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GOING BEYOND IRAP V. TRUMP: CHALLENGING "BAD FAITH" GOVERNMENTAL ACTIONS DENYING NON-CITIZENS ADMISSION INTO THE UNITED STATES

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The Fourth Circuit's decision in *International Refugee Assistance Project v. Trump* upholding the preliminary injunction against President Trump's travel ban, on the ground that it violated the Establishment Clause of the US Constitution, holds out hope for other similar challenges that have otherwise faced a high bar to overcome the Executive branch's unbridled discretion to keep out non-citizens of the United States.

In a lengthy majority opinion, Chief Judge Roger Gregory asked whether the Constitution "protects Plaintiffs' right to challenge an Executive Order that in the text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination."

Courts have continuously applied the "facially legitimate and bona fide" test of *Kliendienst v. Mandel* to challenges to individual visa denials. Although *Mandel* sets a high bar to plaintiffs, the Fourth Circuit's majority opinion emphasized that the government's action must both be facially legitimate as well as be bona fide. The government's action, such as with the executive order banning nationals from six Muslim majority countries in the name of national security may have been facially legitimate, but may not have been bona fide as the President used it as a cover to fulfill his promise to ban Muslims from the United States. This constituted bad faith, according to the majority opinion, and thus the EO was not bona fide. Where the good faith has "seriously been called into question," the court concluded it should be allowed to "look behind the stated reason for the challenged action." The court used the test in *Lemon v.*

Kurtzman to establish that the travel ban violated the Establishment Clause of the US Constitution by disfavoring Muslims. Relying on statements that President Trump made both during his campaign and after he became President, the travel ban was in effect a legal attempt to effectuate Trump's promised Muslim ban rather than advance national security.

The Fourth Circuit opinion broke new ground by challenging the long-held notion that the courts must always give deference to the government's national security justification. The following extract from the majority opinion is worth noting:

> The Government argues that we should simply defer to the executive and presume that the President's actions are lawful so long as he utters the magic words "national security." But our system of checks and balances established by the Framers makes clear that such unquestioning deference is not the way our democracy is to operate. Although the executive branch may have authority over national security affairs, *see Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)), it may only exercise that authority within the confines of the law, *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645–46, 654–55 (1952) (Jackson, J., concurring); and, of equal importance, it has always been the duty of the judiciary to declare "what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

To what extent can *IRAP v. Trump* be extended to other situations where a visa may be denied in bad faith and thus not meet the "facially legitimate and bona fide" test of *Mandel*? In *Kerry v. Din*, the Supreme Court upheld the visa refusal of the beneficiary of an I-130 petition filed by his US citizen spouse under the terrorism ground of inadmissibility pursuant to INA 212(a)(3)(b). According to the concurrence by Justice Kennedy, the beneficiary, an Afghan national, who once worked for the Taliban government in Afghanistan, received sufficient notice by being provided the section number of the INA under which he was found inadmissible, and thus the government met the "facially legitimate and bona fide test" of *Mandel*. However, Justice Kennedy did indeed emphasize, "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."

In *IRAP v. Trump*, the plaintiffs successfully showed bad faith by President Trump who violated the Establishment Clause of the US Constitution. What other sorts of bad faith may a plaintiff show to convince a court to look behind the "facially legitimate and bona fide" test? Perhaps, if the facts in *Kerry v. Din* showed that the beneficiary was unlawfully detained for hours in the US Consulate during his visa interview and forced to admit that he was involved in terrorist activities on condition of being released, even though he was not, that could arguably be tantamount to bad faith? In this hypothetical situation, the constitutional violation which gives rise to bad faith would be the violation of the beneficiary's due process rights rather than the violation of the Establishment Clause. The beneficiary, in this situation, could potentially cite to landmark cases such as *Zadvdas v. Davis* (finding that the power of the Executive is "subject to important constitutional limitations," holding that LPRs are entitled to due process rights, and that their indefinite detention is a violation of those rights), *Hamdi v. Rumsfeld* (noting that the President's Article II powers are subject to review, holding that citizens held as enemy combatants must be afforded due process rights, namely the meaningful opportunity to contest the factual basis for their detention), *Boumediene v. Bush*, (specifically noting that the political branches cannot "switch the Constitution on or off at will" and providing the right of habeas review to a non-citizen outside the US) and *INS v. Chadha* (noting that Courts are empowered to review whether or not "Congress has chosen a constitutionally permissible means of implementing" the "regulation of aliens.").

Finally, the plaintiff would also need to demonstrate standing in order to bring the claim. To establish Article III standing, a plaintiff must demonstrate "that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). In *IRAP v. Trump*, the government in an effort to object to standing to the plaintiffs asserted that in *Saavedra Bruno v. Albright*, a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise. However, the court noted that Saavedra also stands for the proposition that when cases are brought by U.S. citizens, or when statutory claims are combined with constitutional ones, judicial review is permitted.

In a fact pattern similar to *Kerry v. Din*, the I-130 petitioner, a US citizen, would

have standing to bring the action. What about an H-1B visa holder, with three months remaining on that visa, applies for a renewal of that visa at the US consulate? The consular officer, animated by the new rhetoric flowing from the administration that H-1B workers steal jobs of US workers, badgers the H-1B applicant, under threat of many years of imprisonment, to falsely admit she is not performing the duties indicated in the perfectly bona fide H-1B petition and revokes the existing visa as well as refuses to issue a new H-1B visa. Would the H-1B worker have standing to allege bad faith on the part of the consular officer? The H-1B plaintiff can potentially assert that she is residing in the US, and also enjoys "dual intent" under the H-1B visa. . If the H-1B holder has also been sponsored for a green card through the employer, this would further bolster her standing, as she had not just harbored an intent to reside permanently but has taken concrete steps to do so. Finally, the US employer can also file an action as the petitioner of the H-1B who will be affected if she is unable to resume employment in the US. Still, being overaggressive, coercive, and sloppy, even to an extent that would violate due process rights assuming the targets of one's over-aggressiveness had standing to assert such rights, may not necessarily imply bad faith, such as having a hidden agenda like Trump's travel ban. Nevertheless, the evolving jurisprudence in *IRAP v. Trump* does give other plaintiffs food for thought to blow a hole through the "facially legitimate and bona fide" wall set forth in *Mandel*.

The government may have maximum power to deny non-citizens admission into the US, but that power is not absolute. *IRAP v. Trump*, and many other successful challenges to Trump's travel ban, may provide a pathway for a plaintiff to seek judicial review of governmental actions that have been conducted in bad faith.