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CHAPTER 1

Nationality, Citizenship, and Immigration

A. NATIONALITY, CITIZENSHIP, AND PASSPORTS

1. Derivative Citizenship: *Morales*

On September 21, 2015, the United States filed a petition for rehearing *en banc* in the U.S. Court of Appeals for the Second Circuit in *Luis Ramon Morales-Santana v. Loretta Lynch*, No. 11-1252 (2d. Cir. 2015). On December 1, 2015, the petition for rehearing was denied. *Morales* involves the constitutionality of the statutory provisions governing when a child born abroad out of wedlock is granted U.S. citizenship at birth. Children born abroad to U.S. citizens do not acquire citizenship as a matter of right; rather, various immigration and nationality statutes control the transmission and acquisition of citizenship overseas. The 1952 version of the Immigration and Nationality Act (“INA”) provided that when a child was born abroad to a U.S. citizen father out of wedlock, the child was declared to be a U.S. citizen only if, before the child’s birth, the U.S. citizen parent had been physically present in the United States for a total of ten years, at least five of which were after the parent had turned 14 years of age. 8 U.S.C. 1401(a)(7). In contrast, Section 1409(c) provided that, notwithstanding 8 U.S.C. 1409(a), a child born out of wedlock to a U.S. citizen mother shall be a U.S. citizen if the mother had previously been physically present in the United States for a continuous period of one year. 8 U.S.C. 1409(c).

Plaintiff Morales was born out of wedlock in the Dominican Republic to a Dominican mother and a U.S. citizen father. He originally entered the United States as a legal permanent resident, but later faced deportation due to his criminal convictions. He argued that the differing requirements for out of wedlock citizen parents constitutes gender discrimination that violates the Fifth Amendment’s equal protection clause. The Court of Appeals for the Second Circuit applied intermediate scrutiny and invalidated the “more onerous” ten-year physical presence requirement for out of wedlock fathers, requiring them to instead show one-year continuous physical presence. Excerpts follow

(with footnotes omitted) from the U.S. brief arguing for *en banc* review. The brief is available in full at www.state.gov/s/l/c8183.htm.

* * * *

Rehearing *en banc* is warranted because the panel erred, the issues are exceptionally important, and the opinion is inconsistent with Supreme Court precedent and creates a conflict among the circuits. The panel's decision makes it impossible for the Departments of State and Homeland Security to administer the citizenship scheme according to uniform, consistent rules.

I. The Panel's Equal Protection Ruling Applied the Wrong Standard of Review, Misinterpreted the Statute and Its Legislative History, and Created a Conflict with *Flores-Villar*

Pursuant to its exclusive and plenary authority under Article I of the Constitution, Congress has enacted comprehensive rules governing immigration and naturalization, including the acquisition of citizenship by children born abroad to U.S. citizen parents. The panel committed a series of errors when it held aspects of the statutory scheme unconstitutional.

A. The panel erred when it failed to apply rational basis review to petitioner's constitutional challenge. Citizenship for children who are born abroad of U.S. citizen parents is available "only upon terms and conditions specified by Congress." *Miller v. Albright*, 523 U.S. 420, 456 (1998) (O'Connor, J., concurring in the judgment) (quotation marks omitted). Deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo v. Bell*, 430 U.S. 787, 792, 793 n. 4 (1977). Indeed, the Supreme Court has held that Congress's judgments regarding requirements for citizenship of a person born abroad are entitled to great deference and should be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" supporting those judgments. *Id.* at 794.

The panel erred in declining to follow *Fiallo* and instead applying heightened scrutiny. The Supreme Court's decision in *Fiallo* rested its deferential standard of review on Congress's "broad power over immigration and naturalization." 430 U.S. at 792 (emphasis added). The power to confer citizenship is just as subject to the plenary authority of Congress as the power to admit or exclude aliens; indeed, it is an aspect of the same power. See *Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment). Moreover, the plaintiffs in *Fiallo* included U.S. citizens, 430 U.S. at 790 n.3, who unsuccessfully argued that rational basis review should not apply because the statutory provision at issue implicated "constitutional interests of U.S. citizens and permanent residents." *Id.* at 794. If rational basis review applied to the constitutional claims of citizens in *Fiallo*, it should apply to petitioner's constitutional claim as well.

B. The panel also erred in rejecting the government's argument that the statutory scheme is justified by the goal of ensuring a sufficient connection between the child and the United States. Throughout the Act, Congress generally made it easier for U.S. citizens to transmit citizenship to children born abroad in circumstances where the child's only legal parent or parents were U.S. citizens or nationals. It carefully distinguished that circumstance from situations in which the child had two legal parents, one of whom was a U.S. citizen and the other of whom was an alien. That distinction reflects Congress's reasonable view that under such

circumstances, the child would be subject to influences of the alien parent and would therefore be less closely connected to the United States.

Section 1409(c) implements this approach by allowing an unmarried U.S. citizen mother to transmit citizenship to her child at birth subject to a one-year continuous physical presence requirement, instead of the ten-year physical presence requirement in Section 1401(a)(7). As Congress was aware, at the exact moment of birth “there is only one . . . legal parent,” *i.e.*, the mother. *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. 62 (1940) (1940 Hearings)*. In the absence of any competing parental influence, it was reasonable for Congress to treat that differently than it would treat a child born to a married couple consisting of one U.S. citizen and one alien. In doing so, Section 1409(c) helps to ensure a connection between U.S. citizen children and the United States.

C. The panel also erred in concluding that Congress did not enact Section 1409(c) for the concededly-legitimate purpose of avoiding statelessness. Slip op. 21, 25, 32. Most importantly, the panel discounted the clearest statement of Congress’s actual purpose with respect to that provision. The Senate Report expressly declared that “[t]his provision [Section 1409(c)] establishing the child’s nationality as that of the [citizen] mother regardless of legitimation or establishment of paternity is new. *It insures that the child shall have a nationality at birth.*” S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952) (1952 Senate Report) (emphasis added). The panel’s holding that Section 1409(c) was not actually motivated by preventing statelessness at birth is thus directly at odds with the express statement of the enacting Congress.

In a lengthy footnote, the panel attempted to distinguish the unambiguous legislative history by asserting that it addressed only that Section 1409 “had eliminated a provision in the 1940 [Nationality] Act that had conditioned a citizen mother’s ability to transmit nationality to her child on the father’s failure to legitimate the child prior to the child’s eighteenth birthday.” Slip op. 28-29 n.10 (citing and quoting Nationality Act of 1940, § 205, 54 Stat. 1137, 1139-1140). The panel concluded that the statement in the legislative history thus “does not purport to justify the gender-based distinctions in the physical presence provisions at issue in this appeal.” *Ibid.*

That analysis is flawed. It makes sense only on the assumption that Section 205 contained the same “gender-based” distinction now at issue in this case. But if the panel is correct that the 1940 Act did not allow unmarried mothers to transmit U.S. nationality to their children in circumstances where the alien father legitimated the child before he or she gained majority, slip. op. 28-29 n.10, then the 1940 Act did not in fact contain the same “gender-based” distinction at issue here. On the panel’s view of the 1940 Act, in circumstances where (1) a child was born abroad, out of wedlock, to a U.S. citizen and an alien, and (2) the child was subsequently legitimated by the father, the child could obtain U.S. citizenship only if the U.S. citizen mother or father could satisfy the ten-year physical presence requirement set forth in Section 201(g) of the 1940 Act. In other words, on the panel’s understanding of the 1940 Act, Section 205 treated unmarried U.S. citizen mothers and fathers equally.

If that is true, however, then Congress must have introduced the “gender- based” disparity at issue in this case only in 1952, through Section 1409(c)’s “eliminat[ion] of a provision in the 1940 [Nationality] Act that had conditioned a citizen mother’s ability to transmit nationality to her child on the father’s failure to legitimate the child prior to the child’s eighteenth birthday.” Slip op. 28-29 n.10. But as the panel acknowledged, the Senate Report

confirms that Section 1409(c)'s elimination of that provision was intended to "insure[] that the child shall have a nationality at birth." 1952 Senate Report 39. The panel's own analysis of the 1940 Act thus supports the conclusion that Congress's actual purpose when enacting the gender disparity at issue here was to avoid statelessness.

D. The panel also erred in suggesting that Section 1409(c)'s gender distinction reflected "gender-based generalizations concerning who would care for and be associated with a child born out of wedlock." Slip op. 31 (citing sources). The panel's support for that proposition involved government statements about the greater likelihood of maternal responsibility for a child who had not subsequently been legitimated by the father. In those circumstances, however, Congress recognized the mother is the "only . . . legal parent." 1940 Hearings 62.

It was not unreasonable or discriminatory for Congress to assume that the only legal parent would be responsible for the child's upbringing. Nor was it unreasonable or discriminatory for Congress to want to ensure that a child whose only legal parent at birth was a U.S. national mother should acquire nationality through the mother instead of running a risk of statelessness. The fact that the scheme ultimately provided a different standard for mothers to transmit their nationality than fathers in certain circumstances did not reflect impermissible gender bias or stereotypes, but rather the practical reality that unmarried mothers and unmarried fathers are differently situated with respect to their children at the moment of birth. See generally *Nguyen v. INS*, 533 U.S. 53, 64-68 (2001).

* * * *

F. The flaws in the panel's analysis of Section 1409(c) would warrant *en banc* review in any event, but such review is especially justified because the panel decision creates a direct circuit conflict with the Ninth Circuit's decision in *Flores-Villar*, 536 F.3d at 997. The panel's errors are exceptionally important because they invalidated a statute on constitutional grounds, conflict with Ninth Circuit, and establish an unmanageable, divergent rule of citizenship contrary to the constitutional mandate for a uniform nationwide rule. See Fed. R. App. P. 35.

II. The Panel Erred in Conferring Citizenship to Petitioner and in Its Revision of the Statutory Scheme

To remedy the perceived constitutional violation, the panel conducted a severability analysis and ultimately ruled that petitioner is entitled to U.S. citizenship. The panel began by asserting that it had chosen to "sever[] the ten- year requirement in [Sections] 1409(a) and 1401(a)(7) and [to] require[] every unwed citizen parent to satisfy the less onerous one-year continuous presence requirement if the other parent lacks citizenship." Slip op. 36. The panel then implemented that conclusion by literally rewriting Section 1401(a)(7) ...

The panel rejected the government's argument that – even if Section 1409(c) is constitutionally flawed – the proper remedy is to apply Section 1401(a)(7)'s ten- year physical presence requirement, on an equal basis, to any children born abroad, out of wedlock, to a U.S. citizen and an alien. See Br. for the United States, *Flores-Villar v. United States* (No. 09-5801), 2010 WL 3392008 at *45-*52 (explaining severability analysis in detail). The panel's severability analysis is flawed in a number of fundamental ways, two of which are emphasized here.

A. The panel's severability analysis is ambiguous in at least two significant respects, both of which are likely to create confusion in its implementation. First, that analysis fails to appreciate that Section 1401(a)(7) is a broad provision that covers not only children born to

unmarried parents (when one parent is a U.S. citizen and the other is an alien) but also children born to married parents (when one is a citizen and the other is an alien). It is not clear whether the panel intends its rewritten version of Section 1401(a)(7) to apply (1) only to unmarried parents, with parents married to aliens remaining subject to the ten-year physical presence requirement appearing in the version of Section 1401(a)(7) actually enacted by Congress; or (2) to unmarried parents as well as parents married to aliens, as the literal text of its revision suggests, even though the statute as drafted by Congress is not unconstitutional as applied to parents married to aliens. Both of these approaches violate the “Separability” provision, Section 406 of the 1952 Act, which states that if “any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.” 8 U.S.C. § 1101 note (1958).

The panel’s analysis also fails to appreciate the important difference between a “physical presence” requirement (which Congress included in Section 1401(a)(7)) and a “continuous” physical presence requirement (which Congress included in Section 1409(c)). It is conceivable that some U.S. citizen parents are capable of satisfying the ten-year “physical presence” requirement set forth in Congress’s Section 1401(a)(7), but not the one-year “continuous” physical presence requirement that Congress included in Section 1409(c) (and that the panel has now incorporated into its revised version of Section 1401(a)(7)). See 7 Foreign Affairs Manual (FAM) § 1133.4-3(a) (1998). The panel’s revision of Section 1401(a)(7) therefore arguably deprives at least some individuals of the U.S. citizenship to which they were entitled under the version of Section 1401(a)(7) enacted by Congress. It seems unlikely that the panel intended such a result, despite the plain language of its revision of Section 1401(a)(7).

B. The panel’s decision to rewrite Section 1401(a)(7) also violates 8 U.S.C. § 1421(d) (1958). That provision states that “[a] person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in [Title III of the 1952 Act], and not otherwise.” *Id.* In *Nguyen*, the Supreme Court made clear that transmission of citizenship under Section 1409(a) constitutes a “naturalization” for purposes of Section 1421(d), at least where the statutory conditions set forth in that provision are satisfied after the child is born. *Nguyen*, 533 U.S. at 72; see 8 U.S.C. § 1101(a)(23) (1958) (defining “naturalization” for the Act); but see Dept. of State, 7 FAM § 1131.6-3 (2013). Here, the panel decision allows children of unmarried citizen-fathers to acquire citizenship under conditions contrary to those prescribed by statute. That conclusion violates Section 1421(d).

C. For these reasons – as well as those stated in the government’s briefs submitted to the panel in this case, and to the Supreme Court in *Flores-Villar* – the only proper way to cure the equal protection violation identified by the panel would be to apply the ten-year physical presence requirement in Section 1401(a)(7), on a prospective basis, to unmarried citizen mothers. Such a ruling would comply with Section 1421(d) of the 1952 Act, respect Congress’s authority over who may acquire U.S. citizenship, and allow Congress to decide whether or how to extend citizenship to children of unmarried U.S. citizen fathers and mothers who do not meet the physical presence requirement in Section 1401(a)(7).

* * * *

On August 17, 2015, a district court in Texas adopted the Second Circuit’s reasoning in *Morales* and likewise held that the physical presence requirements under 8 U.S.C. § 1409, as applied at the time of the birth of the petitioner in that case, violate the Constitution’s guarantee of equal protection under the Fifth Amendment. *Villegas-Sarabia v. Johnson et al.*, No. 5:15-CV-122-DAE (W.D. Tex.).

2. *Tuaua*: Notation on Passports Issued to Non-Citizen U.S. Nationals

As described in *Digest 2014* at 22-26, *Tuaua et al. v. United States*, No. 13-5272 (D.C. Cir.) is an action challenging the notation on the U.S. passports of American Samoan individuals indicating they are U.S. nationals, but not U.S. citizens, in accordance with INA § 101(a)(29), 8 U.S.C. § 1101(a)(29), which designates American Samoa as an “outlying possession” of the United States. The district court dismissed all claims, and the U.S. filed a brief on appeal in favor of affirming the dismissal. On June 5, 2015, the U.S. Court of Appeals for the D.C. Circuit affirmed the district court, finding that the Citizenship Clause of the U.S. Constitution does not mandate birthright citizenship for American Samoans and that requiring birthright citizenship when the American Samoan government objected would be “impracticable and anomalous.” *Tuaua et al. v. United States*, 788 F.3d 300 (D.C. Cir. 2015). Excerpts follow from the opinion (with footnotes omitted). Appellants petitioned for rehearing *en banc*. The U.S. brief in opposition to the petition is available at www.state.gov/s/l/c8183.htm. On October 2, 2015, the Court denied the petition for rehearing.

* * * *

The Citizenship Clause of the Fourteenth Amendment provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1, cl. 1. Both Appellants and the United States government agree the text and structure of the Fourteenth Amendment unambiguously leads to a single inexorable conclusion as to whether American Samoa is within the United States for purposes of the clause. They materially disagree only as to whether the inescapable conclusion to be drawn is whether American Samoa “is” or “is not” a part of the United States. ...

* * * *

Appellants and Amici Curiae further contend the Citizenship Clause must—under Supreme Court precedent—be read in light of the common law tradition of *jus soli* or “the right of the soil.” See *United States v. Wong Kim Ark*, 169 U.S. 649, 654, 18 S.Ct. 456, 42 L.Ed. 890 (1898) (“The constitution nowhere defines the meaning of ... [the word “citizen”], either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States.’ In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution.”) (internal citation omitted).

* * * *

We are unconvinced, however, that *Wong Kim Ark* reflects the constitutional codification of the common law rule as applied to outlying territories. As the Ninth Circuit noted in *Rabang v. INS*, the expansive language of *Wong Kim Ark* must be read with the understanding that the case “involved a person born in San Francisco, California. The fact that he had been born ‘within the territory’ of the United States was undisputed, and made it unnecessary to define ‘territory’ rigorously or decide whether ‘territory’ in its broader sense meant ‘in the United States’ under the Citizenship Clause.” 35 F.3d 1449, 1454 (9th Cir.1994); accord *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir.2010); *Valmonte v. INS*, 136 F.3d 914, 920 (2d Cir.1998). “It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.” *Wong Kim Ark*, 169 U.S. at 679, 18 S.Ct. 456.

And even assuming the framers intended the Citizenship Clause to constitutionally codify *jus soli* principles, birthright citizenship does not simply follow the flag. Since its conception *jus soli* has incorporated a requirement of allegiance to the sovereign. To the extent *jus soli* is adopted into the Fourteenth Amendment, the concept of allegiance is manifested by the Citizenship Clause’s mandate that birthright citizens not merely be born within the territorial boundaries of the United States but also “subject to the jurisdiction thereof,” U.S. CONST. amend. XIV, § 1, cl. 1; see *Wong Kim Ark*, 169 U.S. at 655, 18 S.Ct. 456 (“The principle embraced all persons born within the king’s allegiance, and subject to his protection.... Children, born in England, of [] aliens, were [] natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king’s dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction, of the king.”).

Appellants would find any allegiance requirement of no moment because, as non-citizen nationals, American Samoans already “owe[] permanent allegiance to the United States.” 8 U.S.C. § 1101(a)(22); see also *Sailor’s Snug Harbor*, 28 U.S. at 155 (“[A]llegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign.”). Yet, within the context of the Citizenship Clause, “[t]he evident meaning of the[] ... words [“subject to the jurisdiction thereof”] is, not merely subject in some respect or degree to the jurisdiction of the United States, but *completely* subject to their political jurisdiction, and owing them direct and immediate allegiance.” *Elk v. Wilkins*, 112 U.S. 94, 102, 5 S.Ct. 41, 28 L.Ed. 643 (1884) (emphasis added). It was on this basis that the Supreme Court declined to extend constitutional birthright citizenship to Native American tribes. See *id.* at 99, 5 S.Ct. 41 (“The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities....”). ...Even assuming a background context grounded in principles of *jus soli*, we are skeptical the framers plainly intended to extend birthright citizenship to distinct, significantly

self-governing political territories within the United States’s sphere of sovereignty—even where, as is the case with American Samoa, ultimate governance remains statutorily vested with the United States Government. *See Downes*, 182 U.S. at 305, 21 S.Ct. 770 (White, J., concurring) (doubting citizenship naturally and inevitably extends to an acquired territory regardless of context).

III

Analysis of the Citizenship Clause’s application to American Samoa would be incomplete absent invocation of the sometimes contentious Insular Cases, where the Supreme Court “addressed whether the Constitution, by its own force, applies in any territory that is not a State.” *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008). ...

“The doctrine of ‘territorial incorporation’ announced in the Insular Cases distinguishes between incorporated territories, which are intended for statehood from the time of acquisition and in which the entire Constitution applies *ex proprio vigore*, and unincorporated territories [such as American Samoa], which are not intended for statehood and in which only [certain] fundamental constitutional rights apply by their own force.” *Commonwealth of N. Mariana Islands v. Atalig*, 723 F.2d 682, 688 (9th Cir.1984).

Appellants and Amici contend the Insular Cases have no application because the Citizenship Clause textually defines its own scope. ... We conclude the scope of the Citizenship Clause, as applied to territories, may not be readily discerned from the plain text or other indicia of the framers’ intent, absent resort to the Insular Cases’ analytical framework. *See Boumediene*, 553 U.S. at 726, 128 S.Ct. 2229 (While the “Constitution has independent force in the territories that [is] not contingent upon acts of legislative grace[,] ... because of the difficulties and disruptions inherent in transforming ... [unincorporated territories] into an Anglo–American system, the Court adopted the doctrine of territorial incorporation, under which the Constitution applies ... only in part in unincorporated territories”).

* * * *

As the Supreme Court in *Boumediene* emphasized, the “common thread uniting the Insular Cases ... [is that] questions of extraterritoriality turn on objective factors and practical concerns, not formalism.” 553 U.S. at 764, 128 S.Ct. 2229. While “fundamental limitations in favor of personal rights” remain guaranteed to persons born in the unincorporated territories, *id.* at 758, 128 S.Ct. 2229 (quoting *Late Corp. of the Church of Jesus Christ of Latter–Day Saints v. United States*, 136 U.S. 1, 44, 10 S.Ct. 792, 34 L.Ed. 478 (1890)), the Insular framework recognizes the difficulties that frequently inure when “determin[ing] [whether a] particular provision of the Constitution is applicable,” absent inquiry into the impractical or anomalous. *See id.*; *see also Downes*, 182 U.S. at 292, 21 S.Ct. 770 (White, J., concurring) (“[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States.”).

A

... Appellants cite to a bevy of cases to argue citizenship is a fundamental right. *See, e.g., Afroyim v. Rusk*, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757 (1967); *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964); *Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630

(1958) (plurality op.). But those cases do not arise in the territorial context. Such decisions do not reflect the Court's considered judgment as to the existence of a fundamental right to citizenship for persons born in the United States' unincorporated territories. *Cf. Wong Kim Ark*, 169 U.S. at 679, 18 S.Ct. 456.⁷

"Fundamental" has a distinct and narrow meaning in the context of territorial rights. It is not sufficient that a right be considered fundamentally important in a colloquial sense or even that a right be "necessary to [the] []American regime of ordered liberty." *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 (9th Cir.1990) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 n. 14, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)). Under the Insular framework the designation of fundamental extends only to the narrow category of rights and "principles which are the basis of all free government." *Dorr v. United States*, 195 U.S. 138, 147, 24 S.Ct. 808, 49 L.Ed. 128 (1904) (emphasis added); *Downes*, 182 U.S. at 283, 21 S.Ct. 770 ("Whatever may be finally decided by the American people as to the status of these islands and their inhabitants ... they are entitled under the principles of the Constitution to be protected in life, liberty, and property ... even [if they are] not possessed of the political rights of citizens of the United States.").

In this manner the Insular Cases distinguish as universally fundamental those rights so basic as to be integral to free and fair society. In contrast, we consider non-fundamental those artificial, procedural, or remedial rights that—justly revered though they may be—are nonetheless idiosyncratic to the American social compact or to the Anglo-American tradition of jurisprudence. *E.g.*, *Balzac*, 258 U.S. 298, 42 S.Ct. 343 (constitutional right to a jury trial does not extend to unincorporated territories as a fundamental right); *see also Downes*, 182 U.S. at 282, 21 S.Ct. 770 ("We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence.").

We are unconvinced a right to be designated a citizen at birth under the *jus soli* tradition, rather than a non-citizen national, is a "*sine qua non* for 'free government' " or otherwise fundamental under the Insular Cases' constricted understanding of the term. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 386 n. 72 (D.C.Cir.1987). Regardless of its independently controlling force, we therefore adopt the conclusion of Justice Brown's dictum in his judgment for the Court in *Downes*. *See* 182 U.S. at 282–83, 21 S.Ct. 770. "Citizenship by birth within the sovereign's domain [may be] a cornerstone of [the Anglo-American] common law tradition," Brief for Petitioner-Appellant at 48, *Tuaua v. United States*, No. 135272 (D.C.Cir. April 25, 2014), but numerous free and democratic societies principally follow *jus sanguinis*—"right of the blood"—where birthright citizenship is based upon nationality of a child's parents. *See Miller v. Albright*, 523 U.S. 420, 477, 118 S.Ct. 1428, 140 L.Ed.2d 575 (1998) (citing various authority "noting the 'widespread extent of the rule of jus sanguinis.' "); Graziella Bertocchi & Chiara Strozzi, *The Evolution of Citizenship: Economic and Institutional Determinants*, 53 J.L. & ECON. 95, 99–100 (2010) (*jus sanguinis* has traditionally predominated in civil law countries, whereas *jus soli* has historically been the norm in common law countries).

In states following a *jus sanguinis* tradition birth in the sovereign's domain—whether in an outlying territory, colony, or the country proper—is simply irrelevant to the question of citizenship. Nor is the asserted right so natural and intrinsic to the human condition as could not warrant transgression in civil society. *See generally Dor*r, 195 U.S. at 147, 24 S.Ct. 808. "[C]itizenship has no meaning in the absence of difference." Peter J. Spiro, *The Impossibility of*

Citizenship, 101 MICH. L.REV. 1492, 1509 (2003). The means by which free and fair societies may elect to ascribe the classification of citizen must accommodate variation where consistent with respect for other, inherent and inalienable, rights of persons. To find a natural right to *jus soli* birthright citizenship would give umbrage to the liberty of free people to govern the terms of association within the social compact underlying formation of a sovereign state. ...

B

The absence of a fundamental territorial right to *jus soli* birthright citizenship does not end our inquiry. “The decision in the present case does not depend on key words such as ‘fundamental’ or ‘unincorporated territory [,]’ ... but can be reached only by applying the principles of the [Insular] [C]ases, as controlled by their respective contexts, to the situation as it exists in American Samoa today.” *King*, 520 F.2d at 1147. *Cf. Boumediene*, 553 U.S. at 758, 128 S.Ct. 2229 (“It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.”). “[T]he question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it.” *Reid*, 354 U.S. at 75, 77 S.Ct. 1222. In sum, we must ask whether the circumstances are such that recognition of the right to birthright citizenship would prove “impracticable and anomalous,” as applied to contemporary American Samoa. *Id.* at 74, 77 S.Ct. 1222.

Despite American Samoa’s lengthy relationship with the United States, the American Samoan people have not formed a collective consensus in favor of United States citizenship. In part this reluctance stems from unique kinship practices and social structures inherent to the traditional Samoan way of life, including those related to the Samoan system of communal land ownership. ...

Representatives of the American Samoan people have long expressed concern that the extension of United States citizenship to the territory could potentially undermine these aspects of the Samoan way of life.

The resolution of this dispute would likely require delving into the particulars of American Samoa’s present legal and cultural structures to an extent ill-suited to the limited factual record before us. ... We need not rest on such issues or otherwise speculate The imposition of citizenship on the American Samoan territory is impractical and anomalous at a more fundamental level.

We hold it anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives. *See* Brief for Intervenor, or in the Alternative, *Amici Curiae* the American Samoa Government and Congressman Eni F.H. Faleomavaega at 23–35, *Tuaua v. United States*, No. 13–5272 (D.C.Cir. Aug. 25, 2014) (opposing constitutional birthright citizenship). ...

“Citizenship is the effect of [a] compact[;] ... [it] is a political tie.” *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 141, 1 L.Ed. 540 (1795) (distinguishing citizenship from the feudal doctrine of perpetual allegiance). “[E]very [] question of citizenship [] ... [thus] depends on the terms and spirit of [the] social compact.” *Id.* at 142. The benefits of American citizenship are not understood in isolation; reciprocal to the rights of citizenship are, and should be, the obligations carried by all citizens of the United States. *See Trop v. Dulles*, 356 U.S. 86, 92, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (“The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation.”); THE FEDERALIST NO. 14 (James Madison) (“[T]he kindred blood which flows in the veins of American citizens, the mingled blood which they have shed in defense of their sacred rights, consecrate their Union.”).

... At base Appellants ask that we forcibly impose a compact of citizenship—with its concomitant rights, obligations, and implications for cultural identity—on a distinct and unincorporated territory of people, in the absence of evidence that a majority of the territory’s inhabitants endorse such a tie and where the territory’s democratically elected representatives actively oppose such a compact.

We can envision little that is more anomalous, under modern standards, than the forcible imposition of citizenship against the majoritarian will. ... To hold the contrary would be to mandate an irregular intrusion into the autonomy of Samoan democratic decision-making; an exercise of paternalism—if not overt cultural imperialism—offensive to the shared democratic traditions of the United States and modern American Samoa. *See King v. Andrus*, 452 F.Supp. 11, 15 (D.D.C.1977) (“The institutions of the present government of American Samoa reflect ... the democratic tradition....”).

* * * *

3. Citizenship Transmission on Military Bases: *Thomas*

On August 25, 2015, the U.S. Court of Appeals for the Fifth Circuit ruled in favor of the U.S. government in *Jermaine Amani Thomas v. Loretta Lynch*, 796 F.3d 535 (5th Cir. 2015). Plaintiff Thomas asked the Fifth Circuit to review a Board of Immigration Appeals order that he be removed from the United States pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii) and (iii). Thomas, who was born on a United States military base located in what is now Germany, argues that he is not removable because he is a United States citizen by virtue of the Fourteenth Amendment. Excerpts follow (with footnotes omitted) from the Fifth Circuit decision.

* * * *

This case requires us to determine whether a United States military base located within what is now Germany was “in the United States” for purposes of the Fourteenth Amendment. The answer to this question is decisive because the Fourteenth Amendment grants birthright citizenship to “[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof.” U.S. Const. amend. XIV, §1 ... If Thomas derived birthright citizenship from the Fourteenth Amendment, we must grant his petition for review because only aliens can be deported. *See* 8 U.S.C. § 1227(a). If he is in fact not a citizen, the petition for review must be denied because it is undisputed that he is otherwise deportable as an aggravated felon. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). After a careful review of the decisions of the Supreme Court, other circuit courts of appeals, and our own court, we hold that Thomas is not a citizen, because the United States military base where he was born, which is located in modern-day Germany, was not “in the United States” for purposes of the Fourteenth Amendment.

...At the time of Thomas’s birth, Congress extended birthright citizenship to children born abroad to one citizen parent and one alien parent, as long as the citizen parent met certain physical-presence requirements. *See* 8 U.S.C. § 1401(g) (1982), *amended by* Pub. L. No. 99-653,

§ 12, 100 Stat. 3655, 3657 (Nov. 14, 1986). Thomas was born on a United States military base located within the territorial boundaries of modern-day Germany. His father was a naturalized United States citizen serving in the United States military and his mother was an alien. However, it is undisputed that Thomas was not a statutory birthright citizen because his father did not meet the physical presence requirement of the statute in force at the time of Thomas's birth. *Id.* Consequently, Thomas must rely on the Fourteenth Amendment, which provides, in relevant part, that "[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," U.S. Const. amend. XIV, § 1, to sustain his claim that he is a birthright citizen. Thomas contends that the military base located in modern-day Germany where he was born was "in the United States" for purposes of the Fourteenth Amendment. We disagree.

We have not previously decided whether a military base located abroad qualifies as "in the United States" for Fourteenth Amendment purposes. However, we have addressed whether a person derived United States citizenship from his parents, who he claimed "became United States citizens at birth because they were born in the Philippines when the country was a United States territory." *Nolos v. Holder*, 611 F.3d 279, 282 (5th Cir. 2010) (per curiam). In that case, we were required to determine whether the Philippines was "in the United States" for Fourteenth Amendment purposes. *Id.* at 282. For guidance, we looked to the Second, Third and Ninth Circuits, which had previously "held that birth in the Philippines at a time when the country was a territory of the United States does not constitute birth 'in the United States' under the Citizenship Clause, and thus did not give rise to United States citizenship." *Id.* (citing *Lacap v. INS*, 138 F.3d 518, 518-19 (3d Cir. 1998); *Valmonte v. INS*, 136 F.3d 914, 915-21 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449, 1450-54 (9th Cir. 1994)). . . .

"In reaching their holdings, the courts found guidance from the Supreme Court's *Insular Cases* jurisprudence on the territorial scope of the term 'the United States' as used in the Citizenship Clause of the Fourteenth Amendment." *Id.* (citing *Valmonte*, 136 F.3d at 918-19; *Rabang*, 35 F.3d at 1452). In the *Insular Cases*, the Supreme Court "created the doctrine of incorporated and unincorporated Territories." *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976). Incorporated Territories "encompassed those Territories destined for statehood from the time of acquisition, and the Constitution was applied to them with full force," while unincorporated Territories were not destined for statehood and only "fundamental constitutional rights were guaranteed to the inhabitants." *Id.* (internal quotation marks omitted). As relevant here, the Court's decision in *Downes v. Bidwell*, 182 U.S. 244 (1901), one of the *Insular Cases*, "was derived in part by analyzing the territorial scope of the Thirteenth and Fourteenth Amendments." *Valmonte*, 136 F.3d at 918. In *Downes*, the Court held that Puerto Rico was "not a part of the United States within the revenue clauses of the Constitution." *Downes*, 182 U.S. at 287. The Court noted that the Thirteenth Amendment prohibits slavery and involuntary servitude "within the United States, or any place subject to their jurisdiction." *Id.* at 251 (quoting U.S. Const. amend. XIII, § 1 (emphasis added)). The "disjunctive 'or' in the Thirteenth Amendment demonstrates that 'there may be places within the jurisdiction of the United States that are no[t] part of the Union' to which the Thirteenth Amendment would apply." *Valmonte*, 136 F.3d at 919 (quoting *Downes*, 182 U.S. at 251). Conversely, the Fourteenth Amendment "is not extended to persons born in any place 'subject to [the United States'] jurisdiction.'" *Downes*, 182 U.S. at 251. Instead, citizenship under the Fourteenth Amendment is "limited to those born or naturalized in the states of the Union." *Nolos*, 611 F.3d at 283 (citing *Rabang*, 35 F.3d at 1452-53). In fact, the Citizenship Clause of the

Fourteenth Amendment, like the Revenue Clause, “ ‘has an express territorial limitation which prevents its extension to every place over which the government exercises its sovereign- ty.’ ” *Id.* (quoting *Rabang*, 35 F.3d at 1453). Therefore, we held that “ ‘[i]t is . . . incorrect to extend citizenship to persons living in United States territories simply because the territories are subject to the jurisdiction or within the dominion of the United States, because those persons are not born “in the United States” within the meaning of the Fourteenth Amendment.’ ” *Id.* at 283-84 . . .

Accordingly, regardless of whether the treaties applicable to the military base in which Thomas was born rendered it “subject to the jurisdiction or within the dominion of the United States,” such a base was not “in the United States” for purposes of the Fourteenth Amendment.

...

Furthermore, scholars who have addressed the issue agree that “contrary to popular belief, birth in . . . United States military facilities, does not result in United States citizenship in the absence of another basis for citizenship.” . . .

Thomas cites the Supreme Court’s decision in *United States v. Wong Kim Ark*, to support his posi- tion. There, the Supreme Court was asked to decide “whether a child born in the United States, of parents of Chinese descent . . . becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution.” *Wong Kim Ark*, 169 U.S. at 653. How- ever, *Wong Kim Ark* is inapposite. As we explained in *Nolos*, “the question of the territorial scope of the Citizenship Clause of the Fourteenth Amendment was not before the Court in *Wong Kim Ark*.” *Nolos*, 611 F.3d at 284. This is because the fact that “the child was born in San Francisco was undisputed and it was therefore unnecessary to define ‘territory’ rigorously or decide whether ‘territory’ in its broader sense (i.e. outlying land subject to the jurisdiction of this country) meant ‘in the United States’ under the Citizenship Clause.” *Id.* (internal quotation marks and brackets omitted). Accordingly, *Wong Kim Ark* does not support Thomas’s contention that the military base on which he was born was “in the United States” for purposes of the Fourteenth Amendment.

Thomas likewise does not find support in the recent decision of the Court of Appeals for the District of Columbia Circuit in *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015). In *Tuaua*, the D.C. Circuit was asked whether the Citizenship Clause of the Fourteenth Amendment affords birthright citizenship to individuals born in American Samoa. *Id.* at 301. In order to answer this question, the D.C. Circuit considered at length “whether the circumstances are such that recognition of the right to birthright citizenship would prove ‘impracticable and anomalous,’ as applied to contemporary American Samoa.” *Id.* at 309 (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)). Ultimately, the D.C. Circuit held that it was “anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives.” *Id.* at 310. We are not convinced that *Reid* requires us to consider whether it would be “impracticable and anomalous” to recognize a right to birthright citizenship to those born on military bases located abroad. *Reid* was concerned with what “constitutional limitations apply to the Government when it acts outside the continental United States.” 354 U.S. at 8. Here, we are not concerned with any of the Constitution’s limitations on the federal or state governments; rather, we are concerned with the “territorial scope of the term ‘in the United States’ as used in the Citizenship Clause of the Fourteenth Amendment.” *Nolos*, 611 F.3d at 282. “We note that the territorial scope of the phrase ‘the United States’ is a distinct inquiry from whether a constitutional provision should extend to a territory.” *Rabang*, 35 F.3d at 1453 n.8 (citing *Downes*, 182 U.S. at 249). Given that we have already determined that “the Citizenship Clause has an express territorial limitation which prevents its extension to every

place over which the government exercises its sovereignty,” *Nolos*, 611 F.3d at 283 (internal quotation marks omitted), we decline to engage in a functional inquiry as to the scope of the Citizenship Clause. Therefore, *Tuaua* does not change our conclusion that Thomas was not born “in the United States” for Fourteenth Amendment purposes.

* * * *

B. IMMIGRATION AND VISAS

1. Consular Nonreviewability

a. *Visa Litigation Relating to Closure of U.S. Embassy in Yemen*

On June 1, 2015, the State Department prevailed on a motion to dismiss in a visa litigation case in which plaintiffs sought to compel adjudication of Yemeni immigrant visa applications which had neither been scheduled for interviews at the embassy in Sana’a nor executed due to the unrest and security situation in Yemen. *Ali Al Naham et al. v. U.S. Department of State*, No. 14-CV-9974 (S.D.N.Y. 2015). The court found that the doctrine of consular nonreviewability bars jurisdiction over plaintiffs’ action, which sought to compel adjudication of the visa applications. Excerpts follow from the court’s opinion.

* * * *

The doctrine of consular nonreviewability is based on “the principle that a consular officer’s decision to deny a visa is immune from judicial review.” *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 123 (2d Cir.2009). The doctrine has its basis in the plenary power doctrine: “The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention.” *Wan Shih Hsieh v. Kiley*, 569 F.2d 1179, 1181 (2d Cir.1978) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972)); see also *Castillo v. Rice*, 581 F.Supp.2d 468, 475 (S.D.N.Y.2008). The Second Circuit has recognized an exception to consular nonreviewability where certain kinds of constitutional claims are at issue, *Am. Acad. of Religion*, 573 F.3d at 125 (“[W]here a plaintiff, with standing to do so, asserts a First Amendment claim to have a visa applicant present views in this country, we should [not apply consular nonreviewability] to a consular officer’s denial of a visa.”), but the doctrine is otherwise treated as nearly absolute.

Plaintiffs do not meaningfully dispute the above. They contend, however, that the doctrine is limited to cases in which a plaintiff challenges an official’s discretionary decision to approve or deny a visa application. It has no applicability, they argue, where a plaintiff seeks to compel an official to simply adjudicate a visa application.

Other circuits have recognized that distinction as having some force. *See, e.g., Patel v. Reno*, 134 F.3d 929, 931–32 (9th Cir.1997) (“Normally a consular official’s discretionary decision to grant or deny a visa petition is not subject to judicial review. However, when the suit challenges the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul’s discretion, jurisdiction exists.” (citations omitted)). But, whatever this distinction’s merits, it is not one that has a basis in Second Circuit law. *See Hsieh*, 569 F.2d at 1181 (“[N]o jurisdictional basis exists for review of the action of the American Consul ... *suspending* or denying the issuance of immigration visas It is settled that the judiciary will not interfere with the visa-issuing process.” (emphasis added)); *Li v. Chertoff*, 06–CV–13679 (LAP), 2007 WL 541974, at *1 (S.D.N.Y. Feb. 16, 2007) (rejecting the plaintiff’s attempt “to circumvent ... long-standing precedent by contending that [consular nonreviewability] does not apply to a request that a visa be adjudicated (as opposed to granted) within a reasonable period of time”); *Saleh v. Holder*, — F.Supp.3d —, 2014 WL 7751230, at *3 (E.D.N.Y. Nov.4, 2014) (same); *Foad v. Holder*, 13–CV–6049, 2015 WL 1540522, at *3 (E.D.N.Y. Apr.7, 2015) (same). Accordingly, consular nonreviewability precludes jurisdiction over Plaintiffs’ action.

* * * *

b. Kerry v. Din: Supreme Court decision on consular nonreviewability

In 2015, the U.S. Supreme Court also considered a case relating to the longstanding doctrine of consular nonreviewability. *Din v. Kerry*, which is discussed in *Digest 2014* at 31-35 and *Digest 2013* at 19-22, involves the denial of a visa to Kanishka Berashk, a native and citizen of Afghanistan, under the statutory provision covering terrorist activities (8 U.S.C. 1182(a)(3)(B)). Berashk applied for a visa predicated on a petition filed by his U.S. citizen wife, Fauzia Din. The U.S. Court of Appeals for the Ninth Circuit held that Din had a liberty interest in her marriage that was protected under the Due Process Clause of the U.S. Constitution such that denying a visa to her husband without providing specific grounds for the denial implicated her rights. The U.S. Supreme Court granted the petition for certiorari brought by the U.S. government. *Kerry v. Din*, No. 13-1402. Excerpts follow from the reply brief of the United States (with footnotes omitted), which was filed on February 11, 2015.

* * * *

1. It is firmly established in this Court’s precedents that Congress has the power to “prescribe the terms and conditions upon which [aliens] may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention.” *Wong Wing v. United States*, 163 U.S. 228, 232-234 (1896) (citation omitted). The Ninth Circuit had no basis for imposing extra-statutory procedural requirements and a regime of judicial review of visa denials that is directly contrary to the doctrine of consular nonreviewability.

Respondent ignores the meaningful process that takes place in connection with immigrant visa applications. When a U.S. citizen submits a visa petition to classify an alien as an immediate relative, DHS reviews it. If the petition is approved, the alien submits a visa application; a consular officer scrutinizes that application, interviews the alien in person, and then takes action. In addition, final denial of a visa is subject to review by the principal consular officer at the relevant post (or that officer's designated alternate). See 22 C.F.R. 42.81(c) and (d); see also Gov't Br. 49 (noting that State Department analysts assist consular officers in connection with security-based denials).

Respondent nonetheless asserts that judicial review, and additional legal and factual explanation by the consular officer, are required as a matter of due process to guard against an "arbitrary" interference with the liberty interest she asserts. But the refusal of the visa was an action concerning respondent's husband, not her, and this Court has made clear that whatever procedure Congress prescribes even for the admission of aliens who have reached our shores is all the process that is due under the Constitution. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). A visa denial following such a process, here augmented by Executive Branch procedures, therefore cannot be deemed "arbitrary" in violation of the Due Process Clause, either for Berashk himself, who is outside the country, or for respondent, who is only indirectly affected.

* * * *

2. Even if some judicial review of the visa denial were required in this case, the decision below would still be wrong. The Ninth Circuit held that the government cannot defend a visa denial as facially legitimate without identifying the specific subsection of Section 1182 under which there was reason to believe the alien was inadmissible and the factual information on which the denial rested. There is no warrant in the Constitution for requiring provision of that detailed information, and such a requirement would threaten significant harm to national security at a time when the risk of undetected terrorist incursions into this Nation is high.

The review mandated by the Ninth Circuit calls for a far more intrusive inquiry than the "facially legitimate" standard deemed sufficient in *Mandel* [*Kleindeinst v. Mandel*, 408 U.S. 753 (1972)]. Respondent repeatedly tries to blur that point (e.g., Br. 14, 31-32) by asserting that "facially legitimate" is equivalent to "supported by some evidence," such that the denial cannot be sustained unless its underlying factual basis is established to the satisfaction of a court. But those standards are not at all equivalent. In *Mandel* itself, the Court deemed the government's reason for the waiver facially legitimate without asking whether there was any evidence supporting the reason provided. See Gov't Br. 53. And the cases on which respondent relies to show the asserted equivalency between the two standards illustrate their differences. See *Superintendent v. Hill*, 472 U.S. 445, 455-456 (1985), cited in *Hamdi v. Rumsfeld*, 542 U.S. 507, 527-528 (2004) (opinion of O'Connor, J.).

By expanding the scope of review to include a requirement that the government explain the legal and factual basis for a visa denial, the Ninth Circuit has rendered Congress's judgment in Section 1182(b)(3)—that when a denial is based on national-security grounds no specific reason need be provided to the alien—essentially meaningless for any alien with a U.S.-citizen spouse. See 8 U.S.C. 1182(b)(3); see also 8 U.S.C. 1202(f) (mandating confidentiality of visa records). The new requirement also would work an end-run around this Court's decisions

permitting information relating to the entry of aliens to be withheld if it would “endanger the public security.” *Knauff*, 338 U.S. at 544. Respondent virtually ignores those authorities; she says (e.g., Br. 49) that they do not apply directly to a claimant like her, without grappling with the fact they do not contemplate that a claim like hers could ever be permitted to proceed in the first place. See, e.g., 338 U.S. at 544 (permitting security analysis based on “confidential information”); *id.* at 547 (stating that when “members” of the “armed forces” married abroad, their alien spouses “had to stand the test of security”).

* * * *

All of these considerations lead to one conclusion: if the Court were now to fashion a judicial exception to the long-established consular nonreviewability doctrine, review should be no more expansive than that found sufficient in *Mandel*. In that case, the Court made clear that a balancing of the government’s interests against the citizen’s interests was not permitted. See 408 U.S. at 765-769 (describing the “dangers and the undesirability” of such balancing). Respondent traveled to Afghanistan to marry Berashk knowing that there was no guarantee that he could obtain an immigrant visa; her interest in the visa decision is indirect and derivative of the interest of a person who has no constitutional rights at all in connection with his request for the privilege of admission to the United States. In contrast, the government’s sovereign interest in controlling admission of aliens to the United States and ensuring that terrorists are excluded is an “urgent objective of the highest order,” *Humanitarian Law Project*, 561 U.S. at 28, and one that the review envisioned by the Ninth Circuit would threaten.

* * * *

If the narrow “facially legitimate” standard applied in *Mandel* were applied to this case, the reason for visa denial that the consular post provided to Berashk—a citation to Section 1182(a)(3)(B), indicating that the denial was based on terrorist activities—clearly suffices. Respondent’s plea for disclosure of evidence underlying a reason to believe that Berashk fits within the Section 1182(a)(3)(B) admissibility bar is contrary to the very limited scope of the facial-legitimacy review that disposed of *Mandel*, and would impermissibly “look behind” the consular officer’s decision, opening the way to substitution of a court’s assessment for the expert officer’s. *Mandel*, 408 U.S. at 770. So, too, would an attempt to assess interpretation of the statutory criteria, since that would occur in the abstract and lack the very analysis of underlying facts in which the *Mandel* Court refused to engage.

* * * *

The Supreme Court issued its decision, vacating the judgment of the Ninth Circuit Court of Appeals, on June 15, 2015. The plurality opinion focuses on whether or not Din had a due process right at issue in the case. The concurring opinion concludes that, even assuming implication of a due process interest, the process granted—simply identifying the broad statutory basis for the denial of the visa—was sufficient. Because neither the plurality nor the concurrence garnered a majority of the votes of the justices, the concurrence is the narrowest ruling that a majority of the Court would

support. Excerpts follow from the concurring opinion of the Court. *Kerry v. Din*, 135 S.Ct. 2128.

* * * *

The conclusion that Din received all the process to which she was entitled finds its most substantial instruction in the Court’s decision in *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972). There, college professors—all of them citizens—had invited Dr. Ernest Mandel, a self-described “ ‘revolutionary Marxist,’ ” to speak at a conference at Stanford University. *Id.*, at 756, 92 S.Ct. 2576. Yet when Mandel applied for a temporary nonimmigrant visa to enter the country, he was denied. At the time, the immigration laws deemed aliens “who advocate[d] the economic, international, and governmental doctrines of World communism” ineligible for visas. § 1182(a)(28)(D) (1964 ed.). Aliens ineligible under this provision did have one opportunity for recourse: The Attorney General was given discretion to waive the prohibition and grant individual exceptions, allowing the alien to obtain a temporary visa. § 1182(d)(3). For Mandel, however, the Attorney General, acting through the Immigration and Naturalization Service (INS), declined to grant a waiver. In a letter regarding this decision, the INS explained Mandel had exceeded the scope and terms of temporary visas on past trips to the United States, which the agency deemed a “ ‘flagrant abuse of the opportunities afforded him to express his views in this country.’ ” 408 U.S., at 759, 92 S.Ct. 2576.

The professors who had invited Mandel to speak challenged the INS’ decision, asserting a First Amendment right to “ ‘hear his views and engage him in a free and open academic exchange.’ ” *Id.*, at 760, 92 S.Ct. 2576. They claimed the Attorney General infringed this right when he refused to grant Mandel relief. See *ibid.*

The Court declined to balance the First Amendment interest of the professors against “Congress’ ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’ ” *Id.*, at 766, 768, 92 S.Ct. 2576 (citation omitted). To do so would require “courts in each case ... to weigh the strength of the audience’s interest against that of the Government in refusing a [visa] to the particular applicant,” a nuanced and difficult decision Congress had “properly ... placed in the hands of the Executive.” *Id.*, at 769, 92 S.Ct. 2576.

Instead, the Court limited its inquiry to the question whether the Government had provided a “facially legitimate and bona fide” reason for its action. *Id.*, at 770, 92 S.Ct. 2576. Finding the Government had proffered such a reason—Mandel’s abuse of past visas—the Court ended its inquiry and found the Attorney General’s action to be lawful. See *ibid.* The Court emphasized it did not address “[w]hat First Amendment or other grounds may be available for attacking an exercise of discretion for which no justification whatsoever is advanced.” *Ibid.*

The reasoning and the holding in *Mandel* control here. That decision 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. *Mandel* held that an executive officer’s decision denying a visa that burdens a citizen’s own constitutional rights is valid when it is made “on the basis of a facially legitimate and bona fide reason.” *Id.*, at 770, 92 S.Ct. 2576. Once 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. *Ibid.* This reasoning has

particular force in the area of national security, for which Congress has provided specific statutory directions pertaining to visa applications by noncitizens who seek entry to this country.

II

Like the professors who sought an audience with Dr. Mandel, Din claims her constitutional rights were burdened by the denial of a visa to a noncitizen, namely her husband. And as in *Mandel*, the Government provided a reason for the visa denial: It concluded Din's husband was inadmissible under § 1182(a)(3)(B)'s terrorism bar. Even assuming Din's rights were burdened directly by the visa denial, the remaining question is whether the reasons given by the Government satisfy *Mandel*'s "facially legitimate and bona fide" standard. I conclude that they do.

Here, the consular officer's determination that Din's husband was ineligible for a visa was controlled by specific statutory factors. The provisions of § 1182(a)(3)(B) establish specific criteria for determining terrorism-related inadmissibility. The consular officer's citation of that provision suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements. Given Congress' plenary power to "suppl[y] the conditions of the privilege of entry into the United States," *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543, 70 S.Ct. 309, 94 L.Ed. 317 (1950), it follows that the Government's decision to exclude an alien it determines does not satisfy one or more of those conditions is facially legitimate under *Mandel*.

The Government's citation of § 1182(a)(3)(B) also indicates it relied upon a bona fide factual basis for denying a visa to Berashk. Cf. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15, 47 S.Ct. 1, 71 L.Ed. 131 (1926). Din claims due process requires she be provided with the facts underlying this determination, arguing *Mandel* required a similar factual basis. It is true the Attorney General there disclosed the facts motivating his decision to deny Dr. Mandel a waiver, and that the Court cited those facts as demonstrating "the Attorney General validly exercised the plenary power that Congress delegated to the Executive." 408 U.S., at 769, 92 S.Ct. 2576. But unlike the waiver provision at issue in *Mandel*, which granted the Attorney General nearly unbridled discretion, § 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa. Din, moreover, admits in her Complaint that Berashk worked for the Taliban government, App. 27–28, which, even if itself insufficient to support exclusion, provides at least a facial connection to terrorist activity. Absent an affirmative showing of bad faith on the part of the consular officer who denied Berashk a visa—which Din has not plausibly alleged with sufficient particularity—*Mandel* instructs us not to "look behind" the Government's exclusion of Berashk for additional factual details beyond what its express reliance on § 1182(a)(3)(B) encompassed. See 408 U.S., at 770, 92 S.Ct. 2576.

The Government, furthermore, was not required, as Din claims, to point to a more specific provision within § 1182(a)(3)(B). To be sure, the statutory provision the consular officer cited covers a broad range of conduct. And Din perhaps more easily could mount a challenge to her husband's visa denial if she knew the specific subsection on which the consular officer relied. Congress understood this problem, however. The statute generally requires the Government to provide an alien denied a visa with the "specific provision or provisions of law under which the alien is inadmissible," § 1182(b)(1); but this notice requirement does not apply when, as in this case, a visa application is denied due to terrorism or national security concerns. § 1182(b)(3). Notably, the Government is not prohibited from offering more details when it sees fit, but the statute expressly refrains from requiring it to do so.

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. See *Fiallo v. Bell*, 430 U.S. 787, 795–796, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977); see also *INS v. Aguirre–Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999). 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.

For these reasons, my conclusion is that the Government satisfied any obligation it might have had to provide Din with a facially legitimate and bona fide reason for its action when it provided notice that her husband was denied admission to the country under § 1182(a)(3)(B). By requiring the Government to provide more, the Court of Appeals erred in adjudicating Din’s constitutional claims.

* * * *

2. Visa Waiver Program

On December 18 2015, the “Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015” was enacted. Pub. Law No. 114-113. The Act restricts the use of the Visa Waiver Program (“VWP”) by those who have traveled on or after March 1, 2011 to Iraq, Syria, or countries designated as “State Sponsors of Terrorism” (“SSTs,” currently Syria, Iran, and Sudan), or other countries “of concern” designated by the Department of Homeland Security (“DHS”). Also restricted are those who are dual nationals of Iraq, Syria, or countries designated as SSTs, or other countries “of concern” designated by DHS. The Act sets forth criteria by which the Secretary of Homeland Security may designate countries or areas of concern. The new restrictions on VWP travelers do not bar travel to the United States, but require travelers to obtain a U.S. visa, which generally includes an in-person interview with a U.S. consular officer. See U.S. Customs and Border Protection frequently asked questions about the Act, available at <https://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq>. The Act also requires all VWP travelers to have an electronic passport for travel to the United States by April 1, 2016. Further implementation and reporting requirements of the Act will begin in 2016.

3. Visa Restrictions and Limitations

a. Venezuela

On February 2, 2015, the U.S. Department of State announced additional steps to impose visa restrictions against human rights abusers, individuals responsible for public

corruption, and their family members in Venezuela. The Department previously took actions to restrict travel pursuant to the INA of certain Venezuelan government officials believed to be responsible for human rights abuses in 2014. See *Digest 2014* at 50.

See Chapter 16 for a discussion of Executive Order 13692 “Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela.” 80 Fed. Reg. 12,747 (Mar. 11, 2015).

b. Burundi

The U.S. government has taken actions to restrict visas with respect to the situation in Burundi. See Chapter 16 for a discussion of Executive Order 13712 “Blocking Property of Certain Individuals Contributing to the situation in Burundi,” which suspends the entry of individuals meeting the criteria for designation for financial sanctions.

4. Agreements on Preventing and Combating Serious Crime

On November 19, 2015, representatives of the governments of the United States and Malaysia signed an agreement in Kuala Lumpur on “Enhancing Cooperation in Preventing and Combating Serious Crime” (“PCSC”). Such agreements provide a mechanism for the parties’ law enforcement authorities to exchange personal data, including biometric (fingerprint) information, for use in detecting, investigating, and prosecuting terrorists and other criminals. For background, see *Digest 2008* at 81–83, *Digest 2009* at 66, and *Digest 2010* at 57-58. The U.S.-Malaysia PCSC Agreement will enter into force after completion of an exchange of notes indicating each government has taken the necessary steps to bring the agreement into force.

C. ASYLUM, REFUGEE, AND MIGRANT PROTECTION ISSUES

1. Temporary Protected Status

Section 244 of the Immigration and Nationality Act (“INA” or “Act”), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) for temporary protected status (“TPS”) after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state (or stateless persons who last habitually resided in the state) can remain in the United States and obtain work authorization documents. For

background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240-47; *Digest 2004* at 31-33; *Digest 2010* at 10-11; *Digest 2011* at 6-9; *Digest 2012* at 8-14; *Digest 2013* at 23-24; and *Digest 2014* at 54-57. In 2015, the United States extended TPS designations for El Salvador, Haiti, and Somalia, extended TPS and redesignated Syria, and designated Yemen, as discussed below.

a. Syria

On January 5, 2015, the Department of Homeland Security (“DHS”) announced the extension of the designation of Syria for TPS for 18 months from April 1, 2015 through September 30, 2016, and the redesignation of Syria for TPS for 18 months, effective April 1, 2015 through September 30, 2016. 80 Fed. Reg. 245 (Jan. 5, 2015). The extension and redesignation are based on the determination that the conditions in Syria that prompted the 2013 TPS redesignation continue to exist, specifically, the ongoing armed conflict and other extraordinary and temporary conditions that have not only persisted, but deteriorated, and these conditions pose a serious threat to the personal safety of Syrian nationals if they were required to return to their country. *Id.*

b. El Salvador

On January 7, 2015, DHS announced the extension of the designation of El Salvador for TPS for 18 months from March 10, 2015 through September 9, 2016. 80 Fed. Reg. 893 (Jan. 7, 2015). The extension was based on the determination that the conditions in El Salvador that prompted the original TPS designation continue to exist, specifically there continues to be a substantial, but temporary, disruption of living conditions in El Salvador resulting from a series of earthquakes in 2001, and El Salvador remains unable, temporarily, to handle adequately the return of its nationals. *Id.*

c. Haiti

On August 25, 2015, DHS announced the extension of the designation of Haiti for TPS for 18 months from January 23, 2016 through July 22, 2017. 80 Fed. Reg. 51,582 (Aug. 25, 2015). The extension is based on the determination that the conditions in Haiti that prompted the TPS designation continue to be met, namely, the extraordinary and temporary conditions in that country that prevent Haitian nationals (or aliens having no nationality who last habitually resided in Haiti) from returning to Haiti in safety. *Id.*

d. Somalia

On June 1, 2015, DHS announced the extension of the designation of Somalia for TPS for 18 months from September 18, 2015 through March 17, 2017. 80 Fed. Reg. 31,056 (June

1, 2015). The extension is based on the determination that the conditions in Somalia that prompted the TPS designation continue to be met, namely, the disruption of living conditions due to ongoing armed conflict that would pose a serious threat to the personal safety of returning Somali nationals, as well as extraordinary and temporary conditions in the country that prevent Somali nationals from returning to Somalia in safety. *Id.*

e. Yemen

On September 3, 2015 DHS announced the designation of Yemen for TPS for 18 months from September 3, 2015 through March 3, 2017. 80 Fed. Reg. 53,319 (Sep. 3, 2015). Excerpts below from the Federal Register notice explain the basis for the designation.

* * * *

The Secretary has determined, after consultation with the Department of State and other appropriate Government agencies, that there is an ongoing armed conflict within Yemen and, due to such conflict, requiring the return of Yemeni nationals to Yemen would pose a serious threat to their personal safety.

In July 2014, the Houthis, a northern opposition group, began a violent territorial expansion across Yemen. The Houthis took over the capital, Sana'a, in September 2014, and placed the President, Prime Minister, and cabinet officials under house arrest in January 2015. President Abdo Rabo Mansur Hadi left Sana'a for Yemen's southern port city of Aden in February 2015 to resume his presidential duties. As the Houthis continued their military campaign, however, they eventually closed in on Aden and by the end of March 2015, President Hadi and many other members of the government relocated to the Kingdom of Saudi Arabia (Saudi Arabia).

On March 26, 2015, a coalition of more than ten countries, led by Saudi Arabia and at the request of President Hadi, initiated air strikes against the Houthis. Air strikes have occurred across the country, but have been concentrated in Sa'dah, Hajjah, Sana'a, Taiz, Marib, Al Dhale'e, and Aden. Houthi ground forces simultaneously engaged in fierce battles in Aden and Marib against local ethnic groups and pro-government fighters. The conflict has affected 21 out of Yemen's 22 governorates.

The conflict has caused an acute and rapidly deteriorating humanitarian crisis. The airstrikes and ground fighting have killed, wounded, and displaced noncombatants and destroyed and damaged hospitals, schools, roads, airports, the electric power grid, the water supply, and other critical infrastructure. The humanitarian situation is compounded by access constraints. Relief efforts and supplies have been hindered by the limited capacity of airports, seaports, and roadblocks. Furthermore, ongoing violence and airstrikes are restricting the movement of civilians to safe areas and restricting their ability to receive needed basic services and supplies.

While the exact number of housing units that have been destroyed or damaged by the airstrikes and ground fighting has not been determined, the United Nations (UN) is reporting that approximately 42,000 people, in 7,000 households, were identified as needing shelter as a direct

result of the conflict since March 2015. The UN has reported that nearly 1.3 million people in Yemen have become internally displaced since the start of the conflict.

Movement through or around the conflict zones is fraught with extreme danger. A full assessment by those reporting on the ground has been hindered by security concerns and infrastructure damage, but the UN has reported that as of July 2015, there have been approximately 3,700 registered deaths and over 18,000 registered injuries attributed to the conflict.

Because Yemen relies on imports for 90 percent of its food, the combination of severely reduced imports, low food stocks, and a shortage of fuel has increased the number of people experiencing food insecurity to 12.9 million, nearly half of the total population of Yemen, including 5 million who are classified as severely food insecure. Due to the conflict, 470,000 children under the age of 5 have lost access to nutrition services previously provided to them through 158 Outpatient Therapeutic Feeding Programs.

The impact on key logistical and civilian infrastructure across Yemen from the airstrikes and ground fighting has been devastating. Yemen has suffered heavy damage to its airports, harbors, bridges and roads, which presents significant obstacles to relief efforts. Damage to health facilities has also been substantial and the UN has reported that, as a result of the fighting, at least five hospitals were destroyed or suffered catastrophic damage in Sana'a, Al Dhale'e, and Aden. Nearly 3,600 schools remain closed due to insecurity, with over 330 schools directly affected by the conflict. Of these, 86 schools were reported damaged due to airstrikes or armed confrontations and a further 246 were reported as occupied by internally displaced persons.

The destruction and closure of numerous hospitals and medical facilities is resulting in increased fatalities, including among women, due to miscarriages and a lack of delivery and postnatal care.

Hospitals that remain open are operating at limited capacity and are unable to cope with the scale of needs, while others have shut down due to insecurity and a lack of fuel, staff and supplies. Internally displaced persons across Yemen indicate that among their most pressing needs are medicine and treatment for malaria, diarrhea, malnutrition, unspecified chronic diseases, and respiratory diseases.

* * * *

An estimated 500 to 2,000 nationals of Yemen (and persons without nationality who last habitually resided in Yemen) are (or are likely to become) eligible for TPS under this designation. This estimate is based on the total number of Yemeni nationals believed to be in the United States in a nonimmigrant status or without lawful immigration status.

* * * *

2. Refugee Admissions in the United States

On September 11, 2015, an unnamed official of the State Department provided a special briefing on the mechanics of the United States Refugee Admissions Program ("USRAP") in light of increasing refugee flows caused by unrest in the Mid-East and Africa, including

the ongoing conflict in Syria. The briefing is excerpted below and available at <http://www.state.gov/r/pa/prs/ps/2015/09/246843.htm>.

* * * *

... [T]he USRAP is an interagency process that includes three primary U.S. Government agencies. That's us, the Department of State, as the primary lead agency; the Department of Homeland Security ["DHS"], specifically U.S. Citizenship and Immigration Services; and the Department of Health and Human Services, their Office of Refugee Resettlement.

...USRAP involves those three government agencies as well as international organizations like the United Nations High Commissioner for Refugees, the International Organization for Migration, a number of nongovernmental organizations – these we normally refer to as resettlement agencies in the United States – as well as U.S. states, cities, private citizens, churches and mosques, and community groups. So it's a lot of people involved, big process, fairly standard procedures.

...[T]here are a number of processing requirements within the USRAP that cannot be waived, such as an in-person DHS interview, security checks, and a medical exam, including a TB test. And this is one way – one of the many ways in which our Refugee Resettlement Program differs from a lot of other countries' resettlement programs. ...So because of these very strict requirements that we have and because at any given time we're processing cases in 70 or more locations worldwide with a limited amount of resources, it currently takes anywhere from 18 to 24 months or even longer to process a case from referral or application to arrival in the United States.

* * * *

...I'm going to go over the main steps on the overseas processing side first. And the first important step in getting access to the USRAP is either a referral or an application. The vast majority of our referrals come from UNHCR, the UN High Commissioner for Refugees, also known as the UN Refugee Agency. U.S. embassies and certain NGOs are also qualified to refer cases to us, but we get very few from those two sources. About 75 percent of our referrals to the program come from UNHCR. Another 25 percent of the program – so about a quarter of the program – a quarter of our applicants gain access through direct applications. And so some of you are probably familiar with some of these direct application programs.

We have a program for U.S.-affiliated Iraqis. We operate that program in Baghdad, Jordan and Egypt. We also have a program for Iranian religious minorities that's mostly operated in Vienna. We have a program for former Soviet Union religious minorities mostly operated in Moscow. We have a program in Havana for various categories of Cubans. And our newest program is a program for Central American minors with a lawfully present parent in the United States. So again, just to repeat, the list of programs that I just described are what we call direct referral programs, and those in any given year make up about 25 percent of the people that come through the U.S. Refugee Admissions Program.

So once a case enters the USRAP, whether it's a referral from UNHCR or a direct application, they are all essentially treated the same once they're into our system. So once we receive those applications, the next step is to prepare the applications, and ...the State Department funds a network of what we call resettlement support centers that we have located around the world. We have nine primary locations. ...

We have a worldwide presence. And at those resettlement support centers, there's something close to a thousand people working for us. Those – these are not U.S. Government officials. They are – these resettlement support centers are mostly run by NGOs like the International Rescue Committee or international organizations like the International Organization for Migration.

So at these RSCs, that's where our case workers are doing things like collecting biographic and other information from applicants so that they can present the files to a DHS officer when they arrive in town to conduct the adjudication.

So the next big step overseas is the USCIS adjudications, so these again are officers of U.S. Citizenship and Immigration Services from the Department of Homeland Security. Refugees are interviewed in person by USCIS officers who travel to where they are located. And so this includes – this involves teams of officers that are based in Washington, D.C., and they send them out in teams ranging from, say, four or five people up to – I think we currently have a team in Istanbul of 17 people doing interviews of Syrians and others.

So USCIS officers get on the road and go to where the refugees are. The main purpose of the USCIS adjudication is to determine whether applicants meet the U.S. legal definition of a refugee and are admissible, so just to – for those who don't know, the legal definition of a refugee includes having a well-founded fear of persecution based on one of the five protected grounds – so race, religion, nationality, political opinion, or membership in a particular social group.

The next big check in – the next big step is security checks. All refugees undergo multiple security checks in order to be approved for U.S. resettlement. Refugees are subject to the highest level of security checks of any category of traveler to the United States. The screening includes involvement of the National Counterterrorism Center, NCTC; the FBI's Terrorist Screening Center; DHS; the Department of Defense; and other agencies. Most of the details of the security checks are classified.

At the same time, refugees are undergoing a health screening. All refugees approved by USCIS have to undergo a screening to identify diseases of public health significance such as TB.

...

Finally, cultural orientation: most refugees attend a three-day class providing information about the United States and what to expect from the resettlement agencies and other things when they arrive.

Let me quickly move to the domestic piece of the portion. All of our travel is arranged by the International Organization for Migration. We pay IOM up front for the cost of the air travel, but before departing for the U.S., refugees sign a promissory note agreeing to repay the loan to the U.S. for their travel costs.

We work with nine domestic agencies to resettle refugees in the U.S. These nine agencies have about 315 affiliates in about 180 communities throughout the United States. Each year, each of these nine agencies and any new agencies that would like to be considered for the program – it's an open, competitive process – these agencies submit proposals describing their capacity to resettle refugees at each of these affiliates, and that would include everything from

staff capacity, how large is the office, what languages do they speak, what sort of special needs cases can they handle, what sort of special relationships might they have with medical centers to handle complex cancer cases or other cases.

Once we've collected all that information, reviewed the proposals and usually made a few tweaks here and there and come up with an overall numerical placement plan by location, it's actually up to the individual resettlement agencies on a weekly basis to determine where the cases are placed...

It's important to note that a refugee, once they arrive, have the ability to pick up and leave the minute they arrive in the United States. ...

These local domestic resettlement agency affiliates arrange – they welcome refugees at the airport and begin the process of helping them to be resettled in their new communities. And these resettlement agencies are responsible for providing initial reception and placement services in the first 30 to 90 days after the refugees arrive. That includes finding safe and affordable housing and providing a variety of services to promote early self-sufficiency and cultural adjustment.

The Office of Refugee Resettlement at the Department of Health and Human Services also funds programs for which refugees are eligible up to five years after arrival. So although the State Department role in the domestic resettlement is limited to the first 90 days, it's ORR funding that takes over after that.

* * * *

[in response to a question]

...UNHCR does focus on the most vulnerable when they are referring cases to us and the 28 or so other countries who have agreed to accept Syrians. This would include female-headed households. It could include victims of torture or violence. It could include religious minorities. It could include LGBT refugees, people who need medical care that they can't get in their country of origin. So basically, people who are not thriving or expected to thrive in their country of origin. The vast majority of referrals that we have gotten from UNHCR have come from five countries, and I believe I – this will be in the correct order of magnitude: first Jordan, then Turkey, then Lebanon, Egypt, and Iraq.

* * * *

[in response to a question]

...[R]esettlement is not the first solution that the international community turns to when you're looking at a major refugee crisis. In general, UNHCR does not refer refugees for resettlement in the first five years of a conflict because the hope is that people will eventually return home that – after the crisis is over, and people will shelter in the region in the meantime; and we, the United States and others, will help support the countries of asylum that are sheltering them.

So the vast majority of refugees that we resettle to the United States have been in situations of asylum for decades. So some of the Somalis that we have resettled have been in asylum since the early 1990s. ...So they actually started referring Syrians earlier than they would have normally.

* * * *

3. Migrant Children and Families with Children

As discussed in *Digest 2014* at 60-65, the United States responded in 2014 to questions from multiple special rapporteurs about treatment of unaccompanied children migrating into the United States. On February 13, 2015, U.S. Permanent Representative to the UN in Geneva, Ambassador Pamela Hamamoto, sent a letter in response to a further inquiry on the subject of migrant children from Kirsten Sandberg, Chairperson of the Committee on the Rights of the Child. Ambassador Hamamoto's letter appears below and is available at www.state.gov/s/l/c8183.htm.

* * * *

On behalf of Secretary of State John Kerry, I am writing in response to your November 12 letter regarding child migrants. We appreciate the concerns you have raised and share your belief that unaccompanied migrant children are a vulnerable population that must be protected. The U.S. government draws from a wide range of available resources to safely process unaccompanied migrant children, in accordance with applicable laws. As a courtesy, we are happy to provide you with the following information to address your concerns, and will endeavor to address related issues in our upcoming periodic report under the Convention on the Rights of the Child Optional Protocols to the extent they relate to our treaty obligations.

Upon encountering unaccompanied children at the border, U.S. Department of Homeland Security (DHS) Customs and Border Protection (CBP) officers provide them information on their rights, conduct a basic health screening, and provide them with basic necessities such as initial shelter and emergency medical care. DHS also screens such unaccompanied children for persecution or trafficking concerns.

For an unaccompanied child to withdraw his or her application for admission and return voluntarily, the child must be a national or habitual resident of a contiguous country (i.e., Canada or Mexico), and CBP must determine that the child meets three criteria: the child (1) does not fear returning due to a credible fear of persecution; (2) is not a victim of trafficking or at risk of being trafficked upon return; and (3) is able to make an independent decision to withdraw his or her application for admission. Many unaccompanied children from Mexico who are encountered by CBP officers at the border voluntarily withdraw their applications for admission and are returned directly to their country.

During the limited time unaccompanied children are in DHS care, they are separated from the general adult population to minimize any potential for coercion or abuse. DHS is committed to ensuring that all individuals in its custody are treated in a safe, dignified, and secure manner. DHS has a zero-tolerance policy for all forms of abuse or assault. All accusations of unlawful conduct are investigated thoroughly and appropriate action is taken whenever a claim is substantiated. DHS's independent Office of the Inspector General (OIG) conducts unannounced, random site visits of CBP holding facilities as well as interviews with unaccompanied children. In a recent report covering field visits in July, the Inspector General did not observe misconduct by DHS employees. The OIG did observe some concerns about shelter conditions, and provided recommendations to address these concerns, which are being

addressed by the DHS. The full report can be found on the Inspector General's website, <http://www.oip.dhs.gov>.

Unaccompanied children from contiguous countries who are determined not to meet any of the aforementioned criteria (e.g., are at risk of trafficking, or fear persecution upon return), as well as unaccompanied children from noncontiguous countries, are transferred to the care and custody of the U.S. Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR), within 72 hours of determining that the child is unaccompanied, absent exceptional circumstances, as required by U.S. law. HHS conducts a complete medical exam and provides them with medical care, including dental care, opportunities for extracurricular activities, counseling, and access to educational programs. Children are also screened again to determine if they are victims of abuse, crime, or human trafficking, or if there are any immediate mental health needs that require special services. Children are given regular telephone access to speak with family members or their consulates on a routine basis while in HHS custody. ORR then seeks to release the child to sponsors in the United States, including family members. The majority of these children are released within 30 days to the sponsorship of a parent or close family member in the United States.

HHS takes very seriously allegations of physical, sexual, and verbal abuse of children in HHS care and custody. HHS published in December 2014 a rule setting forth national standards to prevent, detect, and respond to sexual abuse and sexual harassment in HHS facilities. This rule includes a comprehensive set of standards that include topics such as prevention planning, training and educating, reporting, health care, and data collection. Furthermore, all permanent HHS facilities are licensed by the state in which the facility is located and are overseen by the licensing authority for everything from staffing ratios to the size of the space a child must be provided in a bedroom. HHS makes it a priority to provide all children in its care a safe and healthy environment.

The U.S. government helps facilitate access to legal representation for unaccompanied children who will be subject to immigration removal proceedings. For instance, unaccompanied children in HHS custody are given information on their legal rights and possible legal representation, and are provided individualized legal screenings. In addition, HHS provided \$9 million in grants to nonprofit organizations to hire attorneys to provide immigration representation. Furthermore, HHS is authorized to appoint independent child advocates for trafficking victims and other especially vulnerable unaccompanied children to promote the best interests of the child. A child may be eligible for various forms of immigration relief, including, but not limited to, asylum, Special Immigrant Juvenile Status (for children who have been abused, abandoned, or neglected and meet other qualifying criteria), U visa status for victims of certain crimes, and T visa status for victims of human trafficking. The Department of Justice has provided funding through the Corporation for National and Community Service's "Justice AmeriCorps" grants program to enable legal services organizations to enroll lawyers and paralegals to represent and assist unaccompanied children in immigration removal proceedings. Custodians of unaccompanied children may receive a variety of voluntary legal orientation trainings, assistance with pro bono referrals, and referrals to providers of social services.

The United States is committed to working closely with other governments to address the complex underlying factors that impact irregular migration from Central America. Representatives from the Department of State and DHS participate in the Regional Conference on Migration, a consensus-based conference of regional states that allows for

technical discussions of regional migration issues. The Department of State also partners with the International Organization for Migration (IOM) to implement programs that build the capacity of Central American governments to identify, screen, protect, and refer unaccompanied child migrants to appropriate services, and supports the Office of the UN High Commissioner for Refugees in Central America and Mexico to strengthen asylum systems and to track and address forced displacement due to criminal violence. Through its partnership with IOM, the United States Agency for International Development is working with government officials, civil society organizations, and other partners in Honduras, Guatemala, and El Salvador to provide immediate care, child protection services, and onward assistance for returning families and unaccompanied children. The United States has also launched a program to provide refugee admission to certain children in El Salvador, Honduras, and Guatemala, providing a safe, orderly alternative to the dangerous journey many migrant children have taken north from Central America.

Although the United States is not a party to the UN Convention on the Rights of the Child, the United States has signed the treaty and has laws at the state and federal level that support the treaty's overall goal of protecting the well-being of children. We continue to promote the rights and well-being of children in the United States through vigorous enforcement of laws at the federal, state, and local level. The United States also sends senior delegations to appear before the UN Committee on the Rights of the Child to present our periodic reports on U.S. implementation of the two Optional Protocols to which the United States is a party.

Thank you for reaching out to us regarding your concerns on child migrants. We assure you that we continue to strive for the advancement of migrant children's rights.

* * * *

On June 30, 2015, the United States submitted to the Inter-American Commission on Human Rights ("IACHR") its observations on the IACHR draft report on the situation of refugee and migrant families and unaccompanied children in the United States. Excerpts follow from the U.S. submission (with footnotes omitted). The full text of the U.S. submission is available at www.state.gov/s/l/c8183.htm.

* * * *

The United States respects and supports the Commission and the strong sense of integrity and independence which historically has characterized its work. Nevertheless, the United States notes that the report contains omissions and inaccuracies that would usefully be corrected, and therefore requests that the Commission review its analysis of applicable law and procedures prior to final publication.

The United States is proud of its history as a nation of immigrants. As the Commission recognizes in the report, the United States remains the principal destination country for international migrants in the world and is one of the leading countries for granting asylum and resettling refugees. Of the more than 190 million migrants in the world today, one out of five

resides in the United States, and we value the contributions they make to our economy, our culture, and our social fabric.

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RELEVANT INTERNATIONAL LEGAL FRAMEWORK:

Immigration is an issue of critical importance to the United States, and is extensively addressed by U.S. law and policy. As the Commission knows, international law recognizes that every state has the sovereign right to control admission to its territory, and to regulate the admission and expulsion of foreign nationals consistent with any international obligations it has undertaken. This principle has long been recognized as a fundamental attribute of state sovereignty.

As we have stated before, the United States notes that contrary to the Commission's assertions, neither the American Declaration of the Rights and Duties of Man ("American Declaration") nor international law establishes a presumption of liberty for undocumented migrants who are present in a country in violation of that country's immigration laws. Rather, states assume legal obligations, or undertake political commitments, to protect the right of freedom of movement to persons *lawfully* within a state's territory.

For example, Article VIII of the American Declaration, on freedom of movement, by its own terms extends only to nationals. Article XXXIII of the Declaration also recognizes "the duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be." Non-nationals seeking to enter a state are bound to respect the state's immigration laws and may be subject to various measures, including detention, as appropriate, when they fail to obey the law. In fact, immigration detention can be an important tool employed by states in ensuring public order and safety and removing as expeditiously as possible individuals who are not eligible to remain or who may pose a threat to the security of the country or the safety of its citizens and lawful residents. Accordingly, immigration detention, provided it is employed in a manner consistent with a state's international human rights obligations, is permitted under international law.

The United States places significant import on the necessity that immigration laws and policies, including those pertaining to immigration detention, must be enforced in a lawful, safe, and humane manner that respects the human rights of migrants regardless of their immigration status. At the same time, the United States notes that many of the sources referred to by the Commission do not give rise to binding legal obligations on the United States and are not within the Commission's mandate to apply with respect to the United States.

The United States has undertaken a political commitment to uphold the American Declaration, a non-binding instrument that does not itself create legal rights or impose legal obligations on states. Article 20 of the Statute of the Inter-American Commission on Human Rights ("IACHR Statute") sets forth the powers of the Commission that relate specifically to Organization of American States member states which, like the United States, are not parties to the legally binding American Convention on Human Rights ("American Convention"), including to pay particular attention to the observance of certain enumerated human rights set forth in the American Declaration, to examine communications and make recommendations to the state, and to verify whether in such cases domestic legal procedures and remedies have been applied and exhausted.

The United States wishes to reiterate its respect and support for the Commission. The United States acknowledges the work of the Commission in researching and compiling its draft report. We request, however, that in keeping with its mandate under Article 20 of the IACHR Statute, the Commission center its review of applicable international standards on the American Declaration and U.S. observance of the rights enumerated therein.

For example, the Commission has cited jurisprudence of the Inter-American Court of Human Rights (“Inter-American Court”) interpreting the American Convention. The United States has not accepted the jurisdiction of the Inter-American Court, nor is it party to the American Convention. Accordingly, the jurisprudence of the Inter-American Court interpreting the Convention or other international conventions, including the Court’s advisory opinions, does not govern U.S. commitments under the American Declaration. The Commission also erroneously cites the definition of “refugee” contained in the Cartagena Declaration on Refugees. The Cartagena Declaration is a non-binding statement issued in 1984 by a number of countries in Central and South America, which has no application to the United States. The United States is a party to the 1967 Protocol Relating to the Status of Refugees, which is implemented, *inter alia*, through 8 U.S.C. §§1158 and 1231(b)(3) (respectively, §§ 208 and 241(b)(3) of the Immigration and Nationality Act). The definition of “refugee” for purposes of U.S. law is set forth in 8 U.S.C. § 1101(a)(42).

INCREASE OF UNACCOMPANIED CHILDREN AND FAMILIES WITH CHILDREN IN 2014:

In summer 2014, the United States saw a sharp rise in the number of unaccompanied children from Central America attempting to enter the United States along our Southwest border. In fact, the number of children and families had reached such a high level that it strained the ability of the United States to care for and process them. During the United States’ fiscal year 2014 (October 1, 2013 to September 30, 2014), 68,631 unaccompanied children were apprehended along the U.S. Southwest border, nearly doubling the number of unaccompanied children apprehended during the previous fiscal year. In addition, during fiscal year 2014, 68,445 individuals who are part of a family unit were apprehended along the U.S. Southwest border.

The United States is proud of its record in addressing the humanitarian crisis involving unaccompanied children last summer. We acted swiftly, reallocated resources, and were able to comprehensively address the issue in a fair and humane manner. In this regard, the United States believes the Commission’s report does not adequately address the extraordinary efforts undertaken to address the dramatic rise in the flow of migrants into the United States last year. The protections afforded to unaccompanied children and families by the United States under federal law—both then and now—are extensive and are implemented by multiple federal agencies, including the Department of Homeland Security (DHS), which includes U.S. Customs and Border Protection (DHS/CBP), U.S. Immigration and Customs Enforcement (DHS/ICE), and U.S. Citizenship and Immigration Services (DHS/USCIS); the Department of Health and Human Services (HHS); the Department of Justice (DOJ); the Department of Labor (DOL); and the Department of State (DOS).

The majority of unaccompanied children were between the ages of 15 and 17, but many were younger, some considerably so. In general, many of these children had abandoned their home countries for a complex set of motives that are a combination of push and pull factors, including a desire to be with their parents or relatives already in the United States, the threat of

violence in their home country, fears that criminal gangs would either forcibly recruit or harm them, or to pursue a life of greater opportunity.

Continued economic hopelessness, weak public institutions, and violence by criminal groups suggest that a resurgent increase in the number of migrant children to the border of the United States is possible. This would—once again—put pressure on domestic institutions in transit and destination countries along the route and presage greater social and political instability in the region. Central America’s youth bulge threatens even greater turmoil: without increased economic opportunity, the region cannot absorb the estimated six million people who will enter the workforce over the next decade. Over half the population in Guatemala and Honduras lives below the poverty line.

To address the push and pull factors of the migration of unaccompanied children, the United States continues to focus on seeking solutions not only at home but also abroad, particularly in Honduras, Guatemala, and El Salvador, the three main source countries in Central America. The United States works closely with these countries on the key concerns that led to expanded migration in 2014 and to better address the long-term underlying factors that lead to migration in the first place. For example, in April 2015, DOL announced that it will fund a \$13 million project to help at-risk youth in El Salvador and Honduras develop marketable skills and secure and retain good employment in their home countries.

The U.S. Strategy for Engagement in Central America seeks to promote three interconnected objectives—prosperity, governance, and security. Our efforts in the region are designed to mitigate the underlying factors driving outbound migration. Domestic U.S. agencies are responsible for properly addressing international protection concerns, protecting those who need it, and then beginning timely repatriation to the home countries of those who are found to not merit protection. We have committed significant resources to address the problem and will be increasing our funding to assist these countries with economic development, anti-corruption efforts, and institution building. The Administration has requested \$1 billion for Central America in FY 2016. This request includes the level of resources necessary to improve security, advance systemic reforms to improve government accountability, and support a stronger foundation for economic growth and prosperity in Central America, especially in the Northern Triangle countries of El Salvador, Guatemala, and Honduras. The U.S. Strategy complements the regional Alliance for Prosperity Plan, developed by El Salvador, Guatemala, and Honduras.

During the influx last July, the United States quickly reallocated resources to assist with repatriations of children. For instance, through a \$7.6 million grant to the International Organization for Migration (IOM), USAID is enhancing Central American countries’ ability to process and provide assistance to children and families. We acted swiftly to ensure that we adequately protected and processed these individuals, including establishing a cross-government working group to address the needs of these children at the direction of President Obama. The “Unified Coordination Group” was led by DHS’ [Federal Emergency Management Agency](#) (FEMA) to coordinate the government-wide response to address the needs of the influx of unaccompanied children crossing into the United States.

U.S. LEGAL FRAMEWORK AND RELEVANT POLICIES:

Contrary to allegations in the report, families with children are not “automatically and arbitrarily being detained.” Individual assessments are made in accordance with U.S. law and legal processes, and parents with children are not detained with single migrants. The legal requirements for family detention appear in 8 U.S.C. Sections 1225, 1236, and 1241, and implementing regulations.

Moreover, on June 24, 2015, DHS Secretary Jeh C. Johnson announced a substantial change in the DHS's detention practices with respect to families apprehended with children. The new approach recognizes that, once a family has established initial eligibility for asylum or other relief under U.S. law, long-term detention of the family is an inefficient use of detention resources. Building on the reforms that were announced in May of this year, Secretary Johnson also announced that families who establish credible or reasonable fear of persecution will generally be released on a monetary bond or other appropriate condition of release; bond criteria will be to set bond at a level that is reasonable and realistic, taking into account the family's ability to pay, risk of flight, and public safety. Reasonable and credible fear interviews will take place within a reasonable time frame. Space in the family detention centers will, in general, be used to allow prompt removal of individuals who have not stated a claim for relief under applicable law.

The United States also has a comprehensive legal framework in place to address the needs of the vulnerable population of unaccompanied children. The 2008 Trafficking Victims Protection Reauthorization Act (TVPRA) sets forth detailed procedures for processing all unaccompanied children who do not have lawful status in the United States. Most Mexican unaccompanied children are permitted to voluntarily return expeditiously to Mexico if they express no fear of return and it has been determined that they are able to make an independent decision to withdraw their application for admission to the United States; if they are not a victim of a severe form of trafficking; and if there is no credible evidence that they are at risk of being trafficked upon return. There is no such voluntary return provision for Central American children, who must be placed in the custody of HHS within 72 hours after determining that such child falls within the protections outlined in the TVPRA. HHS provides special care and services for unaccompanied children, including placing them in the "least restrictive setting that is in the best interest of the child," subject to considerations of danger to self, danger to others, and risk of flight. 8 U.S.C. § 1232(c)(2)(A).

Whether or not required by law, all unaccompanied children are screened by CBP for risks, such as the risk that they will be subjected to severe forms of human trafficking or to persecution if they are returned. While in the care and custody of HHS, unaccompanied children receive an array of services, including educational services, case management, medical and mental health services, and legal services information, including information on the availability of some free legal assistance. HHS also must seek wherever possible to safely and expeditiously release a child to a parent or relative, or other qualified sponsor in the United States, which is usually accomplished within a month of the child's apprehension at the border.

By statute, all respondents—adults or children— have a right to representation in immigration court proceedings. While this right does not entail a right to government-funded representation, the U.S. government has taken measures to improve access to free or affordable representation. DHS, DOJ, and HHS have taken numerous steps to support and encourage voluntary organizations to provide *pro bono* counsel and accredited non-attorney representatives to provide representation and services to unaccompanied children. On September 12, 2014, DOJ and the Corporation for National and Community Service, which administers AmeriCorps national service programs, awarded more than \$1.8 million in grants to legal aid organizations for a new direct representation program, "justice AmeriCorps." Some children are also provided legal representation either during their time in HHS care or after their release. On September 30, 2014, HHS announced \$9 million in funding over two years to provide additional representation

for children after release. In cases where children do lack counsel, immigration judges are instructed and trained to assist those appearing before them.

The U.S. government has also taken measures to help educate unaccompanied children and their caregivers about immigration procedures. While in HHS care, children are provided “Know Your Rights” presentations and screenings for immigration relief. Additionally, through the Legal Orientation Program (LOP), representatives from nonprofit organizations provide information to detained aliens on their rights, immigration court, and the detention process. The Legal Orientation Program for Custodians (LOPC) provides the custodians (adult sponsors) of unaccompanied children with important information on the sponsors’ roles and responsibilities and the immigration court process.

Further, the United States has taken numerous other steps to respond to humanitarian needs and ensure both appropriate treatment in custody, and appropriate consideration and adjudication of claims to humanitarian protection under our refugee and asylum laws and policies.

These include:

- Creation of a Dangers of the Journey awareness campaign, to discourage parents from putting their children’s lives at risk by sending them on a dangerous journey to an illegal crossing of the U.S. border;
- Initiating an in-country refugee and parole processing program for certain children in El Salvador, Honduras, and Guatemala;
- President Obama’s assigning FEMA Administrator to coordinate the federal government’s response;
- Opening new processing centers, increasing DHS/CBP’s capacity to appropriately house children and adults following apprehension;
- Expanding efforts to prosecute criminal human smuggling organizations;
- Through bilateral diplomatic engagement in Central America, encouraging increased efforts to prosecute human trafficking offenses – including the forced criminal activity of children by gangs;
- Working with partner governments and civil society in Mexico and Central America, including through ongoing dialogue in the Regional Conference on Migration;
- Reassigning immigration judges and DHS attorneys to prioritize the cases of these recent entrants, including consideration of claims for asylum or other forms of protection;
- Providing legal services to unaccompanied children through a DOJ grant program, enrolling lawyers and paralegals in the justice AmeriCorps national service program to provide legal services to unaccompanied children;
- Reducing length of stay for unaccompanied children in HHS care and custody through streamlined release policy and procedures;
- Arranging for juvenile dockets in the immigration courts to help promote *pro bono* representation by allowing non-governmental organizations and private attorneys to have predictable scheduling and to represent multiple children without multiple hearing dates (every immigration court has now arranged for a juvenile docket); and
- Ensuring appropriate Legal Orientation Programs at DHS/ICE’s family residential facilities.

Finally, the United States takes very seriously any allegations of mistreatment and has launched numerous investigations. The DHS Inspector General issued reports following

unannounced inspections of various DHS/CBP holding facilities, and the ICE Family Residential Centers at Artesia, New Mexico and Karnes, Texas. DHS's Office for Civil Rights and Civil Liberties has also investigated numerous allegations regarding both DHS/CBP and DHS/ICE, including apprehension and custody of both unaccompanied children and adults traveling with children. On May 13, 2015, DHS/ICE announced changes in a number of its family detention practices as well as increased review and oversight.

The Commission may find more information on these changes at: <https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers>

REGIONAL OUTREACH:

The U.S. government has worked closely with the governments of El Salvador, Guatemala, and Honduras, each of which increased consular staffing in cities along the U.S. Southwest border to ensure provision of services to their citizens and to register any complaints. In December 2014, the United States also established an "in-country" refugee and parole processing program for certain children. The program allows parents from El Salvador, Guatemala, and Honduras who are lawfully present in the United States to request access to the U.S. Refugee Admissions Program for their children under the age of 21 who are still in one of these three countries. Children who are found ineligible for refugee admission, but are still at risk of harm, may be considered on a case-by-case basis for parole. Parole is a discretionary mechanism under U.S. law to allow someone to come to the United States for urgent humanitarian reasons or significant public benefit. The United States established this program to provide a safe, legal, and orderly alternative to the dangerous journey that some children are currently undertaking to join parents in the United States.

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4. Refugees in Other States

On July 9, 2015, the U.S. Department of State issued a statement condemning Thailand's forced deportation of over 100 ethnic Uighurs to China. The statement is available at <http://www.state.gov/r/pa/prs/ps/2015/07/244754.htm> and includes the following:

This action runs counter to Thailand's international obligations as well as its long-standing practice of providing safe haven to vulnerable persons. We remain deeply concerned about the protection of all asylum seekers and vulnerable migrants in Thailand, and we strongly urge the Government of Thailand, and other governments in countries where Uighurs have taken refuge, not to carry out further forced deportations of ethnic Uighurs.

We further urge Chinese authorities to uphold international norms and to ensure transparency, due process, and proper treatment of these individuals. We will continue to stress to all parties concerned the importance of respecting human rights and honoring their obligations under international law.

We have consistently urged Thai authorities at all levels to adhere to Thailand's international obligations under the Convention Against Torture, which mandates that countries refrain from refoulement. International humanitarian

organizations should also have unfettered access to them to ensure that their humanitarian and protection needs are met. We urge Thailand to allow those remaining ethnic Uighurs to depart voluntarily to a country of their choice.

Cross References

Evacuation of U.S. citizens in Yemen, **Chapter 2.A.2. Chapter 5.C.1.**

Lin v. United States (nationality of residents of Taiwan), **Chapter 5.C.3**

Diplomatic relations, **Chapter 9.A.**

Zivotovsky decision, **Chapter 9.C**

Airline discrimination against Israel citizen (Gatt case), **Chapter 11.A.4.**

Venezuela sanctions, **Chapter 16.A.8.b.**