Artl.S8.C18.8.8.3 Kerry v. Din and Trump v. Hawaii

Article I, Section 8, Clause 18:

> *[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*

The Supreme Court's recognition of Congress's broad power to exclude aliens was further illustrated in its 2015 decision in *Kerry v. Din*. In that case, a U.S. citizen (Fauzia Din) challenged the State Department's denial of her husband's visa application, claiming that the agency failed to adequately explain the basis for the denial.[1] The Supreme Court rejected Din's challenge in a 5-4 decision, but without a majority opinion.[2] Justice Antonin Scalia, writing for a plurality of three Justices, determined that Din did not have a protected liberty interest under the Due Process Clause in her husband's ability to come to the United States, and did not decide whether the government had established a facially legitimate and bona fide reason for excluding her husband.[3]

However, in a concurring opinion joined by Justice Samuel Alito, Justice Anthony Kennedy determined that the government had shown a facially legitimate and bona fide reason for Din's exclusion by citing the Immigration and Nationality Act's provision barring the issuance

of visas to aliens who engage in terrorist activities.[4] Justice Kennedy reasoned that, even if Din's rights were burdened by the denial of her husband's visa, the government's reference to the statutory provision provided ample justification even if the denial did not disclose the facts underlying that decision.[5] At the same time, Justice Kennedy suggested that there may be circumstances where a court could "look behind" the government's stated reason for a visa denial if the plaintiff makes "an affirmative showing of bad faith" on the part of the government.[6] Nevertheless, because Din had not "plausibly alleged with sufficient particularity" that the government acted in bad faith, Justice Kenney declined to look beyond the government's stated reason for the visa denial.[7]

The Supreme Court reaffirmed that *Mandel* and its progeny permit courts to conduct only a limited review of Executive decisions to exclude aliens abroad in the 2018 case *Trump v. Hawaii*.[8] The case concerned a presidential proclamation that provided for the indefinite exclusion of specified categories of nonresident aliens from seven countries, subject to some waivers and exemptions.[9] Five of the seven countries covered by the proclamation were Muslim-majority countries.[10] The proclamation, like two earlier executive orders that imposed entry restrictions of a similar nature, became known colloquially as the "Travel Ban" or "Muslim Ban."[11] The stated purpose of the proclamation was to protect national security by excluding aliens who could not be properly vetted due to the deficient information-sharing practices of their governments or the conditions in their countries.[12] U.S. citizens and other challengers argued that the actual purpose of the proclamation was to exclude Muslims from

the United States and that it therefore violated the Establishment Clause of the First Amendment.[13] They based this argument primarily upon extrinsic evidence—that is, evidence outside of the four corners of the proclamation—including statements that the President had made as a candidate calling for a "total and complete shutdown of Muslims entering the United States."[14]

A five-Justice majority of the Supreme Court rejected the Establishment Clause challenge and upheld the proclamation.[15] Writing for the majority, Chief Justice Roberts reiterated the holdings from *Mandel* and *Fiallo* that matters concerning the admission or exclusion of aliens are "largely immune from judicial control" and are subject only to "highly constrained" judicial inquiry when exclusion "allegedly burdens the constitutional rights of a U.S. citizen."[16] But the Court did not decide whether the narrow scope of this inquiry barred consideration of extrinsic evidence of the proclamation's purpose.[17] Much of the litigation in the lower courts had turned on this issue. A majority of judges on the U.S. Court of Appeals for the Fourth Circuit, citing Justice Kennedy's concurrence in *Din*, deemed it appropriate to consider the campaign statements and other extrinsic evidence of anti-Muslim animus and relied on that evidence to hold that the proclamation likely violated the First Amendment.[18] Dissenting Fourth Circuit judges, by contrast, reasoned that *Mandel* and the other exclusion cases prohibited consideration of the extrinsic evidence.[19] Instead of resolving this disagreement, the Supreme Court assumed without deciding that it could consider the extrinsic evidence when reviewing the proclamation under a "rational basis" standard to determine "whether the entry policy is plausibly related to the

Government's stated objective to protect the country and improve vetting processes."[20] The Court explained that the government "hardly ever" loses cases under the rational basis standard unless the laws at issue lack any purpose other than a "bare . . . desire to harm a politically unpopular group."[21] Applying this standard, the Court held that the proclamation satisfied it mainly because agency findings about deficient information-sharing by the governments of the seven covered countries established a "legitimate grounding in national security concerns, quite apart from any religious hostility."[22]

Footnotes

1. ^ Kerry v. Din, 576 U.S. 86, 88 (2015).
2. ^ *Id.*
3. ^ *Id.* at 100.
4. ^ *Id.* at 101–02 (Kennedy, J., concurring in the judgment); *see also* 8 U.S.C. § 1182(a)(3)(B) (providing that aliens who engage in terrorist activities are inadmissible to the United States).
5. ^ *Din*, 576 U.S. at 103–04 (Kennedy, J., concurring in the judgment).
6. ^ *Id.* at 105. Justice Kennedy, however, did not explain what an "affirmative showing" would require to allow a court to probe beyond the government's stated rationale for a visa denial.
7. ^ *Id.*
8. ^ No. 17-965, slip op. at 32 (U.S. June 26, 2018).
9. ^ *Id.* at 2–6 (describing Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats).

10. ^ Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,165–67 (Sept. 24, 2017). The proclamation originally applied to nationals of eight countries: Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia. *Id.* The President terminated the restrictions on nationals of Chad, however, after determining that their government "had made sufficient improvements to its identity-management protocols." *Hawaii*, No. 17-965, slip op. at 14.

11. ^ *See Hawaii*, No. 17-965, slip op. at 12; *id.* at 78 (Sotomayor, J., dissenting); *id.* at 2 (Breyer, J., dissenting).

12. ^ Proclamation No. 9645, 82 Fed. Reg. at 45,161–62; *see Hawaii*, No. 17-965, slip op. at 34 ("The Proclamation is expressly premised on . . . preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.").

13. ^ *Hawaii*, No. 17-965, slip op. at 6–7.

14. ^ *Id.* at 27 (quoting record).

15. ^ *Id.* at 38. The Court also rejected statutory challenges to the proclamation. *Id.* at 22–24.

16. ^ *Id.* at 28–32 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

17. ^ *Id.* at 32–33.

18. ^ Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 264 (4th Cir. 2018) (en banc) ("Justice Kennedy's concurrence in *Din* elaborated on [Mandel's] 'bona fide' requirement. An action is not considered 'bona fide' if Plaintiffs make an 'affirmative showing of bad faith,' which they must 'plausibly allege[ ] with sufficient particularity.' Upon such a showing, a court may 'look behind' the Government's proffered justification for its action.") (quoting Kerry v. Din, No. 13-1402, slip op. at 57 (U.S. June 15, 2015) (Kennedy, J., concurring in the judgment).

19. ^ *Id.* at 364 (Niemeyer, J., dissenting) ("[J]ust as the Court in Mandel rejected the plaintiffs' challenge because, even assuming a constitutional violation lurked beneath the surface of the Executive's implementation of its statutory authority, the reasons the Executive had provided were 'facially legitimate and bona fide,' so must we reject this similar challenge today."); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 648 (4th Cir. 2017)

(Niemeyer, J., dissenting) ("Mandel, Fiallo, and *Din* have for decades been entirely clear that courts are not free to look behind these sorts of exercises of executive discretion [to exclude aliens] in search of circumstantial evidence of alleged bad faith.").

20. ^ *Trump v. Hawaii*, No. 17-965, slip op. at 32–33.
21. ^ *Id.* (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (ellipses in original).
22. ^ *Id.* at 34 ("The Proclamation . . . reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review. . . . But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country.").