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The 9th Circuit's Contrived Comedy of Errors in *Washington v. Trump*

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President Trump's January 27 executive order[1] on immigration sent shockwaves throughout our legal order. For 90 days, certain aliens from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen—deemed "detrimental"[2] to American interests—would be denied entry. For 120 days, the Refugee Admissions Program would be suspended. Syrian refugees in particular would be denied entry indefinitely. Almost immediately after the order was signed, airport officials began to detain nationals of those seven nations. In what I've dubbed the *Airport Cases*,[3] judges in New York, Virginia, Washington, Massachusetts, and elsewhere promptly ordered their release. But those emergency proceedings were only the beginning of the lawfare.

On Monday, January 30, the Washington Attorney General sought a temporary restraining order[4] to halt the policy nationwide. (The state Solici-

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1. The White House: Office of the Press Secretary, Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States (Jan. 27, 2017), https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states [https://perma.cc/62UA-T8FS].

2. 8 U.S.C. § 1182.

3. *The Procedural Aspects of "The Airport Cases"*, JOSH BLACKMAN'S BLOG (Jan. 29, 2017), http://joshblackman.com/blog/2017/01/29/the-procedural-aspects-of-the-airport-cases/ [https://perma.cc/RY64-WXUE].

4. Motion for Temporary Restraining Order, Washington v. Trump, No. 2:17-cv-00141-JLR

tor General had planned this challenge[5] well before the order was even signed). At the time, under the direction of Acting Attorney General Sally Q. Yates, the Justice Department was not even permitted to defend the order. However, after President Trump fired her,[6] the government lawyers got to work, and filed a response[7] on February 2. After an hour of oral argument[8] the next day, U.S. District Judge James L. Robart ruled from the bench that the federal government must *immediately* cease enforcing the executive order.

Shortly thereafter, Judge Robart released a written opinion,[9] styled as a temporary restraining order. However, the seven-page order offered only the most threadbare analysis.[10] There was no indication whether the actions violated the Due Process Clause, the Equal Protection Clause, the Establishment Clause, the Free Exercise Clause. Nor was there any discussion of whether the President violated any statutory prohibitions. An extra hour of work between the judge and his law clerks could have resolved this glaring absence. Solely on the basis of this hasty and incomplete opinion, immigration officials around the country, and indeed consular officials around the globe, were now enjoined from implementing the order. Unlike most temporary restraining orders, which are limited in duration for a specific period of time (often less than two weeks), this order had no expiration date. Rather, Judge Robart indicated that he would promptly hold an evidentiary hearing, and decide whether a preliminary injunction was appropriate.

Not willing to follow that schedule, on February 4, the Justice Depart-

(W.D. Wash. Jan. 30, 2017), *available at* https://www.scribd.com/document/338151745/Washington-v-Trump-Motion-for-Temporary-Restraining-Order [https://perma.cc/KW25-A9EM].

5. Sara Randazzo, *Washington Lawyer's Win Over Trump Immigration Ban Brings Sudden Fame*, WALL STREET J. (Feb. 10, 2017), https://www.wsj.com/articles/washington-lawyers-win-over-trump-immigration-ban-brings-sudden-fame-1486759774 [https://perma.cc/F434-55DU].

6. Josh Blackman, *Why Trump Had to Fire Sally Yates*, POLITICO (Jan. 31, 2017) http://www.politico.com/magazine/story/2017/01/why-trump-had-to-fire-sally-yates-214715 [https://perma.cc/GU65-4PJC].

7. Defendants' Opposition to Plaintiff State of Washington's Motion for Temporary Restraining Order, Washington v. Trump, No. 2:17-cv-00141-JLR (W.D. Wash. Feb. 3, 2017), *available at* https://www.scribd.com/document/338399985/Washington-v-Trump-DOJ-Brief [https://perma.cc/XG3Z-KQS5].

8. *Full Hearing: Washington State vs. Trump*, YOUTUBE (Feb. 4, 2017), https://www.youtube.com/watch?v=q1ONqbaH8GU [https://perma.cc/4WSA-JYPK].

9. Temporary Restraining Order, Washington v. Trump, No. 2:17-cv-00141-JLR (W.D. Wash. Feb. 3, 2017), *available at* http://i2.cdn.turner.com/cnn/2017/images/02/03/state.of.washington.v.trump.pdf [https://perma.cc/9TZB-VB2H].

10. *Instant Analysis Nationwide Injunction in* Washington v. Trump, JOSH BLACKMAN'S BLOG (Feb. 4, 2016), http://joshblackman.com/blog/2017/02/04/instant-analysis-nationwide-injunction-in-washington-v-trump/ [https://perma.cc/5R35-PTLU].

ment asked[11] the Ninth Circuit for an emergency stay pending appeal. The brief, signed by Noel J. Francisco, the acting Solicitor General, acknowledged that "temporary restraining orders are ordinarily not appealable," but urged that the court had jurisdiction because of "the essence of the order, not its moniker." In other words, even though the Judge Robart called his decision a temporary restraining order, and so labelled it, wide-ranging decision should be treated "an appealable injunctive order." Washington urged[12] the court not to treat the temporary restraining order as a preliminary injunction, and "wait to review" the judgment until Judge Robart completed further proceedings.

On February 7, a three-judge panel—Judges William C. Canby, Richard R. Clifton, and Michelle T. Friedland—heard oral arguments.[13] Barely forty-eight hours later, the panel issued a per curiam opinion[14] that denied the emergency motion for a stay pending appeal. Treating the lower-court decision as a preliminary injunction, rather than a temporary restraining order, the panel found that Washington was likely to prevail on its claim that the order violated the Due Process Clause of the Fifth Amendment. The court implied in dicta that the order may also violate the Establishment Clause, but stopped short of so holding.

Contemporaneously with the published opinion, the panel also issued an unpublished briefing order,[15] which asked the parties to file further briefs throughout the month of March. The implication of this order, apparently, was that because the court treated the district court's decision as a preliminary injunction, there was no need for a remand for further proceedings before Judge Robart. Later that evening, Washington submitted a letter[16] to the district court to that effect, stating that the Attorney General "assume[s] the district court briefing schedule is no longer applicable." Judge Robart

11. Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal, Washington v. Trump, No. 17-35105 (9th Cir. Feb. 4, 2017), *available at* https://assets.documentcloud.org/documents/3452178/Stay-Motion-2-4-17.pdf [https://perma.cc/AVP5-KD3Y].

12. States' Response to Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal, Washington v. Trump, No. 17-35105 (9th Cir. Feb. 6, 2017), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2017/02/06/17-35105%20Washington%20Opposition.pdf [https://perma.cc/L8MT-M6MZ].

13. *17-35105 State of Washington, et al. v. Donald J. Trump et al.*, YOUTUBE (Feb. 7, 2017), https://www.youtube.com/watch?v=RPOFowWqFGU [https://perma.cc/8MA2-WDKX].

14. Per Curiam Order, Washington v. Trump, No. 17-35105 (9th Cir. Feb. 9, 2017), *available at* https://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/09/17-35105.pdf [https://perma.cc/J5HB-5TXQ].

15. Order, Washington v. Trump, No. 17-35105 (9th Cir. Feb. 9, 2017), *available at* https://cdn.ca9.uscourts.gov/datastore/general/2017/02/09/unpublished_procedural_order.pdf [https://perma.cc/UD6B-9EDT].

16. Letter from Washington Solicitor General Noah Purcell to U.S. Court Clerks' Office, Feb. 9, 2017, *available at* https://www.documentcloud.org/documents/3457993-document-14231375.html [https://perma.cc/7AKT-3KLC].

asked[17] the parties to offer their positions whether "additional briefing and possible evidence on a motion for preliminary injunction is no longer required in the district court."

Despite President Trump's braggadocio tweet[18]—"SEE YOU IN COURT"—early reports suggested that the administration would not appeal[19] the panel's decision to the Supreme Court. Presumably, the preference was to return to the district court, where the government could introduce evidence into the record to support the legality of the policy. At least one judge on the Ninth Circuit had other plans. Nearly twenty-four hours after the panel's decision, Chief Judge Sydney Thomas issued an order: "A judge on this Court has made a sua sponte request that a vote be taken as to whether the order issued by the three judge motions panel on February 9, 2017, should be reconsidered en banc."[20] As a result, the parties would be required to submit briefs one week later—at the same time as Judge Robart considered whether he could maintain the case.

It is remarkable that a basic recitation of *Washington v. Trump*'s posture—which is less than two weeks old—required over 800 words. This fast-developing case has taken countless twists and turns in its infancy, and no doubt there are many curves lying ahead. The purpose of this two-part essay is to study carefully the reasoning in the Ninth Circuit's panel opinion. Despite its well-meaning intentions, the per curiam opinion is, at bottom, a contrived comedy of errors.

First, the court grossly erred by treating a temporary restraining order—that contained no reasoning[21]—as a preliminary injunction. The panel's insistence that emergency relief be provided is irreconcilable with its own conclusion that no such emergency exists. Second, the panel offered zero analysis of the underlying statutory scheme, which is exceedingly complex and intricate. While it is true that this approach would not resolve *all* claims, as Justice Jackson reminded us six decades ago, the conjunction or disjunction between Congress and the Presidency informs the exactness

17. Minute Order, Washington v. Trump, No. C17-0141JLR (W.D. Wash. Feb. 10, 2017), *available at* https://www.scribd.com/document/339172492/Washington-v-Trump-Feb-10-Order [https://perma.cc/8FET-TMVY].

18. Donald J. Trump (@realDonaldTrump), Twitter (Feb. 9, 2017, 3:35 PM), https://twitter.com/realDonaldTrump/status/829836231802515457 [https://perma.cc/B3SZ-RSL8].

19. Pamela Brown, Laura Jarrett & Jim Acosta, *Trump Won't Immediately Appeal Travel Ban*, CNN: POLITICS (Feb. 10, 2017), http://www.cnn.com/2017/02/10/politics/immigration-executive-order-white-house/ [https://perma.cc/W435-GF4S].

20. Order, Washington v. Trump, No. 17-35015 (9th Cir. Feb. 10, 2017), http://cdn.ca9.uscourts.gov/datastore/general/2017/02/10/17-35105_Supplemental%20Briefing%20Order.pdf [https://perma.cc/7EYU-44BR].

21. *Instant Analysis Nationwide Injunction in* Washington v. Trump, JOSH BLACKMAN'S BLOG (Feb. 4, 2016), http://joshblackman.com/blog/2017/02/04/instant-analysis-nationwide-injunction-in-washington-v-trump/ [https://perma.cc/ZX53-KZ9Z].

of judicial review. This timeless lesson was apparently lost on the panel, which, third, applied the strictest of scrutiny to assess whether the executive order was justified based on "a real risk" rather than *alternative facts*. Fourth, I analyze the panel's refusal to narrow an overbroad injunction. Once again, a study of the underlying statutory scheme could have afforded a plausible method of saving part of the order, while excising the unconstitutional portions.

I will close by critiquing the decision's treatment of two leading precedents. First, the panel distinguished away with gossamer threads *Kleindienst v. Mandel*, which for four decades established a presumption of non-reviewability for executive decisions concerning exclusion. Second, the court misread Justice Kennedy's concurring opinion in *Kerry v. Din* to establish a principle that courts can assess the President's policy decisions for "bad faith." Kennedy's opinion, like *Mandel* before it, did no such thing; rather, courts could look only at whether individual consular officers acted in good faith, not whether the policy behind that decision was in bad faith.

Personal sentiments about this egregious order should not shade a candid assessment of precedent and constitutional law. This opinion, which enjoins a policy I personally find deeply regrettable, is itself deeply regrettable.

I. The three critical errors in the Ninth Circuit's decision in *Washington v. Trump*

A. Discarding Neutral Principles of Appellate Review

As a general matter, temporary restraining orders cannot be appealed, outside of a writ of mandamus. Appellate review was not proper here. Washington sought a temporary restraining order. From the bench, Judge Robart called his decision a temporary restraining order. The written opinion was styled as temporary restraining order. Moments after oral arguments concluded, the judgment was issued. The seven-page decision, which offered zero analysis, in no way resembled the sort of reasoned decision-making that attends a preliminary injunction. Rather, it screams of a hasty decision that attempts to maintain the status quo until further proceedings can be held. Despite the fact that the order lacked an expiration date, the district court established a schedule to move on to a preliminary injunction. It is certainly true that the federal government implored the court to allow the appeal. (The wisdom of this strategy is subject to debate). But, the Ninth Circuit did not need to agree; indeed, this may be the *only* point of law where the Trump Administration prevailed!

A colloquy during the oral arguments illustrates the panel's eagerness to prematurely reach these difficult constitutional questions, in the absence of a balanced evidentiary record. At the outset of his argument, Washington

Solicitor General Noah Purcell stated that "Defendants have pursued the wrong remedy by seeking a stay in this court, rather than mandamus."[22] He was right. Judge Clifton interjected: "Why should we care?"[23] The judge seemed undeterred by how everyone, save the scrambling Justice Department, understood Judge Robart's decision. "You're basically saying we shouldn't look at it," he told Purcell. "It's hard to imagine an order this sweeping that shouldn't be subject to some kind of appellate oversight," he continued. "Why shouldn't we view this as an injunction?" Purcell candidly explained that if the court considers this appeal, then the district court would not "have an opportunity to enter a more full preliminary injunction."[24] Rather, the panel's ruling would become the "ultimate" decision.

Discarding neutral principles of appellate review, the court prematurely reached profound questions about the constitutional rights of aliens abroad, without the benefit of an evidentiary hearing—a hearing that Judge Robart would have soon held. "We are satisfied that in the extraordinary circumstances of this case," the per curiam opinion explained, "the district court's order possesses the qualities of an appealable preliminary injunction." True enough, the temporary restraining order was contested by both parties, and there was no expiration date on the order. Under the circuit's precedents, these are factors to be considered. But, based on the tenor of the decision, neither was dispositive. What was the underlying reason for this decision? In a line that must have taken some chutzpah to write, the panel placed its imprimatur on the government's argument that "emergency relief is necessary to support [the government's] efforts to prevent terrorism." If indeed the government's immediate need to prevent terrorism was credible—every other sentence in the opinion dripped with skepticism of this proposition—then the stay should have been granted! However, if the government's urgent interest was unsubstantiated, then emergency relief was not appropriate, and a one-page denial of mandamus would have been the appropriate remedy. Were this case ever to be appealed to the Supreme Court, the Justices should vacate the panel opinion due to a lack of jurisdiction.

B. "Did not bother to even cite the statute."

The morning after *Washington v. Trump* was decided, apparently while watching *Morning Joe*,[25] President Trump tweeted:

22. *17-35105 State of Washington, et al. v. Donald J. Trump et al.*, YOUTUBE (Feb. 7, 2017) (at 30:29), https://www.youtube.com/watch?v=RPOFowWqFGU [https://perma.cc/EV3L-6ENQ].

23. *Id.* at (31:14).

24. *Id.* at (32:25).

25. Louis Nelson, *Trump Quotes Legal Blog to Argue Travel Ban Ruling is 'A Disgracegul Decision'*, POLITICO (Feb. 10, 2017), http://www.politico.com/story/2017/02/trump-react-9th-circuit-ruling-travel-ban-234892 [https://perma.cc/CC3R-QWGX].

> LAWFARE: "Remarkably, in the entire opinion, the panel did not bother even to cite this (the) statute." A disgraceful decision!

The quote was taken entirely out of context from a *Lawfare* post by Ben Wittes,[26] but the President's sentiment was absolutely correct.[27] Despite writing nearly 30 pages, the Ninth Circuit panel failed to put into context the importance of the underlying statutory scheme.

The previous day, Trump offered an introductory lesson to statutory interpretation for a group of law enforcement officers. He read aloud 8 U.S.C. § 1182(f), which provides:

> 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.

Trump explained[28] that the statute "couldn't have been written any more precisely," such that "a bad high school student would understand this." This provision was the core authority for President Trump's executive order, and also served as the statutory basis for prior denials-of-entry signed by Presidents Obama, Bush, Clinton, Bush, and Reagan. Despite the centrality of this provision to the case, the panel did not see fit to even cite § 1182(f).

During the oral arguments, the Washington Solicitor General urged the court that the Executive Order violated a statutory prohibition on nationality-based-discrimination. 8 U.S.C. § 1152(a)(1)(A), enacted a decade after §1182(f), provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." This provision, Washington argued, prevents the President from singling out aliens from those seven nations.

As I've written elsewhere,[29] these statutes are not necessarily in ten-

26. Benjamin Wittes, *How to Read (and How Not to Read) Today's 9th Circuit Opinion*, LAWFARE (Feb. 9, 2017), https://www.lawfareblog.com/how-read-and-how-not-read-todays-9th-circuit-opinion [https://perma.cc/L88V-J3CR].

27. *The Failure of the 9th Circuit to Discus 8 U.S.C. 1182(f) Allowed It to Ignore Justice Jackson's* Youngstown *Framework*, Josh Blackman's Blog (Feb. 10, 2017), http://joshblackman.com/blog/2017/02/10/the-failure-of-the-9th-circuit-to-discuss-8-u-s-c-1182f-allowed-it-to-ignore-justice-jacksons-youngstown-framework/ [https://perma.cc/9YKE-8PT8].

28. The White House: Office of the Press Secretary, Remarks by President Trump at MCCA Winter Conference (Feb. 8, 2017), https://www.whitehouse.gov/the-press-office/2017/02/08/remarks-president-trump-mcca-winter-conference [https://perma.cc/5ULZ-KPRG].

29. *See The Statutory Legality of Trump's Executive Order on Immigration*, JOSH BLACKMAN'S BLOG (Feb. 5, 2017) [hereinafter Blackman, *Statutory Legality: Part I*],

sion—thus the later-in time canon does not control. Along these lines, Judge Clifton asked, "Why should we assume that with Congress enacting 1152 [it] meant to amend or partially reverse 1182." (58:30). More directly, § 1152 only concerns the *issuance*, and not the *revocation* of visas. (The relationship between "entry," visas, and admissibility is frankly complicated.[30]) But most relevant to this case is that § 1152 only implicates immigrant visas.[31] With respect to aliens with non-immigrant visas, or refugees who have no visas at all, the statute does not prohibit nationality-based preference. On this point, the panel pounced on Mr. Purcell's suggestion that the statutory argument could resolve the case. "But the statutory ground would help us only with those seeking immigrant visas," asked Judge Clifton.[32] Judge Friedland added that the statutory argument would not "avoid all of your constitutional claims because it would not cover everyone?" Here, the judges were directly on point. (With respect to any doubts about whether §1152 trumps §1182, the agreement of Congress and the Executive should counsel the judiciary to harmonize them,[33] rather than read them in tension.)

A more careful study of the statutory scheme, however, would have radically altered the panel's constitutional calculus. In his canonical concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[34] Justice Jackson explained that in separation-of-powers disputes—especially those implicating national security—there are rarely any meaningful precedents to guide judicial inquiry. Rather than employing Justice Black's formalist framework, the former Attorney General adopted a functionalist approach: "Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress." (During their confirmation hear-

http://joshblackman.com/blog/2017/02/05/the-statutory-legality-of-trumps-executive-order-on-immigration/ [https://perma.cc/W3LZ-RKQS]; *The Statutory Legality of Trump's Executive Order on Immigration*, JOSH BLACKMAN'S BLOG (Feb. 5, 2017) [hereinafter Blackman, *Statutory Legality: Part II*], http://joshblackman.com/blog/2017/02/05/the-statutory-legality-of-trumps-executive-order-on-immigration-part-ii/ [https://perma.cc/GU37-7EPW]; *The Statutory Legality of Trump's Executive Order on Immigration*, JOSH BLACKMAN'S BLOG (Feb. 6, 2017) [hereinafter Blackman, *Statutory Legality: Part III*], http://joshblackman.com/blog/2017/02/06/the-statutory-legality-of-trumps-executive-order-on-immigration-part-iii/ [https://perma.cc/9UKC-MSXX]; *The Statutory Legality of Trump's Executive Order on Immigration: Part IV*, JOSH BLACKMAN'S BLOG (Feb. 11, 2017) [hereinafter Blackman, *Statutory Legality: Part IV*], http://joshblackman.com/blog/2017/02/11/the-statutory-legality-of-trumps-executive-order-on-immigration-part-iv/ [https://perma.cc/7L96-PHZX].

30. Blackman, *Statutory Legality: Part IV*, *supra* note 29.

31. *Directory of Visa Categories*, U.S. DEP'T OF STATE, https://travel.state.gov/content/visas/en/general/all-visa-categories.html [https://perma.cc/24GC-VLK3].

32. *17-35105 State of Washington, et al. v. Donald J. Trump et al.*, YOUTUBE (Feb. 7, 2017) (at 56:18), https://www.youtube.com/watch?v=RPOFowWqFGU [https://perma.cc/E9UF-2QMP].

33. Blackman, *Statutory Legality: Part IV*, *supra* note 29.

34. 343 U.S. 579 (1952).

ings, the last four confirmed justices[35] agreed that Justice Jackson's framework is our law).

Youngstown is a particularly apt precedent to consider in assessing *Washington v. Trump*. In both cases, plaintiffs asserted that the President's actions to promote national security were ultra vires. In the former, the Youngstown Sheet and Tube Co. argued that Congress did not give the President the authority to seize steel mills to avert a labor strike. In the latter, Washington argued that Congress did not give the President the authority "to deny an immigrant's entry into the country altogether" based on his nationality. Further, while both cases involved separation-of-powers disputes, the gravamen of their complaints concerned violations of the Fifth Amendment. The steel mill owners claimed that the seizures amounted to unconstitutional takings without compensation. Washington asserts that the executive order amounts to a denial of liberty without due process without law. Separation-of-powers dispute can *only* be brought to court when the actions infringe on a provision of the Bill of Rights. Otherwise, they are but mere nonjusticiable political questions.

Where the analyses part, however, concerns the questions about delegation and the appropriate level of scrutiny. In *Youngstown*, the majority opinion, and Justice Jackson in particular, concluded that Congress *did not* give the President the authority to seize steel mills to avert a labor strike. Because the President's authority was "at its lowest ebb," Jackson wrote, "a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[36] Within this framework, President Truman's executive order was set aside.

President Trump's executive order does not wallow in Jackson's third tier, nor does it linger in the so-called "zone of twilight." Through §1182(f) Congress has, with unequivocal language delegated its Article I powers over immigration to the President. In Trump's own words—as a relevant statement about the scope of his constitutional authorities—it "couldn't have been written any more precisely." Further, as a matter of inherent Article II authority, even in the absence of any statute, the President could deny entry to the United States of those he deems dangerous. As a result, the President was acting pursuant to an amalgamation of Article I and Article powers, combined. Here, Jackson's first tier provides the rule of decision:

When the President acts pursuant to an express or implied authoriza-

35. *Government's Sur-Reply Part I: The Applicability of* Youngstown *(Jackson, J.) to DAPA*, JOSH BLACKMAN'S BLOG (Feb. 4, 2015), http://joshblackman.com/blog/2015/02/04/governments-sur-reply-part-1-the-applicability-of-youngstown-jackson-j-to-dapa/ [https://perma.cc/VS3G-JHSB].

36. *Youngstown*, 343 U.S. at 638.

> tion of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

This basic statutory analysis provides the appropriate level of scrutiny that should have pervaded the *entire* decision: the executive order must be afford "the strongest presumption of constitutionality and the widest latitude of judicial interpretation." The panel did the exact opposite, and applied strict scrutiny, affording the government only the slightest latitude in an area where the courts have the least competency: national security. The failure to even address the statutory issue allowed the panel to elide Justice Jackson's framework, and thus not acknowledge how scrutiny should be applied.

The panel's omission is even more inexcusable because Justice Kennedy's concurring opinion in *Kerry v. Din*[37] specifically articulated that due process rights attending the exclusion of aliens is informed by Congress's delegations to the executive branch.[38] Kennedy echoed Jackson's wisdom:

> Congress evaluated the benefits and burdens of notice in this sensitive area and assigned discretion to the Executive to decide when more detailed disclosure is appropriate. This considered judgment gives additional support to the independent conclusion that the notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses. . . . And even if Din is correct that sensitive facts could be reviewed by courts in camera, the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure in a case such as this. Under *Mandel*, respect for the political branches' broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose about a consular officer's denial of a visa to an alien abroad.

Even before *Din*, circuit precedent reached a similar conclusion.[39] Citing

37. 135 S. Ct. 2128 (2015).

38. Kerry v. Din, Kleindienst v. Mandel, *and* Washington v. Trump, JOSH BLACKMAN'S BLOG (Feb. 11, 2017), http://joshblackman.com/blog/2017/02/11/kerry-v-din-kleindiesnt-v-mandel-and-washington-v-trump/ [https://perma.cc/RC2G-REWQ].

39. Angov v. Holder, 788 F.3d 893 (9th Cir. 2013).

the Supreme Court's 1953 decision in *Shaughnessy v. United States ex rel. Mezei*,[40] then-Chief Judge Kozinski found for a unanimous panel that "procedural due process is simply '[w]hatever the procedure authorized by Congress' happens to be."[41] Or, as the Supreme Court recognized in *Landon v. Plasencia*, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application . . . ."

If Congress affords the executive branch a broad power to deny visas to aliens he deems a threat, courts should presume that such a denial—with nothing more—is all the process that is due. Likewise, if Congress affords the executive branch a broad power to deny entry to aliens he deems a threat, courts should presume that such a denial—with nothing more—is all the process that is due.

As a more general matter, under the principles of *Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, the Executive Order's categorical judgment—as opposed to an individualized consular decision—is a quasi-legislative action, for which normal due process requirements do not even apply. Justice Breyer recognized this principle in his dissenting opinion in *Kerry v. Din*, stating that a general policy that results in the "deprivation" of rights for "hundreds of thousands of American families," rather than an "individualized visa determination," would not be subject to a traditional due process analysis. Beyond this case, if the Ninth Circuit's precedent is meant to be more than a one-way ticket, much of the administrative state, which relies on generalized policy statements, would now be subject to attack under this capacious conception of due process. The en banc court would be wise to tidy up this mess.

Due to the conjunction of authority here between the executive and legislative branches, judicial scrutiny should be deferential, and courts should presume—unless there is precedent to the contrary—that Congress acted constitutionally. Disregarding this framework, the panel instead manufactured heretofore unknown due process rights, that neither Congress, nor the executive, nor the Supreme Court ever countenanced.

C. *Strict Scrutiny and Suicide Pacts*

A straightforward application of Justice Jackson's framework—one my law students expertly apply on their final exams—would suggest that the courts should be deferential to the executive's policy. However, all four judges who have worked on this case applied scrutiny stricter than anything I've ever seen—even in the Guantanamo detention cases or the *Pentagon Papers* case. In the district court,[42] Judge Robart asked the Justice Depart-

40. 345 U.S. 206 (1953).

41. *Angov*, 788 F.3d at 898.

42. *Second-Guessing on National Security*, JOSH BLACKMAN'S BLOG (Feb. 6, 2017),

ment lawyer, "Have there been terrorist attacks in the United States by refugees or other immigrants from the seven countries listed, since 9/11?" Not whether there are any investigations, or arrests, but actual terrorist attacks. Despite these pointed questions, Judge Robart purported to apply rational basis review: "But I'm also asked to look and determine if the Executive Order is rationally based," he said. "And rationally based to me implies that to some extent I have to find it grounded in facts as opposed to fiction." This is most certainly not what rational basis review holds[43]—especially in the national-security context. In any event, it was Judge Robart's questions that were grounded in alternative facts.[44]

In one of the more memorable exchanges of the hearing, Judge Robart asked, "How many arrests have there been of foreign nationals for those seven countries since 9/11?" The poor lawyer from the civil division, arguing on short preparation, replied, "I don't have that information." Judge Robart replied, "Let me tell you. The answer to that is none, as best I can tell." As best as I can tell, Judge Robart is wrong. To provide a single instance, in October 2016,[45] an Iraqi refugee in my hometown of Houston pleaded guilty of providing support to ISIS. One month later,[46] a Somalian refugee engaged in a terror attack at Ohio State University with his car and a knife; in fairness to Judge Robart, the refugee was not arrested because an officer shot him first. The White House also released a list[47] of two-dozen refugees from those seven nations who were arrested on terror-related charge. Though the connections to terrorism for some of these aliens are subject to debate, Judge Robart's uninformed blanket statement is simply false.

The level of scrutiny increased on appeal. During the hearing, Judge Clifton asked the DOJ lawyer, August E. Flentje, "Is there any reason for us to think there is a real risk?"[48] That is, a real risk, rather than a fake risk.

http://joshblackman.com/blog/2017/02/06/second-guessing-on-national-security/ [https://perma.cc/TLH2-ATVC].

43. *See generally* Fed. Comms. Comm'n v. Beach Comms., Inc., 508 U.S. 307 (1993).

44. Erick Tucker, *AP FACT CHECK: No Arrests from 7 Nations in Travel Ban?Nope*, WASH. POST: COURTS & LAW (Feb. 6, 2017), https://www.washingtonpost.com/politics/courts_law/ap-fact-check-no-arrests-from-7-nations-in-travel-ban-nope/2017/02/06/bc3a398c-eca0-11e6-a100-fdaaf400369a_story.html?utm_term=.11b6722b57ed [https://perma.cc/4KGW-6VGC].

45. *Iraqi Refugee Living in Houston Pleads Guilty to Trying to Help ISIS*, CBS NEWS (Oct. 17, 2016), http://www.cbsnews.com/news/iraqi-refugee-living-in-houston-pleads-guilty-to-trying-to-help-isis/ [https://perma.cc/PZD3-N4DA].

46. Mitch Smith & Adam Goldman, *From Somalia to U.S.: Ohio State Attacker's Path to Violence*, N.Y. TIMES (Dec. 1, 2016), https://www.nytimes.com/2016/12/01/us/from-somalia-to-us-ohio-state-attackers-path-to-violence.html?_r=1 [https://perma.cc/VH78-46AX].

47. *See White House Fires Back at Immigration Order Critics with List of Terror Arrests*, FOX NEWS (Feb. 8, 2017), http://www.foxnews.com/politics/2017/02/08/white-house-fires-back-at-immigration-order-critics-with-list-terror-arrests.html [https://perma.cc/SC8S-AGHK].

48. *17-35105 State of Washington, et al. v. Donald J. Trump et al.*, YOUTUBE (Feb. 7, 2017)

Flentje replied, with more far restraint than the question deserved, "The President determined there was a real risk."[49] Earlier in the argument, Judge Friedland asked "Has the government pointed to any evidence connecting these countries with terrorism?"[50] Flentje answered that "there were a "number of people from Somalia connected to Al-Shabaab who have been convicted in the United States." No, this was not good enough. Judge Friedland interjected, and asked "Is that in the record? Can you point where in the record you are referring?" This formalism is contrived. Appellate courts are fully empowered to take judicial notice of convictions in other courts of record. Such recognition is *especially* appropriate in a fast-moving case involving a temporary restraining order and national scrutiny. Rather than asking for the docket number of convictions, which the court could study, Judge Freidland instead hid behind an inexplicable demand for a record that she knows was never created.

In its published opinion, the court moved the scrutiny goal posts even further: "The Government has pointed to no evidence that any alien from any of the countries named in the Order has *perpetrated* a terrorist attack in the United States." It is no longer enough to identify aliens from these countries that were arrested, or even convicted of supporting terrorism. Now, the aliens must actually *succeed* in "perpetrat[ing] a terrorist attack in the United States." This is absolutely bonkers. According to a Fact Check[51] from the Associated Press, it is true that no Americans were killed by aliens from these seven countries since 9/11. But could this *conceivably* be the correct standard of review—especially in a field of national security where Congress gave the President plenary authority over exclusion? Can the court look askance if the government acts prophylactically to prevent the loss of life?

This standard, fabricated by the court, raises a morbid hypothetical: if, during the pendency of the injunction, an alien from one of these seven nations enters, and commits a terrorist attack, would the court sua sponte reverse its decision? Ignoring Justice Jackson's wise words about zones of twilight, the panel tragically stumbled into another one of Jackson's famous aphorisms: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[52] Jackson, of course, did not mean that literally. The Ninth Circuit, apparently, did. In his *Boumedienne* dissent,[53] Justice Scalia lamented that judicial intervention "will almost certainly

(at 9:12), https://www.youtube.com/watch?v=RPOFowWqFGU [https://perma.cc/85JU-2MQZ].

49. *Id.* (at 9:53).

50. *Id.* (at 8:10).

51. Tucker, *supra* note 43.

52. Terminiello v. Chicago, 337 U.S. 1, 37 (1949).

53. Boumediene v. Bush, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting).

cause more Americans to be killed." In *Washington v. Trump*, the dynamics are reversed: judicial intervention is inappropriate because not enough Americans have been killed.

II. The Panel's refusal to narrow an overbroad injunction

A. *Entry and Admission for Lawful Permanent Residents*

While Judge Robart's injunction[54] was narrowly reasoned, it was broadly applied. First, it enjoined the enforcement of Section 3(c) of President Trump's January 27 executive order,[55] which "suspend[ed] entry into the United States, as immigrants and nonimmigrants, of such persons [from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen] for 90 days." Second, it enjoined the enforcement of Section 5(a) of the order, which immediately suspended the Refugee Admissions Program for 120 days. Third, the order enjoined Section 5(b), which would "prioritize refugee claims made by individuals on the basis of the religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." Without any explanation, the court enjoined this provision even though it would not go into effect for nearly four months; the state of Washington conceded during the district court proceedings that this provision "does not necessarily require immediate injunction." (Transcript 15).

Fourth, the order enjoined Section 5(c) which suspended the entry of "nationals of Syria as refugees" until the President determines that their entry is "consistent with the national interest." Fifth, the court enjoined Section 5(e), which gave the government discretion to admit refugees "on a case-by-case basis" in cases where "the person is a religious minority in his country of nationality facing religious persecution."

On its own terms, Judge Robart's decision applied "on a nationwide basis . . . all United States borders and ports of entry." (To support the nationwide injunction, Washington argued that immigration law had to be uniform; ironically,[56] the state had opposed this exact argument in *United States v. Texas*). Judge Robart made clear that the temporary restraining order was indeed temporary, as the parties were asked to propose a briefing schedule for a preliminary injunction hearing three days later.

In the immediate aftermath of the executive order, there was widespread confusion about its effects. Many lawful permanent residents

54. Temporary Restraining Order, *supra* note 9.

55. Amira Mikhail, *Donald Trump's Executive Order Suspending Immigrant and Refugee Entry to the US*, Lawfare (

56. *Washington Seeks Nationwide Injunction of Immigration Order, Relying on Argument It Opposed* U.S. v. Texas, JOSH BLACKMAN'S BLOG (Feb. 1, 2017), http://joshblackman.com/blog/2017/02/01/washington-seeks-nationwide-injunction-of-immigration-order-relying-on-argument-it-opposed-u-s-v-texas/ [https://perma.cc/WGR7-CPLC].

(LPRs)—that is, aliens with green cards—were denied entry[57] to the United States. Due to their unique status, the applicability of the executive order to LPRs was not at once clear. As a threshold matter, under our immigration laws, nothing requires Congress to treat the broad class of "alien" in a single manner, nor can constitutional scrutiny be applied to the undifferentiated class of 'aliens' without assessing the characteristics of the discrete groups that comprise that class. Justice Stevens's opinion for the Court in *Matthews v. Diaz* explains this framework:

> The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.[58]

Lawful permanent residents[59] are fully authorized to live permanently in the United States, though they are not citizens. LPRs have a far stronger attachment to the United States than aliens seeking admission with visas, as the presumption is that members of the latter class intend to return to their country of origin. The courts have viewed the special status of LPRs to involve certain due process rights that other aliens lack. This issue is complicated by the fact that the Due Process Clause does not have a simple on/off switch for LPRs and other types of aliens. It can best be understood as applying along a continuum. LPRs at the far end of the continuum have the strongest conceivable due process rights when seeking admission. Aliens with a less permanent attachment to the United States have, on a sliding scale, far fewer rights. Refugees, for example, who lack any visa, receive all the process they are due when their application is denied.

As relevant to our discussion, LPRs that travel abroad and return are treated differently than other aliens. Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[60] "entry," an im-

57. Pamela Brown & Eli Watkins, *Green Car Holders from Trump-Restricted Countries May Not Be Allowed into US*, CNN: POLITICS (Jan. 29, 2017), http://www.cnn.com/2017/01/28/politics/green-card-donald-trump-travel-ban/ [https://perma.cc/YU6H-4GW8].

58. 426 U.S. 67, 78 (1976).

59. *Lawful Permanent Residents (LPRs)*, DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/immigration-statistics/lawful-permanent-residents [https://perma.cc/3HJ4-B73Z].

60. Pub. L. 104-208, *available at* https://www.uscis.gov/sites/default/files/ocomm/ilink/0-0-0-10948.html [https://perma.cc/6YM3-KCP7].

portant term of art, was defined as "any coming of an alien into the United States, from a foreign port or place."[61] Notwithstanding this general definition, LPRs were afforded a special quasi-constitutional protection, that was grounded in due process. As Justice Ginsburg explained for the Court in *Vartelas v. Holder*,[62] under the old regime, an LPR "could travel abroad for brief periods without jeopardizing his resident alien status." Quoting from the Court's 1963 decision in *Rosenberg v. Fleuti*, Justice Ginsburg noted that LPRs "were not regarded as making an 'entry'" unless their trip "meaningfully interrupt[ed] . . . the alien's [U.S.] residence."[63] As a result, "[a]bsent such 'disrupti[on]' of the alien's residency, the alien would not be 'subject . . . to the consequences of an 'entry' into the country on his return."[64] In other words, an LPR who physically entered the United States did not legally "enter" the United States unless the departure interrupted her residency.

By way of the 1996 IIRIRA, in most regards, Congress replaced[65] the concept of "entry" with that of "admission." However, 8 U.S.C. § 1182(f) still permits the President to "suspend the *entry*" (not admissibility) of "any class of aliens as immigrants or nonimmigrants" that he deems "detrimental to the interests of the United States." This provision, drafted in 1952, does not speak of "admission." President Trump relied on this statute to support his January 27 executive order. The interplay between these "entry" and "admission" is, frankly, complicated,[66] but critical to understanding the applicability of the executive order to LPRs.

Under current law, "admission" is generally defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[67] Although the Board of Immigration Appeals determined[68] that the *Fleuti* doctrine did "not survive the enactment of the IIRIRA as a judicial doctrine" with respect to this provision, elements of the case do survive: like under the old regime, not all aliens that gain physical admission to the United States have to seek "admission." In the same section, Congress stated that an LPR "shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien" meets one of six factors.[69] For example, if an LPR was "absent

61. 8 U.S.C. § 1101(a)(13) (1988 ed.).

62. 132 S. Ct. 1479 (2012).

63. *Id.* at 1484.

64. *Id.*

65. Blackman, *Statutory Legality: Part I*, *supra* note 29.

66. Blackman, *Statutory Legality: Part IV*, *supra* note 29.

67. 8 U.S.C. § 1101(a)(13)(A).

68. In re Collado-Munoz, 21 I. & N. Dec. 1061 (B.I.A. 1998), *available at* https://casetext.com/case/in-re-collado-munoz [https://perma.cc/RH87-DQNX].

69. 8 U.S.C. § 1101(a)(13)(C)(i)–(vi).

from the United States for a continuous period in excess of 180 days" (ii) or "engaged in illegal activity after having departed the United States" (iii), upon her return, she would have to seek admission.[70] The converse of this rule is that, as a general matter, an LPR that does not meet any of these six criteria does *not* seek admission upon her return to the United States.

These precedents raise a question about whether the President's executive order, as drafted, applies to LPRs. Courts should conclude that it did not. Denying LPRs admission, without any hearing, would likely be unconstitutional. In *Landon v. Plasencia*, the court held that the Due Process Clause affords LPRs "a fair hearing when threatened with deportation."[71] The avoidance canon would counsel reading the order in a way to exclude LPRs. Such a reading that harmonizes the pre- and post-IIRIRA precedents, is not only possible, but is persuasive. (This is an argument that the government could have, but did not adduce in its own defense.)

Under this framework, if an LPR arrives at the border, and meets one of the six factors, he is seeking admission (under IIRIRA) and entry (under 1182(f)). If an LPR arrives at the border, and does not meet any of the six factors, he is *not* seeking admission (under IIRIRA), nor is he seeking entry (under 1182(f)). LPRs, who are not otherwise subject to the six inadmissibility factors, do not seek entry, and thus cannot be denied entry under 1182(f). The President's executive order, therefore, which denies "entry" to classes of aliens, would not apply on its own terms to LPRs that are not seeking admission. This construction harmonizes the terms "entry" in 8 U.S.C. § 1182(f) and "admission" under IIRIRA, and avoids any constitutional defects with the order.

This construction is consistent with how the White House understands its own order. Three days after the order was signed, Donald F. McGahn II, Counsel to the President, announced that LPRs would not be subject to the policy. His memorandum[72] sent to the acting Secretaries of State and Attorney General, as well as the Secretary of Homeland Security, stated, "to remove any confusion I now clarify that Sections 3(c) and 3(e) do not apply" to "the entry" of "lawful permanent residents." McGahn instructed the secretaries to "immediately convey this interpretive guidance to all individuals responsible for the administration and implementation of the Executive Order." The memorandum offered no analysis, but is consistent with this

70. *See* In Re Collado-Munoz, 21 I. & N. Dec. at 1066 ("[R]eturning lawful permanent resident who is described in sections 8 U.S.C. § 1101(a)(13)(C)(i)-(vi) of the Act shall be regarded as 'seeking an admission' into the United States.").

71. 459 U.S. 21, 33–34 (1982).

72. Donald F. McGahn II, Counsel to the President, The White House, Memorandum to the Acting Secretary of State, the Acting Attorney General, and the Secretary of Homeland Security (Feb. 1, 2017), *available at* http://www.politico.com/f/?id=00000159-fb28-da98-a77d-fb7dba170001 [https://perma.cc/NZ2K-8CDV].

statutory framework. Regardless of the effect of Mr. McGahn's memorandum—I agree with the court that it is in no way binding on the government—as a statutory matter, the Executive Order is best understood not to include LPRs.

B. Due Process for Non-Resident Aliens

Washington's strongest claim to relief is based on the denial of entry of LPRs who reside in the state. To the extent that LPRs are not subject to the Executive Order—or if the order was redrawn to exclude LPRs—then the Ninth Circuit would have had to reach the far more difficult question about what constitutional rights attend aliens without a permanent residency status who are seeking admission. The court attempts to fudge this point, noting that "[t]he Government has provided no affirmative argument showing that the States' procedural due process claims fail as to *these categories of aliens*," where "these categories of aliens" applies (presumably) to *all* aliens affected by the Executive Order, including refugees. This burden is contrived. No court has ever held that aliens, with status less than LPRs, that are seeking entry, have due process rights. To the contrary, in *Plasencia*, the Court reaffirmed 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."

The court, however, defends its due process holding as proper even if "lawful permanent residents were no longer part of this case." (In the event the executive order is redrawn to exclude LPRs, this fallback argument becomes critical.) First, it cites the "due process rights of other persons who are in the United States, even if unlawfully." Once an alien is within the United States, the due process clause protects her. There is no dispute about this. However, the Executive Order only concerns entry of those outside the United States. (Arriving at an airport checkpoint does not mean you are on U.S. soil quiet yet). Second, citing *Plasencia*, the panel refers to the due process rights of "non-immigrant visaholders who have been in the United States but temporarily departed or wish to temporarily depart." This argument is misleading, because the referenced portion of *Plasencia* refers to a "permanent resident alien"—that is, an LPR. Third, the panel wrote without any analysis, "Refugees, see 8 U.S.C. § 1231 note 8." As commenter Asher Steinberg noted on *PrawfsBlawg*,[73] this citation is in error. Section 1231 does not have a "note 8." More likely than not, a law clerk inadvertently

73. Rick Hills, *Procedural Due Process in the Ninth Circuit's Immigration Order Decision*, PRAWFSBLAWG (Feb. 9, 2017), http://prawfsblawg.blogs.com/prawfsblawg/2017/02/procedural-due-process-in-the-ninth-circuits-immigration-order-decision.html [https://perma.cc/MR8B-RW5Y].

copied and pasted from a common string cite for "8 U.S.C. § 1231 note; 8 C.F.R. §False" Regardless of what the court intended, there is zero precedent to the effect that the Due Process Clause affords refugees outside the United States a hearing, let alone any sort of judicial review.

The fourth predicate offered by the panel warrants the closest study:

> and applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert, see Kerry v. Din, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring in judgment); id. at 2142 (Breyer, J., dissenting); Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972).

A quick read of these twenty-two words would lead the reader to believe that the Supreme Court in 1972, as reiterated by a recent concurring and dissenting opinion, established the principle that U.S. citizens, or other American institutions, that have relationships with any alien overbroad, can assert the panoply of procedural due process rights on their behalf. This is not an accurate statement of law.

C. Kerry v. Din

Fauzia Din, a U.S. citizen, was married to Kanishka Berashk, an Afghan national, and a former civil servant in the Taliban. Din applied for an immigrant visa for her husband. Berashk was interviewed at the U.S. embassy in Islamabad. The consular officer told him that he was inadmissible under 8 U.S.C. § 1182(a)(3)(B), which deems inadmissible aliens who had engaged in "terrorist activities." Berashk was not given any reason for the denial beyond the citation to 8 U.S.C. § 1182(a)(3)(B). Berashk himself had no cause of action. In light of the 1972 precedent of *Kleindienst v. Mandel*, the husband had "no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission." Instead, Din filed for mandamus on his behalf in the Northern District of California, and sought a "declaratory judgment that 8 U.S.C. § 1182(b)(2)-(3), which exempts the Government from providing notice to an alien found inadmissible under the terrorism bar, is unconstitutional as applied." The Ninth Circuit, over the dissent of Judge Clifton, ruled for Din.

Before the Supreme Court, Din argued that the denial of the visa "without adequate explanation" in fact deprived her of due process of law, and "violated *her* constitutional rights." The authorship of this case is complicated. Justice Scalia announced the judgment of the Court for the Chief and Justice Thomas. Justice Kennedy, joined by Justice Alito, concurred in judgment. In other words, there was no five-member majority. (At the time, I speculated[74] that Justice Kennedy lost the majority opinion, as Justice

74. *Who Will Write the Remaining Three Opinions Since AMK (Probably) Lost Ayala Majority?*, JOSH BLACKMAN'S BLOG (Jun. 27, 2015), http://joshblackman.com/blog/2015/06/27/who-

Scalia's concurring opinion fractured off votes). Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented.

Justice Scalia's opinion rejected Din's claim. Because she could not assert a "life" or "property" interest, her claim depended on the recognition of a substantive due process right to be with her husband. To the surprise of no one, Justice Scalia concluded that "no such constitutional right" exists. "Only by diluting the meaning of a fundamental liberty interest and jettisoning our established jurisprudence," he wrote, "could we conclude that the denial of Berashk's visa application implicates any of Din's fundamental liberty interests." Critically, Scalia concluded, "The legal benefits afforded to marriages and the preferential treatment accorded to visa applicants with citizen relatives are insufficient to confer on Din a right that can be deprived only pursuant to procedural due process." As a result, the due process claim fails, because "*no* process is due if one is not deprived of 'life, liberty, or property.'"

Justice Breyer's dissent, in contrast, contended that the denial of the visas amounted to a "deprivation of [Din's] freedom to live together with her spouse in America." The dissent stopped short of asserting a fundamental substantive due process right, but claims that the right is significant enough to warrant procedural due process.

Justice Kennedy's opinion, as usual, was far more nuanced. His opinion recognized that "even assuming" Din has a protected liberty interest, the "notice she received regarding her husband's visa denial satisfied due process." Kennedy's opinion stressed that the Court did not decide "whether a citizen has a protected liberty interest in the visa application of her alien spouse." Contrast this assertion with the Ninth Circuit's statement that "applicants who have a relationship with a U.S. resident or an institution that *might* have rights of its own to assert." The word "might" does not even come close to bearing the weight that the panel places on it. Justice Kennedy's concurring opinion specifically stated that the Court did not reach the exact issue the Ninth Circuit said "might" prevail. Even then, Justice Kennedy found that the minimal notification given to Din (that her husband was inadmissible, without any further explanation) satisfied due process.

D. Kleindienst v. Mandel

Justice Kennedy's narrow construction is reaffirmed by his recitation of *Kleindienst v. Mandel*, the other precedent relied on by the Ninth Circuit panel. The 1972 case involved college professors who invited Dr. Ernest Mandel, a self-professed Marxist, to speak at Stanford University. After Mandel was denied a visa—in light of his advocacy for "world com-

will-write-the-remaining-three-opinions-since-amk-probably-lost-ayala-majority/ [https://perma.cc/Q5TR-EUF9].

munism"—he petitioned the Attorney General for a waiver. The Attorney General declined, citing the fact that Mandel had abused temporary visas on past trips to the United States. The Stanford professors brought suit, asserting a First Amendment right to "'hear his views and engage him in a free and open academic exchange.'" The denial of the waiver, they asserted, violated this right. (Not a single word in *Mandel* explains why the professors suffered an Article III injury for purposes of standing; it is difficult to reconcile this decision with later cases such as *Lujan* and *Clapper*).

To the extent that U.S. citizens can assert due process rights on behalf of foreign nationals, Kennedy explains, the judicial inquiry is limited to whether the "Government had provided a 'facially legitimate and bona fide' reason for its action." He added that "[o]nce this standard is met, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the constitutional interests of citizens the visa denial might implicate." Kennedy recognized that imposing a more exacting scrutiny would with respect to the government "'refusing a [visa] to the particular applicant,'" would usurp "a nuanced and difficult decision Congress had 'properly . . . placed in the hands of the Executive.'" What process was due for Mandel? The disclosure of his "abuse of past visas" was sufficient, and that "ended [the Court's] inquiry."

Applying the *Mandel* framework to *Din*, Justice Kennedy concludes that the husband's denial of a visa was "based upon due consideration of the congressional power to make rules for the exclusion of aliens, and the ensuing power to delegate authority to the Attorney General to exercise substantial discretion in that field." The only process that was due was the "consular officer's determination that Din's husband was ineligible for a visa [as] controlled by specific statutory factors" of § 1182(a)(3)(B), which "establish[ed] specific criteria for determining terrorism-related inadmissibility." In this case, the consular officer told the husband that he did not satisfy the statute's requirements. In conclusion, Justice Kennedy wrote, the "Government's decision to exclude an alien it determines does not satisfy one or more of those conditions is facially legitimate under Mandel."

E. "Look Behind"

However, as usual, Justice Kennedy left some wiggle-room in his opinion. As he explained in his opinion in *Din*, in *Mandel*, the Attorney General had "*nearly* unbridled discretion" about issuing waivers. (Here, the word "nearly" may provide significant wiggle-room). In contrast, "§ 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa." Here, the husband admitted that he worked for the Taliban government, "which, even if itself insufficient to support exclusion, provides at least a facial connection to terrorist activity." In the general course, courts cannot "look behind" the denial of the visa for

"additional factual details beyond what its express reliance on § 1182(a)(3)(B) encompassed." In other words, normally, courts are not permitted to inquire about what additional facts went into the officer's denial of the visa, beyond what the statute requires. However, Justice Kennedy went beyond the holding of *Mandel*, finding that presumption is flipped upon an "affirmative showing of bad faith on the part of the consular officer." In such cases, the courts can "look behind" the consular officer's decision. This nebulous opinion raises four distinct questions which will influence the outcome of *Washington v. Trump*. Court watchers would be well-served to carefully divine what it can from these entrails.

1. Is Din *distinguishable from* Washington *because unlike § 1182(a)(3)(B), § 1182(f) does not provide specific "discrete factual predicates" to support the denial of entry?*—Under the latter provision, when the President determines that a class of aliens is "detrimental" to the interests of the United States, all members of that class are denied entry. During oral arguments, Judge Michelle Friedland asked Justice Department attorney August E. Flentje about this distinction. In both *Mandel* and *Din*, the judge began, there were "specific statutes by Congress that set forth specific criteria that were then applied factually." Judge Friedland asked, "[the] President is not applying any specific criteria from Congress [with the executive order] is he?" Flentje replied that indeed the President was indeed applying the statutory factors set in § 1182(f).

We should not overstate how "specific" the statute in *Din* was. The husband was denied a visa because he "engaged in a terrorist activity." That phrase is not defined and gives the government wide latitude to determine what was a "terrorist activity." There is no requirement of a conviction or arrest, a mere inkling would suffice. A proclamation that an alien is "detrimental to the interests of the United States" is indeed more capacious, but as a matter of degree, not of kind. Rather than addressing this point, and arguing that § 1182(f) did not provide adequate guidance, the Ninth Circuit instead vaults over these meaty questions, and gerrymanders the precedents, which allows it to distinguish away *Mandel* with gossamer threads:

> In fact, the *Mandel* standard applies to lawsuits challenging an executive branch official's decision to issue or deny an individual visa based on the application of a congressionally enumerated standard to the particular facts presented by that visa application. The present case, by contrast, is not about the application of a specifically enumerated congressional policy to the particular facts presented in an individual visa application. Rather, the States are challenging the President's promulgation of sweeping immigration policy.

The Attorney General's decision in *Mandel*, like the decisions here, is based on "the application of a congressionally enumerated standard to the particular facts presented by that visa application." Section 1182(f) permits the

President to deem classes of aliens from certain countries as "detrimental" to the interests of the United States. Then, a consular official assesses "the particular facts presented by that visa application"—that is, whether an alien is a national of one of the seven nations specified by the proclamation. If so, entry is denied. The situations are factually analogous. The panel, however, disregards these important nuances in *Mandel* and Justice Kennedy's concurring opinion. (The judges also charged the Justice Department with "omit[ting] portions of the quoted language to imply that this standard governs judicial review of all executive exercises of immigration authority." The acting solicitor general did no such thing.[75])

2. Is Din *limited to individualized decisions made by consular officers, or does it apply to wide-ranging policies adopted by the President?*—Mr. Flientje made this point cogently during his arguments: "Whatever *Din* says about looking at consular decision making does not suggest we look behind national security determination made by the President, where the four corners of that determination are based on the congressional determination that the countries at issue are of concern." (1:00:30). He may as well have been reading from Justice Kennedy's opinion. At every step in the concurrence, the focus was not on the policy itself, but the individual officer who made the decision. Judge Friedland interrupted Flientje, and said, "I thought you were using *Din* and *Mandel* as main authority for unreviewability, and so now you are saying those are distinguishable. I'm a little confused if you are relying on those cases or not." (1:01:00). Her comment is confusing. Flientje was specifically referring to the boundaries imposed by Kennedy's concurring opinion. The DOJ lawyer replied, "We are definitely relying on them for the limits that Court's review these types of issues." Further, as I noted in this Article earlier, this question implicates the classic distinction between *Londoner* and *Bi-Metallic*. If due process now attends to broad policy statements, and not just individualized determinations, large swaths of the administrative state are now susceptible to attack.

3. Does the "bad faith" inquiry focus on the subjective motivations of the Executive branch at large, or is it confined to the individual consular official that acts in "bad faith?"—Prior to *Washington v. Trump*, the courts interpreted *Mandel* to focus on the latter definition. For example, in *Bustamante v. Mukasey*,[76] the Ninth Circuit defined bad faith under *Mandel* in terms of whether consular officer "did not in good faith believe the information he had." In that case, the plaintiffs alleged that an applicant "never has been a drug trafficker," as the officer concluded, but they could not

75. Kerry v. Din, Kleindienst v. Mandel, *and* Washington v. Trump, JOSH BLACKMAN'S BLOG (Feb. 11, 2017), http://joshblackman.com/blog/2017/02/11/kerry-v-din-kleindiesnt-v-mandel-and-washington-v-trump/ [https://perma.cc/B9VP-ZD24].

76. 531 F.3d 1059, 1063 (9th Cir. 2008).

demonstrate that the consular officer knew his report was false. "It is not enough to allege that the consular official's information was incorrect," the panel held. The "bad faith" analysis is limited to its application by an individual consular officer.

In *Din*, Justice Kennedy asserted that providing the husband with the minimal information it did was a "facially and legitimate bona fide reason" for denying the visa under § 1182(a)(3)(B). There was no assertion that the consular officer knew the information was false; indeed the information was conceded as accurate. With respect to *Washington v. Trump*, the denial of entry to an alien from one of the seven nations would likewise be "facially and legitimate bona fide reason," specifically because it is done pursuant to § 1182(f). There is no allegation of a deviation from the policy in bad faith by a rogue consular officer. One could imagine a situation where, under the executive order, a consular official modifies a visa application, such that a Pakistani national is incorrectly listed as an Iranian national, and is thus denied entry. That would be an exercise of bad faith. However, simply denying a visa because of a person's nationality—an accurate fact—would not be in bad faith under the proclamation issued pursuant to § 1182(f).

What is most perplexing about the Ninth Circuit's opinion, which was joined by Judge Clifton, is that Judge Clifton dissented from the panel decision in *Din*. In that case, he stated succinctly that the "good faith" analysis was limited to the behavior of the "consular official."[77] He said *nothing* about the subjective motivations of the policy maker. Rather, the denial was "based on law" and "the reason was at least "facially legitimate." Specifically, Judge Clifton wrote, "The factual basis of the consular's decision is not within our highly limited review." In other words, the manner in which the consular official denied the visa, that is "based on law," is beyond the ken of the courts. The Supreme Court ultimately vindicated his dissent! It is unclear how Judge Clifton can reconcile his opinion in *Din* with the per curiam opinion in *Washington v. Trump*.

4. Even assuming that process is due, then what process is due?— Justice Kennedy states, without equivocation, that the only process Din was due was the notification that her husband was denied a visa based on § 1182(a)(3)(B). Citing the importance of Congress's control over national security concerns, Justice Kennedy concluded that "notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses." Further, he noted, "respect for the political branches' broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose about a consular officer's denial of a visa to an alien abroad." Regardless of what is divined from the entrails, this analy-

77. *Din*, 718 F.3d at 869.

sis portends the result in *Washington*: if an alien is denied entry, with a notice stating that the denial is due to § 1182(f), he is afforded all the process that he is due. No more is needed.

There was not even the slightest hint in *Din* that aliens overseas are entitled, in the words of the Ninth Circuit's panel, to "notice and a hearing prior to restricting" her "ability to travel. This holding is made up out of whole cloth. Even if the aliens covered by the Executive Order are protected by the Due Process Cause—a striking proposition with respect to refugees in particular, who have no connection to the United States—then there is no conceivable requirement that they be afforded a hearing before being denied entry. A consular stamp that says "denied under § 1182(f)" will provide all the process that is due. The end result of the court finding that a due process right attaches yields the same end result: the President can deny entry through a consular notification that the alien is barred by his proclamation under § 1182(f). Here, the panel opinion collapses under its own weight.

Certainly, Justice Kennedy can change his mind on the next case, but we should not pretend that his *Din* concurring opinion provides a clear, inescapable route to invalidating the executive order.