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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN F. KERRY, :

SECRETARY OF STATE, ET AL., :

Petitioners : No. 13-1402

v. :

FAUZIA DIN. :

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Washington, D.C.

Monday, February 23, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioners.

MARK E. HADDAD, ESQ., Los Angeles, Ca.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 13-1402, Kerry,
5 Secretary of State, v. Fauzia Din.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF PETITIONERS

9 MR. KNEEDLER: Mr. Chief Justice, and may it
10 please the Court:

11 This Court has repeatedly held that the
12 power to exclude aliens is inherent in sovereignty and
13 necessary to defending the nation against encroachments
14 and dangers. It is a power exercised by the political
15 branches of government.

16 Respondent's husband was denied a visa by a
17 consular officer because he was found to be inadmissible
18 under the terrorism provisions of the Immigration and
19 Nationality Act. It is firmly established that as an
20 alien outside the United States, he had no right under
21 the INA or the Constitution to seek judicial review of
22 that determination or for a greater explanation of the
23 grounds given.

24 JUSTICE SOTOMAYOR: Could I ask you a
25 question? Assume the following hypothetical. You had

1 an erroneous name, meaning -- or there's a duplicate
2 name, a terrorist and a non- -- and a non-terrorist
3 alien. What you're telling us is that there's no remedy
4 whatsoever for the alien to come in and try to show
5 someone that he's not the guy who's the terrorist.

6 MR. KNEEDLER: At least two responses to
7 that point. First of all, no one is excluded under the
8 terrorism provisions of the Act because their name
9 appears in a database. The databases are assembled as
10 basically raising flags that might warrant further
11 inquiry. I'm informed by the State Department, and as
12 we say on page 49 of our brief, that in any case in
13 which an alien is going to be denied entry under the
14 terrorism provisions, there is a request to the State
15 Department in Washington for a security advisory
16 opinion, which entails sending out notice to interested
17 agencies who may have intelligence about the individual
18 and report it back to the State Department for an
19 advisory opinion.

20 And so it will not --

21 JUSTICE SOTOMAYOR: I asked -- I have a real
22 problem, which is that's what we were told after
23 September 11th, and we have evidence that people were
24 kept for months and months and months, and some were
25 released after there was further probing by the courts,

1 and it was determined that people had been erroneously
2 identified.

3 So I'm not challenging good faith, but I'm
4 just questioning how someone caught up in an
5 administrative nightmare -- you're suggesting that the
6 wife has absolutely no interest in -- in -- in her
7 marriage in not having the government arbitrarily keep
8 her spouse out.

9 MR. KNEEDLER: She obviously has an
10 interest, but -- but she is affected only indirectly by
11 the denial of the visa to her husband. That --

12 JUSTICE KENNEDY: Well, it -- it would seem
13 to me that you're fighting the hypothetical if you're
14 basically saying, well, that's not going to happen.
15 Suppose it happened. There are two Mr. Smiths, or
16 whatever the foreign name is, and they just get the
17 wrong one. It seems to me your position is that the
18 alien has no standing, period.

19 MR. KNEEDLER: The -- it -- I think it's
20 clear under the doctrine of consular nonreviewability,
21 which is one subset of the recognition of Congress'
22 broad power over the exclusion of aliens, which includes
23 conferring the power on executive officers. The Court
24 has said --

25 JUSTICE GINSBURG: But the consular, you

1 have denied --

2 JUSTICE KENNEDY: And then we can -- and
3 then we get to the question of whether -- of whether or
4 not the wife, in this case, has at least a minimum right
5 to make sure that the identification is correct. And
6 you say as to that?

7 MR. KNEEDLER: There is no -- there is no
8 right of judicial review because the consular -- the
9 doctrine of consular nonreviewability applies equally to
10 her. In fact, it would be quite -- it would be a
11 license for circumvention of that doctrine to allow
12 judicial review --

13 JUSTICE GINSBURG: Is there -- is there
14 no -- is there no exception to the consular
15 nonreviewability doctrine? That is, assuming people
16 make mistakes, as Justice Sotomayor pointed out,
17 bureaucrats -- some consulates -- consuls have been
18 known to have a bureaucratic mentality and some may act
19 for improper reasons. But you are sticking to the
20 position that consular determinations are not subject to
21 judicial review on any -- any and all circumstances, no
22 exceptions?

23 MR. KNEEDLER: That -- that is -- that is
24 our position with respect to a consular officer having a
25 bureaucratic point of view. I should point out that a

1 visa is not denied in a way that can't be corrected by
2 additional evidence without it being approved by -- by a
3 supervisor to the consular officer. So it's not --

4 JUSTICE SOTOMAYOR: Now, it's your position
5 that the government could basically say to a wife in the
6 United States, you have no rights whatsoever to
7 challenge the arbitrary -- or a statement by the
8 government. We believe your husband is a terrorist.
9 You can't stay with him.

10 Only the husband could challenge them?

11 MR. KNEEDLER: Someone in the United States
12 or --

13 JUSTICE SOTOMAYOR: Yes.

14 MR. KNEEDLER: In the United States, it
15 would be different, although it would not confer rights
16 on her but the -- but the husband --

17 JUSTICE SOTOMAYOR: Ah, so you're saying in
18 that situation marriage has -- gives her no rights to
19 say, you're interfering with my marriage by arbitrarily
20 keeping my husband. Not talking if he's arrested or if
21 he's -- but do -- you're just saying --

22 MR. KNEEDLER: Well, the husband would
23 have -- what -- whatever -- whatever action the
24 government took against the husband, if he was in the
25 United States, he would have his own due process rights.

1 This --

2 JUSTICE SCALIA: I suppose the wife would
3 have standing to appeal a wrongful conviction of her
4 husband, right?

5 MR. KNEEDLER: That is the point I was going
6 to make. And in fact --

7 JUSTICE SCALIA: And in a regular criminal
8 case, and he doesn't want to appeal, and she says, oh,
9 I'm going to be deprived of my husband, so she has a
10 right to appeal. Is that -- is that the law?

11 MR. KNEEDLER: It -- it's not the law. And
12 in fact, the Court made exactly that point in the
13 O'Bannon case that we cite in our briefs. It --
14 O'Bannon arose in a different context, but the Court, in
15 announcing its rule that someone indirectly affected is
16 not deprived of liberties, used that very example.

17 JUSTICE KENNEDY: I understand -- excuse me.
18 I understand the O'Bannon case. I think it's in point
19 for you.

20 The Mandel case, you say in your brief in
21 pages 38, 39, and 40 that the Court in Mandel simply
22 assumed there was that right. I -- I'm not sure that's
23 a fair reading of Justice Blackmun's opinion. He says
24 recognition that First Amendment rights are implicated,
25 however, is nondispositive. Then he goes on to find no

1 relief.

2 But I read that case as saying the
3 professors had standing. You don't -- you don't read
4 that?

5 MR. KNEEDLER: We're not saying they didn't
6 have standing to make a First Amendment claim. They did
7 and -- and we didn't argue -- or aren't arguing here
8 that she doesn't have a right to go to court to make her
9 constitutional claim. We're just saying it fails on the
10 merits. She -- I -- I don't think it can seriously be
11 contended that it would be unconstitutional.

12 JUSTICE KENNEDY: You -- you -- you say that
13 she has the -- the right to contest the denial of the
14 visa.

15 MR. KNEEDLER: No. No, we don't. All I'm
16 saying -- all I'm saying is she's entitled to come into
17 court to make the argument that she's making here.

18 We think her argument loses, and therefore,
19 she has no right to challenge to have the Court review
20 the consular's denial -- consular's denial of the visa
21 abroad.

22 JUSTICE KENNEDY: Well, you always have the
23 right to come into court to -- to say that you think
24 you have -- have a right to contest, and the court says
25 you don't, and you throw it out.

1 MR. KNEEDLER: Right. No. But -- but -- I
2 think --

3 JUSTICE KENNEDY: But that's not -- I don't
4 think that's the way you can read Mandel.

5 MR. KNEEDLER: Well, I think -- I think the
6 predicate discussion of the First Amendment there was
7 the government was arguing there's no -- there's no real
8 First Amendment problem just on First Amendment terms
9 because you could always hear the same information by
10 reading a book or -- or the telephone or something like
11 that, and the Court said the First Amendment interest --
12 looking at First Amendment interest doesn't disappear in
13 -- in that situation.

14 JUSTICE KENNEDY: Suppose I read the Mandel
15 case to say that the professors have a right to contest
16 the denial of the visa. Suppose I read it that way.
17 And then the Court at the end of the day says the visa
18 was properly denied. They lose on the merit, but they
19 have the right to contest. They have a right for a
20 reason -- to a reason. How is that different from this
21 case if I read it that way?

22 MR. KNEEDLER: First of all --

23 JUSTICE KENNEDY: Then it -- then it seems
24 to me that the wife here has the right to demand a
25 reason.

1 MR. KNEEDLER: First of all, Mandel involved
2 the -- a decision on the waiver, not on -- not a
3 decision by a consular officer abroad to deny a visa,
4 which -- which is really right at the teeth of the
5 consular --

6 JUSTICE KAGAN: I don't see why that doesn't
7 cut the other way, Mr. Kneedler. You make this argument
8 several times in your briefs. But I would think that
9 review would be at its nadir in the waiver authority
10 because there, enormous amount of discretion is given to
11 the executive official. Whereas with respect to
12 consular decisions over visas, Congress has set out
13 clear rules for what those consular officials are
14 supposed to be doing. And it seems to me that the
15 reason for review in that context where you're trying to
16 figure out whether the consular official has, in fact,
17 accorded with the congressional determination of who's
18 entitled and who's not to a visa would be all the more
19 important.

20 MR. KNEEDLER: Well, I don't disagree -- we
21 don't think there should be review in -- in either case.
22 I think part of what might have been motivating the
23 court in Mandel was that the discretionary denial of the
24 waiver might have been based on the characteristics of
25 the U.S. citizen seeking it.

1 There can't be any claim like that here.
2 This -- this -- the terrorism grounds go entirely to
3 the -- for a visa denial -- go entirely to the
4 characteristics of the alien abroad. But beyond --
5 beyond that, what you're describing is the very thing
6 that the doctrine of consular non-reviewability is
7 designed to prohibit judicial review of.

8 JUSTICE BREYER: So is it no matter what?
9 Is that -- I mean, a woman is married -- an American
10 woman is married to a foreign -- foreign person, asks
11 for a visa. She has undeniable proof, the most -- any
12 proof you want that the reason it was denied is because
13 the consular official believes that husbands and wives
14 should live separately, or for racial reasons, or for
15 First Amendment reasons. Undeniable proof.

16 Is your position that it doesn't matter if
17 they decide that -- the consulate -- that husbands and
18 wives cannot live together, there is no review? Is that
19 your position?

20 MR. KNEEDLER: Our position is that there is
21 no judicial review.

22 JUSTICE BREYER: Are you saying -- I want a
23 clear answer to my question because what I'm trying to
24 do, obviously, is make the most far out case I can think
25 of, and -- and I want to know if the Government of the

1 United States thinks that if it is the policy even of
2 the -- of the consulars of the United States that
3 husbands and wives must live separately, there is no
4 judicial review no matter what?

5 MR. KNEEDLER: Well --

6 JUSTICE BREYER: Is that the position or is
7 it not?

8 MR. KNEEDLER: That is -- that would be our
9 position.

10 JUSTICE BREYER: All right. Now, if that is
11 your --

12 JUSTICE SCALIA: Let me give you an equally
13 absurd hypothetical. Okay?

14 JUSTICE BREYER: Oh, I don't know if mine is
15 so absurd.

16 JUSTICE SCALIA: Wait. No, no, no, no. I'm
17 saying the -- the feeling that the law can't be that.
18 Assuming the man is not married and there is no wife who
19 comes in and can make these points. But assume,
20 likewise, there is incontrovertible evidence that he was
21 denied admission because of his race or because of some
22 First Amendment statement he had made or for whatever
23 other reasons Justice Breyer wants to bring forward.
24 Your position would be -- right -- too bad.

25 JUSTICE BREYER: I'm not worried about that

1 case.

2 JUSTICE SCALIA: What?

3 JUSTICE BREYER: I'm worried about that case
4 where there is an American citizen who is married and
5 that the decision of the consular official will prevent
6 her no matter how ridiculous, and take all of Justice
7 Scalia's points to make it ridiculous as you want, but
8 the result of this is that an American citizen either
9 must live separately from her spouse forever or must
10 give up her right as an American to live in her native
11 land. Now, that seems to me to be the government's
12 position, and I just want to be assured that it is.

13 MR. KNEEDLER: That is our position. Let --
14 let me just say one thing.

15 JUSTICE SCALIA: I think he knew that.

16 JUSTICE BREYER: No. I didn't actually.

17 (Laughter.)

18 MR. KNEEDLER: If I may -- if I may add one
19 point here. There is no claim that the ground for the
20 denial of the visa is itself unconstitutional. The
21 ground that was given here was that he had engaged in
22 terrorist activities. There can't be any serious claim
23 that it -- that it's permissible to exclude someone for
24 engaging in terrorist activities.

25 JUSTICE BREYER: Well, terrorist activities

1 are defined in this statute to include such things as,
2 let's say, you're in a -- a particular country where
3 this could happen. You decide to keep overnight at your
4 house and let him stay two people who sometimes go out
5 and solicit funds for any one of the 40 organizations on
6 the list. You've given material aid to two or more
7 people, organized or not, who, in fact, themselves
8 solicit funds for one of these 40 organizations.

9 Now, that isn't much, and there are about
10 100 words here or 200 words that seem --

11 JUSTICE SCALIA: Enough for me.

12 JUSTICE BREYER: Well, I'm just saying it
13 isn't obvious to me that you can tell -- now deprive a
14 person of even telling him what the reason is for saying
15 he falls within this section.

16 MR. KNEEDLER: Well, on that -- on that
17 point, now, first Shaughnessy and Musai are controlling.
18 In those situations, aliens who either reached our
19 borders were -- were denied entry on the basis of
20 confidential information that was deemed necessary for
21 the security of the United States. A fortiori here
22 where the aliens are outside the -- where the alien is
23 outside the United States now requires the conclusion
24 that -- that neither he nor his wife is entitled to a
25 greater explanation than the -- than the executive --

1 JUSTICE ALITO: Can I come back to -- can I
2 come back to Justice Breyer's earlier hypothetical.
3 Suppose there were a case where there is
4 incontrovertible proof that the consular officer denied
5 the visa for some incredible ground based on racism or
6 belief that husbands and wives shouldn't live together.
7 Suppose there's a -- a tape -- a video recording or
8 audio recording of the consular officer saying this is
9 what I believe, and this is what I do when I pass on
10 these visas.

11 Would there be no administrative avenue of
12 relief if that information was submitted to the State
13 Department? Would there be no opportunity to -- to get
14 a correction of the visa denial in that way?

15 MR. KNEEDLER: Of course there would. And
16 that's -- and that is what -- that is what Congress
17 decided in 1952 by not establishing a centralized review
18 of all visas which could lead to judicial review, which
19 is what Congress was specifically concerned about.

20 JUSTICE BREYER: How can you get that relief
21 if you don't tell the person what the reason is?

22 MR. KNEEDLER: It won't be denied. The
23 visa -- as I said, the visa will not be denied under 42
24 C.F.R. -- I mean, 22 C.F.R. 4261 unless it is reviewed
25 by a superior. So one individual consular officer's

1 approach to a case is not going to be sustained if it
2 will be reviewed by someone else.

3 JUSTICE GINSBURG: But that can't be. That
4 process can't be initiated by the relative. That's an
5 internal -- you have described an internal check. But
6 as in this case, the wife, she won't know whether that
7 check has gone.

8 MR. KNEEDLER: Well, as Justice Alito -- I
9 think we have to assume the regularity that the
10 supervising consular officer would be asked.

11 JUSTICE GINSBURG: Can the person -- the
12 relative who's claiming preferential status -- can she
13 initiate such a review? She can't. It's entirely
14 internal.

15 MR. KNEEDLER: She has no -- she has no --
16 there's no procedure that gives her entitlement, and
17 properly so because it's not about her, it's about him.
18 But she could certainly bring the information to the
19 attention of the State Department. And, in fact, in
20 this case, she brought -- brought it to the attention of
21 her representative in Congress, who, in turn, inquired
22 to the State Department --

23 JUSTICE GINSBURG: And was given -- given
24 the same -- the -- her representative was given the same
25 answer, citing the statute and saying we -- we don't

1 disclose any particulars.

2 MR. KNEEDLER: Right, but that -- but that's
3 the system Congress set up. Congress specifically said
4 when it enacted this provision in 1996, it concluded
5 that the executive should be entitled to withhold the
6 grounds of the basis for denying a visa if that would
7 adversely impact the national security and. That
8 descends directly from now --

9 JUSTICE SOTOMAYOR: Mr. Kneedler --

10 MR. KNEEDLER: -- and reside.

11 JUSTICE SOTOMAYOR: If Mandel did control
12 this case, what argument would you make -- or could you
13 make an argument that you -- that you met the Mandel
14 standard? And as I understood the Mandel standard, it
15 wasn't that high. It was you have to provide a facially
16 legitimate and bona fide reason for your decision.

17 MR. KNEEDLER: Okay. If I could -- if I
18 could make two points with respect to Mandel
19 controlling. The Court specifically said in Mandel that
20 it was leaving open the question whether there would be
21 judicial review if the attorney general had not offered
22 any explanation at all. It -- it concluded that the
23 explanation that appeared in the record was sufficient
24 if any -- if any explanation at all was required, but it
25 did not hold that it was necessary.

1 So if this case is controlled by Mandel,
2 we're in exactly the same position. There is no
3 precedent of this Court saying that an explanation to
4 people in the U.S. is required. It was just found to be
5 sufficient in that case.

6 Now, applying that test, we think that the
7 reason given here plainly satisfies the facially
8 legitimate standard. What the consular officer did was
9 cite the statutory provision under which he was found to
10 be inadmissible. Citing the statute is, by definition,
11 facially legitimate because it is the -- it is the
12 standard that -- that the consular officer is intended
13 to apply. So even if we get that part out --

14 JUSTICE KAGAN: Well, do you have to -- I
15 mean, what's the level of generality or specificity that
16 you have to cite? Suppose they just said, well, you
17 know, this was done under 1182. Would that be
18 sufficient?

19 MR. KNEEDLER: As a constitutional matter,
20 we think it would be sufficient, yes. And again --

21 JUSTICE KAGAN: We did this under the INA.
22 Is that facially legitimate?

23 MR. KNEEDLER: Yes. I -- I -- I think it
24 is, but here we have something that --

25 JUSTICE KAGAN: So really, it's a reason

1 that's not a reason at all. At some point, I mean,
2 that's nice, you did it under the INA. And that counts
3 as facially legitimate?

4 MR. KNEEDLER: But -- but here we have the
5 specific paragraph dealing with terrorism.

6 JUSTICE BREYER: It isn't -- this is -- this
7 is actually a serious quote; I didn't mean it
8 facetiously. And go back to Justice Alito's point,
9 which I think was quite a good point, frankly. The --
10 the statute that you're talking about labeled terrorist
11 activities is printed in your appendix from pages 7A to
12 pages 14A. It covers everything from a person who is a
13 member of an organization that's about to throw a bomb
14 to somebody who says, as I said, once, has two members
15 of some organization or different organizations sleep on
16 his floor knowing that they solicit funds on other
17 occasions for these people, the bad ones.

18 Now, he just wants to know what
19 sub-provision they're using because he wants to say, as
20 sometimes happens, to others in the State Department
21 your consulate over here in X city gets a little carried
22 away. They're overly risk-averse. They're interpreting
23 one of these hundreds of words in a way that's really
24 wrong.

25 Now, all he needs to know is what subsection

1 under this 7-page section is at issue so he can make the
2 internal appeal that Justice Alito has described. Why
3 not?

4 MR. KNEEDLER: I mean, that --

5 JUSTICE SCALIA: Does this fellow have a
6 wife? Does this fellow have a wife or is this --

7 MR. KNEEDLER: Yes.

8 JUSTICE SCALIA: Oh, it's the wife that's --
9 that's making the claim.

10 MR. KNEEDLER: I -- I -- I want to -- I want
11 to make one thing very clear again with respect to
12 exclusions under paragraph (b), it is not done by the
13 consular officer alone. No one can be excluded under
14 subparagraph (b) on terrorism activities without a
15 reference to the State Department for a special -- or a
16 security advisory opinion. And that review, since at
17 least 2010, has included review by a lawyer. So this is
18 not some -- a situation that could be decided by a rogue
19 consular officer in -- in the field.

20 But what you --

21 JUSTICE GINSBURG: Mr. -- Mr. Kneedler,
22 could you give us an idea, before you conclude, about
23 what has been the consequence of a decision? The Ninth
24 Circuit in this Bustamante case -- that was 2008 -- what
25 has happened in the Ninth Circuit between 2008 and 2014

1 with respect to these relative applications? How have
2 they fared?

3 MR. KNEEDLER: There -- there have been --
4 there have been a number that -- that have arisen.
5 There's the Ibrahim case that was -- that -- that is
6 cited in the papers. There's -- there's a case called
7 Goltra, which I think involves extending Din to a
8 father. There -- there are other cases which -- which
9 involve children, as I recall.

10 But if this Court were to hold that -- that
11 a family member has a right to insert herself into
12 removal -- or into proceedings involving an entirely
13 independent human being responsible for his own conduct,
14 then I think we could anticipate a number of cases --

15 JUSTICE GINSBURG: But in the cases that we
16 have, you cited extending it to a child, but have any of
17 them held that the government failed to show a facially
18 legitimate bona fide reason?

19 MR. KNEEDLER: The Ibrahim case required the
20 specification of a particular subsection based on Din,
21 said that there had to be a particular subsection of
22 (b).

23 And again, I want to step -- I want to step
24 back. In *Knauff v. Shaughnessy* and *Musai*, the Court
25 held that someone could be excluded simply by the

1 attorney general saying there's confidential information
2 and there is no right to a hearing. There is no --
3 there was no suggestion there that -- that the
4 government was required to at least be somewhat specific
5 in telling the person the basis for his removal.

6 JUSTICE KENNEDY: Do you -- do you think
7 that in the instance, suppose that Justice Breyer asked
8 this particular subsection has to be cited, that if the
9 consular were to cite that, this might give some
10 indication as to our intelligence-gathering capability
11 and the information that we have?

12 MR. KNEEDLER: Absolutely. That's -- that's
13 the very reason why Congress said that it's not
14 necessary to give the particular subsection, or frankly,
15 to cite paragraph (b) at all. It could just be under
16 1182(a).

17 And then in here --

18 JUSTICE BREYER: But why not? If there
19 is --

20 MR. KNEEDLER: Whatever -- whatever
21 interests the wife has in this situation, they are
22 derivative and indirect, even if this Court is going to
23 credit them with some force here. They are derivative
24 and indirect as weighed against the powerful interests
25 of the United States in protecting its borders, which is

1 a core aspect of sovereignty, protecting against --

2 JUSTICE BREYER: Of course. So -- so in the
3 situation that Justice Kennedy just mentioned where
4 there's even a risk of harm to some
5 intelligence-gathering or other national security
6 interest, can't the government come to the judge and say
7 just that? And aren't there methods by which you can
8 allow a judge, even in camera if necessary --

9 MR. KNEEDLER: The case should --

10 JUSTICE BREYER: -- to review -- to review a
11 matter where there is a national security interest at
12 stake.

13 MR. KNEEDLER: It is exceedingly rare for
14 the government to be put in a position where it has to
15 submit classified information to a court. There are
16 situations that arise in a domestic --

17 JUSTICE SCALIA: Courts are very good at
18 this stuff, aren't they?

19 MR. KNEEDLER: Well, as --

20 JUSTICE BREYER: At assessing the -- the
21 level of danger to -- to operatives.

22 MR. KNEEDLER: This Court has said that --
23 that they're not and -- and in situations -- in
24 situations in the domestic context, it may be necessary
25 to allow for some consideration of classified

1 information because the person involved has due process
2 rights and -- and can insist on some information.

3 Here we're in a situation where the person
4 directly affected, the person involved, an alien abroad,
5 has no rights of his own to know what the basis for the
6 government's action is.

7 I'd like to reserve the balance of my time.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Kneedler.

10 Mr. Haddad.

11 ORAL ARGUMENT OF MARK E. HADDAD

12 ON BEHALF OF RESPONDENT

13 MR. HADDAD: Mr. Chief Justice, and may it
14 please the Court:

15 There was substantial discussion of the
16 doctrine of consular non-reviewability thus far, but one
17 point that did not emerge is that this Court has never
18 articulated the doctrine in the way the government has
19 presented it today. This Court has never said that the
20 decisions of a group, a large group of officials of the
21 Executive Branch are somehow immune from judicial review
22 in every instance because they are the decisions of
23 certain officials, consular officers in this case. And
24 the record is --

25 JUSTICE SCALIA: What would the basis be,

1 the Administrative Procedure Act? It -- it has a
2 provision exempting from review action committed to
3 agency discretion by law. And I think what the
4 government is arguing is that this -- you know, this law
5 commits this stuff to the discretion of the consular
6 officials and the State Department.

7 MR. HADDAD: I don't think the APA would get
8 the government where it needs to go in this case,
9 Justice Scalia, because ours is a constitutional claim.
10 It's not raised under the APA. And as came out earlier
11 in the discussion, as Justice Kagan pointed out, unlike
12 the situation in Mandel, where all the Attorney General
13 was doing was implementing a statute that gave him,
14 quote/unquote, "discretion" to weigh the denial of a
15 visa, here we have an extensive statutory set of
16 exclusions, and the government has acknowledged in its
17 reply brief that it does not view its consular officers
18 as having discretion in how they apply and implement the
19 specific terms that Congress has set forward.

20 CHIEF JUSTICE ROBERTS: But to get to your
21 constitutional claim, explain to me the difference
22 between the marital basis in this case and, say, a
23 parental basis. I mean, if the individual here was a
24 child, would the parent in the United States have the
25 same rights as the spouse?

1 MR. HADDAD: If the U.S. citizen parent were
2 trying to get an immigration visa for his or her son or
3 daughter, yes, in our understanding of the liberty
4 interest that this Court has --

5 CHIEF JUSTICE ROBERTS: Okay. So it's
6 spouses. It's parents. I suppose it's children as
7 well, right? If the parent is -- is the one who's being
8 denied access, a child in the United States to be able
9 to get --

10 MR. HADDAD: Certainly a minor child, Your
11 Honor, yes. If the Court looks to the grounding cases
12 that we cite, the Meyer case, the Pierce case, Griswold,
13 the cases the Court is very familiar with, those cases
14 involve the right to marriage and to raise a family.

15 CHIEF JUSTICE ROBERTS: Brother -- a brother
16 and sister?

17 MR. HADDAD: Brother and sister is -- I
18 think the Court would look at, in all likelihood, for
19 the constitutional right, would look at whether the
20 brother and sister were part of a family unit that would
21 be living together. That seems to be an important value
22 that the Court looks at.

23 JUSTICE SCALIA: What about someone who
24 wanted to marry the immigrant? Not yet married, but say
25 you're depriving me of marital bliss. I want to marry

1 this person, and I can't do it. Would that be enough?

2 MR. HADDAD: I -- I don't know that that
3 would be enough, Your Honor. But certainly in this
4 case, where the United States has recognized that the
5 respondent has a valid marriage and there's no question
6 at all about the validity of the marriage, we are in the
7 heartland of what this Court has recognized is an
8 important constitutional right.

9 JUSTICE KAGAN: Mr. Haddad --

10 MR. HADDAD: Yes.

11 JUSTICE KAGAN: -- can -- can I ask you how
12 exactly this case become this kind of constitutional
13 case? Because I had thought that originally this case
14 was brought as an APA challenge, and that it was kind of
15 converted into this constitutional claim by the Ninth
16 Circuit. Is -- is that an incorrect understanding?

17 MR. HADDAD: I wouldn't describe it that
18 way, Justice Kagan. The complaint had three causes of
19 action. The third was an APA cause of action, but the
20 first two were not. And at the time the case was
21 brought, the Bustamante decision had been decided by the
22 Ninth Circuit, and so there was a basis for bringing the
23 constitutional claims, as well as the APA claim. And,
24 indeed, it was the constitutional claim that we pressed
25 in the Ninth Circuit.

1 JUSTICE GINSBURG: Can you explain how we
2 get to the constitutional claim that she has a right to
3 live in the United States with her husband? She has a
4 right by statute to put him at the top of the queue,
5 right? She -- she -- before he can apply, she has to
6 get him the preferential status, right?

7 MR. HADDAD: That's correct as a matter of
8 statutory law, Justice Ginsburg. But our claim is not
9 that her right arises from the statute and from the
10 rights conferred by statute. Our argument is that her
11 rights arise as a constitutional matter from her
12 marriage.

13 JUSTICE GINSBURG: So we have -- so she
14 has -- she has marriage, and you rely on that the right
15 to marry includes the right to live with one's spouse.
16 What do you do with Turner against Safley? The Court
17 held that the prisoner had a right to marry, but
18 certainly not a right to live with his spouse.

19 MR. HADDAD: We believe we're right on point
20 and consistent with Turner, because as we describe the
21 right, it's not the right of entry, of having her
22 husband admitted, any more than a petitioner in Turner's
23 circumstance could say, I have a right to have my
24 husband released from prison.

25 All we're saying is, there's a liberty

1 interest in not being arbitrarily denied the opportunity
2 to live with your spouse through the erroneous
3 application or interpretation of law by an executive
4 decision.

5 JUSTICE KENNEDY: Well -- well, it's --

6 JUSTICE KAGAN: If it --

7 JUSTICE KENNEDY: -- it's odd to presume
8 that there's a fundamental right and then say, well, all
9 we're saying is that it can't be arbitrary. It's --
10 you -- you can't measure arbitrariness until you first
11 define the right. You just want us to skip over that
12 critical step.

13 MR. HADDAD: Well, then, I --

14 JUSTICE KENNEDY: It seems to me you're
15 reasoning backwards.

16 MR. HADDAD: Well, let me try to address it,
17 then, Justice Kennedy, so that I don't skip that step.
18 As we've laid out in our brief, there is a right that we
19 believe is inherent in the right to marry and to raise a
20 family, which this Court has recognized. Inherent in
21 that right, for that right to have meaning, it
22 presupposes that the husband and wife can live together.

23 JUSTICE SCALIA: It would be
24 unconstitutional, then, for Congress to eliminate the
25 provisions of the current immigrations law which says

1 that if -- if the wife or the husband is in this
2 country, the spouse can come in. It would be
3 unconstitutional for Congress to say we -- we have
4 immigration quotas for certain countries for certain
5 things, and whether you have a husband or wife in this
6 country has nothing to do with whether you get in. That
7 would be unconstitutional.

8 MR. HADDAD: The -- the Court would review
9 such a law, were it ever passed, under the same standard
10 it used in Fiallo, which is the facially legitimate and
11 bona fide standard. There is -- and this Court has
12 recognized that --

13 JUSTICE SCALIA: It's facially -- it --
14 it -- you -- you would have to say it's
15 unconstitutional, wouldn't you? If your argument in
16 this case is correct, that would be unconstitutional.

17 MR. HADDAD: We would certainly argue that,
18 Your Honor. The Court would review it under the Fiallo
19 standard, and the Court would need to find, at least if
20 it applied and followed Fiallo, just as there was a
21 constitutional challenge to the lines Congress drew in
22 that case --

23 JUSTICE KENNEDY: And you -- and you would
24 say the same thing if Congress did not give a visa
25 preference, putting the spouse to the head of the line?

1 You'd say the same thing?

2 MR. HADDAD: I -- I don't think we would
3 advance that argument, Your Honor. We have conceded
4 that Congress has broad latitude, broad latitude,
5 plenary powers this Court has stated to set the terms
6 and -- and define who comes in.

7 CHIEF JUSTICE ROBERTS: But it --

8 MR. HADDAD: It's the application, Mr. Chief
9 Justice.

10 CHIEF JUSTICE ROBERTS: But -- but it can
11 take a long time, depending upon the nature of the
12 preference, for somebody to get to the front of line. I
13 mean, under some preferences, it's 20 years after you
14 apply. Then you get to the point where you can actually
15 get a visa to come in. I would assume that that would
16 not be satisfactory to you because the marital
17 relationship would be interrupted for -- for 20 years.

18 MR. HADDAD: Were those the facts, Your
19 Honor, at the time Congress passed such a law
20 eliminating all spousal preference, then we may indeed
21 have a strong claim, even as to the elimination or
22 changing of the preference. But our point is -- is
23 simply this: We are not dealing here with a challenge
24 to Congress's line-drawing. We're dealing with a
25 challenge to the application.

1 CHIEF JUSTICE ROBERTS: Well, I -- I
2 understand that. But my point is that the logic of your
3 position gets to reordering the visa preferences. If
4 you say the fact of the marital relationship gives these
5 certain rights, then it would seem to me -- because they
6 can't keep the husband and wife apart, it seems to me
7 that goes to the length of -- that you have to wait for
8 your -- your visa. So it does go to the -- the tiniest
9 reordering of the immigration preferences.

10 MR. HADDAD: Your Honor, a tiny reordering
11 we don't think would be difficult at all for this Court
12 to accept under the facially legitimate and bona fide
13 standard.

14 CHIEF JUSTICE ROBERTS: Well, okay. But I
15 mean, my point is, it goes -- it goes to the big
16 reordering as well.

17 MR. HADDAD: But --

18 CHIEF JUSTICE ROBERTS: I mean, you have
19 change -- depending upon Congress's ordering of the
20 preferences, you might have to change a great deal.

21 MR. HADDAD: Well, as -- as this Court
22 recognized in *Fiallo*, the Court was unwilling -- as its
23 footnotes 5 and 6 made very clear, the Court was
24 unwilling to say that there would be no check whatsoever
25 by this Court in any -- of any change Congress might

1 make.

2 Now, the Court was extraordinarily
3 deferential to Congress in Fiallo, but it still
4 exercised review.

5 JUSTICE ALITO: May I ask you how this would
6 play out as a practical matter? I -- Congress
7 apparently believed that requiring the government to
8 specify the particular subsection under which the visa
9 was denied had the potential of providing information
10 that might be damaging to the security of the United
11 States.

12 So let's -- let's say that the -- the
13 government comes in and says that, that in this case
14 they say, we can't -- we don't want to tell you which of
15 these particular subsections this action was taken under
16 because we believe that under the circumstances of this
17 case, revealing that information will tell -- would tell
18 the alien, if the information reached the alien, how
19 much we know about him and possibly how we found that
20 out.

21 So you say -- what? The information would
22 have to be provided to the judge alone? Would the judge
23 provide it to the alien? Would the judge provide it to
24 counsel? How would that work out?

25 MR. HADDAD: Well, I'll explain how it would

1 work out as a practical matter. I do want to note that
2 the government has had now the opportunity to file seven
3 briefs at three levels of the court system and has yet
4 to say that that is an issue in our case. But where
5 does it say that --

6 JUSTICE ALITO: That is an issue in all of
7 these cases, but tell me how it would work out.

8 MR. HADDAD: And so in the cases where it
9 was an issue -- and the government has conceded it's not
10 always, but where it is an issue, the government has --
11 and we've laid it out in footnote 20 of our brief.

12 The government has memoranda that give
13 guidelines for how the information is treated, because
14 these same provisions come up and are justiciable in
15 removal context and asylum context. So the government
16 goes to the judge and says, We've got some confidential
17 information here. We want to present it. We want to
18 redact the confidential information, file it under a
19 protective order, the court can review it. If counsel
20 for the individual has a security clearance, then the
21 counsel can review it. If the counsel doesn't and the
22 court concludes ex parte review is necessary, then
23 ex parte review happens.

24 Ultimately, we can't control, in a given
25 circumstance, what the national security implications

1 are. If there are significant national security
2 implications, then that applicant may never find out the
3 reason but --

4 JUSTICE ALITO: But can the judge say, I'm
5 not going to tell counsel? I believe the government
6 that revealing this information would have an adverse
7 effect on -- on national security, I am not going to
8 tell counsel?

9 MR. HADDAD: Yes. The court could do that.
10 That what's the Ninth Circuit anticipated.

11 JUSTICE ALITO: All right. What if the
12 government thinks that the court had made a -- I am
13 going to tell counsel and I trust counsel. What if the
14 government has a problem with that?

15 MR. HADDAD: I imagine the government would
16 press that argument both to the court and, if need be,
17 would try to take an interlocutory appeal to have that
18 decided.

19 JUSTICE BREYER: Do we have to go into all
20 that here? I mean, I thought -- I mean, taking the
21 obvious thing, which would be most adverse to you or the
22 second most adverse would be a possible answer, is to
23 say all the government has to do is to tell the judge,
24 judge, if we tell you which of the 25 different
25 subsections apply here, that will hurt national

1 security. And that's the end of the case.

2 But your case, you say, is a case where the
3 government won't say that because they are honest. When
4 they get into court, they'll tell the truth; and if the
5 truth is there is no adverse effect on national
6 security, we at least would like to know that. That
7 will help us.

8 But they won't give us any reason, none.
9 And if you go back to King John and the rule of law
10 itself, certainly part of that is when you take action
11 that adversely and seriously affects the -- a citizen of
12 the United States. The norm is you at least have to
13 tell them why.

14 I mean, are you arguing for more than that
15 minimal position in this case? Do we have to go beyond
16 it?

17 MR. HADDAD: I don't think you do, Justice
18 Breyer, because at page 52 of Petitioner's brief, they
19 concede that some of these denials under 1182(a)(3)(B)
20 do not involve sensitive, classified information. They
21 admit that some cases fall in that.

22 JUSTICE KAGAN: Mr. Haddad, suppose -- you
23 know, suppose that I agree with you that the Mandel
24 standard should apply, so it's facially legitimate and
25 bona fide. Why isn't that met here?

1 Why hasn't the government actually come up
2 with a facially legitimate reason when it said
3 1182(a)(3)(B)?

4 MR. HADDAD: Well, I think, as your
5 questions to my colleague illustrated earlier, Justice
6 Kagan, all they have done is cite authority that
7 Congress has given them to adjudicate and decide
8 eligibility for a visa. They have not said why the
9 statute applies to this particular applicant, and it
10 can't be a facially legitimate application of the
11 statute unless you know why it's being applied.

12 JUSTICE KAGAN: Well, gosh, I would have
13 thought that it can't be a legitimate application of the
14 statute unless you knew why it was being applied; but
15 the facially legitimate actually is a lesser standard
16 than that. It's just like, you know, on its face. On
17 its face, it's legitimate because they are acting under
18 the authority that the law gives them, according to
19 them.

20 MR. HADDAD: Well, here's an example,
21 Justice Kagan. If the Court looks, for example, at page
22 13a of the government's opening brief where the statute
23 that was referred to earlier this morning, the Court
24 will see that Congress wrote in to the eligibility
25 criteria in certain circumstances an opportunity for the

1 applicant, having received notice of the reason, to
2 rebut with clear and convincing evidence the stated
3 reason for the exclusion.

4 On its face, we have no idea whether that or
5 one of the other provisions that allows a rebuttal was
6 the one invoked here.

7 JUSTICE GINSBURG: I thought that the
8 statute includes a provision that notice of the reason
9 need not be given in the case of a national security.

10 MR. HADDAD: Yes, Justice Ginsburg. That
11 was the status of the statute before Congress added
12 these provisions that allow for rebuttal. So, in our
13 view, it makes -- it would make the statute nonsensical
14 if one were to think that Congress was adding a right to
15 rebuttal to a statute that barred notice.

16 All 1182(b)(3) does is say that it's not
17 required in the normal course when you announce the
18 decision to tell the applicant what the explanation is.

19 JUSTICE SOTOMAYOR: So would you please
20 answer Justice Scalia's earlier point, which is, are we
21 going to get a slew of lawsuits from wives saying that
22 their husbands were treated -- had an unfair trial or
23 unfairly accused?

24 MR. HADDAD: I can't imagine that you would,
25 Justice Sotomayor.

1 JUSTICE SOTOMAYOR: Now, don't tell me it
2 won't happen cause it hasn't --

3 MR. HADDAD: Well --

4 JUSTICE SOTOMAYOR: -- because -- tell me
5 what the argument would be as to why that case would not
6 be sustainable.

7 MR. HADDAD: The case would not be sustained
8 because in every case of a criminal conviction, to take
9 that example, there will be a conviction. It will be
10 according to the rules of due process that this Court
11 elaborated.

12 JUSTICE SCALIA: The husband may choose --

13 MR. HADDAD: And that will extinguish --

14 JUSTICE SCALIA: -- not to appeal. The
15 husband may choose not to appeal. He has a death wish,
16 or whatever, and he doesn't want to appeal. Why would
17 the wife not be able to appeal?

18 MR. HADDAD: Because at the time of the
19 conviction, whatever rights the wife may have had, would
20 have been extinguished by the conviction, which was --

21 JUSTICE SCALIA: Is that right?

22 MR. HADDAD: It certainly is distinct from a
23 situation like this where there is never any process at
24 any time. There is no review at any time.

25 JUSTICE SCALIA: A conviction eliminates

1 your -- your marriage? Is that -- you don't have to get
2 a divorce, you just have to get convicted? That's a
3 good deal.

4 (Laughter.)

5 MR. HADDAD: I think it's a better deal to
6 go the other way. But I think that -- but I think, as a
7 practical matter, Justice Scalia, it would be very
8 straightforward for the court, were such a claim ever to
9 be raised, to know that there is a much higher floor of
10 due process, frankly, in the criminal arena that would
11 be --

12 JUSTICE SOTOMAYOR: But she has been privy
13 to it, and she has, as Justice Scalia said, a husband
14 who's taking tactical steps that are against his
15 interests. So this is a serious question. I very much
16 am troubled by this part of your argument.

17 How do we announce, and what rule do we
18 announce?

19 MR. HADDAD: Your Honor, I think in this
20 situation, you note that this is an exceptional area of
21 the law where there is no process surrounding the
22 decision the government is making of any kind. I can't
23 think of another area of law where there is a complete
24 absence of process at any stage surrounding a decision
25 that has such a profound --

1 JUSTICE KENNEDY: Well, there is process in
2 that she was allowed to petition the visa be
3 entertained. There was very substantial process. She
4 was entitled and did file an application for visa on the
5 husband's behalf.

6 MR. HADDAD: But that is --

7 JUSTICE KENNEDY: So to say that, oh,
8 there's not process at all, that's not correct.

9 MR. HADDAD: Well, the part of the decision
10 that matters, though, that we think -- and, really, that
11 I'm pointing to here is the ultimate decision on the
12 visa. And that's where there is a complete absence of
13 process, where the entire decision-making is behind
14 closed doors.

15 JUSTICE ALITO: Suppose a couple lived in
16 New York and one is convicted of a crime and the spouse
17 is convicted -- is convicted of a Federal crime, sent to
18 an ultra-maximum security prison in Colorado.

19 Does -- can the other spouse contest that
20 because that will have the effect of making it virtually
21 impossible for there to be any communication between
22 them?

23 MR. HADDAD: No, Your Honor.

24 JUSTICE ALITO: What would be the
25 difference?

1 MR. HADDAD: The difference is that in the
2 situation you described, there is process surrounding
3 the conviction; and the Court has held that the Bureau
4 of Prisons has extraordinary latitude and deference
5 comporting with due process to deal with the assignment
6 of prisoners.

7 CHIEF JUSTICE ROBERTS: What if there
8 weren't? That seems to be fighting the hypothetical.
9 Say there is no process established to seek review of
10 that.

11 MR. HADDAD: Assuming -- my point, to be
12 clear, is that either the prisoner in that case has
13 additional due process interest or the prisoner doesn't.
14 But at the time of the conviction which separates the
15 husband and wife, there is process, and there is not in
16 this case.

17 CHIEF JUSTICE ROBERTS: Well, I know, but
18 what if there weren't? In other words, does the marital
19 relation entitle the wife to review of the decision to
20 imprison the convicted husband in Colorado rather than
21 New York?

22 MR. HADDAD: No, I don't think it does.
23 Because the Court has addressed this, and frankly, the
24 framers addressed this, with the due process clause,
25 with the habeas requirement. The -- the fact of --

1 CHIEF JUSTICE ROBERTS: Those are rights
2 that go to the prisoner.

3 MR. HADDAD: Correct, Your Honor.

4 CHIEF JUSTICE ROBERTS: So the spouse has no
5 additional rights, even though her marital relationship
6 will be affected.

7 MR. HADDAD: That's correct, Your Honor,
8 because of the rights that are there at the outset of
9 the process. There's no comparable --

10 JUSTICE KENNEDY: Well, I'm not aware of
11 rights to contest the placement of a prisoner after a
12 conviction. I'm trying to think of it. I just don't
13 think there is any. So I think that hypothetical is
14 very apt.

15 You indicate that there's no remedy where
16 there are two citizens living in this country, and then
17 you want us to apply that remedy to a person who's
18 living out of the country. National security interests
19 are involved.

20 MR. HADDAD: The reason, Justice Kennedy, is
21 that in the situation that we have here, and certainly
22 as it's put to the Court, the respondent is a United
23 States citizen and she knows of no reason why her
24 husband does not satisfy the eligibility requirements
25 and there's been no window into it of any kind. So

1 there is no process around the initial threshold
2 decision that separates the couple.

3 JUSTICE KAGAN: I would have thought that
4 all these kind of parade of horrors could have been
5 played out from the Mandel case as well, that you would
6 have thought, oh, my gosh, we're giving all these
7 professors a chance to complain about people going to
8 prison because the professors want to be able to talk to
9 them. And none of that, of course, ever happened. And
10 I'm wondering, why do you think that is? Is there any
11 difference between the two situations such that we need
12 to worry about the parade of horrors in one but not in
13 the other?

14 MR. HADDAD: I don't think there's any
15 reason to worry about it, because the standard that
16 Mandel set is very, very deferential and generous to the
17 government. The only times that it's going to create an
18 incentive for a lawsuit is where the plaintiffs are
19 convinced that there has been a mistake or an abuse of
20 the process --

21 JUSTICE SCALIA: Maybe there are more
22 incentivized spouses than there are incentivized law
23 professors. Don't you think that's possible?

24 JUSTICE KAGAN: Law professors are very,
25 very insistent, you know?

1 JUSTICE BREYER: But I think -- I think what
2 you're saying, though I'm not certain, is simply --
3 you're not saying that the wife should be able to sue to
4 get her husband out of prison, et cetera, but she does
5 have a constitutionally protected interest. But to say
6 a person has an interest is not to say how that
7 protection goes.

8 If you say we have all the examples of what
9 would happen, if you say there is an interest and none
10 of them need happen, now try it the other way. Suppose
11 you say there is no interest. Then I guess if there's
12 no constitutionally protected interest in living
13 together with your spouse -- you can make up a
14 hypothetical -- Congress passes a law that says all
15 husbands and wives have to live separately, period. Is
16 there anyone who thinks that there would be no court
17 action in such a case?

18 I mean, you can say a person has an
19 interest. Then the next question is, what kind of
20 protection does the law give to that interest? And
21 you're bringing a case where the answer is, virtually
22 none, and you want a little bit. But it has the real
23 problems that people have raised. Now, is that -- is
24 that a fair description of what you're saying?

25 MR. HADDAD: That's very fair, Your Honor.

1 CHIEF JUSTICE ROBERTS: Well, then, I
2 thought you said no. So you now think that the spouse
3 whose husband is convicted and sent to the maximum
4 security prison far away has a constitutionally
5 protected interest with respect to that separation?

6 MR. HADDAD: Your Honor, it's certainly not
7 an interest that we are arguing for.

8 CHIEF JUSTICE ROBERTS: No, no. I know my
9 hypothetical is different from your case.

10 MR. HADDAD: But the reason I point that out
11 is, I think the Court, if it's truly concerned about
12 this kind of floodgates problem -- which I don't think
13 is realistic, for the reasons discussed -- the Court can
14 address it fairly, I think, either through saying, yes,
15 in the abstract, there's a liberty interest but one that
16 would never be --

17 JUSTICE KENNEDY: It's not such a matter --
18 it's not such a matter of floodgates. It's a matter of
19 defining the basic right for constitutional purposes.

20 MR. HADDAD: And the basic right is the
21 right to live together, but it is a right and not have
22 it be interfered with through an arbitrary --

23 JUSTICE GINSBURG: Does that -- would that
24 apply even if she didn't -- she comes in because she has
25 a right to apply for priority status for her spouse.

1 Suppose there were no such right, but he's her husband.
2 You seem to be arguing that the husband/wife
3 relationship is the constitutionally protected
4 relationship, so it wouldn't matter if there were no
5 priority status involved. Or what do you get out of the
6 statute that says the wife can apply for priority status
7 for her husband?

8 MR. HADDAD: Well, certainly the statute and
9 the preferences, which go back to 1907, reflect, I
10 think, Congress's -- is consistent, certainly, with the
11 constitutional value the Court has placed here. And so
12 in that respect, it's helpful.

13 JUSTICE GINSBURG: But it's not necessary.
14 You would say the marital relationship, citizen
15 wife/alien husband, just by virtue of that relationship,
16 she can contest the government's refusal to explain why
17 this person was excluded.

18 MR. HADDAD: That's correct, Your Honor.
19 And I think in terms of the concern about how far this
20 case would go, I think it is meaningful that the Court
21 does not have to deal with a situation, as it would in
22 these other circumstances, of a threshold finding that
23 led to separation and that involved process.

24 And I -- it's actually interesting that the
25 Court looks at Turner against Safley. Justice O'Connor

1 recognized that there were spouses of these prisoners.
2 They weren't before the Court, but she noted that their
3 interest might be different or protected differently.

4 JUSTICE KAGAN: Can I ask, Mr. Haddad -- and
5 this goes back to my earlier question about why this
6 isn't an APA case -- it seems to me if it were an APA
7 case, we wouldn't have to go through all this -- these
8 troubles about defining the scope of the right. We
9 could just say, this is a person aggrieved, for obvious
10 reasons, that she can't live with her husband, and then
11 sort of go on to ask what kind of process she would do
12 under the APA. Why wouldn't that be an easier way to
13 think about this case and to resolve this case?

14 MR. HADDAD: That is an attractive
15 framework, although there are other legal issues that
16 would have to be addressed. Congress has amended the
17 INA to limit the right of action that would be available
18 under the statute under the INA. So there's some
19 indication that Congress did not want private parties to
20 be able to sue the Agency as a statutory matter.

21 So the Court could certainly remand for
22 further consideration under the APA, but that has not
23 been the case that we have brought, and we think the
24 constitutional ground is the stronger ground.

25 If the Court has no further questions, we

1 will submit.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Kneedler, you have four minutes
4 remaining.

5 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

6 ON BEHALF OF THE PETITIONER

7 MR. KNEEDLER: Thank you, Mr. Chief Justice:

8 First of all, in terms of protections that
9 have been afforded by the government, Congress enacted a
10 statute, referred to in footnote 6 of our brief, that
11 every denial under the security grounds for a visa has
12 to be reported to Congress. So Congress has oversight
13 of -- of what is going on here.

14 Secondly, respondent is proposing a radical
15 departure in due process law, one that -- one that is
16 entirely inconsistent with what this Court took as
17 self-evident in the O'Bannon case, that where you have
18 one spouse or one family member who engages in wrongful
19 conduct or has characteristics that disentitle him to
20 benefits or subject him to punishment, that is his
21 problem, his issue, his to litigate --

22 JUSTICE KAGAN: You know, I think you're
23 over-reading O'Bannon, Mr. Kneedler. I think O'Bannon
24 makes it very clear that -- a large part of what's going
25 on there is, it said the nursing home can do this

1 itself. It was almost like a Prudential Standing kind
2 of argument, that there's one party that has all this
3 motivation and incentive to challenge this; we don't
4 need all these other people doing it. And that's
5 clearly not the case here. So I think O'Bannon is a
6 very different factual circumstance.

7 MR. KNEEDLER: Well -- but the importance of
8 O'Bannon is that it says that there's no constitutional
9 deprivation of liberty through the indirect impact of
10 action taken against one person by another.

11 JUSTICE KAGAN: Well, in those
12 circumstances.

13 MR. KNEEDLER: No, I think it was -- and
14 they used the prison -- they used the prison
15 circumstance. But if I could just pick up on what you
16 said. This Court has said on a number of cases that
17 when it comes to the exclusion of aliens, whatever
18 process Congress provides is the process that is due.

19 And here we have process by Congress, but in
20 addition, by the Executive. A fortiori that that is
21 true with respect to aliens outside the United States.
22 As far as -- as the wife is concerned, whatever due
23 process interest she has, has been satisfied by what
24 Congress has afforded. That is the way the structure
25 works under our Constitution. If Congress thinks that

1 greater protection is required, it can do that.

2 JUSTICE SOTOMAYOR: That's too far a
3 statement, Mr. Kneedler. I can imagine too many
4 hypotheticals where the government could afford or could
5 treat aliens that are in the United States in an
6 unconstitutional way.

7 MR. KNEEDLER: I'm not saying in the United
8 States. I'm saying the exclusion of aliens. And those
9 statements were made where the alien had arrived at our
10 shores. A fortiori it is true that with respect to an
11 alien abroad, that -- that is correct. If there are
12 additional rights to be afforded to spouses, it should
13 be up to Congress to do it. As Justice Kennedy pointed
14 out, spouses are entitled to petition for eligibility
15 for a spouse to be considered for a visa. Once that
16 petition is granted, the spouse's cognizable interest is
17 completed. The alien, then, must satisfy on his own
18 terms the -- the elements for admissibility and that
19 applies whatever the basis for -- for his ability to
20 apply for a visa, whether it's an employment petition, a
21 spousal petition, a -- a tourist visa, whatever it is.

22 And I also wanted to respond to what Justice
23 Kagan -- or pick up on what Justice Kagan said about
24 facially legitimate. Nothing in -- in Mandel suggests
25 -- even if we got to that point, even if the Court

1 thought that there was a cognizable basis for the spouse
2 here, nothing in Mandel suggests that you could look
3 behind the stated reason. You would never get to
4 classified information or other information underlying
5 the denial. The Court made that perfectly clear. And
6 here, we have a facially legitimate statement of the
7 reason for the denial, which is an act of Congress
8 identifying terrorism as the ground.

9 And Congress also decided that further
10 notice is not required in that circumstance, picking up
11 exactly on the point this Court made in *Knauff v.*
12 *Shaughnessy*, that it is not necessary to give
13 information to an alien about the basis for his excuse
14 and -- and a spouse cannot get around that.

15 The history of consular non-reviewability is
16 extensive and it is not limited just to the alien. I
17 would point the Court to 8 U.S.C. 1201(i) and 6 U.S.C.
18 236(f), both of which say -- indicate the consular
19 officer decisions are not to be reviewed by anybody.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

22 (Whereupon, at 11:04 a.m., the case in the
23 above-entitled matter was submitted.)

24
25

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