

# USJF Legal Policy Paper

## A Legal Analysis of New Proposals to Limit Immigration from Muslim Countries into the United States (February 12, 2016)

### BACKGROUND

On December 7, 2015, presidential candidate Donald J. Trump issued a “Statement on Preventing Muslim Immigration” which has sparked an important public policy discussion.

*Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing "25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad" and 51% of those polled, "agreed that Muslims in America should have the choice of being governed according to Shariah." Shariah authorizes such atrocities as murder against non-believers who won't convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women. Mr. Trump stated, "Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life. If I win the election for President, we are going to Make America Great Again." - Donald J. Trump*

The Trump proposal of December 7, 2015, has seen some refinements over the succeeding weeks. In sum, the Trump proposal to temporarily ban non-U.S. Citizen professing Muslims from entry into the United States is designed to be a temporary measure, until adequate vetting of immigrants could be performed by the federal government. This proposal appears to be a variant of an earlier proposal to temporarily ban admission of supposed refugees coming in from certain Middle Eastern countries. Whereas the earlier proposal was based on country of origin, the December proposal is based on religious profession. The Trump proposal was met with an outcry among liberal law professors and politicians — most of whom seemed to imply that the Trump proposal was absurd, unprecedented, illegal, and in violation of the U.S. Constitution. However, there was little thoughtful legal analysis offered at the time by its critics. This paper analyzes the legality of the Trump proposal under the U.S. Constitution and existing U.S. law.

## DISCUSSION

### I. The Scope of the Trump Proposal.

As is normally the case with proposals made during campaigns for public office, the Trump proposal was not offered in detail, such as would be true of a bill being introduced in the House or Senate, instead being a concept that has been unfolding in subsequent speeches and press interviews.<sup>1</sup> If Mr. Trump were elected and if he implemented this proposal, it necessarily would be far more detailed, likely allowing exceptions such as visitors to the country with visas granted for specific purposes such as academics attending conferences, etc. Nevertheless, such details and conditions have not been revealed and thus, are not yet known. For purposes of this legal analysis, however, we have assumed that the temporary ban would not apply (i) to U.S. citizens, (ii) to persons representing foreign governments, or (iii) to aliens already legally within the United States. Rather, it would apply only for an indeterminate period of time to restrict Muslim entrants who did not fall within these three categories.

### II. Prior Exercises of Broad Immigration Control by the President or Congress.

What the press has not widely reported is that other presidents have taken action similar to that announced in the Trump proposal. None of these prior Presidential actions has been determined to be unlawful or unconstitutional. However, no prior presidential action that we have discovered would ban immigrants based solely upon their religious beliefs.

#### a. President Carter's Executive Order 12172 (Nov. 26, 1979)

In partial response to Iran's taking hostage of American citizens working in Iran, and seizure of our Embassy, President Carter issued Executive Order 12172, which empowered the Secretary of State and the Attorney General to prescribe limitations and exceptions on the rules and regulations governing the entry of Iranian aliens into the United States.

President Carter based his Executive Order on 8 U.S.C. § 1185, which grants the President broad authority to determine when and how immigrants may enter the United States. (Additionally, 8 U.S.C. § 1182(f) authorizes the President to suspend or restrict the entry of any aliens that he determines would be detrimental. See discussion in Section III, *infra*.)

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<sup>1</sup> Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015) <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>; J. Timm, Trump calls for discrimination against Muslims (Dec. 7, 2015) <http://www.msnbc.com/msnbc/trump-calls-discrimination-against-muslims>; A. Melber, Constitutional scholars: Trump's anti-Muslim immigration proposal is probably illegal (Dec 7, 2015) <http://www.msnbc.com/msnbc/trump-anti-muslim-proposal-probably-illegal>.

In Executive Order 12172, President Carter authorized his Secretary of State and Attorney General to apply special rules to Iranians holding non-immigrant visas. Under the authority of that Executive Order, U.S. immigration officials required thousands of Iranian students to report to an immigration office, and students found to have visa violations were actually deported.

In addition, on April 7, 1980, President Carter reportedly directed U.S. officials to **invalidate all visas issued to Iranian citizens** for future entry into the United States, and to reissue new visas only for compelling and proven humanitarian reasons, or where the U.S. national interest required it.<sup>2</sup>

**b. President Reagan's 1981 Exercise of 8 U.S.C. § 1182(f)**

On September 29, 1981, President Reagan authorized the interdiction of certain vessels containing undocumented aliens on the high seas. Proclamation No. 4865, *46 Fed. Reg. 48107* (published October 1, 1981). At the same time, President Reagan issued Executive Order 12324, ordering the Secretary of State to enter into cooperative arrangements with foreign governments designed to protect the United States from illegal immigration, and ordered the Secretary of Transportation to issue instructions to the Coast Guard to enforce the Executive Order beyond territorial waters regarding undocumented aliens, including the interdiction of any "defined" vessel carrying such aliens.

A lawsuit challenged the constitutionality of these Presidential directives unsuccessfully. A district court ruled that the President's power by such methods to suspend the entry of illegal aliens had a "clear constitutional basis." *Haitian Refugee Center, Inc. v. Gracey*, 600 F. Supp. 1396, 1398, 1400 (D.D.C. 1985), *aff'd*, 809 F.2d 794 (D.C. Cir. 1987).

**c. President Reagan's 1985 Exercise of 8 U.S.C. § 1182(f)**

President Reagan signed Presidential Proclamation 5377 on October 4, 1985, based upon the authority vested in him by 8 U.S.C. § 1182(f). Presidential Proclamation 5377 read, in part, as follows:

Entry of the following classes of Cuban nationals as nonimmigrants is hereby suspended: \* \* \* (b) individuals who, notwithstanding the type of passport that they hold, are considered by the Secretary of State or his designee to be officers or employees of the Government of Cuba or the Communist Party of Cuba.

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<sup>2</sup> See <http://www.newsmax.com/Newsfront/jimmy-carter-barred-iranians/2015/12/09/id/705127/>.

U.S. consular officials concluded that members of an organization known as Grupo Mazcla were ineligible for visas under the Proclamation, and those members filed suit, claiming that such action exceeded the government's authority and impinged on the members' First Amendment rights to freedom of association, speech, and religion. The government's action, including the Proclamation, was sustained, and the suit dismissed. *See Encuentro Del Canto Popular v. Christopher*, 930 F. Supp. 1360 and 944 F. Supp. 805 (N.D. Cal. 1996).

#### d. President Obama's 2011 Exercise of 8 U.S.C. § 1182(f)

On August 4, 2011, President Obama issued Presidential Proclamation 8697, entitled Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses. Section 1 of Proclamation 8697 — issued under the authority of 8 U.S.C. § 1182(f) — suspends the entry into the United States, as immigrants or nonimmigrants, by any aliens who have engaged in “widespread or systematic violence against any civilian population” based in whole or in part on any number of factors (*e.g.*, race, descent, sex, religion, political opinion), as well as any alien who participated (or attempted or conspired to participate) in war crimes, crimes against humanity, or other serious violations of human rights.

We have not identified any legal challenge to the constitutionality of President Obama's 2011 Executive Action.

### III. Whether the Trump Proposal Is Authorized by Federal Statute.

8 U.S.C. § 1182(f) expressly authorizes the President to suspend or restrict the entry into the United States of “any aliens or of any class of aliens” that he determines would be “detrimental to the interests of the United States.” The statute reads as follows:

(f) Suspension of entry or imposition of restrictions by President. Whenever the President finds that the entry of any aliens or of **any class of aliens** into the United States would be **detrimental to the interests of the United States**, he may by **proclamation**, and for such period as he shall deem necessary, **suspend** the entry of **all aliens or any class of aliens** as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.... [Emphasis added.]

This statute appears to give a President virtually unlimited power to suspend or restrict immigration within its framework. 8 U.S.C. § 1182(f) has no language suggesting that the statutory power granted to the President could not be applied generally to an entire class based upon the class members' religious beliefs. On its face, therefore, the statute seems sufficiently broad to encompass the Trump Proposal.

In the past, Presidents taking broad action restricting immigration also have relied upon **8 U.S.C. § 1185**, either alone or in conjunction with 8 U.S.C. § 1182(f). Section 1185 governs travel restrictions on foreigners entering or departing the United States, and provides the President with significant authority to adopt regulations specifying the rules governing said travel. Section 1185(a)(1) provides as follows:

(a) Restrictions and prohibitions. Unless otherwise ordered by the President, it shall be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

8 U.S.C. §§ 1182(f) and 1185(a) give the President substantial authority with respect to control over the entry of foreigners into the country. Clearly, this is an area where Congress has agreed legislatively that the President should have wide berth to restrict foreign travel into the United States.

#### **IV. Whether 8 U.S.C. § 1182(f) Is Constitutional, and Whether an Immigration Ban Against Foreign Persons Because of Their Profession of the Muslim Faith Would Be Constitutional.**

**a. Constitutional Provisions; Plenary Power Doctrine.** Article 1, §8 of the Constitution provides, *inter alia*, that “The Congress shall have Power ... To establish an uniform Rule of Naturalization ....” Under Article 1 §8's “necessary and proper” clause, Congress also has the power to make laws executing enumerated powers. No other Constitutional provision expressly addresses foreign travel.

Congress has passed numerous laws over the years, including the current major federal law — the **Immigration and Naturalization Act** (“INA”), 8 U.S.C. § 101, *et seq.* — of which section 1182(f) is a part.<sup>3</sup> Although this is an area of U.S. law that is under the control of Congress, implementation of the immigration laws, by regulation, and sometimes by proclamation, has been delegated by Congress to the Executive Branch — usually the President, the Attorney General, or the Secretary of State. Moreover, this is an area of U.S. law and policy that has been substantially left alone by the judiciary, which has recognized that immigration policy belongs in the domain of the political branches. *See, e.g., Ekiu v. United States*, 142 U.S. 651 (1892); *Fok Yung Yo v. United States*, 185 U.S. 296 (1902). Indeed,

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<sup>3</sup> Before enactment of the INA in 1952, a number of different federal statutes governed U.S. immigration law. The McCarran-Walter Act of 1952, Public Law No. 82-414, collected and codified many of the existing provisions. The INA has been amended numerous times over the years, but is still provides the foundation for U.S. immigration law.

the U.S. Supreme Court's acquiescence in leaving immigration policymaking to the political branches without significant judicial intervention has come to be known in legal circles as the political branches' "plenary power" over immigration.

There are any number of U.S. Supreme Court decisions illustrating this plenary power. In Mathews v. Diaz, 426 U.S. 67, 81 (1976), a three-judge federal court determined that denial of Medicare benefits to certain alien visitors was unconstitutional. The Supreme Court unanimously reversed, holding that Congress had no constitutional duty to provide all aliens with benefits provided to citizens. Further, the Court ruled that Medicare's alien eligibility requirements did not deprive aliens of liberty or property without due process of law under the Fifth Amendment, since (i) it was reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence, (ii) the statutory classification drew a reasonable qualification line, and (iii) the Court would not substitute its judgment for that of Congress. In its decision, the Supreme Court elaborated:

For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.... **Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution....** [*Id.* at 81 (footnotes omitted) (emphasis added).<sup>4</sup>]

Through more than 125 years of litigation and numerous Supreme Court decisions addressing the issue, the political branches have been relatively unimpeded by the judiciary in their authority to make immigration decisions according to their political, social, and economic

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<sup>4</sup> See also The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 603 (1889) (recognizing an inherent federal power to exclude non-citizens, even though such power is not clearly written into the Constitution, and determining that it was not for the judiciary to override such a legislative determination); Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (upholding an administrative decision under a statute that directed immigration officers to deny admission to anyone likely to become a public charge, and holding that judicial deference to immigration decisions made by executive branch immigration officers was not a denial of due process).

determinations.<sup>5</sup> Whether such judicial deference or restraint is justified under the rubric of the “political question doctrine,” or the need for a cohesively designed immigration system in an ever-changing world, the plenary power doctrine seems well established in U.S. immigration law.<sup>6</sup>

Some may believe that certain recent U.S. Supreme Court decisions have chipped away at the doctrine of plenary power in the area of immigration, and that it is impossible to say that the plenary power doctrine would prevent full Constitutional judicial review, or mandate judicial deference to executive or legislative action in any particular case. *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 23 (1982) (holding certain aliens entitled to constitutional due process protection); *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (determining that Attorney General’s interpretation of statute deprived aliens’ due process rights). These decisions however have not undermined the essence of the plenary power doctrine. In *Landon v. Plasencia*, for example, the determination that an alien was entitled to due process at her exclusion hearing was not a change from existing Supreme Court precedent, since she was a “returning alien.” The Court confirmed its long line of holdings that “**an alien seeking initial admission** to the United States requests a privilege and **has no constitutional rights** regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.” 459 U.S. at 32 (emphasis added). *Zadvydas v. Davis* was a deportation case, and is, perhaps, more complicated, but is best viewed as a case of statutory interpretation.

Although the status of the plenary power doctrine today is not entirely free from doubt, *see generally Feere, supra*, there is no known line of authorities weakening the authority of the political branches with respect to immigration law.<sup>7</sup>

**b. Constitutionality of 8 U.S.C. § 1182(f) (INA section 212(f)).** The power granted to the President by 8 U.S.C. § 1182(f), or by statutes similar to that statute, has been the

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<sup>5</sup> *See* Feere, Jon, “Plenary Power: Should Judges Control U.S. Immigration Policy?” <http://cis.org/plenarypower/>.

<sup>6</sup> *See id.*

<sup>7</sup> Some lower courts have expressed a willingness to provide protections that have not been recognized by the U.S. Supreme Court, expanding judicial involvement in immigration matters, at least where the alien is in the country. *See, e.g., Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984) (“despite the unavailability of due process protections in most exclusion proceedings . . . and whether or not due process protections apply to an application for a discretionary grant of asylum, which secures admission into this country . . . it appears likely that some due process protection surrounds the determination of whether an alien has sufficiently shown that return to a particular country will jeopardize his life or freedom so as to invoke the mandatory prohibition against his return to that country”).

subject of legal challenges in the past, but such statutes thus far have been determined to be constitutional.

One line of attack posited that a federal statute, delegating to the President the power to deny individuals the right to immigrate into the United States, constitutes an unconstitutional delegation of legislative power, since Congress, not the President, is entrusted (by Article 1, § 8 of the Constitution) with controlling the naturalization process. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). However, the Supreme Court rejected that challenge, since the right to exclude aliens from the United States “stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.” *Id.* at 542. There are numerous cases, subsequent to *Knauff v. Shaughnessy*, confirming the President’s inherent constitutional power in the field of immigration and other foreign policy matters.

Pursuant to the statute at issue in *Knauff v. Shaughnessy*, President Truman had issued a Proclamation declaring the need to adopt regulations governing immigration during wartime, and such regulations provided authority to exclude (without a hearing) the immigration of a German national (who was married to an American serviceman). Upholding the President’s power to make such regulations, the Supreme Court pointed out, *inter alia*, that **immigration into the United States is a privilege and is not a matter of right**. *See id.* at 542. *See also Haitian Refugee Center, Inc. v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff’d*, 809 F.2d 794 (D.C. Cir. 1987) (President Reagan’s Proclamation and Executive Order authorizing the interdiction of undocumented aliens on the high seas has a clear Constitutional basis).

In *The Chinese Exclusion Case*, 130 U.S. 581 (1889), the Court affirmed the refusal of the United States to grant a Chinese laborer re-entry into the United States under existing law — despite the existence of an earlier treaty between the United States and China that permitted his re-entry — because Congress has the authority under the sovereign powers delegated by the Constitution to exclude foreigners. The treaties with China did not prevent the enactment of federal legislation power to exclude Chinese laborers. Clearly, this is an area where the will of Congress has been adhered to by the judiciary.

### c. Constitutionality of the Proposed Ban of Mustlims.

(i) **No Constitutional Rights for Excluded Aliens.** Even if 8 U.S.C. § 1182(f) is constitutional with respect to the authority thereby conveyed to the President, would a foreign travel ban similar to that announced in the Trump Proposal — presumably made pursuant to the authority of § 1182(f) — be subject to Constitutional attack by individual aliens complaining that the ban against Muslim immigrants deprived them of their religious liberties under the First Amendment?

Certain previous immigration-related restrictions relate to religious belief. For example, Congress passed an **Immigration Act in 1907** that excluded certain classes of aliens



from admission into the United States, including “persons who admit their belief in the practice of polygamy.” See <http://www.historycentral.com/documents/immigrationact.html>. We have not identified any cases addressing the constitutionality of that law.

Although it would be impossible to speak definitively as to what a court might do, there is no reason to believe that excluded aliens could successfully assert that their exclusion violates some aspect of the Constitution. Indeed, there is a long line of cases holding that excluded aliens — those seeking to enter the United States — have no rights under the U.S. Constitution. See, e.g., Ekiu v. United States, 142 U.S. 651, 659 (1892); Fok Yung Yo v. United States, 185 U.S. 296, 302 (1902); United States ex rel. Turner v. Williams, 194 U.S. 279, 294 (1904); Keller v. United States, 213 U.S. 138, 143-144 (1909); Mahler v. Eby, 264 U.S. 32, 40 (1924); Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953).

Indeed, in the 1904 Turner case, the Supreme Court rejected the argument that the First Amendment precluded the United States Government from excluding an alien “because he is an anarchist.” *Id.* at 292. To be sure, the Court reasoned, while a law excluding him from coming into the country would have the effect of preventing him from “speaking or publishing” his views, “that is merely because of his exclusion therefrom”:

[T]hose who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise. [*Id.*]

The important principle of the Turner case cannot be viewed as an ancient precedent, for 86 years later, the Supreme Court affirmed this rule with the observation that the First, Second, and Fourth Amendments protect the People, that is “a class of persons who are part of a national community....” See United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990). If an alien cannot claim the First Amendment’s speech and press rights, he certainly cannot claim First Amendment religious liberty protections either, for the same reason.

(ii) **Alleged Violation of Constitutional Right of American Citizens.** What if one or more American citizens joined in such a constitutional attack, asserting, for example, that the ban against Muslim immigrants also deprived the American citizens of their constitutional rights (e.g., the right to associate or exchange ideas with such persons)? Such claims have been presented and litigated in other cases, thus far unsuccessfully.

Those attempting to present constitutional issues based upon the exclusion of others from entering the country often have been barred by the doctrine of standing. See, e.g., Haitian Refugee Center, Inc. v. Gracey, 809 F.2d 794 (D.C. Cir. 1987) (organization asserting First Amendment violations of excluded immigrants lacks standing to pursue First Amendment claims).

However, at least where certain constitutional rights of Americans might be implicated in laws excluding aliens, the right of the sovereign still appears to govern. In an extended

discussion of such an effort where standing was not the dispositive issue, the Supreme Court, in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), declined to accept a First Amendment argument advanced by American citizens who contended that refusal to grant a temporary non-immigrant visa to a Belgian journalist and Marxian theoretician — whom the Americans had invited to participate in academic conferences and discussions — violated the Americans' own First Amendment rights. The Court stated (408 U.S. at 765-67):

Recognition that *First Amendment* rights are implicated, however, is not dispositive of our inquiry here. In accord with ancient principles of the international law of nation-states, the Court in *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889), and in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), 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 . . . .” Since that time, the Court’s general reaffirmations of this principle have been legion. The Court without exception has sustained Congress’ “plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.” *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118, 123 (1967). “Over no conceivable subject is the legislative power of Congress more complete than it is over” the admission of aliens. *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). In *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895), the first Mr. Justice Harlan said:

“The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.”

Mr. Justice Frankfurter ably articulated this history in *Galvan v. Press*, 347 U.S. 522 (1954), a deportation case, and we can do no better. After suggesting, at 530, that “much could be said for the view” that due process places some limitations on congressional power in this area “were we writing on a clean slate,” he continued:

“But the slate is not clean. As to the extent of the power of Congress under review, there is not merely ‘a page of history’ ... but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process.... But that the formulation of these policies is

entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government....

“We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens....” *Id.*, at 531-532. [Footnote omitted.]

The majority opinion in Kleindienst v. Mandel ended with the following (*id.* at 769-70):

In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. In the case of an alien excludable under § 212 (a)(28), Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively **on the basis of a facially legitimate and bona fide reason**, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the *First Amendment* interests of those who seek personal communication with the applicant. What *First Amendment* or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case. [Emphasis added.]

The cases discussed above have been guided by the Supreme Court’s determination in Knauff v. Shaughnessy and its progeny that, absent express authorization of law, courts are not entitled to review the determination of the political branch of government to exclude an alien. This has come to be referred to in the literature and case law as the doctrine of “consular nonreviewability.” Kleindienst v. Mandel has been cited for a limited exception to that doctrine, whereby, if and when there are Constitutional implications in a case involving the exclusion of aliens, judicial review is appropriate to determine whether the decision was made on the basis of a “facially legitimate and bona fide” reason. If there is such a reason, though, the courts’ role is at an end; they must defer to the Executive decision.

Clearly, therefore, the law seems settled with respect to the First Amendment right violations asserted in Kleindienst v. Mandel, and with respect to the underpinnings of that decision, no matter what Constitutional right may be asserted.

(iii) **Due Process Concerns.** There are other purported Constitutional right violations that have been alleged in other cases, sometimes with temporary success. For example, in Kerry v. Din, 576 U.S. \_\_\_, 135 S.Ct. 2128 (2015), the Supreme Court reversed a decision of the U.S. Court of Appeals for the Ninth Circuit, which had held that Fauzia Din’s asserted liberty interest in her marriage entitled her to judicial review of the denial of her husband’s visa application, and that she had been deprived of that liberty interest without due process of law. Three justices (Scalia, Roberts, and Thomas) held that there was no constitutional right at stake, but even if there were, there was no judicial authority for substituting the Court’s political judgment for that of Congress. Justices Kennedy and Alito concluded that, even if there is a protected liberty interest, the government notice Ms. Din received would satisfy any due process concerns. The other four justices joined in a dissent written by Justice Breyer, concluding that Ms. Din was entitled to an explanation of the reasons why the State Department denied her husband a visa.

In addition to the many Supreme Court opinions in this area discussed above, in all of the recent lower court cases that we have reviewed denying the immigration claims of aliens, including those, such as Kerry v. Din (where the constitutional claims are not those of the alien) the government has ultimately prevailed. *See, e.g., Macena v. United States Citizenship & Immigration Services*, 2015 U.S. Dist. LEXIS 148395 (D. Md. Nov. 2, 2015) (denial of visa application to plaintiff’s fiancée); Hazama v. Kerry, 2015 U.S. Dist. LEXIS 112876 (N.D. Ill. Aug. 26, 2015) (denial of I-212 visa application of plaintiff’s husband for husband’s admission to the United States).

**CONCLUSION**

The Trump Proposal differs from earlier restrictions only in that it would exclude aliens from entry into the United States based exclusively upon their religion, as opposed to their religious beliefs or other factors. Nevertheless, the Trump Proposal appears to be authorized by 8 U.S.C. § 1182(f). Moreover, there are no Supreme Court decisions that would support an excluded alien’s challenge to such action on constitutional grounds. This is not to say that the Trump Proposal would be immune from constitutional attack, of course. Indeed, one would expect such challenges would be forthcoming, including lawsuits filed by American citizens claiming that the exclusion of Muslims violated their own First Amendment religious rights. However, the Trump Proposal is significantly, if not substantially, supported by federal statutory authority, a long line of court decisions, and is similar to a number of earlier directives issued by both Republican and Democratic Presidents.

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