

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

Brian P. Carr,
Rueangrong Carr, and
Buakhao Von Kramer
Plaintiffs
versus
United States,
US Department of Justice,
USPS, USPS OIG, USPS BoG,
US CIGIE, Department of State,
Department of State OIG,
USCIS, DHS OIG, and SSA
Defendants

Civil No. 3-23CV2875 - S

Verified¹ Brief of Mr. Carr
The Doctrine of Consular Non
Reviewability is
Based on a False Premise

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¹ The Verification of this document is at the end of this document.

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Introduction

Foreign National 'Aliens' Are Actually Human Beings and People

This brief opposes the Doctrine of Consular Non Reviewability (DoCNR) from many directions but primarily centers on the fact that it is based on a false premise. The authors of the constitution chose to use the word 'person' for due process rights in the Fifth Amendment rather than the new term 'citizen' which was created to provide an alternative to the traditional term of 'British subject'. 'British subject' no longer applied once we were independent of Britain. However, in trying to 'form a more perfect union' the authors had diverse views and compromised with many apparent contradictions in the Constitution. As these contradictions were resolved over the last 200 years it has become apparent that foreign nationals in other countries are not just 'aliens' but also people entitled to respect, consideration, and due process the same as any other human being.

DoCNR Created By Appellate Courts, No Constitutional Basis

The DoCNR denies federal courts from reviewing any visa denial (a consular activity). In [Kleindienst v. Mandel, 408 U.S. 753 \(1972\)](#) it is explained that the

appellate courts created the DoCNR without any constitutional authority. In Mandel DoCNR was summarized as:

Congress's plenary power to exclude aliens or prescribe the conditions for their entry into this country. Congress has ... delegated conditional exercise of this power to the Executive Branch. When, as in this case, the Attorney General decides for a legitimate and bona fide reason not to waive the statutory exclusion of an alien, courts will not look behind his decision.

The flaw is the premise that Congress has a plenary power (or absolute power) to exclude aliens. The constitution confers no such power on Congress or any other part of the U.S. government. While Congress certainly can deprive aliens of the fundamental liberty to travel freely (i.e. Congress can exclude aliens) it can only do so through 'due process of law'. This requires Congress to pass lawful statutes empowering the executive branch to exclude aliens within the requirements of 'due process of law'. This implicitly authorizes some form of judicial review of every decision to exclude an alien.

DoCNR Denies That Aliens are People, Human Beings

To restate this, the DoCNR completely ignores the Fifth Amendment requirement for the federal government that:

'No person shall be ... deprived of life, liberty, or property, without due process of law'.

When the constitution was enacted this guarantee basically only applied to white, adult, male, Christian, property owners. Of course that was a rather lengthy and unwieldy description. Fortunately, there was a much more concise description which was citizen, a term also used in the constitution selectively.

However, when writing the Fifth Amendment it was decided to use 'No person' rather than 'No citizen'. This was largely aspirational as 'Due Process' was not applied to non-whites, native Americans, women, slaves, indentured servants, non Christians or the destitute. Over the last two hundred years due process and other fundamental rights have been extended to include most people under most circumstances. The DoCNR is a throw back to the Chinese Exclusion Act of 1882 where aliens like the Chinese were not considered people entitled to 'Due Process' or other constitutional rights.

Recent Court Decisions Have Suggested Failings of DoCNR

DoCNR is fundamentally flawed as Congress never had any absolute power to exclude or deport aliens. This exposure was conceded in [Mandel](#) where the 'fundamental' rights of a citizen are impacted by the improper treatment of an alien, e.g. the due process rights of an alien are reviewable if it can be shown a citizen is impacted.

Doctrine of Consular Non Reviewability Assumes Aliens are Not People

Due Process to All Persons

The fundamental flaw of DoCNR is the premise that Congress has a plenary power (or absolute power) to exclude aliens. The constitution confers no such power on Congress or any other part of the U.S. government. While Congress certainly can deprive aliens of the fundamental liberty of traveling freely (i.e. Congress can exclude aliens) it can only do so through 'due process of law'. This requires Congress to pass lawful statutes empowering the executive branch to exclude aliens within the requirements of due process and provide a fair hearing. In the first section of the Amended Complaint (ECF 29) as well as the predecessor (ECF 3) in the first section of the Introduction ('Due Process Requirements') there is a

discussion due process and its many facets one of which is the right of appeal which implicitly requires the option of some form of judicial review of every decision to exclude an alien.

To restate this, the DoCNR completely ignores the constitutional requirement to the federal government that:

'**No person** shall be ... deprived of life, liberty, or property, without due process of law'.²

Person and Citizen Are Not Synonyms

The authors of the constitution used both 'person' and 'citizen'³ including both in Article I, Section 2, which includes:

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a **Citizen** of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of **free Persons**, including those bound to Service for a Term of Years, and **excluding Indians** not taxed, three fifths of all **other Persons**.⁴

Clearly the framers were careful in their choice of 'person' or 'citizen'.

² Bold added by Plaintiffs.

³ Indeed the word citizen itself was largely a creation of the American Revolution as a replacement for 'British subject (of the Crown)'. There had been citizens and citizen armies in Greek and Roman times, but the English language did not have any common term for citizens. As the Roman empire broke up, all lands and people on them, both serfs and freemen, were the property of different kings (sovereigns) in Europe. Ordinary people were more similar to livestock then to the citizens of early Roman times.

⁴ Bold added by Plaintiffs

Americans Had Suffered Grievously During the American Revolution

The framers of the constitution had succeeded in the American Revolution but with great losses of all kinds. The American Revolution was particularly devastating because a significant portion of the population remained loyal to the king ('Tories') and caused significant suffering for the rebels as well as suffering themselves from the rebels according to the tides of the war.

Further, this was the first of 'modern' citizen armies and the large human losses which result from citizen armies were unprecedented. In their experience there had only been royal armies which were small (due to the expense) and generally did not harm the royal subjects of either side (it is royal subjects who support the armies thru royal taxes). Royal subjects were treated more like livestock or chattel as they could be sold and traded as needed through sovereign treaties.

The French Revolution (a plausible repercussion of the French assisting the American Revolution against the British) resulted in significantly greater citizen armies and new levels of devastation in the Napoleonic wars.

Constitutional Framers Wanted to Create a Lasting Peace

In defining the individual freedoms enshrined in the constitution, the framers were seeking to create a lasting peaceful government to avoid the devastation they had just experienced. As such the right to democratically elected representatives and a fair hearing before the loss of life, liberty or property were of great importance to them.

The colonists had rankled against their treatment by the British Army and Admiralty Courts. As British subjects they had had due process and elected

representatives in England, but as colonists the British Army and Admiralty Courts did not respect those rights. A loyal British subject in the colonies could be required to house and feed British soldiers without any due process. If the local commander needed to house his soldiers, he would simply declare who would provide for them. It is also important to remember that with the smaller royal armies, the soldiers were largely the dregs of society, drunkards and petty thieves who had no alternative to conscription. Housing and feeding the soldiers was not a minor inconvenience.⁵

Violence Is The Result of the Unheard

Most Americans can not really appreciate the importance of these fundamental rights but Blacks who had been raised under the Supreme Court doctrine of 'Separate but Equal' knew it very well as stated by Martin Luther King with 'a riot is the language of the unheard'.⁶ The American Revolution was the result of violations of the traditional British elected representatives and due process. Anger and violence such as riots and revolutions result when people are not given the opportunity to be heard.

The Meaning of Citizen Changed Over Time

When the constitution was enacted the guarantee of due process basically only applied to white, adult, male, Christian property owners. Of course that was a rather lengthy and unwieldy description. Fortunately, there was a much more concise description which was citizen, a term also used in the constitution selectively. The authors of the constitution chose 'No person' for the due process right.

⁵ The British also suffered greatly during the American Revolution and other British colonies benefited with respect to elected representatives and due process. No other British colonies rebelled in the manner of the American Revolution.

⁶ [Martin Luther King, Grosse Pointe High School - March 14, 1968](#)

The choice of 'person' was also largely aspirational as due process had never been provided to non-whites, native Americans, women, slaves, non Christians or the destitute, only proper British subjects, now citizens according to their state.

The original constitution had several contradictions, slavery being, perhaps, the most divisive unresolved issue: are slaves people entitled to due process or property with no rights at all. That issue divided the country leading to the Civil War, a dispute with significantly greater suffering and losses than the American Revolution.

As seen below, after rampant disregard for people of color before the Civil War, starting in 1865 there were a series of amendments and acts thru 1871 which eliminated the blatant contradictions and provided liberty and justice for all (except the Indians). There was no change to the due process clause as it already included all persons, far ahead of the lagging citizenship rights.

However, the Whites in the South violently resisted these reforms with organizations such as the Klu Klux Klan (causing the [Civil Rights Act of 1870](#)⁷ and [Enforcement Act of 1871](#)⁸). It seems that the citizens of the U.S. were not ready for broad promises of liberty and justice for all as the Republicans of the North lost interest preserving the expanded rights and returned to ignoring the rights of women, people of color, non Christians, etc.. leading to [Chinese Exclusion Act of 1882](#) and the doctrine of 'Separate But Equal' [Plessy v. Ferguson, 163 U.S. 537 \(1896\)](#). The Doctrine of Consular Non Reviewability was invented

⁷ Now [42 USC section 1981](#).

⁸ Now 42 USC section 1983

by the Circuit Courts out of nothing but their desires and expediency. DoCNR was unsupported by anything in the constitution or statutes.

Year	Act / Amendment / Decision	Effect
1850	CA Act For The Government And Protection Of Indians	Vagrant Indians sold as Indentured Servant, Indian Children sold Indentured to Whites
1855	CA "Greaser" Act⁹	Vagrants sold as indentured servants for hard labor.
1856	Dred Scott v. Sandford, 60 U.S. 393 (1856)	Slaves remain property even in states banning slavery
1865	13th Amendment	Abolish slavery
1868	14th Amendment	Citizenship expanded (including slaves, not Indians)
1870	42 USC section 1981 Civil Rights Act of 1870	Equal rights under the law
1871	42 USC section 1983 - Enforcement Act of 1871	Civil action for deprivation of rights, Response to Klu Klux Klan
1882	Chinese Exclusion Act of 1882	Excluded Chinese Laborers
Late 1800s	Doctrine of Consular Non Reviewability	Invented by Circuit Courts, Denies Due Process to Aliens
1896	Plessy v. Ferguson, 163 U.S. 537 (1896)	Creates 'Separate but Equal', negates Equal Rights Law of 1870
1920	19th Amendment	Gives women right to vote
1924	Indian Citizenship Act	Grant citizenship to all Indians
1942	EO 9066, Public Law 77-50	Japanese Incarceration
1944	Ex parte Mitsuye Endo, 323 U.S. 283 (1944)	Strike down EO966

⁹ Machine readable text for the "Greaser" Act is hard to find so I have included the text in ECF 45-3.

1954	<u>Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)</u>	Strike down 'Separate But Equal', mandatory segregation via National Guard
1964	<u>2 USC section 1311</u> Civil Rights Act	Restrict discrimination race, religion, color, or national origin, also sex for employment
1967	Age Discrimination in Employment Act	Restrict Age Discrimination in Employment
1973	Rehabilitation Act	Disability Protections
1990	Americans with Disabilities Act	Disability Protections
1993	<u>Religious Freedom Restoration Act</u>	Free exercise of religion protected

After the tragic losses of WW1, the United States returned to the dream of liberty and justice for all and extended liberties and full citizenship to women and native Americans. There was a brief relapse during WW2 with the incarceration of Japanese (1942), but that was promptly corrected in 1944.

Then in 1954 the heinous (and false) Doctrine of Separate but Equal was overturned and another series of expansions of rights followed until the promise of liberty and justice for all was realized with the sole exception of DoCNR.¹⁰

DoCNR Was Created Out of Expediency, Not Founded in Law

In 1882 the exclusion of the courts from judicial review overseas (e.g. consular activities) was an essential expediency. Communication with the consulates could take weeks. There was no way for the U.S. courts to provide timely oversight. Indeed it could be argued that Congress chose to not provide judicial oversight for consular activities by not creating judges / magistrates to provide the oversight (e.g. a part time Magistrate at each Consulate).

¹⁰ That I know of, though, realistically there are probably numerous other injustices seeking correction.

It is not clear that the judges who created the DoCNR and ‘Separate But Equal’ had any choice. It should be understood that all such judges were the usual adult white male Christian property owners and could well have agreed with sentiment of the masses (i.e. other adult white male Christian property owners) that people of color (a.k.a. ‘niggers’, ‘greasers’, ‘coolies’, and ‘Indian Savages’¹¹), non Christians (a.k.a. heathens and other derogatory slurs), and the destitute (a.k.a. vagrants, people of low moral character who undermine the proper functioning of society) were vermin who needed to be controlled and exploited for profit if possible or eliminated if there was no profit in it. The view of women was more moderated as every adult white male Christian property owner had a mother and many had wives, sisters and daughters. The normal affection for these women tended to moderate the exploitation of women in general.

According to my usual rules of thirds, one third of the judges probably agreed with the masses that due process did not apply to such vermin and due process would hinder the exploitation of these groups. Another third probably thought that such exploitation was wrong, but did not believe that any order protecting these groups would be respected. If there was no Eisenhower to order the 101st Airborne to enforce segregation, then it would just weaken the court to make an order that the President and Congress would just ignore. They instead went along with ‘supporting’ the exploitation of these groups. The last third disagreed and advocated another course but were outvoted.

However, we are in a different time. In [Sandra Munoz v. State Department \(case](#)

11 ‘Indian Savages’ was used in the Declaration of Independence but by the late 1800’s Indians and Savages were synonyms for most people and they would say ‘Indians’ in polite company but think ‘savages’.

no. 21-55365) (9th Cir. 2022), Munoz was able to get due process through court orders so the foundation of DoCNR is exposed as unfounded. It is time for DoCNR to be sent to the trash bin of history with ‘Separate But Equal’ and the Dred Scott decision.

It is interesting that Congress has designated the DoJ as the sole agency responsible for upholding the law, but not upholding the constitutional rights of individuals. On reflection, that is almost certainly because every agent of the federal government (from judge to officer to employee) must take an oath to support the constitution and, thus, we are each responsible for insuring constitutional rights are upheld.

It is Time for DoCNR to Join Its Contemporary, Separate But Equal

Even if DoCNR was based on the inability of the court to provide timely oversight, that justification has past. Since the year 2000 there have been enough fiber optic cables connecting every significant continent so that consulate officers and judges now have 'instant' access to government records around the world and video conferences can eliminate the need for judges or witnesses to travel. It is time for the courts to step up and take on their role of monitoring the DoS to insure that due process is provided to all persons, even foreign nationals who are outside the U.S..

Of course, there will still be significant venue problems for any foreign national who does not have family, friends, or business contacts residing in the U.S., but Congress has no obligation to provide access to the courts to foreign nationals outside the U.S.. Further, with the widespread access to high speed data around the world, most foreign nationals who have a serious need could likely develop a contact in the U.S. to be a party to the suit and file the suit initially.

To be clear, the federal government has the right to deprive anyone: citizens, permanent residents, and other foreign nationals from life, liberty, and property as long as it is done with due process of law. So Congress certainly has the ability to restrict the fundamental right of movement and travel from aliens, barring entry to the U.S. and deporting them as appropriate.

If it is necessary to determine any factual criteria for admittance or denial, DoS must allow the applicant to present the evidence required for acceptance which is, apparently, not the usual procedure at this time.

The primary and fundamental requirement for such restrictions is due process but the requirement of due process can not be over-ridden by Congress or the courts under any circumstances.

Even If DoCNR is Valid, The OIG and DoS Must Support Due Process

Every agent of the federal government must swear an oath to support the constitution and the Fifth Amendment due process right applies to all human beings (borrowing from the extended DoJ mission) by a clear choice of the framers of the constitution.

We seek ancillary relief that DoJ work with DoS OIG and DoS Bureau of Consular Affairs to insure that all people get the fair hearings required by due process in future visa interviews.

Initial Test of Doctrine of Consular Non Reviewability Met / Extended

We object to the DoCNR because it is offensive (classifying aliens as non-persons (e.g. vermin to be exploited for profit)) and based on a false premise (as logic breaks down when you start with a false premise).

However, according to [Mandel](#) the first test for exceptions to the DoCNR is if the visa denials met the 'facially legitimate and bona fide reason' test. As none of the visa denials which we are contesting cited any facts at all, only restated the statutory requirements ('you did not prove you would not overstay your visa') with no description of the evidence which was considered (which would be problematic as my wife and her sister were not permitted to present the evidence they had prepared).

Citizen Right To Travel With Spouse Recognized Exception to DoCNR

However, [Mandel](#) and the later cases it seems that the DoCNR restriction on court review also does not apply if the alien is married to a citizen and they wish to travel together. [Bustamante v. Mukasey, 531 F.3d 1059, 1062 \(9th Cir. 2008\)](#) states:

Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-640, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); see also *Israel v. INS*, 785 F.2d 738, 742 n. 8 (9th Cir. 1986). Presented with a procedural due process claim by a U.S. citizen, we therefore consider the Consulate's explanation for the denial of Jose's visa application pursuant to the limited inquiry authorized by [Mandel](#).

The court found that the freedom to travel together for married couples is a Due Process protected right. The Executive can not deprive a citizen from traveling

freely with their foreign national spouse unless due process is provided to the citizen spouse. This means that the proceedings to deny a visa to a foreign national must provide for due process if there is a citizen spouse who wishes to travel with the foreign national.

This provision for judicial review applies exactly for my wife as she was the spouse of a U.S. citizen, and I wished to travel with her. Further, it is relevant even though my wife is currently a citizen herself as she has several relatives who she would like to invite to visit her in the U.S..

Additional Exceptions to DoCNR Should Be Reviewed

Does DoCNR Apply to Citizen Spouse's Siblings

We would also like to argue to extend exceptions for DoCNR in the first denial of Buakhao's visa as I am a U.S. citizen and desired to travel with and host my sister-in-law, Buakhao. In Thai culture families are very close and every marriage is between entire families. In marrying my wife, I was establishing close ties (logically my own sister) with Buakhao. My citizen right to travel freely and host guests was improperly restricted when my sister-in-law's visa was denied. As such the court is asked to review the denial under a novel and untested exception to DoCNR applicable to a citizen spouse's siblings.

Does DoCNR Apply to Citizen Veteran's Widow

We would also like to extend exceptions for DoCNR in the second denial of Buakhao's visa in that Buakhao is the widow of an American Army pre-1968 veteran. In particular, Congress has added several special exceptions to restrictions on government assistance and social security survivors benefits for widows of pre-1968 veterans and DoS visa denial effectively improperly denied those benefits

without due process. As such Buakhao's visa denial must be subjected to judicial review as a novel and untested exception to DoCNR applicable to surviving spouses of pre-1968 veterans.

Does DoCNR Apply to a Permanent Residents' Sister

The Plaintiffs would also like to extend exceptions for DoCNR in the third denial of Buakhao's visa in that my wife was a lawful U.S. permanent resident and desired to travel with and host her sister. In Thai culture, extended families intrinsically share finances, property ownership, and liabilities with siblings, children, and parents. Thai tort law is very complex. My wife's lawful permanent resident right to travel freely and host guests was improperly restricted when her sister's visa was denied. As such the court is asked to review the denial under a novel and untested exception to DoCNR applicable to lawful permanent resident's siblings.

Additional Challenge to DoCNR as Mrs. Von Kramer is a Person

If any of the above requests for judicial review of the three visa denials for Buakhao fail, we request that each visa denial be subjected to judicial review under the novel and untested premise that Buakhao is a person and entitled to all the rights and privileges included in the Fifth Amendment to include judicial review of adverse executive decisions in accordance with due process of law. The physical barriers to court oversight of consular activities in 1882 have been reduced by current electronic access and it is time that DoCNR be relegated to the trash can of history.

Summary

Now that there are excellent communication capabilities to all consulates supporting electronic document sharing and video conferences with 'instant'

access, it is time to eliminate the DoCNR completely. It was based on a premise common in the 1890's that due process only applied to adult white male Christian property owners and people of color, women, and the destitute were exploited for profit.

Respectfully submitted,

Verification of Document

Mr. Carr hereby affirms under penalty of perjury in both the United States and Thailand that as an individual:

1. I have reviewed the above affirmation and believe all of the statements to be true to the best of my knowledge.
2. I have reviewed the associated documents and exhibits and believe them to be true and accurate copies with the exception of the documents identified as being redacted. The redacted documents have only been altered to remove sensitive personal information or other redactable information (as cited in the redaction) according to normal redaction procedures.

I hereby reaffirm that the above is true to the best of my knowledge under penalty of perjury in both the United States and Thailand.

/s Brian P. Carr

Brian P. Carr
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Date: 28. Jul. 2025

Location: Irving, Texas

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