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CHALLENGING THE DOCTRINE OF CONSULAR NONREVIEWABILITY IN IMMIGRATION CASES

By Donald S. Dobkin*

INTRODUCTION

It has happened to everyone who has ever practiced in the United States immigration field. Your client's petition is approved by the United States Citizen and Immigration Services (USCIS). After a long and arduous process, in most cases several years, your client finally arrives at the United States embassy in his home country for his interview on the appointed date and time. A terse consular officer tells the applicant that his visa will not be issued. The officer may or may not give reasons for the denial. The attorney attempts to contact the embassy by email, telephone, and registered mail, requesting reasons for the failure to issue the visa. No one ever responds.

This sequence is repeated everyday at the more than 150 state department posts worldwide. In fiscal year 2006, 58,794 petitions which had been approved by USCIS, were returned by the consular posts to USCIS for revocation.¹ While the numbers of revocations have reached epidemic proportions in the years since September 11,² most observers would have thought that there was no problem. This is the United States—the

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¹ USCIS, 2006 Statistical Yearbook..

² See, e.g., Stephen J.O. Maltby et al., *Impact of U.S. Security Initiatives of Business Travel*, 1390 *PLI/CORP.* 245, 266 (2003) (noting that September 11 led to “stricter visa issuance and admission policies”); see also, e.g., Maria Zas, *Consular Absolutism: The Need for Judicial Review in the Adjudication of Immigrant Visas for Permanent Residence*, 37 *J. MARSHALL L. REV.* 577, 588–89 (2004) (noting that since September 11, consular officers have been called upon “to defend the country from terrorist attacks” and have as a result had “more incentives to deny, rather than issue” visas).

beacon of individual rights and civil liberties.³ We can appeal the consular officer’s decision, either with the State Department or with the courts, right? Wrong!

Roughly 60 years ago, the Supreme Court in *United States ex rel. Knauff v. Shaughnessy*⁴ established the general doctrine that a consular officer’s decision to grant or deny a visa petition is not subject to judicial review. The *Knauff* Court explicitly stated that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”⁵

This doctrine—referred to both as consular nonreviewability and as consular absolutism—was long in the making. The Supreme Court has noted that precedents from over a century ago “held broadly 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—a power to be exercised exclusively by the political branches of government.’”⁶ From this principle, the courts have created a common law doctrine that generally precludes any meaningful judicial review of consular decisions regarding the issuance or denial of visas.

As a result, when a consular officer denies a visa, the visa applicant is generally without any recourse. Although some applications receive administrative review by the state department’s visa office, this is generally limited to purely legal questions, is merely

³ See, e.g., David F. Axelrod, *White Collar Crime*, 32-AUG CHAMPION 66, 66 (2008) (“Throughout its history the United States has been regarded as a bastion of individual rights and a beacon for the Western world . . .”).

⁴ 338 U.S. 537 (1950).

⁵ *Id.* at 544. For an interesting argument that *Knauff* is premised on ideas that no longer hold true “in light of the modern separation of powers doctrine,” see Mary Scott Miller, *Aliens’ Right to Seek Asylum: The Attorney General’s Power to Exclude ‘Security Threats’ and the Role of the Courts*, 22 VAND. J. TRANSNAT’L L. 187, 192–93 (1989).

⁶ *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (internal citation omitted) (citing *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

advisory on factual issues, and can only occur when requested by a consular officer—a visa applicant has no right to request such review.⁷ Regardless of whether any administrative review occurs, judicial review is generally barred by the doctrine of consular nonreviewability.

The doctrine of consular nonreviewability has been followed overwhelmingly by most courts in the United States. Indeed, some courts even go so far as to state that “the doctrine of nonreviewability of consular officers’ visa determinations is essentially without exception.”⁸ In 1996, the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),⁹ which was interpreted by some courts to preclude non-governmental entities from bringing lawsuits challenging consular actions,¹⁰ further strengthened the stranglehold on alien rights at United States embassies.

According to a recent federal district court decision, a court “does not have jurisdiction to review a consular official’s decision, even if its foundation was erroneous, arbitrary, or contrary to agency regulations.”¹¹ As one scholar has noted, challenges to the

⁷ James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 22 (1991); *see also, e.g.*, *Van Ravenswaay v. Napolitano*, 613 F. Supp. 2d 1, 5 (D.D.C. 2009) (“Plaintiff argues that he is entitled to an advisory opinion from the Secretary of State. This argument fails because an advisory opinion is an optional step in the visa decision-making process and is *neither necessary nor required* for a consular determination.” (emphasis added) (internal citation omitted)).

⁸ *Romero v. Consulate of U.S., Barranquilla, Colombia*, 860 F. Supp. 319, 322 (E.D. Va. 1994).

⁹ Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified in various sections of Title 8 of the United States Code).

¹⁰ *E.g.*, *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999). For a discussion of some of the jurisdiction-stripping provisions of IIRIRA, *see generally* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1623–25 (2000).

¹¹ *Ngassam v. Chertoff*, 590 F. Supp. 2d 461, 466–67 (S.D.N.Y. 2008); *see also, e.g.*, *Loza-Bedoya v. INS*, 410 F.2d 343, 347 (9th Cir. 1969) (holding that the doctrine of consular nonreviewability applies even when the record reveals that a visa denial was based on clearly erroneous information); *Hossain v. Rice*, No. 07-CV-2857, 2008 WL 3852157, at *3 (E.D.N.Y. Aug. 16, 2008) (noting that the visa applicant’s “allegations, if true, are troubling,” but that the doctrine of consular nonreviewability barred the court from doing anything about it); Daniel J. Steinbock, *Designating the Dangerous: From Blacklists to Watch Lists*, 30 SEATTLE U. L. REV. 65, 114 (2006) (“[J]udicial review is generally unavailable, in visa processing, even

doctrine of consular nonreviewability have been met with only “limited success in federal courts.”¹²

Despite the general doctrine of consular nonreviewability, and despite claims that it is essentially without exceptions and that challenges to it are often unsuccessful, courts have in fact carved out at least two major exceptions to the doctrine—situations where visa applicants are allowed to argue that a consular officer’s decision was particularly arbitrary or contrary to law.¹³ This Article focuses on those exceptions and how practitioners can best make use of them to help their clients overcome unfavorable consular decisions.

Part I of this article provides a brief overview of the development of the doctrine of consular nonreviewability and highlights some of the problems created by the doctrine. The rest of the Article is devoted to the two main exceptions to the doctrine of consular nonreviewability. Part II addresses an exception that the Supreme Court recognized in *Kleindienst v. Mandel*¹⁴ for instances where the government does not have a “facially legitimate and bona fide reason” for denying a visa.¹⁵ Part III discusses an exception allowing judicial review when a visa applicant requests a court to analyze an underlying legal issue that does not involve the discretionary decisionmaking of a consular officer. Specifically, Part III.A addresses situations where courts have allowed visa applicants to

when factual errors in visa denial are alleged.”); Leonard David Egert, *Granting Foreigners Free Speech Rights: The End of Ideological Exclusions?*, 8 CARDOZO ARTS & ENT. L.J. 721, 739 (1990) (“The absence of any judicial review of decisions abroad allows the consular officer to exclude someone on the basis of insufficient or incorrect information.”).

¹² Enid Trucios-Haynes, *Religion and the Immigration and Nationality Act: Using Old Saws on New Bones*, 9 GEO. IMMIGR. L.J. 1, 58 n.304 (1995).

¹³ See, e.g., *Raduga USA Corp. v. U.S. Dep’t of State*, 440 F. Supp. 2d 1140, 1146 n.2 (S.D. Cal. 2005), as amended March 3, 2006 (“[T]here are exceptions to this general rule of non-reviewability.”).

¹⁴ 408 U.S. 753 (1972).

¹⁵ *Id.* at 769.

challenge the constitutionality of the underlying statute or regulation that formed the basis for the visa denial. Part III.B addresses situations where courts have granted review to determine whether a consular officer made a procedural error, such as violating federal regulations by failing to issue a written decision for the denial or issuing a letter that fails to qualify as a refusal.¹⁶

These two exceptions allow a visa applicant at least some degree of hope for reversing an unfavorable decision made by a consular officer. Although immigration law practitioners are all too well aware of how slim that hope sometimes is, it is better than nothing. This Article analyses how to best take advantage of the two recognized exceptions to the doctrine of consular nonreviewability.

I.

The modern doctrine of consular nonreviewability is best understood by viewing it in light of its historical origins. This Part provides a brief overview of the development of the doctrine of consular nonreviewability, with a particular focus on the racist and xenophobic attitudes that helped shaped the doctrine and that continue to make it difficult for non-citizens to get their day in court in the United States.

The doctrine of consular nonreviewability has its origins in the infamous *Chinese Exclusion Case*,¹⁷ where the Supreme Court announced that decisions regarding whether to admit or exclude aliens lie exclusively within the political branches:

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on

¹⁶ See 22 C.F.R. § 42.81(b).

¹⁷ 130 U.S. 581 (1889).

behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. . . . Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition, and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject.¹⁸

The *Chinese Exclusion Case* was merely the beginning of a long line of cases that entrenched this judicially created doctrine as a mainstay in immigration law. In 1927, the Second Circuit Court of Appeals delineated the doctrine of consular nonreviewability in a case called *United States ex rel. London v. Phelps*.¹⁹ The *Phelps* court noted in dicta that it was “beyond the jurisdiction of the court” to review a refusal to issue a visa.²⁰ A year later, the United States Court of Appeals for the District of Columbia held in *Ulrich v. Kellogg*²¹ that consular officers have broad discretion in issuing visas, and the court implied that courts need affirmative statutory provisions allowing review of that discretion before such review can occur.²² Because the *Ulrich* court was “not able to find any provision of the immigration laws which provides for an official review of the action

¹⁸ *Id.* at 609.

¹⁹ 22 F.2d 288 (2d Cir. 1927), *cert. denied*, 276 U.S. 630 (1928).

²⁰ *Id.* at 290. Scholars have noted that *Phelps* is rather ambiguous on this point, since “the court does not clearly state whether it lacked personal jurisdiction or subject matter jurisdiction over the parties.” Timothy R. Hager, Comment, *Recognizing the Judicial and Arbitral Rights of Aliens to Review Consular Refusals of “E” Visas*, 66 TUL. L. REV. 203, 213 (1991) (citing STEPHEN LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 145 (1987)).

²¹ 30 F.2d 984 (D.C. Cir. 1928), *cert. denied*, 279 U.S. 868 (1929).

²² *Id.* at 986.

of the consular officers in such case by a cabinet officer or other authority,” the court denied judicial review.²³

Then, in 1950, the Supreme Court stated in *United States ex rel. Knauff v. Shaughnessy* that “it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.”²⁴ This unequivocal pronouncement firmly established the doctrine of consular nonreviewability as a legitimate part of the common law, even though “courts have been unable to point to any evidence . . . to support an exemption from the usual rules that govern judicial review of administrative decisions.”²⁵

In 1972, in *Kleindienst v. Mandel*,²⁶ where the United States Supreme Court reaffirmed the general doctrine of consular nonreviewability, the Court cited the infamous *Chinese Exclusion Case* as providing a foundation for the doctrine.²⁷ This raises numerous questions about the origins of the doctrine of consular nonreviewability—questions that call into doubt whether such a doctrine should still be viable in light of modern notions of fairness and equality. As scholars have noted, the Supreme Court should be reluctant to rely upon precedents that are now generally seen as having been grounded in racist and xenophobic attitudes: “Reliance on the *Chinese Exclusion Case* is a bit like reliance on *Dred Scott v. Sandford* or *Plessy v. Ferguson*.”

²³ *Id.*

²⁴ 338 U.S. 537, 543 (1950).

²⁵ Legomsky, *supra* note 10, at 1623.

²⁶ 408 U.S. 753 (1972).

²⁷ *Id.* at 765.

Although the Supreme Court has never expressly overruled the *Chinese Exclusion Case*, it represents a discredited page in the country's constitutional history."²⁸

It is not coincidental that the doctrine of consular nonreviewability originated at a time when anti-immigration sentiments ran high.²⁹ This origin in the *Chinese Exclusion Case* is especially troubling in light of recent information suggesting that consular officers sometimes rely on racial and economic stereotyping when they deny visas.³⁰ Indeed, some consular officers have been found to have used openly racist criteria in rendering visa decisions.³¹

²⁸ Steven R. Shapiro, Commentary, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 Harv. L. Rev. 930, 942 (1987) (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1854) and *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

²⁹ Legomsky, *supra* note 10, at 1626–27 (“Most immigration cases are decided during periods of high-level immigration, partly because this is when most immigration cases are likely to arise, and partly because high levels of immigration are more likely to trigger restrictive legislation that in turn creates higher absolute numbers of aggrieved immigrants. This is an unlucky circumstance for immigrants. Historically, there has been a positive, though concededly imperfect, correlation between periods of high-volume immigration and public hostility toward immigrants. Thus, the periods in which major immigration precedents are most likely to be set are those very periods in which public antipathy toward immigrants is at its peak. For that reason, it is not coincidental that some of the most extreme plenary power precedents were laid down either during the period of substantial Chinese immigration in the late nineteenth century or during the post-World War II influx of Eastern Europeans.” (internal citations omitted)).

³⁰ Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 343 n.279 (2002).

³¹ Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 762 (2000). Professor Ogletree explains this open racism as follows:

In *Olsen v. Albright*, [990 F. Supp. 31 (D.D.C. 1997),] a consular officer stationed in Brazil sued the State Department because he was fired for refusing to follow the consulate's racial visa eligibility policies. The manual he refused to follow established fraud profiles which were based on factors such as race and national origin. The manual instructed consular officers to scrutinize Korean and Chinese applicants for fraud and declared anyone from certain predominately black cities “suspect unless older, well-traveled, etc.” The consular section head had further stated that “Filipinos and Nigerians have high fraud rates, and their applications should be viewed with extreme suspicion, while British and Japanese citizens rarely overstay, and generally require less scrutiny.”

Id. (citations omitted); see also A. James Vazquez-Azpiri & Daniel C. Horne, Symposium, *The Doorkeeper of Homeland Security: Proposals for the Visa Waiver Program*, 16 STAN. L. & POL'Y REV. 513, 525 (2005) (“The occasionally odious assumptions that can infiltrate the visa adjudication process were publicly revealed during a former consular officer's lawsuit against the State Department. The ex-consular officer complained of retaliatory discharge after refusing to comply with an ‘arbitrary, irrational, and discriminatory’ consular policy of denying visas based upon physical appearance, often involving ethnicity,

Even when consular officers are properly instructed to avoid using racial or economic stereotyping, it is all too common for these officers to fail to follow those instructions. As one commentator has noted, “many instances of abuse have been documented,” and an extensive study “concluded that most consuls did not follow the guidelines for visa adjudication set forth in the State Department’s Foreign Affairs Manual.”³² The documented instances of unchecked abuse of consular decisions have led to widespread criticism of the doctrine of consular nonreviewability:

Immigration scholars love to hate the plenary power doctrine; they have argued forcefully for years that it should be reexamined or abolished, in general and in particular contexts. . . . [T]he plenary power doctrine is, as others have pointed out, “aberrational,” “a maverick, a wild card,” “a constitutional fossil,” an “oddity,” theoretically unsatisfying, and inconsistent with modern international law³³

Some courts have criticized the doctrine as well and referred to it as an ““astonishing anomaly””³⁴ that leaves consular officers “free to act arbitrarily or even maliciously in their conduct toward foreign nationals.”³⁵

As mentioned earlier, perhaps the most poignant criticism of the doctrine of consular nonreviewability comes from those scholars who focus on the “implications of

surname, and dress.” (citing *Olsen v. Christopher*, 962 F. Supp. 5 (D.D.C. 1997))). For a description of how racism has historically permeated all aspects in which the United States handles those seeking entrance through our borders, see generally Donald S. Dobkin, *Race and the Shaping of U.S. Immigration Policy*, 28 CHICANA/O-LATINA/O L. REV. 19 (2009).

³² Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237, 255 (1994).

³³ Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 7–8 (1998); see also, e.g., *Doan v. INS*, 990 F. Supp. 744, 747 (E.D. Mo. 1997) (recognizing that “the doctrine of nonreviewability of consular decisions has been heavily criticized by the academic community”); Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 SAN DIEGO L. REV. 887, 888 (1989) (“The lack of any meaningful administrative or judicial review of the denial of United States entry visas is one of the major outrages of the American immigration system.”).

³⁴ *Pena v. Kissinger*, 409 F. Supp. 1182, 1186 (S.D.N.Y. 1976) (citing *Rodriguez v. Rogers*, Civ. No. 72-5233 (S.D.N.Y. Oct. 30, 1973)).

³⁵ *Id.* at 1185; see also, e.g., Stuart Matthews, *Consular Practice: Immigrant Visas*, 41-DEC MD. B.J. 72, 74 (2008) (noting that a consular officer “simultaneously act[s] as judge, jury and prosecutor”).

[the doctrine's] disreputable birth in cases authorizing racial discrimination—and sympathetic to that discrimination.”³⁶ Racial discrimination can easily work its way into consular decisions because many of those decisions rely upon subjective factors.³⁷ For instance, one of the criteria for obtaining a tourist or student visa is the intent to return home. According to some, determining whether such an intent exists is often “totally subjective.”³⁸ Yet, the doctrine of consular nonreviewability often leaves courts powerless to address even blatant racial stereotyping.³⁹ The lack of judicial review of visa denials corresponds with efforts by Congress to strip courts of jurisdiction to hear other types of immigration cases brought by foreign citizens, which raises serious questions about the fundamental fairness of our current system:

The lack of judicial review is particularly problematic in light of the fact that courts are often the best suited branch of government to address matters of discrimination, such as the racism that underlies much of what occurs in U.S. immigration law. In the famous footnote four of *United States v. Carolene Products Co.*,⁴⁰ the Supreme Court recognized that “discrete and insular minorities” present a special situation where the courts cannot simply defer without inquiry to the political process.⁴¹ The Supreme Court has also explicitly stated that “[a]liens as a class are a prime example of a ‘discrete and insular’ minority for whom such

³⁶ Chin, *supra* note 33, at 8–9.

³⁷ As one court has noted, “[t]he instructions of the Secretary of State . . . require the consul to ‘satisfy himself of the temporary nature of the visit’ of the alien.” *U.S. ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927). It does not help matters that “[c]onsular officers have only a limited time to review visa applications.” Susan Martin & Philip Martin, *International Migration and Terrorism: Prevention, Prosecution, and Protection*, 18 GEO. IMMIGR. L.J. 329, 331 (2004). When consular officers need to make numerous on-the-spot determinations in a short period of time, racial stereotyping is all the more likely to emerge.

³⁸ Michael Maggio, Larry S. Rifkin, & Sheila T. Starkey, *Immigration Fundamentals for International Lawyers*, 13 AM. U. INT’L L. REV. 857, 870 (1998).

³⁹ *E.g.*, Charles P. Schwartz, Jr., *American Immigration Policy*, 55 COLUM. L. REV. 311, 336 (1955) (“[A]s with all visa denials, there is no right to review if a consul arbitrarily denies a visa because of racial prejudice.”); *see generally* Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”*, 7 J. GENDER RACE & JUST. 315, 337–40 (2003) (discussing how the lack of judicial intervention allows openly racist policies to persist).

⁴⁰ 304 U.S. 144 (1938).

⁴¹ *Id.* at 152–53 n.4.

heightened judicial solicitude is appropriate.”⁴² Professor Erwin Chemerinsky has noted that courts must apply heightened scrutiny in these situations because “[p]rejudice and the history of discrimination make it less likely that racial and national origin minorities can protect themselves through the political process.”⁴³ In other words, intervention by the courts—meaning judicial review—is most needed when dealing with matters affecting minority groups, such as immigrants. Thus, the lack of judicial review in this area is all the more troublesome.⁴⁴

The limited administrative review that is currently available in some instances is not a substitute for judicial review. As mentioned earlier, advisory opinions from the Secretary of State are entirely optional and cannot be requested by visa applicants.⁴⁵ Further, these opinions are not published or even circulated internally among consular officers.⁴⁶ Most importantly, the Secretary of State belongs to a political branch and therefore cannot provide the guarantee of independent and impartial decisionmaking that is at least theoretically available whenever a case goes before a federal Article III judge.⁴⁷ Thus, even if administrative review were more widely available,⁴⁸ it would not be a substitute for judicial review.

⁴² *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

⁴³ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 669 (Aspen Publishers 2d ed. 2002).

⁴⁴ Dobkin, *supra* note 31, at 38–39; *see also, e.g.*, Legomsky, *supra* note 10, at 1616 (recognizing that “the general unpopularity and political powerlessness of immigrants” has made it difficult for them to obtain judicial review).

⁴⁵ *See supra* note 7 and accompanying text.

⁴⁶ Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 266 n.240 (2002).

⁴⁷ *See generally* Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17-SPG KAN. J.L. & PUB. POL’Y 362, 379–82 (2008) (explaining why executive branch employees sitting as immigration law judges do not provide the same protections of independence and impartiality that can be expected before Article III judges).

⁴⁸ *See* Benson, *supra* note 46, at 306 n.422 (noting that some have recommended the expansion of administrative review and stated that such a step “would be beneficial to the participants and to the agency itself because of the resulting protections for consistency, accuracy, and fairness”).

Although supporters of the doctrine of consular nonreviewability often argue that the federal court system is simply not equipped to handle the flood of cases that would result from allowing review of consular decisions,⁴⁹ these concerns are often overstated because only a small percentage of visa applicants would actually seek judicial review even if it were available.⁵⁰ Indeed, a number of European countries allow judicial review of visa denials, and their court systems have not come to a grinding halt.⁵¹ For instance, in Germany, although judicial review is guaranteed, it is “seldom invoked.”⁵² There are at least two reasons why the court system is not flooded when countries allow judicial review of visa denials. First, seeking judicial review is an expensive process—in terms of money and time—and is therefore likely only going to be sought when an applicant believes there to be a decent chance of success.⁵³ Second, allowing judicial review makes consular officers accountable and therefore often leads to better consulate decisions in the first place: “the mere prospect of review in Europe encourages the initial decision-maker

⁴⁹ *E.g.*, *Romero v. Consulate of the United States*, 860 F. Supp. 319, 324 (E.D. Va. 1994) (“[T]he doctrine of consular nonreviewability is . . . well-grounded in sensible public policy. Were the rule to be otherwise, federal courts would be inundated with claims of disappointed and disgruntled off-shore aliens seeking review of consular officers’ denials of their requests for nonimmigrant visitor’s visas.”); *Zas*, *supra* note 2, at 595 (“[T]he volume of non-immigrant visa denials (more than 1,000,000 per year) could prompt an avalanche of appeals overburdening the federal courts.”); *Wildes*, *supra* note 33, at 906 (“[P]roviding judicial review to all visa denials could strain the already overloaded federal court system . . .”). Indeed, as one scholar has noted, in recent years various members of the press and Congress, as well as some federal judges, have expressed concern that the number of immigration cases that currently receive judicial review have already surged to the point of overwhelming the federal courts. Lenni B. Benson, *You Can’t Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 410–14.

⁵⁰ *See, e.g.*, *Legomsky*, *supra* note 10, at 1631 (“Realistically, in only a small fraction of immigration cases will judicial review in fact be sought.”)

⁵¹ Bryan Paul Christian, *Visa Policy, Inspection and Exit Controls: Transatlantic Perspectives on Migration*, 14 GEO. IMMIGR. L.J. 215, 223 (1999).

⁵² *Id.*

⁵³ *Legomsky*, *supra* note 10, at 1631 (noting that judicial review “is expensive, complicated, and a great deal of trouble for the litigant”).

to examine cases more carefully before reaching a decision.”⁵⁴ In fact, internal documents from the state department reveal that government officials are keenly aware that they must be on their best behavior when their actions might be subject to judicial review.⁵⁵ Thus, judicial review would not overwhelm the courts. It would, however, have numerous benefits, including—at the very least—discouraging consular officers from engaging in blatant racial discrimination against visa applicants.⁵⁶

Given the racist origins of the doctrine of consular nonreviewability, it is not surprising that when scholars have looked at the practical effects of the doctrine, they have discovered that it disproportionately affects Africans seeking nonimmigrant visas.⁵⁷ The reason for this is that a significant number of consular officers “are predisposed to deny Africans visas, because of the consular officers’ belief that applicants from African countries will commit fraud, overstay their visas, and/or become public charges.”⁵⁸

Although United States courts have over the last century come to soundly reject blatant racial discrimination such as this—discrimination that is remarkably similar to that which gave rise to the *Chinese Exclusion Case* from which the doctrine of consular nonreviewability was born—the doctrine of consular nonreviewability still somehow

⁵⁴ Christian, *supra* note 51, at 223.

⁵⁵ *Department of State Advises on New Procedures for Petitions Returned for Revocation*, AILA InfoNet Doc. No. 04030364, at ¶ 5 (posted Mar. 3, 2004) (on file with author) (“Unlike consular determinations regarding visa eligibility, which are not subject to judicial review, actions relating to [Department of Homeland Security] petitions are potentially subject to administrative and/or judicial review. The [State] Department is regularly named as a co-defendant with DHS in cases involving the return of immigrant or nonimmigrant petitions to DHS. Therefore, it is particularly important that consular petition adjudications are well documented and clearly state the basis for the petition return.”).

⁵⁶ *See, e.g.*, Boswell, *supra* note 39, at 354 (noting that “increased willingness by the judiciary to revisit established doctrine” would act as a check on racial discrimination in immigration matters).

⁵⁷ Andowah A. Newton, *Injecting Diversity into U.S. Immigration Policy: The Diversity Visa Program and the Missing Discourse on Its Impact on African Immigration to the United States*, 38 CORNELL INT’L L.J. 1049, 1062–63 (2005).

⁵⁸ *Id.* at 1063.

persists. Given that the doctrine of consular nonreviewability is unlikely to be overridden anytime soon, it is important for practitioners to focus on those few exceptions that courts have developed as instances where the doctrine does not apply. The rest of this Article is devoted to exploring the two main exceptions to the doctrine.

II.

This Part discusses the most well-recognized exception to the doctrine of consular nonreviewability—an exception that the United States Supreme Court announced in 1972 in *Kleindienst v. Mandel*.⁵⁹ Although the *Mandel* Court ultimately declined to grant judicial review in that case, it noted that the reason that review was unavailable was because the government had put forth “a facially legitimate and bona fide reason” for its actions.⁶⁰ Courts have since interpreted *Mandel* as allowing limited review of certain consular decisions to determine whether a facially legitimate and bona fide reason exists. As one scholar has noted, although *Mandel* only allows limited review, “[e]ven this minimal standard of judicial scrutiny is a significant departure from the complete abdication of judicial review which protected the attorney general’s discretion in such cases as *Knauff v. Shaughnessy*.”⁶¹

In 1969, Mr. Mandel, a Belgium citizen, applied for a nonimmigrant visa to enter the United States to participate in a series of conferences at Stanford, Princeton, Amherst, Columbia, and Vassar universities.⁶² Mr. Mandel was a prominent professional journalist

⁵⁹ 408 U.S. 753 (1972).

⁶⁰ *Id.* at 770.

⁶¹ Wildes, *supra* note 33, at 898 (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950)).

⁶² *Mandel*, 408 U.S. at 756–57.

who described himself as a revolutionary Marxist.⁶³ Under the Immigration and Nationality Act of 1952, anyone who advocated “the economic, international, and governmental doctrines of world communism” was generally ineligible to receive a visa.⁶⁴ The only way around this rule was to receive a waiver from the Attorney General, who had the power to grant waivers “in [his] discretion.”⁶⁵

Mr. Mandel had received this type of waiver when he went on a similar visit to the United States the year before.⁶⁶ But the waiver had required Mr. Mandel to stick to his stated itinerary, and on that previous trip Mr. Mandel had apparently “engaged in activities beyond the stated purposes” of the trip.⁶⁷ Thus, the Attorney General decided to deny the waiver request for the new trip.⁶⁸ Mr. Mandel was therefore unable to gain entry to the country and had to appear by teleconference to participate in the scheduled conferences.⁶⁹ A handful of university professors—all United States citizens—then joined Mr. Mandel in bringing this lawsuit against the government for the following reasons:

Plaintiff-appellees claim that the statutes are unconstitutional on their face and as applied in that they deprive the American plaintiffs of their First and Fifth Amendment rights. Specifically, these plaintiffs claim that the statutes prevent them from hearing and meeting with Mandel in person for discussions, in contravention of the First Amendment; that § 212(a)(28) denies them equal protection by permitting entry of “rightists” but not “leftists” and that the same section deprives them of procedural due process; that § 212(d)(3)(A) is an unconstitutional delegation of congressional power to the Attorney General because of its

⁶³ *Id.* at 756.

⁶⁴ 66 Stat. 185, § 212(a)(28)(G)(v) (then codified at 8 U.S.C. § 1182(a)(28)(G)(v) (1970) (repealed)).

⁶⁵ *Id.* § 212(d)(3).

⁶⁶ *Mandel*, 408 U.S. at 756.

⁶⁷ *Id.* at 758.

⁶⁸ *Id.*

⁶⁹ *Id.* at 759.

broad terms, lack of standards, and lack of prescribed procedures; and that application of the statutes to Mandel was “arbitrary and capricious” because there was no basis in fact for concluding that he was ineligible, and no rational reason or basis in fact for denying him a waiver once he was determined ineligible. Declaratory and injunctive relief was sought.⁷⁰

Mr. Mandel and his university colleagues prevailed before the district court, which held that “although Mandel had no personal right to enter the United States, citizens of this country have a First Amendment right to have him enter and to hear him explain and seek to defend his views.”⁷¹ The government appealed directly to the United States Supreme Court,⁷² which reversed, citing the *Chinese Exclusion Case* and its progeny for the proposition that “plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established” and can be delegated to the executive branch.⁷³ Given how entrenched the doctrine of consular nonreviewability was at the time that the Supreme Court decided *Mandel*, it was not surprising that the Court declined to grant judicial review to the visa denial at issue in that case. What was surprising was that the Court declined to adopt the government’s position that the Executive Branch has “sole and unfettered discretion” in granting waivers and that “any reason or no reason” at all may be given when such waivers are denied.⁷⁴ The Court instead relied heavily on Mr. Mandel’s past abuse of visa privileges and held that this provided a “facially legitimate and bona fide reason” for denying the current visa

⁷⁰ *Id.* at 760.

⁷¹ *Id.* (citing 325 F. Supp. 620 (E.D.N.Y.1971)).

⁷² The government was able to file an appeal directly with the Supreme Court, rather than going through the Second Circuit Court of Appeals, for two reasons. First, under 28 U.S.C. § 1252 (repealed in 1988), the Supreme Court could hear cases where a district court had declared federal statutes unconstitutional, and here the district court had held that certain sections of the Immigration and Nationality Act of 1952 were unconstitutional. Second, the district court had granted injunctive relief, which provided another independent avenue for direct appeal to the Supreme Court. *See* 28 U.S.C. § 1253.

⁷³ *Mandel*, 408 U.S. at 769.

⁷⁴ *Id.*

application.⁷⁵ This reasoning opened the door to future judicial review in a select set of cases—namely, those cases where the consular officer does not provide “a facially legitimate and bona fide reason” for denying a visa.⁷⁶ In deference to this important Supreme Court precedent, courts and scholars in the years since *Mandel* have often referred to the “*Mandel* test” or the granting of “*Mandel* review” to determine whether a consular officer had a facially legitimate and bona fide reason for denying a visa.

In reflecting upon the scope and significance of *Mandel*, courts, scholars, and immigration lawyers have wrestled with how to interpret it:

Unfortunately, *Mandel* is quite ambiguous. To be sure, the *Mandel* test seems clear: when the Executive’s reasons for a waiver denial are “facially legitimate and bona fide . . . 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.” In context, however, it is unclear whether the Court considered this case to be reviewable only because it involved a first amendment issue, that is, an issue involving specially protected constitutional guarantees. It is also unclear whether reviewability is available after *Mandel* in all cases involving the exercise of executive discretion, or just those involving waiver denials. Finally, it is unclear whether the American plaintiffs had standing to bring the action whereas a non-resident alien alone would not have had standing. . . .

Mandel has aroused considerable commentary Because the decision is rather fuzzy around the edges, it leaves more questions than it resolves about the extent to which visa denials are reviewable.⁷⁷

Although Professor Nafziger describes *Mandel*’s ambiguity as “unfortunate,” there is an upside to this ambiguity: it allows room for argument for practitioners of

⁷⁵ *Id.* at 770.

⁷⁶ *Id.*

⁷⁷ Nafziger, *supra* note 7, at 32–33 (citing *Mandel*, 408 U.S. at 770); *see also, e.g.*, Egert, *supra* note 11, at 744–45 (“[T]he Court has not offered any assistance in defining a ‘facially legitimate and bona fide’ reason for denial. As a result of the lack of clarification, court decisions subsequent to *Mandel* have inconsistently applied the ambiguous standard. Responses have ranged from allowing virtually any government justification to pass the facially legitimate test to requiring more than a conclusory statement to justify exclusion.”).

immigration law whose clients wish to challenge visa denials under the *Mandel* test. Indeed, immigration lawyers have succeeded in persuading some courts to interpret *Mandel* broadly.

One of the first courts to expand the reach of *Mandel* was the First Circuit Court of Appeals, which cited *Mandel* as a basis for granting review of a visa denial in *Allende v. Shultz*.⁷⁸ Like *Mandel*, *Allende* involved a prominent public figure who had been invited to attend numerous speaking engagements in the United States.⁷⁹ When Ms. Allende applied for a visa, the consular officer denied her application because of her affiliation with the World Peace Council (WPC) and the Women’s International Democratic Federation—two organization that the Department of State considered “to be international fronts for the Communist Party of the Soviet Union.”⁸⁰ The consular officer then submitted the application to the Department of State, which issued an advisory opinion concluding that Ms. Allende was ineligible for another reason—namely, that there was reason to believe that she would “engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.”⁸¹ The government submitted the following justification for denying Ms. Allende’s visa application:

In his affidavit, the Undersecretary of State testified that Allende belonged to the WPC, that the WPC acted as a covert instrument of Soviet policy to manipulate public opinion in the United States, that the Reagan Administration had decided to deny entry to WPC members, and that pursuant to that policy [the Undersecretary of State] had determined that

⁷⁸ 845 F.2d 1111 (1st Cir. 1988).

⁷⁹ *Id.* at 1113.

⁸⁰ *Id.*

⁸¹ *Id.* at 1113–14 (citing 8 U.S.C. § 1182(a)(27) (1982) (repealed)).

the admission of Allende to the United States would be contrary to the nation's foreign policy interests.⁸²

Applying the *Mandel* test, the First Circuit agreed with plaintiffs that this did not constitute a facially legitimate and bona fide reason for denying a visa: "The government may not exclude Allende on the bare assertion that her presence in the United States at a given time may prejudice foreign policy interests."⁸³

Allende is remarkable for at least two reasons. First, unlike most visa denial cases, where courts are all too quick to cite the doctrine of consular nonreviewability to avoid reaching the merits of a case, the *Allende* court went out of its way to review a consular officer's decision. In a concurring opinion, then-Judge Breyer presented a well-reasoned argument that this case was moot because it involved a visa that had been denied in 1983, and the government had subsequently changed many of its policies and in fact granted multiple visas to Ms. Allende to travel to the United States through the end of 1987.⁸⁴ Yet the majority held that the case still presented a live case or controversy, thereby allowing the court to review the consular officer's decision. The second remarkable thing about *Allende* is that the government put forth a somewhat detailed explanation for its decision, and the court still found that this was not a good enough explanation. In this way, the *Allende* court gave some teeth to *Mandel*'s requirement of a facially legitimate and bona fide reason for denying a visa. According to the *Allende* court, the government's reasons for denying a visa were subject to scrutiny, and courts would not automatically accept any explanation put forward by the government.⁸⁵

⁸² *Id.* at 1115.

⁸³ *Id.* at 1116.

⁸⁴ *Id.* at 1121 (Breyer, J., concurring).

⁸⁵ *See id.* at 1115.

Other courts have read even more stringent requirements into the *Mandel* test. In *Marczac v. Greene*,⁸⁶ which involved a habeas corpus proceeding on parole requests by detained Polish immigrants, the Tenth Circuit Court of Appeals held that under the *Mandel* test a consular officer's decision "must be at least reasonably supported by the record."⁸⁷ In this way, the *Marczac* court expanded the test to require that consular officers provide "facially legitimate and bona fide reasons, *factually supportable*" by the record.⁸⁸ Although the Tenth Circuit in *Marczac* noted that a district court cannot substitute its own judgment for that of the consular officer, the ultimate result of *Marczac* was a court-ordered reopening of the immigrants' case.⁸⁹

In one of the most recent cases applying *Mandel* review of a visa denial by a consular officer, the Second Circuit Court of Appeals also noted that review is available when "*the record does not establish*" that the consular officer acted in accordance with law.⁹⁰ In *American Academy*, the University of Notre Dame offered a tenured teaching position to Mr. Ramadan, a well-known Swiss-born Islamic scholar, but Ramadan was

⁸⁶ 971 F.2d 510 (10th Cir. 1992).

⁸⁷ *Id.* at 517.

⁸⁸ *Id.* at 519 (emphasis added); *cf. also, e.g., Adams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990) (analyzing the evidence put forward by the Government and holding that although that evidence does not need to be admissible in court, the evidence must be "sufficient to justify a reasonable person in the belief that the alien falls within the proscribed category"). One court has held that holding that when affidavits refer only to general classified intelligence information—without putting forward any specific allegations—such evidence "arguably fail[s] to establish a reasoned basis for action," but courts may still examine the Government's classified information to find a basis for upholding that action. *El-Werfalli v. Smith*, 547 F. Supp. 152, 153–54 (S.D.N.Y. 1982). *But see Abourezk v. Reagan*, 785 F.2d 1043, 1060–61 (D.C. Cir. 1986) (noting its "grave concern" about allowing the Government to use "*in camera ex parte* evidence," since courts have a duty "to make certain that plaintiffs are accorded access to the decisive evidence to the fullest extent possible, without jeopardizing legitimately raised national security interests"), *aff'd by an equally divided court*, 484 U.S. 1 (1987).

⁸⁹ *Marczac*, 971 F.2d at 521.

⁹⁰ *Am. Acad. of Rel. v. Napolitano*, 573 F.3d 115, 118 (2d Cir. 2009) (emphasis added).

unable to secure a visa to enter the country.⁹¹ The government’s basis for denying the visa was that Ramadan had contributed money to a group that the United States Treasury Department later designated as a terrorist organization because it funded Hamas.⁹² By statute, a consular officer can deny a visa to anyone who “commit[s] an act that the actor knows, or reasonably should know, affords material support, including . . . funds . . . to a terrorist organization . . . , 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.”⁹³ The Second Circuit engaged in a detailed analysis of statutory interpretation and concluded that the statute “require[d] confronting the visa applicant with the allegation of the knowledge he needs to negate.”⁹⁴ The court then remanded the case to the district court to determine whether the consular officer confronted Ramadan with this allegation and gave him a meaningful opportunity to respond.⁹⁵

In *American Academy*, the Second Circuit surveyed what other courts had done regarding whether the district court could hold an evidentiary hearing on remand. The *American Academy* court ultimately distinguished cases like *Marczac* and held that the district court could not hold an evidentiary hearing, since to do would violate “the statement in *Mandel* that courts may not ‘look behind’” the decisions of consular officers.⁹⁶ Although at first glance this ruling seems to create a major hurdle for visa

⁹¹ *Id.* at 119–20.

⁹² *Id.* at 120.

⁹³ 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd).

⁹⁴ *Am. Acad.*, 573 F.3d at 133.

⁹⁵ *Id.* at 138.

⁹⁶ *Id.* at 137 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

applicants challenging visa denials because the ruling denies them the opportunity to present evidence in their favor, other aspects of the *American Academy* ruling favor visa applicants. As mentioned earlier, the *American Academy* court made several references to the “record”⁹⁷ and ultimately concluded that a remand was necessary, since the court could not uphold a consular officer’s actions when the “record [was] unclear” as to whether the officer complied with all applicable legal duties.⁹⁸ Thus, while the court did not state so explicitly, the implication of its ruling was that once a court grants review of a visa denial, the government bears the burden of putting forward some sort of documentation into the record to justify its actions before courts will uphold a visa denial. This is a major departure from what normally occurs in these types of cases, where—if any review is even allowed—courts will construe all unknown facts in favor of the government.

Further, given the *American Academy* court’s conclusion that district courts cannot hold evidentiary hearings in these matters, it is unclear how the government will meet its burden of creating a record justifying its actions: in addition to preventing visa applicants from presenting evidence, *American Academy* might also be interpreted as precluding the government from putting forth after-the-fact explanations of its reasons for denying a visa. As a result, *American Academy* could force consular officers to document everything extensively and contemporaneously or risk having their decisions overturned

⁹⁷ *Id.* at 118 (mentioning the “record” once); *id.* at 132 (mentioning the “record” three times).

⁹⁸ *Id.* at 132.

on judicial review. This may be one reason why some commentators have referred to *American Academy* as a “milestone civil liberties and immigration decision.”⁹⁹

Another recent case granting *Mandel* review is *American Sociological Association v. Chertoff (ASA)*.¹⁰⁰ In *ASA*, a federal district court granted review of a consular officer’s decision denying a visa.¹⁰¹ The *ASA* court read *Mandel* as granting courts the power to review visa denials “at least in cases where there is a claim that the constitutional rights of U.S. citizens have been affected.”¹⁰² In *ASA*, as in *Mandel*, a group of professors invited a prominent activist to speak at university events.¹⁰³ The activist’s visa was denied by a consular officer who cited a provision that makes applicants ineligible for visas if they have engaged in terrorist activity.¹⁰⁴ The consular officer did not provide any explanation of the basis for finding that this provision was applicable here.¹⁰⁵ As in *Mandel*, the professors—all United States citizens—brought a lawsuit alleging violations of their First Amendment rights to engage in dialogue with the activist whose visa was denied.¹⁰⁶ The *ASA* court agreed that the plaintiffs had a right to “‘*Mandel* review’ to determine whether the visa denial at issue had been supported by a ‘facially legitimate and bona fide reason.’”¹⁰⁷

⁹⁹ Press Release, 2nd Circuit—Consular Decisions Are Reviewable: *Ramadan* Case Finds Constitutional Defect in Visa Denial That Barred Islamic Scholar (July 17, 2009) (on file with author).

¹⁰⁰ 588 F. Supp. 2d 166 (D. Mass. 2008).

¹⁰¹ *Id.* at 170.

¹⁰² *Id.*

¹⁰³ *Id.* at 168.

¹⁰⁴ *Id.* (citing 8 U.S.C. § 1182(a)(3)(B)(i)(I) (2000 & Supp. 2006)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 173 (citing two previous First Circuit cases recognizing the availability of this type of review: *Adams v. Baker*, 909 F.2d 643, 650 (1st Cir. 1990), and *Allende v. Shultz*, 845 F.2d 1111, 1116 (1st Cir. 1988)).

Perhaps the most significant ruling in *ASA* was the court’s rejection of the government’s argument that *Mandel* applies only to waiver decisions made by the Attorney General and not to decisions made by consular officers.¹⁰⁸ The *ASA* court recognized that such a distinction is “plausible”—“[o]ne might not regard it a significant departure from the doctrine of *consular* nonreviewability to permit judicial review of the Attorney General’s discretionary disposition of . . . a waiver [request]”—but ultimately concluded that such a distinction should not be read into *Mandel*:

Not only did the *Mandel* Court not draw such a distinction between an original consular decision and a discretionary waiver decision, the difference is not one that was germane to the claim there, as it is not germane here. Like *Mandel*, this case is not about a visa applicant’s personal interest in seeking to be admitted to the United States and what process might be available to him for review of a visa denial, but rather about the plaintiffs’ First Amendment rights, as the Court put it in *Mandel*, to “hear, speak, and debate with *Mandel* in person” in the United States.¹⁰⁹

Other courts have come to similar conclusions and allowed review of decisions by consular officers.¹¹⁰ As the Second Circuit stated in *American Academy*, there is “no sound reason” to read *Mandel* as limited to waiver decisions made by the Attorney General, and *Mandel* review therefore applies to a consular officer’s decision to deny a visa.¹¹¹

One area where courts have generally been unwilling to expand *Mandel* is the category of plaintiffs who have standing to appeal a visa denial. *Mandel* made it quite

¹⁰⁸ *Id.* at 171–73.

¹⁰⁹ *Id.* at 172 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)).

¹¹⁰ *See* *Am. Acad. of Rel. v. Napolitano*, 573 F.3d 115, 124 (2d Cir. 2009) (arriving at this same conclusion and citing the following cases as support for it: *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 n.1 (9th Cir. 2008); *Adams v. Baker*, 909 F.2d 643, 647–50 (1st Cir. 1990); *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988); *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff’d by an equally divided court*, 484 U.S. 1 (1987)).

¹¹¹ *Am. Acad.*, 573 F.3d at 125.

clear that review was only available in that case because the plaintiffs included United States citizens who alleged violations of their own constitutional rights.¹¹² Thus, a foreign citizen—the person whose visa is actually denied—is still unable to personally challenge the visa denial; he or she must find willing United States citizens to join the lawsuit before there can be any hope of receiving *Mandel* review.¹¹³

A more difficult issue is what type of violation a plaintiff must allege to receive *Mandel* review. *Mandel* involved alleged violations of the plaintiffs' constitutional rights under the First Amendment. Some plaintiffs have tried to expand *Mandel* review to cover alleged due process violations. The theory here is that if someone meets the criteria for receiving a visa, but is improperly denied one, then something must have been procedurally deficient in the visa review process. One of the difficulties with this argument is that, as mentioned, the plaintiffs who have standing in these cases are not the ones who actually had their visas denied.¹¹⁴ Thus, the plaintiffs with standing (the United States citizens bringing the lawsuit) have to argue that it violates *their* due process rights when a consular officer treats a foreign citizen in a procedurally deficient manner. Courts are understandably disinclined to accept such arguments. It appears as if a generalized

¹¹² *Mandel*, 408 U.S. at 762 (“It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise. The appellees concede this. Indeed, the American appellees assert that ‘they sue to enforce their rights, individually and as members of the American public, and assert none on the part of the invited alien.’ ‘Dr. Mandel is in a sense made a plaintiff because he is symbolic of the problem.’ The case, therefore, comes down to the narrow issue of whether the First Amendment confers upon the appellee professors, because they wish to hear, speak, and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country or, in other words, to compel the Attorney General to allow Mandel’s admission.” (internal citations omitted)).

¹¹³ See *id.*; cf. also Franklin E. Fink, Note, *Abourezk v. Reagan: Curbing Recent Abuses of the Executive Immigration Power*, 21 CORNELL INT’L L.J. 147, 153 (1988) (“[The Supreme] Court regularly approves facially discriminatory and arbitrary procedures governing aliens which, if applied to citizens, would be grossly unconstitutional.”).

¹¹⁴ See *supra* notes 112–113 and accompanying text.

due process claim—divorced from any concrete constitutional right—usually does not trigger *Mandel* review.¹¹⁵ It is not enough for an applicant to have a United States citizen allege a general violation of procedural due process, since “the requirements of procedural due process . . . attach only to the deprivation of constitutionally protected liberty and property interests.”¹¹⁶

While *Mandel* review does not appear to extend to generalized due process claims, the Ninth Circuit Court of Appeals has recognized that a United States citizen can get *Mandel* review for due process claims when a consular officer denies a visa to a spouse or other family member.¹¹⁷ When a visa denial interferes with the “[f]reedom of personal choice in matters of marriage and family life”—for instance, by keeping a United States citizen separated from her spouse—the due process violation is no longer abstract and generalized, and courts are therefore willing to grant *Mandel* review.¹¹⁸

Further, *Mandel* review is not limited to constitutional challenges. Although some courts and commentators believe that *Mandel* review applies only to constitutional challenges, the District of Columbia Court of Appeals recognized in *Abourezk v. Reagan*¹¹⁹ that in some situations courts can also review statutory claims.¹²⁰ *Abourezk* involved constitutional challenges as well as statutory challenges to visa denials, and some courts claim that *Abourezk* “is limited to the case when United States sponsors of a

¹¹⁵ See, e.g., *Zambuto v. County of Broward*, No. 08-61561, 2009 WL 1564264, at *1 (S.D. Fla. June 2, 2009) (“[G]eneralized due process claims fall within the scope of the consular nonreviewability doctrine.”).

¹¹⁶ *Raduga USA Corp. v. U.S. Dep’t of State*, No. 07-55140, 2008 WL 2605564, at *1 (9th Cir. 2008).

¹¹⁷ *Bustamente v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008).

¹¹⁸ *Id.*

¹¹⁹ 785 F.2d 1043 (D.C. Cir. 1986), *aff’d by an equally divided court*, 484 U.S. 1 (1987).

¹²⁰ See *id.* at 1062.

foreign individual claim that the denial of the visa violated their constitutional rights.”¹²¹ But the *Abourezk* court did not limit its review to only the constitutional challenges. Rather, the court granted review of all three consolidated cases involving visas that had been denied for various reasons, and the court remanded the appeals to determine whether “the challenged government action is within the *statutory* and constitutional authority of the State Department.”¹²² Indeed, one commentator has noted that in *Abourezk* the “basis of the court’s ruling was statutory and . . . did not discuss the constitutional issue” at all.¹²³

¹²¹ *Chun v. Powell*, 223 F. Supp. 2d 204, 207–08 (D.D.C. 2002).

¹²² *Abourezk*, 785 F.2d. at 1062 (emphasis added).

¹²³ Egert, *supra* note 11, at 739. Professor Egert goes on to criticize the United States Supreme Court for failing to grant certiorari in *Abourezk*:

Abourezk v. Reagan provided the Supreme Court with an opportunity to clarify its position on the “facially legitimate and bona fide” standard. *Abourezk* involved three consolidated actions with fact patterns similar to *Mandel*. In all three cases, the State Department, pursuant to section 212(a)(27) of the INA, denied temporary visas to foreigners who were invited to speak by United States citizens. The United States Court of Appeals for the District of Columbia was concerned that the government could avoid the McGovern amendment if visa denials were allowed under section 212(a)(27) on the basis of affiliation with a Communist organization. Consequently, the court of appeals held that section 212(a)(27) denials must be based on reasons other than affiliation with a Communist organization to prevent the government from avoiding the McGovern amendment. . . . The Supreme Court affirmed without rendering an opinion. While the Court underscored the confusion and unsettled nature of the law dealing with ideological exclusions, it did not offer any guidance in the *Abourezk* affirmance nor has it offered any guidance since. The Supreme Court should clarify the appropriate standard to apply to decisions to exclude foreigners.

Id. (internal citations omitted). Some commentators have also argued that *Abourezk* itself went too far in reviewing decisions that are ordinarily left to the legislative and executive branches. See Katherine L. Vaughns, *A Tale of Two Opinions: The Meaning of Statutes and the Nature of Judicial Decision-Making in the Administrative Context*, 1995 B.Y.U. L. REV. 139, 206 (1995) (“As a matter of policy, the agency’s construction in *Abourezk* was not unreasonable nor was it plainly inconsistent with other INA statutory provisions. Under *Chevron* [*U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)], it was therefore a permissible construction that should have been given due deference. It was not given such deference”); see also Fink, *supra* note 113, at 160 (referring to the *Abourezk* decision as “result-oriented”). Indeed, even the D.C. Circuit itself has questioned some of the underpinnings of the *Abourezk* decision. See Saavedra Bruno v. Albright, 197 F.3d 1153, 1163–64 (D.C. Cir. 1999); see also Michael James Burt, *Recent Decision of the United States Court of Appeals for the District of Columbia Circuit: Immigration Law*, 69 GEO. WASH. L. REV. 679, 684 (2001) (explaining how the *Saavedra Bruno* court distinguished and greatly narrowed *Abourezk*). Nevertheless, the D.C. Circuit has never overruled *Abourezk*, and plaintiffs challenging visa denials can continue to cite the decision as precedent for allowing

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

judicial review in at least some limited set of instances. *See* *Am. Acad. of Rel. v. Napolitano*, 573 F.3d 115, 124 n.10 (2d Cir. 2009) (noting that in limiting its earlier ruling, the *Saavedra Bruno* court still “adhered to *Abourezk*”).

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:

[C]ourts 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.¹²⁵ 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

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.

Chun v. Powell, 223 F. Supp. 2d 204, 206 (D.D.C. 2002) (internal citations and quotations omitted)).

¹²⁵ See, e.g., *Martinez v. Bell*, 468 F. Supp. 719, 725–26 (D.C.N.Y. 1979).

with the visa issuing process,”¹²⁶ and the *Martinez* court also noted that courts cannot direct consular officers “to issue a visa . . . to any individual,”¹²⁷ 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*,¹²⁸ “(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.”¹²⁹ 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 exists¹³⁰

Following a similar rationale, in *Chiang v. Skeirik*,¹³¹ a federal district court recognized that judicial review is available to a visa applicant “alleg[ing] constitutional violations in the application procedure.”¹³² 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.¹³³

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.

¹³¹ 529 F. Supp. 2d 166, (D. Mass. 2007).

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*,¹³⁴ 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.¹³⁵

The *Fiallo* court’s pronouncement is reminiscent of Chief Justice John Marshall’s famous statement in *Marbury v. Madison*¹³⁶ “that every right, when withheld, must have a remedy, and every injury its proper redress.”¹³⁷ 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

¹³⁴ 406 F. Supp. 162 (E.D.N.Y. 1975), *aff’d sub. nom.*, *Fiallo v. Bell*, 430 U.S. 787 (1977).

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.

¹³⁸ *Alexis v. U.S. Atty. Gen.*, 431 F.3d 1291, 1294–95 (11th Cir. 2005) (quoting *Gonzalez-Oropeza v. U.S. Atty. Gen.*, 321 F.3d 1331, 1333 (11th Cir. 2003)).

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”).

¹⁴¹ *Chen v. Rice*, No. 07-4462, 2008 WL 2944878, at *7 n.16 (E.D. Pa. July 28, 2008) (internal citations omitted).

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.”¹⁴² The idea here is that the doctrine is most protective of the ultimate decision of whether to grant or deny a visa.¹⁴³ Thus, in *Mulligan v. Schultz*,¹⁴⁴ 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.”¹⁴⁵ 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.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.”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.¹⁴⁸ As the United States Supreme Court stated in *Japan Whaling Association v. American Cetacean Society*,¹⁴⁹ courts are “particularly ill suited” to address matters of foreign relations.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.”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

¹⁴⁶ See *infra* Part III.B.

¹⁴⁷ *Pinho v. Gonzalez*, 432 F.3d 193, 204 (3d Cir. 2005).

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

¹⁴⁹ 478 U.S. 221 (1986).

¹⁵⁰ *Id.* at 230.

¹⁵¹ Nafziger, *supra* note 7, at 46 (recognizing—but ultimately rejecting—this theory).

accepted task for the federal courts.”¹⁵² 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.¹⁵³ This is true even when the statute touches upon an issue that implicates foreign policy.¹⁵⁴

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,¹⁵⁵ the doctrine in fact weakens congressional powers by permitting consular officers to act in

¹⁵² 478 U.S. at 230.

¹⁵³ *E.g.*, Legomsky, *supra* note 10, at 1629 (noting that judicial review of decisions by consular officers generally involves “examin[ing] the evidence in the record” and engaging in “statutory and other interpretation”—“the kinds of skills that lawyers acquire and develop in law school and further refine in practice and on the bench”).

¹⁵⁴ *See, e.g.*, *Deutsch v. Turner Corp.*, 324 F.3d 692, 713 n.11 (9th Cir. 2003) (“No political question . . . is raised by the simple application of the requirements of a treaty to which the United States is a party. Treaties have the force of law, and, if they are self-executing or have been implemented through legislation, *must* be applied by the courts.” (emphasis added) (internal citation omitted)). The *Deutsch* court noted that to hold otherwise would “make[] every dispute over the proper application of a treaty into a political question, because treaties inherently involve foreign affairs.” *Id.*; *see also, e.g.*, Legomsky, *supra* note 10, at 1628 (noting that most immigration law decisions “are inherently unlikely to disrupt U.S. foreign policy”). For a more general criticism of the political question doctrine, *see Lobato v. State*, No. 08SC185, 2009 WL 3337684, at *8 (Colo. Oct. 19, 2009) (“The federal political question doctrine . . . has been subject to debate and criticism by leading scholars. A major critique of the political question doctrine is that the *Baker* [*v. Carr*] criteria ‘seem useless in identifying what constitutes a political question.’ ‘[T]here is no place in the Constitution,’ Professor Chemerinsky observes, ‘where the text states that the legislature or executive should decide whether a particular action constitutes a constitutional violation. The Constitution does not mention judicial review, much less limit it by creating “textually demonstrable commitments” to other branches of government.’ Moreover, the ‘most important constitutional provisions,’ including ones that courts have never hesitated to interpret, ‘are written in broad, open-textured language and certainly do not include “judicially discoverable and manageable standards.”’” (citing *Baker v. Carr*, 369 U.S. 186 (1962); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 149–50 (5th ed. 2007)).

¹⁵⁵ *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972) (referring to the “plenary congressional power to make policies and rules for exclusion of aliens”).

ways that flaunt congressional intent.¹⁵⁶ 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.¹⁵⁷ 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.*”¹⁵⁸

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

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.¹⁵⁹ 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.”¹⁶⁰ 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.

¹⁶⁰ *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

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.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.”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.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,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.”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.

¹⁶¹ *Cf.*, e.g., *Cruzan v. Harmon*, 760 S.W.2d 408, 412 (Mo. 1988) (noting that a number of constitutional rights are “amorphous”).

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).

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).

¹⁶⁴ 22 C.F.R. § 42.81(a).

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.”¹⁷⁴ The government argued that the consular officer had sent a letter that qualified as a refusal.¹⁷⁵ 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.¹⁷⁶ The United States Consulate was then ordered to act expeditiously “to either grant or deny the visa applications.”¹⁷⁷

Courts are divided as to the proper scope of *Patel*. Some courts have implied that they do not intend to follow *Patel*¹⁷⁸ or have found ways to limit it—for instance, by holding that “the *only* nondiscretionary duty of the consular officer is to act.”¹⁷⁹ But it is

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*,¹⁸⁰ 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.”¹⁸¹ In *Amidi*, the plaintiffs challenged the process followed by a consular officer in terminating a visa application.¹⁸² 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”¹⁸³

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.¹⁸⁴ In

characterize their complaint as one challenging the process followed by the consulate rather than its ultimate decision does not exempt the case from this well-settled doctrine [of consular nonreviewability]. At its core, the relief sought by the Appellants would require the Manila consulate to revisit its decision denying the visa applications. Issuing such relief would be exactly what the doctrine of consular nonreviewability prevents us from doing.”)

¹⁸⁰ No. 07cv710 (AJB), 2008 WL 2662599, at *3 (S.D. Cal. Mar. 17, 2008).

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.”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.”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.”¹⁸⁷ Rather, courts need “only . . . determine whether the agency followed the procedures it was required to follow.”¹⁸⁸

A similar conclusion was reached in *International Union of Bricklayers and Allied Craftsmen v. Meese*.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.”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

¹⁸⁵ *Id.* (citing 8 U.S.C. § 1153(g)).

¹⁸⁶ *Singh v. Clinton*, No. C 08-2362 WDB, 2009 WL 673736, at *2 (N.D. Cal. Mar. 11, 2009).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ 761 F.2d 798 (D.C. Cir. 1985).

¹⁹⁰ *Id.* at 801.

a particular case of matters which Congress has left to executive discretion.”¹⁹¹ 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.¹⁹²

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 ineligibility.¹⁹³ 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.”¹⁹⁴ 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.¹⁹⁵ 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

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).²⁰⁰ A number of scholars have made forceful arguments for why courts should read the APA as providing judicial review of decisions by consular officers.²⁰¹ Further, a federal district court recently reaffirmed the statement in *Patel* that “judicial review may also exist under the APA.”²⁰² Nevertheless, numerous other courts—both before²⁰³ and after *Patel*²⁰⁴—have soundly rejected the idea that the APA creates an exception to the doctrine of consular nonreviewability.²⁰⁵

Thus, with the possible exception of the Ninth Circuit,²⁰⁶ 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*,²⁰⁷ where a federal district court recently granted review to analyze an alleged procedural deficiency—one of the generally recognized exceptions to the doctrine

²⁰⁰ *Patel v. Reno*, 134 F.3d 929, 932 n.1 (9th Cir. 1998); see generally Administrative Procedure Act, Pub. L. No. 79-4101, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2006)).

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.

²⁰² *Raduga USA Corp. v. U.S. Dep’t of State*, 440 F. Supp. 2d 1140, 1146 n.2 (S.D. Cal. 2005), *as amended* March 3, 2006.

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)).

²⁰⁷ No. C 08-2362 WDB, 2009 WL 673736 (N.D. Cal. Mar. 11, 2009).

of consular nonreviewability²⁰⁸—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”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 *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 *Singh* realized, it is difficult to convince a court that a government official’s actions were “arbitrary, capricious . . . [or] not in accordance with law.”²¹⁰ This is particularly true in light of the fact that agency officials—including consular officers—receive what is often referred to as *Chevron*²¹¹ deference when courts are reviewing their actions.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;²¹³ rather, courts

²⁰⁸ See *supra* Part III.B.

²⁰⁹ *Singh*, 2009 WL 673736, at *2 (citing APA, 5 U.S.C. § 706(2)(A)).

²¹⁰ *Id.* (citing APA, 5 U.S.C. § 706(2)(A)).

²¹¹ See generally *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

²¹² E.g., *Singh*, 2009 WL 673736, at *3.

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 decision²¹⁴—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.²¹⁵

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.²¹⁶ 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*

issuance of visas. As a court has no power to serve as a proxy consular officer, that part of the district court's order that purports to direct the issuance of visas is without force and effect." (internal citations omitted)).

²¹⁴ *E.g.*, *Patel v. Reno*, 134 F.3d 929, 933 (9th Cir. 1998) (remanding the case "for the district court to order the consulate to either grant or deny the visa applications").

²¹⁵ *Baker*, 878 F.2d at 509 ("On October 22, 1988, President Reagan issued Presidential Proclamation 5887, 53 Fed. Reg. 43,185 (Oct. 26, 1988), which prohibits 'officers and employees of the Government of Nicaragua' from entering this country as nonimmigrants. The parties agreed that the Proclamation constituted an independent intervening cause for future exclusions of Tomas Borge, the Interior Minister of Nicaragua, and that therefore his case was moot. Accordingly, in our March 1, 1989 order, we dismissed the appeal in *Abourezk* and instructed the district court to vacate its judgment and dismiss that case." (internal citation omitted)).

²¹⁶ *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

²¹⁷ 440 F. Supp. 2d 1140 (S.D. Cal. 2005), *as amended* March 3, 2006.

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.”²²²

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.