INA § 212(f): REVIEW OF EXECUTIVE AUTHORITY AT THE INTERSECTION OF IMMIGRATION, NATIONAL SECURITY, AND FOREIGN AFFAIRS

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I. INTRODUCTION

In September 2017, President Trump issued Proclamation No. 9645 ("Proclamation"), which imposed a range of entry restrictions on eight countries identified as having deficient information-sharing practices and presenting national security concerns.[1] Invoking his authority under 8 U.S.C. § 1182(f) ("INA § 212(f)"),[2] President Trump determined that certain restrictions were necessary to "'prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information'" and "'elicit improved identity-management and information-sharing protocols and practices from foreign governments'[.]"[3] The state of Hawaii, three individuals with foreign relations affected by the entry suspension, and the Muslim Association of Hawaii challenged the Proclamation as violating the Immigration and Nationality Act ("INA") and the Establishment Clause.[4] In upholding the Proclamation, the Supreme Court held that the Proclamation fell within the

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[1] Trump v. Hawaii, 138 S. Ct. 2392, 2399 (2018).

[2] Immigration and Nationality Act § 212, 8 U.S.C.A. § 1182 (West 2013); Immigration and Nationality Act § 212(f) ("Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.").

[3] *Trump*, 138 S. Ct. at 2399–400.

[4] *Id.* at 2417 ("Plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims."); *see also id.* ("Shortly after being elected, when asked whether violence in Europe had affected his plans to 'ban Muslim immigration,' the President replied, 'You know my plans. All along, I've been proven to be right.'").

president's delegated authority under the INA and withstood rational basis review.[5]

The *Trump v. Hawaii* decision illuminates a new uncertainty with which courts review executive action taken according to INA § 212(f) authority. While the Court spent much breath and ink describing the history and rationale for applying *Mandel*'s "facially legitimate and bona fide" test to limit judicial review of visa denials,[6] it nevertheless endeavored to "look behind the face of the Proclamation" to the extent of applying rational basis review and considered whether the entry policy was plausibly related to the government's stated objective to protect the country and improve vetting processes.[7] While Chief Justice Roberts defended the more constrained standard of review as appropriate for any constitutional claim concerning the entry of foreign nationals, national security, and foreign affairs, the dissent ardently objected to the limited review as "throw[ing] the Establishment Clause out the window."[8]

In the wake of *Trump v. Hawaii*, this paper seeks to forecast the future of the standard of review used for INA § 212(f) executive action. To do so, Part II first tries to identify what kind of authority or power Congress delegated to the president in INA § 212(f).[9] After identifying the scope and nature of the authority delegated in INA § 212(f), Part III discusses why *Mandel*'s "facially legitimate and bona fide" test should not apply to an executive order flowing from INA § 212(f) authority. Finally, Part IV uses Justice Jackson's Zones of Executive Power[10] as a starting framework and proposes that recent judicial attitudes signal a trend toward a more robust judicial review standard of executive action taken under INA § 212(f) authority.

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[5] *Id.* at 2423. Courts applying rational basis review seek to determine whether a law is "rationally related" to a "legitimate" government interest, whether real or hypothetical. *See generally* United States v. Carolene Products Co., 304 U.S. 144 (1938). The party bringing the challenge bears the heavy burden of showing the act is not rationally related to a legitimate government purpose. *See Trump*, 138 S. Ct. at 2420 ("Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny.").

[6] Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) ("[W]hen the Executive exercises this [delegated] power [to deny immigrant or nonimmigrant admission to the United States] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification [against the asserted constitutional interests of U.S. citizens]. . . .").

[7] *Trump*, 138 S. Ct. at 2420.

[8] *Id.* at 2420 n.5.

[9] For example, whether Congress is giving the executive some of its "plenary power to make rules for the admission of aliens . . ." Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 123 (1967). Or, whether Congress is giving some authorization of concurrent authority over matters of national security. *See generally* Abraham D. Sofaer, *Presidential Power and National Security*, 37 PRESIDENTIAL STUD. Q. 101 (2007) (arguing that the constitutional allocation of powers over national security to all the branches implies that the executive, legislative, and judicial branches enjoy concurrent implied power over national security).

[10] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

II. NATURE AND SCOPE OF AUTHORITY DELEGATED BY CONGRESS TO THE PRESIDENT UNDER INA § 212(f)

To discern the limits on executive authority under INA § 212(f), the power Congress delegates through the provision must first be identified.[11] INA § 212(f) was codified in 1952, and gives the president the authority to suspend or restrict the entry of any aliens or class of aliens "for such a period as he shall deem necessary," so long as the president finds that entry of such aliens or class of aliens into the United States "would be detrimental to the interests of the United States."[12] While the United States Department of State ("DOS") in its Foreign Affairs Manual ("FAM") offers some administrative guidance on INA § 212(f), courts have thus far not identified or defined clear limits on the president's INA § 212(f) authority.[13] Justice Ginsburg, writing for the D.C. Circuit, once explained that "[t]he President's sweeping proclamation power thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in [the old section 212]."[14] Similarly arguing that the power of INA § 212(f) is a catch-all provision in relation to a larger framework, the Ninth Circuit in *Mow Sun Wong v. Campbell* suggested that various statutory and constitutional provisions in combination were a sufficient source of authority for the president's actions concerning immigration.[15]

Under Ginsburg's view, INA § 212(f) is a stopgap measure which allows the president to supplement Congress's immigration authority in a way that is consistent with the other provisions of the INA. By limiting INA § 212(f) to the confines of already-existing immigration policy, Ginsburg's interpretation suggests that the power delegated by Congress under INA § 212(f) relates back to Congress's immigration authority alone.[16] According

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[11] This is because, borrowing from the reasoning in *A.L.A. Schechter Poultry v. United States*, "[t]he Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." 295 U.S. 495, 529 (1935). Although *Schechter*'s nondelegation doctrine is a dead ringer today, a changing court landscape may signal a new receptiveness to the *Schechter* rationale (discussed further in Part IV).

[12] Immigration and Nationality Act § 212(f), 8 U.S.C.A. § 1182(f) (West 2013).

[13] In the FAM, the DOS explains that a presidential proclamation issued under INA § 212(f) "typically grants the Secretary of State authority to identify individuals covered by the presidential proclamation and waive its application for foreign policy or other national interests" and instructs DOS officers to first ascertain whether an individual who may be covered by INA § 212(f) is inadmissible on other grounds. 9 FOREIGN AFFAIRS MANUAL 302.14-3(B)(1)(U) (2017).

[14] Abourezk v. Reagan, 785 F.2d 1043, 1049 n.2 (D.C. Cir 1986), *aff'd*, 484 U.S. 1 (1987).

[15] Mow Sun Wong v. Campbell, 626 F.2d 739, 743 (9th Cir. 1980) ("While we do not necessarily find any one of the foregoing [statutory and constitutional provisions] to be sufficient in and of itself, we do find the above statutory and constitutional provisions in combination to be a sufficient source of authority for the president's issuance of the executive order.").

[16] Since the Chinese Exclusion Cases in the late 1800s, courts generally regard immigration power to be held concurrently between Congress and the executive, with Congress possessing the power of prescribing the procedures concerning the admissibility of aliens and the executive having some

to *Mow Sun Wong*, however, the President's authority over immigration matters may also be supplemented by support from independent constitutional authority.[17] Indeed, while the *Trump v. Hawaii* Court discussed the INA § 212(f) textual authority argument the plaintiffs presented, the Court's conclusion upholding the Proclamation rested on the President's authority in the national security context.[18]

Even if INA § 212(f) was determined to delegate immigration authority, the *Mow Sun Wong*, *Encuentro*, and *Trump v. Hawaii* cases suggest that INA § 212(f) is superfluous to the president's authority in the foreign affairs and national security contexts.[19] While INA § 212(f) could be viewed as a delegation of Congress's immigration power, it could also be interpreted as signaling for the executive to invoke his independent national security authority where there is some overlap with the immigration sector. Because the president may defer to his independent constitutional authority concerning foreign affairs and national security, the issue the *Trump v. Hawaii* Court has left open is whether INA § 212(f) actually *gives* the executive power he would not have otherwise. Where the president can make a tenuous link between INA § 212(f)'s "interests of the United States" and "national security," the president can shift

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independent constitutional authority where matters of foreign affairs and national security are concerned. *See* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution . . . cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties."); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established[.]"); *see also* Harisiades v. Shaughnessy, 342 U.S. 580, 597–98 (1952) (Frankfurter, J., concurring) ("The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification . . . have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control."); *see also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (upholding INA § 212(f) against a challenge that it constituted an illegal delegation of legislative power); *United States ex rel. Knauff*, 338 U.S. at 543 ("[T]here is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.").

[17] This is a view also expressed in *Encuentro Del Canto Popular v. Christopher*. 930 F. Supp. 1360, 1364 (N.D. Cal. 1996) ("[T]he excluded members of Grupo Mezcla were excluded under Proclamation 5377, which President Reagan issued based both on his constitutionally-granted authority over foreign affairs and on his authority over immigration granted by Congress in 8 U.S.C. § 1182(f). The excluded members, in other words, were denied visas based on the *President*'s authority under the constitution and 8 U.S.C. § 1182(f). . . .").

[18] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018). *See also id.* at 2429 (Breyer, J., dissenting) ("If, however, its sole *ratio decidendi* was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it?").

[19] Even where courts do engage in an analysis of the textual authority of INA § 212(f), courts will likely find the president's actions easily fit within the broad parameters of "national interest," "for such a period as he shall deem necessary," and "entry." *See Trump*, 138 S. Ct. at 2410 ("In short, the language of § 1182(f) is clear, and the Proclamation does not exceed any textual limit on the President's authority.").

the court's analysis from statutory authority to constitutional executive authority, rendering INA § 212(f) toothless and unnecessary.[20] Because INA § 212(f) ultimately seems like a mixed bag—one that can be related back to immigration, national security, and foreign affairs—it is no surprise that courts have had difficulty articulating any one clear and consistent standard of review.

III. *MANDEL*'S "FACIALLY LEGITIMATE AND BONA FIDE" TEST IS NOT SUITABLE FOR EVALUATING EXECUTIVE ORDERS PROMULGATED UNDER INA § 212(f) AUTHORITY

The rule announced by *Mandel* states that, "when the Executive exercises this power [to exclude aliens] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [constitutional rights and] interests of those who [challenge the order]."[21] At issue in *Mandel* was the denial of a nonimmigrant visa to a Belgian journalist and Marxian theoretician, Mandel, whom the American plaintiff-appellees had invited to participate in academic conferences.[22] Mandel was determined ineligible for admission under INA § 212, barring those who advocate or publish "the economic, international, and governmental doctrines of world communism," and the Attorney General declined to waive ineligibility as he had the power to do under INA § 212(d).[23] Plaintiffs (persons who invited Mandel to speak at universities and other forums or who expected to participate in colloquia with him) claimed that INA § 212(a)(28) prevented them from hearing and meeting Mandel in person for discussions, contravening the First Amendment.[24] Rather than limiting the exercise of INA § 212(a)(28)(D) to the bounds set by other constitutional rights, the court's "facially legitimate and bona fide" test limited the courts analysis to an inquiry as to whether the Attorney General articulated a good-faith reason that is linked to the criteria for admissibility determined by Congress.[25]

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[20] As other authors have pointed out, INA § 212(f) is not the only INA provision authorizing an executive to restrict aliens' entry into the United States. *See* KATE M. MANUEL, CONG. RESEARCH SERV., R44743, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF 10 (2017), https://fas.org/sgp/crs/homesec/R44743.pdf [https://perma.cc/AFA6-94DW] (referring to INA § 214(a)(1), which prescribes that the "admission of any alien to the United States as a nonimmigrant shall be for such time and under such conditions as [the executive] may by regulations prescribe"). *Id.* at 11 (quoting INA § 215(a)(1) which provides that "it shall be unlawful for any alien" to enter or depart the United States "except under such reasonable rules, regulations, and orders . . . as the President may prescribe"). *Id.* (noting that President Carter cited INA § 215(a) rather than INA § 212(f)—when authorizing the revocation of immigrant and nonimmigrant visas issued to Iranian citizens during the Iran Hostage Crisis).

[21] Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

[22] *Id.* at 753.

[23] *Id.*

[24] *Id.* at 760.

[25] The *Mandel* court held that the Attorney General satisfied this standard by citing his reason for denying Mandel's waiver as Mandel's failure to conform to his itinerary and limit his activities to the stated purposes of his trip during earlier nonimmigrant visits to the United States. *Id.* at 758.

Since the *Mandel* decision, federal courts have limited its use in the context of challenges to INA § 212(f) to policy rationale or discreet issue background noise.[26] The most robust discussion of the "facially legitimate and bona fide" test was not until 1996, in *Encuentro Del Campo Popular v. Christopher*, where the issue was the denial of visas to members of the Cuban musical group, Grupo Mezcla, according to Presidential Proclamation 5377—authorized in part under INA § 212(f) authority—which suspended entry of classes of Cuban nationals who were considered employees of the Government of Cuba or the Communist Party of Cuba.[27] Plaintiffs brought up *Mandel* to argue that the exclusion decision was improper because it was not supported by a "facially legitimate and bona fide reason."[28] Despite plaintiffs' urging the court to apply the *Mandel* standard, the Court was reluctant to do so in the context of INA § 212(f) for lack of any clearly stated standards on which to evaluate the Secretary of State's visa denial decision.[29] The *Encuentro* Court interpreted *Mandel* as applying only where Congress had delegated immigration authority to the executive through an INA provision that conditions the power through clear and plain language.[30] Because of the extremely broad grant of discretion to the president in INA § 212(f) and the president's "own inherent powers in this area," the *Encuentro* Court found that *Mandel*'s "facially legitimate and bona fide" analysis was not the applicable test to review decisions by the executive under INA § 212(f).[31]

Despite a history of courts' reluctance to apply *Mandel* to INA § 212(f) issues, and *Encuentro*'s affirmatively decisive conclusion that it was an inappropriate standard, the Court in *Trump v. Hawaii* nevertheless resurrected the issue of figuring out what role *Mandel* plays in the INA § 212(f) context. Chief Justice Roberts acknowledged the dissent's suggestion that *Mandel* has no bearing in the case[32] but proceeded to comment on how other lower courts have applied *Mandel* to broad executive action.[33] Further, Roberts noted that "*Mandel's* narrow standard of review has particular force" in admission and

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[26] *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 201 (1993) (Blackmun, J., dissenting) (arguing that Executive Order No. 12,807—suspending the entry of all undocumented aliens in the United States by the high seas—was mentioned in *Mandel* only to affirm Congress's plenary power over immigration matters); *see also* Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 800 (D.C. Cir. 1987) (considering the validity of an earlier version of the same order, issued by President Reagan, the court considered *Mandel* for the proposition that Article III standing could be satisfied where plaintiffs allege infringed associational rights).

[27] Encuentro Del Canto Popular v. Christopher, 930 F. Supp. 1360, 1362 (N.D. Cal. 1996).

[28] *Id.* at 1368.

[29] *Id.* at 1374.

[30] *Id.* at 1371–72; *see, e.g.*, Abourezk v. Reagan, 785 F.2d 1043, 1047–48 (D.C. Cir. 1986) (using the text of INA § 212(a)(27) itself as the standard against which to judge the challenged executive action for legality).

[31] *Encuentro*, 930 F. Supp. at 1372.

[32] Justice Sotomayor uses similar reasons to dismiss *Mandel* as the *Encuentro* court did. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2440 n.5 (2018) (Sotomayor, J., dissenting) ("*Mandel* and *Din* are readily distinguishable from this case . . . each involved a constitutional challenge to an Executive Branch decision to exclude a single foreign national under a specific statutory ground of inadmissibility.").

[33] *Id.* at 2419.

immigration cases that overlap with "the area of national security."[34] Roberts concluded by announcing that the Court should favor the general policy that any constitutional framework for limiting the president's flexibility in responding to changing world conditions should be "'adopted only with the greatest caution,'"[35] and that the Court's "inquiry into matters of entry and national security is highly constrained."[36] Accordingly, even though application of *Mandel* is consistent with the policy of constrained judicial review in this context and its application *would* put an end to the Court's review, Roberts nevertheless assumed to look behind the Proclamation's face and leave the issue of *Mandel*'s purpose to another day.[37]

Roberts's handling of *Mandel* leaves courts with the sticky issue of figuring out just what to do with *Mandel* in relation to INA § 212(f), but Roberts's own grappling with the problem illuminates just why *Mandel* is an unhelpful standard. INA § 212(f) is a unique provision within the rest of the INA's statutory scheme. While INA § 212(f) purports to constrain the president's decision by its stated parameters, broad terms, such as "interests of the United States" and "necessity," impose no meaningful nor concrete limit on the president's discretion. Because INA § 212(f) does not necessarily force a president to relate a decision back to more clear standards in other provisions of the INA (other than to show they are not in direct conflict), INA § 212(f) easily lends itself to the president invoking his own reasons relating to national security and foreign affairs, which triggers the courts' extra cautious and constrained methods of review. At the intersection of INA § 212(f) and national security, *Mandel* is unhelpful because where it would ask whether a decision was facially legitimate, a president satisfies that standard by arguing that national security is within the "interests of the United States." Where *Mandel* would ask whether a decision was bona fide, the Court stops itself short of further inquiry.[38]

IV. WHAT STANDARD SHOULD COURTS APPLY IN REVIEWING INA § 212(f)?

Looking forward, courts should identify a standard that accounts for and balances the broader policies Congress sets forth in the rest of the INA framework, the executive's power over national security and foreign affairs, and a meaningful application of constitutional rights limitations. This kind of

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[34] *Id.* (citing Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring)).
[35] *Id*. at 2419–20 (quoting Mathews v. Diaz, 426 U.S. 67, 81–82 (1976)).
[36] *Id*. (citing *Mathews*, 426 U.S. at 81–82).
[37] *Id.* at 2420. Roberts cryptically suggests that the government's position at oral argument, describing *Mandel* as "the starting point," might be how the rule develops going forward. *See id.*
[38] Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018) ("[W]e cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.' . . . the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving 'sensitive and weighty interests of national security and foreign affairs.'"); *id.* (citing Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)); *see also* Holder v. Humanitarian Law Project, 561 U.S. 1, 33–34 (2010).

analysis could be multi-step, addressing each consideration in turn. To order the steps according to their primacy, it is helpful to consider them under Justice Jackson's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, which sets up a framework for evaluating the strength of executive power.[39]

In *Youngstown*, concerning whether the president had exercised valid authority delegated by Congress, Justice Jackson in his concurrence proposed three possible categories to evaluate a president's exercise of power.[40] In zone one, when the president acts pursuant to an expressed or implied authorization of Congress, his authority is at its maximum—it includes all that he possesses in his own right and all that Congress can delegate.[41] In zone two (the "zone of twilight"), the president acts in the absence of either a congressional grant or denial of authority, and must only rely on his own independent powers. But in the zone of twilight, there is also Congress's concurrent authority, in which Congress's quiescence, inertia, or indifference invites independent presidential responsibility.[42] Finally, in zone three, the president's power is at its "lowest ebb" when he takes measures incompatible with the expressed or implied will of Congress, and can only rely upon his own constitutional powers minus any constitutional powers Congress has over the matter.[43] Jackson's Zones framework is helpful as a preliminary matter to determine first how strong a president's power ought to be when operating under INA § 212(f).

The Court in *Jean v. Nelson* helps us initially orient ourselves in Justice Jackson's scheme in describing the character of the president's power in the immigration context.[44] Possessing concurrent authority, Congress may exercise its implied powers in the immigration field through its legislative powers, while the executive has two sources of authority in the area of immigration: (1) power delegated by Congress through statutes, such as the INA, and (2) its inherent power, arising out of the executive's plenary authority over foreign relations.[45] Although the comprehensive character of the INA restricts the area of potential executive freedom on action, the *Jean* court explained that courts have tended to view the president's inherent powers as justification for permitting Congress to make remarkable broad delegations of its authority in immigration without raising delegation concerns.[46]

With *Youngstown* and *Jean*'s frameworks in mind, we can start building a test. In Step one, the easy part is to continue doing what courts have already been doing—determine whether an act under INA § 212(f) is inconsistent with any other statutory provision in the INA.[47] Consistent with Justice Ginsburg's

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[39] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).
[40] *Id.*
[41] *Id.* at 635–36.
[42] *Id.* at 637.
[43] *Id.* at 637–38.
[44] Jean v. Nelson, 727 F.2d 957, 965 (11th Cir. 1984).
[45] *Id.* (citing United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950)).
[46] *Id.*
[47] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2414 (2018) (considering whether the Proclamation violated INA § 202(a)(1)(A), which relates to the issuance of immigrant visas).

view discussed above in Part II, INA § 212(f) allows the executive to address distinct classes that do not quite fit in other provisions of the INA, but should also align with the rest of the INA's policies. If the president's proclamation is incompatible with another provision in the INA, he is operating in Jackson's zone three, where his power is at its lowest and will only be supported by the executive's own independent authority. Under *Jean*, a finding of incompatibility would be dispositive, and no other weighing of the executive's other independent powers (at least where he is invoking INA § 212(f) authority to begin with), would be necessary.[48] If the proclamation survives Step one (i.e., is found to be at least not incompatible with any other INA provision), the court moves on to Step two.

Because INA § 212(f) is about excluding aliens either not already admitted to the United States or seeking readmission (i.e., foreign nationals with no preexisting formal immigration ties to the United States), the provision inherently invokes the executive's authority regarding foreign affairs or national security.[49] Accordingly, Step two should employ a presumption that the executive is acting not only according to his immigration authority expressly delegated by Congress, but he is also invoking his own independent powers over foreign affairs and national security. Under Jackson's framework, this puts the executive in zone one, the highest power threshold, because it includes all the power that Congress can give as well as any power he already possesses.

However, because the problem noted with *Mandel* is that it excludes the analysis of other constitutional limits, Jackson's Zones framework should be modified slightly for our purposes for similar reasons. Because putting the executive in zone one has the same preclusive effect as *Mandel*, Step two should instead be a balancing system similar to Jackson's zone two—the zone of twilight—in which the "test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[50] Accordingly, while past courts have regarded national security in the abstract, as requiring the greatest caution and requiring the court to avoid methods of collecting evidence that would inhibit the flexibility of executive action,[51] a meaningful test of this authority would also recognize that, "'like

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[48] Chief Justice Roberts seems receptive to *Jean v. Nelson*'s take. *See id.* at 2410–11 ("The President, they say, may supplement the INA, but he cannot supplant it.").

[49] Historically, the bases for exclusion in past proclamations seem to oscillate between exclusions on the basis of the United States' official foreign relations stance or national security. *See* Proclamation 6925, 61 Fed. Reg. 52,233 (1996) (Clinton, suspending the entry into the United States, as immigrants or nonimmigrants, persons who "formulate, implement, or benefit from policies that impede Burma's transition to democracy" and their immediate family members); *see also* Proclamation 8158, 72 Fed. Reg. 36,585 (2007) (Bush, suspending the entry into the United States, as immigrants or nonimmigrants, of persons responsible for policies or actions that threaten Lebanon's sovereignty and democracy); *see also* Exec. Order No. 13,608, 77 Fed. Reg. 26,409 (2012) (Obama, suspending the entry into the United States as immigrants or nonimmigrants, of aliens who are determined to have engaged in certain conduct as to Iran and Syria—for example, facilitating deceptive transactions for or on behalf of any person subject to U.S. sanctions concerning Iran and Syria).

[50] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[51] *Trump*, 138 S. Ct. at 2419–20.

every other government power, [it] must be exercised in subordination to the applicable provisions of the Constitution[.]'"[52]

But what should such a balance look like? In *Trump v. Hawaii*, the Court applied rational basis review, which considered whether the entry policy is plausibly related to the government's stated objective to protect the country and improve vetting processes.[53] Although the *Trump v. Hawaii* Court considered plaintiffs' extrinsic evidence (such as Trump's campaign trail statements implying Muslim animus[54]), the policy nevertheless was upheld as being reasonably understood to result from a justification independent of unconstitutional grounds.[55] Contrast this approach with Justice Douglas's rights-first proposal in his *Mandel* dissenting opinion, where he proposes that, "as a matter of statutory construction . . . Congress never undertook to entrust the Attorney General with the discretion to pick and choose among the ideological offerings which alien lecturers tender from our platforms," and therefore the Attorney General's power to constrain First Amendment rights could not be inferred.[56] In similar fashion, Justice Marshall (also dissenting in *Mandel*), proposed that "all government power—even the war power, the power to maintain national security, or the power to conduct foreign affairs—is limited by the Bill of Rights.[57]

Step two of the analysis might therefore begin with Justice Douglas and Justice Marshall's rights-first approach, in which the court takes seriously the constitutional claims of classes of plaintiffs challenging an INA § 212(f) proclamation. For example, Justice Sotomayor notes that laws "involving discrimination on the basis of religion . . . are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause."[58] This would give claimants the opportunity to marshal the facts (i.e., Jackson's zone two "events and contemporary imponderables") to meaningfully test the extent of the executive's national security and foreign affairs powers. However, sensitive to the delicate issues

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[52] Encuentro Del Canto Popular v. Christopher, 930 F. Supp. 1360, 1365 (N.D. Cal. 1996) (quoting United States v. Curtiss-Wright Corp., 299 U.S. 304, 319–20 (1936)).

[53] *Trump*, 138 S. Ct. at 2420 (citing U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

[54] *Id.* at 2417 ("[W]hile a candidate on the campaign trail, the President published a 'Statement of Preventing Muslim Immigration' that called for a 'total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.' . . . Then-candidate Trump also stated that 'Islam hates us' and asserted that the United States was 'having problems with Muslims coming into the country.' . . . Shortly after being elected, when asked whether violence in Europe had affected his plans to 'ban Muslim immigration,' the President replied, 'You know my plans. All along, I've been proven to be right.'").

[55] *Id.* at 2423.

[56] Kleindienst v. Mandel, 408 U.S. 753, 770–74 (1972) (Douglas, J., dissenting).

[57] *Id.* at 782–83 (Marshall, J., dissenting) ("When individual freedoms of Americans are at stake, we do not blindly defer to broad claims of the Legislative Branch or Executive Branch, but rather we consider those claims in light of the individual freedoms. This should be our approach in the present case, even though the Government urges that the question of admitting aliens may involve foreign relations and national defense policies.").

[58] *Trump*, 138 S. Ct. at 2441 (2018) (Sotomayor, J., dissenting) (citing Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1266 (10th Cir. 2008)).

concerning national security and the way in which judicial supervision and fact-finding could actually inhibit the "'flexibility' of the President to 'respond to changing world conditions'"[59], the level of scrutiny should be adjusted to shift the evidentiary burden to the plaintiff. For example, where a constitutional right invokes strict scrutiny, the government satisfies the prong for a compelling governmental interest by citing national security, but the plaintiff challenging the proclamation may bear the burden of demonstrating that it is not narrowly tailored in furtherance of that interest. Likewise, where the test is intermediate scrutiny, the plaintiff could bear the burden of demonstrating that the proclamation is not substantially related to the government's important interest.

Ultimately, the test for assessing INA § 212(f) power proposed by this paper is roughly a two-step process, with sub-steps included in the second part. First, the court determines whether the proclamation is incompatible with any other provision in the INA. If so, plaintiffs challenging the order should prevail. If not, the court proceeds to Step two and presumes that the authority exercised rests in part on the executive's authority in national security or foreign affairs. With the presumption in mind, the court nevertheless employs a rights-first analysis, permitting plaintiffs to prove their constitutional rights claim according to the appropriate level of scrutiny, with the additional burden that the proclamation is somehow not sufficiently related to obtaining a national security or foreign relations objective.

Whether or not this is the best test to apply to INA § 212(f), there is a present need to formulate *some* test that resolves the uncertainty the Court left us in *Trump v. Hawaii*. This particular gap, when coupled with the argument posed by some legal scholars that Trump's presidency has ushered in a new era of increased litigation over executive orders and proclamations, makes it likely that executive action taken under INA § 212(f) will soon and repeatedly be the subject of litigation.[60] By formulating a clear framework now, instead of leaving it up to future debate in the context of the facts of a particular controversy, judges and administrators acting at the direction of executive orders can proceed with certainty. Furthermore, as illustrated by the *Trump v. Hawaii* case, executive action under INA § 212(f) may force judges to balance the interests of national security and foreign affairs with constitutional individual liberties. Without a working model, courts must awkwardly fashion solutions in an *ad hoc* manner.

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[59] *Id.* at 2419–20 (citing Mathews v. Diaz, 426 U.S. 67, 81–82 (1976)).

[60] *See* Matt Viser, *Trump Has Been Sued 134 Times in Federal Court Since Inauguration*, BOS. GLOBE (May 5, 2017), https://www3.bostonglobe.com/news/politics/2017/05/05/trump-has-been-sued-times-federal-court-since-inaugurationday/E4AqZBYaKYHtzwfQ3k9hdM/story.html?s_campaign=bostonglobe%3Asocialflow%3Atwitter&arc404=true [https://perma.cc/W98F-6VS8] (asserting that, approximately three months into his term, "Trump has been sued 134 times in federal court . . . nearly three times the number of his three predecessors in their early months combined"); *see also* Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1790–91 (2019) (arguing that, in light of the uptick in litigation over Trump's executive orders and proclamations, "Trump's presidency appears to have ushered in this era, [and] there is little reason to think this trend will reverse itself once he leaves office. Rather, the long-term trends motivating these legal developments—including those relating to the increased forcefulness of presidential control over administrative action—are well entrenched").

Because national security and foreign affairs—implicating the safety of U.S. citizens—and fundamental constitutional liberties are both extremely weighty interests, a clear test is necessary to ensure that the best possible balance is struck in any case.

Considering the drawbacks of instituting this paper's two-part test as the solution to the problems raised by *Trump v. Hawaii*, at least Step one of the test should be fairly uncontroversial because Step one retains the current analysis and determines whether an act under INA § 212(f) is inconsistent with any other statutory provision in the INA.[61]

Step two on the other hand, allowing the court to immediately apply the appropriate level of scrutiny according to the rights and liberties implicated by an INA § 212(f) action, may be far more worrisome. First, Step two bucks the current precedent that favors very constrained judicial review of matters involving national security.[62] This constraint makes sense because the judicial branch is not in as good a position as the president to analyze matters of national security and the president ought to be free to respond to changing threats as they come, without having to litigate every one of those sensitive decisions. With the safety of U.S. citizens on the line, the courts should not be second-guessing the executive's national security determinations. Furthermore, it could be argued that *Mandel* is the right test to apply to INA § 212(f) executive action in the context of national security and foreign affairs because it guides courts to the correct level of scrutiny—rational basis review.[63] In response to the inquiry as to whether the action is "facially legitimate" under *Mandel* or legitimate for purposes of rational basis review, the president can cite national security. In response to the inquiry as to whether the act is "*bona fide*" under *Mandel* or rationally related to the legitimate purpose under rational basis review, the president satisfies both standards by citing some link between the order and the stated national security interest.[64] Departing from a *Mandel* analysis therefore

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[61] *See Trump*, 138 S. Ct. at 2413–14 (considering whether the Proclamation violated INA § 202(a)(1)(A) relating to the issuance of immigrant visas).

[62] *See id.* at 2419 ("For another, 'when it comes to collecting evidence and drawing inferences' on questions of national security, 'the lack of competence on the part of the courts is marked.'" (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2010))); *see also id.* at 2419–20 ("The upshot of our cases in this context is clear: 'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained." (quoting Mathews v. Diaz, 426 U.S. 67, 81–82 (1976))).

[63] *See id.* at 2420 n.5 ("The dissent finds 'perplexing' the application of rational basis review in this context[.] . . . But as the numerous precedents cited in this section make clear, such a circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals.").

[64] *See id.* at 2422–23 (concluding that the Proclamation withstood rational basis review); *id.* at 2422–23 ("Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. . . . Second, for those countries that remain subject to entry restrictions,

means departing from longstanding precedent favoring rational basis review in the national security context.

Considering the objections to Step two's formula, readers should keep in mind the scope of this paper. This paper does not propose to upend the entire jurisprudence of national security analysis. This paper is much narrower—it seeks to provide a test that is appropriate to review INA § 212(f) executive action alone. Consistent with *Encuentro*, this paper is concerned that INA § 212(f)—a broad and ill-defined signal of power to the executive in the immigration context—is not suitable for the particularity of *Mandel*'s analysis.[65]

While ruling out *Mandel* as the proper analysis, the purpose of the balancing mechanism in Step two is to prevent INA § 212(f) from being used as a bolstering mechanism for the president to amplify his inherent constitutional powers with delegated congressional power in order to exclude broad categories of people without inquiry into individual rights violations. Under Ginsburg's D.C. Circuit opinion, discussed *supra*, INA § 212(f) is a stopgap provision that should be consistent with the provisions of the rest of the INA. Therefore, Step two prevents the president from artificially inflating his own power through a provision which arguably does not delegate any significant power to begin with.[66] Therefore, Step two opens the door to a more searching inquiry of the challenger's claim to prevent executive power bolstering and to narrowly incorporate the views of Justice Marshall and Justice Sotomayor, discussed *supra*, that individual rights analyses should not be summarily disposed of when national security and foreign affairs justifications are invoked. Furthermore, other legal scholars, such as Lisa Manheim and Katherine A. Watts, advocate for shying away from rational basis review of presidential orders issued pursuant to some kind of statutory authorization because they are enacted without formal legislative procedure.[67] However, taking seriously the need to proceed cautiously in matters of national security, Step two's narrow application to INA § 212(f) does not preclude the president's ability to independently invoke his national security and foreign affairs powers and utilize other precedent to support applying rational basis review.[68]

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the Proclamation includes significant exceptions for various categories of foreign nationals. . . . Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. . . . Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review.").

[65] Encuentro Del Canto Popular v. Christopher, 930 F. Supp. 1360 (N.D. Cal. 1996).

[66] *See supra* text accompanying note 19 (raising doubts as to whether INA § 212(f) actually gives the president power he would not otherwise possess).

[67] *See* Manheim & Watts, *supra* note 60, at 1812 (discussing how rational basis review is the primary standard to evaluate congressional legislation, but noting that Congress must also comply with cumbersome bicameralism—approval by both the House of Representatives and the Senate—and presentment—the opportunity for the president to exercise his veto power—whereas presidential proclamations do not need to comply with the same constitutionally-mandated procedures).

[68] *See Encuentro*, 930 F. Supp. at 1364–65 (supporting the view that the executive may exercise his constitutionally-granted authority over foreign affairs to deny admittance to the United States and that, when Congress statutorily grants the president the same exclusionary authority under its immigration laws, it merely strengthens the legitimacy of the president's actions).

The final point this paper proposes is that changing attitudes amongst some justices indicate that modern courts might be receptive to more involved judicial review of statutes, like INA § 212(f), that intersect with the executive's independent authority in national security and foreign affairs. Justice Gorsuch, writing for the Tenth Circuit in *Gutierrez-Brizuela v. Lynch*, offered a scathing review of the current state of administrative autonomy due to doctrines of non-reviewability, like *Chevron* and *Brand X*.[69] There, Gorsuch bemoaned these judicial restraint doctrines as preventing courts from fulfilling their duty to interpret law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them.[70] In the immigration context in particular, Justice Wardlaw, writing for the Ninth Circuit, expressed that courts' willingness to take a more aggressive stance on review, where appropriate, promotes accountability within the executive branch.[71] Therefore, even if the standard of review proposed in this paper is not a complete nor readily applicable framework for courts to employ, it may nevertheless serve as the general direction that courts, recently invoking their duty to "say what the law is," might be looking to as they continue to grapple with reviewing INA § 212(f).[72]

V. CONCLUSION

While *Trump v. Hawaii* created a lot of uncertainty regarding the role *Mandel* has to play in the context of INA § 212(f) challenges, *Trump v. Hawaii* also created an opportunity in the void for courts to reassert a more robust review of executive action in the immigration sector. Accordingly, this paper seeks to propose a kind of framework to match changing court attitudes about judicial review of executive action, and in particular review of INA § 212(f). Although INA § 212(f)'s scope has not been clearly articulated, it should be treated as Congress signaling for the executive to invoke his authority at the intersection of immigration, national security, and foreign affairs. Because of the breadth of INA § 212(f) authority, *Mandel*'s "facially legitimate and bona fide test" should be discarded in favor of a rights-first analysis that meaningfully balances plaintiffs' constitutional injury against national security interests.

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[69] *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

[70] *Id.* at 1153.

[71] Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 498 (9th Cir. 2018) ("'[A]ccountability' is one of the two 'principal values that all modes of administration must attempt to further.'" (quoting Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251–52 (2001)); *see also Regents of the Univ. of Cal.*, 908 F.3d at 498 ("'[U]nder our system of government, the primary check against prosecutorial abuse is a political one.' . . . [W]hen prosecutorial functions are exercised in a manner that is within the law but is nevertheless repugnant to the sensibilities of the people, 'the unfairness will come home to roost in the Oval Office.'" (quoting Morrison v. Olson, 487 U.S. 654, 728–29 (1988))).

[72] Marbury v. Madison, 5 U.S. 137, 177 (1803).