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Margaret Laufman
New York Law School Class of 2010

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MARGARET LAUFMAN

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ABOUT THE AUTHOR: Margaret Laufman received her J.D. from New York Law School in May of 2010.

Judicial review ensures that actions taken by the legislative and the executive branches of government are subject to some degree of oversight.[1] It guarantees that government actions are within the bounds of law.[2] For foreign nationals seeking to enter the United States, whether for work, education, or familial reasons, judicial review of the government's decision to deny a visa is generally unavailable.[3] Courts have held for over seventy-five years that a consular official's decision regarding visa grants and denials is beyond review.[4] This is known as the doctrine of consular nonreviewability.[5] As a result of the courts' refusal to review such decisions, consular officers have very broad powers in deciding visa applications.[6] This presents a practical challenge for foreign nationals when a consular officer denies them a visa.[7] An individual officer's decision regarding a visa can cause someone to lose a "dream job" in the United States. However, not all hope is lost. Recently, some courts have held that an applicant who was denied a visa may possess a limited judicial remedy.[8]

In *American Academy of Religion v. Napolitano*, the Second Circuit held that the doctrine of consular nonreviewability does not preclude a court from engaging in a "limited judicial review" when a visa denial by a consular officer implicates a U.S. citizen's First Amendment rights.[9] This case comment contends that, while the court's holding is limited to plaintiffs with First Amendment claims, the decision

1. *See* Marbury v. Madison, 5 U.S. 137 (1803).

2. *Id.*

3. *See* United States *ex rel.* London v. Phelps, 22 F.2d 288, 290 (2d Cir. 1927) (establishing the doctrine of consular absolutism, noting that "whether the consul has acted reasonably or unreasonably is not for us to determine"); United States *ex rel.* Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929).

4. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999). Consular nonreviewability applies to both immigrant and nonimmigrant visas. *See* Li Hing of H.K. v. Levin, 800 F.2d 970 (9th Cir. 1986) (applying the doctrine to nonimmigrant visas); DePena v. Kissinger, 409 F. Supp. 1182, 1184 (S.D.N.Y. 1976) (denying judicial review of an immigrant visa).

5. *Saavedra Bruno*, 197 F.3d at 1159.

6. See Immigration and Nationality Act (INA) § 104(a), 8 U.S.C. § 1104(a) (2006), which exempts consular officers' decisions to grant or deny visas from reviewability by the Secretary of State. This limitation of the Secretary of State's authority has been understood as eliminating both administrative and judicial review. Some scholars have traced federal court deference in this area to the plenary powers of Congress in immigration. *See Knauff*, 338 U.S. at 543 (finding actions taken by the political branches of government immune from review by the courts "unless expressly authorized by law"); *see also* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). For an extensive overview of consular visa decisions, see James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 Wash. L. Rev. 1 (1991).

7. For a discussion of a lawyer's role in advocating for visa applicants, see Andrew T. Chan & Robert A. Free, *The Lawyer's Role in Consular Visa Refusals*, Immigr. Briefings, Apr. 2008, at 1; Stewart Matthews, *Consular Practice: Immigrant Visas*, Md. B.J., Dec. 2008, at 72. For an argument on extending review to certain visas which carry important interests, see Maria Zas, Comment, *Consular Absolutism: The Need For Judicial Review In The Adjudication of Immigrant Visas For Permanent Residence*, 37 J. Marshall L. Rev. 577 (2004).

8. *See* Bustamante v. Mukasey, 531 F.3d 1059, 1060 (9th Cir. 2008); Adams v. Baker, 909 F.2d 643, 647–49 (1st Cir. 1990); Abourezk v. Reagan, 785 F.2d 1043, 1050 (D.C. Cir. 1986).

9. 573 F.3d 115, 124–25 (2d Cir. 2009).

has potentially far-reaching consequences regarding future application of the doctrine of consular nonreviewability. By recognizing this limited exception and expanding the grounds on which a visa denial may be reviewed, the Second Circuit has opened the door for other challenges to this doctrine. This could provide a basis for courts to recognize a broader exception that would allow judicial review of visa denials that implicate *any* constitutional interest of U.S. citizens or companies.

Tariq Ramadan is a well-known, Swiss-born academic who, at the time, was a Professor of Contemporary Islamic Studies in the Faculty of Oriental Studies at Oxford University.[10] The University of Notre Dame offered Ramadan a teaching position in January 2004.[11] After Ramadan accepted the position, Notre Dame submitted an H-1B visa petition to the U.S. Citizenship and Immigration Services (USCIS) to allow Ramadan to come to the United States and teach for the university.[12] USCIS initially approved the visa petition.[13] Ramadan planned to move to the United States in August 2004.[14] But in July 2004, Ramadan's H-1B visa was revoked by the U.S. Embassy in Bern, Switzerland.[15] Ramadan was subsequently told that he could reapply for a visa.[16] In October 2004, Notre Dame filed a second H-1B petition for Ramadan.[17] After receiving no decision on that petition from USCIS by December 2004, Ramadan was forced to resign from the Notre Dame teaching position.[18]

In September 2005, Ramadan applied for a visitor's visa (known as a "B visa") so that he could attend academic conferences.[19] A consular officer at the U.S. Embassy in Bern interviewed Ramadan in December 2005.[20] Ramadan was questioned about his political views and associations to which he had either belonged or donated money.[21] During the interview, the officer discovered that Ramadan had donated approximately $1336 to the Association de Secours Palestinien (ASP) between 1998

10. *Biography*, TARIQRAMADAN, http://www.tariqramadan.com/BIOGRAPHY,11.html (last visited Apr. 14, 2011).

11. *Am. Acad. of Religion*, 573 F.3d at 119.

12. *Id.* An H1-B category visa applies to people who wish to perform services in a specialty occupation. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A) (2010).

13. *Am. Acad. of Religion*, 573 F.3d at 119.

14. *Id.*

15. *Id.* No explanation was given for why Ramadan's visa had been revoked. *Id.*

16. *Id.* at 120.

17. *Id.*

18. *Id.* DHS subsequently rejected the second petition. *Id.*

19. *Id.* Some of the conferences Ramadan sought to attend were sponsored by the American Academy of Religion. The American Academy of Religion is a professional organization of academics who research or teach in areas related to religion. The organization's website is available at AM. ACAD. OF RELIGION, http://www.aarweb.org (last visited Feb. 27, 2011).

20. *Am. Acad. of Religion*, 573 F.3d at 120.

21. *Id.*

and 2002.[22] The ASP was designated as a terrorist organization by the U.S. Treasury Department in 2003 because of financial support it had given to Hamas, the Palestinian Islamic organization.[23] Ramadan was not notified of a decision regarding that second visa application as well.[24]

In January 2006, the American Academy of Religion filed a suit in the U.S. District Court for the Southern District of New York challenging Ramadan's exclusion from the United States based on the July 2004 revocation of Ramadan's H-1B visa and the government's failure to act on Ramadan's B visa petition.[25] In June 2006, the district court ordered the Department of Homeland Security to issue a decision on Ramadan's B visa petition within ninety days.[26] Ramadan was notified in September 2006 that his B visa had been denied because he provided "material support to a terrorist organization."[27] Plaintiffs moved for summary judgment, arguing in part that the government's failure to render a final decision on Ramadan's pending visa application violated their First Amendment rights by preventing them from engaging in academic exchange with Ramadan, in person.[28] The government cross-moved for summary judgment, arguing that Congress's plenary power to control immigration policy and the delegation of that power to the executive branch allowed them to exclude Ramadan as a matter of law.[29]

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22. *Id.*

23. *Id.* The INA renders inadmissible any alien who provides "material support" to a terrorist organization. *See* INA § 212(a)(3)(B)(i)(IV), 8 U.S.C. § 1182(a)(3)(B)(i)(IV) (2006 & Supp. I 2007). Material support is defined broadly and can include providing "funds, transfer of funds or other material financial benefit." *See* INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006 & Supp. I 2007).

24. *Am. Acad. of Religion*, 573 F.3d at 120. Ramadan eventually discovered in September 2006 that the consulate had denied his visa petition because the government claimed that he had provided material support to a terrorist organization. *Id.*

25. *Id.* Because Ramadan is an "unadmitted and nonresident alien," he has no constitutional right of entry to the United States. *See* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972). Thus, he was a symbolic plaintiff, and the American Academy of Religion asserted its First Amendment rights in bringing the case. *See Am. Acad. of Religion*, 573 F.3d at 122.

26. *Am. Acad. of Religion*, 573 F.3d at 120. Interestingly, by issuing the order to the government, the court effectively recognized an additional exception (beyond that espoused in *Mandel*) to the doctrine of consular nonreviewability. "Normally a consular official's discretionary decision to grant or deny a visa petition is not subject to judicial review," but, when a consular officer has not taken any action on a visa petition, a court will have jurisdiction to compel an officer to adjudicate the petition. Patel v. Reno, 134 F.3d 929, 931 (9th Cir. 1997).

27. *Am. Acad. of Religion*, 573 F.3d at 120.

28. *See* Am. Acad. of Religion v. Chertoff, 463 F. Supp. 2d 400, 410 (S.D.N.Y. 2006); *Mandel*, 408 U.S. at 760.

29. *Am. Acad. of Religion*, 573 F.3d at 125. Congress's plenary power to regulate immigration has long been recognized and upheld by the Supreme Court. *See, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649 (1898); Lem Moon Sing v. United States, 158 U.S. 538, 543–44 (1895).

The district court granted the government's motion and dismissed the complaint.[30] The court noted that federal courts are precluded under the doctrine of consular nonreviewability from exercising jurisdiction over a foreign national's challenge to a denied visa application.[31] The court then discussed the applicability of the U.S. Supreme Court's decision in *Kleindienst v. Mandel* to *American Academy of Religion*.[32]

Mandel concerned a Belgian scholar and self-described "revolutionary Marxist" who was invited to the United States to attend a conference at Stanford University and to lecture at various other American universities.[33] Mandel's visa was denied, based in part on a finding by the Department of State that, during previous trips to the United States, he engaged in activities beyond his stated itinerary.[34] The State Department asked the Attorney General to waive Mandel's inadmissibility pursuant to the Immigration and Nationality Act (INA) section 212(d).[35] The Attorney General declined to exercise discretion and affirmed "that Mandel's temporary admission was not authorized."[36] Mandel, along with a group of U.S. citizens including the university professors who had invited Mandel to speak at several universities, challenged his exclusion from the United States.[37] The plaintiffs alleged that Mandel's denial deprived them of their First Amendment right to "hear his views and engage him in a free and open academic exchange."[38]

The Supreme Court held that, "when the Executive exercises this power [to exclude aliens] . . . on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion nor test it by balancing its justification against First Amendment interests."[39] However, the Court declined to address what "First Amendment or other grounds" could provide a basis for challenging a negative exercise of discretion where no justification was given.[40] The Court found that the "Attorney General did inform Mandel's counsel of the reason

30. Am. Acad. of Religion v. Chertoff, No. 06 CV 588(PAC), 2007 WL 4527504 (S.D.N.Y. Dec. 20, 2007).

31. *Am. Acad. of Religion*, 573 F.3d at 121.

32. *Id.* (discussing *Mandel*, 408 U.S. 753).

33. *Mandel*, 408 U.S. at 756. It is interesting to consider to what extent the Supreme Court decided *Mandel* on the basis of the value of his physical presence for engaging in discussion. In the opinion, the Court noted that, because Mandel was excluded from the United States, he missed a speaking engagement sponsored by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference. His speech was to be on *Revolutionary Strategy in Imperialist Countries*. *Id.* at 757. The Court noted that he gave the speech via transatlantic telephone. *Id.* at 759. It is significant that the Court did not consider as a factor in its decision that Mandel was still able to deliver the speech.

34. *Id.* at 758–59.

35. *Id.* at 759.

36. *Id.*

37. *Id.* at 759–60.

38. *Id.* at 760.

39. *Id.* at 770.

40. *Id.*

for refusing [to grant him] a waiver. And that reason was facially legitimate and bona fide."[41] Thus, the Court recognized a limited First Amendment right to "hear, speak, and debate" with a visa applicant, allowing a court to review the Attorney General's decision not to waive inadmissibility of a visa applicant.[42]

In its decision on the merits, the district court in *American Academy of Religion*, based on the holding in *Mandel*, found that U.S. citizens may challenge a visa denial based on a violation of their First Amendment right to receive information.[43] The district court found that federal jurisdiction is proper in such a case.[44] In the absence of guidance from the U.S. Supreme Court on how to determine whether the consular officer had a "facially legitimate and bona fide" reason for excluding Ramadan, the district court applied a three-part inquiry to the facts before it.[45] The district court analyzed whether the government provided a reason for the denial of the visa, whether there was a statutory basis for the denial, and finally, whether the provision was properly applied to the facts at hand.[46] In its analysis, the court found that the defendants "had provided a facially legitimate and bona fide reason for denying Ramadan's visa," relying on Ramadan's "donations to organizations supporting known terrorist organizations."[47] As a result, the court denied plaintiffs' motion for summary judgment while granting that of the defendants.[48]

The plaintiffs appealed the district court's decision, again seeking to use the narrow exception from *Mandel* to challenge the doctrine of consular nonreviewability.[49] The defendants contended that *Mandel* did not apply to the facts of *American Academy of Religion* because *Mandel* addressed a situation in which a court "reviewed the Attorney General's discretionary decision not to waive . . . inadmissibility," while *American Academy of Religion* dealt with a consular officer's decision to deny a visa—a decision that the defendant argued is immune from review pursuant to INA section 104(a).[50] To determine whether *Mandel* was controlling in this case, the Second Circuit looked to precedent subsequent to *Mandel* from the Ninth, First, and D.C. Circuits.[51]

In *Bustamante v. Mukasey*, the Ninth Circuit was faced with an American citizen seeking review of a consular officer's decision not to grant a visa to her Mexican

41. *Id.* at 769.

42. *Id.* at 762.

43. Am. Acad. of Religion v. Chertoff, No. 06 CV 588(PAC), 2007 WL 4527504, at *7–8 (S.D.N.Y. Dec. 20, 2007).

44. *Id.*

45. *Id.* at *11.

46. *Id.*

47. *Id.*

48. *Id.* at *13.

49. Am. Acad. of Religion v. Napolitano, 573 F.3d 115, 120 (2d Cir. 2009).

50. *Id.* at 123.

51. *Id.* at 124.

husband.[52] The court found that, when a visa denial violates a U.S. citizen's constitutional rights, a limited judicial review is required in order to determine whether the consular officer has a "facially legitimate and bona fide reason" for denying the visa.[53] In reaching its conclusion, the Ninth Circuit relied on *Mandel*.[54] The *Bustamante* court found that, as long as a constitutional challenge is raised, a citizen is entitled to a "highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason."[55] The Ninth Circuit found that the plaintiff, Ima Bustamante, had a protected liberty interest in her marriage "that [gave] rise to a right to constitutionally adequate procedures in the adjudication of her husband's visa application."[56] Because Bustamante was a U.S. citizen and raised a constitutionally protected right (i.e., a procedural due process claim), the Court engaged in the limited inquiry permitted by *Mandel* and considered whether the explanation for the denial of her Mexican husband's visa application was facially legitimate and bona fide.[57] The Ninth Circuit found the reason was both facially legitimate and bona fide, and affirmed the judgment of the district court.[58] Importantly, the court noted in a footnote that:

> We are unable to distinguish *Mandel* on the grounds that the exclusionary decision challenged in that case *was not a consular visa denial, but rather the Attorney General's refusal to waive Mandel's inadmissibility*. The holding is plainly stated in terms of the power delegated by Congress to "the Executive." The Supreme Court said nothing to suggest that the reasoning or outcome would vary according to which executive officer is exercising the Congressionally-delegated power to exclude.[59]

In *Allende v. Shultz*, the First Circuit decided a case involving Hortensia de Allende, the widow of the former president of Chile, Salvador Allende.[60] She had applied to the U.S. Embassy in Mexico City, Mexico, for a visa in response to an invitation to speak during International Women's Week in San Francisco.[61] Allende was found ineligible for a visa under a provision of the INA that barred the admission of aliens who "advocate communism or are affiliated with communist organizations."[62] Allende's admission to the United States was also determined to be "prejudicial to

52. 531 F.3d 1059, 1061–62 (9th Cir. 2008).

53. *Id.* at 1062.

54. *Id.*

55. *Id.* at 1060.

56. *Id.* at 1062.

57. *Id.*

58. *Id.*

59. *Id.* at 1062 n.1 (emphasis added).

60. 845 F.2d 1111, 1112–13 (1st Cir. 1988).

61. *Id.* at 1112–13.

62. *Id.* at 1113. Allende was excluded under a section of the INA similar to that found in the present statute at INA § 212(a)(3)(D)(i), 8 U.S.C. § 1182(a)(3)(D)(i) (2006 & Supp. I 2007).

the foreign policy interests of the United States."[63] The consular officer denied her the visa accordingly and forwarded the application to the Secretary of State who declined to grant a waiver for her ineligibility and affirmed the consular officer's denial.[64] The plaintiffs, scholars who had extended speaking invitations to Allende, alleged that the misapplication of the waiver provision violated their First Amendment right to receive information as recognized in *Mandel*.[65] The First Circuit implicitly rejected the distinction between a consular officer's denial of a visa and the Attorney General's denial of a waiver, and went on to engage in a limited judicial review as set forth by *Mandel*.[66]

In *Abourezk v. Reagan*, the U.S. Court of Appeals for the District of Columbia heard an appeal involving three consolidated district court actions that challenged four separate visa denials by consular officers in Cuba, Italy, and Nicaragua.[67] The plaintiffs, who included members of Congress, professors, and civic leaders, argued that by continuing to exclude foreign nationals who had been invited by the plaintiffs to speak in the United States, the State Department was violating their First Amendment right to "engage in dialogue" with the foreign nationals.[68] The court found that it had jurisdiction to hear the case based, in part, on the holding in *Mandel*. In doing so, the court implicitly rejected the distinction between a consular officer's denial of a visa and the Attorney General's denial of a waiver.[69] The court of appeals remanded the cases for examination of the visa denials to ensure that the government action was within the "statutory and constitutional authority of the State Department."[70]

After reviewing these circuit court cases, the Second Circuit in *American Academy of Religion* rejected the defendant's distinction between a visa denial by a consular officer and the Attorney General's decision not to waive inadmissibility.[71] The court reasoned that, if some judicial review is permitted for the Attorney General's

63. *Allende*, 845 F.2d at 1114.

64. *Id.* at 1112.

65. *Id.* at 1114. For an additional example of a First Amendment challenge to the denial of a visa application, see *Adams v. Baker*, 909 F.2d 643, 647–50 (1st Cir. 1990).

66. *See Allende*, 845 F.2d at 1116, 1119–21.

67. 785 F.2d 1043, 1048–50 (D.C. Cir. 1986).

68. *Id.* The plaintiffs also claimed that the denial exceeded the State Department's statutory authority under section 212(a)(27) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 182 (repealed 1990). *Mandel*, 785 F.2d at 1049. This section provides that certain aliens are excludable if "the Attorney General has reason to believe that the alien 'seeks to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States.'" *Id.* at 1047 (quoting INA § 212(a)(27)). When a consular officer faced with such an applicant deems the applicant ineligible on the above statutory grounds, the application is then forwarded to the State Department for advice, and the possibility of a waiver. *Id.* at 1048.

69. *Id.* at 1050.

70. *Id.* at 1062.

71. Am. Acad. of Religion v. Napolitano, 573 F.3d 115, 125 (2d Cir. 2009).

discretionary decision, it would only be logical to extend the same review to a consular officer's decision regarding an applicant's statutory ineligibility where First Amendment interests are at issue.[72] The court held that, "where a plaintiff, with standing to do so, asserts a First Amendment claim to have a visa applicant present views in this country, we should apply *Mandel* to a consular officer's denial of a visa."[73] The court then remanded the case for further proceedings.[74]

In *American Academy of Religion*, the Second Circuit left the door of consular nonreviewability ajar by announcing a narrow exception for plaintiffs raising First Amendment claims. Despite the narrow holding, the court's willingness to recognize an exception shows a cautious establishment of a judicial role in consular matters.[75] This signals to future plaintiffs that the courts may be willing to follow the Ninth Circuit in extending reviewability where any constitutional claim of a U.S. citizen is implicated by the denial of a visa. As one commentator noted, the holding in *American Academy of Religion* has "potentially far-reaching consequences" for immigration matters because judicial review of consular decisions is not typically within the purview of the courts.[76]

Lower courts have consistently bound themselves by the doctrine of consular nonreviewability,[77] and *Mandel* is the only Supreme Court case that has addressed the doctrine.[78] In *Mandel*, the Supreme Court noted that an unadmitted foreign national has no right of entry into the country.[79] Instead, the Court relied on the

72. *Id.*

73. *Id.*

74. *Id.* at 138. In regards to the safe-harbor exception found in INA section 212(a)(3)(B)(iv)(VI)(dd), an alien is barred from admission if that alien engaged in terrorist activity "unless [he] can demonstrate by clear and convincing evidence that [he] did not know, and should not reasonably have known, that the organization was a terrorist organization." *Am. Acad. of Religion*, 573 F.3d at 138. The court remanded the case in order to determine whether the consular officer "confronted Ramandan with the allegation of knowledge that ASP had funded Hamas and provided him some opportunity thereafter to negate such knowledge." *Id.* at 134.

75. The holding is narrow because the court affirmed the view that a foreign national has no constitutional right to challenge the denial of a visa. *Id.* at 125, 128. But, the court also endorsed the idea that a U.S. citizen has such a right in the limited situation where a First Amendment claim is implicated. *Id.* at 121.

76. Rami D. Fakhoury, *Second Circuit Confirms that Consular Decisions Are Reviewable*, Immigr. Daily, http://www.ilw.com/articles/2009,0903-fakhoury.shtm (last visited Feb. 24, 2011); *see also* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 Tex. L. Rev. 1615, 1619–20 (2000).

77. For a general discussion of the doctrine and how courts adhere to it, despite criticism from scholars, see Legomsky, *supra* note 76; Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 San Diego L. Rev. 887, 888 (1987) (noting that American consular officers stationed abroad are "probably the only administrative employees of the United States government whose functions have been insulated from administrative and judicial review").

78. *See* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

79. *Id.* at 762.

plaintiffs' First Amendment right to "hear, speak, and debate" with Mandel, in person, in order to find jurisdiction.[80]

The INA provision under which Mandel was denied entry addressed an exclusionary ground that could be waived upon approval from the Secretary of State.[81] Critical to the present case is the fact that the Court in *Mandel* was considering a non-consular denial of a waiver of inadmissibility, not a consular visa determination.[82] Scholars point out that *Mandel* did not answer the question of whether limited judicial review is available outside of cases dealing with discretionary waivers.[83] In *American Academy of Religion*, the Second Circuit gave its first indication that it is willing to take a less restricted view of the doctrine of consular nonreviewability. The court read the ambiguity in *Mandel* as leaving open the possibility that judicial review might be appropriate when based on a plaintiff's First Amendment claims.[84] By authorizing judicial review of a consular officer's visa determination, the court held that such review was appropriate.[85] This establishes a role for the judiciary in an area previously considered closed to the courts.

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80. *Id.*

81. *Id.* at 755. Specifically, the provisions were sections 212(a)(28)(D), (G)(v), and 212(d)(3)(A) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, 182 (codified as amended at 8 U.S.C. § 1182 (2006)). These provisions rendered individuals who had promoted Communism inadmissible unless the Attorney General waived inadmissibility pursuant to section 212(d)(3)(A). *Id.*

82. *Mandel* was not a consular review case. Am. Acad. of Religion v. Napolitano, 573 F.3d 115, 123 (2d Cir. 2009). Arguably, there is a difference between Congressional delegation of plenary power to consular officers for visa determinations and a provision for a discretionary review by the Attorney General of a visa denial. *See* Saavedra Bruno v. Albright, 197 F.3d 1153, 1156–59 (D.C. Cir. 1999).

83. *See* Nafziger, *supra* note 6, at 32–33 ("[I]t 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."); *see also* David A. Martin, Mandel, Cheng Fan Kwok, *and other Unappealing Cases: The Next Frontier of Immigration Reform*, 27 Va. J. Int'l L. 803, 810 (1987).

84. *Am. Acad. of Religion*, 573 F.3d at 125. While the Second Circuit's decision may not seem groundbreaking because of its narrow holding, very few federal courts have formally adopted this stance. *See, e.g.*, De Castro v. Fairman, 164 F. App'x 930, 934 (11th Cir. 2006) (holding that the doctrine of consular nonreviewability precluded review of a mandamus petition and that a naturalized citizen who alleged a due process violation did not warrant circumvention of the applicability of the doctrine of consular nonreviewability); Doan v. Immigration & Naturalization Serv., 160 F.3d 508, 509 (8th Cir. 1998) (finding that absent express statutory language to the contrary, a decision of an INS district director ("a functional equivalent to a consular official") was not subject to judicial review); Centeno v. Shultz, 817 F.2d 1212, 1213–14 (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988); Li Hing of H.K., Inc. v. Levin, 800 F.2d 970, 971 (9th Cir. 1986) ("[I]t has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review.").

85. For an example of a court coming to the opposite conclusion, see *Centeno*, 817 F.2d at 1213–14. Centeno, a Filipino citizen, applied at the U.S. Embassy in Manila for a visitor's visa, which the consular officer denied. *Id.* at 1213. A lawsuit was filed by Centeno's brother-in-law, a U.S. citizen. *Id.* The Fifth Circuit noted that:

> Under *Kleindienst v. Mandel*, the *denial of visas* to aliens is not subject to review by the federal courts. Such review is limited solely to the determination of whether a facially legitimate and bona fide reason exists for the *denial of the waiver*. Since Centeno was

As mentioned above, three other jurisdictions have taken the Second Circuit's approach: the Ninth Circuit in *Bustamante*,[86] the D.C. Circuit in *Abourezk*,[87] and the First Circuit in *Allende*.[88] Resolving the ambiguity in favor of judicial review signals that the Second Circuit might be open to expanding jurisdiction beyond First Amendment claims.[89] This case comment contends that the Second Circuit should follow the Ninth Circuit and expand review to encompass any constitutional challenge brought by a U.S. citizen.

The Second Circuit cited with approval the Ninth Circuit's reasoning in *Bustamante* regarding the lack of a distinction between a consular visa denial and a discretionary waiver.[90] In *Bustamante*, the case in which a U.S. citizen sought review of a consular officer's decision not to grant a visa to her Mexican husband,[91] the court found that, where a U.S. citizen's constitutional rights have been violated by the denial of a visa, then a limited judicial review is required in order to determine whether the consular officer has a "facially legitimate and bona fide reason" for denying the visa.[92] In reaching its conclusion, the Ninth Circuit relied on *Mandel* to find that, along with First Amendment claims, a citizen is entitled to limited judicial inquiry when the liberty interest of marriage is implicated in a visa determination.[93] The court found that Bustamante's constitutional challenge involved her protected liberty interest in marriage, a due process issue, and "consider[ed] the Consulate's

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denied a visa under 8 U.S.C. § 1184(b), which does not provide for a waiver, however, the denial of the visa is not subject to any review by federal court.

Id. at 1213–14 (emphasis added) (footnote omitted) (citations omitted).

86. 531 F.3d 1059 (9th Cir. 2008).

87. 785 F.2d 1043 (D.C. Cir. 1986).

88. 845 F.2d 1111 (1st Cir. 1988). In *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990), the First Circuit also held that exceptions existed to the doctrine of consular nonreviewability. *Id.* at 647–50. In that case, Gerry Adams, former president of Sinn Fein, sought to enter the United States for speaking engagements. *Id.* at 645. His visa application was denied based in part on the State Department's belief that he was "engaged in terrorist activities" through his affiliation with the Provisional Irish Republican Army. *Id.* U.S. citizens and organizations brought suit challenging his exclusion from the United States. *Id.* The court entertained the case based on the limited review permitted in *Mandel* and found that the government had provided a "facially legitimate and bona fide reason" for Adams's exclusion. *Id.* at 650.

89. Aside from the Second Circuit, only three other federal appellate courts have read *Mandel* to permit judicial review in cases involving consular visa denials, as distinguished from a discretionary waiver of inadmissibility. *See Bustamante*, 531 F.3d at 1060; *Adams*, 909 F.2d at 647–48; *Abourezk*, 785 F.2d at 1050.

90. Am. Acad. of Religion v. Napolitano, 573 F.3d 115, 124 (2d Cir. 2009) ("The Ninth Circuit has explicitly rejected the Government's distinction, for purposes of permitting some judicial review of a constitutional claim, between a consular officer's denial of a visa and the Attorney General's denial of a waiver of inadmissibility."). While the Second Circuit did not address the broad holding of the Ninth Circuit, this does not necessarily indicate that the court would be unwilling to entertain challenges based on other constitutional interests.

91. *Bustamante*, 531 F.3d at 1061.

92. *Id.* at 1062.

93. *Id.*

explanation for the denial of [her husband's] visa application pursuant to the limited inquiry authorized by *Mandel*."[94]

The Ninth Circuit's reasoning makes sense from a logical perspective, as well as from the perspective of those most affected by the denial.[95] When constitutional rights are implicated by actions of the government, citizens should have an avenue to judicial review. The Ninth Circuit seemed to apply the language and spirit of *Mandel* as supporting its decision to exercise judicial review. The Supreme Court in *Mandel* stated that it declined to consider what "First Amendment *or other grounds*" would be available for challenge when a consular officer's decision was not facially legitimate and bona fide.[96] Adding the words "or other grounds" implies that reviewable challenges would not be limited to claims involving only the First Amendment.

Not all visa denials can be reviewed in court; there are simply too many for courts to be able to provide an individualized review.[97] But there is a potential for developing a limited review that strikes a balance between the competing interests of efficient visa processing and ensuring avenues for judicial review. Federal courts should review *all* constitutional claims of U.S. citizens relating to consular decisions—pursuant to jurisdiction over federal questions granted by 28 U.S.C. § 1331—and not just those claims implicating the First Amendment.[98] As the Ninth Circuit discussed in *Bustamante*, "[t]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures."[99] Neither *Mandel*, *Abourezk*, nor *Allende* articulated a reason

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94. *Id.*

95. Family unity is a concern for many people seeking to obtain visas. *See* Memorandum from Denise A. Vanison et al., U.S. Citizenship & Immigration Servs., to Alejandro N. Mayorkas, Director, U.S. Citizenship & Immigration Servs. (undated), *available at* http://www.aila.org/content/default.aspx?docid=32746. A lawsuit is currently pending in the United States District Court for the Central District of California regarding the situation when a consular officer determines that a beneficiary of a petition under the Child Status Protection Act is not a "child" and then denies the visa on said grounds. *See* Cuellar de Osorio v. Scharfen, No. EDCV 08-0840 (C.D. Cal. filed June 23, 2008). The petitioning parent may now seek review of the decision under the Due Process Clause of the Constitution. *Id.* To date, both appellee's and appellant's briefs have been filed. For more information and to read the appellant's briefs filed in the case, see *Child Status Protection Act*, Shusterman.com, http://shusterman.com/childstatusprotectionact.html (last visited Apr. 3, 2011).

96. Kleindienst v. Mandel, 408 U.S. 753 at 770 (1972).

97. For example, in fiscal year 2008, the State Department issued 470,099 immigrant visas and 6,603,073 nonimmigrant visas. U.S. Dep't of State, Table I: Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts Fiscal Years 2004–2008, *available at* http://www.travel.state.gov/pdf/FY08-AR-TableI.pdf (last visited Feb. 20, 2011). For immigrant visas, 291,792 were refused and 2,083,726 nonimmigrant visas refused (keeping in mind, however, that an individual can apply for and be denied a visa more than once in a fiscal year). U.S. Dep't of State, Table XX: Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2008, http://www.travel.state.gov/pdf/FY08-AR-TableXX.pdf (last visited Feb. 20, 2011).

98. 28 U.S.C. § 1331 (2006) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

99. 531 F.3d 1059, 1062 (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985)) (internal quotation marks omitted).

for limiting judicial review of consular decisions to only First Amendment claims.[100] The lack of elaboration or clarification on the part of the Supreme Court in *Mandel* regarding what "other grounds" might warrant reviewability may have contributed to the lower courts' reluctance to expand the doctrine beyond the confines of the First Amendment.[101] The Supreme Court has not addressed consular nonreviewability since *Mandel*.[102] At the same time, the limited review conducted in *Mandel* signals that some additional review is already permissible.[103] The ability to challenge a consular officer's decision regarding a visa denial should not remain confined only to U.S. citizen plaintiffs with First Amendment claims.[104]

Important interests are implicated when a consular officer makes a decision.[105] At stake in visa determinations are the due process interests of U.S. citizens, companies, and universities wishing to bring foreign nationals into the United States.[106] When a U.S. citizen seeks to have a family member join them in the United States, visa denials implicate more serious interests than the First Amendment interests found in cases involving academic conferences, including *Mandel* and *American Academy of Religion*.[107] U.S. citizens should be entitled to judicial review as well, if not more so,

100. *See Mandel*, 408 U.S. at 764–65 (acknowledging the importance of the right to receive information under the First Amendment); Allende v. Shultz, 845 F.2d 1111 (1st Cir. 1988); Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986).

101. Nafziger, *supra* note 6, at 33 (noting that "the opinion contributed to the snowballing effect of the plenary power doctrine by encouraging judicial abstention," and that "[w]ithout much elaboration several lower court decisions have therefore precluded review of consular discretion").

102. *See, e.g.*, Centeno v. Shultz, 817 F.2d 1212 (5th Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988) (regarding an appeal from the Fifth Circuit Court of Appeals dealing with a consular determination refusing a nonimmigrant visitor's visa).

103. Nafziger, *supra* note 6, at 34 ("*Mandel*'s 'facially legitimate and bona fide reason' test has encouraged limited reviewability. After all, the courts did in fact review Mandel itself, and the foreign applicant was at least a nominal co-plaintiff. Thus, the plenary power doctrine may be going through a sixth stage that is beginning to stall the movement of the 'plenary power' snowball, or even melt it.").

104. Wildes, *supra* note 77, at 907 (recommending judicial review where there was a "substantial interest" in the foreign national's admission into the United States); Zas, *supra* note 7, at 595 (noting that judicial review should be open in those cases where an important interest affecting a U.S. citizen, legal resident, or U.S. company is involved).

105. Wildes, *supra* note 77, at 907–08.

106. "The Commission believes that consular decisions denying or revoking visas in specified visa categories, including, all immigrant visas and those LDA categories where there is a petitioner in the United States who is seeking the admission of the visa applicant, should be subject to formal administrative review." U.S. Comm'n on Immigration Reform, Becoming an American: Immigration and Immigrant Policy 181 (1997).

107. Am. Acad. of Religion v. Chertoff, No. 06 CV 588, 2007 WL 4527504, at *7–8 (S.D.N.Y. Dec. 20, 2007). In both *Mandel* and *American Academy of Religion*, the "symbolic plaintiffs" (Ernst Mandel and Tariq Ramadan, respectively) were seeking to enter the United States in order to attend symposia and conferences involving universities and other academic groups. *See id.* at *1–2; *Mandel*, 408 U.S. at 756. Most challenges to the doctrine of consular nonreviewability continue to involve academic issues implicating First Amendment rights because of the limitation on what grounds a consular officer's decision will be reviewed. *See, e.g.*, Am. Sociological Ass'n v. Chertoff, 588 F. Supp. 2d 166, 169 (2008)

based on the intimate nature of their complaint.[108] Decisions that carry such significant consequences, such as disrupting family unity, should not be left in the hands of the "most inexperienced State Department staff. . . . [and] the most junior in the profession."[109] The courts' deferential stance seems anachronistic and misplaced in an age where facilitating the movement of people across borders is crucial for business, familial, and academic purposes.[110]

If the Second Circuit adopts an expansive view of judicial review to encompass all constitutional rights, the courts will not be flooded with litigation. The review would be very limited because only U.S. citizens or companies whose constitutional issues are affected by the denial of the visa would have standing.[111] A foreign national would not be granted any new rights under such treatment.[112] Limiting review to cases where a "substantial interest in the alien's eligibility for admission to the United States" is present strikes a balance between a complete lack of judicial review and excessive judicial review.[113] Also, the "facially legitimate and bona fide" standard is extremely deferential—only requiring a reason for the denial that is based in law (i.e., a particular provision of the INA) and proper treatment of the visa claim by the consular official—and is thus not likely to result in numerous reversals.[114]

(holding that the organization that invited a South African professor to the United States in order to attend events stated a constitutionally based claim for judicial review).

108. U.S. Comm'n on Immigration Reform, *supra* note 105, at 181.

109. Doris Meissner, *Immigration in the Post 9-11 Era*, 40 Brandeis L.J. 851, 853–54 (2002) (noting that consular work "has never ranked in the panoply of rewards to which the best and brightest aspire").

110. *Id.* at 853 (explaining the economic and security implications behind immigration policy).

111. Angelo A. Paparelli & Mitchell C. Tilner, *A Proposal for Legislation Establishing a System of Review of Visa Refusals in Selected Cases*, 65 Interpreter Releases 1027, 1027–32 (1988) (advocating for judicial review of immigrant and non-immigrant visa denials, only excluding review of refusals to crewmen, tourist and in transit visas); Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U. L. Rev. 1137, 1164 (1977) (advocating for judicial review to be limited to immigrant visa denials to avoid burdening federal courts).

112. A foreign national's rights would not be expanded, but rather the U.S. citizen would have the right to challenge the consular officer's denial of the visa application.

113. *See* Wildes, *supra* note 77, at 907 (discussing a proposed bill that would allow judicial review in cases in which there was a "substantial interest" in the foreign nationals' presence in the United States). Wildes gives examples of immediate relatives, and certain employment-based visas. *Id.* Wildes also notes that "[i]n each of the chosen categories is a clear interest of an American business, citizen, or lawful resident, or to any alien who has commenced training or schooling in the United States." *Id.*; *see also* Martin, *supra* note 83, at 812–15.

114. The "facially legitimate and bona fide" standard is not a very helpful one. As Nafziger notes, "[i]n practice, the *Mandel* standard offers an uncertain measure of constitutional protection. Some courts appear to have accepted 'almost any reason the government offers,' so long as it is not patently absurd, while other courts have scrutinized visa denials more carefully." Nafziger, *supra* note 6, at 35 (footnote omitted) (quoting Note, *First Amendment Limitations on the Exclusion of Aliens*, 62 N.Y.U. L. Rev. 149, 164 (1987)); *see, e.g.*, Adams v. Baker, 909 F.2d 643, 647–50 (1st Cir. 1990) (finding the grant of summary judgment proper where the "State Department had competent evidence upon which it could reasonably find that Adams participated in terrorist activities").

Taking into consideration both the above arguments for extending judicial review and the Second Circuit's decision providing a limited judicial review of consular decisions, a case similar to *Burrafato v. U.S. Department of State* may have a different result if decided today.[115] *Burrafato* was an early Second Circuit case dealing with consular nonreviewability.[116] In *Burrafato*, an Italian citizen married to a U.S. citizen was denied a visa.[117] The Italian citizen and his U.S. citizen wife filed a complaint seeking declaratory and injunctive relief based on claims that the visa denial violated the wife's constitutional rights and that the failure to state reasons for the visa denial deprived the husband of procedural due process.[118] In dismissing the complaint, the Second Circuit held that a U.S. citizen spouse's constitutional rights are not violated by deportation of an alien spouse.[119]

Based on *American Academy of Religion*, a matter involving a U.S. citizen spouse and foreign national applicant may well be entertained in the Second Circuit given the limited judicial review afforded to First Amendment claims. The *Burrafato* case was decided soon after *Mandel*, before any case law or commentary had developed regarding the doctrine of consular nonreviewability.[120] Since *Mandel* was decided, there has been much criticism of the doctrine, and valid arguments have consistently been posited for expanding the limited review.[121] The Second Circuit undoubtedly recognized jurisdiction for the plaintiff's claim in *American Academy of Religion* by relying on 28 U.S.C. § 1331.[122] As the court stated, "[t]he Plaintiffs allege that the denial of Ramadan's visa violated their First Amendment rights, and subject matter jurisdiction to adjudicate that claim is clearly supplied by 28 U.S.C. § 1331."[123]

115. 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976). For other cases involving the denial of a spouse's immigrant visa, see *Hermina Sague v. United States*, 416 F. Supp. 217 (D.P.R. 1976); *Pena v. Kissinger*, 409 F. Supp. 1182 (S.D.N.Y. 1976).

116. 523 F.2d 554. This case was decided in 1975, just three years after *Mandel*, which was decided in 1972.

117. *Id.* at 555.

118. *Id.* at 554–55.

119. *Id.* (citing Noel v. Chapman, 508 F.2d 1023, 1027–28 (2d Cir. 1975)).

120. Nafziger, *supra* note 6, at 33 ("*Mandel* has aroused considerable commentary, some of which has misinterpreted it to confirm the notion of judicial non-reviewability even though it clearly upheld the right to review under some circumstances. 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."). Additionally, at the time of *Burrafato*, the concept of substantive due process rights was just beginning to develop. Today, such concepts are an established constitutional protection. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

121. *See, e.g.*, Sam Bernsen, *Consular Absolutism in Visa Cases*, 63 Interpreter Releases 388 (1986); Nafziger, *supra* note 6; Paparelli & Tilner, *supra* note 111; Harry Rosenfield, *Consular Non-reviewability: A Case Study in Administrative Absolutism*, 41 A.B.A. J. 1109 (1955); Wildes, *supra* note 77; Note, *supra* note 111; Zas, *supra* note 7. While beyond the scope of this case comment, the doctrine of consular nonreviewability seems even more problematic in the face of the Administrative Procedure Act. *See* Wildes, *supra* note 77, at 899 (explaining that judicial review is not precluded under the APA and therefore should be available as a matter of common law as expressed by the APA).

122. *Am. Acad. of Religion*, 573 F.3d at 123.

123. *Id.*

Furthermore, by allowing for judicial review, the Second Circuit took a liberal reading of *Mandel*, which indicates that the court may be open to further challenges to the consular nonreviewability doctrine.[124]

Based on *Mandel*, there is reason to believe that grounds for reviewability could and should be expanded. The Second Circuit should continue to follow the Ninth Circuit's approach to consular nonreviewability. The significance of judicial review cannot be overstated. Where a U.S. citizen has a constitutional interest in the admittance of another individual into the United States, a consular officer's denial of a visa application should be subject to judicial scrutiny to ensure that U.S. citizen's constitutional rights are being protected.

124. As noted previously, it is not a foregone conclusion that *Mandel* would be read to permit limited judicial review. *See, e.g.*, Centeno v. Shultz, 817 F.2d 212, 1213, *cert. denied*, 484 U.S. 1005 (1988).