant to 8 U.S.C. § 1182(a)(28)(F) (1988) (repealed), which rendered inadmissible aliens “who advocate or teach” various forms of terrorism. See Adams, 909 F.2d at 646. The consular officer determined that Adams fit within that category “because of his advocacy of, and personal involvement with, IRA terrorist violence, including participation in bombings.” See id. The First Circuit ruled that the statutory ground and the alien’s conduct together provided the “facially legitimate and bona fide” reason for the visa denial.

In Abourezk II, the visas were denied pursuant to 8 U.S.C. § 1182(a)(27) (1982) (repealed), which rendered inadmissible aliens who “seek to enter the United States ... to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety or security of the United States.” The State Department determined that the aliens fit within that category “because of their personal status as officials of governments or organizations which are hostile to the United States.” Abourezk v. Reagan, 592 F.Supp. 880, 888 (D.D.C.1984) (“Abourezk I”). The D.C. Circuit appeared to assume that a statutory ground of inadmissibility and conduct by the visa applicant fitting within the statute would satisfy the Mandel standard, but remanded for reconsideration of whether the statutory
ground had been properly construed. See Abourezk II, 785 F.2d at 1053-60.

[3] [4] We think the identification of both a properly construed statute that provides a ground of exclusion and the consular officer’s assurance that he or she “knows or has reason to believe” that the visa applicant has done something fitting within the proscribed category constitutes a facially legitimate reason. See § 1201(g); 22 C.F.R. § 40.6. We also conclude, in agreement with the Ninth Circuit, that the absence of an allegation that the consular officer acted in bad faith satisfies the requirement that the reason is bona fide.

(i) Construction of the relevant statutory provisions. The asserted statutory basis for the denial of Ramadan’s visa was section 1182(a)(3)(B)(i)(I), which renders ineligible an applicant who “has engaged in a terrorist activity.” Subsection 1182(a)(3)(B)(iv)(VI)(dd) defines “engage in terrorist activity” to include “to commit an act that the actor knows, or reasonably should know, affords material support, including ... funds ... to a terrorist organization ... described in clause (vi)(III) ... unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.” Clause (vi)(III) defines “terrorist organization” to mean “a group ... which engages in ... the activities described in subclauses (I) through (VI) of clause (iv),” which include funding a terrorist organization. Three issues arise as to whether the consular officer properly construed and applied these statutory provisions *127 to Ramadan. These issues concern (A) retroactivity, (B) the knowledge requirement, and (C) the “unless” clause.

[5] (A) Retroactivity. The first issue concerns retroactivity. The Government acknowledges that, prior to enactment of the REAL ID Act in 2005, the “material support” provision of the INA did not apply to aliens who provided funds to what the Government calls “undesignated terrorist organizations” that in turn provided funds to terrorist organizations. See Brief for Defendants-Appellees at 33-34 n.*. It is undisputed that Ramadan’s contribution of $1,336 to ASP, which in turn gave money to Hamas, occurred prior to 2005.

[6] (B) Requirement of knowledge. […]

[7] (C) The “unless” clause. The third statutory issue concerns the proper application of the “unless” clause. This clause specifies the circumstance under which an alien can exclude himself from § 1182(a)(3)(B)(iv)(VI)(dd), which would otherwise render him ineligible for a visa because he provided material support to a terrorist organization “unless [he] can demonstrate by clear and convincing evidence that [he] did not know, and should not reasonably have known, that the organization was a terrorist organization.” The existence of the opportunity for the visa applicant to prove that he lacked actual or constructive knowledge that the recipient of his funds was a terrorist organization implies that, before a decision on *132 the visa application is made, the alien must be confronted with the allegation that he knew he had supported a terrorist organization. Otherwise, he has no way of understanding what it is that he must show he did not know or should not have known.

We have agreed with the Government that Clause (VI) imposed no requirement that the consular officer find that Ramadan knew that ASP had funded Hamas, and that ASP was therefore itself a terrorist organization. But the “unless” clause, properly construed, required the consular officer to confront Ramadan with the claim that he knew that his donations to ASP constituted material support to a terrorist organization because it had funded Hamas, and then afford him the opportunity to negate such knowledge.13 Ramadan’s case is different from typical situations, likely contemplated by Congress in enacting the “unless” clause, where the recipient of funds is a terrorist organization because of its own terrorist activities. See § 1182(a)(3)(B)(iv)(I)-(III). ASP is a conduit for funds to Hamas. Thus, for Ramadan to have a meaningful opportunity to negate knowledge, he had to be confronted with the claim that he knew or should have known that ASP provided funds to Hamas.

13 We have no occasion to consider how the “unless” clause should be interpreted in a case where, because of criminal or security grounds, the consular officer uses the authority provided in section 1182(b)(3) not to inform a visa applicant of an adverse determination or the specific provisions under which a determination of inadmissibility was made. In Ramadan’s case, he was notified of the adverse determination and the provisions

In the end, the plain meaning of the “before, on, or after” phrase in subsection 103(d)(2) renders the REAL ID amendments applicable to Ramadan’s acts occurring before 2005.
under which it was made.

Our record is unclear as to whether the consular officer confronted Ramadan with a claim that he had knowingly supported a terrorist organization, ASP, before affording him an opportunity to satisfy the “unless” clause. The Declaration of Martz, the consular officer, does not say that he did so. What the record thus far discloses are the following circumstances. On July 28, 2004, Ramadan’s H-1B visa was “prudentially” revoked. See Kinder Decl., ¶ 7. “Prudential” revocation occurs when some derogatory information is received, but the revocation is not a determination of inadmissibility. See id. ¶¶ 5, 6. On August 25, 2004, a spokesperson for the DHS stated publicly that the visa had been revoked “because of a section in federal law that applies to aliens who have used a position of prominence within any country to endorse or espouse terrorist activity.” See Ramadan Aff. II ¶ 6.

In September 2005, Ramadan applied for a B1/B2 non-immigrant visa at the U.S. Embassy in Bern. He was interviewed at the Embassy in December (and perhaps in September as well), where he was asked questions. See Ramadan Aff. II ¶ 8. As far as the current record discloses, his only prior awareness of grounds for inadmissibility was the 2004 claim, since abandoned, that he had endorsed or espoused terrorist activity.

On September 19, 2006, Martz denied the visa because of “Ramadan’s provision of material support to undesignated terrorist organizations, ASP and CBSP.” See Kinder Decl. ¶ 12. Nearly a year after being interviewed in Bern, Ramadan learned for the first time from Kinder’s letter dated September 19, 2006, that the visa had been denied because of Ramadan’s donations to organizations “which you knew, or reasonably should have known, provided funds to Hamas.” Martz has stated the following concerning Ramadan’s knowledge:

14 The Government seems to place no reliance on donations to CBSP, donations that Ramadan has denied. See [page 10 n. 5], supra.

15 Whereas the District Court thought the first component of the knowledge requirement concerned only whether Ramadan knew that he had contributed money to ASP, the consular officer properly understood that component to require that Ramadan knew that providing money to ASP would afford material support to ASP.

16 In requiring adequate indication that the “unless” clause was properly applied, we point out that, while consular officers should apply the clause properly in all instances of visa applications, judicial review of whether proper application occurred is limited to cases cognizable in a federal court under Mandel.

However, when the officer stated that Ramadan did not satisfy the “unless” clause, he gave no indication that he had confronted Ramadan with the claim that Ramadan knew that ASP funded Hamas. Without such an indication, we have no way of knowing whether the officer correctly applied the “unless” clause, and hence the proffered reason for the denial has not yet been shown to conform to the relevant statute and to be facially legitimate.

The need to confront Ramadan with a claim that he knew ASP funded Hamas is especially important in this case because of the timing of Ramadan’s contributions. Ramadan’s contributions were made between 1998 and 2002, before the Government officially listed ASP as a “Specially Designated Global Terrorist” in 2003. See Press Release, U.S. Dep’t of Treasury, Office of Public Affairs, “U.S. Designates Five Charities Funding Hamas and Six Senior Hamas Leaders as Terrorist Entities” (August 22, 2003). That designation was motivated in part by the fact that “too many innocent donors who intend for their money to be used to provide humanitarian services here or abroad, are unwittingly funding acts of violence when these funds are diverted to terrorist causes.” Id. Thus, Ramadan’s claim that he lacked the requisite knowledge cannot be dismissed out of hand. Moreover,
Ramadan had previously been told that he was suspected of being inadmissible because of the “endorse or espouse” provision. He therefore had no reason to think, in the 2005 interview, that he needed to negate knowledge that he knew ASP had funded Hamas. Confronting him with a claim of knowledge was necessary to make the “unless” clause meaningful, especially in a case where Ramadan, now alerted to the Government’s claim, has evidence negating his knowledge, at the time he made contributions to ASP, that ASP had funded Hamas.

In construing the “unless” clause to require confronting the visa applicant with the allegation of the knowledge he needs to negate, we are not requiring the consular officer to conduct a mini trial. It will suffice for the consular officer to state the knowledge alleged to render the visa applicant ineligible and then afford the applicant a reasonable opportunity to present evidence endeavoring to meet the “clear and convincing” negation of knowledge. 17

17 Unless the allegation of knowledge has been conveyed to the applicant prior to his appearance before the consular officer, it will normally be advisable to afford the applicant at least a brief opportunity to return with his available evidence. 18

The Department of State might wish to consider amending the Foreign Affairs Manual to make clear the consular officer’s responsibilities in properly applying the “unless” clause. That manual currently states:

In cases where consular officers must determine whether an alien knows or should have known that an organization is a terrorist organization, officers must consider several factors. First, facts particular to the individual, such as his or her residence, profession, or education, may permit a conclusion that the applicant knows, or should have known, that the organization is a terrorist organization. Secondly, officers must consider whether information about the organization is so widely known in the area that most persons know that the organization is engaged in terrorist activities. Other factors may also be relevant....

FAM § 40.32, N2.3 (Note) (May 3, 2005)

The Manual does not advise that the officer should confront the alien with an allegation of knowledge that the recipient of his funds is a terrorist organization before affording him an opportunity to satisfy the “unless” clause.

We will therefore remand to afford the Government an opportunity to ascertain whether the consular officer can assure the District Court that he confronted Ramadan with the allegation of knowledge that ASP had funded Hamas and provided him some opportunity thereafter to negate such knowledge, or, if not, to conduct a renewed visa hearing now that Ramadan is aware of the knowledge he must negate.

(b) The adequacy of evidence to support the reason.

The second issue concerning scope of review is whether, on a First Amendment challenge to a visa denial, a reviewing court need only satisfy itself that the conduct alleged fits within the statutory provisions relied upon as the reason for the visa denial, or may determine if there is evidence that either supports the reason or at least supports the consular officer’s reasonable belief that the reason exists. See § 1201(g).

Mandel appears to foreclose any inquiry as to supporting evidence by stating that courts will not “look behind” the decision of the Executive Branch. See 408 U.S. at 770, 92 S.Ct. 2576. This statement was made with respect to the Attorney General’s decision to deny a waiver of inadmissibility. The Court did not explicitly state whether the decision of the consular officer to deny the visa was...
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...similarly insulated from an evidentiary inquiry, but nothing in the Court’s opinion suggests that such inquiry would be permitted. The absence of an explicit statement precluding an evidentiary inquiry as to the consular officer’s decision appears to be due to the Mandel plaintiffs’ concession that the Government was entitled to “conclude that Dr. Mandel’s Marxist economic philosophy falls within the scope of” subsection *135 212(a)(28)(D), which rendered inadmissible an alien who advocates “the economic, governmental, and international doctrines of world communism.” See id. at 756 n. 3, 92 S.Ct. 2576."

In dissent, Justice Marshall decried the Court’s unwillingness to take “[e]ven the briefest peek” behind the reason for the Attorney General’s waiver denial. See id. at 778 (Marshall, J., with whom Brennan, J. joins, dissenting). In his view, the Attorney General’s reason—that Mandel had exceeded the terms of his prior visa—was completely unsupported by the record and put in issue by the Department of State’s acknowledgment that Mandel “‘may not have been aware of the conditions and limitations attached to the [previous] visa issuance.’” Id. (quoting Department’s letter to Mandel’s counsel).

The court of appeals’ decisions entertaining First Amendment challenges to visa denials have varied as to the appropriateness of an evidentiary inquiry into whether the facts support the consular officer’s reason. In Bustamante, the Ninth Circuit made no inquiry as to whether the facts supported the consular’s conclusion that the visa applicant was a drug trafficker. Acknowledging that Bustamante denied drug trafficking, see 531 F.3d at 1062, the Court stated, “Under Mandel’s limited inquiry, the allegation that the Consulate was mistaken about [Bustamante’s] involvement with drug trafficking ... fails to state a claim upon which relief could be granted.” Id. at 1063.

In Adams, the First Circuit made some examination of evidence proffered by the Government, but did so only for the limited purpose of determining whether the evidence was sufficient “to support a finding of ‘reasonable belief’” that the visa had been denied on a valid statutory ground. See Adams, 909 F.2d at 649. Although the District Court had made findings that the visa applicant made statements providing a facially legitimate basis for his exclusion, the First Circuit declined to review those findings, concluding only that “the State Department had competent evidence upon which it could reasonably find that Adams participated in terrorist activities.” Id. at 648 n. 4.

In Abourezk II, the D.C. Circuit’s ruling explicitly concerned only the issues of statutory interpretation. The Court concluded that the District Court had erred in its construction of the provision under which the visa had been denied. See Abourezk II, 785 F.2d at 1053-1060. Nevertheless, the Court of Appeals appears to have contemplated some examination of evidence underlying the reason for the visa denial. At the outset the Court stated that “questions of material fact remain.” Id. at 1047. Later the Court expressed concern about the District Court’s reliance on “in camera ex parte evidence,” id. at 1060, and cautioned the Court, in the proceedings on remand, “to make certain that plaintiffs are accorded access to the decisive evidence to the fullest extent possible, without jeopardizing legitimately raised national security interests.” Id. (emphasis added).

Two district court decisions declined to make any inquiry as to evidence supporting reasons for a visa denial. In El-Werfalli v. Smith, 547 F.Supp. 152 (S.D.N.Y.1982), the Court initially ruled that the reasons provided for a visa denial were “so general,” id. at 154, that examination of classified materials was required to determine if the specific reasons fit within the statutory ground of inadmissibility. Having satisfied itself that they did, however, the Court undertook no examination of evidence to determine whether the facts supported the asserted reasons. The Court noted that the Mandel standard permits the Court “to inquire as to the Government’s reasons, but proscribes its probing into their wisdom or basis.” *136 Id. at 153 (emphasis added); see also Azzouka v. Sava, 777 F.2d 68, 76 (2d Cir.1985) (noting with approval the “procedures and standards applied in El-Werfalli”).

Similarly, in Abourezk I, prior to the D.C. Circuit’s remand because of disagreement as to construction of the relevant statutory ground of inadmissibility, see Abourezk II, 785 F.2d at 1053-1060, the District Court examined the Government’s in camera submission only to identify the Government’s particularized reason, in light of the “conclusory” reason that the aliens’ entry “would have been prejudicial to the conduct of the foreign affairs of the United States,” Abourezk I, 592 F.Supp. at 886 (quoting affidavit of Under Secretary of State). There was no inquiry as to whether the particularized reason—that the aliens were officials of governments or organizations...
hostile to the United States—was factually supported. See id. at 888. See also NGO Committee on Disarmament v. Smith, 1982 U.S. Dist. LEXIS 13583 (S.D.N.Y.) (June 10, 1982) (Leval, J.) (inquiry as to specific reasons for exercise of discretion not to waive inadmissibility, but not as to evidence supporting reasons), aff’d mem., 697 F.2d 294 (2d Cir.1982).

The Appellants endeavor to draw support for an evidentiary inquiry from the First Circuit’s decision in Allende. However, that decision declared a visa denial invalid because the supporting affidavit made clear that the denial had been based on the applicant’s prior speeches, activity that the Court ruled was an impermissible basis under then-existing law. See Allende, 845 F.2d at 1120-21. The Court had no occasion to consider whether the proffered reason was supported by evidence.

The Appellants urge an evidentiary inquiry in reliance on decisions that did not nullify visa denials. They contend that our Court required “some degree of factual review,” Reply Br. for Appellants at 8 n. 5, in Bertrand v. Sava, 684 F.2d 204 (2d Cir.1982). However, that decision, involving discretionary denials of parole for aliens with pending asylum applications, required only a record indicating that discretion had been exercised, and stated that the parole denials would be upheld even on the assumption that some of the reasons for the denials were “inaccurate.” See id. at 213. Nevertheless, our Court did not fault the District Court for taking evidence, some of which appears to have concerned whether the District Director’s reasons were factually supportable. What required reversal of the District Court’s decision rejecting the denials of parole was our Court’s conclusion that the District Judge had substituted his judgment for that of the District Director. See id. at 213-18. Ultimately, we remanded, not for an evidentiary inquiry, but to permit the District Director to exercise his discretion again in light of changed circumstances.

More persuasive is the Tenth Circuit’s decision in Marczak v. Greene, 971 F.2d 510 (10th Cir.1992), concerning denial of parole pending exclusion proceedings. On review of the parole denial decision, the Court applied the Mandel standard of a “facially legitimate and bona fide” reason. See id. at 516-17. In doing so, the Court *137 said that it was “tempting to conclude from the broad language of the test that a court applying the ‘facially legitimate and bona fide’ standard would not even look to the record to determine whether the agency’s statement of reasons was in any way supported by the facts.” Id. at 517. However, the Court rejected such a restricted review and concluded that the District Director’s decision to deny parole “must be at least reasonably supported by the record,” id., and remanded to afford the Director an opportunity to persuade the District Court that the reasons for the decision were “factually supportable,” id. at 519.

Somewhat helpful to the Appellants, but less supportive than Marczak, is the First Circuit’s decision in Amanullah v. Nelson, 811 F.2d 1 (1st Cir.1987), which also concerned review of a decision denying parole pending exclusion proceedings. The Court appears to have equated Mandel’s standard of “a facially legitimate and bona fide reason” with an “abuse of discretion” standard, implying that some inquiry is permissible to see if the reasons advanced are not arbitrary in the sense of lacking at least some factual support. However, the Court confined judicial inquiry to the facts appearing in the administrative record, see id. at 17, and rejected the aliens’ claim to an evidentiary hearing in the District Court, see id. at 16-17.

The Ninth Circuit’s decision in Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir.2006), also cited by the Appellants, is less helpful. First, the Court stated that if “a facially legitimate and bona fide reason” is given for a denial of parole pending immigration proceedings, “the denial of parole is essentially unreviewable.” Id. at 1082. Second, in granting parole, the Court ruled that continued detention after five years was unlawful and that the evidence favoring release was undisputed. See id. at 1083.

We doubt that the judicial decisions reviewing administrative denial of parole are even applicable to consular denial of a visa. Although several courts purport
to apply the Mandel standard when reviewing denials of parole, the parole and visa decisions are significantly different. Parole concerns release from detention; a visa concerns admission into this country. It is understandable that some courts exercising habeas jurisdiction would make at least a limited factual inquiry as to a local District Director’s ground for confining an alien. But a similar inquiry does not seem appropriate concerning the visa decisions of consular officers stationed throughout the world.

We conclude that we have to take literally the statement in Mandel that courts may not “look behind” exclusion decisions, whether the decision is the Attorney General’s exercise of discretion to waive inadmissibility or the consular officer’s decision that a statutory ground of inadmissibility applies to the visa applicant, at least in the absence of a well supported allegation of bad faith, which would render the decision not bona fide. Thus, to whatever extent the District Court may have assessed Ramadan’s evidence negating knowledge, it exceeded its proper role.

The only remaining issue is the District Court’s dismissal of the challenge to the “endorse or espouse” provision. The Court correctly rejected this claim for lack of standing.

### Conclusion

Since Ramadan’s undisputed conduct—making donations that he knew afforded material support to ASP—fits within the statute relied upon to deny him a visa, the only issue requiring a remand is further consideration of whether the consular officer properly construed and applied the “unless” clause of § 1182(a)(3)(B)(iv)(VI)(dd) by confronting Ramadan with the allegation that he knew that ASP provided funds to Hamas and then providing him with a reasonable opportunity to demonstrate, by clear and convincing evidence, that he did not know, and should not have reasonably known, of that fact. Accordingly, we remand for further proceedings consistent with this opinion.

### III. The “Endorse or Espouse” Provision
Bustamante v. Mukasey, 531 F.3d 1059 (2008)  

531 F.3d 1059  
United States Court of Appeals,  
Ninth Circuit.

Alma Lupe BUSTAMANTE; Jose Jesus  
Bustamante, Plaintiffs–Appellants,  
v.  
Michael MUKASEY, Attorney General; Michael  
Chertoff, Secretary, Department of Homeland  
Security; United States Citizenship and Immigration  
Services; Al Gallman, Acting District Director,  
Phoenix; Drug Enforcement Agency; Karen Tandy,  
Administrator; Condoleezza Rice, Secretary of  
State; Maurice Parker, Consul General of the United  
States, City of Ciudad Juarez, Mexico; Eric Cruz,  
United States Consular Official, in his official  
and individual capacities, Defendants–Appellees.

No. 06–17228. | Argued and Submitted      

Synopsis

Background: Alien from Mexico and his American citizen  
wife sued consular official and other government officials,  
claiming violation of procedural due process rights by  
allegedly conditioning grant of alien’s visa on his agreement  
to become informant. The United States District Court for  
the District of Arizona, Roslyn O. Silver, J., dismissed on  
grounds that decisions of consular officers to grant or deny  
visas were not reviewable. Alien and wife appealed.

Holdings: The Court of Appeals, Silverman, Circuit Judge,  
held that:

[1] consulate official’s visa denial was reviewable due to  
citizen’s liberty interest in marriage giving rise to procedural  
due process right, but

[2] officer had facially valid and bona fide reason for denying  
visa.

Affirmed.

West Headnotes (5)

Visa Proceedings

Judicial review and intervention

[3] Constitutional Law  
Familial association, integrity, and privacy in general

Judicial review and intervention

Generally, a consular official’s decision to issue  
or withhold a visa is not subject either to  
administrative or judicial review, with a limited  
exception where the denial of a visa implicates  
the constitutional rights of American citizens.

14 Cases that cite this headnote

A United States citizen raising a constitutional  
challenge to the denial of a visa to an alien is  
entitled to a limited judicial inquiry regarding  
the reason for the decision, and as long as the  
reason given is facially legitimate and bona fide,  
the decision will not be disturbed.

19 Cases that cite this headnote

Freedom of personal choice in matters of  
marrige and family life is one of the liberties  
protected by the Due Process Clause. U.S.C.A.  
Const.Amend. 5.

2 Cases that cite this headnote

United States citizen’s claim that protected  
liberty interest in her marriage gave rise to her  
procedural due process right for adjudication of  
her alien husband’s visa application warranted
limited judicial review to determine whether consular official had facially legitimate and bona fide reason for denying visa. U.S.C.A. Const.Amend. 5.

21 Cases that cite this headnote

Aliens, Immigration, and Citizenship

Visa Proceedings

Constitutional Law

Admission and exclusion; deportation

Consular official's denial of alien's visa on grounds that consulate “had reason to believe” that alien was drug trafficker was facially legitimate and bona fide reason for denying visa, as required to comport with due process rights of alien's wife, who had protected liberty interest in her marriage giving rise to her right to constitutionally adequate procedures in adjudication of husband's visa application, since drug trafficking was statutory basis for inadmissibility, and alien and wife did not allege that official lacked good faith belief in information he had received from government investigator about alien's alleged drug trafficking. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 212(a)(2)(C), 8 U.S.C.A. § 1182(a)(2)(C).

16 Cases that cite this headnote

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Opinion

SILVERMAN, Circuit Judge:

We hold today, as we did twenty-two years ago in Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 971 (9th Cir.1986), that ordinarily, a consular official's decision to deny a visa to a foreigner is not subject to judicial review. However, when a U.S. citizen's constitutional rights are alleged to have been violated by the denial of a visa to a foreigner, we undertake a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason. In this case, the consular official offered a facially valid reason for denying the visa: he had reason to believe that the visa applicant was a drug trafficker. Furthermore, it was not alleged that the consular official did not have a good faith belief in the truth of the information on which he relied.

I. FACTS

Alma Bustamante is a citizen of the United States and resides in Yuma, Arizona. Her husband, Jose Bustamante, is a citizen of Mexico and resides in San Luis Rio Colorado, Sonora, Mexico. Jose has a business in Mexico and for many years commuted between Mexico and the United States using a border-crossing card issued by the former Immigration and Naturalization Service.

Seeking to obtain lawful permanent resident status for her husband, Alma filed an immediate relative petition on Jose's behalf. Jose applied for an immigrant visa at the United States Consulate in Ciudad Juarez, Mexico. The Bustamantes were informed by Eric Cruz, a consular official, that the Consulate had reason to believe that Jose was trafficking in illegal drugs. By virtue of 8 U.S.C. § 1182(a)(2)(C), “[a]ny alien who the consular officer or the Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance ... is inadmissible.” Cruz refused
Bustamante v. Mukasey, 531 F.3d 1059 (2008)

to reveal the information upon which this determination was based, asserting that the information was secret.

*1061 At a subsequent meeting in Mexico with officials of the U.S. Drug Enforcement Administration, Jose was asked to become an informant. The Bustamantes were told that if Jose agreed to cooperate, his problems obtaining a visa "would go away." The Bustamantes were also told that if Jose declined to cooperate, he would never obtain a visa and would never become a lawful permanent resident of the United States. Jose refused to become an informant, and his visa application was denied on March 25, 2003. Consular officials also revoked Jose's border crossing privileges.

In a letter dated September 9, 2003, Cruz replied to an inquiry sent by a lawyer representing the Bustamantes. In explaining the Consulate's decision, Cruz referred to a letter, dated March 5, 2003 and written by the "Resident Agent-in-Charge of our local Drug Enforcement Administration Office," that contained "derogatory information" to support the finding that there was reason to believe that Jose was a controlled substance trafficker.

On January 6, 2006, the Bustamantes filed an action in district court against Cruz and a number of other U.S. government officials, alleging that Jose has not trafficked in illegal drugs and that the consular officials improperly conditioned the granting of a visa on Jose's agreement to become an informant. The Bustamantes asserted in the complaint that there was reason to believe that Jose was a controlled substance trafficker.

The defendants moved to dismiss and for summary judgment, asserting lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. Noting that the defendants had provided a facially valid reason for the visa denial, the district court, relying on Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970 (9th Cir.1986), dismissed the complaint on the grounds that the decisions of consular officers to grant or deny visas are not subject to judicial review; all other motions were denied as moot. The Bustamantes timely appealed, asserting that the district court failed to recognize an exception to the doctrine of consular nonreviewability applicable where a U.S. citizen raises a constitutional challenge to the consular decision.

II. ANALYSIS

[1] "[I]t has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review." Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 971 (9th Cir.1986). However, courts have identified a limited exception to the doctrine where the denial of a visa implicates the constitutional rights of American citizens. See, e.g., Adams v. Baker, 909 F.2d 643, 647–48 (1st Cir.1990); Burrafato v. United States Dep't. of State, 523 F.2d 554, 556–57 (2d Cir.1975); Saavedra Bruno v. Albright, 197 F.3d 1153, 1163 (D.C.Cir.1999). The exception is rooted in Kleindienst v. Mandel, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972), a suit brought by American citizens challenging on First Amendment grounds the exclusion of a Belgian national who was an advocate of "world communism." The Supreme Court specifically noted that an unadmitted and nonresident alien himself had no right of entry, and that the case came down to the "narrow issue" whether the First Amendment right to "receive information and ideas" conferred upon the American citizens the ability to compel Mandel's admission. Mandel, 408 U.S. at 762, 92 S.Ct. 2576. The Court acknowledged that First Amendment rights were implicated, but emphasized the longstanding principle that Congress has plenary power to make policies and rules for the exclusion of aliens. Id. at 765–66, 92 S.Ct. 2576. Noting that Congress had delegated to the executive conditional exercise of this power with regards to certain classes of excludable aliens, the Court held that "when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.” Id. at 770, 92 S.Ct. 2576.

[2] [3] [4] [5] Joining the First, Second, and D.C. Circuits, we hold that under Mandel, a U.S. citizen raising a constitutional challenge to the denial of a visa is entitled to a limited judicial inquiry regarding the reason for the decision. As long as the reason given is facially legitimate and bona fide the decision will not be disturbed. 408 U.S. at 770, 92 S.Ct. 2576. 1 Here, Alma Bustamante asserts that she has a protected liberty interest in her marriage that gives rise to a right to constitutionally adequate procedures in the adjudication of her husband's visa application. The Supreme Court has deemed "straightforward" the notion that
“[t]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–640, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); see also *Israel v. INS*, 785 F.2d 738, 742 n. 8 (9th Cir.1986). Presented with a procedural due process claim by a U.S. citizen, we therefore consider the Consulate's explanation for the denial of Jose's visa application pursuant to the limited inquiry authorized by *Mandel*. Concluding that, on the record presented to us, the reason was both facially legitimate and bona fide, we affirm the judgment of the district court.

As set forth in the complaint, Jose was denied a visa on the grounds that the Consulate “had reason to believe” that he was a controlled substance trafficker. This is plainly a facially legitimate reason, as it is a statutory basis for inadmissibility. 8 U.S.C. § 1182(a)(2)(C). The Bustamantes concede this, but note that the district court did not also address whether the reason given for the visa denial was bona fide as well as facially legitimate. They urge that in order to complete the analysis we must remand to the district court for factual development, during which the defendants will be required to present specific evidence to substantiate the assertion that Jose was a drug trafficker. We decline to do so, because the complaint fails to make an allegation of bad faith sufficient to withstand dismissal.

While the Bustamantes alleged in their complaint that Jose is not and never has been a drug trafficker, they failed to allege that the consular official did not in good faith believe the information he had. It is *not* enough to allege that the consular official's information was incorrect. Furthermore, the Bustamantes' allegation that Jose was asked to become an informant in exchange for immigration benefits fails to allege bad faith; if anything, it reflects the official's sincere belief that Jose had access to information that would be valuable in the government's effort to combat drug trafficking. Moreover, the Bustamantes do not allege that Jose was asked to do anything illegal or improper. Under *Mandel*'s limited inquiry, the allegation that the Consulate was mistaken about Jose's involvement with drug trafficking, and offered to make a deal with Jose on the basis of this mistaken belief, fails to state a claim upon which relief could be granted.

Nor does it appear that the defect can be cured by amending the complaint. The Bustamantes themselves provided the district court with a letter from the consular official identifying the head of the local DEA office as the source of his information that Jose was involved in drug trafficking. We express no opinion on the accuracy of this information; what is significant is that the consular official relied on a fellow government official assigned to investigate illicit drug trafficking. The evidence that Jose was involved in drug trafficking came from the agent in charge of the DEA office. The Bustamantes do not allege that the transfer of information between the DEA and the Consulate never took place, or that the Consulate acted upon information it knew to be false. On the record before us, there is no reason to believe that the consular officer acted on this information in anything other than good faith.

The allegations in the complaint, taken as true, as well as evidence presented by the Bustamantes themselves, illustrate that the reason given by the consular official in support of the visa denial was both facially legitimate and bona fide. The district court's judgment is therefore **AFFIRMED**.

Parallel Citations


Footnotes

* The Honorable Roger T. Benitez, United States District Judge for the Southern District of California, sitting by designation.

1 We are unable to distinguish *Mandel* on the grounds that the exclusionary decision challenged in that case was not a consular visa denial, but rather the Attorney General's refusal to waive *Mandel*'s inadmissibility. The holding is plainly stated in terms of the power delegated by Congress to “the Executive.” The Supreme Court said nothing to suggest that the reasoning or outcome would vary according to which executive officer is exercising the Congressionally-delegated power to exclude. Moreover, holding that *Mandel* applies only to cases concerning the Attorney General's refusal to grant a waiver is inconsistent with those cases in which we have
been asked to review a consular official’s denial of a visa, and have cited Mandel in declining to do so. See, e.g., Li Hing of Hong Kong, Inc., 800 F.2d at 971, Ventura–Escamilla v. INS, 647 F.2d 28, 30 (9th Cir.1981).
### Statutes Related to Visa Eligibility

#### Key


** - indicates that neither MOU nor 6 U.S.C. § 236 address the statutory provision

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1 Copyright 2013(c), National Immigration Project of the National Lawyers Guild.
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If DHS exercises authority to refuse visa, DHS must provide DOS with sufficient information (**including factual basis for the refusal**) for DOS Secy to fulfill reporting requirement under 22 U.S.C. § 2723.

See below for responsibilities relating to specific aspects of this ground of inadmissibility.

**Statutes Related to Visa Eligibility** 

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(C) misrepresentation, including false USC claims; (D) stowaways; (E) smugglers; (F) civil doc fraud; and (G) student visa abusers

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§ 236. Visa issuance

(a) Definition. In this subsection, the term "consular office" has the meaning given that term under section 101(a)(9) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(9)).

(b) In general. Notwithstanding section 104(a) of the Immigration and Nationality Act (8 U.S.C. 1104(a)) or any other provision of law, and except as provided in subsection (c) of this section, the Secretary--

(1) shall be vested exclusively with all authorities to issue regulations with respect to, administer, and enforce the provisions of such Act, and of all other immigration and nationality laws, relating to the functions of consular officers of the United States in connection with the granting or refusal of visas, and shall have the authority to refuse visas in accordance with law and to develop programs of homeland security training for consular officers (in addition to consular training provided by the Secretary of State), which authorities shall be exercised through the Secretary of State, except that the Secretary shall not have authority to alter or reverse the decision of a consular officer to refuse a visa to an alien; and

(2) shall have authority to confer or impose upon any officer or employee of the United States, with the consent of the head of the executive agency under whose jurisdiction such officer or employee is serving, any of the functions specified in paragraph (1).

(c) Authority of the Secretary of State.

(1) In general. Notwithstanding subsection (b), the Secretary of State may direct a consular officer to refuse a visa to an alien if the Secretary of State deems such refusal necessary or
advisable in the foreign policy or security interests of the United States.

(2) Construction regarding authority. Nothing in this section, consistent with the Secretary of Homeland Security’s authority to refuse visas in accordance with law, shall be construed as affecting the authorities of the Secretary of State under the following provisions of law:

(A) Section 101(a)(15)(A) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15) (A)).
(B) Section 204(d)(2) of the Immigration and Nationality Act (8 U.S.C. 1154) (as it will take effect upon the entry into force of the Convention on Protection of Children and Cooperation in Respect to Inter-Country adoption).
(D) Section 212(a)(3)(B)(i)(VI) of the Immigration and Nationality Act (8 U.S.C. 1182(a) (3)(B)(i)(VI)).
(E) Section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act (8 U.S.C. 1182(a) (3)(B)(vi)(II)).
(F) Section 212(a)(3)(C) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(C)).
(G) Section 212(a)(10)(C) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(10) (C)).
(H) Section 212(f) of the Immigration and Nationality Act (8 U.S.C. 1182(f)).
(I) Section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a)).
(J) Section 237(a)(4)(C) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(4)(C)).
(K) Section 401 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (22 U.S.C. 6034; Public Law 104-114).
(L) Section 613 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1999 [unclassified] (as contained in section 101(b) of division A of Public Law 105-277) (Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999); 112 Stat. 2681; H.R. 4328 (originally H.R. 4276) as amended by section 617 of Public Law 106-553.
(M) Section 103(f) of the Chemical Weapon Convention Implementation Act of 1998 (112 Stat. 2681-865) [22 USCS § 6713(f)].
(N) Section 801 of H.R. 3427, the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001, as enacted by reference in Public Law 106-113 [8 USCS § 1182e].
(O) Section 568 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002 (Public Law 107-115) [unclassified].
(P) Section 51 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2723).

(d) Consular officers and chiefs of missions.

(1) In general. Nothing in this section may be construed to alter or affect--

(A) the employment status of consular officers as employees of the Department of State; or
(B) the authority of a chief of mission under section 207 of the Foreign Service Act of 1980 (22 U.S.C. 3927).
(2) Construction regarding delegation of authority. Nothing in this section shall be construed to affect any delegation of authority to the Secretary of State by the President pursuant to any proclamation issued under section 212(f) of the Immigration and Nationality Act (8 U.S.C. 1182(f)), consistent with the Secretary of Homeland Security's authority to refuse visas in accordance with law.

(e) Assignment of Homeland Security employees to diplomatic and consular posts.

(1) In general. The Secretary is authorized to assign employees of the Department to each diplomatic and consular post at which visas are issued, unless the Secretary determines that such an assignment at a particular post would not promote homeland security.

(2) Functions. Employees assigned under paragraph (1) shall perform the following functions:

(A) Provide expert advice and training to consular officers regarding specific security threats relating to the adjudication of individual visa applications or classes of applications.

(B) Review any such applications, either on the initiative of the employee of the Department or upon request by a consular officer or other person charged with adjudicating such applications.

(C) Conduct investigations with respect to consular matters under the jurisdiction of the Secretary.

(3) Evaluation of consular officers. The Secretary of State shall evaluate, in consultation with the Secretary, as deemed appropriate by the Secretary, the performance of consular officers with respect to the processing and adjudication of applications for visas in accordance with performance standards developed by the Secretary for these procedures.

(4) Report. The Secretary shall, on an annual basis, submit a report to Congress that describes the basis for each determination under paragraph (1) that the assignment of an employee of the Department at a particular diplomatic post would not promote homeland security.

(5) Permanent assignment; participation in terrorist lookout committee. When appropriate, employees of the Department assigned to perform functions described in paragraph (2) may be assigned permanently to overseas diplomatic or consular posts with country-specific or regional responsibility. If the Secretary so directs, any such employee, when present at an overseas post, shall participate in the terrorist lookout committee established under section 304 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (8 U.S.C. 1733).

(6) Training and hiring.

(A) In general. The Secretary shall ensure, to the extent possible, that any employees of the Department assigned to perform functions under paragraph (2) and, as appropriate, consular officers, shall be provided the necessary training to enable them to carry out such functions, including training in foreign languages, interview techniques, and fraud detection techniques, in conditions in the particular country where each employee is assigned, and in other appropriate areas of study.
(B) Use of Center. The Secretary is authorized to use the National Foreign Affairs Training Center, on a reimbursable basis, to obtain the training described in subparagraph (A).

(7) Report. Not later than 1 year after the date of enactment of this Act [enacted Nov. 25, 2002], the Secretary and the Secretary of State shall submit to Congress--

(A) a report on the implementation of this subsection; and

(B) any legislative proposals necessary to further the objectives of this subsection.

(8) Effective date. This subsection shall take effect on the earlier of--

(A) the date on which the President publishes notice in the Federal Register that the President has submitted a report to Congress setting forth a memorandum of understanding between the Secretary and the Secretary of State governing the implementation of this section; or

(B) the date occurring 1 year after the date of enactment of this Act [enacted Nov. 25, 2002].

(f) No creation of private right of action. 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.

(g) Study regarding use of foreign nationals.

(1) In general. The Secretary of Homeland Security shall conduct a study of the role of foreign nationals in the granting or refusal of visas and other documents authorizing entry of aliens into the United States. The study shall address the following:

(A) The proper role, if any, of foreign nationals in the process of rendering decisions on such grants and refusals.

(B) Any security concerns involving the employment of foreign nationals.

(C) Whether there are cost-effective alternatives to the use of foreign nationals.

(2) Report. Not later than 1 year after the date of the enactment of this Act [enacted Nov. 25, 2002], the Secretary shall submit a report containing the findings of the study conducted under paragraph (1) to the Committee on the Judiciary, the Committee on International Relations, and the Committee on Government Reform of the House of Representatives, and the Committee on the Judiciary, the Committee on Foreign Relations, and the Committee on Government Affairs of the Senate.

(h) Report. Not later than 120 days after the date of the enactment of this Act [enacted Nov. 25, 2002], the Director of the Office of Science and Technology Policy shall submit to Congress a report on how the provisions of this section will affect procedures for the issuance of student visas.

(i) Visa issuance program for Saudi Arabia. Notwithstanding any other provision of law, after the date of the enactment of this Act [enacted Nov. 25, 2002] all third party screening programs in Saudi Arabia shall be terminated. On-site personnel of the Department of Homeland Security
shall review all visa applications prior to adjudication.

**HISTORY:**

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

References in text:
The "Immigration and Nationality Act", referred to in this section, is Act June 27, 1952, ch 477, which appears generally as 8 USCS §§ 1101 et seq. For full classification of such Act, consult USCS Tables volumes.

Effective date of section:
This section took effect 60 days after enactment, pursuant to § 4 of Act Nov. 25, 2002, P.L. 107-296, which appears as 6 USCS § 101 note.

**NOTES:**
Research Guide:
Am Jur: